Neutral Citation Number: [2023] EWHC 1578 (Pat)

Case No: HP-2019-000032

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

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27th June 2023

Before :

THE HON MR JUSTICE MELLOR

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Between :

(1)	**INTERDIGITAL TECHNOLOGY CORPORATION**	**Claimants**
(2)	**INTERDIGITAL PATENT HOLDINGS, INC.**	
(3)	**INTERDIGITAL, INC.**	
(4)	**INTERDIGITAL HOLDINGS, INC.**	
	- and -	
(1)	**LENOVO GROUP LIMITED**	**Defendants**
(2)	**LENOVO (UNITED STATES) INC.**	
(3)	**LENOVO TECHNOLOGY (UNITED KINGDOM) LIMITED**	
(4)	**MOTOROLA MOBILITY LLC**	
(5)	**MOTOROLA MOBILITY UK LIMITED**	

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Adrian Speck KC, Mark Chacksfield KC, and Edmund Eustace (instructed by **Gowling WLG**) for the **Claimants**
Daniel Alexander KC and James Segan KC (instructed by **Kirkland & Ellis International LLP**) for the **Defendants**

Hearing dates: 2nd & 3rd May 2023

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives and other websites. The date and time for hand-down is deemed to be Tuesday 27th June 2023 at 10.30am.

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THE HON MR JUSTICE MELLOR

Mr Justice Mellor:

INTRODUCTION

1. Following my FRAND Judgment (in its Confidential version [2023] EWHC 538 (Pat) and in the public version [2023] EWHC 539 (Pat) but generally 'the FRAND Judgment' or 'the Main Judgment'), there were two sets of issues left outstanding.

2. The first concerned confidentiality of my FRAND Judgment i.e. whether I should remove some of the redactions in the current public version of the FRAND Judgment. I heard argument on the confidentiality issues at a hearing just before Easter on 5th April and I have issued a separate Judgment on those issues.

3. This judgment deals with the second set of issues, the subject of the hearing on 2nd & 3rd May 2023, essentially those left outstanding between the parties. These are:

    i) Whether I should award interest on the principal sum of $138.7m which resulted from my comparables analysis covering the period from 2007 to the end of 2023 regarding InterDigital's portfolio of 3G, 4G and 5G Patents, and if so, at what rate or rates?

    ii) What the appropriate order should be as to the costs of the FRAND trial.

    iii) The resolution of certain issues arising on the terms of the Licence.

    iv) Whether I should grant permission to appeal.

    v) The final form of my Order.

INTEREST

4. In the FRAND Judgment at [552] I said I remained undecided whether interest should be awarded on 'past royalties' and indicated I would hear submissions on the point. On hand down of the FRAND Judgment, I gave directions that each side should serve a Statement of their Case on Interest and an exchange of pleadings took place. It is not necessary to set out all the elaboration raised in the Statements of Case and I summarise the positions of each side as follows.

5. InterDigital's position was summarised in this passage:

> 7. InterDigital maintains its position that it would be right, fair and in accordance with FRAND and the ETSI IPR Policy, and the approach taken to the past in the Judgment itself, for interest to be awarded, and that this should be calculated at a rate of 4% p.a. (an agreed rate asserted by Lenovo to be FRAND for late payments), else at a higher rate of 5 - 10% in accordance with the comparable licences and the expert

evidence, or such a rate as the Court thinks fit. It should be compounded, quarterly.

6. InterDigital reminded me of various passages in my FRAND Judgment at [202], [205], [522], [529], [540] and [550], all of which are apposite but which it is unnecessary to repeat here.

7. InterDigital also reminded me that it was common ground between Messrs Bezant and Meyer that the economically correct approach was to convert past royalties to present value using a relevant interest rate to reflect the time value of money (compare Bezant 4 [2.15] and Mr Meyer XX at T10/p1522 lines 4-16). Mr Djavaherian also opined that the detrimental effects to the licensor of delay can be addressed, at least in part, through the payment of interest (Djavaherian 2 [3.15] and XX at T8/pp1064 and 1072-1075).

8. Accordingly, InterDigital concluded:

> 11. It is accordingly appropriate as a matter of principle and policy, supported by the evidence of the experts, and in accordance with the Judgment, that the sums payable under a FRAND licence should reflect interest in respect of past sales. That reflects how a willing licensee would behave, reduces the incentive for implementers to delay agreeing FRAND terms and making FRAND payments, supports the policy and principles underlying the ETSI FRAND obligation and provides an economically just result".

9. Annexed to InterDigital's Statement of Case was a schedule showing the rate and type of interest in all the comparable licences. There was significant variation – the rates vary between 3 and 18%, on bases varying between simple interest and interest compounded monthly, quarterly and annually. Perhaps the most common combination was 10% compounded annually, but there was no discernible pattern, aside from renewals carrying the same interest as before. A table showing the rates in the Lenovo 7 was also presented, but those data presented no consistent picture at all.

10. As for the rates specifically referred to:

    i) It is true that in the draft licence, the parties had already agreed interest on late payments should be 4%, compounded quarterly;

    ii) Attention was drawn to the fact that Mr Meyer applied a discount rate of 10%, a figure supported by evidence from Mr Brezski who said in his witness statement that InterDigital has generally applied time value of money discounts reflecting InterDigital's weighted cost of capital at a rate of 10.5%.

    iii) InterDigital also relied on their cost of debt of 5%, also applied by Mr Meyer.

iv) In their Reply Statement of Case, InterDigital asserted that their cash and short-term investments were raised in part by debt, principally through the issue of convertible bonds issued in 2011 of $230m with an effective rate of interest of 7%, 2015 of $316m at 5.89% and 2019 of $400m at 6.25%. This was in response to the data set out in Lenovo's Statement of Case which detailed the figures for 'Cash on Balance Sheet' and 'Cash/Short term investments' drawn from InterDigital's financial statements from December 2007 to December 2021. Those combined figures went above $1bn in December 2013 and continued to rise to $1.64bn in 2021. These data were relied upon by Lenovo in support of their allegation that, had any sums been paid over at an earlier date, they would have just been added to the short-term balances and further, that InterDigital had not pleaded or proved that it made any losses as a result of payment being delayed. InterDigital's reply to those allegations was to the effect that it was necessary for their business to carry such large short-term balances in case there was delay in a major licensee renewing their licence.

11. Lenovo's position can be summarised as follows:

i) Their first set of arguments were to the effect that there was no power to award interest in these circumstances. I was presented with a learned analysis of all the jurisdictional bases on which the English Court could award interest, culminating in the assumption that InterDigital's claim to interest was a contractual one, based on the FRAND obligation but tempered by the assertion that the ETSI IPR Policy and ETSI Guide makes no mention of 'interest'.

ii) Their second set of arguments were that it would not be FRAND to award interest in the circumstances of this case, relying on a selection of quotes from my FRAND Judgment, including on InterDigital's conduct. Lenovo also made a point that hold out by both licensor and licensee should be discouraged. Lenovo contended that an award of interest would encourage hold out by licensors, providing no incentive to make FRAND offers at an early stage because they will know/expect to receive compensation at the FRAND rate at some point in the future, with interest on top.

iii) If, which they denied, any interest was to be awarded, Lenovo contended no interest should be awarded from any date earlier than November 2018 and the rate should be no higher than the Bank of England base rate +1% on a simple (non-compound) basis.

12. The elaboration in the arguments on interest from both sides is explained by the estimates provided as to the total sums which would be payable on the principal sum of $138.7m at various rates and bases of interest:

i) 4%, compounded quarterly, would result in total interest of $46.2m;

ii) 5%, compounded quarterly, would result in total interest of $60.7m;

iii) 7%, compounded quarterly, would result in total interest of $94.5m;

iv) 10%, compounded quarterly, would result in total interest of $159.7m.

13. These totals result from the application of the rate and basis to the annual royalties I have determined to be FRAND. They are what they are.

DISCUSSION

14. I mean no disrespect to the interesting arguments which were deployed but I see the situation in rather simple terms, albeit there are two countervailing arguments.

15. In terms of the jurisdictional basis to award interest, the basis is the FRAND obligation in the ETSI IPR Policy. Therefore, the question is whether it is FRAND to award interest or, to put it another way, would the willing licensor and willing licensee agree that interest should be payable on 'past royalties'?

16. The argument in favour of an award of interest starts with this consideration: if a sum of money should have been paid over in the past, whether in 2011 or 2015, one's natural instinct is to say, of course interest should be paid to compensate the person who has not had the use of the money in the intervening period. However, it is important not to isolate the question of interest from the whole FRAND analysis which I undertook in the Main Judgment.

17. It will be recalled that the lump sum of $138.7m was derived from a per-unit rate of $0.175. I applied that rate across the entire period from 2007-2023 despite the fact that I favoured applying different rates to different periods of time - [803]. That per-unit rate arose from consideration of the period from 2012-2018 at [805]-[807]. For the period 2019-2023, I applied the same rate because LG 2017 remained the best comparable – see [809]. For the earlier period 2007-2011, an absence of reliable data caused me to apply the same rate – see [810]. Overall, the application of the single per-unit rate was driven by consideration of what the willing licensor and willing licensee would agree in the circumstances I posited – see [812]-[813].

18. All of that analysis was based on the single best comparable (see [811]) – LG 2017 and on my conclusion that there was no evidence the resulting lump sum was procured or influenced by hold-out (see [675] and [722]-[734]). On that basis, the LG 2017 lump sum can be taken to have been considered FRAND or at least in the FRAND range (i.e. appropriate compensation) by InterDigital for royalties on LG's sales from 2011 through to 31 December 2020, including the more than 6 years past sales (1st January 2011-30th November 2017).

19. That conclusion (that the lump sum was appropriate compensation) holds notwithstanding the way in which InterDigital subsequently decided to apportion that lump sum as between past and future. It will be recalled that, when deriving separate rates for past and future, Mr Meyer adopted InterDigital's apportionment between past and future. That resulted in Mr Meyer's per-unit rates derived from LG 2017 of $0.09 for the past and $0.61

for the future. His overall rate which blended past and future was \$0.24. The per-unit rate for Lenovo of \$0.175 was derived from that \$0.24 by making suitable adjustments for the differences in position between LG and Lenovo.

20. Mr Meyer's blended rate was derived over the period from 2011 through to end 2023. 'Future' royalties (i.e. paid in respect of unit sales after 30 November 2017) were discounted for accelerated payment, using the mid-year convention, at a rate of 10% per annum. Mr Meyer applied no discounting factor (or equivalent) for the past.

21. As was to be expected, Mr Meyer adopted exactly the same approach when it came to Lenovo's sales. Future sales were discounted at 10% per annum and no adjusting factor was applied to any past sales. The consequence is clear: on Mr Meyer's analysis, the unit sales in each year (take, by way of example, 2011) is multiplied by my derived rate of \$0.175. If Lenovo had been under a running royalty licence, Lenovo would have been obliged to pay four payments (amounting (I assume) to the resulting annual figure), each one payable shortly after the end of each quarter. This analysis points firmly in favour of interest being required to be charged at an appropriate rate.

22. The countervailing argument is that no interest should be awarded because, to the extent that it matters, it had already been accounted for in the analysis in my FRAND Judgment. When considering this argument, there are three points to take into account.

23. First, this argument starts from the point made in paragraph above. It could be said that, to the extent that interest was significant to InterDigital, it was included in the lump sum agreed for LG. If that is right, the argument would be that it follows that, by relying on the LG 2017 lump sum and calculating from it, the lump sum of \$138.7m also includes such sum as is appropriate for interest.

24. However, the fallacy in that argument is obvious when one recalls the way in which InterDigital approached past sales – see in my FRAND Judgment, [391]-[426] and [546]-[551]. In short, because InterDigital discounted past sales so heavily, interest did not feature in their approach.

25. Second, it is necessary to consider whether an award of interest should be incorporated into the analysis. I am conscious that the treatment of past sales in my FRAND Judgment is different to the way in which InterDigital accounted for past sales in recent years. If my analysis is upheld, it is likely that InterDigital will have to modify its licensing approach. If it does so, I consider it is inevitable that InterDigital will charge interest on those sums which should have been paid in respect of past sales. It might be said that InterDigital will do that in any event in order to maximise their revenue, so it is a point of little weight.

26. Third, I must take account of the way I expressed my conclusion in [812]-[813]. As I said there, my task was to determine what a willing licensor and a willing licensee would agree by way of FRAND terms, in this context a lump

sum, to cover the period from 2007 to the end of 2023. I stated my conclusion at [813] in these terms:

> 813. With my decisions on the points of principle in mind, I consider the willing licensor and willing licensee would agree a single per unit rate which would reflect all the considerations I have discussed above. I conclude that rate is $0.175 per cellular unit.

27. The application of that rate to the Lenovo sales figures in the calculation model yielded a lump sum of $138.7m.

28. To say that the willing licensor and willing licensee would agree a single per unit rate which would reflect all the considerations I had discussed above could be said to be a final conclusion which took account of all possible considerations (i.e. including interest). However, I also said 'With my decisions on the points of principle in mind…', and it will be recalled that in amongst my decisions on the points of principle, at [552] I expressly reserved the issue of interest for further argument. So my determination of the lump sum of $138.7m took no account of interest and does not preclude an award.

29. Overall, it seems to me that there are several pointers towards an award of interest being appropriate, not least that the application of the rate of $0.175 to the sales made by Lenovo in, say, 2011, indicates that Lenovo should have paid and InterDigital should have received the relevant royalties in that year (or shortly after), and should be compensated now for the delay in receipt of those sums. I also conclude that there are no pointers against. Accordingly, I conclude InterDigital are entitled to an award of interest on the sums making up past royalties in the lump sum of $138.7m.

30. That leaves the issue of interest at what rate. Having considered all the various rates which InterDigital put forward, I award interest at the rate agreed between these parties in the draft Licence i.e. 4%, compounded quarterly. I see no justification for any higher rate or for simple interest.

31. Lenovo submitted that InterDigital should be deprived of interest, or any rate should be reduced, due to their conduct, as found in my FRAND Judgment. The argument seemed to be founded on the Court's discretion to award interest. It seems to me that this argument confuses two separate things namely: first, the question of what is FRAND and second, the process of determining what is FRAND. The inclusion of interest is part of the first question and it is difficult to see how it should be affected by issues over the process which can be reflected in costs. I do not rule out the possibility that in an extreme case, a Court might consider it right to deprive a licensor of interest but that is not this case. Accordingly, I see no reason to award interest at a lower rate.

32. The calculation model, amended to include interest at 4%, compounded quarterly, yields an interest payment of $46.2m. When added to the lump sum, the total payment which Lenovo must pay to InterDigital for a FRAND licence from 2007 to the end of 2023 is $184.9m.

33. Having reached that conclusion, there are some additional points I should mention. First, the possible countervailing points I mentioned at [551] did not dissuade me from my conclusion to award interest. Second, Lenovo argued that an award of interest would encourage SEP licensors to make excessive demands in the knowledge that, even if the Court does not agree with the SEP licensor's demands, he still walks away with interest. I do not regard this risk as significant. Any implementer who considers they are being held up by excessive licensor demands is able to protect their position by (a) (at least in part) making payments on account and/or (b) initiating proceedings for a FRAND determination, in which a licensor which maintains excessive demands can be expected to be paying costs.

34. Finally, in the slightly unusual circumstances of this case, it could be said that Lenovo got away with a low rate in the early years (2007-2011), largely due to a dearth of evidence which enabled me to move away from the $0.175 rate I derived for the period from 2012-2018. I applied the same rate across all years, for the reasons summarised in paragraph above. I also noted that I favoured applying different rates to different periods of time, but that was a consequence of noting some overall trends in licensing rates over the years – see in my FRAND Judgment [318] & [319]. In view of those generally downward trends, my expectation is that if a FRAND rate had been agreed between these parties back in 2012, covering 2007-2012, it is likely that it would have been somewhat higher than $0.175, although by how much is a matter of speculation. I observe that my award of interest may compensate InterDigital to some degree.

THE COSTS OF THE FRAND PROCEEDINGS

35. The costs in issue are substantial. Down to the conclusion of the hearing on 2nd & 3rd May 2023, the estimates of their total costs attributable to the FRAND part of this action were: InterDigital: £17.25m; Lenovo: £14.27m.

36. Although these figures are high, they did not come as a surprise to me in two respects:

    i) First, it does not surprise me that InterDigital's costs are higher than Lenovo's, in view of the cases each side ran.

    ii) Second, in view of the amount of work which must have gone into the development of each side's case, the preparation of the evidence and the presentation of each side's case at trial. They also reflect the compressed nature of the 17 days of the FRAND trial.

37. The issues for decision under this heading are familiar:

    i) Who is the overall winner?

    ii) Are there any suitably circumscribed issues in respect of which it is appropriate in the circumstances for the winner to be deprived of their costs?

iii) Is this case a suitable one to justify making a costs order on such issue(s) against the party who has won overall?

Applicable Principles

38. These too are familiar. I will not lengthen this judgment by setting out principles which were not controversial, but I was referred to and will keep in mind the following passages from the authorities:

i) On the general approach: first and foremost, CPR 44.2 and the notes thereunder. My attention was also drawn to *Specsavers International Healthcare Ltd v Asda Stores Ltd (No.2)* [2012] EWCA Civ 494 at [26]-[31], which includes the endorsement of the succinct summary of Floyd J in *Qualcomm v Nokia* [2008] EWHC 777 at [6] (albeit I should recognise there is no requirement for exceptionality or unreasonable conduct – see *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.3)* [2012] EWCA Civ 843 per Davis LJ at [47]-[49]).

ii) On what amounts to a 'suitably circumscribed issue': *Unwired Planet v Huawei* [2016] EWHC 410 (Pat) per Birss J. at [5], plus at [9] the fact that, on such a suitably circumscribed issue, the Court will be more ready to make 'no order as to costs' of such an issue.

iii) On an issues-based costs award: *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 per Jackson LJ at [62]; *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.3)* [2012] EWCA Civ 843 per Davis LJ at [47] & [49]; *Pigot v Environment Agency* [2020] EWHC 1444 (Ch) per Stephen Jourdain QC (sitting as a Judge of the High Court) at [6(1)].

39. In a normal commercial dispute, determining the winner is usually straightforward (who has to write the cheque?). In a similar vein, but in situations where offers have been made, is a dictum from a case relied upon by InterDigital: *Gibbon v Manchester City Council* [2010] EWCA Civ 726 at [40] for the proposition that: '*to recover judgment for more than what was offered is legitimately regarded as success.',* although it should be noted that partial quote was made in the context of CPR Part 36. In the normal patent action where infringement and validity are both in issue, the issue is also straightforward if the patentee wins on both, or if the defendant wins on validity. A FRAND determination is different.

40. When deciding costs in *Unwired Planet v Huawei* [2017] EWHC 1304 (Pat), Birss J. held there were three main issues in the case before him: (i) worldwide vs UK licence; (ii) the FRAND rate and (iii) Art 102 TFEU. Unwired Planet won on issues (i) & (iii) and the debate was over who won on the FRAND rate. The Judge decided that Unwired Planet were the overall winner, but that the FRAND rate part of the case should be considered to see if deductions were appropriate.

41. It is not necessary to rehearse all the arguments Birss J. had to consider, but two were echoed in the arguments before me:

i) First, he took the rates for a 4GMM handset: Huawei offered 0.040%, Unwired Planet contended for 0.13% and the benchmark rate was set in the judgment at 0.062%. Birss J. recognised the arguments both ways: Unwired had to come to court to get more than 0.040%, but so too Huawei to get less than 0.13%. The benchmark rate was closer to Huawei's offer, being about one and a half times that but was about half the rate for which Unwired contended.

ii) Second, the amounts of money which Huawei had to pay as a result of the judgment. The figures which Birss J. had to compare were for 2013-2016. Huawei's offer amounted to $453,000. Under the Settled Licence, the lump sum was $23m. On Unwired's original case, the lump sum would have been $150m, but later dropped to about $100m. Again, Unwired emphasised they were going to receive much more than Huawei offered (as Birss J held at [44]) and Huawei responded with the point that the amounts were much less than Unwired claimed.

42. At [56], Birss J. characterised the FRAND rate issue as more like a tariff setting exercise than a simple claim for damages. He continued:

> 'Given the FRAND undertaking a rate had to be settled somehow. Huawei offered rates which were too low to be FRAND and they will have to pay at a higher rate than they were offering. They did not win the rate issue. But it would not be just for Unwired Planet to recoup the very substantial costs of the FRAND rate issue along with the costs they will recover. Their offered rates were not FRAND either and were quite some way further from the end result than Huawei's. The correct thing to do with the costs associated with the FRAND rate is to deprive Unwired Planet of them but go no further than that.'

WHO IS THE OVERALL WINNER?

43. Both sides argued they were the overall commercial winner. I summarise their positions as follows. Unfortunately, as with many aspects of this case, the devil is in the detail.

InterDigital's contentions

44. When contending they were the overall winner, InterDigital emphasised what they said were the key points of difference that underlay this dispute: first, that Lenovo disputed whether it required a licence at all; second, the price of the licence. InterDigital submitted that the first point must not be overlooked. Lenovo put in issue the validity and infringement of all the patents sued upon. They have continued to infringe InterDigital SEPs for many years, without making any payment. They refused multiple proposals from InterDigital to resolve the FRAND terms by way of third-party neutral arbitration. They filed the French law evidence to persuade HHJ Hacon that they were not required to commit to take a licence at the Trial A FOO hearing, they refused to commit to take the Court determined licence until after trial. Indeed, Lenovo only

committed to take the FRAND licence after receipt of the draft of my Main Judgment, when they knew the result of my lump sum determination.

45. On the second point, InterDigital made familiar arguments. Even though the price has been determined to be significantly below what InterDigital was seeking, and significantly above what Lenovo was offering, InterDigital still had to come to Court to establish that Lenovo did have to take the FRAND licence and that it was worth significantly more than Lenovo contended it was.

46. Further points made by InterDigital, which require some discussion, were that:

i) The lump sum in my Main Judgment far exceeds any of Lenovo's offers, and this point is reinforced by my award of interest.

ii) InterDigital's November 2018 offer was better for Lenovo than the Judgment, again reinforced by my award of interest.

iii) Lenovo's pursuit of collateral attacks on the Main Judgment is not consistent with Lenovo being the overall winner.

47. On the first point, InterDigital drew attention to three offers made by Lenovo:

i) Lenovo's first offer in May 2016 was $23m for a 10 year term (to 2026) with a past release.

ii) Lenovo's other pre-litigation offer was in July 2018 at 0.07%, unpacked by Mr Meyer to a unit rate of $0.11 and by Mr Bezant to $0.09. InterDigital point out that this applied to limited past sales, and not sales dating back to 2007.

iii) The third offer was made on 15 December 2021, just a few weeks before the start of the FRAND trial, Lenovo introduced its Lump Sum Offer, which proposed a lump sum payment of $80m +/- 15% for all sales in the 6 year term to the end of 2023 with a full release for all past sales for no additional consideration. InterDigital emphasise that this offer was made well after preparation for the FRAND trial had started, when a huge proportion of the total costs of the FRAND trial had been incurred and that the sum I determined of $138.7m was almost $60m greater than the $80m offered, a point which is improved still further by the addition of $46.2m by way of interest. Indeed, the addition of interest means the total sum which InterDigital will recover is more than twice Lenovo's offer.

48. Lenovo's third offer I consider later. The other two offers were made when Lenovo was asking for more information from InterDigital, and InterDigital had yet to provide adequate information to Lenovo about comparable licences.

49. InterDigital's third point concerns Lenovo's alleged collateral attacks on the Main Judgment. Although I have to return to the positions taken in the foreign proceedings between the two sides below, I do not consider that they have any relevance to the issue of who should be regarded as the overall commercial winner.

The November 2018 offer

50. The second point gave rise to extended argument about how the November 2018 offer should be characterised. Both sides have changed their position on this offer. I summarised this offer in the Main Judgment at [27], noting that it was made in November 2018 and withdrawn in February 2019. I also recorded that Lenovo relied on that offer as being consistent with its Lump Sum Offer, whereas InterDigital was on the defensive, saying it did not indicate that Lenovo's offer was FRAND and that it was an offer made after 10 years of attritional negotiation, made in an attempt to reach a deal.

51. In the light of the Main Judgment, InterDigital are now very keen on this offer, characterising it as 'commensurate with the FRAND lump sum royalty ultimately determined by the Court'. The evidence filed for this hearing (Brodie 25, Lim 11 & Brodie 26 in reply) included various points made about the November 2018 offer, including the effect of it as contended on behalf of InterDigital in recent correspondence:

> The November 2018 offer was for a 10 year term from the start of 2018 to the end of 2027, with a past release. It covered 3G, 4G, 5G, 802.11 and HEVC, and included mobile phones, tablets and personal computers operating in accordance with at least one of those standards. The offer also included the transfer of patents with a value of $20 million. The consideration was $170 million, plus a share of Avanci pool revenues with an NPV of $20 million. The licence therefore involved a net consideration of $170 million [FN1: $170 million cash + $20 million Avanci - $20 million for the transferred patents.]
>
> Pursuant to the Judgment, the licence determined by the Court will run to 31 December 2023, covering 3G, 4G and 5G and attracts a payment of $138.7 million [FN2 Putting aside for the moment the issue of interest.] (calculated based on a rate of 17.5c per unit), Following Mr Meyer's approach, the period from the start of 2024 to the end of 2027 would correspond to an additional expected 246 million unit sales by your clients [FN3 Taking the figure of 57.5 million units in 2023 and increasing at 2.73% p.a. (as used by Mr Meyer in the lump sum calculator PTS-13, which cross refers to PKM-51).] If, for the purposes of comparison only [FN4 Recognising that the Court's judgment does not apply to sales made after 2023, and reserving InterDigital's position on the true FRAND royalties for the period 2024 - 2027.], one were to apply the Judge's rate of 17.5c per unit to those additional sales, extending the Judgment Licence out to the end of 2027 would result in an additional consideration of $43.1 million, giving a total consideration of $181.8 million ($138.7 million + $43.1 million).
>
> Accordingly the November 2018 Offer corresponds to (and indeed is on terms more favourable to Lenovo than) the rates

> determined by this Court, and for a significantly wider licence to additional standards (WiFi and HEVC) and a broader range of products (including your clients' substantial business in non-cellular enabled laptops). It is plain from the foregoing that the November 18 Offer was significantly better for your clients than the Judgment Licence. Your clients could and should have accepted it, and had they done so then the entirety of this litigation would have been avoided.

52. In her evidence, Ms Brodie quoted this passage but added that it had omitted making NPV adjustments for future royalties at the rate of 10% per year, as Mr Meyer had done in his reports. With those adjustments, the total consideration was said to reduce to $172.7m.

53. In response, in his evidence for Lenovo, Mr Lim raised three points from the trial evidence as to why the November 2018 offer was not capable of acceptance by Lenovo and was not 'commensurate' with my FRAND Judgment as alleged:

i) His first point concerned uncertainty as to the scope of the past release. The proposal was for a 'Release from specified past sales' but these were not specified. In Bezant 4, Mr Bezant took the view that this did not mean a release from all past sales and concluded (based on some evidence from Mr Merritt) that '*it would not be appropriate to consider all sales in the period 2014 to 2018 as having been released.'* Mr Lim made the point that the economics of the November 2018 offer were highly sensitive to assumptions regarding which sales were covered by any past release.

ii) By way of background, that evidence in Bezant 4 was a response to footnote 62 in Meyer 3, where he expressed the view that InterDigital's November 2018 offer could be used as a rough cross-check against Lenovo's $80m offer. I need not set out his reasoning.

iii) His second point concerned the condition in the offer that Lenovo join the Avanci patent pool as a licensor and pay InterDigital a 50% share of the revenue stream passing to Lenovo from that pool over an extended number of years. He says that in negotiations, Lenovo expressed concern that joining the Avanci pool would have negative repercussions on Lenovo's ability to participate in other pools, including Via Licensing, in which Lenovo was already a participant. Despite these concerns, Lenovo indicated on 13 November 2018 that it was still considering the proposal. In cross-examination, Mr Merritt agreed that Lenovo's concerns were reasonable.

iv) His third point concerned the circumstances in which InterDigital withdrew the November 2018 offer. On 15 November 2018, Lenovo wrote asking InterDigital if it could share data regarding litigation results or other licensees (payment and/or royalty rates in particular) so Lenovo could validate the value of the Technicolor portfolio which was to be licensed as part of the November 2018 offer.

v) Two points may be noted by way of background:

a) First, in the November 2018 offer, InterDigital presented a slide deconstructing the offer to help Lenovo convince their management to accept it. Part of this put a value of $30m on the licence of HEVC and WiFi (802.11xx) to Lenovo's PC business.

b) Second, at the end of July 2018, InterDigital had acquired the licensing business of Technicolor '(mainly directed to video-related technologies)' according to Mr Ditty. In her evidence Ms Mattis indicated that, when she first joined, InterDigital did not actively license their WiFi/802.11 and HEVC portfolios but did so after the Technicolor acquisition.

vi) Thus, it would appear Lenovo's request for information was reasonable, but InterDigital never responded to it. Although the parties met on December 5, 2018 at a conference in Shanghai, the next communication was InterDigital's letter of 4 February 2019 which withdrew the November 2018 offer, replacing it with an offer for a 5 year licence (2019-2023) at specified rates or an upfront payment of $134m, together with a binding arbitration regarding past sales. Alternatively, InterDigital offered a binding arbitration to set FRAND terms and conditions. The terms of that offer and all subsequent offers were considerably higher than the November 2018 offer.

54. In the table under [898] in the Main Judgment (on p211), I included Mr Meyer's summary of the November 2018 offer, which he unpacked as representing a per unit rate of $0.39 (see his Figure 2, reproduced in [902]) but with the qualification that this rate is overstated, for the reasons summarised in [33].

55. Furthermore, the November 2018 offer must be viewed in context. I drew attention to some of the relevant context in the Main Judgment, including:

i) InterDigital's acknowledgement at the meeting on 20 September 2018 that they needed to provide more information about the rates being paid by Lenovo's competitors if Lenovo were going to be persuaded to agree a rate and a PLA – see [907].

ii) The information which InterDigital provided in the slide deck at that meeting – see [908]-[910] – and my findings about that information in [924], the result of InterDigital's creative accounting (see also [923]).

56. Lenovo summarised their contentions as regards the November 2018 offer in these points:

i) InterDigital's reliance on this offer ignores the rate case which they advanced throughout this litigation.

ii) Instead, InterDigital alight on the November 2018 offer despite the fact that it was incapable of acceptance by Lenovo for the reasons detailed by Mr Lim, it was withdrawn after 4 months and replaced by higher offers and it was disavowed by InterDigital at trial as not FRAND.

iii) Finally, Lenovo point to my finding at [942 i)] that it was reasonable for Lenovo to reject all the offers made by InterDigital as not FRAND. Although I did not spell this out in the Main Judgment specifically in relation to the November 2018 offer, elsewhere I drew attention to the fact that Lenovo were justified in seeking information from InterDigital (see [932]). Furthermore, the November 2018 offer was not straightforward in view of the bundling of HEVC and WiFi and the requirement to join the Avanci pool.

57. I broadly agree with these contentions, which is why I conclude the November 2018 offer does not assist InterDigital. Specifically, it does not convert InterDigital into the winner of this action.

LENOVO'S CONTENTIONS

58. Lenovo submitted they were clearly the overall winners and InterDigital clearly were not. Lenovo made the following points:

i) There were three parts to the case: (i) the Comparables Analysis (ii) the Top Down cross check and (iii) Conduct. Lenovo was successful on each of those parts.

ii) On the Comparables Analysis, which turned out to be key to the determination of the appropriate FRAND rate and the consequent lump sum, Lenovo submit that their analysis was almost entirely preferred to that of InterDigital. In particular, all of InterDigital's comparables were rejected. The Court considered the Lenovo 7, accepted Mr Meyer's unpacking of them (and rejected Mr Bezant's approach) and identified LG 2017 as the best comparable. Although Lenovo accept that I did not accept every step in Mr Meyer's analysis, the bulk of it was accepted.

iii) The Court accepted Lenovo's point about volume discounts.

iv) The final per unit rate was almost the same as that proposed by Lenovo at trial, based on analysis which overlapped substantially with that of Lenovo's experts. Certainly, the rate was far closer to Lenovo's suggestion than to InterDigital's.

59. In their skeleton, Lenovo correctly anticipated that InterDigital would make something of my finding on limitation periods. This was not a point which InterDigital made at the start of the trial but, as the trial continued, they correctly sensed it was an issue in my mind and sought to adopt it. Very little time was spent on it, despite its actual ramifications in this case and wider impact more generally.

MY CONCLUSION ON THE OVERALL WINNER

60. Notwithstanding InterDigital's contentions, I am in no doubt that Lenovo are the overall winner of this FRAND trial. I summarise my reasons as follows:

    i) First, I agree with Birss J. (as he then was) that the FRAND rate determination in this type of case is properly to be characterised as a tariff setting exercise.

    ii) I realise that characterising this case as a tariff setting exercise tends to downplay InterDigital's argument that they had to pursue this whole case down to judgment in the FRAND trial in order to secure the commitment from Lenovo to accept this Court's FRAND determination. However, the fact that Lenovo will be 'writing the cheque' and a sizeable cheque at that cannot, in my view, convert InterDigital into the winner of the FRAND trial.

    iii) The FRAND rate determination/Comparables part of the case accounted for a significant majority of the evidence and argument.

    iv) The per unit rate I found of \$0.175 is very close to Lenovo's contention of \$0.16 and a long way from InterDigital's contention, but I must also consider the total amount now payable to InterDigital.

    v) In terms of the lump sum payable, although \$138.7m is substantially higher than Lenovo's basic offer of \$80m, it is very substantially lower than InterDigital's initial contention of \$337m. Of course, both of those contentions were made before I decided that royalties were payable on all past unlicensed sales – a decision on a short point of law. If the parties had known at the start of trial that that point was live, their alternative contentions on the appropriate lump sum would have been: Lenovo: \$126.8m; InterDigital: £394.8m.

    vi) I must also consider the impact of my award of interest. In terms of the time taken on the issue of interest, at the main trial, the time taken was miniscule but it must have accounted for about ½ day at this recent hearing, with some not insignificant preparatory costs. As I recorded at [549], interest did not form part of InterDigital's FRAND case, largely because it did not fit with their whole licensing approach, but its gradual emergence (in particular due to my FRAND Judgment) can be said to represent opportunism on InterDigital's part. Once again, if the parties had known at the start of trial that interest was very much in the mix, their alternative contentions on the appropriate total would have been commensurately higher still.

    vii) In a tariff setting exercise, it will be rare indeed for the Court to adopt the contentions of one side in their entirety. This is the equivalent to the observation that a winning party need not succeed on every point.

    viii) I rejected all of InterDigital's comparables and Mr Bezant's approach to unpacking. Although I did not accept the entirety of Mr Meyer's approach, I accepted most of it. Furthermore, where I departed from his analysis, I still relied on data presented by him.

ix) I have analysed the November 2018 offer above. For the reasons given there, it does not assist InterDigital in my view.

x) Overall, I conclude that Lenovo must be adjudged the winner on the Comparables part of the case.

xi) As to the other two parts to the case, there can be no doubt that Lenovo were successful on both the Top Down and the Conduct parts of the case, although there are aspects of their conduct of the Top Down case which I must consider below.

xii) Finally, as indicated in *AL Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 402 per Longmore LJ at [28], it is not irrelevant as to which party seeks to appeal the Judgment. Although Lenovo has a conditional cross-appeal and I assume that Lenovo will also appeal my finding on interest, there is little doubt that it is InterDigital which is mounting the substantive appeal against my FRAND Judgment.

61. I have not forgotten InterDigital's points (i) regarding Lenovo's very long delay in committing to take what the Court determined to be FRAND; (ii) that InterDigital had to pursue this action down to the FRAND judgment in order to obtain that commitment from Lenovo; (iii) that not all of Lenovo's analysis was accepted; (iv) in particular that royalties are payable on all past sales, back to 2007; and (v) InterDigital has succeeded in securing an award of interest; but those points are to be considered in the next section.

62. On that second point, InterDigital repeatedly referenced that they faced the risk that Lenovo would refuse the FRAND licence settled by this Court and exit the UK market. It is well-known that some Chinese implementers have exited the market in Germany as a result of infringement claims brought by some SEP owners. I cannot rule out that there might have been such a risk if I had accepted InterDigital's case but at the more realistic end of the spectrum, it seems unlikely that Lenovo thought it was worth trying to escape payment of damages (which would only go back 6 years from commencement of proceedings and which would only be awarded on the Patents found valid and infringed) and exit the UK market. Even before the FRAND trial started, Lenovo must have spent £5m at the very least on these FRAND proceedings, hardly the action of a party seriously contemplating exiting the UK market.

SUITABLY CIRCUMSCRIBED ISSUES? AND WHO SHOULD PAY?

63. The next topic(s) are (a) whether there are any suitability circumscribed issues on which Lenovo lost and in respect of which I consider Lenovo should not recover its costs and (b) whether, in all the circumstances, I should make Lenovo pay InterDigital's costs of any of those issues.

64. InterDigital provided evidence of its costs of two issues:

i) First, the costs of the top down cross check and hedonic regression. Ms Brodie estimates that InterDigital's costs attributable to (a) patent counting and (b) hedonic regression as £781k and £702k respectively. Since Lenovo won on these issues I need not discuss these estimates further, but they provide some indication that the costs of the comparables part of the case account for the vast majority of InterDigital's costs, and similarly regarding Lenovo's costs.

ii) Second, the costs of the foreign law evidence. Ms Brodie estimates InterDigital's total costs of the evidence relating to French, Chinese and US law at about £1.4m, and suggests that Lenovo should pay those costs.

65. Lenovo provided a different breakdown of their costs which does not allow for direct comparison. However, I note that their costs of their expert on hedonic regression are larger than the total estimated to have been spent by InterDigital on that topic. Lenovo's costs of the foreign law experts amount to just over £200k, but to that it would be necessary to add the costs of the solicitors and counsel.

66. As I noted in the Main Judgment, there was no cross examination on either the evidence of US or Chinese law. The relevance of the few points I mentioned from that evidence at [239]-[242] basically fell away at trial when Lenovo dropped their demand for a provision to adjust the FRAND licence in the light of decisions from the US and Chinese courts (since resurrected, as I discuss below). In relation to the evidence of French law, the big issue evaporated at trial (see [208] and [233]-[238]), leaving no issue of French law for me to decide. As I mentioned at [237] I was left with the strong suspicion that the issues of French law raised by Lenovo were a device to put off their having to commit to the Court determined licence for as long as possible.

67. In the light of these considerations, I consider that the foreign law issues are suitably circumscribed and that Lenovo should be deprived of their costs on those issues. I also consider that Lenovo should be ordered to pay InterDigital's costs of the foreign law issues in order to reflect not just what transpired on the foreign law issues but also the wider game played by Lenovo in delaying making a commitment to take the FRAND terms determined by this Court until receipt of my FRAND Judgment in draft.

68. Finally, I must consider the costs of the argument on interest, on which InterDigital have prevailed. InterDigital's additional costs since the FRAND Judgment were estimated to be about £1.4m, whereas Lenovo's were estimated at about £0.8m, but only a relatively small proportion of those costs could possibly be attributed to the arguments on interest. Again, the issue of interest was suitably circumscribed. I consider Lenovo should be deprived of their costs of the issue and should also pay InterDigital's costs of that issue.

69. I have considered whether I should send InterDigital's costs of the foreign law and interest issues to detailed assessment, since the sums involved are substantial. Unless the parties manage to reach agreement on costs, there will have to be a substantial detailed assessment of Lenovo's costs, which will

provide figures for Lenovo's costs of the foreign law and interest issues so they can be deducted. In the circumstances, I do not think it would be right for me to make estimates of what should be deducted from Lenovo's costs and so I consider it right for InterDigital's costs of the foreign law and interest issues to be the subject of a detailed assessment.

OUTSTANDING ISSUES ON THE DRAFT LICENCE

70. The issues on the draft licence developed before and during the hearing, with the result that I requested the parties to discuss the issues further after the hearing and report back a few days later. Some minor issues fell away as a result, but major issues remained.

71. By far the most significant issue concerned the on-going proceedings between these parties in Delaware and in China. By way of retaliation, Lenovo sought to interest me in some actions brought by InterDigital against Lenovo in Germany on patents relating to HEVC.

72. In the Main Judgment at [210]-[221] & [228] I summarised the Delaware and Chinese proceedings. Neither side raised any issue with my summary at this hearing, but it needs updating. It is apparent that neither set of proceedings has proceeded either to trial or judgment.

73. Instead, the evidence filed for this hearing covered the status of those three sets of proceedings and what has been said to those Courts in the light of my FRAND Judgment. I will first set out the facts, as relayed to me, and then discuss the accusations made by each side before me.

THE CURRENT POSITION IN THE DELAWARE PROCEEDINGS

74. In Delaware, InterDigital's claim is for infringement of now 7 alleged SEPs, said to be essential to 3GPP cellular standards, seeking an injunction, damages for past infringements and a declaration that InterDigital has fulfilled all FRAND obligations by seeking a mandatory FRAND licence in the UK.

75. Lenovo's counterclaim is for breach of contract and US Federal anti-trust laws as a result of InterDigital's licensing practices and demands in relation to their portfolio of SEPs said to be essential to the 3GPP cellular standards. Lenovo seek injunctive relief, damages (it would seem), attorney's fees and such other relief as may be proven.

76. These claims are now consolidated for a single trial currently scheduled to begin on 4th December 2023. In addition to other directions down to that trial, the parties have been ordered to notify the Delaware Court within 7 days of the execution/effective date of the licence determined in these UK proceedings.

77. InterDigital drew attention to various statements made on behalf of Lenovo to the US Court before my FRAND Judgment was made available (either in draft or in final form). I need not detail these, but suffice to say that Lenovo clearly identified as a possible issue for trial '*compensation to Lenovo for the harm*

caused by InterDigital's anticompetitive conduct, including a refund of any overpayment for a license to US Patents based on InterDigital's UK action…'

78. After Lenovo's undertaking to take the FRAND terms determined by this Court on 6 March 2023 (in the light of my draft FRAND Judgment) and the subsequent handing down of my FRAND Judgment on 16 March 2023, InterDigital's US lawyers then asked Lenovo's US lawyers for clarification of Lenovo's position and particularly why Lenovo's claims in the US were not moot in the light of Lenovo's unconditional commitment to this Court.

79. Lenovo's response, plus what Lenovo told Judge Wolson during a status conference on 22 March 2023, appears to confirm that Lenovo takes the position in the Delaware proceedings that the FRAND Licence settled by this Court represents an abuse of US antitrust law given it covers a period of 12 years before this claim was filed.

80. In submissions, Mr Segan KC for Lenovo said on instructions that Lenovo was perfectly content to say that they would not now or in the future seek any damages from InterDigital in Delaware. InterDigital sought clarification in correspondence after the hearing as to whether that statement included any monetary relief, whereupon the assurance, such as it was, rather fell apart. The parties were back to the standoff position as regards the Delaware proceedings, where InterDigital are willing to withdraw their claim but only if Lenovo also withdraw their counterclaim. Of course, the US Judge may decide that InterDigital's claim for patent infringement is moot in the light of my FRAND Judgment, but that InterDigital's claim for the declaration should continue as long as Lenovo's counterclaim continues.

THE CURRENT POSITION IN THE CHINESE PROCEEDINGS

81. There are now two actions pending in China: the ongoing FRAND proceedings before the Beijing Intellectual Property Court of the People's Republic of China (designated by Lenovo as the 'BIPC FRAND Action') and the ongoing proceedings in the Wuhan Intermediate People's Court (the 'Wuhan FRAND Action'). Dr Qi's witness statements did not mention the Wuhan proceedings, which is why my summary did not mention them. I infer those were the proceedings commenced in late November 2021 and after Dr Qi's witness statements had been served.

82. In his witness statement Mr Lim explained that in the BIPC FRAND Action, Lenovo is seeking a determination of FRAND terms for the period up to the end of 2023 for Chinese SEPs for 3G, 4G and 5G owned by InterDigital in China i.e. the Beijing Court is being asked to set China-only FRAND rate(s). InterDigital added that the period in question is from 27 August 2016 to end 2023. Mr Lim explained that action has essentially been on hold pending the outcome of InterDigital's jurisdictional challenge which was finally dismissed on 23 August 2022. A first pre-trial conference was held on 17 March 2023. The trial is said to be likely to be scheduled for September or October 2023 with a first-instance judgment expected by the end of 2023 or in early 2024.

83. In the Wuhan FRAND Action, Lenovo are seeking the determination of FRAND rates for a **global** licence for 2024-2029 for InterDigital's portfolio of SEPs for 3G, 4G and 5G technologies. Mr Lim says there has been no substantive progress in that action since the UK FRAND trial. InterDigital's jurisdictional issues are anticipated to be scheduled for hearing in the second or third quarter of 2023. If Lenovo prevails on jurisdiction, the trial is said to be likely to be held in the second half of 2024 with a first instance judgment expected in the first half of 2025.

84. In the BIPC FRAND Action, on 17 March 2023 (i.e. the day after I handed down the FRAND Judgment and 16 days after Lenovo received the draft embargoed Judgment), Lenovo's Chinese Counsel stated that Lenovo's commitment to take the Licence settled in these proceedings was contingent on there being an adjustment mechanism inserted into the Licence such that the terms would be adjusted by any judgment handed down in the BIPC FRAND Action. Counsel indicated they might need further instructions on this issue. InterDigital's Chinese Counsel asked for clarification, but instead of responding, Lenovo then filed a letter with the BIPC Court dated 17 April 2023 clarifying that Lenovo's undertaking did not contain any preconditions, but also stated that the Licence is not final. Ms Brodie in her witness statement set out two quotes from a translation of Lenovo's letter to the BIPC:

> "your court's determination on the Chinese rates will continue to be one of the factors that the UK courts will consider when determining the specific license terms"
>
> "The first instance decision in the UK proceedings does not resolve the issues that arise in the Beijing Case. On the contrary, your court's swift determination on the license terms of InterDigital's Chinese portfolios will instead assist the UK courts in determining the global license terms."

85. On that basis, Ms Brodie submitted that Lenovo continues, therefore, to tell the BIPC that it is seeking an adjustment clause in these proceedings, whereas it dropped its argument that a lump sum licence should contain such a clause before trial.

86. In the course of submissions before me, Mr Segan KC explained that Lenovo were not seeking any adjustment provision in the Licence. Instead, he indicated that Lenovo wished to continue with the Beijing proceedings (at their own risk as to costs) with a view to possibly influencing the Court of Appeal with any rate which the Beijing Court might determine. I found this a little far-fetched since it is going to be difficult to say the least to draw any equivalence between any China-only rate determined by the BIPC and the global rate determined in my FRAND Judgment.

PROCEEDINGS IN GERMANY

87. Mr Lim provided details of the actions commenced by InterDigital against Lenovo in Germany on 25 March 2022, 28 April 2022 and 6 April 2022 involving four patents said to be essential to the HEVC video codec standard,

two in LG Munich I and two in Mannheim. The alleged infringements are Lenovo and Motorola smartphones, laptops, tablets and server products. As one of its defences, Lenovo has filed invalidity actions at the German Federal Patent Court to invalidate each patent.

88. Mr Lim drew attention to quotes from the brief filed by InterDigital at the Mannheim court on 31st March 2023, to the effect that InterDigital was very critical of my FRAND Judgment, contending that the UK Court had '*disregarded its own case law',* that *'hold-out was judicially encouraged and rewarded'* by my FRAND judgment and that there was '*an obvious imbalance in the court's assessment of the conduct of the parties there and a disregard for Unwired Planet principles'*.

89. It is not necessary for me to detail what has occurred since the filing of that brief, although I am told the Mannheim Court is waiting to hear whether InterDigital agree to a suspension of that action (regarding EP447) or whether they wish to elect to proceed with the so-called Orange Book Offer process for a determination of FRAND rates for InterDigital's HEVC portfolio.

90. These actions in Germany have nothing to do with the issues I have to decide. I mention them only to complete the picture behind the rival accusations, which I will now summarise.

THE RIVAL ACCUSATIONS

91. InterDigital take the view that the positions so far explained by Lenovo's counsel to the Delaware court and the BIPC, if continued, would represent a collateral attack on my FRAND Judgment. The correspondence which continued after the hearing appeared to me to make it clear that Lenovo does intend to maintain their attacks on the Judgment, the Licence and to undermine its Undertaking to this Court.

92. Lenovo's response seems to me to evade the force of the accusation made by InterDigital. Instead, Lenovo seek to obfuscate by (i) seeking to equate InterDigital's intention to appeal against the Order resulting from my FRAND Judgment with Lenovo's positions in Delaware and China and (ii) mixing in the HEVC proceedings in Germany.

93. It seems to me that Lenovo could have been much more straightforward about their intentions. I assess the situation as follows:

    i) The positions taken by Lenovo in the Delaware and Beijing proceedings cannot be equated at any sensible level with the appeal which InterDigital seeks to mount against my FRAND Judgment, although there is *some* relation which I explain below. InterDigital seeks to invoke, as is their right, the procedures for appeal in this country. I might add that Lenovo seek to do that as well. Lenovo's cross-appeal will raise the issue before the appellate courts of this country whether I was right to hold that limitation periods have no role to play in the relationship between willing licensor and willing licensee, and also the issue of interest.

ii) It seems to me that at least *part* of what Lenovo seek to do in the Delaware and Beijing proceedings is to find out whether the US Courts and the Chinese Courts agree on this limitation issue.

iii) Mr Segan's explanation for Lenovo continuing to pursue the BIPC Action was to obtain a China-only rate from the BIPC which Lenovo could then use in an attempt to influence the Court of Appeal in this country. Despite that justification appearing very thin indeed, I cannot rule out either that or the other justification which is apparent – that Lenovo wish to obtain a ruling from the BIPC that Chinese limitation does apply in setting a China-only FRAND rate, and seek to interest the Court of Appeal here in it. The same point applies to Lenovo's pursuit of their counterclaim in Delaware.

iv) If Lenovo are permitted by the US Court to continue with their counterclaim, notwithstanding the assurance given by Mr Segan, I also cannot rule out that Lenovo will seek a repayment of some part of the lump sum representing Lenovo's sales made outside relevant limitation periods – and that part may be just royalties for the US, or globally, or globally excluding the UK. Of course, a repayment may not be necessary if the appellate courts here disagree with my limitation finding.

v) Whilst I hope that the US and Chinese Judges would agree with my analysis so that there is convergence globally on applicable FRAND principles, I cannot rule out the possibility that they or one of them or the appellate courts here may disagree.

vi) However, it is for the US and Chinese Judges to regulate the proceedings which are before them, not me. It will be for them to decide whether to allow the proceedings before them to proceed and in what form, whether to dismiss some or all of them as moot or whether to stay some or all of them pending the resolution of the appeal procedures here.

94. With that overlong diversion explaining the position in the foreign proceedings, I can now return to resolve the issues over the wording in the Licence.

THE RIVAL PROPOSALS IN THE DRAFT FRAND LICENCE

95. InterDigital's proposed draft licence would have required Lenovo to withdraw their counterclaim in Delaware and their action in China, InterDigital being willing to withdraw their claim in Delaware but only if Lenovo withdrew its counterclaim. Lenovo submitted that InterDigital sought to achieve this result, which Lenovo characterised as anti-suit injunctions by the back door, without bringing applications for such injunctions.

96. Lenovo's proposals for the draft Licence included a carve-out for their proceedings in both Delaware and in China. InterDigital's evidence as to what had been submitted to both courts on behalf of Lenovo left me in little doubt

that Lenovo's proposed carve out would be presented to one or both foreign courts as my inclusion of an adjustment clause to take account of whatever those courts decided. Whether my suspicion is correct or not, I consider it is necessary to make the position absolutely crystal clear in this and other material respects, as follows.

97. First, although Lenovo were contending for an adjustment provision at the start of trial, this was abandoned during trial. As I found at [222], a willing licensee would not have made its acceptance of a FRAND licence conditional on the outcome of either the Delaware or Chinese actions. Accordingly, and in any event (in view of my finding at [222]), there will be no adjustment clause in the FRAND licence arising from these proceedings.

98. Second, as for the various sets of foreign proceedings in Delaware, Beijing, Wuhan and Germany, I emphasise once again I have no role in any of those proceedings which are for the national judges to control and determine. Furthermore, those judges are more than capable of responding as they see fit in the light of my FRAND Judgment and any appeal from it.

99. Third, Lenovo will be held to the unconditional undertaking given to this Court on 6 March 2023. For ease of reference that undertaking was as follows:

> '(1) That within seven days of the expiry of the time to appeal against the final order of the High Court settling the terms of a FRAND licence ("Final FRAND Trial Order") or, if there is an appeal (or appeals) against the Final FRAND Trial Order, the withdrawal or final determination of such appeal(s), the Defendants will enter into the form of licence settled by Mr Justice Mellor or such other licence as may be finally settled by the courts in these proceedings ("Settled Licence");'

100. Lenovo's proposed wording for clause 3.2(a) of the draft Licence seemed to me to be an illegitimate attempt to revive a point which they dropped during trial – their proposed adjustment mechanism. It also wrongly confuses the distinct roles of this court at first instance and of the appellate courts. It seems to me that the Licence I must settle is one which gives effect to my FRAND Judgment. Whether some or all of its terms require to be suspended pending appeal is a separate matter, but if all appeals fail, the Licence I settle should be able to stand without amendment.

101. With that guiding principle in mind, on the first and main issue, I decline to include Lenovo's proposed wording at the start of clause 3.2(a), namely 'Other than in relation to the PRC Proceedings and Delaware Proceedings,' This means there is no need for the definitions of those two sets of proceedings to be included.

102. The only outstanding issues concern clause 2.4 which is headed 'Third Party Enforcement'. There are three issues but they need to be understood in context:

i) Clause 2.4 is part of Article II – License Grant. Clause 2.1 sets out the license granted by InterDigital (and its Related Parties) to Lenovo which permits the manufacture and sale of 'Licensee Terminal Units' (LTUs).

ii) Clause 2.2 sets out certain limitations on the License Grant. These limitations are agreed. In short the rights granted are limited to the grant in clause 2.1 and the release in clause 3.2, and nothing further is granted or conveyed.

iii) By clause 2.3 the parties acknowledge that the authorized sale of a Licensee Terminal Unit exhausts the Licensed Patents embodied in that functional unit, without additional compensation other than that set out in Article III.

iv) Clause 2.4 is a long clause, containing some long sentences which I will attempt to summarise:

a) The first provides that if InterDigital is unable to grant a licence, covenant or release under any of the Licensed Patents, then the licence, covenant or release shall be the widest they are able to grant.

b) The second sentence is concerned with so-called Controlled Third Party Licensed Patents i.e. Patents acquired during the Term which would have qualified as Licensed Patents if owned at the Judgment Date. InterDigital and its affiliates are obliged not to enforce such Patents and to use best endeavours to prevent their enforcement.

c) The third sentence also concerns Controlled Third Party Licensed Patents but those in a patent pool arrangement. In respect of such patents, InterDigital agrees to reimburse Lenovo for any amounts InterDigital receives from any pool but only if any such patents are enforced against LTUs within the scope of the Licence, despite InterDigital's obligation to use best endeavours to prevent such enforcement.

d) Next comes two sentences in dispute (issues A and B) which provide as follows:

> Neither InterDigital Group nor any of its Affiliates shall in any event materially assist or encourage any third party to enforce any Patent, against Licensee, any of its Affiliates, customers, or suppliers within the scope of the releases, licenses and covenants set forth in this Agreement. The foregoing shall not apply to any Patents (not being Licensed Patents) (other than Patents which are, or are for the purposes of this clause deemed to be, Licensed Patents) that may be asserted

by a pool or licensing consortium of which InterDigital Group or its Affiliates may be a member.

e) What then follows is the remainder of the clause which extends over more than 20 lines. It comprises two sentences and both are disputed – this is issue C. The first obliges InterDigital to indemnify Lenovo against any costs, liabilities etc. caused by a breach by InterDigital of clause 2.4. The second sentence is a deeming provision (affecting issue B above) which seeks to expand the definition of Licensed Patents to include (i) Patents acquired by any Related Party to InterDigital; (ii) Patents that would otherwise be or have been Licensed Patents if not for a change in InterDigital's Group or any of its affiliates corporate structure or ownership, and (iii) Patents owned or controlled by a third party over which any member of the InterDigital Group or any Affiliate has the ability to direct, manage or control the enforcement of such patents.

103. On issue A, I find the proposed wording unclear – what is 'within the scope of the releases etc' supposed to mean in this context? If all that relates to is Licensed Patents, then this additional clause is unnecessary. If it embraces any Patent, then this clause is too broad as arguably it might prevent InterDigital even talking to other SEP licensors about their experiences in this litigation. InterDigital explained their concerns and correctly submitted that Lenovo has not advanced any real justification for the inclusion of this sentence. I do not include it.

104. On issue B, one effect of the rival contentions is agreement that 'Licensed Patents' should be excluded, a point I agree with. The issue is whether those Patents which are deemed to be Licensed Patents by the last sentence of the proposed clause (i.e. the second sentence of issue C) should also be excluded.

105. On issue C, InterDigital objected to the inclusion of this long and expanded indemnity on a number of bases which they contended Lenovo had not addressed:

i) First, why Lenovo need any protection beyond the normal measures provided for by an action for breach of contract by InterDigital according to the normal rules.

ii) Second, why Lenovo needs this term, when they have not been able to point to an equivalent term in any of the licences examined in this action.

iii) Third, why it is reasonable to include the deeming provision which means InterDigital is giving an indemnity in respect of patents regardless of whether InterDigital or its Affiliates has any control over them or which InterDigital may have divested years ago.

106. Essentially for those reasons, with which I agree, I decline to include the wording the subject of issue C. I do not think it is necessary and in major respects the deeming provision goes too far.

107. However, it is apparent that these issues arose from a level of distrust between the parties. I observe that this licence has only a short time to run, until the end of 2023. I give permission to both parties to apply in case of any alleged breaches of this Licence i.e. a fresh action is not required. This should help to keep both parties to the terms of the Licence.

108. As Birss J. did in *Unwired Planet*, the terms of the Settled License are appended to this Judgment.

THE OPERATION OF THE SETTLED LICENCE PENDING APPEAL

109. Pending appeal, I must ensure that neither side is forced to take irrevocable steps which might be inconsistent with the position achieved on appeal. To that end, I agree with InterDigital's proposal that the parties should undertake to treat the Settled License as if it were in force pending the resolution of all appeals, save in respect of clause 3.2 (the so-called patent peace clause) and clauses 3.3, 4.2, 5.1 and 5.2 (which concern matters which are only properly engaged once the License is fully in force).

PERMISSION TO APPEAL

110. InterDigital sought permission to appeal and presented me with draft Grounds of Appeal in four sections in a total of 15 paragraphs. Lenovo's position, in summary, was that permission to InterDigital to appeal should be refused but if I were to grant permission, Lenovo sought permission to cross-appeal on one 'narrow' ground concerned, in effect, with my decision that limitation periods do not have a role to play in FRAND determinations. I assume that Lenovo will also appeal on the issue of interest.

111. The general rule I must apply is that permission to appeal should only be granted if (a) the court considers that the appeal would have a real prospect of success or (b) there is 'some other compelling reason for the appeal to be heard': CPR 52.6(1).

112. On limb (b), as InterDigital reminded me, my FRAND Judgment is only the second time the English Court has been required to determine a FRAND rate and terms. Perhaps more importantly, my FRAND Judgment contains my determinations on a number of points which seemed to me to be points of principle and which had not arisen for decision before. Furthermore, and as I recognised in my FRAND Judgment at [166], the correct approach to setting global FRAND terms is an international endeavour. These are all reasons in favour of points of principle being subject to further consideration at the appellate level(s).

113. Lenovo made three points on the correct approach:

i) First, that the Court of Appeal has emphasised the importance, where the High Court is asked to give permission to appeal, of ensuring that any permission is given on defined grounds, thereby avoiding '*a general permission…not limited to any grounds that might be properly arguable.'* See *TRW Ltd v Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558 per Peter Jackson LJ at [75].

ii) Second, that the *TRW* principle acquires even greater significance when the judgment of the High Court is a long and detailed consideration of a large body of evidence, drawing attention to *Staechlin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817 at [29]-[34] per Lewison LJ. Lenovo summarised the point in this way (accurately in my view):

> 'Appeals against "*not only … findings of primary fact, but also … the evaluation of those facts and … inferences to be drawn from them*" are subject to a "*high hurdle*" requiring an appellant to demonstrate "*either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached*".'

iii) Third, Lenovo submitted that Birss J applied this approach when giving permission to appeal in *Unwired Planet v Huawei* [2017] EWHC 1304 (Pat) at [62]-[69]. In effect, Birss J. gave permission on '*properly arguable points of principle'* but refused permission for a sub-ground which simply involved '*re-arguing the court's assessment of the facts and evidence'* -see [64].

114. I agree with all three points. Indeed, they have special importance in relation to a judgment as detailed and dense as the FRAND Judgment. I propose to apply those approaches.

INTERDIGITAL'S GROUNDS OF APPEAL

115. Having considered InterDigital's Grounds of Appeal, it seems to me they all depend on Ground A. In order to explain this and my decision on permission, it is necessary to analyse what is alleged under the various Grounds.

InterDigital's Ground A –'The rate to be derived from the LG licence'

116. InterDigital's first ground is concerned with the rate to be derived from the LG licence. The explanation of my errors extend over 2 ½ pages but in his oral submissions, Mr Speck KC described the point as a short one, directed to a single point of principle '*which is articulated entirely within the bounds of Mr Meyer's calculations'*. In essence InterDigital say, as a matter of principle, there were two things I should have done '*to eliminate the sub-FRAND effect of very significantly depressed revenue for past sales that we see in real life agreements'* but I only did one of them, namely to apply the same rate to past and future sales. The effect in question, as I understand it, is that payments for past sales in real-life licences are valued at a very significant discount or waived entirely. So, it is said, the other thing I should have done but didn't,

was to eliminate that effect in the data derived from the patent licences in evidence. Accordingly, so it is said, it is not FRAND to allow the effect of the discounts/waivers to depress the rates which are derived from such licences.

117. InterDigital point to the unit rates derived by Mr Meyer from LG 2017: past rate \$0.09, future rate \$0.61, blended past/future unit rate \$0.24. It is said I erred in adopting the blended rate and should have taken the future rate of \$0.61. It is said that in adopting the blended rate my assessment included the '*very significant (and non-FRAND) depressing effect of a lower value being attributed to sales prior to the date of the agreement.'*

118. In argument, Mr Speck used as the 'correct' rate the figure of \$0.50 or \$0.49. These rates derive from Ground B – see below. A per unit rate of \$0.50 gives a lump sum for the period from 2007-2023 of \$396.4m. This is greater than the sum InterDigital originally sought, but of course their claim increased once sales going back to 2007 were included.

119. In their draft Grounds, InterDigital set out further detail. Here I quote paragraphs 3 and 5 from their Grounds:

> 3. Further, the Judge erred in failing to take account of the fact that:
>
> a. it was common ground that past royalties are either waived or discounted in licences,
>
> b. both parties' experts recognised that, in order to appreciate the true economics of the licences, one needed to assess the consideration to be attributed to the future and past for each licence separately, and then make adjustments applicable to that past and future consideration differently,
>
> c. the unchallenged evidence of Richard Brezski, to the effect that 10-K filings are independently audited financial statements (made following the US rules on fair accounting) that require relative fair value allocation of the transaction price to the deliverables', and
>
> d. that both sides' experts took as the most accurate measure of the proportion of consideration attributable to the past and future respectively the allocation recorded in InterDigital's 10-K filings.
>
> 5. At [422] the Judge suggests that it was 'incorrect' to proceed upon the basis of what he considered were 'subjective assessments' as to what proportion of a lump sum payment to allocate to past sales and future sales respectively, and at [425] the Judge suggests that taking a blended rate was the "normal way for others in the market to assess the rate derivable from a lump sum licence". He made similar points elsewhere in the Judgment. Each of these suggestions constitute errors, and/or

the Judge erred in concluding that such matters justified adopting the blended approach:

a. In respect of whether or not the allocations in the 10-K filings were "subjective", the Judge ignored the fact that both experts considered the most accurate measure of the split was that recorded in the 10-K filings, that the filings are made following the US fair accounting rules, and that it was never suggested by Mr Meyer that the allocations in those 10-K filings were unfair and/or inflated. Indeed his evidence was that "*the past sales amounts provided in InterDigital's audited financial statements provide a reliable source for determining InterDigital's assessment of the consideration, and therefore the rate, associated with past versus fixture sales*" and that "*failing to do so [i.e. reflect the differential treatment of past sales and future sales] would result in an unpacking analysis which did not reflect the true economics of the agreement as understood by the parties*" [Meyer 1 93]).

b. In respect of how others in the market assess the rate derivable from lump sum licences, the Judge's analysis ignored the fact that (a) it was common ground that past royalties being either waived or discounted was a part of licensing practice and (b) that the apportionment in the 10-K filings is public information that third parties in the industry have access to and do use when deriving rates from lump sum licences. Further, the Judge failed to appreciate that, even if implementers in licensing negotiations do seek to rely on blended rates averaged across past and future sales, they would do so out of obvious self-interest.

c. Finally and in any event, even if the Judge was right to conclude that the particular methodology used by both sides' experts to determine a discounted past rate and a future rate was flawed for the reasons he gave, the Judge erred in adopting a solution that did not seek to take any account of the effect of past discounting/waiving at all, and thereby carrying out an assessment by which numbers of units at a very significant discount are included without any attempt to eliminate the effect.

120. There are a number of problems with these allegations:

i) First, the important phrase in the first quote from Mr Meyer in [5(a)] is ‘provide a reliable source for *InterDigital’s* assessment of the consideration.’ For the reasons explained at [422] and [446(i)], I decided it was not correct to proceed on the basis of one party’s view of any particular licence.

ii) Second, the second quote from Mr Meyer should not be taken too far or as necessarily accurate. There was no evidence to suggest the allocations made by InterDigital in their 10-K filings were ever discussed let alone agreed with the licensee in question. Indeed, I so found in [425]. For this reason, the true economics of a Lump Sum deal, as understood by the parties, was reflected in the Lump Sum itself and in their assessments of the number of units covered by the deal (which may well not have been agreed).

iii) Third, the reliance on the fact that the 10-K filings are independently audited begs the question as to whether the precise issue under consideration here (namely, did InterDigital allocate a relatively small proportion of the overall lump sum consideration to past sales in order to produce an inflated future rate) was ever identified to or considered by the auditors. My very severe doubts that auditors have ever considered this question (why would they?) point to a finding that they have not. I did not make this explicit finding in my FRAND Judgment but it underpinned [424] and I make it now. In any event, in [426] I went on to consider whether the allocations were *mandated* by accounting principles but even on that assumption I gave reasons why it was wrong in principle to rely on InterDigital's internal justifications, even if part of the justification was later published in a 10-K filing.

iv) Fourth, these grounds do not take account of my reasoning at [420]-[421] that Mr Bezant and Mr Meyer had different reasons for adopting InterDigital's allocations. My reasoning at [422] rejected both sets of reasons. It follows that 3(d) is both incomplete and a veiled challenge to my evaluation in [422].

v) All these 'problems' are attempts by InterDigital to challenge evaluative judgments and/or findings of fact.

121. These grounds involve two separate issues:

i) The first is whether the Court should be bound by justifications internal to InterDigital of the allocation of a lump sum to past sales and future sales. I accept that involves points of principle.

ii) The second issue is that raised in [5(c)], which requires some unpacking. It proceeds on the basis that I was right to reject the methodology of both experts in deriving a discounted past rate and future rate (i.e. from InterDigital's allocations). On that basis, the alleged error is that I adopted a solution which did not take any account of past discounting/waiving at all. Two points arise and both require some further explanation which I give below:

a) First, this allegation is founded on the assumption that the Lump Sum agreed in LG 2017 was not FRAND or in the FRAND range. This assumption is a challenge to my evaluation that the Lump Sum in LG 2017 was FRAND.

b) Second, as I pointed out at [724(ii)], InterDigital did not develop a case on what I might call the 'middle ground'.

InterDigital's case remained focussed on supporting their headline rates, and, it would seem that focus remains on their Appeal.

122. Regarding [724(ii)] of my FRAND Judgment, this was the second of two striking absences from InterDigital's evidence which I noted, notwithstanding the 'reasonably consistent refrain *in general terms* about hold-out (mostly via Dr Brismark)'. In the light of this Ground of Appeal, it is an observation worth repeating:

> 'ii) The second was that InterDigital did not develop a case in what I might call 'the middle ground'. By that I mean that no case was presented that the Lenovo 7 were affected by hold-out and resulted in rates which were, say, 20% below the true value. Instead, InterDigital's case was that the 'true value' was multiples of the rates which were derived from the Lenovo 7 on a straightforward blended analysis.'

123. Having reminded myself of that observation, I note that by this proposed Appeal, InterDigital are not seeking to develop a case on any 'middle ground'. Instead, they are seeking to maintain a case akin to their 'program' rates, albeit by a different route by relying on *part* of Mr Meyer's analysis.

124. Returning to the first point, this concerns the founding assumption that the Lump Sum agreed for LG 2017 was not FRAND. Implicit also is the suggestion that all the Lump Sum agreements which included past sales were also not FRAND either. However, in the FRAND Judgment I considered all the arguments which InterDigital put forward as to whether the lump sums paid in each of the Lenovo 7 and therefore the rates implied from them appeared to be depressed by hold-out or for other reasons. In relation to Samsung 2014 I concluded at [645] that the derived rate was somewhat depressed by the factors I discussed in the preceding paragraphs. In relation to ZTE 2019 I concluded at [687] that the rate was on the low side. In relation to the remainder of the Lenovo 7, including LG 2017 in particular, I found no evidence of hold-out affecting the sums paid. Indeed, for LG 2017, Mr Merritt's evidence (referred to at [675] and quoted at [665]) was, as I found, hardly the evidence of an organisation reluctantly acquiescing to result procured by hold-out. I also considered InterDigital's more general arguments on hold-out, and rejected them – see [722]-[734], but note [724(i) and (ii)] in particular. So the contention that LG 2017 was not FRAND is a challenge to a long and involved evaluation of many different factors, not a promising basis for a ground of appeal.

125. In addition, let me assume for the purposes of argument that the lump sum in LG 2017 was depressed somewhat, whether by hold-out or some other factors, I can see no possible basis upon which it can be maintained that, but for the hold-out or other factors, the derived per unit rate could be $0.61.

126. Another aspect of this requires a comparison of the rates derived from the Lenovo 7. It will be recalled that 3 of the Lenovo 7 involved (substantial[1])

[1] i.e. this excludes Samsung 2014, for the reason given in [627].

past sales: LG 2017, ZTE 2019 and Huawei 2020. Samsung 2014, Huawei 2016, Apple 2016 and Xiaomi 2021 involved future sales only. If the allegation in [5(c)] were correct, one might expect to see that the rates derived from LG 2017, ZTE 2019 and Huawei 2020 were materially lower than the rates derived from the future only PLAs. For this purpose, it is sufficient to glance at X1, reproduced under [586]. Although ZTE 2019 and Huawei 2020 sit at the lower end, LG 2017 plainly does not.

127. A further relevant comparison can be made with the (future only) rate derived from Apple 2016. I described this rate as an outlier and really only useful as indicating an upper bound (see [797]). Yet the rate which InterDigital contend should be derived from LG 2017 of $0.61 is significantly higher than that upper bound. Even the adjusted figure of $0.50 is higher than that upper bound.

128. These comparisons indicate to me that, unless InterDigital succeed in persuading the Court of Appeal that the Court is bound to accept InterDigital's allocation of the lump sum to past sales, their appeal on the rate to be derived from the LG 2017 licence does not have a real prospect of success. On a comparables analysis it does not seem to me that there is a real prospect of InterDigital achieving a rate applicable to Lenovo of $0.50 per unit or thereabouts, unless my analysis of all of the Lenovo 7 is overturned (which it seems InterDigital are not contending as part of their Appeal).

129. Overall, I conclude that this Ground A does include some points of principle but they are wrapped up in an attempt to get the Court of Appeal to accept an argument which I rejected at several different levels and which would require the Court of Appeal to overturn several evaluative assessments I made.

130. Finally, I should point out that InterDigital's 'program' rates were the result of the whole edifice of their approach to licensing which included, it is said, substantial volume discounts to the largest licensees, other supposed discounts, and heavy discounting of past royalties with consequent inflated future rates, all resulting in discrimination against smaller licensees.

131. I realise that InterDigital say that volume discounts do not affect the analysis based on LG 2017 because their volumes were equivalent to those of Lenovo. Notwithstanding that, my findings in the FRAND Judgment involve a completely different approach to that applied by InterDigital hitherto. The point is that just because the lump sum resulting from success on the entirety of Ground A might be in the same ball-park as the lump sum derived from InterDigital's 'program' rates, that is no endorsement of InterDigital's licensing approach hitherto.

132. To put the same point a different way, I am not persuaded that the points of principle raised in Ground A are separable from all the other points of principle raised in this case – see the list at [163.] below.

InterDigital's Ground B - 'Mr Meyer's economic adjustments'

133. This only arises if InterDigital succeed on Ground A. This Ground concerns which of Mr Meyer's economic adjustments should be applied to the $0.61 rate.

134. InterDigital point to [807] where I favoured Mr Meyer's economic adjustments 1 and 2 but where I applied only economic adjustment 2 since the multiplier for economic adjustment 1 was very close to unity. I considered and applied Mr Meyer's economic adjustments which were applicable to the blended past/future rates.

135. What InterDigital seek to do is to apply the economic adjustments calculated by Mr Meyer as applicable to the future rate only i.e. 1.018 and 0.803 respectively:

    i) If both adjustments are applied, the $0.61 rate comes down to $0.50;

    ii) If just economic adjustment 2 is applied, the rate comes down to $0.49.

136. Therefore, this is not a separate Ground of Appeal, merely a possible consequence of success on Ground A. As I indicate below, I have not analysed whether either of the steps in [135.] necessarily follow.

InterDigital's Ground C – 'Top Down cross check'

137. This ground concerns the Top Down cross check. InterDigital do not seek to revive the Hedonic Regression but contend I erred in rejecting the 'simpler' top down cross check at [880]-[885]. Two errors are alleged:

    i) The first repeats Ground A, in effect;

    ii) The second allegation is that it is circular and illogical to reject a cross check on the basis that the cross check does not support the rate found having regard to the comparables. However, in view of the fact that the comparables part of the case was always the principal part and the top down analysis was only ever a cross check, it seems to me it is this allegation which is circular and illogical.

138. InterDigital's point is that their top-down and comparables cases were mutually supportive. But having given detailed reasons for rejecting their comparables case, their top-down cross check was never powerful enough to revive their comparables case or to persuade me that my analysis of their comparables case was in error.

139. The suggestion is that InterDigital's simpler top-down cross check would be consistent with a rate of $0.50.

140. Another point taken under this ground concerns my suggestion that my conclusion may imply that the patent counting studies may not be reliable. What I actually said at [885] was this:

> '885. I realise that my conclusion may imply that the patent counting studies on which InterDigital relied are <u>not a reliable guide to the value to be attributed to their portfolio</u>, <u>but there are many reasons why that might be the case</u>. It may also be the case that other inputs (e.g. the ASPs) were inappropriate. It is not necessary to explore those reasons any further.'

141. Although I did not feel it necessary to spell this out in my already very long FRAND Judgment, one of the reasons was indicated in the assessment in the PA 3G report of InterDigital's portfolio quoted at [831], namely that InterDigital has engaged in the numbers game (see [836 i), iii), iv) & vi)]) i.e. generating and declaring to ETSI many patents from far fewer inventions.

142. Finally, it is said this suggestion was contrary to the express basis on which I said I approached the matter in [839]. This point has no merit at all. In [838] I said this:

> 838. For reasons which appear below, it is not necessary for me to resolve all the myriad points raised and responded to in the closing submissions on the patent counting studies. Without deciding any of those points or the reliability generally of these patent counting studies, I am prepared to assume that, subject to the critical assumption I have already identified, they provide estimates of InterDigital's share of the assessed handset SEPs attributable to each generation of technology.

143. Having made that assumption to see where the analysis went, I do not believe that any material error was made by returning to consider, even in outline, why the patent counting studies may not be a reliable guide to the value to be attributed to InterDigital's SEP portfolio.

144. For all these reasons, I do not consider Ground C raises any separate appealable issue to Ground A.

InterDigital's Ground D 'Unwillingness finding against InterDigital'

145. This ground concerns my finding that InterDigital was an unwilling licensor, or, to be more accurate, my conclusion at [928] that '...by consistently seeking supra-FRAND rates, InterDigital did not act as a willing licensor.'

146. When developing this ground orally, Mr Speck characterised a finding of unwillingness as particularly damaging to a patentee in the position of InterDigital, although Mr Speck did not specify whether the damage was reputational or financial or both. It was clear that InterDigital took umbrage at this finding but I do not really see why. After all, as I recognised in the FRAND Judgment at [554], it was a perfectly logical business approach for a SEP licensor like InterDigital to operate with an overriding consideration in negotiating and agreeing PLAs to achieve the maximum money from the licensee (whether by way of lump sum or running royalties). Equally, I recognised that the overriding consideration for each licensee is to pay as little

money as possible for the licence. FRAND requires compromise between willing licensor and willing licensee between these two positions.

147. To a significant extent, the paragraphs in the draft grounds (12-15) are based on a misconception which I raised at the hearing. In advance of the hearing, InterDigital's draft Order contained a proposed declaration that 'InterDigital are not willing licensors'.

148. At the hearing I indicated a declaration in those stark terms did not accurately reflect my judgment – see the quote from [928] above.

149. The discussion at the hearing then focussed on other aspects of InterDigital's conduct, in particular their offers to accept whatever FRAND rate or terms would be decided by arbitration or in these proceedings, the assumption being that such offers were the actions of a willing licensor. Indeed, Mr Speck submitted that as soon as InterDigital made those offers of third-party resolution, simply by maintaining requests at a supra-FRAND level should not result in a finding of unwillingness. The discussion was left on the basis that any proposed declarations required refinement. As a result, in their further submissions and draft Orders received after the hearing, both sides presented more nuanced declarations as to conduct.

150. Lenovo's initial suggestion was simply to delete the declaration set out in paragraph above. InterDigital then proposed a more complicated set of declarations as to conduct in these terms:

> 1. Prior to making an offer that the FRAND licence to InterDigital's 3G, 4G and 5G cellular portfolio of patents be determined by binding arbitration or through this Court's FRAND determination, by seeking supra-FRAND rates InterDigital did not act as a willing licensor.
>
> 2. Prior to giving the Undertaking, by failing to undertake to HHJ Hacon to take a FRAND licence on terms to be determined by this Court Lenovo did not act as a willing licensee.
>
> 3. Since making an offer that the FRAND licence to InterDigital's 3G, 4G and 5G cellular portfolio of patents be determined by binding arbitration or through this Court's FRAND determination, InterDigital has been a willing licensor.
>
> 4. Since giving the Undertaking, Lenovo has been a willing licensee.

151. Lenovo responded with one declaration: 'Lenovo fall within the class of beneficiaries of the stipulation in clause 6.1 of the ETSI IPR Policy and are entitled to enforce InterDigital's obligations thereunder.'

152. As for conduct, Lenovo again suggested that, in view of the detailed Judgment, no declarations as to conduct were required. As a fallback, they

proposed the following terms, suggesting that they encapsulate the key points from the key paragraphs of the Judgment in a streamlined manner:

> 1. InterDigital did not act as a willing licensor, in particular by failing to make FRAND offers to grant licences to its declared cellular SEP portfolio to Lenovo and consistently seeking supra-FRAND terms in the manner identified in the Judgment.
>
> 2. Lenovo acted reasonably in rejecting all the offers made by InterDigital as not FRAND.
>
> 3. Lenovo conducted itself as a willing licensee, save for dragging its heels on occasion during the negotiations.

153. My reason for setting out the rival proposed declarations is that they each, in different ways, illustrate why (in line with Lenovo's primary position) that these declarations are not required. Each of them seeks to summarise the more nuanced picture presented in the Judgment. They are unnecessary and in certain respects, incomplete or inaccurate.

154. There is one point I wish to add and it concerns the fresh issue raised by InterDigital's set of proposed declarations. The issue is whether, as Mr Speck submitted (see paragraph above), a SEP holder automatically becomes a willing licensor by proposing and/or pursuing a third party resolution of FRAND terms, even if, at the same time, the SEP holder continues to demand supra-FRAND rates and/or terms. This was not an issue which it was necessary to address in my FRAND Judgment. Furthermore, it is an issue which will always depend on the facts.

155. Suffice to say that I have considerable doubt that a SEP licensor which has been demanding supra-FRAND rates and is an unwilling licensor can automatically transform itself into a willing licensor simply by offering third party adjudication of FRAND terms, whilst continuing to demand supra-FRAND rates.

156. I recognise the point made by Birss J. (which Mr Speck raised in argument) that there is a difference between a licensor adopting the attitude of 'take it or leave it' and one who has initiated and engaged in third party adjudication whilst maintaining what it says is FRAND, but that does not mean there is not also a difference between a licensor who maintains a supra-FRAND case and one who runs a case in the FRAND range.

157. I can take this litigation by way of example. InterDigital's primary position was that they sought to maintain their 'program' rates which (subject to appeals) have been determined to be supra-FRAND. InterDigital's fallback position was that they would accept whatever terms this Court determined to be FRAND. The very significant costs incurred by both sides in the FRAND part of this litigation illustrate how InterDigital strained every sinew to support their 'program' rates and it seems to me that this amount of effort and cost cannot simply be set on one side just because of the fallback position.

158. I accept entirely that once proceedings are undertaken the Court (or arbitrator(s)) has the power to make awards of costs, but it is trite that costs awards in this country do not fully compensate even a party which is awarded all its costs. Whilst Lenovo had the resources to be able to fight litigation on this scale, that is not the case for many smaller licensees, especially if the contemplated costs of litigation are of the same order of magnitude as the licence fees demanded by the licensor.

159. In other words, I do not believe that an offer to engage in third part adjudication of FRAND terms provides a licensor with a free rein to demand supra-FRAND rates.

160. Once again, the answer is provided by consideration of what would a willing licensor do? Having offered and commenced a third-party adjudication, the willing licensor would present terms including a rate or rates at least in the FRAND range. Furthermore, what terms are FRAND or in the FRAND range must be an objective measure. They do not depend on what a particular licensor *believes* to be FRAND. Their particular beliefs may be wrong. In this case the consequence of my findings (if upheld) is that what InterDigital apparently believed to be FRAND was not.

161. Drawing these threads together, *if* InterDigital were to succeed in persuading the Court of Appeal that the correct unit rate for Lenovo is $0.50 or thereabouts, that would put their 5G Extended Offer in the FRAND range at the very least so that InterDigital would have a very strong argument that, in making their 5G Extended Offer, InterDigital had acted as a willing licensor even though the lump sum derived from that Offer was calculated in a different way.

162. However, if InterDigital did not so succeed, a challenge to my conclusion in [928] would be nothing more than a disagreement with my evaluation of the facts and therefore is not a separate point on which I should grant permission to appeal.

THE POINTS OF PRINCIPLE IN MY FRAND JUDGMENT

163. I return to consider the points of principle which I decided in the FRAND Judgment (which I listed at [446]) and any others the parties have identified in their proposed Grounds of Appeal. As I indicated a number of these points are interrelated, and they can be improved upon. It is certainly possible to take them in a slightly different order which I do here:

i) First, whether national limitation periods have a role to play in the relationship between willing licensor and willing licensee. [446 iii)], [431]-[433] & [520]-[535].

ii) Second, whether account should be taken of the subjective and/or *ex post facto* views of one party as to the value to it of a patent licence. [446 i)], [448]-[457] & [553]-[555].

iii) More specifically, what is the correct approach, in the unpacking analysis, to the valuation of past and future sales. Even more specifically:

a) whether the Court is bound to accept InterDigital's allocations of Lump Sum consideration to past and future sales, the resulting supposed heavy discounting of past sales and the inflated future rate [446 v)], [391]-[426]; and

b) whether the fact that an allocation to past sales has been audited is relevant.

iv) Third, whether volume discounts said to have been applied to the largest InterDigital licensees (60%-80%) have any economic justification or are FRAND or whether they result in discrimination against smaller licensees [446 ii)] & [495]-[507].

v) Plus, whether other discounts said to have been applied by InterDigital (other than those concerned with the time value of money) are FRAND [516]-[519].

vi) Fourth, whether it is appropriate for the Court to seek to eliminate or discourage hold-out e.g. by finding that a willing licensee must pay royalties on all unlicensed sales [446 iv)] & [540]-[545].

vii) Fifth, whether interest should be awarded on the principal sum derived from the comparables analysis: FRAND Judgment [547]-[552] & [4.]-[33.] above.

viii) Sixth, whether it would be discriminatory against Lenovo not to apply the sort of discounts (e.g. for volume and past sales) hitherto applied by InterDigital or, more generally, if the Court adopts an approach which is different to that employed by InterDigital hitherto, that is discriminatory against Lenovo: [446 vi)] & [567]-[569].

Lenovo's contingent cross-appeal

164. Lenovo's single ground is that I erred in holding that the Defendants should pay any royalty to the Claimants under a FRAND licence on sales made by the Defendants prior to the third quarter of 2013 i.e. six years prior to the commencement of the proceedings.

165. Bearing in mind that I specifically mentioned in the FRAND Judgment that limitation periods vary around the world, giving the examples of the 6-year limitation period applicable here and the 3 year somewhat stricter limitation applicable in China, it can be seen that Lenovo are not contending that the Court must apply each national limitation period. Instead, it seems to be an argument that a willing licensor and a willing licensee would agree upon and apply a 6-year limitation period, possibly on the basis or assumption that this is the most common period.

166. Two points of principle are raised, it seems to me:

i) The first is the one I identified in my FRAND Judgment at [520]-[535], namely whether limitation periods have a role to play in assessing what would be agreed between a willing licensor and a willing licensee.

ii) The second point is if so, what period would those parties agree?

167. Inherent in Lenovo's ground is the suggestion that a willing licensor and a willing licensee would not insist on the application of each national limitation period but would agree a compromise period to be applied globally. This is very much a subsidiary point to the first.

168. Finally I note that Lenovo have not sought permission to appeal on the point summarised in above, but they clarified they saw it as a point for a Respondent's Notice.

OVERALL EVALUATION

169. I can now return to the decision of whether to grant permission to appeal.

170. For the reasons I have endeavoured to explain, all the Grounds A-D depend on InterDigital succeeding on Ground A, but that, for the reasons explained in [128.] above, I remain of the view that InterDigital does not have a real prospect of success on Ground A.

171. Accordingly, I consider it right to grant permission to appeal on the points of principle identified in [163. i)-vii)] above. These include, at [163.iii)] the points of principle raised as part of Ground A and, at [163.i)] the point of principle raised in Lenovo's cross-appeal.

172. I should also consider the consequences of one party or the other succeeding on one or more of these points of principle:

i) If Lenovo succeed on the limitation period issue, the consequence is simple – the lump sum of $138.7m (and associated interest) reduces by a fixed amount which is easily calculable.

ii) If InterDigital succeed on the points of principle raised in their Ground A, then the first consequence is also simple because the rate then implied from the LG 2017 licence is $0.61. It is not immediately obvious to me (i.e. without further analysis) that it can be assumed that Mr Meyer's adjustment 2 (or 2 and 1) can be applied to that future rate, just because I applied adjustment 2 to the period Q3 2013-2018 [806]-[807], and then applied the same *rate* to the period 2019-2023 [808]-[809].

iii) If InterDigital achieve success on any of the other points of principle, it seems to me that would require a new evaluation of the evidence to be carried out.

173. If the Court of Appeal consider that InterDigital should be permitted to range beyond the points of principle and into evaluations of the evidence, that is a matter for the Court of Appeal, in my view.

CONCLUSIONS

174. For the reasons explained above:

   i) I award interest on the lump sum of $138.7m found in my FRAND Judgment at 4%, compounded quarterly, which amounts to $46.2m. Accordingly, the total sum which Lenovo must pay is $184.9m.

   ii) I order InterDigital to pay Lenovo's costs of the FRAND part of this action, save for Lenovo's costs of the foreign law and interest issues, to be the subject of a detailed assessment if not agreed. I order Lenovo to pay InterDigital's costs of the foreign law and interest issues, to be the subject of a detailed assessment if not agreed. The resulting net amount to be paid by InterDigital to Lenovo.

   iii) I have settled the terms of the FRAND Licence and a copy of the Settled Licence is appended.

   iv) I grant permission to InterDigital to appeal on the points of principle set out in paragraphs 163.ii) to above, but not otherwise.

   v) I grant permission to Lenovo to cross-appeal on the limitation issue as summarised in 163.i) and above. I also grant Lenovo permission to appeal on issues of interest.

   vi) The Order reflects the findings above, including my findings on the declarations.

175. Finally, following a reasoned request from InterDigital I direct that the date by which any Appellant's Notice must be filed with the Court of Appeal is 31st July 2023.

POSTSCRIPT

176. Following receipt of this Judgment in draft, a few additional issues arose.

177. First, Lenovo contended that the draft Licence should include a reference to the Wuhan proceedings. However, those proceedings concern FRAND terms from 2024 onwards i.e. after the expiry of the FRAND Licence I have settled. I decline to include the proposed wording as it is unnecessary.

178. Second, there was a debate about the scope of the permission to appeal on interest. I have amended the text above to make it clear that the permission concerns all issues of interest, whether rate, period or whether it should be awarded at all.

179. Third, Lenovo contended that they should not have to pay the interest sum of $46.2m pending any appeal and offered to pay that sum into escrow pending appeal. Lenovo also contended that if InterDigital did not accept that escrow offer, there was no basis for making any Order for payment of that interest sum. I disagree. What I have found is that the lump sum payable by Lenovo

for a FRAND licence from 2007 to the end of 2023 is the total sum of $184.9m, and that is the total sum I order to be paid.