



Neutral Citation Number: [2024] EWCA Civ 1100

Case No: CA-2024-001320

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY
COURTS OF ENGLAND AND WALES, INTELLECTUAL PROPERTY LIST (ChD),
PATENTS COURT

Mrs Justice Bacon
[2024] EWHC 1267 (Pat)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 September 2024

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

Between :

(1) MOTOROLA MOBILITY LLC
(2) LENOVO (UNITED STATES) INC.
- and -

Claimants/
Appellants

(1) ERICSSON LIMITED
(2) TELEFONAKTIEBOLAGET LM ERICSSON

Defendants/
Respondents

Michael Bloch KC and Kathryn Pickard (instructed by **Kirkland & Ellis International LLP**) for the **Appellants**

Michael Tappin KC, Josephine Davies KC and Fiona Petersen (instructed by **Taylor Wessing LLP and Pinsent Masons LLP**) for the **Respondents**

Hearing date : 11 September 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Arnold:

Introduction

1. This is an appeal by the Claimants (“Lenovo”) against an order of Bacon J dated 23 May 2024 dismissing their application for an interim injunction to restrain the Defendants (“Ericsson”) from doing acts which Lenovo allege infringe European Patent (UK) No. 3 646 649 (“EP 649”) until final judgment in this claim. The application was dismissed for the reasons the judge gave in her judgment of the same date [2024] EWHC 1267 (Pat). Although the decision whether or not to grant an interim injunction involves an exercise of discretion applying well-settled principles, I granted Lenovo permission to appeal because this is a novel application in a rapidly developing area of jurisprudence.
2. EP 649 was granted on 10 January 2024. It has been declared by Lenovo to be essential (and is thus a “standard-essential patent” or “SEP”) to the European Telecommunications Standards Institute (“ETSI”) 5G standard. It is part of a global portfolio of SEPs owned by Lenovo, which also includes patents declared essential to various other standards. As Lenovo accept, Lenovo are obliged by clause 6.1 of the ETSI Intellectual Property Rights (“IPR”) Policy to license the SEPs in their portfolio on fair, reasonable and non-discriminatory (“FRAND”) terms and Ericsson are entitled to such a licence. Ericsson also own a global portfolio of SEPs, which again also includes patents declared essential both to 5G and to various other standards. As Ericsson accept, Ericsson are obliged by clause 6.1 to license the SEPs in their portfolio on FRAND terms and Lenovo are entitled to such a licence. Both sides have required reciprocity when making their declarations to ETSI. Thus it is common ground that there should be a global cross-licence of the two portfolios. The dispute between the parties is as to the terms of the cross-licence, including which side should be a net recipient of sums payable under the cross-licence.
3. Although they exploit each other’s SEPs, the parties are not direct competitors, since Lenovo manufacture and sell devices for purchase by consumers whereas Ericsson supply products and services to mobile network operators.
4. Proceedings have been commenced both by Ericsson in the Eastern District of North Carolina (“the EDNC”) and by Lenovo in the Patents Court seeking in essence the determination of the terms of the cross-licence. As explained in more detail below, subject to certain nuances, Ericsson have committed to accept the determination of the EDNC while Lenovo have committed to accept the determination of the English courts. Until such terms have been determined by one of those courts, and the other side has decided whether to accept the determination or to accept the consequences of not taking a licence on those terms, neither side has the benefit of a licence to the other’s portfolio.
5. Ericsson dispute validity and infringement of EP 649, but accept that there are serious issues to be tried. Ericsson contend that no interim injunction should be granted to restrain the acts complained of by Lenovo because royalties payable under the cross-licence if one is ultimately entered into by the parties, alternatively damages equating to such royalties if no cross-licence is entered into, would be an adequate remedy for Lenovo.

6. Lenovo dispute that the royalties payable under the cross-licence, alternatively damages equating to such royalties, would be an adequate remedy on the ground that Ericsson are, Lenovo allege, exerting illegitimate pressure on Lenovo to agree to supra-FRAND royalty rates for the licence to Ericsson's portfolio by obtaining preliminary injunctions in Brazil and Colombia and by seeking relief from the United States International Trade Commission ("the ITC") the practical effect of which would be to debar Lenovo's smartphones, tablets and laptops from the US market. For this reason, the order that Lenovo seek is not a conventional interim injunction, but an interim injunction to restrain Ericsson from carrying out acts alleged to infringe EP 649 qualified by a proviso that it will not apply if Ericsson either (i) undertake to enter into a cross-licence on terms to be determined by a court of competent jurisdiction, and not to seek or enforce any injunctive relief pending that determination, with the terms offered by Lenovo applying in the interim, or (ii) agree to enter into an interim cross-licence on the terms offered by Lenovo, or (iii) agree to some other mutually acceptable interim regime. Lenovo are candid that their preference is for Ericsson to take one of those courses rather than for the interim injunction to bite. Ericsson argue that the relief sought by Lenovo would be tantamount to anti-suit relief by the back door when Lenovo have not actually applied for an anti-suit injunction ("ASI").
7. The judge held that damages would be an adequate remedy for Lenovo if Lenovo prevail at trial since the losses which Lenovo are sustaining due to Ericsson's actions in other jurisdictions are not caused by the alleged infringement of EP 649 in the UK. Rather, they are caused by Ericsson's enforcement of their SEPs in those jurisdictions. Since she concluded that damages would be an adequate remedy for Lenovo, she did not go on to consider the balance of the risk of injustice. Lenovo accept that damages would not be an adequate remedy for Ericsson if the injunction is granted but Ericsson prevail at trial. Both sides contend that the balance of the risk of injustice favours them.

The general background to disputes of this nature

8. I have set out the general background to disputes of this nature in a number of judgments, most recently in *InterDigital Technology Corp v Lenovo Group Ltd* [2024] EWCA Civ 743 at [6]-[15]. It is not necessary to repeat that explanation in this judgment. It is, however, worth reiterating that many of the problems in this field are caused by the absence of any global dispute resolution mechanism in the IPR policies of standards-development organisations such as ETSI, leaving national courts competent to enforce SEPs as the only available fora in the absence of ad hoc agreements to arbitrate: see *Nokia Technologies OY v OnePlus Technology (Shenzhen) Co Ltd* [2022] EWCA Civ 947, [2023] FSR 11 at [16]-[17] and *Optis Cellular Technology LLC v Apple Retail UK Ltd* [2022] EWCA Civ 1411, [2023] RPC 1 at [115].

The present dispute

9. Since the facts have not been found at any trial, the following account of the dispute is necessarily a provisional one. It is based on the parties' skeleton arguments, which are in turn drawn from the witness statements filed for the purposes of the present application.

The need for a cross-licence

10. Under clause 6.1 of the ETSI IPR Policy, a declaration of essentiality may be given “subject to the condition that those who seek licences agree to reciprocate”. The declaring party simply has to tick a box to make their undertaking to grant licences on FRAND terms conditional on reciprocity. The consequence of requiring reciprocity is that an implementer who seeks to invoke a SEP owner’s FRAND undertaking must, if the SEP owner requests, offer a licence on FRAND terms of its own SEPs. In such a case the result is liable to be a cross-licence.
11. Both Lenovo and Ericsson have indicated in their declarations to ETSI that they will require reciprocity. It is, therefore, common ground that, in so far as their respective undertakings to ETSI are invoked by way of defence to allegations of infringement of each other’s SEPs, any FRAND licence will be a cross-licence.
12. Lenovo have been manufacturing and selling devices which implement one or more of the relevant standards since 2008. To date, Lenovo have never held a licence from Ericsson (apart from a licence, whose scope is disputed, covering certain Ericsson patents entered into by the First Claimant (“the 2011 MM Licence”) prior to its acquisition by the Lenovo group in 2014) and have not paid for their exploitation of Ericsson’s SEPs (save under the 2011 MM Licence). Ericsson claim to have been trying to negotiate a global cross-licence with Lenovo since 2008. Ericsson contend that this is a textbook example of hold out by an implementer.
13. Equally, however, Ericsson have been manufacturing and selling devices which implement one or more of the relevant standards without a licence from Lenovo and without paying for their exploitation of Lenovo’s SEPs.
14. Ericsson’s position is that Lenovo are nevertheless to blame for this state of affairs because (i) Ericsson’s portfolio is larger than Lenovo’s portfolio (for example, Ericsson claim to have 18% of 5G approved contributions against Lenovo’s 1.4%, although Lenovo claim that Ericsson has 4.89% of 5Gs SEPs against Lenovo’s 3%) and (ii) Ericsson have always been willing to negotiate a cross-licence. Lenovo’s position is that Ericsson are to blame because Ericsson have consistently demanded royalty rates for their portfolio which exceed FRAND rates. Ericsson deny that the rates they seek are supra-FRAND rates.
15. As noted above, both sides claim that they would be a net recipient of royalties under a cross-licence. Ericsson’s position is that Lenovo’s claim to this effect is a recent one which is fanciful and made for tactical purposes.

Ericsson’s October 2023 offer

16. On 11 October 2023 Ericsson wrote to Lenovo enclosing its latest offer of terms for a cross-licence and notifying Lenovo that Ericsson was commencing proceedings in the EDNC. Although Lenovo had previously rejected an offer of arbitration in 2015, Ericsson again offered arbitration to resolve the dispute instead of pursuing court proceedings. Ericsson’s offer to arbitrate remained open for 30 days, but was again not accepted by Lenovo.

The EDNC Proceedings

17. On the same date Ericsson commenced two sets of patent infringement proceedings in the EDNC. In the first (“the EDNC I Proceedings”), Ericsson assert infringement of four US SEPs alleged to be essential to the 5G standard and claim (among other things): (i) a declaration that Ericsson have complied with their FRAND commitments and with the ETSI IPR policy; and (ii) if Ericsson have failed to comply with their FRAND obligations, that the EDNC determine a FRAND rate for a global cross-licence between Ericsson and Lenovo. In the second set of proceedings (“the EDNC II Proceedings”), Ericsson assert infringement of five US patents which are not alleged to be SEPs. The EDNC II Proceedings can therefore be ignored for present purposes. On 12 December 2023 Ericsson commenced a third set of proceedings (“the EDNC III Proceedings”) in which Ericsson assert infringement of SEPs claimed to be essential to the HEVC/H.265 standard.
18. Ericsson have undertaken to the Patents Court in essence to enter into a cross-licence which is consistent with the EDNC determination. Lenovo have not given such an undertaking. It appears that, for various reasons, the EDNC Proceedings are unlikely to come to trial before late 2026 at the earliest.

The ITC proceedings

19. On 11 and 12 October 2023 Ericsson commenced two patent infringement proceedings against Lenovo in the ITC, alleging infringement of the same US patents which are the subject of the EDNC I and EDNC II Proceedings. Ericsson subsequently filed a third patent infringement proceeding in the ITC on 12 December 2023, alleging infringement of the same US patents which are the subject of the EDNC III Proceedings. In the ITC proceedings, Ericsson seek by way of relief orders which would instruct United States Customs and Border Protection to exclude any infringing products from the US and prohibit Lenovo from importing or selling infringing products, with severe civil penalties for non-compliance. The US is Lenovo’s largest market.
20. The first two ITC cases were heard in July and August 2024, and initial determinations are expected in December and November 2024 respectively.

Proceedings in England and Wales

21. Lenovo have issued three claims in this jurisdiction:
 - i) HP-2023-000036, issued on 13 October 2023, seeks (a) declarations of essentiality and infringement concerning Lenovo’s European Patent (UK) No. 3 780 758 (“EP 758”), (b) declarations that various Ericsson patents are invalid and/or non-essential and (c) the determination of the FRAND terms of a global cross-licence (“the E&W I Proceedings”).
 - ii) HP-2023-000041, issued on 28 November 2023, alleges that certain of Lenovo’s products are licensed under the terms of the 2011 MM Agreement, which includes an exclusive jurisdiction clause in favour of England and Wales. Nothing turns on this claim for present purposes.

- iii) The present claim, HP-2024-000005, was issued on 12 February 2024.
22. There have been a number of relevant applications in the E&W I Proceedings:
- i) On 28 November 2023 Lenovo made an application which sought, among other things, (a) a declaration that willing parties in the position of Lenovo and Ericsson would agree to a short-term licensing regime, and a declaration as to the terms of an appropriate short-term licence agreement between the parties (“the “Short-Term Licence Application”) and (b) expedition of the FRAND trial (“Lenovo’s Expedition Application”). In the Short-Term Licence Application, Lenovo propose a short-term regime whereby they will pay a specified sum into court until FRAND terms are finally determined between the parties, on the condition that no injunctive or other relief will be sought or enforced by parties in the intervening period. The Short-Term Licence Application is listed for hearing in late October 2024.
 - ii) On 5 December 2023 Ericsson made an application challenging the jurisdiction of the English court (“the Jurisdiction Application”) and in the alternative seeking a case management stay pending determination of the EDNC I Proceedings (“the Stay Application”).
 - iii) On 8 December 2023 Meade J decided that the Short-Term Licence Application could not be heard until after the Jurisdiction Application and the Stay Application had been determined: [2023] EHC 3222 (Pat). Ericsson contend that the present application was devised by Lenovo as a response to that decision.
 - iv) The Jurisdiction and Stay Applications were refused by Richards J for the reasons he gave in a judgment dated 18 April 2024: [2024] EWHC 846 (Pat). In that judgment Richards J commented at [81] that it was “extraordinarily wasteful” for the parties to be pursuing two proceedings that were directed to the same issue, but noted that the risk of parallel proceedings was inevitable for the reasons I have touched on in paragraph 8 above. He went on to say at [120] that “[t]he sooner [the dispute] is brought to an end by the determination of a FRAND global cross-licence the better”. Ericsson did not appeal against this decision, and subsequently served a Defence challenging the validity and essentiality of EP 758.
 - v) On 5 June 2024 Ericsson applied for expedition of the technical trial (“Ericsson’s Expedition Application”).
 - vi) On 21 June 2024 Richards J granted Lenovo’s Expedition Application and refused Ericsson’s Expedition Application for the reasons he gave in his judgment of that date: [2024] EWHC 1734 (Pat). The FRAND trial has been listed to be heard at the end of April 2025. The technical trial has been listed to be heard in October 2025.
 - vii) Ericsson did not attempt to appeal against the order for expedition of the FRAND trial. Ericsson did, however, seek permission to appeal against the refusal to expedite the technical trial. I refused that application on 23 July 2024.

23. Lenovo have undertaken to the English court to enter into a cross-licence agreement in the form that is determined to be FRAND at the FRAND trial in the E&W I Proceedings, or to the extent that there are any appeals, on appeal. Ericsson have not given such an undertaking.

Proceedings in Brazil

24. On 21 November 2023 Ericsson filed without notice to Lenovo a complaint in the State Court of Rio de Janeiro alleging the infringement of two Brazilian SEPs and seeking a preliminary injunction with the aim of effectively preventing the sale by Lenovo of 5G-compatible mobile devices in Brazil. On 27 November 2023 the State Court granted Ericsson's request for a preliminary injunction and Lenovo is currently subject to a substantial penalty for each act of alleged infringement. On 7 August 2024 the Brazilian appeal court upheld the preliminary injunction. Lenovo have continued to market their devices in Brazil despite the injunction. Ericsson applied to the State Court on 11 June 2024 seeking enforcement of the injunction and asking the Court to order Lenovo to deposit with the Court the penalty for each act of non-compliance on a monthly basis. On 27 August 2024 the State Court made the order sought, but Lenovo have appealed and the Court has stayed the order pending the appeal. Brazil is Lenovo's second largest market. Lenovo claim to have offered to pay Ericsson the full royalty rate claimed by Ericsson in respect of sales in Brazil, creditable against a final FRAND cross-licence determination, in return for a stay or non-enforcement of injunctive relief. Lenovo also claim that Ericsson refused this offer.

Proceedings in Colombia

25. The position in Colombia is complicated, and it is unnecessary to set out the details. The broad picture is that Ericsson have obtained various preliminary injunctions, some but not all of which have subsequently been revoked on appeals by Lenovo. Colombia is another significant market for Lenovo. Again, Lenovo claim to have offered to pay Ericsson the full royalty rate claimed by Ericsson, creditable against a final FRAND cross-licence determination, in return for a stay or non-enforcement of injunctive relief. Again, Lenovo claim that Ericsson refused this offer.

Counter-offers by Lenovo

26. Lenovo claim to have made counter-offers to Ericsson's 11 October 2023 offer in November 2023 and February 2024. Ericsson accept that Lenovo made a counter-offer in February 2024. Ericsson's position is that this was prompted by the litigation and constructed for the purposes of the litigation, rather than being a genuine good faith counter-offer.

Counterclaims by Lenovo in the EDNC

27. In the EDNC Proceedings Lenovo have counterclaimed for a determination of FRAND terms. Lenovo have also applied for an ASI to restrain enforcement by Ericsson of the Brazilian and Colombian injunctions. That application was refused by the EDNC. Lenovo's appeal against that decision was heard by the Court of Appeals for the Federal Circuit on 7 August 2024, and at the time of the hearing before this Court judgment was awaited.

The basis of Lenovo's application

28. As counsel for Ericsson submitted, it is important to be clear as to the basis of Lenovo's application for an interim injunction. Although the form of the order sought by Lenovo is novel, the basis of the application is entirely conventional, namely an allegation of patent infringement. Lenovo have not applied for an ASI in this jurisdiction. Nor have Lenovo based their application upon a claim that Ericsson are in breach of their obligations under the ETSI IPR Policy and the English courts can specifically enforce those obligations at the suit of Lenovo. Any such claim would have to be pleaded, and would probably require expert evidence as to French law, since the ETSI IPR Policy is governed by French law, but Lenovo have neither pleaded such a case nor adduced any evidence as to French law.

Applicable legal principles

29. It was common ground before the judge that the principles applicable to Lenovo's application were those set out by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, although Lenovo pointed out that Lord Diplock's speech is not to be read as a statute: *Bath and Northeast Somerset District Council v Mowlem* [2004] EWCA Civ 115, [2015] 1 WLR 785 at [12] (Mance LJ). The principles set out in *American Cyanamid* are extremely well-known and it is unnecessary to rehearse them here.
30. The judge added:
- “29. The purpose of interim relief, as Lord Diplock articulated it in *American Cyanamid* at 406E, is to protect the claimant against injury by a violation of its right for which it could not be adequately compensated in damages if the claimant were to succeed at trial. That is why, if damages are indeed an adequate remedy, there are no grounds for interference with the defendant's freedom of action by grant of an injunction: *National Commercial Bank Jamaica v Olint* [2009] UKPC 16, [2009] 1 WLR 1405, §16.
30. That does not necessarily require a loss which would sound in damages. Indeed, a loss for which damages may not be recoverable is a classic example of a case where damages would not be adequate compensation: *SmithKline Beecham v Apotex Europe* [2003] EWCA Civ 137, per Carnwath LJ, and *AB v CD* [2014] EWCA Civ 229, §27. The foundation of the injunction must, however, always be a risk of harm to the claimant that is caused by the infringement of the claimant's right of which vindication is sought in the underlying claim. As Lord Diplock emphasised in *Bremer Vulkan v South India Shipping* [1981] AC 909, 979–80, the jurisdiction to grant an infringement injunction is confined to injunctions ‘granted for the enforcement or protection of some legal or equitable right’. That is, indeed, the reason why the first question that must be considered by the court in determining an application for an

interim injunction is whether there is a serious question to be tried on the merits of the claim in question.”

31. Lenovo’s third ground of appeal challenges the correctness of this statement of the law, but it is convenient to consider it after addressing Lenovo’s first two grounds of appeal.

The FRAND context

32. Although the basis of Lenovo’s application is an allegation of patent infringement, it is an important plank of Lenovo’s case that the context of the application is one in which both sides, but in particular Ericsson, are bound by their undertakings to ETSI to grant licences of their SEPs on FRAND terms in accordance with clause 6.1 of the ETSI IPR Policy. As discussed in *InterDigital v Lenovo*, clause 6.1 has been authoritatively analysed by the Supreme Court in *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2020] UKSC 37, [2020] Bus LR 2422 (“UPSC”). For present purposes it suffices to note three points.
33. First, clause 6.1 must be interpreted and applied in a manner which avoids both hold up by the SEP owner and hold out by an implementer. Hold up by the SEP owner will be avoided by ensuring that the SEP owner is held to its undertaking. Hold out by the implementer will be avoided by allowing the SEP owner to enforce its normal right under the general law to obtain an injunction to prevent infringement of the SEP by the implementer save to the extent that this would be inconsistent with the SEP owner’s undertaking.
34. Secondly, FRAND is not merely a result, but also a process. What this means is that a SEP holder is required to behave consistently with its obligation to grant a licence on FRAND terms, and an implementer is required to behave consistently with its need to take a licence on FRAND terms. Thus the SEP holder should not behave in a manner which promotes hold up, and the implementer should not behave in a manner which promotes hold out. On the contrary, both parties should attempt in good faith to negotiate terms which are FRAND.
35. Thirdly, it is not necessarily the case that only one set of terms is FRAND. On the contrary, a range of terms may all be FRAND. If so, the SEP holder can comply with its obligation by offering a licence on the FRAND terms that are most favourable to itself.

Lenovo’s grounds of appeal

36. Lenovo have four grounds of appeal. Ground 1 is that the judge was wrong to conclude that Lenovo would be adequately compensated by the payment of royalties under a cross-licence or damages equivalent to such royalties. Ground 2 is that the judge should have held that the balance of the risk of injustice favoured the grant of the relief sought. Ground 3 is that the judge erred in treating the *American Cyanamid* principles as fettering the court’s discretion to grant an interim injunction. Ground 4 is that the judge was wrong to reject the application on the basis that the relief sought was an ASI, but nevertheless should have found that Ericsson’s conduct is unconscionable.

Ground 1

37. The starting point here is that it is not disputed that, if EP 649 is valid and has been infringed by Ericsson, then Lenovo's losses due to the infringing acts in the UK can be quantified as the royalties which Lenovo would have earned under the FRAND licence. If Ericsson enter into a licence of Lenovo's portfolio following the determination of what terms are FRAND, then the acts complained of will retrospectively be licensed. If no licence is entered into by Ericsson, Lenovo will be entitled to damages equivalent to the royalties that would have been payable under such a licence: see *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2017] EWHC 2988 (Pat), [2017] RPC 19 at [798]-[802] (Birss J, as he then was). In practice, the quantification exercise may be complicated by the fact that, as explained above, the licence will be a cross-licence, but neither side suggests that this affects the principle.
38. On the other hand, it is, as the judge recorded at [20], "not seriously disputed that the injunctions obtained by Ericsson in Brazil and Colombia are causing, and will cause, very significant disruption to Lenovo's business in markets that are very important to it in commercial terms". The judge found at [35] that, if those injunctions are maintained, "there is likely to be significant disruption to Lenovo's business and strategy, both in the short term and in terms of Lenovo's longer-term ability to grow and retain market share". The judge accepted at [36] that this "enables Ericsson to exert commercial leverage on Lenovo to take a licence on the terms offered by Ericsson, during this interim period before a FRAND rate is determined either in the EDNC proceedings or in ... the English proceedings". The judge also accepted at [37] that "the courts have deprecated the practice of bringing of infringement proceedings in multiple jurisdictions around the world as a way of exerting commercial pressure on alleged infringing implementers of SEPs to agree to supra-FRAND terms".
39. The judge nevertheless held at [38] that the damage Lenovo relied upon was "not damage ... caused by Ericsson's infringement of Lenovo's patents in this jurisdiction", but "damage caused by Ericsson's enforcement of its patent rights in Brazil and Colombia". The judge went on at [40]:

"The disconnect between the alleged infringement and the loss relied on by Lenovo can be illustrated in this way: if Ericsson were to be enjoined by this court in the manner sought in paragraph 1 of the draft order, that would not have any impact whatsoever on the proceedings in Brazil and Colombia, or any injunctions granted in those jurisdictions. It is, therefore, transparently not the alleged infringement that is the cause of Lenovo's loss. That is why, of course, Lenovo does not actually want the outcome of this application to be an order in the terms of paragraph 1. What it wants is for Ericsson to avoid that outcome by agreeing to one of the Preferred Alternatives. But that merely emphasises the fact that this application has nothing to do with the protection of Lenovo's right under the EP 649 patent. What Lenovo is actually seeking is an outcome that does nothing at all to protect its rights under EP 649."

40. Lenovo advance four criticisms of the judge’s reasoning. The first criticism is that the judge failed to address Lenovo’s case that, if the order was not granted, Lenovo might be forced by the coercive pressure of Ericsson’s actions to abandon their claim and to accept a cross-licence on supra-FRAND terms, resulting in an unquantifiable loss of licensing revenue to which Lenovo are properly entitled.
41. Lenovo are correct that the judge did not explicitly address this point. Ericsson contend that the judge was correct implicitly to reject it for two reasons. The first is that any claimant seeking an interim injunction could say that it may not actually obtain the (entirely quantifiable) damages to which it would be entitled after trial because it may be forced to settle the claim before trial (perhaps because of an inequality of arms). But the question which the court has to consider under *American Cyanamid* is whether the claimant can be adequately compensated in damages in respect of loss caused by the alleged infringement if it succeeds at trial in establishing its right to final relief.
42. Secondly, and in any event, Ericsson contend that the evidence does not establish that it is likely that Lenovo will be forced to accept the rates demanded by Ericsson rather than pursue this claim to trial. On the contrary, the evidence of Lenovo’s solicitor Nicola Dagg in paragraph 9 of her fifth witness statement is as follows:

“One can ask why would Lenovo persevere with litigation once it is enjoined in two of its important markets, the answer is evident, it is because the rates on the table from Ericsson would cause significantly more damage than the short term pain which is being inflicted in those jurisdictions.”
43. In my judgment Ericsson are correct that, for both these reasons, the possibility that Lenovo might decide to accept the rates demanded by Ericsson rather than pursue this claim to trial does not establish that Lenovo will not be adequately compensated by royalties/damages if the injunction sought is not granted.
44. Lenovo’s second criticism is that the judge was wrong to hold that Lenovo’s losses as a result of Ericsson’s pursuit of injunctive relief in Brazil and Colombia were not arguably caused by Ericsson’s infringement of EP 649. It is common ground that the infringement must at least be the “but for” cause of the loss claimed: see *Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd* [2023] EWCA Civ 11, [2023] FSR 14 at [50]. Lenovo argue that this requirement is satisfied because: (i) the commercial benefit to Ericsson of continuing to supply 5G-compliant goods and services in the UK is part of Ericsson’s strategy to exert pressure on Lenovo to accept a licence at supra-FRAND rates; and (ii) faced with a choice between abandoning their 5G market in the UK and abandoning their strategy, Ericsson are likely to choose the latter.
45. As Ericsson submit, however, this does not show that the losses in Brazil and Colombia relied on by Lenovo are caused by Ericsson’s supplies of alleged infringing products in the UK. If Ericsson were to cease supplying the accused products in the UK, whether voluntarily or as a result of an injunction, that would have no impact on the injunctions granted by the courts in Brazil and Colombia. In effect, Lenovo’s argument amounts to saying that they would not suffer the losses they rely on if Ericsson were to withdraw their foreign claims. But the relief claimed by Lenovo on this application is an interim injunction to restrain allegedly infringing acts by

Ericsson in the UK, not an injunction requiring Ericsson to withdraw the foreign claims. I shall return to this point below.

46. Lenovo's third criticism is that the judge did not consider whether the losses it claimed were foreseeable or excluded by legal causation. As Ericsson point out, however, the judge did not need to do so, having correctly concluded that the losses were not factually caused by the allegedly infringing acts. Moreover, while the losses may well be foreseeable, legal causation is another impediment to Lenovo's argument rather than providing any support for it.
47. Lenovo's fourth criticism is that the judge failed to take into account Lenovo's case that the commercial value of their patent portfolio resides in part in its deterrent effect against other holders of portfolios in the same field and that this deterrent effect depends on the willingness of the court to grant relief in appropriate circumstances. As Ericsson point out, however, this is not an argument advanced by Lenovo below, and so the judge cannot be criticised for not addressing it. In any event, the argument is a circular one, because it depends upon this case being one of those in which the grant of an interim injunction is appropriate.

Ground 2

48. Since I have rejected ground 1, ground 2 does not arise and it is unnecessary to say anything about it.

Ground 3

49. Lenovo's third ground of appeal is perhaps the most significant, since it challenges the application of the *American Cyanamid* principles in this context. Lenovo focus on the judge's statement at [30] that the foundation of the application "must ... always be a risk of harm to the claimant that is caused by the infringement of the claimant's right of which vindication is sought in the underlying claim". Lenovo argue that it is implicit in this statement that no other forms of loss may be taken into account, and that that is wrong in law.
50. Lenovo's starting point for this argument is the decision of the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47, [2024] 2 WLR 45 adopting key aspects of the Privy Council's reasoning in *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24, [2023] AC 389. For present purposes, it suffices to quote Mellor J's convenient summary of the relevant principles in *Crypto Open Patent Alliance v Wright* [2024] EWHC 1809 (Ch) at [27]:
 - "i) The power to grant injunctions stated in s.37(1) [of the Senior Courts Act 1981] merely confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 and still exists (*Wolverhampton*, [17]).
 - ii) It is necessary to distinguish between two senses of the word 'jurisdiction': the power to grant an injunction and the principles and practice governing the exercise of that power. The former is the only really correct sense of the expression

(*Wolverhampton*, [16]). The power of the courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited (*Wolverhampton*, [17]). As a court of inherent jurisdiction, the High Court possesses the power, and bears the responsibility, to act so as to maintain the rule of law (*Wolverhampton*, [18]).

- iii) Like any judicial power, the power to grant an injunction must be exercised in accordance with principle and any restrictions established by judicial precedent and rules of court (*Wolverhampton*, [19]). Nevertheless, the principles and practice governing the exercise of the power to grant injunctions need to and do evolve over time as circumstances change (*Wolverhampton*, [19]-[20]).
- iv) The width and flexibility of the equitable jurisdiction to issue injunctions are not to be cut down by categorisations based on previous practice (*Wolverhampton*, [21]). That is not to undermine the importance of precedent, or to suggest that established categories of injunction are unimportant. However, injunctions may be issued in new circumstances when the principles underlying the existing law so require (*Wolverhampton*, [22]).
- v) The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year (*Wolverhampton*, [21] ...)."

51. Mellor J went on:

"30. The Supreme Court identified some novel categories of injunction that have been developed by the courts. Those include:

- i) Injunctions against non-parties, including injunctions *contra mundum* to protect human rights (*Wolverhampton*, [23]-[42]).
- ii) Injunctions in the absence of a cause of action ('*It is now well established that the grant of injunctive relief is not always conditional on the existence of a cause of action.*' (*Wolverhampton*, [43]-[49])). Examples of these include: relator and ex officio actions by the Attorney General; the freezing injunction; the *Norwich Pharmacal* order; the *Banker's Trust* order; internet blocking orders. One might also add cases in which local authorities obtain injunctions to preclude criminal conduct such as unlawful trading where the criminal sanctions are insufficient to deter the (usually profitable) conduct.

...

33. The Privy Council in *Convoy Collateral* held that the granting of injunctive relief extends beyond the protection of legal or equitable rights of the applicant, referring instead to the protection of legitimate ‘interests’:

‘The proposition asserted by Lord Diplock in *The Siskina* and *Bremer Vulkan* on the authority of *North London Railway* was that an injunction may only be granted to protect a legal or equitable right. There can be no objection to this proposition in so far as it signifies the need to identify an interest of the claimant which merits protection and a legal or equitable principle which justifies exercising the power to grant an injunction to protect that interest by ordering the defendant to do or refrain from doing something. ... within a very short time after *The Siskina* was decided, it had already become clear that the proposition cannot be maintained if it is taken to mean that an injunction may only be granted to protect a right which can be identified independently of the reasons which justify the grant of an injunction.’ (*Convoy Collateral* at [52].)

34. That view was endorsed by the Court of Appeal in *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312 at [61], [69] and [71]. The Court of Appeal expressly endorsed the ‘*interest of the claimant*’ formulation, and indeed expanded it to ‘*the interest of the person protected by the injunction*’ so as to include a third party for whose benefit the original orders were made and which the defendant sought to frustrate.”
52. Lenovo argue that, if loss to Lenovo in the form of supra-FRAND rates caused by Ericsson’s strategy is not recoverable, sufficient connection between that loss and the infringement of EP 649 is nevertheless created by (i) the parties’ mutual obligations to ETSI and to each other, as holders of international portfolios of SEPs, including the mutual duty of reciprocity, and (ii) Ericsson’s unconscionable conduct within the FRAND regime.
53. As the Supreme Court explained in *UPSC* at [14], SEP holders’ obligations to ETSI represent a contractual modification to the general law of patents designed to achieve a fair balance between the parties’ respective interests. Here, those obligations require the conclusion of a cross-licence on FRAND terms. Both sides have undertaken in effect to enter into a cross-licence on FRAND terms to be determined by a court, albeit not the same court.
54. Against that background, Lenovo contend, a fair balance requires that ongoing negotiations between the parties should take place on a level playing field pending the backstop of court-determined FRAND terms. In that sense, Ericsson’s alleged infringement of EP 649 is connected to Lenovo’s alleged infringement of Ericsson’s 5G SEPs in Brazil, Colombia and the United States. Lenovo say that that connection

is sufficient to warrant the court's intervention, notwithstanding any irrecoverability of loss, if the balance of convenience otherwise favours the grant of the order.

55. There are three related problems with this argument. The first is that, in so far as it is based on the proposition that losses for which damages are not recoverable in law may be taken into account when deciding whether to grant an interim injunction, that proposition was already established by *SmithKline Beecham plc v Apotex Europe Ltd* [2003] EWCA Civ 137, [2003] FSR 31, as the judge recognised. The judge's reason for refusing Lenovo's application was not based upon Lenovo's losses not being recoverable in law, but upon their not being caused by the allegedly infringing acts which Lenovo seek to restrain by the injunction. I have already concluded that she was right about that.
56. The second problem is that this argument does not overcome the disconnection between the relief which Lenovo seek – an interim injunction to restrain Ericsson from infringing EP 649 in the UK – and the harm of which Lenovo complain – losses in Brazil and Colombia due to the injunctions obtained by Ericsson in those countries. Even assuming that Lenovo have a legitimate interest to protect in those countries, the injunction is not framed to protect that interest. Rather, the injunction is intended to give Lenovo a lever in the negotiations between the parties.
57. The third problem is that Lenovo allege that Ericsson's conduct is in breach of their obligations under clause 6.1 of the ETSI PIR Policy, but as noted above that is not the basis of the application. In any event, this allegation is disputed by Ericsson, and the court is not in a position to decide this issue on the present application. Nor have Lenovo demonstrated that Ericsson's conduct is unconscionable. *Prima facie*, Ericsson have merely been exercising their rights as SEP holders in accordance with the laws of Brazil and Colombia. Unless this is a breach of Ericsson's obligations under clause 6.1, it is difficult to see what is unconscionable about it.
58. It seems to me that Lenovo's real complaint is that Ericsson's behaviour in obtaining injunctions in Brazil and Colombia, and in seeking the relief they seek in the ITC, is inconsistent with the apparent acceptance by both sides that the FRAND rate for the cross-licence should be determined by a court. This complaint has considerable force, but it does not justify the relief which Lenovo seek on this application. As Richards J recognised, the best way to resolve the dispute between the parties is for one court to determine what terms are FRAND as soon as possible. That leaves open the question of how the position is to be regulated in the period between the commencement of proceedings and the court's determination. There may be a role for the court in addressing that question, but Lenovo's present application does not invoke any relevant jurisdiction on the part of the court.

Ground 4

59. I can deal with Lenovo's fourth ground relatively briefly. As Ericsson point out, contrary to the premise of this ground, the judge did not reject the application on the basis that the relief sought was an ASI. On the contrary, the judge expressly noted at [9] that Lenovo had not sought an ASI, presumably because Lenovo appreciated that they would be unable to satisfy the applicable conditions for such relief. The judge went on to say that the effect of the order sought by Lenovo "would be to obtain anti-

suit relief by the back door, by forcing Ericsson to agree to terms which Lenovo plainly considers that it cannot ask the court to order”.

60. Lenovo argue that the relief they seek is not “anti-suit relief by the back door”, since it does not require Ericsson to withdraw any foreign claims. They accept that the order is designed to persuade Ericsson to do just that, but they argue that there is nothing wrong with that and draw an analogy with the grant of an injunction to restrain infringement of a UK SEP unless the defendant takes a global licence on the terms determined by the court to be FRAND. I do not accept the validity of this analogy, because in that scenario the court is simply putting the defendant to its election as to whether it wishes to rely upon its rights under clause 6.1 of the ETSI IPR Policy or not. If the defendant does rely upon its rights, no injunction will be granted. If not, the relief granted is an injunction to restrain infringement in the UK. Moreover, that injunction will be granted because the ordinary conditions for the grant of such an injunction have been satisfied.
61. Lenovo also argue that Ericsson’s conduct in obtaining injunctions prior to a FRAND determination meets the test of unconscionability laid down in *Airbus Industrie GIE v Patel* [1999] 1 AC 119. In the absence of an application for an ASI, it is difficult to see the relevance of this argument save insofar as unconscionability is relevant to ground 3, which I have already considered.

Conclusion

62. For the reasons given above I would dismiss the appeal.

Lord Justice Phillips:

63. I agree.

Lord Justice Moylan:

64. I also agree.