



Neutral Citation Number: [2023] EWHC 2250 (Pat)

Case No: HP-2021-000022 and 000023

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

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

Date: Friday, 8th September 2023

Before:

MR. JUSTICE MEADE

Between:

- (1) NOKIA TECHNOLOGIES OY
(2) NOKIA SOLUTIONS AND NETWORKS OY

Claimants

- and -

- (1) ONEPLUS LIMITED TECHNOLOGY
(SHENZHEN) CO., LTD
(2) UNUMPLUS LIMITED (t/a OnePlus)
(3) GUANGDONG OPPO MOBILE
TELECOMMUNICATIONS CORP, LTD
(4) OPPO MOBILE UK LTD
(2) ASCENSION INTERNATIONAL
TRADING CO., LIMITED (t/a Realme)
(3) REALME CHONGQING MOBILE
TELECOMMUNICATIONS
(SHENZHEN) CO.K LTD
(4) REALME CHONGQING MOBILE
TELECOMMUNICATIONS CORP LTD

Defendants

MS. SARAH FORD KC and MR. THOMAS JONES (instructed by Bird & Bird) for the
Claimants

MR. ANDREW LYKIARDOPOULOS KC and MR. RAVI MEHTA (instructed by Hogan
Lovells International LLP) for the Defendants

**APPROVED JUDGMENT – COSTS AND
LEAPFROG APPEAL**

MR. JUSTICE MEADE:

1. I have to deal with three matters concerning costs. The first is the costs of Trial E, the second is the post-trial costs in the 023 action, which concerned the NEP, and the third, raised by Oppo this morning, is the costs of this hearing; in other words, the hearing yesterday and today about the form of order.
2. I address first the costs of Trial E, where the parties agree that the applicable principles are the well-known ones arising under CPR Part 44, which is that I must enquire whether there are suitably circumscribed issues on which the overall winning party, which is agreed to be Nokia, was unsuccessful, and if I do identify any such issues, then I have to consider whether Nokia should, first of all, not recover its costs and then further enquire whether there are sufficient factors, such that Nokia should, in addition, have to pay Oppo's costs.
3. Those principles are, to some extent, applicable to the third issue, or at least given the way it was argued before me today, about the costs of this hearing, but primarily I am now dealing with the costs of Trial E.
4. Oppo contend that there were issues on which Nokia did not succeed and those relate to the issues of French and Chinese law. In terms of quantification, a calculation has been put forward in the evidence of Mr. Brown, of Hogan Lovells which, by a page-counting exercise, attributes the overall percentages attributable to French and Chinese law by looking at the pleadings, the skeletons, the list of issues and the transcripts. Roughly speaking, the numbers come out to 15%. Since Oppo contends that Nokia ought to not only not recover its costs but pay Oppo's costs, that would amount to an overall reduction in Nokia's recovery of 30%.

5. Much of the foreign law was not in dispute by the time of trial and that was through the process of pleadings, exchange of expert reports, skeletons and so on and so forth and by the preparation of the document which I directed on foreign law and to which I refer in the Trial E judgment. I will say straightaway that I think it must be wrong in principle for Oppo to contend that Nokia ought to have to pay all the costs of the foreign law since much of that, if not most, is attributable to matters on which Nokia was not unsuccessful: the matters were agreed.
6. None the less, I can see from the figures in PJB-51 what was the approximate percentage of time spent at trial on the issues which were in dispute which, in relation to French law, was essentially the requirement of determinability for contracts and in relation to Chinese law was in relation to hard-edged FRAND and the treatment of matters on FRAND in the Chinese authorities such as *InterDigital*, to which I refer to in my judgment. For the trial, Mr. Brown comes up with numbers which are overall similar to the 15% for the conduct of the case as a whole. These seem about right to me, and these were points on which Oppo was indeed successful. But that does not mean they were “issues” within the sense of the exercise required by CPR Part 44.
7. It is always a value judgment for the court to identify what is meant by an issue on which the winning party was unsuccessful. It is possible to characterise an issue at the trial having been what the standard of determinability under French law for contracts is. Alternatively, one can phrase the issue more broadly, as Ms. Ford did for Nokia today, by saying that the issue was whether Oppo was already licensed under French law.
8. Mr. Mehta undertook the oral advocacy on these points today for Oppo and in his helpful and able submissions, he primarily characterised the issue as being “the

foreign law”. I reject that for reasons I have already given. Nokia was not unsuccessful in relation to foreign law as a whole, but I think the underlying spirit of Oppo’s argument on this point is that the issue on French law was determinability and, under Chinese law, the two matters that I have referred to already.

9. In my view, the issues are much more appropriately assessed at the level for which Nokia contends, which was whether Oppo was already licensed under French law and whether Nokia was entitled to choose as between a rate set in Chongqing and a rate set in the UK. Nokia succeeded on both of these issues and I therefore do not consider that there is any issue in a meaningful sense on which Nokia was overall unsuccessful.
10. I think that Oppo’s treatment of the matter slices matters much too finely. It is always possible at an atomic level to describe an issue within a greater issue on which the overall successful party has failed and it is a value judgment as to whether that is the appropriate assessment. But I think Nokia is right on this overall point. I think that also does broad justice because the parties worked diligently to reduce the disagreement on foreign law in a way which was widely successful and for which I am grateful. I think trying to pick out these minor bones from that broader body of work is not an appropriate exercise. So, I decline to make any reduction in Nokia’s costs of Trial E.
11. I turn to the second point, which is the post-trial costs of the ’023 action. This was a complicated situation and when I came to deal with the form of order on ’023, Nokia sought an immediate injunction and Oppo opposed that. The issues going to that question were broad, diverse and quite complicated. Ultimately, I made an order (and this was paragraph 2 of my order of 14th December 2022) that in respect of the

claimant's post-trial costs, 50% were reserved to the judge hearing Trial E in the '022 action, which, of course, in the event is me.

12. Two important things have happened since then. The first is I have given judgment in Trial E and I have held that Oppo was not in fact already licensed under French law and still is not licensed for the Nokia implementation patents. Indeed, yesterday I granted an injunction over the EP 560 patent and declined to stay it.
13. Importantly, however, on the other side of the scales, Nokia has, since the '022 form of order hearing, conceded that a licence set by this court for its portfolio will include a standstill covering its implementation patents which, for reasons covered in my judgment in Trial E, is not identical to a licence, but has the same effect in terms of there not being an injunction.
14. Mr. Mehta, for Oppo, argues that Nokia should have made this concession much earlier. Indeed, I think implicitly that it should have made that concession by the time of the form of order hearing in the '023 action, and that had it done so, those 50% of costs would not have been incurred at all. Were it not for this balancing point, it seems to me that Oppo would have no argument at all, because Nokia has been successful and has obtained an injunction on EP 560, so my analysis must focus on the point about Nokia having made a concession.
15. In my view, although Nokia has agreed that any licence settled by this court for its portfolio and to which Oppo commits to take will include a standstill, that is not a concession or a late concession in the sense of Nokia coming to a realisation that its position is untenable and that it must include a standstill. It is, as Ms. Ford submits, in my view, a pragmatic decision that Nokia has taken and not a surrender.

Furthermore, Nokia has only made the concession in relation to a licence set by this court and to which Oppo commits.

16. In my view, that is quite different from Nokia having, in any way, given up or accepted that it was wrong. So I do not consider that Nokia's change of position is any reason to adjust the costs order which would otherwise follow, which is that Nokia having been successful in getting an injunction on EP 560 – which, with the benefit of hindsight, one can say it was entitled to at the time of the '023 form of order hearing – is entitled to all the costs of the post-trial phase of the '023 action and that is my conclusion on that.
17. The third point is the costs of this hearing. Mr. Mehta makes the point that much of the costs of yesterday's phase of this hearing, on the Oppo side, were devoted to the evidence which was necessary to support its application for a stay of any injunction pending appeal and that application for a stay has been successful.
18. Oppo's contention is that Nokia should pay the costs of yesterday's hearing. Nokia's contention is that the right order is costs in the case which, since it is accepted that Nokia is the overall winner, would mean that Nokia gets the costs.
19. I consider that Ms. Ford is right about the general proposition and that Oppo would need to make an argument to displace that. I accept that Oppo has incurred, no doubt, significant costs in putting together its evidence about the irreparable harm that it would suffer. But, for the reasons given in my judgment yesterday, Nokia did not really join issue with that in its evidence and although a faint argument was made by Ms. Ford, Nokia did not really cause any costs post-Oppo's evidence to be incurred about the issue of irreparable harm. Furthermore, other matters yesterday went in Nokia's favour. In particular the argument about the adjournment of Trial D on

which Nokia was successful, was tightly integrated with the question of stay and the future conduct of this action in general.

20. I do not see any reason why Nokia should have to pay Oppo's costs of putting forward its case on irreparable harm. Were I to deprive Nokia of its costs on irreparable harm, those would be trivial, in any event, because that is not the way Nokia argued matters yesterday.
21. So, in general, I do accept that Oppo has achieved some modest degree of success over the course of the hearing yesterday. Other matters were matters relating to management of the action post-trial in the usual way and matters that Nokia was successful.
22. None of this, in my view, is adequate to displace the general proposition that the post-trial costs are costs in the case and therefore in practical terms are the costs of the winner.

(For continuation of proceedings: please see separate transcript)

23. I now have to deal with Oppo's application for a certificate under the Administration of Justice Act 1969 and what is usually referred to as a leapfrog appeal. My powers arise under section 12 of the Act as follows:

“12 Grant of certificate by trial judge.

(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied —

(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings or that the conditions in subsection (3A) ('the alternative conditions') are satisfied in relation to those proceedings, and

(b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal ...

the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.

(2) This section applies to any civil proceedings in the High Court which are either —

(a) proceedings before a single judge of the High Court ...

(b) ...

(c) proceedings before a Divisional Court.

(3) Subject to any Order in Council made under the following provisions of this section, for the purposes of this section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in that decision and that that point of law either —

(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or

(b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the Supreme Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Supreme Court (as the case may be) in those previous proceedings.

(3A) The alternative conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in the decision and that —

(a) the proceedings entail a decision relating to a matter of national importance or consideration of such a matter,

(b) the result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that, in the opinion of the judge, a hearing by the Supreme Court is justified, or

(c) the judge is satisfied that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.

(4) Any application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings:

Provided that the judge may in any particular case entertain any such application made at any later time before the end of the period of

fourteen days beginning with the date on which that judgment is given or such other period as may be prescribed by rules of court.

(5) No appeal shall lie against the grant or refusal of a certificate under this section.

(6) Her Majesty may by Order in Council amend subsection (3) of this section by altering, deleting, or substituting one or more new paragraphs for, either or both of paragraphs (a) and (b) of that subsection, or by adding one or more further paragraphs.

(7) Any Order in Council made under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) In this Part of this Act ‘civil proceedings’ means any proceedings other than proceedings in a criminal cause or matter, and ‘the judge’, in relation to any proceedings to which this section applies, means the judge ... referred to in paragraph (a)... of subsection (2) of this section, or the Divisional Court referred to in paragraph (c) of that subsection, as the case may be.”

24. It is to be noted that under sub-section (4) of section 12, the application has to be made no later than 14 days from the date on which judgment was given and Oppo met that time period.

25. If I grant a certificate under section 12, that does not of course compel the Supreme Court to take the appeal and that is provided for in section 13, which is as follows:

“Leave to appeal to Supreme Court

(1) Where in any proceedings the judge grants a certificate under section 12 of this Act, then, at any time within one month from the date on which that certificate is granted or such extended time as in any particular case the Supreme Court may allow, any of the parties to the proceedings may make an application to the Supreme Court under this section.

(2) Subject to the following provisions of this section, if on such an application it appears to the Supreme Court to be expedient to do so, the Supreme Court may grant leave for an appeal to be brought directly to the Supreme Court; and where leave is granted under this section —

(a) No appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal, but

(b) an appeal shall lie from that decision to the Supreme Court.

(3) Applications under this section shall be determined without a hearing.

(4) ...

(5) Without prejudice to subsection (2) of this section, no appeal shall lie to the Court of Appeal from a decision of the judge in respect of which a certificate is granted under section 12 of this Act until —

(a) the time within which an application can be made under this section has expired, and

(b) where such an application is made, that application has been determined in accordance with the preceding provisions of this section.”

26. The circumstances of this application are unusual, in the sense that a central aspect of my judgment on Trial E relates to the decision on what I call the *Optis F* point and in respect of which the Supreme Court has given permission to appeal to Apple, which appeal is due for hearing early next year.
27. However, a further complication is that I am told that Apple has applied or is likely to apply in the near future to withdraw that appeal, for reasons which I do not know in detail, but may well have something to do with the later course of the *Optis v Apple* proceedings after the Court of Appeal’s decision referred to in my judgment on Trial E as *Optis F (CA)*.
28. Applications under the 1969 Act are rare, and the grant of certificates rarer still: it is a jurisdiction which, in my view, is to be exercised only with great caution. In the present case, that approach must be modified, in my view, given the unusual situation that by giving permission to appeal in *Optis F*, the Supreme Court has already effectively expressed its own opinion that there is a point of law of general importance at stake and that a hearing by the Supreme Court is justified.

29. Were it only a question of my granting a certificate in relation to the Optis F point, that, in itself ought to be enough but, of course, my judgment in Trial E dealt not only with the consequences of the Court of Appeal's decision in *Optis F CA*, but matters which Oppo said meant that even if Optis F was rightly decided by the Court of Appeal, it ought to prevail because of the effect of the Chongqing proceedings and/or because, on a proper interpretation of the ETSI undertaking, it is already licensed.
30. On those questions, the Supreme Court has not, by its decision to give permission to appeal in Optis F, expressed a view about whether there is a point of sufficient importance involved.
31. Oppo asks me to make a certificate in respect of each of its grounds of appeal and it does so to protect itself against the scenario where I make a certificate under the 1969 Act, but the Supreme Court then only gives permission on some of the grounds. Oppo wants to be sure that it is able to appeal to the Court of Appeal in the event that the Supreme Court only takes part of the matter.
32. In my view, what subsection (3) and subsection (3A) of section 12 require me to do is to consider my decision as a whole, that decision being that Nokia is right and that Oppo is liable to the relief which I granted yesterday and to ask whether, involved in that decision, is a point of law of general public importance. The subsections do not seem to me to require that I should step through the grounds of appeal, paragraph-by-paragraph and identify whether each of them involves a point of law of general public importance.
33. My decision in my judgment in Trial is that Nokia won and Oppo lost, and that clearly involved a point of law of general public importance in the opinion of

Supreme Court, because it depended critically on the result of the decision of the Court of Appeal in *Optis F (CA)*.

34. I, therefore, consider it right to grant a certificate in general terms, that my decision involved a point of law of general importance. The Supreme Court has the power to decide what to do with each issue. There is obviously a real likelihood that it may give permission on the Optis F issue. Whether or not it gives permission on the other issues is different. I am aware from other hearings and from the interest in Trial E that there are numerous other players in the SEP world who would be keen to know the answers to the arguments that Oppo is already licensed, and the effect of parallel proceedings abroad. So it seems to me also to be a possibility that the Supreme Court may give permission on them. It is however entirely a matter for it and it might also prefer that the issues other than the Optis F one follow the conventional appellate course.
35. I pause to spell out explicitly, in case it is not clear already, that in my view the requirements of subsection (3) are met because a point of law of general public importance, to wit the Optis F issue is involved in my decision, and under subsection (3)(b) is one in respect of which I am bound by the decision of the Court of Appeal in *Optis F (CA)*, where the point was fully considered.
36. Since I consider that a certificate is appropriate under subsection (3), it is strictly unnecessary for me to consider subsection (3A), but I would also have considered that that was satisfied under 3A(b), because again my decision involves a point of law of general public importance and I would have considered that a hearing by the Supreme Court is justified on the strength primarily of the fact that the Supreme Court, by

giving permission in *Optis F* has indicated that it itself thought that a hearing was justified.

37. I turn to consider further the procedural matter raised by Oppo, which is that it wants to ensure, to the extent that the Supreme Court does not grant permission on any of the grounds, it is able to appeal to the Court of Appeal.

38. The draft certificate put before me by the defendants spells out in its second paragraph that the relevant conditions of section 12(3) and (3A) are met in respect of each of the grounds. I decline to take that approach for reasons I have already given and I do not think it is appropriate to grant a separate certificate in relation to each ground.

39. The third paragraph of the draft certificate says,

“That in the event that leave to appeal to the Supreme Court is not granted in respect of any one of the grounds of appeal, the ’022 defendants have permission to appeal to the Court of Appeal in respect of that ground.”

40. It seems to me that that third paragraph of the draft certificate is not a necessary precaution in the light of the decision of the House of Lords in *Jones v Ceredigion County Council* [2007] UKHL 24, but I suppose it is possible that I might be wrong about that and I see no objection to my making such an order as a further layer of comfort for Oppo.

41. But in the light of the reasons that I gave when I gave permission to appeal in principle yesterday, the proviso must spell out that the defendants do not have permission to appeal to the Court of Appeal if the only ground of that appeal is the competition law point. It would be wrong of me to undermine what I said yesterday, which is that if that were the only point standing, I would not have given permission to appeal.

42. I record and note that Nokia did not make any substantial opposition to the course which I had indicated in the course of argument today and yesterday I was inclined to make. They took the position that it was primarily a matter for me, which I think was both pragmatic and correct.