

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

NEWBY, ARNOLD, FALK LJJ

[2025] EWCA (Civ) 182

BETWEEN:

**(1) LENOVO GROUP LIMITED
(2) LENOVO (UNITED STATES) INC.
(3) LENOVO TECHNOLOGY (UNITED KINGDOM)
LIMITED
(4) MOTOROLA MOBILITY LLC
(5) MOTOROLA MOBILITY UK LIMITED
("Lenovo")**

**Respondents/
Claimants**

- and -

**(1) TELEFONAKTIEBOLAGET LM ERICSSON
(2) ERICSSON LIMITED
("Ericsson")**

**Appellants/
Defendants**

ERICSSON'S GROUNDS OF APPEAL (SC Rule 13(4)(d))

*Unless otherwise indicated, paragraph references in the format §x are to the judgment of the Court of Appeal in *Lenovo v Ericsson* [2025] EWCA (Civ) 182 (the "**Judgment**"), with the first instance decision in [2024] EWHC 2941 (Pat) referred to as the "**HC Judgment**".*

INTRODUCTION

1. This case arises in the context of the international enforcement of standard essential patents ("**SEPs**"). Its implications go even wider, and also concern the proper limits on the power of the English and Welsh courts¹ to interfere with properly brought prior proceedings in foreign jurisdictions.
2. Ericsson pursued lawful (and first-brought) proceedings for the enforcement of its SEPs against Lenovo in the USA. The Court of Appeal, however, granted declaratory relief intended to lead to the termination of the US patent proceedings in favour of English

¹ Given that the present proceedings have taken place exclusively in London, the remainder of this documents adopts the shorthand the "English court" and the "English proceedings".

proceedings subsequently brought by Lenovo. That is not because the US proceedings were improperly brought or there is any reason to grant an antisuit injunction to stop them. Nor is it because the matter would be determined first in England. It is solely because the outcome in the US might be different to the outcome before the English court; and that for a claimant to pursue such foreign proceedings must, so the Court of Appeal held, inherently amount to bad faith. That conclusion amounts to an act of “*jurisdictional imperialism*” (§155), in stark breach of the principle of comity. It is also logically incoherent because, by parity of reasoning, the pursuit by Lenovo of its English proceedings would equally be in bad faith and require abandonment because the outcome might be different to that in the US.

3. The Court of Appeal’s Judgment is also contrary to the Supreme Court’s decision in *Unwired Planet v Huawei* [2020] UKSC 37, [2020] Bus LR 2422 (“*UPSC*”), which held that (i) a patent owner is *prima facie* entitled to prevent infringement of its property rights by seeking injunctions from national courts, and (ii) the possibility of the grant of an injunction by a national court is necessary to incentivise the implementer to negotiate and accept FRAND terms for use of the owner’s SEP portfolio.² The Court of Appeal failed to heed this, instead introducing an unprincipled and erroneous distinction between court-determined and negotiated FRAND rates, elevating the former over the latter.
4. Further or alternatively, (i) the Court of Appeal made a fundamental error in holding that the first instance judge should not even have considered whether an offer in the FRAND range had been made, (ii) the relief granted by the Court of Appeal serves no legitimate useful purpose, and (iii) there was in any case no principled legal basis for that relief.
5. In the last year, the Court of Appeal, in each case by the sole reasoned (non-dissenting) judgment of Arnold LJ, has overturned three decisions of judges of the High Court in relation to similar issues, consistently expanding the jurisdictional reach of the English courts.³ The case of *Panasonic v Xiaomi* [2024] EWCA Civ 1143 (“*Panasonic*”), involved a dissenting judgment by Phillips LJ.

² *UPSC* §§3-4 & 61

³ Leech J in *Panasonic v Xiaomi* [2024] EWHC 1733 (Pat), Zacaroli J (as he then was) in *Alcatel v Amazon* [2024] EWHC 1921 (Pat) and Richards J in *Lenovo v Ericsson* [2024] EWHC 2941 (Pat): see Judgment §1

6. The case raises arguable points of law of general public importance which ought to be considered by the Supreme Court at this time. Ericsson respectfully submits that the Supreme Court should intervene in order to avoid the Judgment being applied as guidance by the lower courts, thus causing further breaches of comity.

GROUNDINGS OF APPEAL

(1) Breach of the principle of comity

7. The principle of comity was described by the US Supreme Court in *Hilton v Guyot* 159 U.S. 113, 164 (1895) as “*the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.*”⁴ Arnold LJ in *Panasonic* held at §94 that “*comity in this context means that the courts of this jurisdiction should respect the ability of courts [in other countries] to decide issues falling within their respective competencies, and should be cautious about granting any relief which might interfere with such courts' exercise of their own jurisdictions or which might be perceived as an attempt to do so (unless there are proper grounds for the grant of an [anti-suit injunction])*” (cited at §147).
8. The Court of Appeal considered that Ericsson was not acting in good faith because Ericsson has chosen to continue claims for injunctions and equivalent remedies in other jurisdictions, principally the US, in circumstances where the Patents Court had become seised of the matter and will determine the terms of a FRAND cross-licence. However, neither Richards J nor the Court of Appeal found that Ericsson has done anything wrong in the other fora. The objection is simply “*that Ericsson want to achieve a better outcome than a determination by the English courts would provide*” (§124) – without any consideration for whether the terms offered by Ericsson already complied with its contractual FRAND commitment.
9. Even assuming a “better” outcome could be achieved in the US proceedings (which may include factors such a speedier determination and/or greater foreseeability), there is nothing inherently objectionable in such conduct. The purpose of any commercial litigation and related negotiations is to achieve the best possible outcome. The cross-

⁴ See also e.g. *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818 (CA), p.827 (per Millett LJ)

licence that is ultimately arrived at (and the process for doing so) are required to be FRAND – but there is no justification for enforcing the *English* court’s approach for achieving that over the approach taken by other countries.

10. A patent holder who prefers, as a means of attempting to resolve a dispute as to the terms of a FRAND licence with an implementer, to enforce its patents in the US, according to the proper laws and procedures in that country, should be permitted to do so. The Court of Appeal was wrong to conclude that such a patent holder is required instead to abandon the US proceedings (especially where first seised) and have their dispute resolved by the English court as soon as the implementer brings proceedings seeking a declaration as to FRAND terms in this country.
11. Arnold LJ posed the question: “*what is Ericsson’s purpose in pursuing the ITC I proceedings when they are guaranteed to get whatever the English courts determine is FRAND plus interest?*” (§115). That inherently assumes the English courts’ determination is to be preferred over the approach taken by the ITC in the US in resolving the dispute.
12. The proceedings before the ITC were commenced first, and the evidentiary hearing was held in July 2024. A neutral third party (the OUII) has concluded, based on the evidence heard, that Ericsson’s offer was “*clearly*” within the FRAND range,⁵ that Ericsson did not engage in hold up with Lenovo, and that Lenovo infringed Ericsson SEP patents. The parties are awaiting a ruling on remedy. There is no reason why the ITC proceedings will lead to a final outcome that fails to respect the FRAND obligation in clause 6.1 of the IPR Policy. If the ITC accepts (as the OUII did) that Ericsson’s October 2023 Offer “*is comfortably within the FRAND range*”⁶ and accordingly grants the relief sought by Ericsson, then, commercially, Lenovo can choose to accept an offer that has been determined by an independent and impartial body (appealable to the US Court of Appeals for the Federal Circuit) to be within the FRAND range.⁷ A final determination by the English courts is many years away, given that it relies on a parallel claim brought by Lenovo in this jurisdiction (referred to as the E&W II Proceedings in the Court of Appeal Judgment) that has not been listed yet (see §70(x)), is unlikely to be heard before 2026,

⁵ OUII Brief p.99

⁶ HC Judgment §96.

⁷ As Arnold LJ noted at §§22: “*It is not necessarily the case that only one set of terms is FRAND. On the contrary, a range of terms may all be FRAND.*”

and which Lenovo has recently even proposed staying. It is in that context unsurprising that the greater certainty and speed of such an outcome would be preferable to Ericsson than the determination of a FRAND range by the English courts.

13. Such an ITC-driven outcome would also accord with the Supreme Court's judgment in *UPSC*, where it held at §61 (emphasis added):

*“... Nor do we construe the IPR Policy as prohibiting the SEP owner from seeking in appropriate circumstances an injunction from a national court where it establishes that an implementer is infringing its patent. On the contrary, **the IPR Policy encourages parties to reach agreement on the terms of a licence and avoid litigation which might involve injunctions that would exclude an implementer from a national market, thereby undermining the effect of what is intended to be an international standard. It recognises that if there are disputes about the validity or infringement of patents which require to be resolved, the parties must resolve them by invoking the jurisdiction of national courts or by arbitration. The possibility of the grant of an injunction by a national court is a necessary component of the balance which the IPR Policy seeks to strike, in that it is this which ensures that an implementer has a strong incentive to negotiate and accept FRAND terms for use of the owner's SEP portfolio. The possibility of obtaining such relief if FRAND terms are not accepted and honoured by the implementer is not excluded either expressly or by necessary implication. The IPR Policy imposes a limitation on a SEP owner's ability to seek an injunction, but that limitation is the irrevocable undertaking to offer a licence of the relevant technology on FRAND terms, which if accepted and honoured by the implementer would exclude an injunction.**”*

14. In contrast, the Court of Appeal's Judgment has the effect of wrongly elevating the institutional and judicial approach adopted in relation to enforcement of SEPs in England above that of foreign jurisdictions such as the US. It is not an answer that doing so might relieve the foreign court of burdensome litigation (§149) – the breach of comity is inherent in branding the pursuit of foreign proceedings *per se* as an act of bad faith. It might equally be said that an implementer such as Lenovo who brings responsive proceedings in England when sued in the US is seeking to do better than it might in the US and that its continuing of the English proceedings is inherently in bad faith. Equally, the English Court could be relieved of burdensome litigation if these second brought proceedings were abandoned and the dispute plays out in the US (where it may well be resolved faster than in England, in a jurisdiction chosen by both parties). Implicit in the approach of the Court of Appeal is that determination of the dispute in England is superior to determination of the dispute in the US and should be prioritised. That is the very jurisdictional imperialism that should be eschewed.

15. The Court of Appeal’s judgment was also wrong to introduce a *de facto* ‘hierarchy’ between court-determined and negotiated FRAND licences. In effect, it elevated the former over the latter, prioritising the English rate-setting process over the US process before the ITC, which will already consider whether an offer (Ericsson’s October 2023 Offer) is within the FRAND range. Either process should result in a FRAND outcome, as an offer that is determined to be within the FRAND range is by definition FRAND. Any process which confines its assessment to offers the parties have themselves made puts greater emphasis on the need to make genuine FRAND offers and to negotiate, as compared to a process where the parties’ offers are essentially ignored and determination of FRAND terms is subcontracted to the court. In addition to being contrary to binding Supreme Court authority, there are good policy reasons not to undermine the primarily negotiations-based process underpinning the IPR Policy in favour of one where FRAND rates are primarily determined by the (English) courts. In practical terms, doing so is likely to incrementally increase the burden on the courts in settling FRAND disputes and incentivise hold-out.
16. The Court of Appeal (rightly) made no finding that the US ITC will grant injunctive style relief to a SEP owner who is in breach of its obligations under clause 6.1 of the IPR Policy. Accordingly, if Ericsson ultimately wins in the proceedings brought before the ITC (including any appeal to the Federal Circuit), any relief granted by the ITC will be lawful and in accordance with clause 6.1. If Ericsson loses, it will not obtain the relief sought and Lenovo has nothing to fear.
17. As a matter of law, a patent holder cannot be acting in bad faith merely because it seeks to have its dispute resolved in the US and believes those proceedings may be preferable for doing so, rather than subsequent proceedings in England. In holding otherwise and making the declaration, the Court of Appeal offended against the principle of comity.

(2) Wrong test for finding that Ericsson was in breach of its FRAND obligation

18. The Court of Appeal further erred in deciding that Ericsson had not acted in good faith without addressing whether, or making any finding that, Ericsson’s October 2023 Offer was not within the FRAND range.
19. The basis for the finding of bad faith was predicated on Ericsson’s obligations under clause 6.1 of the IPR Policy (see for instance §157). However, this merely requires that a party be “*prepared to grant*” licences on FRAND terms. As the Supreme Court made

clear in *UPSC*, under the IPR Policy, SEP holders who have made a FRAND offer are entitled to obtain injunctions restraining infringement in order to force implementers to choose between accepting a FRAND offer and abandoning the relevant market. As such, if Ericsson's October 2023 offer is within the FRAND range, then, given it is open for acceptance (such that Ericsson is prepared to grant a licence on those terms), Ericsson has *already* met its obligations under the IPR Policy and cannot be acting in bad faith in relation to the same. In that context, it was perverse to conclude that Ericsson was in breach of the good faith requirement under the IPR Policy even if Ericsson's October 2023 Offer was FRAND and thus, by definition, it had met its obligations under the IPR Policy (§117). Rather, by making a FRAND offer, and seeking to enforce its right to receive FRAND remuneration for its IPR, Ericsson was acting fully within the requirements of the IPR Policy and *UPSC*.

20. Moreover, at §§130-131, Arnold LJ challenged the first instance assessment of Ericsson's October 2023 Offer and Richards J's conclusion that "*I am not satisfied to a high degree of assurance that the pressure [on Lenovo to settle at or around the terms of the October 2023 Offer] is directed at securing supra-FRAND rates.*" Arnold LJ considered this did not answer the question as to why Ericsson was pursuing foreign proceedings. He held that it was unnecessary and unrealistic for Richards J to assess whether the parties' respective offers were FRAND.
21. That was wrong in principle. To grant the relief sought by Lenovo, the applicable (and undisputed) test required the Judge to have a high degree of assurance that Ericsson was not acting in good faith.⁸ He could not do so without a high degree of assurance that Ericsson's offer was outside the FRAND range. But no such finding has ever been made. On the contrary, the only independent expert body (the OUII) to have considered whether Ericsson's 2023 offer was FRAND, came to the conclusion (after a detailed evidentiary hearing, which included cross-examination of experts, review of comparable licences, and cross-examination of Ericsson and Lenovo corporate representatives) that it is comfortably within the FRAND range.

(3) No useful purpose

22. "*[A]s a matter of principle, it is wrong for an English court to make a declaration solely for the purpose of influencing a decision by a foreign court on an issue governed by the*

⁸ Judgment §§97 & 101

law of the foreign court.”⁹ In reality, however, the sole practical purpose of the declaration (and the Court of Appeal’s Judgment more generally) is to do just that. Primarily this is by pushing Ericsson to abandon the foreign proceedings (to “*reconsider its position*” as §142 puts it); but, failing that, by seeking to influence the decision of the foreign tribunals. The latter was swiftly illustrated by Lenovo. Within days of the Judgment, it filed supplementary submissions with the ITC, seeking to persuade it that “*the Court of Appeal made critical findings on issues that overlap with those in the pending [ITC] Investigation*” which “*bear directly*” on the issues before the ITC.¹⁰ This illustrates why, in order to avoid such declarations becoming the norm in future FRAND cases, clear guidance from the Supreme Court is required.

23. Further, the Court of Appeal applied an unduly low standard of proof to this part of its analysis. In particular, it held that there was a “*realistic prospect*” that Ericsson would change its mind when faced with a declaration from the English court (§142), and therefore the declaration had utility beyond influencing foreign proceedings. However, almost any declaration could be said *potentially* to alter the behaviour of a party. Applying such a low standard would render the requirement that a declaration serve a useful purpose essentially pointless. Instead, the Court of Appeal should have applied the “*high degree of assurance*” test, as applied by the first instance Judge, which is appropriate for declarations that will not be revisited and have the effect of final relief. Had it done so, it would have had no basis to overturn the conclusion of the first instance Judge that he was “*unable to conclude to any high degree of assurance that, even if the declaration were made and Ericsson did think again about its actions, it would choose to enter into a Short-Term Licence.*”¹¹ For the reasons explained to the Court of Appeal, Ericsson has not entered into the interim licence.

(4) No obligation to enter into an interim licence in any event

24. Finally, for the reasons explained by Phillips LJ in *Panasonic* §104, the Court of Appeal was in any event wrong to hold that it was appropriate to grant a final declaration (prior to the trial of any issue) that Ericsson is obliged to enter an interim licence on terms which have not been determined on the evidence to be FRAND, but which (in this case)

⁹ *Teva UK v Novartis* [2022] EWCA Civ 1617, [2023] Bus LR 820 §51 (per Arnold LJ)

¹⁰ Lenovo’s *Notice of Supplemental Authority* in the ITC I proceedings, 3 March 2025. Lenovo also made similar submissions in Brazil, Colombia, and in the UPC.

¹¹ HC Judgment §§128-129

were chosen by “splitting the difference” between two rates which Lenovo contended represented the range of possible outcomes on FRAND.¹²

25. An obligation to act in good faith in relation to the negotiation of the terms of a FRAND licence does not translate to an obligation to enter into an interim licence during that process. The obligation to enter into an interim licence is not found in clause 6.1 of the IPR Policy¹³ and neither Lenovo nor the Judgment provides an alternative legal basis. Moreover, this means there is no proper legal basis for judging whether the terms of the interim licence are FRAND, given it is a concept which falls outwith clause 6.1 of the IPR Policy.¹⁴

Conclusion and general public importance

26. In the premises, the appeal raises arguable points of law. These are matters of general public (indeed worldwide) importance suitable for an appeal to the Supreme Court:
- a. The case raises important issues as to comity and the ability of the English court to seek to influence litigants in foreign proceedings, or indeed foreign courts and tribunals themselves.
 - b. The Court of Appeal’s decision raises further sensitive political issues beyond whether the English court should in effect appoint itself a superior arbiter of FRAND over the US courts or ITC. For example, the European Union is currently bringing a legal challenge against China before the World Trade Organization (“WTO”) for restricting EU companies from going to foreign courts to protect and use their patents.¹⁵ It has recently filed a further WTO complaint against the

¹² In the present case, Ericsson did not even put forward a rate, with the Court of Appeal instead splitting the difference between two rates posited by Lenovo.

¹³ As highlighted by the Court of Appeal at §90, Lenovo did not, on appeal, rely upon the disputed principle of French law set out at §83 of the Judgment and it was not contended that clause 6.1 of the IPR Policy was the legal basis for the remedy sought (which would in any event be unsustainable for the reasons advanced by Ericsson before the Court of Appeal).

¹⁴ Cf. *Panasonic* §104(ii) (per Phillips LJ)

¹⁵ WTO, WT:DS611 - China – Enforcement of intellectual property rights, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds611_e.htm

Chinese courts' practice of setting worldwide FRAND terms which are binding on parties without their consent.¹⁶

- c. The Judgment has far-reaching ramifications for the worldwide FRAND regime. In particular, there is a significant risk that the decision will reshape the global landscape of SEP licensing negotiations and litigation. Implementers may take from it that they can delay negotiations as much as they like (as Lenovo has in this case by some 16 years), safe in the knowledge that they can simply ignore any injunction risk subsequently brought by a patent holder attempting to defend its patent rights, as they have the ability to turn to the English court to render nugatory the injunctive threat inherent in a patent holder's global portfolio. Commentators have warned that this will shift the balance in any negotiations in favour of implementers and result in a proliferation of litigation as opposed to negotiation.¹⁷ It is also a recipe for holdout, and is directly contrary to the IPR Policy that underpins the very rights purportedly underlying the relief granted by the Court of Appeal.
- d. Authoritative further guidance from the Supreme Court is required to avoid the errors of law in the Court of Appeal's Judgment being applied as guidance by the lower courts (as indicated at §1).

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28 March 2025

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¹⁶ European Commission, EU challenges China at WTO on royalties for EU high-tech sector, 20 January 2025, available at:

https://ec.europa.eu/commission/presscorner/detail/en/ip_25_293

¹⁷ China Business Law Journal, *UK ruling in Lenovo v Ericsson may reshape SEP negotiations*, 18 March 2025, available at <https://law.asia/uk-ruling-lenovo-ericsson-sep-licence/>