IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

(1) OPTIS CELLULAR TECHNOLOGY LLC
(2) OPTIS WIRELESS TECHNOLOGY LLC
(3) UNWIRED PLANET INTERNATIONAL LIMITED

(collectively, "Optis")
Respondents/Claimants

– and –

(1) APPLE RETAIL UK LIMITED
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED
(3) APPLE INC

(collectively, "Apple")
Appellants/Defendants

APPLE'S WRITTEN CASE

---

*This Written Case generally uses the abbreviations and definitions in the Grounds and in the Statement of Facts and Issues ("**SFI**"). For example, this Court's judgment in Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd [2020] UKSC 37 is abbreviated to Unwired SC.* **[3/31-51]** **[166/3417-3468]**

The exceptions are that, in this document the Court of Appeal judgment below is denoted "CAJ"; the main High Court judgment is denoted "HCJ", and the trial judge's consequentials judgment is denoted "CJ".

INTRODUCTION

Overview

1. This appeal is about the legal principles to be followed at first instance and on appeal in determining a fair, reasonable and non-discriminatory ("FRAND") royalty under a worldwide licence of standard essential patents ("SEPs"), in the field of mobile telecommunications. As explained below, this case saw the CA substitute its own FRAND determination for the careful assessment of the trial judge, based only on the limited material before it; increase the sum to be paid by an order of magnitude, guided by indefensible yardsticks, so as to reach a level far beyond the pre-existing reasonable rates in the worldwide marketplace; and decide that it is appropriate as a rule to award royalties on all of a licensee's past unlicensed sales, despite there being a contrary industry practice to respect limitation periods, and regardless of other considerations. It has also pegged its award to the final determination of parallel litigation between the parties in the USA on 5 US patents from the licensor's portfolio.

2. The jurisdiction of the UK courts to undertake such determinations was established in this Court's judgment in _Unwired SC_ in August 2020. It is based on the contractual effect of the voluntary undertaking given by the patentee to ETSI as part of the declaration process under ETSI's IPR Policy: CAJ [1]. This jurisdiction affects undertakings, large and small, making and selling equipment that supports cellular telecommunication standards globally, including mobile handsets, cellular-connected cars, and a growing array of "Internet of Things" devices. It also has ramifications for other standardised technologies, such as Wi-Fi and video codecs, administered by other standard-setting organisations with a similar emphasis on FRAND licensing.

[166/3417-3468]

[15/284]

3. In _Unwired SC_, this Court highlighted certain key objectives of ETSI. Those are: (a) the aim to promote technological innovation, and competition between manufacturers, and thereby to benefit consumers through more convenient products and services, interoperability, lower product costs, and increased price competition: [4]; (b) the aim to achieve a fair balance between the interests of implementers and owners of SEPs: [7]; (c) the intention that parties and courts should look to and draw on commercial practice in the real world when setting rates: [62]; and (d) the objective that the terms and conditions on offer be generally available as a fair market price for any market participant, to reflect the true value of the SEPs to which the licence relates and without adjustment depending on individual participants' characteristics (i.e. that there be a "*single royalty price list available to all*"): [114].

[166/3423-3424]

[166/3425]

[166/3372-3373]

[166/3454]

4. The UK courts' approach to the exercise of the FRAND jurisdiction to determine global licences is of great significance. In any given case, the SEP holder's portfolio will be one part of the corpus (or "Stack") of patents – often totalling tens of thousands – that their owners have declared to be essential to each relevant international standard such as the 4G telecommunications standard. These declarations are commercially highly advantageous to the declarants. The patent owners who make such declarations can expect thereby to reap a royalty income from manufacturers worldwide if their patents are (or may be) regarded as essential to a widely-accepted international standard, and for various reasons to do with the way the ETSI system operates, as well as because of the potential for "*gaming*", there is a powerful incentive to over-declare: HCJ [105]-[107]; *Unwired SC* [44]. For their part, the manufacturers (i.e., the implementers) in principle need licences to all the SEPs to "*buy access*" to the standard: *Unwired SC* [60]. There are repeated rounds of negotiations between SEP owners and manufacturers over the licensing on FRAND terms of the various SEP portfolios. The rates set by the UK courts, as well as the principles applied in setting those rates, are often important inputs, and the UK courts' determinations of global licence terms are closely scrutinised internationally.

[17/400-401]
[166/3434]
[166/3437-3438]

5. The FRAND rate set by the UK court for a SEP holder's global portfolio falls to be extrapolated to the whole Stack of SEPs. In turn, the cost of the Stack as a whole affects competition between manufacturers globally, in telecommunications and other industries that implement cellular connectivity, such as automotive, health, shipping and aviation. The licensing costs for the relevant technology affect their cost base. For downstream markets to achieve their potential, the manufacturers require predictability and consistency as to the royalties for patents that have been voluntarily committed for licensing, as well as reasonable cost. It matters whether to plan for royalty costs (for cellular SEPs) of e.g., $6 or $40 in pricing a mobile handset. These are realistic figures: $6 is the implied 4G Stack cost faced by manufacturers based on the CA's recent FRAND judgment in *InterDigital v Lenovo* [2024] EWCA Civ 743; [2024] RPC 24 ("*InterDigital CA*"), given 9 months earlier than its judgment in this case. $6 is also very close to the implied Stack cost from the trial Judge's determination in this case. By contrast, $40 is the implied Stack cost based on the CA's judgment in this case. The relevance of this variance is stark, given that basic smartphones with 4G cellular functionality retailed at around $125 or less at the time of the first instance trial (and do so for even less now).

[147/2716-2792]

6. In summary, manufacturers in industries using standardised technologies require stable economic conditions in which to create innovative and differentiated products and compete in the marketplace, to further the aim of global adoption of the technology. If the UK courts' approach

to determining rates is subjective, unprincipled or erratic, this damages the proper functioning of industries worldwide. Equally, if the UK courts fail to ensure the implied total royalty for all SEPs is kept to a reasonable level (taking into account the fact of thousands of declared SEP families per standard), in view of its impact on suppliers, this harms innovation, quality and product prices borne by consumers worldwide.

7. In this case, the CA held that the principles applied by the trial Judge, and his fact-sensitive approach to determining FRAND licence terms, had been entirely wrong and, in effect, treated the first instance trial as a mere '*dress rehearsal*'. The CA identified its own principles for addressing this type of case but did not remit the matter. It determined for itself the terms of a global licence, drawing on the information available to it at appellate level, commenting in the course of its reasoning: "*the nature of the evidence here does not justify fine distinctions*": CAJ [143]. It arrived at a royalty that, together with interest, amounts to a sum more than 10 times higher than that of the Judge, applying an approach that did not reflect either party's case at trial (or on appeal), and new workings. **[15/311]**

8. The CA's decision undermines each of the objectives identified in §3 above. In addition, the CA's disregard of the limits on its appellate function introduces additional uncertainty and unpredictability for industry.

Summary of the appeal

9. Apple advances five Grounds of appeal. **[1/13-28]**

a) **Grounds 1 and 2** challenge the lawfulness and correctness of the principles that the CA applied in entirely overturning the trial Judge and then substituting its own determination of a FRAND rate, at the appellate level. These Grounds raise questions of substance about how to approach FRAND determinations, and questions of procedure – including the CA's failure to respect key findings of fact by the trial Judge, before going on to form new evaluative judgments of its own based on the limited evidence before it. **[1/18-24]**

b) **Ground 3** raises the question whether, even if the CA had been right to find that the trial Judge's determination should be wholly set aside (which was not the case), it was appropriate for the CA to perform the function of a first-instance court determining FRAND terms itself, rather than remit. **[1/24-25]**

c) **<u>Ground 4</u>** is an appeal against a point of law that was determined at the CA level in *<u>InterDigital CA</u>*, shortly before its decision in this case. Arnold LJ summarised this point of law as follows, in his later judgment in *<u>Panasonic v Xiaomi</u>* [2024] EWCA Civ 1143; [2025] 3 All ER 66, at [23]: "*This Court held in <u>InterDigital v Lenovo</u> that limitation provisions under national law had no role to play in the determination of what terms were FRAND, and thus <u>royalties should be paid in respect of the whole period during which the implementer has been exploiting the SEP holder's portfolio</u>*" (emphasis added). Applying this to the present case, the CA also rejected the trial Judge's conclusion that past royalties should be limited to the date when Optis first asserted its rights against Apple, which was in 2017, some 3-4 years after Optis acquired its "assertion portfolio" from the original industry SEP owners. Apple's case is that, in line with industry practice and internationally-respected policy considerations, royalties on past sales should be limited by reference to the applicable periods of limitation for the jurisdictions where the substantial proportion of the portfolio was filed (normally 6 years prior to commencement of the infringement proceedings), and that in particular circumstances it may be fair and reasonable for the relevant period to be further adjusted.

[1/25-26]

[147/2716-2792]

[153/2877]

d) **<u>Ground 5</u>** challenges the CA's decision to treat as a "floor" to its determination of worldwide FRAND royalty terms whatever sum may turn out to be awarded to Optis in a final judgment on a US patent damages action, which concerns only five US patents in Optis' portfolio. At the time of the CAJ, there was an extant jury award in the US District Court, and there was a pending appeal to the Court of Appeals for the Federal Circuit ("CAFC"). Although Arnold LJ stated at [258]: "*For present purposes, … I am assuming that it [i.e. the then-extant US judgment] will be maintained by the CAFC to the extent that one of the two jury awards is upheld*", that turned out to be wrong. The CAFC in fact vacated the most recent jury award, and remanded the matter for a retrial. On a retrial it was found in February 2026 that <u>none</u> of Optis' 5 US patents was infringed, and therefore no damages were due. Nonetheless, the questions of principle raised by Ground 5 remain live and relevant for future cases: even if (*quod non*) Apple was responsible for Optis' pursuit of the US proceedings, at least up to late 2023, was Arnold LJ correct to hold at [257] that this should affect the right level of a worldwide FRAND royalty determined by the UK court? And was this outcome "*supported by considerations of comity*", as Arnold LJ held at [258]?

[1/27-28]

[15/336]

[15/335-336]

[15/336]

10. As regards **disposition of this appeal**, if successful, Apple will invite this Court to uphold (and restore) the Judge's fundamental <u>approach</u> to determining a FRAND rate, the essence of which is (i) to seek to price the value of the Stack to Apple, and then apportion a percentage of

that price to Optis;[1] (ii) to value the Stack by adopting an "*inclusive*" approach to the use of other licences which the Court had evidence about, removing only those that "*distort rather than elucidate*" (HCJ, [291]); and (iii) to estimate an <u>average</u> value from these other licences, reflecting the uncertainties surrounding them individually. This is Ground 1(a) of this appeal. **[17/503]** **[1/18]**

11. As regards the <u>detailed implementation</u> of the averaging approach, Optis made a group of specific criticisms of the Judge before the CA. The main one boiled down to a criticism of the Judge for starting with the lump sum considerations under the other licences that he assessed in order to derive an average value of the Stack to Apple, instead of starting with "unpacked" dollar per unit values which had been derived by the parties' respective accountancy experts. Optis argued that this caused the Judge to overlook certain (in Optis' view) relevant differences between the licences. Apple's position is that those criticisms can readily be shown to be misplaced: generally, they confuse legitimate simplifications on points of detail with errors of principle.[2] If Apple succeeds in this appeal, it is accepted that these various detailed points may require to be remitted to the Judge but, if so, such a remittal would have a narrow compass. In particular, irrespective of whether one takes the Judge's lump sum implementation or uses the "per unit" figures of the accountancy experts, if one accepts the Judge's averaging approach there are then a small number of fairly straightforward choices to be made on a tightly-focused remittal, based on submissions of the parties about the evidence.

12. In short, none of those specific issues requires the adducing of any new evidence, nor a retrial. They are tractable points that can be addressed shortly at first instance (if necessary), in the light of the full evidential record. Furthermore, neither individually nor cumulatively are they capable of leading to the radical outcome in the Court of Appeal below, whereby the payment due pursuant to the Judge's determination of a FRAND royalty was replaced by a figure an order of magnitude higher.

GROUND 1: The CA adopted an approach to determining a FRAND rate for the Optis-Apple licence that ran counter to the fundamental aims of the international standard-setting system described by this Court in <u>*Unwired SC*</u>, and to the requirements of consistency and predictability in exercising the global rate-setting jurisdiction. **[1/18]** **[166/3417-3468]**

---

[1] For the purposes of this appeal, it is undisputed that Optis' share of the Stack is 0.38%.

[2] In line with Ground 1(c), Apple accepts that the Judge's assessment should not have included an unusable Optis licence – Optis-Google 2020. It is easy to remove this, and redo the calculations. **[1/18]**

13. The CA rejected the Judge's entire approach to determining a FRAND rate, as flawed in principle. The CA stated at [115] that the "right approach" was based on selecting the best individual comparables and working from there. However, it then itself used an idiosyncratic approach, guided by what it admitted to be non-FRAND benchmarks, so as to land on its own rate for a licence from Optis to Apple. The resulting rate was far higher than the pre-existing market rates paid by Apple to any of the major international SEP licensors in the industry in the group that were regarded as helpful comparables. **[15/306]**

14. In summary, for the reasons outlined below, Apple submits the CA was wrong to reject the Judge's approach. The CA's approach runs contrary to ETSI's fundamental aims, and this Court's intention as to how the FRAND jurisdiction should work. It moves the entire basis of SEP owner remuneration up and away from pre-existing levels of fair rates found in the marketplace, so disrupting the proper functioning of the industry. It is apt to give rise to inconsistency and unpredictability in the operation of the FRAND global rate-setting system in future cases, so undermining the conditions needed for economic growth and innovation.

The CA was wrong to reject the Judge's approach

15. A number of key elements of the Judge's reasoning and findings at first instance are not properly reflected in the account given at CAJ, [24]-[76]. **[15/289-298]**

16. *First*, the Judge considered that, in valuing SEP portfolios under the ETSI framework, what ultimately matters to businesses that use the standardised technology (here, cellular connectivity under the 4G Standard) in the products that they make and sell is the aggregate price for licences to the Stack. Accordingly, it would be an error for the Court to focus only on individual "comparables", at least if detached from the critical need to understand what they imply more widely for the level of the aggregate Stack price, and its reasonableness. The Judge stated at HCJ, [413]: "*In my judgement, what is being valued or priced is access to the Standard or the right to use it without infringing. It is the SEP Owner's contribution to this access or right of use that an Implementer is paying for.*" **[17/566]**

17. *Second*, the Judge sought to gain an understanding of the extent of Optis' contribution, in terms of the relative quantity and "quality" of patents in its portfolio:

a) As regards quantity, the trial Judge found that, in total, about 22,000 patent families had been declared to ETSI at the relevant time as potentially essential cellular patents to which implementers may need a licence: HCJ, [460(iv)(b)]. Of that number, Optis, a "patent assertion entity" controlled by a New York hedge fund, had obtained 135 patent families **[17/584-585]**

from 4 major industry licensors: Ericsson, LG, Panasonic and Samsung. The original licensors retained rights to share in Optis' licensing revenues: [181]. Excluding the patents transferred by Ericsson (with whom Apple directly concluded a new portfolio licence in the course of the proceedings), there were only 83 such patent families: [460(iv)(c)]. **[17/437-438]** **[17/585]**

b) As regards the "quality" of these patents (i.e., the prospect of them actually standing up to scrutiny as valid, essential and infringed) this was found to be dubious. The evidence showed that they had been chosen based on a "*pyramid concept*", with "*litigation-grade*" patents at the top and a substantial amount of "*fluff*" at the bottom. The Judge explained: "*The patents that were placed in the portfolio comprised some "litigation grade" patents, intended to make good any claim in the courts (whether on validity or essentiality); some to read onto specifications, to enrich the quality or apparent quality of the pool; and some "makeweights"*": [177]. See, generally, [158], [177]-[181]. The Judge concluded, at [182]: "*I am prepared – for the present – to proceed on the basis that Optis' portfolio was "average". That, however, is an assumption not especially supported by any evidence; and gainsaid by Optis' failure to call [a technical expert who was abruptly withdrawn by Optis shortly before trial].*" **[17/436]** **[17/425-431, 436-438]** **[17/438]**

18. *Third*, the Judge appreciated that: "*Although I have been able to consider the Optis Portfolio in some (albeit still superficial) detail, I have no material before me to reach any particular conclusion about the portfolios of SEPs comprising the rest of the Stack. I have no way of knowing whether – set against the Optis Portfolio – these collections of SEPs are better or worse (in terms of validity, essentiality and importance) than those comprising the Portfolio. It therefore seems to me that I should regard the SEPs comprising the Stack as essentially homogeneous when grouped together in a portfolio of any substance*": [409] (emphasis added). In other words, the value of any given SEP owner's portfolio ought here to be approached by a form of patent-counting exercise, in the absence of there being any reason to say it was better or worse than others.[3] **[17/565]**

19. *Fourth*, from this premise, the Judge reasoned that SEP portfolios should be valued according to their Stack share: "*The key differentiator is the proportion of the Stack owned by different SEP Owners. It is plainly discriminatory for the price charged by SEP Owners not to vary as to the proportion of the Stack owned by each SEP Owner. This, of course, is the essence of the Apple Framework [i.e. Apple's approach in licensing negotiations to valuing a portfolio], and it seems self-evident. SEP Owner A, owning 1% of the Stack,* **[17/573]**

---

[3] The Judge noted that the ETSI database itself could not be used to ascertain each SEP owner's holding of SEPs and its share of the Stack: [111]. The evidence showed, e.g., that ETSI declarations could be general (see e.g. Optis' declaration dated 6 May 2020), and up-to-date ownership of patents after assignments/transfers was not systematically recorded. He found it necessary to use a commercial database produced by an organisation called Innography: [134]. **[17/402]** **[17/411]**

ought to receive one tenth of what SEP Owner B, owning 10% of the Stack receives. And the 1% of A and the 10% of B ought to be in proportion, not merely with each other, but with the overall Stack (i.e. 100%)": [433(iii)]. **[17/573]**

20. *Fifth*, these four matters set out above provided the context within which the Judge formulated his essential methodology for determining the FRAND value of Optis' portfolio in the present case. He stated at [456]: "*The best approach, as it seems to me, … is to seek to price the value of the entire Stack to Apple, and then to apportion that price pro rata amongst the co-owners of the Stack in proportion with their holding, as calculated by Innography. In calculating the price, I am not making any assessment of the value of the individual patents. I am pricing the Stack and what Implementers (and, specifically, Apple) should pay for it*." Birss LJ refers to this approach at CAJ [55]. He describes it as a "*new method, devised by the judge and not heralded at trial*", but it is important to note that Birss LJ's focus was on the particular way that the Judge went on to implement this (i.e., by assessing the lump sum payments made by Apple to other licensors), which the CA proceeded to criticise (at [111]-[115]); his focus was not on the basic method itself, which Birss LJ acknowledges (CAJ, [55]) was similar to the essence of the Apple Framework (as the Judge too had emphasised, in HCJ, [405]). **[17/582]** **[15/294-295]** **[15/305-306]** **[15/294-295]** **[17/564]**

21. *Sixth*, the Judge examined the Optis 'comparables'. He found that Optis concluded licensing agreements with a string of small manufacturers that were all very low value, but which on their face presented high ad valorem royalty rates. The Judge found Optis had consistently demanded rates that were excessive, and out of line with the rates being charged by others in the market: [194]. Optis made claims about the quality of its portfolio to all its counterparties that it was unable to defend at trial: [200(iv) and (v)]. The Judge concluded at [398(iv)]: "*…it is difficult to avoid the conclusion that Optis was not dealing with these small counterparties for the revenue streams they would bring in, but because the licences they agreed would produce comparables that would assist Optis in this litigation*." As regards the size of royalty rates implied by the Optis comparables for the Stack, the Judge noted (based on workings by Optis' expert accountant) at [467(iii)(a)]: "*That means that a large portion of the price of a Handset would be paid to the SEP Owners of this particular Stack, leaving █% or █% for all other costs and profit*". He commented at [467(iv)]: "*No Implementer could stay in business paying Optis' rates*" (meaning Optis' rates extrapolated for the Stack). **[17/445]** **[17/451-453]** **[17/560]** **[17/590]** **[17/590]**

22. One of the licences in the Optis group that was not one struck with a tiny counterparty was the *Optis-Google* 2020 licence, to which the CAJ attributed some weight in its assessment of a FRAND value: see Ground 1 below. This was a licence for a modest sum ($█) in respect of a much smaller handset business (one expert's analysis suggested it was roughly 50 times smaller than Apple's; the other expert's analysis suggested over 100 times smaller). The Judge noted at [470(iii)] that his 'unpacking' of the licence rate showed that using this licence as a comparable in **[1/18]** **[17/592-593]**

its own right would imply that implementers would have to pay █% of the entire selling price of a handset to SEP owners, which is "*indefensibly high*". He therefore appreciated that, at least taken on the basis of the "unpacked" numbers, this licence was wholly unusable for the FRAND determination. It falls to be observed that, prior to his looking at these implications of the unpacked rates derived from this licence, the Judge said at [470(iii)] that he did not think the licence was "*something to be dismissed without more as unrepresentative*", and that he rejected a suggestion from Apple that "*a licence with Optis was so minor a matter that Google would not be inclined to pay much attention to it.*" However, Apple's main point (repeated before the CA, in §56 of Apple's skeleton argument), was a different one: it was that the royalties under this licence were outweighed by or broadly equal to the cost of FRAND litigation, the costs of which are notoriously high.[4] A rational undertaking would take this into account in deciding whether to strike a deal at that price. In fact, the Judge himself <u>accepted</u> this, earlier in his judgment at [270]: "*Of course, Google would have regard to transaction costs (cost of review; cost of litigation) in reaching a deal, which would be different to those of Apple.*"

[17/592]

[17/592]

[40/1061-1062]

[17/495-496]

23. *<u>Seventh</u>*, the Judge reviewed the Apple licence agreements disclosed in the proceedings for their worth as comparables in the FRAND rate-setting exercise. He noted the advantage that together they accounted for around 50% of the total Stack (to be contrasted with Optis' share of 0.61%/0.38%). He commented: "*These licences therefore provide a source for rates for a good proportion of the Stack*": see [460(iii)]. However, he perceived a problem in picking out any <u>individual</u> licences to act as the comparables for a FRAND determination, for the reasons explained below. This is where he said he parted company with the approach favoured by Lloyd LJ in *<u>Cimetidine</u>*[5]: see [290]-[291] (also fn. 420). He stated: "*In my judgement, in this case at least, the comparables only have value if an <u>inclusive</u> approach is taken. I appreciate that even when an inclusive approach is taken, there will be some comparables that cannot be included, because they distort rather than elucidate.*"

[17/583-584]

[17/503]

24. In short, the Judge considered that there were sufficient <u>uncertainties</u> about the individual Apple licences that it would not be right to pick any of them as direct individual comparables. There were a number of reasons for the Judge's conclusion:

a) <u>Coverage/content</u>: As recorded by Birss LJ at CAJ, [92], the Judge received evidence on the various uncertainties affecting the interpretation of the Apple licences. Apple's accountancy expert, Elizabeth Gutteridge, stated in §6.51 of her first report (identified by Birss LJ): "*Based on Apple's witness evidence, the differences in royalty rates across the Apple Licence*

[15/302]

[61/1542]

---

4 For example, see *<u>Unwired Planet v Huawei</u>* [2017] EWHC 1304 (Pat); [2017] RPC 20, [40], <u>(£19.4 million total)</u>; *<u>InterDigital v Lenovo</u>* [2023] EWHC 1578 (Pat); [2023] RPC 14, [35] (£31.5 million total).

5 *<u>Smith Kline & French Laboratories Ltd's (Cimetidine) Patents</u>* [1990] RPC 203.

[164/3343]

[146/2715]

[161/3081-3143]

subset were, at least in part, influenced by the number of non-cellular SEPs and non-essential patents (cellular and non-cellular), licensed in addition to 4G multimode SEPs, as well as the strength of these patents."[6] The point that most of Apple's licences put forward as comparables (all but three) included significant IPR beyond 4G cellular SEPs had been repeatedly underlined in Apple's "Position Statement" (the pre-trial pleading ordered by the Judge): see §§42(2), 45, 59(1), 61(4). It was unknown to what extent this caused the rates derived from those Apple licences for Optis's small, 4G cellular SEP-only portfolio to be overstated: Ms. Gutteridge could only observe the "*directional impact*".[7]

[43/1160-1161, 1163, 1173-1174, 1176]

[61/1541]

b) Uncertainty of allocation of a lump sum between different elements in a SEP licence: The evidence before the Judge showed him that there were some important "*subjectivities*" to be grappled with, in making judgments even about the division of a lump sum licence fee into constituent elements to derive the value of a SEP-only licence. He identified these at [301] as (i) the different approaches to computing rates in the various licences; (ii) cross-licences; (iii) the division between payment for future royalties and for past releases. For (i), one would need to make assumptions about matters such as the projected future volumes of devices to be sold, and their prices. For (ii), one would need to make an assumption about the value of a cross-licence (in this case to the net SEP licensor, from Apple), bringing in considerations of the future volumes of devices to be sold by the SEP licensor. For (iii), one would often need to know how to apportion a single lump sum licence fee between a "release" payment for unlicensed past sales, and a payment in respect of sales over the future period of the licence agreement. The Judge discussed a concrete example of this third case, when considering the cross-examination by Optis' counsel of Apple's commercial licensing witness, Heather Mewes, in relation to what element of the lump sum licence fee in the *Apple-Ericsson* 2015 agreement should be regarded as a past release. Apple's negotiating

[17/505-506]

[17/506]

[17/506]

[17/506]

[6] Apple's witness evidence explained the importance in the individual Apple licences of the non-cellular SEP elements of the deals. For example, Whitt 1 stated (§§26-31): "[redacted]" There was very little cross-examination of the factual witnesses about this issue, in the course of which Apple's witnesses confirmed and underlined the importance in fact of the value of non-cellular SEPs: see e.g. Ankenbrandt, Trial E transcript, day 7, pp.1258-1264; Rockower, Trial E transcript, day 7, pp.1271-1274.

[58/1510-1512]

[72/1659-1661]

[72/1662-1663]

[7] In a similar vein, Optis' factual witness Ray Warren referred in his oral evidence to the fact that, in his experience, patent licence agreements might involve a range of hidden considerations, such as an implicit price for settlement of "*other commercial litigations that were ongoing*." The Judge quoted this evidence at [261], and stated at [262]: "*Mr Warren was making a general point of considerable importance … that adopting a comparables approach (where, for instance, one simply compared the rate in one licence with the rate in another) was almost certainly distortive and over-simplistic, given the complexity of the issues actually being resolved in the licence agreement*."

[17/492-494]

witnesses had given evidence that they understood a substantial fraction of the fee was attributable to a past release, and their evidence had been used by Apple's accountancy expert. Optis' accountancy expert, Mark Bezant, had disregarded that evidence, and in his so-called "adjusted release" analysis he had used a lower past release figure derived from different sources, which translated into a far higher "unpacked" per unit rate. The Judge commented at [245(ii)] (internal pp.138-139): "… *I have no idea – if a court had to construe the payment terms of this licence – how the split between payment for the past and payment for the future would be resolved. Very likely, the question will never arise, and I certainly am not going to resolve it now. The point is that whatever Apple's and Ericsson's subjective beliefs or wishes, these are irrelevant to the objective construction of the contract, which is opaque on this point.*" **[17/483-484]**

c) Deliberate sculpting of detailed licence terms in order to help them serve as comparables in other cases: The evidence before the Judge indicated that, against the backdrop of the FRAND regime, it was not uncommon for parties to sculpt the detailed terms of their licence agreements to help them in future licensing negotiations with other parties (Optis' behaviour in this case was an example of this). He cited evidence from Apple's witness, Ms. Mewes, that Ericsson had behaved in this manner in its negotiations with Apple: [245(i)] at pp.136-138; and fn. 352. He concluded: "…*the overall evidence before me is clear, namely that licences performed two functions in this market … secondly, and less obviously, the licenses were seen as precedents to be deployed (as advised) in negotiations with others*." **[17/481-483]**

25. In view of his findings, the Judge explained at [462]: "*What I can do is consider as many components of the Stack as I can, rendering them comparable or equivalent, and using those equivalent values to derive a 100% value, which is the value I attribute to the Stack. Use of multiple data sources means that outliers or unrepresentative cases can be averaged out, and a safer, more reliable, overall figure obtained.*" Put differently, he preferred to use an averaging approach across the data on the useable licensing agreements that he had. (As noted above at §23, the Judge commented that the Apple licences together already accounted for a good proportion of the entire Stack). **[17/585]**

26. *Eighth*, the Judge needed to deal with Optis' submission at the trial, which formed a major focus of its counsel's cross-examination of Apple licensing executives over multiple days, that all the rates in the licences which Apple put forward as comparables were unduly depressed, and therefore tainted and unusable, because of '*hold out*' behaviour by Apple. This was said to be the case even in Apple's dealings with the major international SEP licensors such as Ericsson (which had deep pockets and could – and indeed did - apply for injunctions against Apple in major markets across the globe). The Judge found on the evidence that Optis' allegation was wrong: **[17/567]**

[17/567] [417(iii)]. Among other matters, he considered evidence relied on by Optis that, in Apple's negotiations with licensor counterparties prior to a deal, Apple typically did not concede that any of the asserted patents were valid or essential during the talks. Discussing the example of Apple's negotiations with Ericsson, the Judge stated: "*The fact is that the parties were testing their respective positions* …": see [245(iii)], p.143; and see the extract from the evidence of Apple's witness Brian Ankenbrandt in relation to negotiations with Conversant, at [272]. The Judge concluded, at [481(iv)]: "*On the whole, I consider that Apple's counterparties were "big beasts" in the world of Cellular Connectivity (and generally), and well able to look after themselves.*"

[17/488] **[17/496-497]** **[17/596-597]**

27. *Ninth*, and finally, the Judge dealt with Optis' submissions that Apple had exerted '*hold out*' in its licensing negotiations with Optis itself, which had started in early 2017 and ran until the launch of proceedings by Optis on 26 February 2019. This provided a concrete basis for the Judge to consider the constant refrain of '*hold out*' from Optis, directed at Apple in every possible way. The Judge found Apple's approach was process-driven, and it could not seriously be suggested that Apple was failing to engage: [210], [359]. Optis' approach in the negotiations, on the other hand, was to put forward "*no more than a series of demands for money, not underpinned by any particular effort at persuading the purchaser that the price represented proper value*": [354], [356]. Rather than finding Apple guilty of 'hold out' to frustrate negotiations, he found that "*whatever chance of a deal that existed was, in my judgement, scotched by Optis' approach*": [354(ii), (iii)].

[17/460-461, 543-544] **[17/534-543]** **[17/534-535]**

28. Apple respectfully submits that all these basic elements of the Judge's reasoning were unimpeachable and reflected the exercise of sound judgment by a commercially-astute judge who had the benefit of reading and hearing all the evidence. It is not contested that the Judge went on to make an error in his detailed implementation of the approach outlined above, by including the unusable *Optis-Google* licence alongside the set of Apple licence agreements that he used for "*averaging*", perhaps because he had forgotten that it would be necessary in the case of the *Optis-Google* licence for him to scale up by a factor of at least 50 its implied lump sum fee for the whole Stack, so as to reflect the very small level of device sales made by Google as compared with Apple. Birss LJ pointed out in CAJ, [110] that, had this been done, it would have suggested a Stack value of $[redacted] per year, which no doubt would have given the Judge pause for thought.

[15/305]

29. In deciding to reject the Judge's approach entirely, Birss LJ refers at CAJ, [38] to "*two crucial conclusions*" reached by the Judge. At [42], he states that "*These two conclusions are fundamental to the appeal*…". The *first* was that, according to Birss LJ (but in error), the Judge considered both parties had wrongly adopted an exclusionary approach to comparable licences, in the sense of picking the best comparables from the pool of available evidence and excluding others. That was said to be

[15/291] **[15/292]**

the approach familiar from previous cases and referred to by Lloyd LJ in *Cimetidine*, whereas the Judge decided that the case before him required an inclusive approach: see §§23-25 above. The CA's decision to overturn the Judge's decision on this point, as amounting to an error of law, is dealt with in Ground 1(a) below. **[161/3081-3143]** **[1/18]**

30. The *second* crucial conclusion reached by the Judge was said to be his decision to reject the evidence of both accountancy experts entirely, for the purposes of the methodology for determining the FRAND rate for a licence from Optis to Apple. Optis had raised this aspect of the Judge's decision as a ground of appeal before the CA. Birss LJ summarises the Judge's reasoning at [39]-[41], and then addresses the matter in detail at [86]-[97]. It is submitted that the CA was wrong to have treated the Judge's rejection of the accountancy evidence as a factor that, in itself, vitiated his entire averaging approach and methodology (which did not require accountancy expertise). The Judge rightly perceived that the accountancy experts were not in a position to assist the Court with what were essentially factual questions about the patent licence agreements that they were tasked with 'unpacking', e.g. the extent to which the lump sum consideration for a licence should be attributed to payment for the release of past liability rather than the licensing of future sales: see §24.b) above. It was in recognition of these very inherent limitations that Ms. Gutteridge said in her first report she was able only to observe certain factors (such as whether a licence covered a portfolio of non-essential patents as well as cellular SEPs) and to refer to the "*directional impact*" of this observation. **[15/291-292]** **[15/300-302]**

31. There were nonetheless numerous instances where the accountancy experts came to different conclusions about the 'unpacked' royalty rates in the licences they considered, not because of disagreements relating to the application of their expertise to the facts, but owing to their making different factual/industry assumptions, which they were not themselves in a position to validate (e.g. in unpacking the Optis-Google licence, Mr. Bezant relied on various assertions by his client's witness, Mr. Blasius, such as assuming no part of the value of the licence sum related to [redacted]).

32. Ultimately, there was actually not a great deal of difference between the Judge's view of the proper role of the accountancy evidence and that of the CA. Birss LJ points out at CAJ, [90] that the accountancy experts cannot help on the issue of the "*comparability*" of a licence, in the sense of opining on whether it is a "*good parallel*" for the licence in respect of which the Court is required to determine a FRAND royalty rate. He states: "*Comparability itself will be a matter for the judge to decide based on evaluation of all the evidence*" (recognising the importance of "*all the evidence*"). He distinguishes this from "*reliability*", and states that 'unpacking' is "*about improving the reliability of the* **[15/301]** **[15/301]** **[15/301]**

comparison [between two licences]": [91]. For his part, the Judge was conscious of the very high degree of uncertainty that confronted him in assessing the true "*comparability*" of any individual licence disclosed by Apple. This is what led him to conclude that an "*inclusive*" approach to considering all useable licences was called for, combined with the use of averaging of the data: see §25 above. **[15/301]**

33. In the following paragraphs, the errors in the approach which was substituted by the CA for that of the Judge are identified in turn.

Ground 1(a): The CA erred in holding the "*right approach*" to determining the FRAND rate was to identify the best individual comparables, which the Judge failed to do **[1/18]**

34. Birss LJ stated at CAJ, [11] that "*each side sought to use selected licences as the best comparable licence(s) from which to derive information to allow the court to answer the financial question … each side advanced a case which included an approach of selecting the best comparable(s) from the available licences*." This was an elaboration of what the Judge below had said at HCJ, [290], namely: "*The mind-set of both parties was that focus on fewer, better, comparables was to be preferred to a focus on more, less good, comparables. In other words, a focussed approach was to be preferred over an inclusive approach*." **[15/285-286]** **[17/503]**

35. In fact, Apple's approach in its Position Statement was not to use selected licences as the best individual comparables out of a set of available licences. What Apple did was to refer to a wide range of 14 Apple licences as evidence of the existing spread of rates in the marketplace. It was made clear that these Apple licences generally included significant payment for matters going beyond cellular SEPs, so that the 'unpacked' rates referred to were over-inclusive in Optis' favour (see §24.b) above). In doing the 'unpacking', it was also assumed in Optis' favour by Apple's expert, among other matters, that no part of the lump sum payments by Apple under these licences related to a release of liability for past device sales, so that all of it was loaded onto the licence for future sales.[8] The resulting spread of unpacked rates (scaled down to reflect Optis's Stack share) was shown in Table 1 of the Position Statement: it ranged from $[redacted] to $[redacted] per licensed unit: see §45 of the Position Statement.[9] **[43/1161]** **[43/1163]**

36. Apple relied on this broad spread to ground the FRAND assessment by reference to real-world market rates achieved by Apple's counterparties, including some of the largest and most

---

[43/1161] 8 See Apple's Position Statement in Trial E, 17 January 2022, §42(3)(a). Yet further assumptions in Optis' favour were also made: see e.g. §42(3)(b). **[43/1161]**

9 This treated Optis' share of the Stack as 0.61%, on the assumption that it included a group of patents obtained from Ericsson. Those patents were licensed directly by Ericsson to Apple during the course of the proceedings, reducing Optis' Stack share to 0.38%.

sophisticated patent licensors worldwide. But this was only part of Apple's methodology at the trial for determining a FRAND rate for Optis' portfolio. Apple also used its commercial "*FRAND Framework*", applied to the available profits on a chip and, alongside it, a variant looking at affordability with respect to the available profits on a basic-level smartphone. The Judge found this Framework (termed the "*Apple Framework*"), which involved coming up with a reasonable aggregate price for the Stack and allocating a share to the licensor, to be "*in essence sound*" (HCJ, [405]), even though he disagreed with how Apple chose the Stack price under the Framework. **[17/564]** Thus, Apple did not adopt what Optis referred to as a "*conventional*" comparables approach.

37. Birss LJ proceeded to evaluate the Judge's approach at CAJ, [101] *et seq*. The crux of his **[15/303-306]** criticism concerned the Judge's choice to average across the spread of licences (after removing clear outliers), to help him in estimating an implied overall price for the Stack. Birss LJ commented **[15/304-305]** at [108] that, however the averaging was done, the weakness was "*in giving weight to all licences in the table as comparables*…". He reasoned that this was manifested because of the wide range of implied **[15/305]** prices for the Stack, and stated at [109]: "*Either these licences are not all equally good comparables for various reasons or, putting it another way, not all these rates are FRAND*."

38. However, by reasoning in this manner, Birss LJ overlooked the key consideration that had caused the Judge to prefer an inclusive "*averaging*" approach. The Judge simply did not find himself in a position to conclude that any of the specific Apple (or Optis) licences in evidence was capable as serving as a "*close parallel*" to the licence for which he was tasked with determining FRAND terms (although he certainly did not suggest that any of the fees agreed in the Apple licences were unfair or artificially depressed). That is because he had formed the view, on a full review of the evidence, that there was real uncertainty about the scope and coverage of all the individual licences and the effective royalty rates for the use of SEPs within them: see §24 above. It was this that explained the wide spread of implied aggregate prices for the Stack from the Judge's workings. **[161/3081-3143]** The approach described by Lloyd LJ in *Cimetidine* cited at CAJ, [35] – namely that "*[t]he object of the comparability exercise, in this as in any other branch of the law, is to find the closest possible parallel*" – therefore **[15/290-291]** could not be applied rigidly. In short, the Judge's application of an averaging approach was not borne of a desire to reject an identified "*close parallel*" but was, rather, a pragmatic response to the evidential problem confronting him in the circumstances of the licences before him.

39. In a different case, it could be appropriate to use an approach of picking "best individual comparables" – most obviously, where the SEP licensor has in the recent past licensed other similarly-situated parties to the same portfolio that is subject to the FRAND determination, and where no vitiating factors are present such as were found in respect of Optis' licences in the present

case. The prior FRAND determination case that had been considered 9 months earlier by the CA, [147/2716-2792] _InterDigital CA_, was such a case. Arnold LJ recorded there at [305]: "*Undertaking the first task [examining alleged comparable licences, their circumstances, the rival cases on unpacking, and so on], the judge examined the various putative comparable licences with care, factors affecting them were identified, and the conclusion was that the best comparable was LG 2017*". But the approach of searching for close or exact parallels to the subject-matter before the Court will not always be suitable, and it was not suitable here. [147/2790]

[15/302] 40. At [92], Birss LJ stated: "*As an approach, the "comparables approach" is the one described in _Cimetidine_. Therefore the fact either expert adopted a comparables approach on instructions is no criticism. It is an appropriate approach in law*." If and insofar as Birss LJ was treating Lloyd LJ's judgment in _Cimetidine_ [161/3081-3143] as setting out the "*right approach*" to a "comparables" framework, to be followed by the courts in FRAND value determinations whenever they are taking into account information about past licences (see [35], [38], [78], [92], [115]), this was in error. Indeed, in _Cimetidine_ itself, the Court [15/290-291, 299, 301, 306] emphasised the fact-dependent nature of the assessment, and the need to respect the judgment of the trial judge. Nicholls LJ stated at p.250: "*The complexities and uncertainties involved in cases such as the present appeals are formidable … An example of this is the extent to which rival comparables advanced by SK&F and the applicants assist in the present case. Inevitably there are points of resemblance and points of distinction in almost all comparables. The weight to be attached to these various points, and the conclusion on the degree of assistance a particular comparable affords, are matters which lie in the judgment of the tribunal to whom the calculation has been entrusted*." [161/3128]

41. Birss LJ reasoned, at CAJ, [121], that one can infer from the Judge's choice to analyse lump sum payments under the Apple licences "*at face value*" that he had "*necessarily rejected*" the proposition that these licences included valuable rights other than SEPs. This was a *non sequitur*. The Judge's decision to employ an average, across all the lump sums in the licences before him that he considered useable, was precisely _because of_ the uncertainties affecting all of them individually. [15/307]

42. Notably, the Judge's decision to use an inclusive approach to the available data was, in part, supported by the clear oral evidence of Optis' expert. The concept did _not_ emerge only from the Judge. In response to a question from the Judge about whether the expert was saying that one had to do "*preliminary spade work*" before deciding to pick (say) three licence comparables out of an available pool, Mr. Bezant responded: "…*even then I caution against saying these are the three and I will put the rest in the bin, because I think there is a danger that you may be left with characteristics of the three that you either do not know about or cannot control for, if I could put it like that, without taking into account the other licences … I would always have more rather than less information available to me personally as trying to decide -- and these things are often relative questions rather than absolute questions, when one is trying to synthesise an* [74/1668]

answer. I would have a larger set of information to help me synthesise my answer because different facets may affect subsets of the portfolio." (Trial E transcript, day 11, p.2106). **[74/1668]**

43. Subsequently, the Judge canvassed with Optis' expert how one might go about using an averaging approach to arrive at an answer, including by stripping out outlier data points. This item of expert evidence too foreshadowed the approach that the Judge decided to take: see Trial E **[75/1674-1675]** transcript, day 12, pp.2311-2318. At p.2318, for example, Mr. Bezant said: "*I agree. You can do the average. You can say is there something about the average that concerns me? Why is that? Oh, these three are very, very low, these two very, very high, whichever one it is. So you can either chop them and recompute the average, because that is part of the iteration of deciding what you are comfortable with, or you can take the average and adjust it in a more qualitative sense to recognise what has affected the average*". **[75/1675]**

44. In short, there is no principled reason why the Judge's approach of using the Apple licences collectively as the main basis for valuation, by taking an average (corresponding to what was a portfolio of at-best-average quality before him), should have been rejected as an error of law. The search for close or exact parallels to the licence to be determined was not suitable on the facts of this case. The CA had no proper basis to overturn the Judge's evaluative assessment, which was far from unreasonable: cf. *Maso Capital v. Trina Solar (PC)* [2025] UKPC 48; [2026] Bus LR 373 **[151/2834-2835]** ("*Maso Capital*"), [19]-[21].

Ground 1(b): The CA erred in reasoning that the evidence showed there must have been '*hold out*' by Apple in the licences it had agreed with others, artificially depressing the royalty rates **[1/18]**

45. At CAJ, [122], Birss LJ states: "*Having got this far, when one puts together the judge's clear finding that Apple's Framework included indefensible elements such as an insistence on patent by patent [rather than worldwide portfolio] licensing (which manifestly would involve a degree of hold out) with the spread of values implied by the Apple Comparables when they are placed on a common scale (either using the judge's Table 13 or DPU rates), there is only one, hardly surprising conclusion. When it can do so, Apple's significant negotiating strength leads some parties to agree lower rates than would be agreed between a willing licensor/willing licensee. There is a degree of hold out involved.*" **[15/308]**

46. There are a number of errors in the CA's reasoning in this paragraph, and the sweeping inference of 'hold out' by Apple across the entire international market was flawed and unreasonable, and contrary to the Judge's findings.

47. *First*, the explanation for the spread of values implied from the individual Apple licences is given at §38 above. Birss LJ's line of reasoning depends on the premise that each Apple licence was seen by the Judge as a potentially close parallel in its own right to the Optis licence for which the Court is required to set FRAND terms. That was incorrect: the Judge was not making an assumption that all those licences were purely licences for cellular SEPs, where implied rates could be reliably discerned via 'unpacking' and where only a difference between them in scale is relevant.

48. In this regard, Birss LJ refers at [122] to the fact that "*although there are exceptions (e.g. Huawei and LGE), by and large it is the organisations with larger stack shares like Ericsson, Interdigital and Nokia who have agreed licences with Apple which imply the total stack is more valuable than the stack implied by the licensees with smaller stacks*." What is overlooked is not only the fact that the deals with these larger licensors covered various value elements going well beyond cellular SEPs, and/or that their extensive portfolios might well be superior in quality to Optis' (taking account of the "*pyramid concept*" that it emerged had been used for putting it together out of the original portfolios of Ericsson, LG and Panasonic); it is also very plausible that many of these large licensors may have successfully exerted 'hold up' practices against Apple (via seeking injunctions to bring to a halt Apple's sales operations in major markets) in order to achieve higher rates than would otherwise be justifiable: see the extracts from the witness evidence cited in para. 49 below. The CA simply overlooked this. **[15/308]**

49. *Second*, the CA accords no weight to – indeed, in effect overrules – the clear finding by the trial Judge that Optis' contention was incorrect that Apple practises hold out against almost all SEP licensors globally. The Judge stated at HCJ, [417(iii)]: "*A number of the Apple Comparables were with counterparties who were large enough to be able to look after themselves: Huawei, Ericsson, Interdigital, Orange, Nokia, LGE, Qualcomm, Blackberry, ZTE and Panasonic were all SEP Owners with whom Apple dealt*." He stated that he had "*not seen any evidence of the rates that Apple achieve being unduly low through the exercise of Hold Out*." The Judge reached that finding after having received extensive evidence at trial, including witness evidence from Apple's main negotiators, and hearing detailed cross-examination of three of them over several days. For example: **[17/567]**

a) "[redacted]" (first witness statement of Jayna Whitt ("**Whitt 1**"), §26); **[58/1510]**

b) "[redacted]" (Whitt 1, §49); [58/1514]

c) "[redacted]" (Mr Ankenbrandt's first witness statement ("**Ankenbrandt 1**"), §32). [59/1519]

50. *Third*, Birss LJ's reliance in [122] on the point that the Judge found that Apple's Framework included "*indefensible elements such as an insistence on patent by patent licensing…*" is misplaced, for three reasons. In the first place, for clarity, the Judge stated that "*at least the potential for a patent-by-patent review was generally present in Apple's approach to negotiation*": HCJ, [207]. The Judge was clear-eyed that Apple did not actually insist on patent-by-patent licensing, cf. the gloss placed on this by Birss LJ. The Judge stated at [207(ii)]: "*Apple frequently takes licences without conducting an examination of each and every patent in the portfolio being licensed. In other words, licences are frequently concluded on the basis of (far) less than perfect knowledge. Clearly, therefore, the "we must review every patent" approach is not fixed, but a negotiating ploy.*" In the second place, the Judge stated in [207]: "*I find that to be generally the case, but it is important to see this approach in context.*" He explained that the context included, in particular, the fact that the approach was understandable in commercial negotiations, where neither side wants to make concessions in the period before striking a deal: [207(i) and (iii)].[10] In the third place, even were it the case that Apple's approach to licence negotiations included an undesirable element, that does not show that the net result of negotiations with "*big beasts*" such as Ericsson, Huawei, InterDigital, *etc.*, with deep pockets and formidable ability to engage in 'hold up', would be artificially low royalty rates. The upward thrust of the threats or actuality of injunctive proceedings against Apple in major markets across the world may be far more urgent and effective than the reverse thrust of mere statements by Apple in negotiations with these companies about the potential for litigation in several jurisdictions, if the parties cannot arrive at a global deal.[11]

[15/308] [17/459] [17/459] [17/459] [17/459]

[10] See also para. 26 above, providing concrete examples in the HCJ from Apple's negotiations with Ericsson ("*The fact is that the parties were testing their respective positions …*") at [245(iii)], p.143; and the extract from the evidence of Apple's witness Mr. Ankenbrandt in relation to negotiations with Conversant, at [272]: "*…most people we negotiate with are sophisticated. They understand that a negotiation is about hybrid adversarial and collaborative process. We are collaborating to try to reach an agreement but at the same time we recognise the possibility that litigation may ensue.*" [17/484] [17/496]

[11] At [145], the CA refers cryptically to the fact "*that there would appear to be degrees of **hold up** and hold out involved*" (emphasis added), but it is hard to see what exactly this alludes to, or how this fits in with its process of reasoning. [15/312]

51. Indeed, there has been a run of recent CA decisions in 2024/2025, each concerned with the situation that, in the context of adjudicating a worldwide dispute over FRAND royalty terms, the SEP owner has chosen to launch injunctive proceedings against its counterparty (the "implementer") in various foreign jurisdictions to disrupt its sales operations in important markets.[12] Thus, in *Lenovo v Ericsson*, Ericsson launched injunctive proceedings against Lenovo in the USA, Brazil and Colombia. This was effectively identical to the strategy that Ericsson pursued against Apple during the currency of the first instance proceedings in this case in 2022, in the course of negotiations over a new worldwide patent licence.[13] In *Lenovo v Ericsson*, Arnold LJ explained at [16]: "*Typically, the jurisdictions selected for this purpose are ones that do not determine what terms are FRAND. The purpose of doing this can be to exert pressure on the implementer to agree to the terms demanded by the SEP owner rather than await the determination of the English courts of what terms are FRAND*." **[149/2797-2819]** **[149/2807]**

52. In short, the CA had no basis to make findings on this itself, let alone reverse the Judge's finding based on all the evidence that there had not been "hold out" by Apple depressing market rates. Birss LJ's conclusion (CAJ, [123]) that "*the judge was wrong to place weight on the values derived from the Apple licences as a whole*" (emphasis added) had no proper basis. One consequence was that it led to the automatic rejection by the CA of two out of the three Apple licence agreements with the very same licensors from whose portfolios Optis' portfolio had been assembled in 2013: LG and Panasonic. The implied rates for both those licences were low in relative terms ($[redacted] per unit) but, rather than reflecting on whether these were unduly low to compare with Optis' portfolio built on a "*pyramid concept*", or considering any of the circumstances or expert evidence that might have shone a light on the reasonableness of these rates as comparables for the Optis Portfolio, Birss LJ rejected them *simpliciter* because of the headline numbers. **[15/308]**

53. Indeed, had Birss LJ been in a position to review the full expert evidence, as the trial Judge did, he would have seen that (i) Mr. Bezant accepted that both these licences appeared to involve significant consideration given by Apple for value elements other than cellular SEPs, so that his unpacking work would overstate the value of the SEPs, and would show them at too high a level;[14] and (ii) Mr. Bezant stated as regards Panasonic in particular:[15] "[redacted] **[66/1574]** **[66/1597]**

[12] See *Panasonic v Xiaomi* [2024] EWCA Civ 1143; [2025] 3 All ER 66, at [10]-[11], [43]-[45], [55]-56], [82], [86]; *Amazon v Nokia* [2025] EWCA Civ 43; [2025] RPC 6, at [12]-[20], [59]-[60]; *Lenovo v Ericsson* [2025] EWCA Civ 182; [2025] RPC 11, at [15]-[16], [58], [64], [75]-[76]. **[153/2871-2892]** **[137/2444-2448]** **[149/2806-2818]**

[13] This was outlined Apple's main closing submissions (§§19, 86) and reply closing submissions (§20, fn. 28) at the trial. **[52/1423]** **[51/1481]**

[14] Bezant 3, [2.37]. **[66/1574]**

[15] Bezant 3, [6.29]. **[66/1597]**

”

[66/1597]

54. In summary, the CA's finding – in opposition to the Judge – that Apple had practised global 'hold out' behaviour with the effect of depressing rates in its licences with major international licensors and other parties, was based on flawed logic, was unreasonable, and was a wholly inappropriate evaluation based on limited material at the appellate level.

<u>Ground 1(c): The CA erred by treating all Apple's pre-existing licence agreements in the group, including those with the highest implied rates, as too low to be FRAND for the Optis agreement, and in using non-FRAND benchmarks to reach a higher rate</u> [1/18]

55. As its third step, the CA went further, as it used non-FRAND benchmarks <u>far</u> above the highest implied rates for any of the Apple licences in the group in order to reach a putative FRAND rate for Optis.

56. As explained above, the CA's finding of '*hold out*' by Apple was based on a combination of: (a) the observed spread of implied Stack prices in the group of Apple licences, which the CA took to mean that "*either this approach does not work or that these licences cannot <u>all</u> be useful comparables*": [108] (emphasis added); and (b) Apple's practice of referring to the potential for a patent-by-patent review, in the course of its negotiations, as described by the Judge. Even if that reasoning were adequate and logical (it is not, for the reasons discussed in §§45-54 above), it does not support a conclusion that even the <u>highest</u> royalty rates achieved by the major international licensors in the group must be viewed as sub-FRAND. The CA did not give any attention to whether, for instance, *<u>Apple-Ericsson</u>* – which had – must somehow be regarded as vitiated as a comparable owing to artificially depressed royalty rates. [15/305]

57. Nonetheless, the CA made a finding that <u>all</u> the Apple licence rates in the group were too low, including the highest. Birss LJ looked at the implied DPU rates (scaled to Optis) for the Apple licences, and also at the implied rate for *<u>Optis-Google</u>*: see CAJ, [129]-[136]. Whereas the implied rates for the Apple licences (unpacked by Optis' expert in a manner generous to Optis) lay in a range between less than $ and $ DPU (see Annexes A and B to the Judgment, created by Birss LJ), the implied rate for the *<u>Optis-Google</u>* licence unpacked on a "*simple release*" basis by Mr. Bezant was much higher – $: see [130]. At [138], Birss LJ reasoned: "*The simple conclusion is that the Google licence as a comparable shows that deriving a rate from Apple licences on their own – either as a whole or just focussing on the four I have identified - would produce a rate which was too low*." [15/309-310] [15/309] [15/311]

58. This, however, amounted to a further error. The CA gave no reason for concluding the *Optis-Google* licence was a "*close parallel*" to the licence to Apple for which the Court was asked to determine rates. Rather, it stated, "*Putting rates from the four higher Apple licences beside Google strongly suggests that simply using the Google rate unmodified would be too high*": [139]. It confirmed this by holding "*another indication that the Google rate relied on by Optis is too high comes from a top-down cross-check*": [140]. **[15/311]** **[15/311]**

59. The CA therefore chose to use the non-FRAND *Optis-Google* licence in a purely subjective manner. It stated at [138]: "*the Google licence as a comparable shows that deriving a rate from Apple licences on their own – either as a whole or just focussing on the four I have identified - would produce a rate which was too low.*" This was a novel approach, that in itself marked a radical departure from the *Cimetidine* methodology of relying on close parallels, which the CA had endorsed as the "*right approach*". **[15/311]** **[161/3081-3143]**

60. Even if one were to accept the correctness of the first two steps in the CA's approach, this novel next step was fundamentally unsuited for a FRAND determination, and wrong in principle. This internally inconsistent use of a non-FRAND datapoint in order to arrive at a FRAND rate is not capable of leading to a sound outcome that meets any of the four objectives of the ETSI scheme identified by this Court in *Unwired SC* (see §3 above); such an approach is antithetical to the need for predictability and consistency that is essential for valuations in this important field. **[166/3417-3468]**

61. Moreover, the CA's decision to refer to the *Optis-Google* licence as demonstrating that every relevant Apple licence had implied rates that were too low was manifestly unreasonable in the particular circumstances of the case at hand:

a) the CA had no proper basis for concluding that the fee agreed in the small *Optis-Google* licence of $[redacted] was usable at all, even in an entirely impressionistic way, in view of the fact that the transaction costs that Google would have had to incur in litigating the dispute were likely to equal or exceed the licence fee. More generally, the CA did not have before it the trial evidence about Optis' various representations in the negotiations of *Optis-Google*; (e.g. its misleading assertion of possession of a [redacted]% stack share).

b) Google's handset sales were tiny compared with those of Apple, and scaling up from the small *Optis-Google* licence involved substantial scope for error: cf. the Judge's reasoning at HCJ, [470(i)(b)]: "*Although I am confident that the correlation between proportion of Stack owned and rate payable will be positive and, in general, linear, I doubt very much whether that proportionality will hold good at the margins, particularly where the share of the Stack is small, as is the case with all the Optis Comparables*"; **[17/591]**

c) The Judge had revealed the commercial consequences of treating the 'unpacked' *ad valorem* rates in the *Optis-Google* licence as FRAND, noting it would imply licensees having to pay [redacted]% of all their revenues from handset sales for access to the Stack, which was "*indefensibly high*": HCJ [470(iii)(b)]. This should have alerted the CA that the *Optis-Google* licence was simply unusable, taken with its own finding that *Optis-Google* had a sky-high implied rate of $[redacted] per unit, and was "*too high*": CAJ [142].

[17/592] [15/311]

Ground 1(d): the CA determined a FRAND rate above the highest rate in any of the Apple licences in the group, based on subjective and arbitrary judgments, and the notion that if there is a range of possibilities then the licensee is entitled to the top of the range

[1/22]

62. Having reached this point in its process of reasoning:

a) The CA stated that a FRAND rate for the Optis licence must lie somewhere in the substantial range between the highest DPU rate implied from the Apple licences ($[redacted]/$[redacted]), and the non-FRAND *Optis-Google* licence ($[redacted]). It reasoned: "…*the FRAND answer is between the two, but where?*": [139].

[15/311]

b) Next, without argument or evidence, the CA alighted on a different figure that it invented itself, designed to represent an unreasonably high number for a royalty rate payable to Optis, but lower than the absurdly high rate implied by *Optis-Google*. This was $0.27 DPU: [142]. The CA manufactured this number arbitrarily, by combining a figure for the total royalty burden viewed as "*too high*" (15% of the selling price – see [51], [140]) with the price of a Google handset (on no rational basis, only having used that price in another context). It then reframed the question before it: "*The question therefore is where to go down from $0.27 DPU*": [143]. But $0.27 was itself just a meaningless number.

[15/311] [15/294, 311] [15/311]

c) In answering that question, the CA stated that there were two considerations. The first was a legal principle that it identified, that "*if and to the extent there could be a range of FRAND rates, then the patentee is entitled to the top of that range*". The second consideration was a comment that: "…*the nature of the evidence here does not justify fine distinctions. The realistic options are a DPU of $0.20, $0.15, or $0.10*". It stated that the last of these was "*clearly too low because it is too far from the Google licence and* [redacted]": [143].

[15/311-312]

d) Ultimately, the CA went for the middle number, $0.15. It stated as a "*cross-check*" that this would imply a total Stack price of just under $40, which would in particular be 8.4% of a $470 Google handset.

63. There are a number of further serious flaws at this final point in the CA's approach.

64. *First*, the generation of a new, candidly non-FRAND, point rate ($0.27), just to act as the upper bound for the FRAND determination, was wrong in principle, for the same reason that the use of *Optis-Google* was wrong: see §60 above. The CA explained this figure of $0.27 "*would still be much too high because that would imply an ad valorem overall stack price for a Google priced phone was 15% (the level the judge rejected)*": [142]. It could not be treated as a rational upper bound for ascertaining a FRAND rate for a licence to the Optis portfolio that would satisfy the ETSI objectives. All one could logically derive from the figure was the fact it was "*much too high*": the Court could not decide by how much it was too high, to assist in alighting on a FRAND rate somewhere below it. **[15/311]** **[15/311]**

65. *Second*, the suggestion that "*if and to the extent there could be a range of FRAND rates, then the patentee is entitled to the top of that range*" was in error:

a) In CAJ, [143], the CA is concerned to locate a point in a range between a number that is "*much too high*" and a number that is "*too low.*" In this context, the putative principle can only mean that the patentee (Optis) ought to be given the benefit of the doubt if there is uncertainty, by being awarded the highest possible number. **[15/311-312]**

b) As such, this fails to meet the ETSI aim to achieve a fair balance between the interests of implementers and SEP owners. It also undermines the wider general aim to lower product costs, and foster competition and innovation between product manufacturers to the benefit of the public. If the financial burden imposed on industry is higher than it should be, the ability of innovators at the product supply level – such as (but by no means limited to) Apple – is likely to be dampened, to the prejudice of the public.

66. *Third*, the CA's reasoning that "*[because] the nature of the evidence here does not justify fine distinctions …[t]he realistic options are a DPU of $0.20, $0.15, or $0.10*" was flawed. The nature of the evidence before the CA was manifestly insufficient; yet the solution chosen was to generate, on the Court's own initiative, three huge step-changes within a subjectively-defined range, and declare that one needed to be chosen: [143]. This was little more than arbitrary, and so unlawful: cf. *Maso Capital*, [64]-[66]. To put this in perspective, each $0.05 increment equated to $167m in real terms. **[15/311-312]** **[15/311-312]** **[151/2850]**

67. Similarly, the manner of choosing between these three increments was unbounded by principle, and subjective. The CA stated that one of them ($0.10) "*is clearly too low because it is too far from the Google licence and* [redacted]," [143], but it had no rational tools with which to gauge what was "*too far*" or "[redacted]": this was seemingly a matter of pure subjective instinct. The choice between $0.15 and $0.20 was made by means of a "*cross-check*", to see what these rates would imply for the total Stack price and as a proportion of the selling price of a Google handset and an Apple handset. The CA settled on a total Stack price of just under $40 as being acceptable: [145]. But there was no attempt to consider what this aggregate royalty burden would mean for any other product innovators in the marketplace, despite the fact that the CA was intentionally setting a SEP rate <u>higher</u> than the rates implied from Apple's pre-existing licences actually struck in the marketplace (even assuming, in Optis' favour, that all the value under those agreements should be attributed to the licensing of cellular SEPs). As outlined in Ground 2 below, the failure to attend properly to the implications of the aggregate royalty burden was itself an error of law.

[15/311-312]

[15/312]

[1/22]

68. In short, the valuation approach of the CA ran counter to the ETSI objectives, and erred in law: it was inspired by non-FRAND rates; it was unacceptably subjective in a number of respects; it was wrongly skewed towards favouring the interests of the patentee at the expense of the product industries that are dependent on the consistent, predictable and rational application of the ETSI regime; and it overrode the trial Judge's unimpeachable findings of fact.

GROUND 2: The CA failed to ensure its chosen rate fulfilled the aims of the international standard-setting system to conform with reasonableness and existing market levels

[1/22]

<u>Failure to attend properly to the need for reasonableness of the aggregate royalty burden</u>

69. It is an important feature of the ETSI system (in common with other standard-setting organisation systems), that a FRAND rate-setting body should satisfy itself that the <u>overall</u> Stack cost implied by the rate determined in the case at hand is reasonable. This is because it is the overall impact of SEP licensing fees on the cost base of suppliers in the industry that ultimately matters. The danger of excessive aggregate costs being loaded on manufacturing industries is often referred to as "*royalty stacking*". In its November 2017 Communication "*Setting out the EU approach to Standard Essential Patents*"[16], the Commission listed a number of IP valuation principles that it considered should be taken into account in FRAND valuations. It recorded, among other matters:

[127/2397]

[16] COM (2017) 712 final, 29 November 2017. See Section 2.1, 'Licensing Principles'.

[127/2397]

"Finally, to avoid royalty stacking, in defining a FRAND value, an individual SEP cannot be considered in isolation. Parties need to take into account a reasonable aggregate rate for the standard, assessing the overall added value of the technology. The implementation of measures on SEP transparency can already support this objective…".

[127/2398]

70. On 27 April 2023 the Commission published a 'Proposal for a Regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU)2017/1001'. Although progress towards adopting a new EU Regulation to govern SEP licensing has stalled recently,[17] it is instructive that the proposal identified the key importance of attending to the reasonableness of the aggregate royalty burden on manufacturers, and contained mechanisms for addressing it. Recital (15) to the proposed SEP Regulation stated in particular:

[128/2399-2410]

[128/2403]

"Knowledge of the potential total royalty for all SEPs covering a standard (aggregate royalty) applicable to the implementations of that standard is important for the assessment of the royalty amount for a product, which plays a significant role for the manufacturer's cost determinations."

71. As explained at §67 above, in this case the CA referred to what its rate determination would imply for the aggregate royalty burden ("ARB") borne by manufacturers in the industry, but it did so in a way that was meaningless, and so incapable of satisfying the legal requirement. The CA merely stated at [145] about its chosen rate of $0.15: "*As a cross-check, grossed up it would imply a total DPU stack of just under $40 … which would make the total stack 6.3% of the earlier relevant representative Apple ASP of $625 (and 3.9% of a more current Apple ASP of $1000). It would be 8.4% of a $470 Google ASP phone.*" Those figures provided no objective assessment of the reasonableness of the ARB, from the point of view of the community of manufacturers. For example, the significance of royalties accounting for 8.4% of the price of a Google handset was left blank (particularly as the Court had no reason to treat this as the correct base, rather than, say, $125 as the price of a basic-level 4G smartphone, in evidence before the Judge). Given the low market-price level of a basic level smartphone, it is plain that it matters greatly whether the implied stack cost is, say, $6, or $40.

[15/312]

72. The rate determined by the Judge did not exceed the existing market rates in evidence in the case. By contrast, the CA's approach meant selecting a rate higher than any of those existing market rates, let alone an average of those rates. Before selecting it, there should have been anxious scrutiny by the CA of whether the resulting court-determined rate was reasonable. An implied

[17] The Commission's proposal was withdrawn on 6 October 2025, but on 14 November 2025 the European Parliament brought an action against the Commission over the withdrawal. On 25 November 2025, the European Parliament voted to maintain the action.

ARB that sits within pre-existing market rates can be presumed *prima facie* to be reasonable. A court considering a higher implied ARB ought to consider whether, and how, the outcome still strikes the fair balance between SEP owner and implementer interests envisaged by the ETSI scheme.

<u>Failure to take into account the CA's own recent FRAND determination for 4G SEPs</u>

73. The CA's rate determination in this case implied a total DPU Stack of just under $40: [145]. **[15/312]** This is information of obvious commercial importance to all manufacturers internationally making and selling 4G-enabled products. Manufacturers, across the globe, can be expected to study the CA's decision, and the methodology and considerations supporting it (such as the (erroneous) finding of worldwide hold out by Apple). These matters can be expected to feed into their future licence negotiations over SEP portfolios, as the parties seek to agree rates that are fair, reasonable and non-discriminatory.

74. Such manufacturers will also have access to the CA's recent rate determination made only nine months earlier in respect of a major 4G SEP portfolio, in *<u>InterDigital CA</u>*. **[147/2716-2792]** It is easy to see the large difference between the implied aggregate royalty burden in the two cases, simply by taking the CA's determined dollar per unit rates stated in each case, and scaling them up to 100% of the Stack using the Stack shares listed in the (public) Annex A to the Optis CoA judgment.

	Per unit rate	**Licensor stack share**	**Implied 4G aggregate royalty burden**
InterDigital v Lenovo [2024]	$0.225	3.74%	$6.02
Optis v Apple [2023], first instance	~$0.022	0.38%	$5.79
***Optis v Apple* [2025], appeal**	**$0.15**	**0.38%**	**$39.47**

75. Thus, the Judge's determination in this case meant an ARB <u>extremely</u> close to the outcome **[147/2716-2792]** in *<u>InterDigital CA</u>*. But the CA's determination was far higher. In its Notice of Objection to Apple's application for permission to appeal to this Court, Optis said (at §14(d)) it did not accept **[28/893]** that this was *"the relevant comparison*". But it is reasonable to apply the CA's stated Stack shares **[15/338]** (Annex A in the judgment below) to the DPU rates from each of the cases, showing the implied ARBs for each.

76. Doing so, it is apparent that the implied royalty burden in this case – i.e. the central point of interest for affected manufacturers worldwide – is about <u>7 times</u> greater than in the earlier **[147/2716-2792]** *<u>InterDigital CA</u>* case. It is respectfully submitted that, in this field, it is not only permissible, but

requisite, for a court determining FRAND licensing terms to take account of the findings made in an earlier case, given the special features of the ETSI regime, and the CA in this case ought to have taken account of this consideration. This is for the reasons outlined below.

77. The general rule in *Hollington v Hewthorn*[18] is that factual findings in one case are not admissible as evidence in a subsequent case. As this Court confirmed recently in *Evans v Barclays Bank*[19] at [144], the rule is founded on a principle of fairness. That principle requires that a tribunal responsible for finding facts should base its findings on its own evaluation of the evidence, not on the evaluation of someone else who is not the relevant decision-maker. **[143/2496-2512] [141/2476]**

78. It is obviously not suggested that the prior findings of another court (whether domestic or foreign) as to FRAND licensing terms should be regarded as binding in the case at hand, or raise a presumption as to the right rate, as that would plainly be unfair. However, it is respectfully submitted that it is appropriate – indeed, correct – for UK courts carrying out worldwide FRAND determinations under the jurisdiction established in *Unwired SC* to take account of the findings in other court decisions on the same subject-matter, so that they can have in mind how their determination will fit within the wider set of other determinations faced by industry. **[166/3417-3468]**

79. In the present case, Birss LJ indicated that the conclusions of foreign courts could be taken notice of by a UK court determining FRAND licensing terms, effectively in this way. He stated at [45]: "*…when the court is exercising this jurisdiction, which involves setting rates in a global context, questions of comity mean that the court might very well take judicial notice of conclusions other courts around the world have come to (such as the aggregate rates in Japan and in the USA in TCL v Ericsson). This is not to use other cases as a source of admissible evidence, far from it, but it is nonetheless helpful to see what is happening.*" It is submitted that the line between (i) it being "*helpful to see what is happening*" for a UK court, and (ii) taking it into account at least in the manner outlined in para. 78 above, is a subtle one. The reason why it may be expected to be "*helpful*" is that it assists the UK court in reaching its decision; and it engages considerations of comity for the UK court to take notice of it, because the UK court will not want to reach an inconsistent conclusion without being aware it is doing so. Exactly the same considerations should apply to prior UK court decisions. The distinction between UK and foreign judgments that is drawn by Birss LJ at CAJ [44]-[45], relying on *Hollington v Hewthorn*, serves no sensible purpose, and is unsustainable. **[15/293]** **[15/293]**

[18] [1943] KB 587; [1943] 2 All ER 35. **[143/2496-2512]**

[19] [2025] UKSC 48; [2026] Bus LR 328. **[141/2476]**

80. The trial Judge discussed the _Hollington v Hewthorn_ point at HCJ, [363]-[364]. He pointed out that where previous FRAND determinations covering the same subject-matter have been relied on by industry parties as part of their licensing negotiations, it is plainly appropriate for the Court to take this into account in its own appraisal: it is what the Judge called a "*litigation fact*": [364(ii)]. He continued, however, at [364(iv)] in the following vein: **[17/544-545]** **[17/545]** **[17/545]**

> *"The present case has significant differences from the "vanilla" case of simply importing a finding from one case into another case between different parties. In particular, I am conscious of that fact that a FRAND rate is specifically said to be "Non-Discriminatory" (the "N" and the "D" in FRAND). I consider that it is important that this Judgment lift its eyes from the narrow facts and the outcome predicated by those facts, and scan the wider horizon so that – consistently with the facts – this Judgment sits as well as it can in the range of decisions that have been articulated by other courts, including Unwired Planet (First Instance), but also the decisions of courts of other jurisdictions. This is as much a question of comity as it is of non-discrimination. The fact is that these are international issues, where the same or similar points are going to crop up before many different courts."* (emphasis added)

81. In short, the Judge placed emphasis on the special need for consistency across court determinations (both domestic and foreign) in this particular field, which industry crucially depends on. It is respectfully submitted that this is correct.

82. It also falls to be recalled that, in _Unwired SC_, two of the ETSI objectives referred to by this Court were: (i) the intention that parties and courts should look to and draw on commercial practice in the real world when setting rates: [62]; and (ii) the objective of setting/determining a "*single royalty price list available to all*": [114]. In a context where industry parties deploy the conclusions and methodologies from published judicial FRAND determinations in their real-world negotiations, this is itself an aspect of commercial practice that points towards FRAND courts carrying out the 'horizon-scanning' referred to by the Judge in this case. **[166/3438]** **[166/3454]**

83. In the present case, it is submitted that it would have been right for the CA at least to cross-check the implied aggregate royalty in the present case ($40) against the implied aggregate royalty determined by the CA in _InterDigital CA_ ($6, or an even lower number if the Court were to use Stack share figures stated in the earlier case). There would have been no unfairness in taking account of this. It would be one datapoint amongst others, and Optis would have been able to contest its weight, in just the same way as with any "comparable" in a rate determination. **[147/2716-2792]**

GROUND 3: Even if the CA had been right to overturn the Judge entirely, it was wrong to proceed to determine a FRAND rate directly, rather than remit. **[1/24]**

84. For the reasons given under Grounds 1 and 2, the CA was wrong to have disregarded key findings of fact made by the Judge on the evidence before him, and to have made far-reaching evaluative judgments based on the limited material before it. Such an approach was institutionally inappropriate, including because of the principles and authority referred to at paras. 87-88 and 94 below, and Apple relies on this in support of those Grounds. **[1/18, 22]**

85. Ground 3 is specifically concerned with whether, even if the CA had been right to overturn the Judge entirely, as it did, it ought to have remitted the matter to the Judge. In this context, a number of the same considerations apply as under Grounds 1 and 2.

86. CPR r.52.20(2) empowers an appeal court, among other things, to *"(a) affirm, set aside or vary any order or judgment made or given by the lower court; (b) refer any claim or issue for determination by the lower court;* [or] *(c) order a new trial or hearing".* That power must be exercised in accordance with *"important and binding principles regarding what justice requires in the context of litigation"* established by higher courts: Sainsbury v Mastercard,[20] [238]. **[135/2436-2437]** **[156/2925]**

87. One of the most fundamental *"principles regarding what justice requires in the context of litigation"* is that making of findings of fact, and evaluative judgements, is for the first-instance courts. In Volcafe v Cia Sud,[21] Lord Sumption held that ([41]): *"…the weight of the evidence is a matter for the trial judge. There is a world of difference between the impression which evidence makes on a judge who has followed it as it was deployed and the impression that an appellate court derives from cold transcripts."* Courts have therefore repeatedly warned against an appellate court substituting its own evaluation in a case involving "*a multifactorial assessment of the documents, the evidence and the submissions made by the parties*": Maso Capital (*supra.*) [17], [19]-[21]; Lifestyle Equities CV v Amazon UK Services Ltd,[22] at [46]-[50], approving the well-known observations of Lewison LJ in Fage UK Ltd v Chobani UK Ltd,[23] [114]. **[167/3474]** **[151/2833-2835]** **[150/2823-2824]** **[142/2494]**

88. A closely-associated principle is that where "*the necessary factual findings have not been made below and the material on which to make those findings is absent*", an appellate court should not determine the matter and should instead "*remit the case for a re-hearing below*": Chin v Chin[24] *per* Lord Scott of Foscote **[140/2468-2469]**

[20] [2020] UKSC 24; [2020] 4 All ER 807. **[156/2925]**
[21] [2018] UKSC 61; [2019] AC 358. **[167/3474]**
[22] [2024] UKSC 8; [2024] 3 All ER 93. **[150/2823-2824]**
[23] [2014] EWCA Civ 5; [2014] FSR 29. **[142/2494]**
[24] [2001] UKPC 7. **[140/2468-2469]**

[168/3482-3483] at [14]; Western Broadcasting Services v Seaga[25] at [17]-[18] *per* Lord Carswell (obiter); Sandhu v The Secretary of State for Work and Pensions[26] at [6] *per* Maurice Kay LJ ("*For this court to be able to re-make the decision, we would have to be in possession of clear factual findings*"). [159/3053]

89. The CA decided that the Judge's entire approach to the valuation exercise was misconceived. The CA was wrong to have made that decision (see Ground 1 above), but even assuming it was right, the only proper and fair course was to remit the case for reconsideration or retrial. Nevertheless, the CA decided itself to reach a *"conclusion on the FRAND rate starting from the position of identifying the potential comparables in issue and analysing them"*: [128]. It then embarked on its own (remarkably brief) assessment spanning 19 paragraphs, effectively afresh, of a global FRAND rate. It did so based on a selection of written materials that happened to be before the Court, based on arguments and considerations significantly different from (and in important respects contrary to) those canvassed in the High Court, without having heard the lengthy 17-day first instance trial. **[1/18]** **[15/309]**

90. The short section between CAJ, [129] and [148] effectively re-decided the entirety of the central issue in the case (i.e. the FRAND royalty rate) afresh, as if sitting as a first-instance court, inconsistently with both parties' case before the appeal court and below. Among other matters, the CA (i) adopted a new approach and decision as to which comparables were relevant and how they should be analysed; (ii) considered a new case opened up by Optis on appeal, involving reliance on a single comparable, (iii) created columns of data and comparisons for itself, by way of original analysis, (iv) picked numbers rounded to the nearest $0.05, a variation making a difference of $167 million dollars for each increment, as the only "*realistic options*" even though there was and is no basis for such an approach and such had not been suggested by any expert or other witness, and (v) conducted a cursory and flawed cross-check analysis. None of this analysis was supported by findings in the first-instance Judgment, with the analysis instead being approached from scratch. The net effect of this attempt to mimic first-instance analysis was to add some three quarters of a billion dollars (with interest) to Apple's liability, substituting an allegedly FRAND lump sum of US$502m plus interest of (now) approximately $250m and rising, where previously it had been liable to pay US$56m plus interest, based on the High Court's evaluation. **[15/309, 312]**

91. The CA took the view that, "*bearing in mind the impact of an order for a retrial, the interests of justice will be the paramount consideration, the order is one of last resort and so a retrial will only be ordered if it is* **[15/308]**

---

[25] [2007] UKPC 19; [2007] EMLR 18. **[168/3482-3483]**

[26] [2010] EWCA Civ 962. **[159/3053]**

the only just course": [126]. Apple agrees that the interests of justice will be the paramount consideration, but submits CA lost sight of what the interests of justice require in this case. The Court's task was to determine global FRAND licensing terms, a fact-intensive exercise that leads to a result which does not only affect the two litigating parties, but has substantial ramifications for the wider industry. The CA should have recognised that this could not be achieved justly or fairly to Apple on the basis of the slender evidential material available to it. **[15/308]**

92. One way in which there was conspicuous unfairness to Apple is referred to in CAJ, [125]-[127]. At first instance, Optis' case had rested on 3 separate methodologies for determining a FRAND rate, the main one described as "*scaling from UPHC*": [49]. Optis' case on comparables, certainly at all times prior to the close of the trial, involved reliance on a group of 9 licences. Optis-Google was merely one of these. Optis' Amended Position Statement stated at [29]: "*Optis will say that the remaining nine of the licences, namely ZTE 2016, Kyocera 2016, Doro 2018, Doro 2020/2021, Blu 2018, Blu 2021, Gigaset 2021, Cyrus 2021 and Google 2020, constitute suitably reliable and useful data points (see Bezant 1 [2.52] to [2.55]). These licences are referred to as the "Optis Comparables"*. **[15/308]** **[15/293]** **[44/1192]**

93. Before the CA, when Optis advanced a new case relying on *Optis-Google* as a single comparable, Apple pointed out that this involved a fundamental change. Apple observed that its focus in the trial, and its cross-examination, would have been different if the case made on appeal by Optis had been pursued below. At CAJ, [127], the CA finds: "*…the Google licence, it was one of the main comparables advanced by Optis and so a foreseeable possibility at trial was for the judge to decide to rely on that licence either alone and use it as the basis for further analysis, as Optis now seeks to do, or alongside other licences. Either way Apple's trial strategy will or ought to have taken that into account*." However, the CA was mistaken. There was no special reliance placed by Optis on *Optis-Google*, either in writing prior to trial or at trial, certainly above any of the group of running royalty licence agreements Optis also relied on, and at the trial Apple had to allocate limited time for cross-examination of Optis' witnesses on all relevant issues, and cover each of the 9 licences relied on. **[15/309]**

94. Ultimately, as described under Ground 1 above, in performing its own determination the CA was driven to make assessments plucked out of thin air whose real-world market impacts could not be properly tested in the appellate setting. This was unsafe, and disregarded the limits on its competence. Even if the CA had been justified in condemning the Judge's "averaging" approach, it should have ruled on the errors of principle, and remitted the matter for redetermination in the light of the full evidential record. The principle stated by this Court in *Iconix v Dream Pairs Europe*[27] **[1/18]** **[144/2517]**

---

[27] [2025] UKSC 25; [2025] 4 All ER 711. **[144/2517]**

at [94] ("*the law has imposed structured constraints designed to prevent a free for all in a higher court*") applies fully here. The context is not simply a self-contained dispute between two litigants. The proper functioning of affected industries depends on the Court's careful assessment of full evidence presented by the parties, including on the wider industry impacts of its determination. **[144/2517]**

GROUND 4: The CA erred in deciding that the past period for which FRAND royalties should be paid ought to extend back to the date of the first sale **[1/25]**

Context

95. The amount of royalty payable to a SEP owner will depend, *inter alia*, on the period of sales for which it is appropriate to require recompense by way of royalty for what may otherwise be patent infringement. Ground 4 is concerned with the proper approach to determining that period.

96. In *InterDigital CA*, the CA stated that a hypothetical willing licensor and willing licensee would agree that royalties should be paid for the full duration of past use by an implementer to qualify as FRAND for the purposes of the ETSI IPR Policy. The consequence is that a SEP holder may demand a licence in respect of future use on terms which require the implementer to pay royalties in respect of all its past sales of devices practising any of the SEP holder's patents, regardless of: (i) whether a claim in respect of such past sales would be barred by limitation; (ii) the reasons why such past sales have not been licensed previously (including the commercial policies of previous owners of the SEPs); (iii) any market practice to the contrary in any relevant jurisdiction; (iv) other legitimate considerations that a willing licensor and willing licensee might take into account in respect of remuneration of past sales. **[147/2716-2792]**

97. Apple submits that the CA was wrong. The correct position is that there is an industry practice whereby negotiating parties generally agree on a limit on the period for payment for past royalties back to the limitation threshold in the jurisdictions where the substantial proportion of the portfolio was filed (typically 6 years), and recognise that additional case-specific considerations may also be present that could lead to adjustment of the FRAND period for royalties on past sales.

98. The trial Judge found, on the evidence before him, that it was "*unrealistic and overly burdensome*," even for a leading undertaking involved in the manufacture and sale of handsets such as Apple, to seek out each SEP owner and ask for a licence – and that this was also not what occurred in practice. He held that it should be "*for the person asserting rights as an SEP Owner to come forward and assert them*": HCJ, [499]. The evidence before him, unchallenged on appeal, showed that the ETSI database did not allow manufacturers to ascertain reliably what declared SEPs they were **[17/611]** **[17/611]**

infringing with standard-compliant products, nor who the owners were (especially following transfers, such as those to Optis), nor even the size of the total Stack: see e.g. HCJ [111].[28] He concluded it was appropriate to set the amount to be paid to Optis for a past release by reference to the date when Optis first asserted its portfolio *vis-à-vis* Apple, i.e., 2017: HCJ, [500].

[17/402]

[17/611]

99. After the HCJ was handed down, the CA (Arnold LJ, with whom Nugee and Birss LJJ agreed) decided in *InterDigital CA* that limitation periods have no part to play in the assessment of FRAND terms, and royalties should be paid covering the full period of unlicensed use. In view of that ruling (restated shortly afterwards in *Panasonic v. Xiaomi*, *supra*), Apple accepted before the CA in these proceedings that the lump sum payable under the FRAND licence was to include a royalty on "*all relevant actual sales from 2021 back into the past*": CAJ, [80], [83], [148], [163] (though Optis identified the effective start date for the calculation of the royalty as 1 January 2013, for what it said were "*pragmatic reasons*"). Apple reserved its position if the matter went further and, accordingly, it is the correctness of the holding in *InterDigital CA* which now falls to be determined by this Court. The "past sales" issue has great importance for industry as evidenced by the submissions filed under Rule 16, every one of which has highlighted concerns in relation to this matter.[29]

[147/2716-2792]

[153/2867-2897]

[15/299-300, 312, 314]

[147/2716-2792]

The CA's reasoning in *InterDigital CA* on the past sales issue

100. The CA's reasoning in *InterDigital CA* in support of the finding that limitation provisions generally have no role to play in determining what terms are FRAND, and royalties should be paid in respect of the whole period during which the implementer has been infringing the SEP holder's patents, is at [186]-[206] *per* Arnold LJ. He relies on **6** main points, endorsing the reasoning of Mellor J.

[147/2771-2774]

101. **First**, in [187], Arnold LJ identifies the critical question for the Court, when identifying what are FRAND terms, as being the question what a (hypothetical) willing licensor and willing licensee would agree. He begins by stating that "*[a]n implementer … requires a licence from the first day it implements the relevant standard(s).*" He draws on statements in the ETSI Guide and FAQs page that "*a willing licensee would not sit back and wait for demands from SEP owners, but would pro-actively contact*

[147/2771]

[28] Other major international standards referred to by proposed interveners, such as video coding and Wi-Fi mentioned by the Fair Standards Alliance in its application of 14 April 2026, at para. 26(b), also allow blanket declarations or do not even require patentees to disclose SEPs and so do not have any centralised database.

[7/177]

[29] See e.g., Intel's letter of 7 October 2025 (stating that the CA's decision "*risks disrupting business norms for Intel and other technology companies in the global market*"). See also Lenovo's letter of 8 October 2025; HMD's letter of 10 October 2025; Tunstall's letter of 14 October 2025; MPA's letter of 16 October 2025; Fair Standards Alliance's undated submission (served on 11 November 2025).

[30/899-901] **[31/902-904]** **[33/909-911]**

[32/905-908] **[34/912-914]** **[35/915-919]**

SEP owners (whose identities can readily be ascertained from ETSI) and would put money aside for the payment of royalties." Then, he posits that the hypothetical willing licensor/willing licensee would agree a standstill agreement "*to ensure that the passage of time during the negotiations did not affect the substantive terms ultimately agreed.*" On these premises, the willing licensee would pay royalties on all its sales.

[147/2771]

[147/2771]

102. Stepping back, this first point involves a hypothetical scenario, based on assumptions about the industry conditions in which a willing licensor and willing licensee negotiate over FRAND terms. Those assumptions depend on inferences drawn from two ETSI documents, and they do not withstand contact with the real world.

103. In the first place, it is assumed that a willing licensee would not sit on its hands, but would contact the relevant licensors whose identities can be readily ascertained from ETSI. This proposition was supported by reference to an FAQ page on the section of the ETSI website concerning IPRs. However, this was misconceived. At one time in the past, prior to 25 April 2015, this webpage (which forms part of the context, when interpreting the ETSI IPR Policy as a matter of French contract law, but which is not itself contractually binding) had included the statements, "*It is the responsibility of each STANDARD user to contact directly the patent owner*" and "…*each standard user should seek directly a license from a patent holder.*"[30] Since 25 April 2015, those statements have been absent from the FAQs page.[31] Accordingly, there was no good reason for the Court to rely on them in the first place.

[121/2354]

[121/2354]

[122/2356]

104. Moreover, the underlying assumption that it is commercially realistic for implementers to have to seek out SEP licensors is wrong. The trial Judge in the present case made a clear finding on the evidence that this was not practicable: see [499]. This reflected the point that, contrary to the reasoning of Arnold LJ, the ETSI database is not actually usable as a means of making contact with the SEP owners. The evidence showed, among other things, that it is not possible to ascertain from the ETSI database who is the up-to-date SEP owner of any patent that has been declared essential: see the parties' Joint Response to the Court's Questions of 30 June 2022 concerning the ETSI database.[32] Also, it was possible for a party simply to declare in generalised and uninformative terms that it is prepared to license any standard-essential patents it may have: HCJ

[17/611]

[48/1220]

[17/399-400]

---

[30] ETSI IPR Policy FAQs webpage as of 1 April 2015, available via online archive at *https://web.archive.org/web/20150401045856/http://www.etsi.org/about/how-we-work/intellectual-property-rights-iprs/etsi-ipr-policy-faqs*. **[121/2354]**

[31] ETSI IPR webpage as of 25 April 2015, available via online archive at *https://web.archive.org/web/20150425081403/http:/www.etsi.org:80/about/how-we-work/intellectual-property-rights-iprs*. **[122/2356]**

[32] See in particular p.2, "On obtaining data from ETSI", referring to the European Commission's "Landscape Study of Potentially Essential Patents Disclosed to ETSI" at section 2.3, p.13. **[133/2430]**

[103]-[104]; it was not practicable for implementers to find on the ETSI database a clear statement of what specific patents are even asserted to be SEPs. It was "*common ground that the raw ETSI data was not useable*": see HCJ [103]-[104], [111]. **[17/399-400]** **[17/399-400, 402]**

105. Relatedly, the evidence at the trial in this case also established that it is almost always the SEP holder that reaches out to an implementer whom it believes is making use of the SEP holder's patents, if it wishes to assert its rights. Thus, Optis's licensing expert (Mr. Stasik) stated in [22] of his first expert report: "*Whilst the initial contact about licensing SEPs can be made by an implementer, in my experience almost always the first step in a licensing negotiation is when the SEP holder reaches out to an implementer whom it believes is making use of the SEP holder's patents.*" Optis' factual evidence also showed it is straightforward for SEP holders to identify the overwhelming majority of implementers by value, and contact them. Optis's principal witness and its President and Chief Executive Officer, Mr. Blasius, stated in [56] of his second witness statement: "… … *As and when new implementers emerge or we become aware of them, we consider contacting them by sending an outreach letter. …*". (Optis failed to do this, of course, with Apple). **[67/1600]** **[64/1559]**

106. This picture of how the industry operates also matches the points made by AG Wathelet in his Opinion in Case C-170/13, *Huawei v. ZTE*, at [80]-[82]. The Advocate General highlighted the practical difficulties faced by product suppliers in being able to identify what SEPs it was using, and in being able to contact licensors before starting to use the standard in question. His Opinion on these points was endorsed by the CJEU at [61]-[62] and fn. 54 of its judgment. **[170/3516]** **[169/3496]**

107. In short, Arnold LJ's assumption that in a hypothetical ideal world the willing licensees would promptly seek out the willing licensors when starting to use the patented technology overlooked basic real-world facts about the industry.

108. The <u>second</u> assumption made by Arnold LJ was equally unwarranted: this was the proposition that a willing licensee would put money aside in the ordinary course of its business to meet future licensing liabilities, indefinitely. That was drawn from a statement in the ETSI Guide (para. 4.5). Arnold LJ referred to <u>no</u> evidence that this reflected industry practice. Nor, indeed, does para. 4.5 of the Guide even state that implementers are required to maintain a form of "reserve fund" indefinitely, including after limitation periods have expired. Para. 4.5 says nothing about the duration over which such a "reserve fund" is to be maintained. **[124/2373]**

109. And, finally, it is self-evident that there are strong reasons to doubt that this could possibly be a feasible commercial strategy for device manufacturers to follow, in the absence of any real-world evidence about it. It is well-known that device manufacturers generally face intensely competitive selling environments. It is also apparent that device manufacturers face enormous uncertainty *ex ante* as to the levels of FRAND royalties that may actually be due.[33] Any suggestion that in the real world "willing licensees" will be in a position to put aside part of the income from sales of their devices into a reserve fund (actual or notional), for an indefinite period, in order to cater for uncertain future licensing liabilities that may never crystallise or which may crystallise only many years hence – thereby leaving cash unavailable to the business as working capital, is not a sound basis for the UK courts to fashion a new industry norm. **[131/2423]**

110. In this regard, it must be emphasised that the CA and Mellor J were aware that they were – or at least may be – imposing a new framework on the entire industry. They were not mirroring commercial practice: they saw themselves as shaping it. For example, at *InterDigital CA* [98], Arnold LJ quotes Mellor J's explanation ([568]-[569] of his judgment) that: "*In certain respects … the existing practices seem to me to be based on flawed premises. To adopt them would greatly inhibit the ongoing development of FRAND in SEP licensing … the findings and the approach I take in this judgment may well cause particular licensees to wish to change the terms on which they are licensed or to argue, upon renewal, for a different approach. That, however, is all a necessary part of the development of SEP FRAND licensing…*". **[147/2753]** **[145/2643-2644]**

111. In summary, the slender assumptions made by Arnold LJ to produce his hypothetical scenario, in *InterDigital CA* [187], are not well-founded. Arnold LJ has based his interpretation of FRAND on false assumptions, and thereby misdirected himself about the "*external context*" which falls to be taken into account when construing the ETSI IPR Policy: see in this regard *Unwired SC*, [8]-[10], [62]. This Court clarified at [9] that the external context includes *inter alia*: "*…the fact that ETSI is a body comprising experts and practitioners in the telecommunications industry who would be expected to have a good knowledge of … the practice of the industry in negotiating patent licensing agreements voluntarily*" (emphasis added). Arnold LJ did not pay sufficient, if any, attention to those practices, which should have been both the starting point and central feature of his analysis. **[147/2771]** **[166/3425, 3438]** **[166/3425]**

112. Indeed, once it is appreciated that (a) device manufacturers may be faced with entirely unpredictable demands for payment from SEP owners, and (b) device manufacturers are to a

---

[33] The Intellectual Property Office of the UK ("UKIPO") recently published a consultation paper in relation to SEPs, 'Standard Essential Patents Consultation' (July 2025, CP 1357). It recorded, at para. 36 of the Overview: "*A lack of pricing transparency means that licensees can overpay for licences, and we have seen evidence emerging through litigation that licensing offers made by SEP holders have exceeded court adjudicated rates by 4-500 times*" (emphasis added). **[131/2423]**

significant degree reliant on entities holding declared SEPs coming forward to establish their intellectual property rights, the importance in this field of one of the major policy objectives supporting the applicability of limitation periods becomes clear: device manufacturers – who include small as well as large undertakings, and start-ups as well as developed businesses – need to be able to plan their affairs and to be able to finance their operations efficiently, so that the markets for the products they produce can develop (in line with ETSI's basic objectives). The respect for relevant limitation periods is conducive to achieving these objectives, because device manufacturers will know that they do not ordinarily have to be concerned about making provision for uncertain SEP royalties based on sales potentially many years in the past. Put another way, in this field a willing licensor and willing licensee would readily appreciate the good sense of taking account of limitation periods in their licensing discussions insofar as these relate to past sales.

113. Arnold LJ's **second point**, in *InterDigital CA* [188]-[189], starts from the observation that this Court held in *Unwired SC* that FRAND terms must reflect the value of the SEPs in the portfolio, and must be available to any market participant. Arnold LJ considers it to follow from this that FRAND terms should not depend on the date on which the licence is entered into. Otherwise, he suggests, there would be discrimination in favour of implementers who are slow to take a licence and against implementers who are quick to take a licence. **[147/2771]**

114. It is respectfully submitted that this line of reasoning is flawed. The point that was being made in *Unwired SC* is that what amounts to FRAND licensing terms should not vary depending on the idiosyncratic characteristics of a particular market participant: see [114], [122]. Most obviously, a large product supplier with significant bargaining power should not get a better deal on a licensing rate for SEPs than a small product supplier. This Court did not exclude economically rational licensing deals in which the royalty payable is adjusted to reflect the objective market circumstances in which the negotiating parties are dealing with each other. Indeed, it was made quite clear that such an approach to the assessment of what may qualify as FRAND is contemplated: see [124] (approving the practice of "price discrimination" between different licensees – in other words, offering a better deal than the market rate to some licensees to get the deal over the line); [125] (approving the practice of offering a special deal to the first person to take a licence "*because it provides the owner with initial income on its portfolio and may serve to validate the portfolio in the eyes of the market and hence encourage others to seek licences as well*"); [126] (approving a situation in which a SEP owner in commercial difficulties engages in a fire sale licensing deal with a particular licensee at low royalty rates, to help ensure its survival). **[166/3454, 3455]** **[166/3456]** **[166/3456]** **[166/3457]**

115. Just as differences in the amounts payable by different licensees may may be FRAND where this is consistent with rational economic policy, the same is true of limitation provisions. These are conducive to an environment of business certainty for licensees, and they help to avoid licensors sleeping on their rights and claims becoming stale. In short, Arnold LJ's proposition that this Court envisaged in *Unwired SC* that the rates payable under a FRAND licensing deal should be impervious to legitimate policy considerations was wrong.

116. Arnold LJ's **third point** is at *InterDigital CA* [190]-[191]. He rejects the submissions that had been made by Lenovo that the underlying policy objectives served by limitation provisions remain relevant when one is determining what are FRAND terms. He observes that limitation periods do not directly apply to the situation of parties negotiating over the past period that their licence agreements should cover, and returns to the point that the decisive question in this context is what a willing licensor and willing licensee would agree. There is no question, according to Arnold LJ, of implementers such as Lenovo being required to give up accrued limitation defences, because such defences typically apply to damages claims, and if Lenovo failed to take a licence on the terms found by a court to be FRAND, the licensor's remedy would be an injunction rather than damages. **[147/2771]**

117. That is formally true, but it does not grapple with the gravamen of the point: even though limitation periods do not apply directly, SEP owners are able to use the potent threat of injunctive relief to compel the implementer indirectly to pay compensation in respect of sales in a past period for which a patent damages claim would be met with a limitation defence. The point is that the underlying policy concerns which justify limitation periods apply in such a case, just as they do in a patent damages action. Limitation periods are a widespread, or even ubiquitous, feature of national legal systems worldwide. The broad policy justifications underpinning them are succinctly summarised in McGee on *Limitation Periods* (9th edn, 2024) at 1-050: **[132/2417]**

> "*Arguments with regard to the policy underlying statutes of limitation fall into three main types. The first relates to the position of the defendant. It is said to be unfair that a defendant should have a claim hanging over him for an indefinite period and it is in this context that such enactments are sometimes described as "statutes of peace". The second looks at the matter from a more objective point of view. It suggests that a time-limit is necessary because with the lapse of time, proof of a claim becomes more difficult—documentary evidence is likely to have been destroyed and the memories of witnesses will fade.*

[130/2419]

> *The third relates to the conduct of the claimant, it being thought right that a person who does not promptly act to enforce his rights should lose them.*"[34]

[162/3152]

[173/3533-3541]

118. In the present context, if the CA is right, implementers can have no confidence that they will not be pursued in relation to events in the distant past, when evidence is lacking of matters relevant to establishing what (if any) FRAND payment is due, such as (a) the size, composition (including geographic coverage) and quality of the licensor's portfolio at the relevant (historic) time, and (b) the licensor's share of the Stack at the relevant time. Similarly, implementers are unable to plan their affairs on the basis that they will not be at risk of suit after a given time. Nor is there the incentive for licensors to institute proceedings as soon as it is possible to do so. On the contrary, provided that they have at least one enforceable, valid and infringed SEP to assert later in time, they can (according to the CA) seemingly demand payment relating to all past unlicensed sales, even in respect of long-expired SEPs, plus compound interest (see [214]). **[15/324]**

119. Arnold LJ's **<u>fourth point</u>**, in <u>*InterDigital CA*</u> [192]-[194], is about incentives. He reasons that a failure to take account of limitation periods does not create any perverse incentives for <u>SEP owners</u> to make "*excessive demands*", since SEP owners cannot enforce their rights against licensees until they offer to license their portfolios on FRAND terms. Turning to the incentives of <u>licensees</u>, he finds that <u>taking account</u> of limitation periods positively encourages them to delay, that delay harms SEP owners more than licensees, and it is no answer to say SEP owners can stop the clock by issuing a claim, because it is "*inconsistent with FRAND to place an onus on the SEP owner to start proceedings*". **[147/2772]** **[147/2772]**

120. As regards incentives on SEP owners, the learned Judge misses the point: the main policy consideration at issue here is the concern that SEP owners may not be properly incentivised to <u>assert their rights promptly</u>. If one considers the circumstances of the present case, having acquired its patent assertion portfolio in 2013/2014, Optis spent the following years seeking to build up a strategic portfolio of curated licensing agreements with mostly tiny entities, to eventually deploy these as comparables against Apple. This type of strategic behaviour would be aggravated in a situation where principles of limitation are disregarded. SEP owners could "*sleep on their rights.*" This would, by the same token, tend to increase the period of business uncertainty faced by all

---

[130/2419] [34] See also Report of the Committee on Limitation of Actions in Cases of Personal Injury (September 1962, Cmnd 1829), chaired by Edmund Davies J (as he then was) at §17; see in the EU context, <u>*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*</u> [2012] UKSC 19; [2012] 2 AC 337, [149] ("*Not only is limitation a feature of every national legal system of the EU, but the recognition of national rules of limitation as both necessary and desirable is treated as part of the principle of legal certainty in EU law*"); see in the US context, the Supreme Court judgment in <u>*Wood v Carpenter*</u>, 101 US 135 (1879). **[162/3152]** **[173/3533-3541]**

product suppliers in the marketplace, concerning when they might be approached with a demand for licence fees on sales in the distant past.

121. In *InterDigital CA* [193], Arnold LJ reasons that a problem of perverse incentives in fact is created if regard is had to limitation periods. He states that in such a situation licensees are given the incentive to delay and run down the clock, and that it is no answer to say that the SEP owner can file claims to stop the clock from running: SEP owners should not have to go to court at all. But this concern too is unrealistic and misplaced: SEP owners are readily able to require standstill agreements if there is a justified concern about delaying behaviour by implementers; nor is it onerous or unusual to file protective claims in a case where negotiations stall. Arnold LJ's premise that FRAND implies that SEP owners should be altogether exempted from the need to take any basic litigation steps to enforce their patents – or indeed even to approach licensees promptly – is unsupported. **[147/2772]**

122. As regards the proposition in *InterDigital CA* [194] that the effects of delay tend to have a significantly greater harmful effect on SEP owners than licensees, this is claimed by Arnold LJ to have been recognised by this Court in *Unwired SC* at [10]. That is incorrect: this Court referred in that paragraph to the possibility that an implementer might use their economic strength to avoid paying anything to the SEP owner, and might unduly drag out negotiations so as to force a SEP owner to accept an unduly low rate. It did not refer to this as a general industry feature, and it is not: it all depends on the relative bargaining position of each side, in a context in which the Court can award interest to a SEP owner on payments that should have been made in the past, as part of its determination. **[147/2772]** **[166/3425]**

123. Arnold LJ's **fifth point** is in *InterDigital CA* [195]-[196]. He rejects the argument of Lenovo in that case that a decision not to have regard to limitation periods or principles, including foreign limitation periods and principles, would be inconsistent with the need to take account of the laws, approaches and determinations of relevant foreign jurisdictions, and would encourage forum-shopping (i.e. SEP owners bringing their disputes to the UK to enable them to sidestep the less favourable approaches adopted elsewhere in the world). **[147/2772]**

124. It is respectfully submitted that this too is wrong. Arnold LJ's principal response to Lenovo's argument is that a decision not to pay heed to limitation periods or principles at all would not be a question of applying English limitation periods in preference to foreign limitation periods: it would be "*forum-neutral*" in that sense. However, this overlooks the point that if other courts around the world do pay heed to limitation periods in determining FRAND terms, but the UK

courts do not do so, then the UK forum becomes relatively more attractive to SEP owners, and it is this which gives rise to forum shopping.

125. Arnold LJ states as follows in the second part of *InterDigital CA* [195]: "*There is no reason to think that the judge's decision on this issue will make England and Wales any more attractive as a forum than it already is as a result of the decisions in Unwired Planet. The logic is the same: as InterDigital points out, Lenovo's argument is a temporal version of the argument as to geography which Huawei unsuccessfully advanced in that case*." But this is not the case. The argument that prevailed in *Unwired SC* was that the Court was entitled to mirror commercial practice, which involved the striking of worldwide licensing deals. Here, by contrast, the CA has no basis for concluding that disregard of limitation periods mirrors commercial practice, on the part of parties in licensing negotiations. **[147/2772]** **[166/3417-3468]**

126. Arnold LJ's **sixth point** is in *InterDigital CA* [197]-[198]. He held that, contrary to Lenovo's submissions, there was no evidence of a relevant industry practice concerning an appropriate past period for which to require royalty payments. Insofar as there was evidence of non-collection of royalties by SEP owners such as InterDigital in respect of sales which had occurred more than 6 years in the past, Arnold LJ held that this only reflected practical difficulties in enforcement, not an acceptance by the SEP owners that limitation is relevant in determining FRAND terms. **[147/2772]**

127. It is respectfully submitted that the learned Judge was in error on this point too. There are various sources all clearly indicating that there is a practice of generally forgiving past sales beyond 6 years. These include: (i) evidence in *InterDigital v Lenovo* [2023] EWHC 1583 (Pat); [2023] RPC 13 ("*InterDigital HC*") itself of a practice of discounting past sales, and generally forgiving them beyond six years: see *InterDigital HC*, e.g. [401], and *InterDigital CA* at [229(ii)-(iii)] (summarising InterDigital's evidence, not disputed by Lenovo, that "*A practice had grown up of SEP owners, including InterDigital, giving substantial discounts for past sales. … InterDigital's practice in its licensing negotiations had been not only heavily to discount past sales, but also to forgive them after six years*"); and (ii) Apple's own evidence about how it approached "past release" clauses in licensing agreements, i.e., to take into account past sales "*up to the statute of limitations in jurisdictions where the substantial proportion of the portfolio is filed*" when valuing those clauses.[35] A group of the interveners have all indicated an intention to address this point in their submissions. Arnold LJ's statement in [198] that Mellor J "*made no finding*" regarding the existence of such an industry practice fails to engage with the undisputed evidence in the *InterDigital* proceedings. Furthermore, Arnold LJ's reliance on the terms of the release **[145/2523-2706]** **[145/2620]** **[147/2777]** **[54/1488]** **[56/1500]** **[59/1519]** **[60/1529]**

[35] Mewes 1, [41]. See also Mewes 3, [41]; Ankenbrandt 1, [28]; Rockower 1, [27]. **[54/1488]** **[56/1500]** **[59/1519]** **[60/1529]**

clauses in the Lenovo licences and the fact that these releases did not map onto an exact six-year past period misses the point: what matters is the period of past sales taken into account financially, when negotiating royalties. As recorded at [229(iii)], the undisputed evidence in *InterDigital* was that past sales beyond six years were "*forgiven*". **[147/2777]**

128. Arnold LJ's more fundamental point is that such an industry practice is not to be given any weight by the Court in assessing FRAND because it was "*forced*" upon InterDigital and other SEP owners by licensees (as "*hold out*"), and is itself non-FRAND: see *InterDigital CA*, [197], [252]. This sweeping suggestion of industry-wide "*hold out*" falls to be contrasted with the Judge's findings in the present case to the contrary, as regards Apple. More generally, this is another example of the CA failing to appreciate the relevance in this context of the policy objectives underpinning limitation periods, as well as relying on a false conception of what ideal negotiations between a willing licensor and willing licensee entail: see the submissions on Arnold LJ's first and second points, above. There is no basis for the assertion that abiding by limitation periods, or requiring SEP owners to take steps to prevent time from running if negotiations stall, involves any illegitimate force or coercion. It is a routine facet of litigation and commercial life the world over, and SEP owners have no special claim to be exempt from the imperatives of avoiding delay and ensuring legal certainty. **[147/2772, 2781]**

Discussion and disposition

129. For the reasons given above, it is respectfully submitted that the CA erred in deciding that there is a rule that all past sales must be compensated for when setting a FRAND royalty amount. In deciding what is "*fair*" and "*reasonable*" in relation to remunerating the use of standardised technology in past sales, two of the overarching considerations referred to by this Court in *Unwired SC* are particularly relevant. These are the need to mirror industry practice (see [62]), and to promote the development of the global industries using the standardised technologies (see [4] (last sentence), [9](iii) and (iv)]). **[166/3438]** **[166/3423]** **[166/3425]**

130. In line with industry practice (see §127 above), as well as consonant with the aim to promote the development of those global industries, the FRAND rate-setting court should take full account of the periods of limitation for the jurisdictions where the substantial proportion of the portfolio was filed. Observance of limitation periods facilitates the development of those industries by giving the manufacturers a proper basis to plan their business operations efficiently: see the discussion of the underlying policy considerations, at §§117-118 above.

131. The present case also demonstrates that there are additional considerations that may apply in individual cases, pointing to adjustment of that period. The critical context is that licensing past sales is different in nature from licensing future sales: unlike the position with future sales, licensees cannot build into their pricing decisions late demands by a licensor for royalties on completed sales, and so pass the business costs on to their customers.[36] Within that context, the trial Judge in the present case had evidence before him that justified his decision that past sales should be remunerated only back to the date when Optis first "*asserted themselves*".

132. First, this is a case where a "patent assertion entity" acquired a small portfolio of patents from major industry licensors. One of those industry licensors was Samsung. Samsung had generally followed a policy of licensing its portfolio of SEPs only defensively,[37] which meant there was no automatic expectation of enforcement. Optis' licensing expert, Mr. Stasik, explained in his first report (at para 24) that one reason for a time delay before a SEP owner asserts itself can indeed be "*because a patent holder has maintained SEPs primarily for defensive purposes and has not licensed them to anyone, then assigns those rights to a third party who may seek to monetize them*." In cross-examination, he stated that in such a situation, he would "*give some consideration for that in terms of past use*". He continued "*That is why oftentimes there are discounts for past use because, just as a practical element of fairness, you think that is a fair thing to do.*"[38] In short, Optis' expert explained that in this industry it is accepted to be relevant to the question of what is FRAND that a manufacturer may have good reason not to expect active enforcement.[39] **[67/1600]** **[73/1665]** **[73/1665]** **[172/3528]**

133. Second, the findings by the Judge in this case were that, after having acquired the majority of its portfolio in 2013/2014, Optis did not contact Apple until 2017 to assert its rights and open negotiations. This was in circumstances where the Judge found it was not reasonable to have expected Apple to seek out Optis with a view to negotiating a licence any earlier: [499].[40] Optis **[17/611]**

---

[36] This key point of commercial reality in the present context was referred to by the Munich Regional Court's recent decision in *Wilus v Asus*, 7.O.5007/25 on 8 January 2026. The Court there observed at [124] that a demand for royalties on past sales differs from a demand for royalties on current and future sales, for which the licensee can adjust its product prices. In view of this, the Judge in that case took the view that "*a certain degree of protection is warranted*" in relation to royalty demands on past sales, at least until the patent holder has made an "*unambiguous demand for licence payment*". **[172/3528]** **[134/2435]**

[37] See Samsung's Response to DG Enterprise Questionnaire, Patents and Standards, 13 February 2026, p.2. **[73/1665]**

[38] See Trial E transcript, day 10, p.1854, line 24 to p.1858, line 6. **[172/3528]**

[39] See also *Wilus v. Asus*, fn. 37 above, at [125]-[126].

[40] See also the Opinion of AG Wathelet in *Huawei v. ZTE*, cited at §106, *supra*. In the USA, Federal law (35 USC 287) provides that in order to obtain pre-suit damages on a patent covering an apparatus, the patentee and its licensees either must mark the patent number on their patent-practising products, or else the patentee must notify the accused infringer of its alleged infringement. If the patentee does either of these, it can seek damages from (1) the earliest date from which the products were continuously marked or (2) the earliest date that the accused infringer was notified of the alleged infringement. **[171/3522]**

approached HTC, Huawei, [redacted]; ZTE and Kyocera before Apple (concluding licences with the last two in 2016), but did not approach Apple before the time of the *Unwired Planet v Huawei* trial, the judgment from which Optis was later found to "leverage" to negotiate higher rates with counterparties. After the approach to Apple, as the Judge found, Optis was negotiating with small counterparties precisely to generate (artificial) comparables that would assist it in anticipated litigation with Apple: HCJ [398(iv)]. **[17/560]**

134. It is submitted that these case-specific considerations point to the conclusion that the Judge's decision on royalties for past sales should be upheld.

135. Finally, it is noted that, the Judge having decided that the period for past royalties to start when Optis asserted its rights in 2017, and negotiations began, he subsequently decided in the CJ to award interest on past royalties at a higher than market rate, specifically to incentivise "*faster negotiation of a FRAND licence*": CJ [64(vi)-(vii)]. Thus, the reasoning in support of this high rate was tied to the onset of negotiations between the parties. Such a harsh rate would under no circumstances be appropriate if it were considered FRAND for royalties to be paid by Apple in respect of an earlier date, before it was even contacted by Optis. **[18/662]**

GROUND 5: The Foreign Proceedings Issue **[1/27]**

The background to the foreign proceedings issue

136. The parallel proceedings for patent infringement initiated by Optis in the United States remain live.[41] After the proceedings were remanded in 2025 for a new trial on liability and damages, a jury reached a verdict on 12 February 2026 that Apple had not infringed any of the five US patents asserted by Optis in the EDTX proceedings, so no damages at all are due. However, in post-trial motions filed on 1 April 2026, Optis has sought a yet further retrial.[42] **[15/317-318]** **[80/1687, 1690]**

---

[41] On two occasions, the EDTX proceedings resulted in significant damages awards against Apple and on both occasions the relevant damages awards were overturned. An award of US $506 million was made on 11 August 2020 after there had been no FRAND direction to the jury; and, following a successful motion by Apple, upon a retrial a subsequent award of US $300 million was made on 13 August 2021: see CAJ, [178], [183]. That latter award was in turn vacated by the Court of Appeals for the Federal Circuit (CAFC) in a judgment on 16 June 2025, owing to a jury verdict that violated Apple's right under the US Constitution to jury unanimity on each legal claim. **[15/317-318]**

[42] On 17 March 2026, Optis offered to "*agree that the US Proceedings be terminated, and the US floor provisions be removed from the FRAND licence*", subject to conditions about the way in which the US proceedings may be referred to in any English retrial. Apple responded on 30 March 2026. There has been subsequent correspondence concerning the conditions. The parties have, to date, not agreed terms for the termination of the US proceedings. As such, there remains a possibility that a damages award may be made against Apple in the future. **[80/1687]** **[80/1690]**

137. The CA made its own determination of the FRAND royalty that Apple is required to pay for a global licence of the entire PO Portfolio but went on to hold that the apprehended "*US final judgment*" was to be treated as a "*floor*" to the royalty payable under the CDL: CAJ, [257]. Apple's case is that such a "floor" is an inappropriate means of addressing the consequences of related foreign proceedings. It is inconsistent with the parties' mutual commitment to enter into a worldwide FRAND licence on the royalty terms determined by the English Court, and with Optis' contractual commitment to ETSI to grant a licence to its portfolio on those terms. Its sole possible effect is to require Apple to pay an amount that is, by definition, in excess of the FRAND royalty amount determined by the English court. And contrary to the CA's findings, the "floor" is not justified either as a response to Apple's perceived responsibility for the existence of parallel proceedings (CAJ, [257]) or on account of comity (CAJ, [258]). **[15/336]**

[15/336]

[15/336]

The Court of Appeal's reasoning in outline

138. At first instance, Optis was asking the English court to settle the terms of a worldwide licence to the entirety of the PO Portfolio.[43] The Judge held that a global licence would be inconsistent with Optis also recovering sums from Apple in the EDTX proceedings: HCJ, [503]-[505] (confirmed at CJ, [75]-[76], [83], [84]-[86(i)]). **[41/1115]** **[44/1184]** **[17/611-612]** **[18/671-675]**

139. The CA held that this was the correct starting point: CAJ, [252], [257]. The "*decisive factor*" for departing from that starting point was stated as being that "*Apple was responsible for the EDTX proceedings having proceeded to judgment (and pending appeals) prior to their change of stance on 15 September 2023*": CAJ, [257]. Apple's responsibility was held to lay in not "*undertak*[ing] *to take a licence to the global Optis portfolio on the terms determined to be FRAND by the English courts*" at the outset of the UK proceedings in February 2019 and not giving an unqualified undertaking to do so until 15 September 2023: CAJ, [232]-[233].[44] **[15/335]** **[15/336]** **[15/331]**

140. The CA went on to hold (still at CAJ, [257]) that: **[15/336]**

a) A willing licensee in Apple's position – i.e. one that recognised itself as responsible for the US proceedings progressing to judgment in parallel to the English proceedings – would recognise that (i) it is not fair or reasonable to require Optis to consent to "*the EDTX*

---

[43] See Optis' SoC on FRAND, 26 February 2019, para. 7; Optis' Position Statement in Trial E, 17 January 2022, para. 5. **[41/1115]** **[44/1184]**

[44] The CA also made reference to: (1) Apple's formal position that it did not need a licence until Optis showed it had a valid and infringed patent (CAJ [224]); and (2) Optis' concern that Apple would contest the jurisdiction of the English courts (CAJ [225]-[226]) but it is not apparent that it relied on these matters in support of its conclusion that it was Apple's responsibility that the US proceedings had progressed to judgment. **[15/330]**

judgment (or any judgment of the CAFC on appeal) being set aside" and (ii) it would be all the more unfair to have the EDTX judgment set aside without compensating Optis for its costs of the US proceedings up to 15 September 2023. **[15/336]**

b) In these circumstances, the "*right answer*", "*in principle*", would be for the English court's FRAND valuation to be "*adjusted*" to take account of the EDTX judgment. **[15/336]**

c) However, because "*the valuation methodologies adopted by the parties*" in the English proceedings did not allow for this, the "*least-worst solution to the problem which Apple has caused*" was to treat the final EDTX judgment as a "*floor*" for the royalty under the CDL. **[15/336]**

141. The CA also reasoned that its imposition of a "floor" derived from a final EDTX judgment was justified by "*considerations of comity*", rejecting the Judge's view to the contrary: CAJ, [256],[258]. **[15/336]**

142. The CA reached its conclusions assuming there were "*broadly speaking, three possible outcomes [in the CAFC appeal]: (i) Optis get nothing; (ii) Optis get $300 million for the past and future; and (iii) Optis get $506.2 million for the past*": CAJ, [210], [241]. Its reasoning at CAJ, [257] focuses on scenarios (ii) and (iii): see [242] and [258]. The CA did not contemplate that the CAFC appeal would not yield a final decision on the amount of damages due to Optis; but instead a remittal on liability and damages, following which the jury rejected Optis' infringement claims altogether. **[15/324, 333]** **[15/333, 336]**

The introduction of a "*floor*" is unprincipled

143. The only possible operative effect of any "floor" based on the Final US Damages Award is to require Apple to pay Optis more than the English court has determined to be FRAND for a global licence. In other words, where the "floor" is operative, the payment to be made by Apple under the CDL will be supra-FRAND relative to the assessment by the English Court. This is starkly illustrated by the fact that CA was prepared to countenance the first EDTX verdict (if reinstated) as a "floor" (CAJ, [210], [242], [258]). This first verdict was one where the jury was not given any FRAND instruction at all (and was vacated because it was a non-FRAND result).[45] Thus, the CA was prepared to countenance a US jury award, even on non-FRAND terms, standing in place of its own global FRAND determination. **[15/324, 333, 336]** **[18/668]**

144. More generally, the English court cannot determine that a specific amount is FRAND while simultaneously making provision for an altogether different amount to be paid under the CDL (if the "floor" is higher). This sort of approach creates an inconsistency between the English

[45] CJ [73(iv)(b)(3)]. **[18/668]**

Court's own assessment of FRAND value – which both parties have undertaken to accept - and the amount which it orders to be paid. It is not open to an English court to proceed on an inconsistent or unprincipled basis: see *Jennings v Rice* [2002] EWCA 159; [2003] 1 P & CR 8, [43], *per* Robert Walker LJ ("*It cannot be doubted that in this as in every other area of the law, the court must take a principled approach, and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case*"). **[125/2796]**

<u>The CDL royalty should not be adjusted to address allegedly improper litigation conduct of one party</u>

145. By its own account, the CA departed from the "correct" starting point for the treatment of the EDTX judgment principally because it considered this necessary to redress (what it wrongly considered to be) blameworthy conduct of the licensee. Indeed, it stated that Apple's conduct was the "*decisive factor*" leading to the imposition of a "floor": CAJ, [257]. **[15/336]**

146. The CA considered it improper for Apple to take the position – prior to September 2023 - that it should not be required to agree to enter into the CDL (rather than choose to submit to an injunction) until the CDL's terms had been settled and could be seen. However, Apple's position was properly arguable, as evidenced by the fact that this Court gave Apple permission to appeal on this very issue (the appeal was ultimately withdrawn on 15 September 2023).

147. More importantly, redressing blameworthy procedural conduct of either party is not the function of the FRAND Licence. As this Court explained in <u>*Unwired SC*</u>, [114], "*the terms and conditions on offer should be such as are generally available <u>as a fair market price for any market participant</u>, to reflect the true value of the SEPs to which the licence relates <u>and without adjustment depending on the individual characteristics of a particular market participant</u>*" (emphasis added). Any perceived procedural misbehaviour of Apple is an individual characteristic and so is not a factor that ought to affect the FRAND royalty. **[166/3454]**

148. However, in this regard the CA appears to have relied on the elastic concept of the "*willing licensee*" at [257]. A similarly constituted CA described the proper role of this concept in the assessment of FRAND terms in <u>*InterDigital CA*</u> at [40] *per* Arnold LJ (with whom Birss and Nugee LJJ agreed; emphasis added): **[15/336]** **[147/2735]**

> "*…In the present context, for the reasons given above, a willing licensor is one not intent on hold up and a willing licensee is one not intent on hold out. Because FRAND terms are those that would be agreed by a willing licensor and a willing licensee<u>, it is immaterial whether the SEP owner in question is in fact</u>*

willing to license on those terms or whether the implementer is in fact willing to take a licence on those terms: such willingness only affects the availability of an injunction once the court has determined what terms are FRAND. Still less is it relevant whether the SEP owner or the implementer has previously acted as a willing licensor or licensee." **[147/2735]**

149. To similar effect, in these proceedings Birss LJ stated at CAJ, [119] *"… As a matter of principle [the FRAND rate] is a rate which a willing licensee and willing licensor would agree. … The purpose of the willing licensee/willing licensor standard is not to measure the legitimacy or illegitimacy of a party's conduct in negotiations…*" (emphasis added). In short, the Court should not determine FRAND royalty terms based on its own notions of fair play in the case before it. It should have regard to industry practice, and to what a willing licensor and willing licensee would agree. **[15/307]**

150. Furthermore, there are other tools at the Court's disposal to address issues of improper litigation conduct by either party. For example, the Court can refuse an injunction to an unwilling SEP licensor, or order an injunction against an unwilling licensee. It can address improper litigation conduct through costs orders, and it has power to award interest on sums due which should have been paid sooner.

Comity does not support the imposition of a "floor"

151. The CA's reasoning at [258] – that comity "*supported*" its imposition of a "*floor*" - appears to be based on the fact that the EDTX judgment at that time had been obtained "*well before the English court's FRAND determination*" (emphasis added), and on an express assumption that the judgment would be "*maintained by the CAFC to the extent that one of the two jury awards is upheld*". On its own terms, this logic does not support use of any final judgment emerging in the US proceedings as a "*floor*", as provided for at CAJ [257]. As matters have turned out, the final judgment in the US proceedings will not have been made prior to the English FRAND determination, and the CA's assumption in this regard was proved false. The CAFC was conscious of this when it gave judgment in June 2025, and commented in fn. 9: "*Based on our conclusions here—that both the infringement and second damages judgments are vacated and the original verdict of $506,200,000 is not reinstated—we do not know how this opinion affects the English Court of Appeal's decisions.*"[46] **[15/336]** **[15/336]** **[26/869]**

152. In any event, even if the CAFC had upheld one of the earlier jury verdicts, considerations of comity do not support the inclusion of a royalty "*floor*" in the CDL. The English Court is exercising a jurisdiction to determine FRAND terms, in accordance with contractual obligations

[46] *Optis Cellular Tech, v Apple Inc.*, 139 F.4th 1363 (Fed. Cir. 2025). **[26/869]**

set out in clause 6.1 of the ETSI IPR Policy. The trial Judge was right at CJ [83] to find: "*This is a case where the outcome is <u>not</u> a judgment that competes with or is inconsistent with the EDTX Proceedings, but rather a Court-Determined Licence that will oblige Optis, as a matter of contract, to behave in a certain manner in relation to the EDTX Proceedings and any fruits of those proceedings (should any be paid by Apple to Optis).*" **[18/674-675]**

153. Where the English Court determines a FRAND licence that is worldwide in scope and the parties then enter into such a licence, the practical effect is ordinarily to preclude the licensor from bringing or continuing proceedings in respect of such non-UK SEPs as are covered by the licence, for the simple reason that the implementer is then <u>licensed</u> pursuant to the licence entered into by the parties. That is not an interference with foreign proceedings and does not give rise to comity concerns. There is no apparent reason – and the CA does not explain – why a worldwide licence that expressly provides for the dismissal of relevant foreign proceedings should give rise to any more comity concerns than a worldwide licence of the kind contemplated under the <u>*Unwired SC*</u> jurisdiction that is silent on the point but necessarily requires their dismissal. **[166/3417-3468]**

<u>Disposition of the appeal on Ground 5</u>

154. In the light of the above, the terms of the CDL providing for payment of a "Floor" (Clause 5.3 supported by definitions at Clauses 1.7 & 1.8) should be removed.

JON TURNER KC
MICHAEL BLOCH KC
BRIAN NICHOLSON KC
SARAH LOVE KC
LIGIA OSEPCIU
THOMAS SEBASTIAN
NAOMI HART

Instructed by Wilmer Cutler Pickering Hale and Dorr LLP

1 May 2026