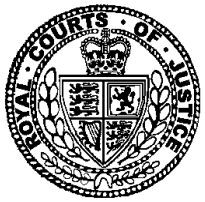

Neutral Citation Number: [2023] EWHC 2249 (Pat)
Case No: HP-2021-000022

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

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

Date: Thursday, 7th September 2023

Before:

MR. JUSTICE MEADE

- -

Between:

(1) NOKIA TECHNOLOGIES OY **(2) NOKIA SOLUTIONS AND NETWORKS OY**	**Claimants**
- and -	
(1) ONEPLUS LIMITED TECHNOLOGY (SHENZHEN) CO., LTD **(2) UNUMPLUS LIMITED (t/a OnePlus)** **(3) GUANGDONG OPPO MOBILE TELECOMMUNICATIONS CORP, LTD** **(4) OPPO MOBILE UK LTD** **(5) ASCENSION INTERNATIONAL TRADING CO., LIMITED (t/a Realme)** **(6) REALME CHONGQING MOBILE TELECOMMUNICATIONS (SHENZHEN) CO.K LTD** **(7) REALME CHONGQING MOBILE TELECOMMUNICATIONS CORP LTD**	**Defendants**

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- -

MS. SARAH FORD KC and MR. THOMAS JONES (instructed by **Bird & Bird**) for the **Claimants**
MR. ANDREW LYKIARDOPOULOS KC and MR. RAVI MEHTA (instructed by **Hogan Lovells International LLP**) for the **Defendants**

- -

APPROVED JUDGMENT: TRIAL E INJUNCTION AND STAY, TRIAL D ADJOURNMENT

MR. JUSTICE MEADE:

1. This is my judgment on the central aspects of dispute between the parties on this, the form of order hearing, following my judgment of 26th July 2023. I stated my conclusions at paragraph 350 of that judgment and I will not lengthen my judgment now by repeating those. At paragraph 363, I said that I would have wanted to hold the form of order hearing within 28 days; that would not be possible because of the Vacation; but that I thought it should happen in September, this month. I invited the parties to liaise about timing, which they did, and for that I am grateful.

2. This form of order hearing in what is referred to as "Trial E" is being heard by me in the Vacation, for reasons I have just given, back-to-back with the PTR in Trial D, the FRAND trial, which is for tomorrow. There is some overlap in representation, but not identity. Today, I have heard from Ms. Ford KC, who leads Thomas Jones, for Nokia, and Mr. Lykiardopoulos KC, who today leads Mr. Mehta, for Oppo.

3. A key bone of contention before me today has been whether Oppo ought to be required to make an election between taking the FRAND terms to be decided at Trial, D or otherwise an injunction over the patents so far held to be valid and infringed, of which it may be recalled there are two, '103, which is the SEP, and '560, which is the NEP.

4. In the event that Oppo does have to make an election, for reasons I will come on to, it has made clear that it will not undertake to accept a licence on the terms determined at Trial D. It says that even on that basis, there should be no injunction, for reasons I will also come on to, but if there is to be the need for an election and if I reject those submissions and find that there should be an injunction, that injunction should be stayed pending appeal.

5. There are, therefore, three scenarios, according to which counsel have argued the matter today: first of all, either no election or no injunction at all, scenario 1; scenario 2, an election is required and an injunction is made but stayed; and scenario 3, the same as scenario 2, but in the event that I refuse to stay the injunction pending appeal.

6. In scenario 3, Oppo contends that Trial D should be adjourned because it would serve no useful purpose, but it says that in scenario 2 and indeed scenario 1, Trial D should go ahead. Nokia disagrees and it says that, as matters have now turned out, Trial D will not serve a useful purpose and should be adjourned in any case. That, Ms. Ford candidly acknowledged, is a change of position, and quite a recent one by Nokia, but I do not attach any great importance to that and both sides have been changing their positions quite freely over the recent days, weeks and months.

7. I have reached a conclusion on this. In the ordinary course of things, I might well have wanted to reserve my judgment and give it in writing, but the imminence of Trial D, the PTR for it and other matters at play at the moment, have led me to conclude that I should give this oral judgment, which, in the way of things, is bound to be rather rougher as a result than would have been a written judgment, but I am clear in my own mind about my conclusion. I think that the speed of giving my decision is more important than reducing it to writing, with the inevitable delay that would involve.

8. A logically prior matter to deal with is permission to appeal. I have mentioned already the parties' contentions in various scenarios pending appeal. I have indicated that I will give permission to appeal from my judgment in Trial E, since I consider that the various points are arguable to the standard required to give permission to appeal to the Court of Appeal. Matters are complicated because the point raised in Optis F (explained in my main judgment on Trial E) is on appeal to the Supreme

Court following ***Optis F (CA)*** (I use herein the same abbreviations as in my main judgment), but I have recently been informed that Apple may, and possibly already has, applied to withdraw that appeal.

9. Regardless of whether Apple does make that application and whether it is successful, Oppo has indicated that it will invite me to grant a certificate under the Administration of Justice Act 1969 to allow the possibility of a leapfrog appeal and I have yet to rule on that. So, at least in principle, it is possible that an appeal from this judgment might be to the Supreme Court, which was going to hear the Apple appeal early next year, or to the Court of Appeal. For that reason, when I refer to an appeal or the appeal, I roll up both those possibilities or, indeed, the theoretical possibility that some points could go to the Supreme Court and others to the Court of Appeal.

10. I should say by way of elaboration on my grant of permission to appeal that I think some of Oppo's points are stronger than others. I focus in particular on the competition law points. Had those been the whole subject of my judgment, I may well not have given permission to appeal on those. They seem to me exceptionally weak and I give permission on those only because of their interaction with the other points in the case. I mention that upfront, simply to dismiss and not need to come back to a point that Mr. Lykiardopoulos made in relation to stay pending appeal, that the competition law point was time-sensitive and might dwindle away to nothing by the time of an appeal. I attach no weight to that, in view of the extreme weakness, as I see it, of the competition law points.

11. However, the other points, in my view, clearly merit permission to appeal. The Optis F point has already been given permission for appeal by the Supreme Court and the points which Oppo say distinguish this case from Optis F, fundamentally the impact

of the Chongqing proceedings, but also the argument that there already is a licence under French law, are complex ones and important ones of law where, although I have ruled against Oppo, there is quite clearly an argument to be made to the contrary, which should be considered by a higher court.

12. I therefore turn to deal with the three possible scenarios identified, (1), (2) and (3). I have received and considered evidence from Mr. Vary of Nokia's solicitors, Mr. Brown of Oppo's solicitors, commercial evidence from Lynn Jiang and Charleen Fang of Oppo, on the real-world irreparable harm which it is said would be inflicted on Oppo pending appeal if there were no stay and expert evidence of Chinese law from Professor Wang, who gave evidence at Trial E before me, and whose evidence I commented on in my judgment, and Mr. Yuguo Wong of Nokia's Chinese lawyers, in relation to the possible effect on the Chongqing proceedings of an election by Oppo to take the FRAND terms determined at Trial D, to which I will come in a moment.

13. I deal first with whether Oppo be put to an election now, without knowing the Trial D terms and, if it should, and if it does not elect to take those terms, whether there should be an injunction.

14. This is separate, in my view, conceptually, and practically, from the question of how to hold the ring pending the appeal. I am deciding now what the appropriate final relief is. The decision of the Court of Appeal in ***Optis F (CA)*** is binding on me and they upheld my decision that in circumstances such as the present, the implementer who has been found to infringe a SEP and does not have a licence must make the election without knowing the terms in advance.

15. It is argued by Mr. Lykiardopoulos that that is not an absolute rule and that it is appropriate to depart from it in this case, bearing in mind the relative imminence of

Trial D by contrast with the situation in Optis F, where there was anything up to a year between my consideration and the likely FRAND trial.

16. I do not rule out absolutely the possibility that there might be circumstances in which a court would depart from the general decision in Optis F but, in my view, it is a strong decision in favour of implementers in this sort of situation being put to election, and given we are now in September and that a judgment in Trial D, in the absence of an adjournment of course, and further argument means that the final resolution of that trial could be six months away, that persuades me that the time yet to elapse in which, on the hypothesis on which I am proceeding, Oppo would be operating without a licence, is significant, and I see no reason to depart from the general Optis F position. Therefore, Oppo must elect between committing itself to the Trial D terms or an injunction and for reasons I shall come on to shortly, it has made clear that its election is, if it must make an election, for an injunction.

17. Oppo also argues that in a case that is all about money, even if it must elect, there should still be no injunction because, essentially, damages are an adequate remedy. This is, to some extent, related to the question of how long will be the period between now and the FRAND trial but, in any event, the argument that, in circumstances such as those presently before me, damages are an adequate remedy, was rejected by the Supreme Court in ***UPSC***, which I revisited in some detail in ***Optis F (HC)***, and my decision in that case was upheld by the Court of Appeal.

18. Therefore, in my view, the election must be made. Oppo has made it clear that it prefers an injunction to committing to the FRAND terms from Trial D and, therefore, that will be the result.

19. I need to turn to Oppo's reasons for making that decision. Oppo says that if it agrees to be bound by the terms at Trial D, that could have an adverse and possibly fatal impact on the Chongqing proceedings because it says the Chongqing court might, in that scenario, consider that its own proceedings had been rendered moot because Oppo was licensed globally to Nokia's portfolio.

20. This argument was touched upon, but not explored in any detail at Trial F and that is a matter that I touched on in paragraph 16 of my judgment, where I expressed some scepticism about it. I recorded that it was not an issue of Chinese law that I was invited to decide.

21. This is all somewhat hypothetical, because whether or not Oppo's reasons are good or bad or somewhere in between, it has, in its own mind, decided that it will not elect to accept the Trial D terms, but I none the less think it worth explaining what the reasons are said to be in a little bit more detail.

22. Had Oppo elected to undertake to take the terms from Trial D, Nokia accepts, and it would in any event have been my decision, that that undertaking should be capable of being released if Oppo were successful on appeal. Nokia also agreed that it would not, in that scenario, use the election by Oppo as a basis for seeking to stay or have dismissed the Chongqing proceedings, and Nokia accepts that if the result of the undertaking was that a licence actually entered into force prior to an appeal, the licence would need to be arranged so that payments made under it were repaid.

23. Although I do not regard it as critical to my decision, the parties have argued in some detail what the reaction of the Chongqing Court would be, and as I have said already, that is the subject of evidence from Professor Wang and Mr. Zuo.

24. Both of those experts agree, to this limited extent, that there is no firm guidance from the Chinese courts on what should happen in the current situation. Each of them has referred to some extremely limited materials, more so Mr. Zuo than Professor Wang. Mr. Zuo refers to two Articles of what are called the new amendments to the Chinese Civil Procedure Law, Articles 280 and 281, which he says might be regarded as applicable by analogy and also to two cases, one in the US and one in China, between Huawei and Samsung.

25. Professor Wang does not say that it is certain that the Chinese court would stay or dismiss the Chongqing proceedings, although she says it is possible and she offers the opinion that it is likely. Mr. Zuo disagrees on the strength of the two Articles that I have referred to and the *Huawei v Samsung* cases. Without going into details, Oppo argues that Mr. Zuo's materials are all about jurisdiction and the situation that arises in the present case is a different one, in particular whether the Chongqing proceedings would be rendered moot by Oppo's undertaking here.

26. The position is further complicated by the fact that, of course, if Oppo did give an undertaking, for reasons I have touched on already, that would be qualified so that the undertaking could be withdrawn following an appeal. Professor Wang deals with that in paragraph 2.6 of her report, to say that it would not affect her analysis. She said the following:

> "I consider that once the Plaintiff has indicated that it will be bound by the decision of a foreign court then the possible outcomes are as described above ..." and I interpolate, those include stay or dismissal "... as the PRC Court would focus on the actions of the Plaintiff in committing to take the terms set by the foreign court, and not any possibility of the situation changing in the future."

27. I do not feel able to reach a firm conclusion about the level of risk that the Chongqing court would stay or dismiss its proceedings, but doing the best I can, I think the risk of

the Chongqing Court staying or dismissing them is low.

28. The Chongqing proceedings are extremely well-advanced. All the written and oral argument has been concluded and what remains is for the Chongqing Court to write and deliver its judgment. In a situation where it is that close to a result and where the situation is that Oppo might or might not enter into a licence in the UK, it seems to me inherently very unlikely that the Chongqing Court, of its own motion (given Nokia accepts that it will not seek stay or dismissal), will terminate or delay its proceedings.

29. However, I do conclude that the risk is not such that it can altogether be rejected and I take the view that that risk is part of Oppo's reason for not committing to the terms which will come out of Trial D, but I do not feel that I have a full understanding of Oppo's reasons. Oppo's evidence has focused on the risk that I have been discussing, but I am sure there is more to it than that.

30. In any event, as I have said, it is a risk that cannot be rejected. It forms part of Oppo's thinking, and rightly or wrongly it has concluded that it will not commit to the Trial D terms.

31. My conclusion, therefore, on the first issue is that Oppo must make its election. It has been made clear what that election is; there is no other reason not to grant an injunction and I will do so. There is a point of some potential importance about what the form of that injunction should be, which I will return to with the parties at the conclusion of this judgment or shortly after. I mention it only to make it clear that I have not overlooked that and I still need to decide that. I mention in passing that there are various other points of detail which I have said I will deal with after I cover these main points.

32. The second scenario is that Oppo makes its election but that injunction, which I have held should be granted, should be stayed pending appeal. To deal with this, I need to determine, of course, whether there should be a stay pending appeal. If there is not a stay, then Oppo will come off the UK market in short order, the precise details being the subject of debate, just as it had to come off the market in Germany when Nokia enforced injunctions that it had obtained there.

33. Oppo, as I said already, put in evidence from its commercial personnel in the form of Lynn Jiang and Charleen Fang, and those witness statements go into considerable detail about the effect that an injunction would have and deal with the scenario which is the relevant one to consider for my present purposes of what would happen if Oppo had to come off the market for the period between now and an appeal from Trial E and then try to re-enter the market after a successful appeal.

34. I will come to the categories of irreparable harm that are mentioned in a moment, but first I record that there was no significant dispute between the parties on the principles to be applied to the grant or refusal of a stay. Nokia referred to the well-known *3M* decision, [1976] RPC 671 at 676, which has been cited with approval repeatedly. Oppo, for its part, cited some of the cases in which that has been applied, in particular the recent decision of the Court of Appeal in *Neurim v Generics* [2022] EWCA Civ 370, about the importance of the *status quo* and before that *Novartis v Hospira* [2013] EWCA Civ 583, which affirms that the court's task in deciding whether to stay an injunction pending appeal is essentially, and certainly for present purposes, the same as when considering whether to grant or refuse an interim injunction pending trial. Oppo also referred me to the Enforcement Directive and to the decision of Arnold J (as he then was), considering that in *Nokia v HTC* [2023] EWHC 3778. As I say,

although these well-known decisions were cited to me, there was no dispute between the parties on the principles to be applied.

35. Ms. Fang, in particular, explained the effect of an injunction for a limited period under the following headings: "impact on commercial ranging timelines", which dealt with Oppo's relationships with carriers, "switching losses due to multi-year contracts with operator partners", "unquantifiability of lost sales during an injunction period", "loss of opportunity to stabilise market ranking", "brand damage, loss of trust and loss of customers", and "reduced innovation". Oppo also relies on reputational damage generally.

36. Some of these, I think, are perhaps slightly overplayed. When it comes to reputational harm, I think at least the carriers, if not customers, will understand that Oppo's actions are driven by litigation brought by Nokia and not Oppo itself. But, none the less, I accept Ms. Fang's evidence that relationships with important players in the market and customers generally will be damaged in a way which, in my assessment, would be significant and unquantifiable and would not be at all easily reversed. I also accept that trying to quantify compensation *ex post*, if Oppo comes off the market and then is restored to it following an appeal, would be formidably difficult to the point of impossible.

37. I also note, and it is an important part of my thinking, that Nokia has not really answered any of these points in its evidence and has sought, instead, to make a few arguments orally or in writing which are not supported by evidence. For example, Ms. Ford relied in argument on the notion that royalties from other licensees might be affected, that Oppo might be on the market with a lower cost base pending an appeal and other similar points. But, these points would need to be made good in evidence

and, in any event, Oppo's evidence, which I find cogent and detailed, really supports what would be one's intuitive impression anyway. I, further, would attach very considerable importance to the fact that Oppo has been on the market for a long period with Nokia's licence, and since then after the 2018 licence expired in 2021, and that the grant of an injunction pending an appeal would be a very serious disturbance to a well-established *status quo*.

38. So, for those reasons, in terms of what I would call the traditional matters going to the balance of convenience pending appeal, I would stay the injunction, which I have decided to grant.

39. This forms a natural segue to the question about what should happen to Trial D. Trial D is now only three weeks away. I have the PTR in that trial scheduled for tomorrow. I have done my preparation for the PTR and, I have to say, reading the skeletons of both sides for that PTR, I formed the impression that there was still quite a lot to do before Trial D, but I, none the less, will to proceed on the basis that, with some appropriate management, Trial D could be kept well on track for a hearing this term.

40. That, however, is not the problem, or at least it is not the issue. The issue is one of timing and of trying to arrange matters so that whichever way the appeal from Trial E goes, the parties can be put back, as best as possible, in the position they ought to have been.

41. The timing issue is that the licence to be debated at Trial D, on both sides' position, only runs to the end of June 2024 and a result from Trial D will not emerge until early 2024, assuming, as is my intention in keeping with normal practice, that I would be able to give judgment in three months. But even then there will be inevitably a

consequentials hearing from that trial. The effect of Trial D, therefore, is, unfortunately, very much backwards looking.

42. Nokia's position is that if Oppo, as it has now made crystal clear, is not willing to commit now to take the licence at Trial D and may well refuse to take it after that trial – which I infer is more than possible and indeed highly likely – Trial D is a waste of time and money and that what is needed is a resolution of what Oppo has to pay for a meaningful period of the future.

43. It is fair to say, as I have touched on already, that this is a position that Nokia has taken only extremely recently. I have to say that, in retrospect, it perhaps unsurprising that we are in the present position, by which I mean close to Trial D that will only determine licence terms that would only run for a short time into the future and with Oppo declining to commit to take the licence, and I wish that had been borne in on me earlier. None the less, I have to decide in a practical sense and in a fair way how to proceed for the future.

44. Oppo, as I have said already, agrees that Trial D should be adjourned if there were no stay of the injunction. That does not arise now, because I have held that there should be a stay, but I think its agreement that Trial D should be adjourned in that scenario is important because it indicates that Oppo cannot regard the adjournment of Trial D as a disaster and it is something that Oppo regards as an event that can be countenanced. The difference between the parties is whether Trial D should be adjourned in the scenario that I have arrived at, which is where Oppo has to elect, chooses an injunction, but the injunction is stayed.

45. I turn to consider the possible scenarios following an appeal. If, on appeal, the result of Trial E and/or the result of Optis F is reversed and it is held that Oppo is entitled to

see FRAND terms before it decides whether to commit to them, then, if Trial D has been adjourned, it will not be liable to an injunction. It will have remained on the market and, as Ms. Ford accepts, it will be entitled to remain on the market going forward from there until FRAND terms are determined. In that scenario, it seems to me that Oppo is fully and fairly protected.

46. If, on appeal, the result of Trial E and/or Optis F is maintained, and therefore the result is that Oppo ought to have had to commit to a FRAND licence without sight of the terms, and if Trial D is adjourned, then it seems to me that in broad terms, the parties will be back where they ought to have been (albeit later).

47. I have been more concerned about the scenario where Trial D takes place, a result is known, Nokia prevail on appeal on Trial E and Oppo then gets the opportunity to decide whether or not to take FRAND terms (by saying that it then *does* want a licence after all), when it has been able to fight out the FRAND terms. That seems to me to rob Nokia of the effect of the Optis F result, even as the Optis F result is upheld on appeal. It also raises the undesirable possibility of the parties having conducted Trial D, only for Oppo to reject the terms and for all of that effort to have been wasted. In saying that, of course, I recognise that much of the effort to prepare for Trial D has already been incurred.

48. Earlier in the hearing before me today, Mr. Lykiardopoulos's submissions focused on Trial D going ahead (in the event of a stay of the injunction) being the best, perhaps the only, way for Oppo to hold open the possibility of remaining on the UK market in due course. I do not accept that. It seems to me that if Trial D does not go ahead and Oppo wins on appeal, then Oppo will remain on the UK market. If Trial D does not go ahead and Oppo loses on appeal, then I would expect at that stage it will be able to

commit to FRAND terms, although it will have to do so sight unseen, as Optis F which, in this scenario will have been upheld, decides that it ought. It can still stay on the market if it wants to, though.

49. I therefore reject the submission that Oppo needs Trial D to go ahead, even when there is a stay, to preserve its ability to stay on the UK market. I note that although Oppo's evidence in support of a stay, in a conventional sense, was detailed and cogent, what Mr. Lykiardopoulos said about holding on to the UK market, depending on whether or not Trial D was adjourned, was not supported by evidence.

50. In later reply submissions, Mr. Lykiardopoulos stressed, much more strongly –I thought the submission was made for the first time, but in any event it came to the fore for the first time – the possibility that Trial D might provide useful guidance about what the right answer to FRAND was for these parties, even though a licence going forward, by which I mean from July 2024 onwards, would be bound to be on different terms, because it would be based on different actual or forecast sales. Mr. Lykiardopoulos also submitted that a result in Trial D might provide terms which Oppo, once having seen them, would actually accept (so giving it a global licence until mid-2024 which might bring an end to the international litigation if accepted). That goes back to some extent to the points I have made already about putting the parties back in the position they should have been following an appeal.

51. I do not accept these submissions. I must say I do not understand fully or well Oppo's thinking in insisting strongly on Trial D happening at this stage and in this scenario. It seems to me inconsistent with Oppo's positive assertion that there should be an adjournment if there is no stay of the injunction, a scenario which, of course, I have rejected, and also with Oppo's conduct throughout these proceedings in which it has

stressed that the right venue for the FRAND decision is Chongqing, that it might wish to apply to stay Trial D if it prevailed in Chongqing sufficiently soon, and its submissions about its fallback declaration in Trial E, that Trial D should await the result in Chongqing and only take place in the sense that Nokia would have the opportunity to argue that the Chongqing result should apply differently in the UK. Again, there is no evidence in support of the submission that Trial D will provide important commercial guidance going forwards or, indeed, that Oppo might accept the terms so as to bring it global patent peace for the first few months of 2024.

52. For all those reasons, I attach no weight to that consideration but, none the less, it has to be a matter of very important concern to the court (and it is) that what Nokia proposes and Oppo opposes, in the scenario I have reached about relief, is the adjournment of a trial which is close to being ready and has been scheduled for some time.

53. Had the timing difficulty that I referred to earlier in this judgment been borne in on me earlier in these proceedings, I think, with some confidence, that my reaction would have been to suggest that the licence to be settled needed to have a longer term than the three years on which basis the parties were proceeding. That did not happen but, none the less, I think it is an important consideration that with all the efforts the courts of this country have given to these proceedings, it would be much more desirable to have a long-term decision for the future than a backward-looking decision which is only even argued to have advisory weight.

54. Nokia's proposal is that in the scenario which has now eventuated which, as I have said already, with the wisdom of hindsight I think was foreseeable, but was not in fact foreseen by it and certainly not provided for, Trial D does not make sense and what is

needed is a determination which covers not only the period 2021-2024, but a substantial period going forward.

55. After anxious consideration and bearing in mind that it is always a very, very significant matter to adjourn a trial, I conclude that Nokia is right about this. Not only is Trial D of extremely limited utility (if any) now, but I assess the chances, doing the best I can, that Oppo will accept the terms that come from it as being very low indeed and the likelihood is that it would at most resolve some points of principle, which could have relevance to a licence going forwards, but will not give the parties the clarity and confidence to be able to predict what the right answer is for the period going forwards.

56. I also think that the adjournment of Trial D will enable the appellate court (whether the Court of Appeal or Supreme Court), whichever way it decides things, to put the parties back where they ought to be, following a resolution of the appeal from Trial E.

57. I also emphasise that I do not think that Trial D will even resolve the backward-looking question of damages for infringement of Nokia's patents over the period of unlicensed use in the event that Oppo declines to take the terms decided. That is a distinct question which is not currently in Trial D, although there have been arguments about how that might be brought about.

58. So, for all those reasons, and after considering it carefully, in the quite exceptional circumstances of this litigation, I adjourn Trial D. I do so in the understanding that the adjournment could be quite a lengthy one. It cannot be assumed that another three or four weeks can be found easily in the court diary very soon. It may be that the steps that are necessary to re-plead the issues and update them so that the trial has meaningful forward-looking effect are not too extensive, as Ms. Ford submits. I

might be wrong about that and it might be quite an effort, but the real limiting factor, in my view, about bringing back Trial D, is going to be the availability of a court slot. However, there is also a real chance that court time can be found within fairly few months.

59. That is my conclusion on the relief to be granted and on the question of Trial D.

(For continuation of proceedings: please see separate transcript)

60. The next issue I have to consider is the form of the injunction to be granted and the bone of contention between the parties here is whether the injunction should be unless and until Oppo undertakes to enter into a FRAND licence or on the other hand unless or until the defendants, Oppo, actually enter into a FRAND licence.

61. It is pointed out to me by Nokia, who contend for the second form of injunction, that that is what Birss J (as he then was) did in *Unwired Planet*, the original genesis of the FRAND injunction. But I accept Oppo's submission that that cannot be unthinkingly applied because, at that stage, Birss J, had decided the FRAND terms and it was expected that the defendants would take that FRAND licence, whereas the present situation is not such.

62. Nokia's concern about the formulation which causes the injunction to lapse as soon as Oppo undertakes to enter into a FRAND licence is that Oppo has some tactical intention to reach a situation where it can obtain a timing advantage by agreeing to enter into a FRAND licence with a further period of ability to operate on the market when the terms are not known.

63. In my view, the problem with both approaches is that there are a lot of different scenarios that may yet arise and trying to cater for everything that could happen by

the choice of one form of words now or another is a risky approach. Whether an undertaking by Oppo to enter into a FRAND licence will always be enough for an injunction to come to an end is not a conclusion that I think I can safely reach at the moment.

64. In my view, the safest and best course is to do what Nokia seeks and provide that the injunction must cease to have effect if Oppo enter into a licence – clearly that carve-out must be there – but to give Oppo liberty to apply to have the injunction lifted upon its giving an undertaking to enter into a FRAND licence, in the expectation that there will be legitimate situations where Oppo would want to do that, but where an automatic lifting of the injunction unconditionally would be inappropriate.

65. I have in mind, in particular, that it might be inappropriate to let Oppo out from under an injunction if it was obvious that there were very large amounts that were payable, either for the past or going forwards, and which it ought to have to pay before it was able to re-enter the market. I therefore make the injunction in the form contended for by Nokia with an appropriately worded express liberty to apply, which I will leave it to counsel to draft.

(For continuation of proceedings: please see separate transcript)

66. The next point I have to deal with is whether there should be a stay of the injunction on EP 560. This is a non-essential patent which was the subject of the trial in the '023 action, in respect of which it is accepted that it is possible to modify Oppo's products to avoid infringement.

67. Oppo has not put in any evidence that there would be irreparable harm involved in making this change and, therefore, normally it would follow that there ought to be an

injunction and I accept Ms. Ford's general submission that an injunction follows a finding of infringement and there ought to be no stay unless there is some prospect of irreparable harm.

68. What makes this situation slightly different is that Nokia accepts that if a FRAND licence is settled in the UK, it is willing but not obliged to include a standstill which would effectively rule out an injunction from then on in relation to EP 560. Oppo relies on this in seeking a stay of the injunction on EP 560.

69. The problem with Oppo's submission is that Nokia has not accepted that Oppo is entitled to a standstill. Nokia's concession is very carefully limited to the UK, and it has made no such concession in Chongqing or in relation to any other means by which Oppo seeks a licence. It seems to me that it is illogical and unfair for Oppo to say that it will get a standstill from Nokia, because of Nokia's concession. It will only do so if it agrees to FRAND terms in the UK, which it stoutly resists. So I do not think a stay in relation to EP 560 is merited.

70. I do find some attraction in Oppo's submission that it could well turn out to be rather pointless work, designing round the patent. On the other hand, it might be something that Oppo would consider sensible anyway and may well have done, to some extent, but as a matter of principle I do not think that a stay in relation to EP 560 is appropriate.

(For continuation of proceedings: please see separate transcript)

71. Paragraph 9 of the draft order relates to '560 and the respective contentions are that Nokia says that Oppo must take all reasonable steps within its power to retrieve from

distribution channels infringing product and Oppo proposes a more limited and more specific requirement to issue recall notices to its distribution channels.

72. My understanding of phrases such as "all reasonable steps within their power", "best endeavours" and the like, without going into the fine detail, is that they are extremely demanding and that they put a severe burden on a party subject to them to take even very onerous grave steps. I think that is unjustified in circumstances where the actual sale of products which infringe '560 has no different commercial impact on Nokia from ones which do not infringe '560. Nokia will get appropriate damages in due course, if EP 560 finds a life of its own in that sense, which one hopes may be avoided, but in principle could happen, and I prefer the clearer and more specific requirement of Oppo's wording, which in any event I think is a fair degree of protection for Nokia.

(For continuation of proceedings: please see separate transcript)

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