

ENGLAND AND WALES / JUDGMENT

Samsung Electronics Co Ltd & Anor v ZTE Corporation & Ors

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Neutral Citation Number: [2025] EWCA Civ 1383 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, INTELLECTUAL PROPERTY LIST (ChD), PATENTS COURT Mr Justice Mellor

[2025] EWHC 1432 (Pat) Case No: CA-2025-001926 Royal Courts of Justice Strand, London, WC2A 2LL Date: 31 October 2025 Before : LORD JUSTICE PETER JACKSON LORD JUSTICE ARNOLD and LORD JUSTICE BIRSS

- ----- Between :

- (1) SAMSUNG ELECTRONICS CO., LTD
- (2) SAMSUNG ELECTRONICS (UK) LIMITED Claimants/ Respondents

- and -

- (1) ZTE CORPORATION
- (2) ZTE (UK) LIMITED
- (3) NUBIA TECHNOLOGY CO., LTD
- (4) LIVEWIRE TELECOM LIMITED
- (5) EFONES. COM LIMITED

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- ----- Defendants/ Appellants Sarah Abram KC and Ligia Osepciu (instructed by Powell Gilbert LLP) for the Appellants Daniel Alexander KC and Henry Ward (instructed by Kirkland & Ellis International LLP) for the Respondents Hearing date : 28 October 2025

- ----- Approved Judgment This judgment was handed down remotely at 10.30am on 31 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives. Judgment Approved by the court for handing down. Samsung v ZTE Lord Justice Arnold:

Introduction

1. This is another appeal raising the question as to whether a willing licensor of a portfolio of patents declared essential to one or more European Telecommunications Standards Institute (“ETSI”) standards (“standard-essential patents” or “SEPs”) would grant an implementer of those standards who has undertaken to take a licence to that portfolio on the terms to be determined by the Patents Court to be fair, reasonable and non-discriminatory (“FRAND”) an interim licence pending that determination. It follows three decisions of this Court which have established the principle that, in an appropriate case, the Patents Court may make a declaration that a SEP owner would enter into such an interim licence: *Panasonic Holdings Corp v Xiaomi Technology UK Ltd* [2024] EWCA Civ 1143, [2005] RPC 2 (“*Panasonic v Xiaomi*”); *Alcatel Lucent SAS v Amazon Digital UK Ltd* [2025] EWCA Civ 43, [2005] RPC 6 (“*Alcatel v Amazon*”); and *Lenovo Group Ltd v Telefonaktiebolaget Ericsson (Publ)* [2025] EWCA Civ 182, [2005] RPC 11 (“*Lenovo v Ericsson*”). This case differs from the previous cases in that the parties agree that there should be an interim cross-licence, and even agree as to the terms of the interim cross-licence, and in particular how much should be paid for it (the amount is confidential). They disagree as to whether the terms of the interim cross-licence, and in particular the amount payable, should be subject to adjustment so as to bring them into line with the terms of the final cross-licence determined to be FRAND by the Patents Court, as the Claimants (“Samsung”) contend, or so as to bring them into line with the terms of the final cross-licence determined to be FRAND by the Intermediate People’s Court of Chongqing Municipality (“the Chongqing Court”), as the Defendants (“ZTE”) contend. The appeal raises an important issue of principle: does it constitute bad faith for a SEP owner to commence infringement proceedings in multiple courts with the objective of forcing an implementer to accept determination of FRAND terms by the SEP owner’s preferred court rather than the implementer’s preferred court? Mellor J answered that question in the affirmative for the reasons given in his judgment dated 25 June 2025

[2025] EWHC 1432 (Pat). I granted permission to appeal and expedited the appeal. I regret that, for reasons that it is unnecessary to go into, it was not possible to grant the appeal greater expedition. The general background to disputes of this nature, basic legal principles applicable to the determination of FRAND terms and legal principles applicable to the grant of declarations 2. I set these matters out in my judgment in *Lenovo v Ericsson* at [3]-[16], [17]-[26] and [27]-[29] respectively. There is no point in repeating that exposition, and so I shall take it as read. Interim licence declarations: a brief summary of the principles 3. 4. The ETSI IPR Policy requires SEP owners and implementers to negotiate FRAND terms in good faith. The basis for, and nature of, the good faith obligation was explained in *Panasonic v Xiaomi* at [48] and *Lenovo v Ericsson* at [82]. The SEP owner’s undertaking to ETSI provides an implementer which is willing to take a licence of SEPs on FRAND terms with a contractual defence to claims of patent infringement. An implementer which has undertaken to the Patents Court to Judgment Approved by the court for handing down. *Samsung v ZTE* take a licence on the terms determined by the Patents Court to be FRAND (subject to adjustment on appeal) is by definition a willing licensee. Such an implementer

will be required to pay royalties at the rate determined by the Patents Court to be FRAND from day one of implementation regardless of limitation periods and to pay realistic interest in respect of past royalties. The implementer therefore cannot be accused of holding out even if it had previously been holding out. Interim licence declarations are a limited remedy to the problem of hold up by SEP owners after implementers have given such an undertaking. The essential basis for the declarations which this Court made in *Panasonic v Xiaomi* and *Lenovo v Ericsson* (*Alcatel v Amazon* was only concerned with the principle) was that the SEP owners were acting contrary to their obligation to negotiate FRAND terms in good faith: their purpose in pursuing injunctive (or equivalent) relief in other jurisdictions was to try to force the implementers to agree to take a licence on terms more favourable to the SEP owner than the English courts would find to be FRAND. Further, any rational SEP owner would want to be paid at least part of what they were due sooner rather than later, and yet the SEP owners were refusing this because of their desire to coerce the implementers. The Court considered that the grant of the declaration would serve a useful purpose because it would be persuasive, albeit not coercive. It would not be contrary to comity because, if it led to an interim licence being agreed, it would relieve the foreign courts of burdensome and wasteful litigation; and, if not, it would be up to the foreign courts to make their own assessments of the parties' conduct. As to what terms for an interim licence would be FRAND, in both *Panasonic v Xiaomi* and *Lenovo v Ericsson* the Court essentially took a midpoint between the parties' most recent royalty rate offers and applied that rate to the anticipated period of the interim licence. (This does not exclude the possibility of another solution in an appropriate case.) In *Panasonic v Xiaomi* the parties did subsequently agree to enter into an interim licence on the terms specified by the Court. In *Lenovo v Ericsson* they did not. All three cases were the subject of global settlements not long after this Court's decision, which may or may not be coincidental. Thus the issues raised by an application for a declaration that a SEP owner would enter into an interim licence are as follows: i) Is the SEP owner in breach of its obligation to negotiate FRAND terms with the implementer in good faith? ii) Would the grant of the declaration serve a useful purpose? iii) Would the grant of the declaration be contrary to comity with foreign courts? iv) What terms for an interim licence would be FRAND? The burden of proof lies on the implementer and the court must have a high degree of assurance before granting a declaration. I should record before proceeding further that ZTE accept that the trio of cases referred to in paragraph 1 above constitute binding authority at this level that the 5. 6. 7. 8. 9. 10. Judgment Approved by the court for handing down. *Samsung v ZTE* Patents Court has jurisdiction to make an interim licence declaration, but reserve the right to argue to the contrary in the Supreme Court. Jurisdictional conflict 11. 12. As I have observed in many judgments concerning FRAND issues, the ETSI IPR Policy, while valuable in many ways, has a flaw in that it does not provide for a global dispute resolution mechanism for determining FRAND disputes. In the absence of such a mechanism, or an ad hoc agreement to arbitrate, the possibility of jurisdictional conflict is inescapable. In this regard the parties and the judge referred to what I said in *Nokia Technologies OY v OnePlus Technology (Shenzhen) Co Ltd* [2022]

EWCA Civ 947, [2023] FSR 11 (“Nokia v OPPO”): “16. 17. But what is to happen if the courts of more than one country are seised with proceedings concerning the SEPs in question? If more than one country’s courts proceed to determine the terms of a global FRAND licence, there is an obvious risk of inconsistent decisions (not to mention a huge waste of legal costs). The only way to avoid the risk of inconsistent decisions is to ensure that only one court determines the terms of the global FRAND licence. As a matter of principle, one might expect this to be the court first seised of the dispute, with its determination being binding on the parties (by way of *res judicata*) in any other proceedings. This has three potential consequences. The first is a rush by each party to the court to establish jurisdiction in a forum which is perceived to be favourable to that party’s position. The second is an application by one party for an anti-suit injunction to restrain the other party from commencing or pursuing proceedings in a different jurisdiction to that considered favourable by the applicant party. The third is an application by the respondent party in the forum sought to be enjoined for an anti-anti-suit injunction restraining the first party from making or pursuing its application for the anti-suit injunction in the other forum. All of these consequences have manifested themselves in disputes between patentees and implementers in recent years. The only sure way to avoid these problems is to use a supranational dispute resolution procedure, and the only supranational procedure currently available is arbitration. If the parties do not agree to arbitration, however, the national courts must deal with the resulting jurisdictional disputes as best they can. Because there are no bespoke jurisdictional rules applicable to such disputes, still less any internationally agreed ones, national courts must apply their ordinary jurisdictional rules. In doing so national courts must have due regard to comity (that is, the need to respect the jurisdictions and judicial systems of other nations), but national courts cannot solve the Judgment Approved by the court for handing down. Samsung v ZTE problems inherent in the present system of resolving SEP/FRAND disputes.” 13. I will return to these points below. Factual background The parties and their SEP portfolios 14. Although both the Claimants and the Defendants include companies incorporated in England and Wales, the parent companies are incorporated in South Korea (Samsung) and the People’s Republic of China (ZTE). Both Samsung and ZTE own substantial portfolios of SEPs declared essential to one or more of the 2G, 3G, 4G and 5G standards for wireless communications. The 2021 Agreement 15. In July 2021 Samsung and ZTE entered into a global patent cross-licence covering their respective portfolios of SEPs for the 4G and earlier standards (“the 2021 Agreement”). The licence expired on 31 December 2023, but the 2021 Agreement included a defined covenant not to sue until 31 December 2024. Negotiations for a further cross-licence 16. In mid-2023 the parties started negotiating the terms of a further cross-licence which would not only continue the previous cross-licence, but also extend it to their respective portfolios of 5G SEPs. To date the parties have been unable to agree the terms of the further cross-licence, but it is agreed that Samsung will be the net payer under the cross-licence. Thus Samsung effectively stands in the position of an implementer so far as this appeal is concerned. For that reason I shall refer in the remainder of this judgment to an interim licence in favour of Samsung rather than an interim cross-licence. The English

proceedings 17. On 19 December 2024 – one day after a meeting between the parties and without any prior warning to ZTE – Samsung issued the claim form in these proceedings. In these proceedings Samsung: i) ii) iii) allege that ZTE has infringed a number of Samsung UK SEPs (“the Asserted Patents”) and seek a FRAND injunction in respect of those patents; seek declarations of invalidity and non-essentiality in respect of certain UK SEPs owned by ZTE (“the Challenged Patents”), and in the alternative ask the Court to determine the terms of a FRAND licence covering the Challenged Patents; claim that the FRAND licence covering the Asserted Patents and/or the Challenged Patents is a single global cross-licence covering Samsung’s and ZTE’s respective portfolios of “Cellular SEPs”; and Judgment Approved by the court for handing down. Samsung v ZTE iv) undertake to enter into the FRAND licence covering the Asserted Patents and/or the Challenged Patents on the terms that are determined by the English Court to be FRAND (“the English Court-Determined Licence” or “CDL”) following the exhaustion of appeals. The Particulars of Claim initially defined “Cellular SEPs” as patents that have been declared essential only to 5G. The Asserted Patents and Challenged Patents were also initially limited to 5G-only SEPs. The Particulars of Claim were amended on 21 March 2025, inter alia, to extend the definition of Cellular SEPs to patents declared essential to the 2G-5G standards and to include 4G SEPs amongst the Asserted and Challenged Patents. ZTE argue that the original, more limited, definition was adopted tactically with a view to avoiding a breach of the covenant not to sue in the 2021 Agreement, which applied to 4G and earlier SEPs, but not 5G SEPs. Samsung riposte that, because the covenant not to sue did not prevent Samsung from enforcing 5G SEPs, Samsung were entitled to bring the proceedings when they did. It was nevertheless inevitable that any cross-licence would embrace 2G-4G SEPs as well as 5G SEPs, and thus the amendment in March 2025 simply formalised that reality. ZTE have not challenged the English courts’ jurisdiction in these proceedings, but neither have they given any undertaking to enter into the CDL. ZTE have not counterclaimed for infringement of the Challenged Patents or otherwise sought a FRAND injunction against Samsung in this jurisdiction. On 13 March 2025 the judge directed an expedited FRAND trial to be heard starting on 12 January 2026. Two technical trials in the English proceedings – which could result in a UK FRAND injunction against ZTE (but not Samsung) – are listed to be heard starting on 2 March and 5 May 2026. 18. 19. 20. The Chongqing proceedings 21. 22. 23. On 23 December 2024, two working days after the English proceedings were commenced, ZTE commenced proceedings in the Chongqing Court. In the Chongqing proceedings ZTE seek a determination of the terms of a global FRAND cross-licence between the parties covering the entirety of their respective portfolios of wireless communication SEPs. On 24 January 2025 Samsung challenged the personal jurisdiction of the Chongqing Court. That challenge was rejected by a judgment of 4 June 2025. Samsung’s appeal against that judgment was dismissed by the Supreme People’s Court of China on 30 July 2025. The Chongqing Court has held substantive hearings on 8-12 September, 13-17 October 2025 and 27-31 October 2025. Thus it appears that there is a real prospect of the Chongqing Court issuing its decision on FRAND before the start of the English FRAND trial on 12 January 2026, or at any rate before the judge

hearing that trial hands down his or her judgment. Frankfurt proceedings brought by Samsung 24. On 20 December 2024, one day after issuing the English proceedings, Samsung issued competition law proceedings in the Frankfurt District Court. ZTE's evidence Judgment Approved by the court for handing down. Samsung v ZTE before Mellor J was that the Frankfurt proceedings had the potential to result in a third determination of FRAND terms, but the judge found that the possibility of global FRAND determination is "mooted in Samsung's Frankfurt pleading in a very tentative way". There is no challenge to that finding, and accordingly the Frankfurt proceedings did not feature in the argument before us. German and UPC proceedings brought by ZTE 25. On 1 January 2025 ZTE commenced three patent infringement proceedings seeking unqualified injunctive relief, one in the Munich I Regional Court and two in the Mannheim Local Division of the Unified Patents Court ("the UPC"). On 10 January 2025 ZTE commenced a second action for infringement in Munich. Brazilian and Hangzhou proceedings brought by ZTE 26. On 15 January 2025 ZTE commenced an action for infringement in Brazil. On 23 January 2025 ZTE obtained a preliminary injunction against Samsung in Brazil, apparently on an ex parte but on notice basis. An appeal was heard on 19 March 2025 and judgment is awaited. The injunction was lifted on 25 March 2025 after Samsung had posted a bond. 27. On 16 January 2025 ZTE commenced two actions for infringement in the Intermediate People's Court of Hangzhou, China ("the Hangzhou Court"). US proceedings brought by Samsung 28. On 25 February 2025 Samsung brought anti-trust proceedings in the US District Court for the Northern District of California. The precise nature of the US proceedings is unclear, and accordingly the US proceedings did not feature in the argument before us. German, UPC and Hangzhou proceedings brought by Samsung 29. On 28 February 2025 Samsung commenced five patent infringement proceedings seeking unqualified injunctive relief: a counterclaim in the Munich I Regional Court proceedings brought by ZTE, two claims in the UPC and two claims in the Hangzhou Court. On 6 March 2025 Samsung commenced a further claim in the Munich I Regional Court. German invalidity proceedings brought by both parties 30. As I understand it, both parties have brought invalidity proceedings in the German Federal Patents Court in respect of the patents alleged to be infringed by the other. Standstill offers made by the parties 31. On 1 January 2025 ZTE wrote to Samsung (i) inviting Samsung to agree to a determination of FRAND terms for a global cross-licence of the parties' respective portfolios of wireless communication SEPs by the Chongqing Court and (ii) offering to stay or terminate all other global litigation if Samsung did agree. That offer has not been accepted by Samsung. It remains open. Judgment Approved by the court for handing down. Samsung v ZTE 32. On 14 February 2025 Samsung proposed to ZTE that the parties enter into a standstill of all global litigation pending the determination of FRAND terms in the English proceedings. That offer would have required ZTE to abandon the Chongqing proceedings. That offer has not been accepted by ZTE. It appears that it remains open. The interim licence application 33. 34. 35. 36. On 11 March 2025 Samsung made its application for an interim licence declaration (although its intention to make such an application had been signalled by service of a draft Amended Particulars of Claim on 28 January 2025). Samsung circulated

the terms of their proposed interim licence on 12 March 2025. This was also an offer for a global cross-licence covering the parties' respective SEPs, providing for an upfront payment from Samsung to ZTE (albeit in an amount lower than that proposed by ZTE in March), but subject to prospective and retrospective adjustment of all terms in accordance with the FRAND determination of the English courts. Also on 11 March 2025 ZTE offered Samsung a global interim cross-licence covering the parties' respective SEPs providing for an upfront payment from Samsung to ZTE, subject to prospective and retrospective adjustment of all terms (including royalties) in accordance with the final determination of FRAND terms in the Chongqing proceedings. ZTE made a further interim licence offer on 16 April 2025, which supplemented ZTE's March offer. Samsung served an amended set of proposed interim licence terms on 12 May 2025. By the time of the hearing before the judge, any earlier differences as to the scope of the interim licence and the level of upfront payment had dissipated. The only material difference between the parties' proposals was as to the forum that should determine FRAND terms for the final cross-licence. Samsung's complaint to ETSI 37. On 18 July 2025 Samsung complained to ETSI that ZTE was in breach of the ETSI IPR Policy. On 14 October 2025 ZTE obtained an ex parte preliminary injunction from the Munich I Regional Court requiring Samsung to withdraw the complaint. On 16 October 2025 Samsung withdrew the complaint in compliance with the injunction. A recent stay in Germany 38. On 22 October 2025 the parties sensibly agreed to stay three sets of proceedings in the Munich I Regional Court where hearings had been scheduled in October and December 2025 and related invalidity proceedings in the Federal Patent Court. The next scheduled hearing in any of the German proceedings is on 4 February 2026. The earliest scheduled hearing in the UPC is on 17-18 March 2026. Offers to arbitrate 39. Given that each side objects to the other's preferred forum for FRAND determination, the obvious solution is arbitration. We were told that both sides had made offers to arbitrate, but neither had accepted the other's offer. We were not given any details of either side's proposal, save that we were informed that it was agreed that the arbitral Judgment Approved by the court for handing down. Samsung v ZTE tribunal should be composed of persons who were neither Korean nor Chinese nationals. It is deeply regrettable that the parties have been unable to agree terms for arbitration of this dispute. As discussed in the course of argument, it merits consideration whether one way for such deadlocks to be broken would be for the Patents Court to be asked to make a declaration as to suitable arbitral terms. That is a question for another day, however. The judge's judgment 40. 41. The judge's judgment sets out a meticulous account of the factual background, the applicable legal principles and the parties' arguments, and a careful analysis of those arguments. There is no challenge by either side to the accuracy of the judge's account of the factual background or the law. The key points in the judge's reasoning which are material to the appeal are set out below. Before turning to the issues I have identified in paragraph 8 above, the judge addressed two matters which are significant. First, he explained that he had raised with the parties the possibility of a jurisdictionally-neutral interim licence: "77. My second point, raised late on the first day, was exploring whether there were ways to craft an interim licence which did not specify

the Court or methodology by which any adjustment to the interim licence may be made. Samsung prepared a note overnight addressing this issue, which persuaded me that (a) these ideas would only create unnecessary uncertainty and procedural complexity and (b) the nettle should be grasped now. 78. Accordingly, I leave aside any consideration of how, at the final FRAND trial, the Judge may consider whether, and if so how, to adjust the FRAND terms (including the royalty) in the light of developments elsewhere.” 42.

Secondly, the judge considered a number of criticisms of Chinese law, the approach to FRAND cases in China and the Chongqing Court raised by Samsung. He concluded at [81]: “I do not find it necessary to address any of these criticisms advanced on behalf of Samsung for a number of reasons: i) First, because the evidence in support of these criticisms was less than compelling. There was no expert evidence filed in support. In this regard I accept Ms Abram KC’s point, founded on *Altimo Holdings v Kyrgyz Mobil* [2011] UKPC 7 at [93]-[98] that any allegation of bias or procedural unfairness needs to be made in crystal clear terms and be supported by cogent evidence. Judgment Approved by the court for handing down. *Samsung v ZTE* Second, if I was forced to assess these criticisms based on the inadequate evidence base, I would be likely to reject them or place no weight on them. Third, even if appropriate expert evidence had been filed as to the current practice of the Chinese courts, I have my doubts whether accurate predictions could be made as to how the Chinese courts might develop their law and procedures in the future. Fourth, I acknowledge the point made by Arnold LJ in *Nokia CA* at [79] regarding the significance of the Chinese Courts applying Chinese law and not French law to the interpretation of the ETSI terms, but I had no evidence to indicate the significance, if any, of that point. Fifth, what the Chinese courts do or don’t do in the action brought by ZTE against Samsung in Chongqing is a matter entirely for them. ... Sixth, because although it is apparent that Samsung felt the need to argue these points, I do not find any of them necessary for a decision on Samsung’s application. I suspect that, on reflection, Samsung will accept that these points should not have been raised. ii) iii) iv) v) vi) ...” 43. The judge considered the issues of whether ZTE are in breach of their obligation to negotiate FRAND terms with Samsung in good faith and what terms for an interim licence would be FRAND together at [93]-[134]. At [99] he posed this question: “what is the point of ZTE pursuing the Brazilian, German, UPC and Hangzhou proceedings and attempting to exclude Samsung’s products from those commercially important markets, with all the massive attendant effort and expense for both parties?” 44. 45. The judge noted at [100] that the evidence of ZTE’s solicitor Dr Ari Laakkonen was to the effect that “it was ZTE’s aim to try to force Samsung into accepting that global FRAND terms would be decided in Chongqing, the threat being that if Samsung did not agree, it faced possible injunctive relief excluding them from major markets.” The judge acknowledged at [102] that a similar question could be posed to Samsung regarding the infringement proceedings they had commenced, but he considered that it was clear that Samsung were simply responding in kind to ZTE’s claims. 46. The judge went on: Judgment Approved by the court for handing down. *Samsung v ZTE* “104. ... It is perfectly possible that ZTE had several aims in mind in seeking injunctive relief in various markets: (a) to put pressure on Samsung to agree to

Chongqing as the forum for determination of global FRAND terms; and (b) to put pressure on Samsung to agree to supra-FRAND rates. I acknowledge that the offers put forward by ZTE do place the emphasis on the first aim because the price for Samsung of avoiding injunctive relief was acceptance of Chongqing. For the purposes of analysis I will proceed on the basis that the aim was the first, as stated by Dr Laakkonen.

105. However, that aim gives rise to a slightly different but equally obvious question: why are ZTE spending so much effort and cost on insisting that the global FRAND terms are determined in Chongqing? As I have indicated, I proceed on this application without taking into account Samsung's criticisms of the Chinese approach to FRAND or of the Chinese courts. But the answer can only be that ZTE perceive an advantage, an advantage which must be a substantial one in view of the cost and effort devoted to achieving this aim. 106. In her oral submissions, Ms Abram submitted that there were so many reasons why parties want to litigate in their home court: 'Parties want to litigate where they do business because they are familiar with the legal system, because they are familiar with court procedures, because the language of the litigation is familiar to them, because of the location of documents or witnesses, because of the desire not to lose management time through travel, because of relative legal costs in China compared to England.' 107. I did not recall these reasons being covered in the evidence for this application, so I asked where they were set out in the evidence. I was given the reference to Laakkonen 1, [26]. This witness statement was made in ZTE's opposition to Samsung's Listing Application. Although in the bundles, it did not form part of my pre-reading for this application. 108. In his first witness statement at [26], Dr Laakkonen set out 4 factors for ZTE's preference for a FRAND determination in Chongqing. In summary, these are: i) China is a major manufacturing and sales market for both parties, but especially ZTE. ii) Both parties have significant patent portfolios in China. Judgment Approved by the court for handing down. Samsung v ZTE iii) iv) Chinese courts (including in Chongqing) have substantial experience in rate-setting litigation. The cost of litigation in China is substantially lower than the cost of FRAND litigation in the UK. 109. I make these observations: i) ii) iii) First, if these reasons (both sets) were the real answer to the question I posed above, I would have expected them to have been set out in the evidence on this application. After all, the parties did not skimp on the preparation of evidence. Second, the fact that a number of the points submitted by Ms Abram were not in any evidence suggests they were a bit of an afterthought, even though in some ways they are obvious. Third, in any event, whilst these reasons (both sets) would support a preference for Chongqing, given a free choice, I find them insubstantial in the present circumstances. They would matter if ZTE were an SME but they do not, in my view, provide a justification for the wave of litigation which ZTE set in motion, with all the attendant effort and expense, let alone for the costs which ZTE have incurred in fighting tooth and nail on this application." 47. The judge considered the question of jurisdictional preference at [110]-[122]. In this context he discussed a passage from my judgment in *Lenovo v Ericsson* at [152]- [155], and in particular [153]: "In the absence of a global dispute mechanism for determining FRAND disputes, or an ad hoc agreement to arbitration, the possibility of jurisdictional conflict is

inescapable. ... the principled answer to this might be that the court first seised should determine what terms are FRAND. In the present case, however, it is plain that Ericsson do not want the EDNC to determine FRAND terms for the cross-licence any more than they want the English courts to do so. ... Ericsson's stance is not driven by jurisdictional preference with respect to FRAND determination. It is driven by a preference for the exclusionary power of a national injunction (or equivalent relief) over FRAND determination by any court. This is hold up.” 48. The judge reasoned as follows: “117. ... In my view, [ZTE's argument on jurisdictional preference] is based on a misunderstanding of [153] of *Lenovo CA*. In that case, just because Ericsson was determined to avoid a FRAND Judgment Approved by the court for handing down. *Samsung v ZTE* determination by any court does not mean that it is good faith for a SEP licensor to use the exclusionary power of national injunctions to enforce its jurisdictional preference.

118. On the closely related topic of ‘first-seised’, what I think was being indicated in [153] was that there was a principled basis for Ericsson to choose the EDNC forum for the determination of global FRAND terms because it was first seised of the dispute. If Ericsson had made that choice, then *Lenovo's* offer (to accept the EDNC's determination as to FRAND terms provided Ericsson dropped their campaign to obtain injunctions and equivalent relief) would have come into sharp focus, and it is difficult to see how Ericsson could have resisted abandoning their campaign without being branded an unwilling licensor. 119. I do not consider that *Arnold LJ* was suggesting that ‘first- seised’ necessarily is a trump card in all situations, but it may be a tie-breaker in an appropriate case. In these paragraphs, *Arnold LJ* was explaining why, in the current situation in which ETSI does not mandate a global FRAND dispute mechanism, forum shopping (although to be deprecated) can be an inevitable feature of global FRAND disputes. Implicit in this is that someone has to choose a forum.” 49. This led the judge to conclude as follows: In my judgment, a willing licensor in the position of ZTE would have engaged with this action and proceeded as speedily as possible to the FRAND trial, in the absence of earlier agreement between the parties. In my view, a willing licensor would not commence a wave of injunctive proceedings, whatever the aim of the pressure which those proceedings would exert on the SEP licensee. The wave of injunctive proceedings commenced by ZTE were completely unnecessary since Samsung were and are actively seeking fresh global FRAND cross- licence terms, to replace the previous global cross-licensing terms which the parties abided by for several years. There is no suggestion that Samsung were operating other than as a willing licensee (and as a willing licensor). “127. ...
129. Of course, from ZTE's standpoint, the wave of injunctive proceedings was necessary to fulfil a principal aim of ZTE: to force Samsung into accepting a global FRAND determination in Chongqing.
130. Overall, and notwithstanding the manoeuvring by ZTE to narrow the gap between the two sides, the conclusion in my judgment is inescapable. ZTE have acted in bad faith with their wave of unnecessary injunctive proceedings, and by using the continuing threat imposed by

them to seek to sideline or displace the jurisdiction of this Judgment Approved by the court for handing down. Samsung v ZTE Court and in seeking to secure their preference for a determination in Chongqing.” 50. 51. The judge considered whether a declaration would serve a useful purpose at [135]- [139]. He concluded that it would, because it would “forc[e] ZTE to reconsider their position”, and he hoped that ZTE would “see the error of their ways”. The judge considered the question of comity at [140]-[161]. In this context he stated at [144]: “... I reiterate that I have rejected Samsung’s arguments about the abilities of the Chinese Courts in this area and I have proceeded on the basis that the Chinese Courts are as well-equipped to engage in global FRAND rate-setting.” 52. The judge reasoned as follows: “152. ... The reasoning in Panasonic CA at [96]-[97] and Lenovo CA at [149] is equally applicable here. If the declaration does induce ZTE to reconsider their position and grant Samsung an interim licence on the terms Samsung seek, that would promote comity because it would relieve the courts and tribunals of Brazil, Germany, the UPC and Hangzhou of a great deal of burdensome and wasteful litigation commenced by ZTE, but also the retaliatory litigation in those jurisdictions plus the USA commenced by Samsung. 153. In saying that, I acknowledge that the various offers made by ZTE would, if accepted, also relieve the same courts of the same amount of burdensome and wasteful litigation. The March Offer required Samsung to abandon this action and the April Offer does not. The April Offer allows this action to proceed.

154. As above, it is for the Chinese Courts to decide what they should do with the Chongqing Proceedings. I have no role in that process.
155. However, to similar effect, it is for Judges in this jurisdiction to decide what should happen to this action. The Court has jurisdiction. ZTE dropped their challenge to jurisdiction, thereby accepting the jurisdiction of this Court over the claim brought by Samsung. Not surprisingly, ZTE did not attempt to seek a case management stay of this action in favour of the Chongqing Proceedings. A trial date has been set, along with directions to that FRAND trial. 156. In these circumstances there is no basis, in my judgment, for criticising Samsung for not accepting ZTE’s terms. At best, ZTE’s approach results in unnecessary duplication of determination of global FRAND terms between these parties. Judgment Approved by the court for handing down. Samsung v ZTE
157. As for ZTE, there is a basis for criticising ZTE’s conduct in trying, through their interim licence terms, backed by their wave of litigation, to either derail or displace this action. ZTE’s terms interfere with the jurisdiction of this Court which they have accepted.... In practical terms, ZTE’s terms are designed to render this action pointless, so that Samsung effectively has to abandon it, unless they can bear the prospect of the costs of two FRAND determinations.” The order under appeal 53. The relevant parts of the judge’s order are declarations in the following terms: “1. 2. 3. 4. 4.1 4.2 ZTE are in breach of their obligations of good faith under clause 6.1 of the ETSI IPR Policy. A willing licensor in the position of ZTE, and in light of the undertaking given by Samsung, would enter into the interim cross-licence with Samsung on terms and including the sum to be paid by Samsung by way of

royalty in respect of the interim licence period as set out in Confidential Annex 1 to this Order (the Interim Licence). The terms (including the sum to be paid) of the Interim Licence are subject to adjustment and amendment so as to bring the terms into line with the terms of the final cross-licence determined to be FRAND by the Patents Court after the FRAND Trial in these proceedings (subject to any later adjustments or amendments following any appeals). In the event that, within seven days of the date of this Order, ZTE refuse either 4.1 or 4.2 below, ZTE are in breach of their FRAND commitments under the ETSI IPR Policy and are unwilling licensors (and unwilling licensees). To offer Samsung the Interim Licence and to enter into the same with Samsung; or Give the following undertaking to the Court on condition that Samsung give the reciprocal undertaking set out above: Pending any application for permission to appeal or the determination of any such appeal, ZTE undertake that they shall abide by the terms of the Interim Licence as if the same were in full force and effect and shall enter into the Interim Licence within seven days of any such appeal or permission to appeal being refused or withdrawn. If any appeal is finally allowed, ZTE shall repay any sums paid by Samsung under their undertaking given above which the Court decides should be repaid (including interest if appropriate)” Judgment Approved by the court for handing down. Samsung v ZTE Grounds of appeal 54. ZTE appeal on four grounds. Ground 1 is that the judge was wrong to hold that ZTE had acted in bad faith. Ground 2 is that the judge was wrong to treat the fact that the English courts were first seised as a decisive factor. Ground 3 is that the declaration granted by the judge went beyond what was necessary to remedy the mischief he had identified. Ground 4 is that the judge was wrong to hold that the declarations he granted were not contrary to comity. Respondents’ notice 55. Samsung have served a respondents’ notice contending that the judge’s decision should be upheld for two additional or alternative grounds. Ground 1 is that the general law and practice relating to choice of fora in the arbitration of international commercial disputes supports the selection of a neutral forum to determine FRAND disputes. Ground 2 is that ZTE’s proposed interim licence amounts in effect to a forum non conveniens application by the back door when no such application has been made by ZTE. Appeal grounds 1 and 2 and the respondents’ notice grounds: bad faith 56. 57. Appeal grounds 1 and 2 and the respondents’ notice grounds are all inter-related and fall to be considered together. Although Samsung argued that the judge’s decision that ZTE had acted in bad faith involved an evaluative assessment which could only be interfered with on the limited grounds identified in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, [2024] Bus LR 532 at [46]-[50] (Lord Briggs and Lord Kitchen) and *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc*

[2025] UKSC 25 at [94]-[95] (Lord Briggs and Lord Stephens), these grounds raise the issue of principle identified in paragraph 1 above. It is important to emphasise before proceeding further that this case is to be distinguished from *Panasonic v Xiaomi* and *Lenovo v Ericsson*. As I have explained, in those cases this Court concluded that the SEP owners were acting in bad faith because they were attempting by means of claims for injunctive (or equivalent) relief in other jurisdictions to force the implementers to agree to terms

more favourable to the SEP owners than a court would order. The judge acquitted ZTE of any such intention, and there is no challenge by Samsung to that aspect of his decision. The judge's decision to grant the declarations sought by Samsung was based solely on his conclusion that ZTE were acting in bad faith by bringing claims for injunctive relief in other jurisdictions which were intended to try to force Samsung to agree to FRAND determination by the Chongqing Court rather than by the English courts. Neither *Panasonic v Xiaomi* and *Lenovo v Ericsson* involved the SEP owner seeking to force the implementer to accept the SEP owner's preferred forum for FRAND

determination.

58. Counsel for Samsung emphasised the submissions which he made and I accepted in *Panasonic v Xiaomi* at [79]-[80], and reiterated in *Lenovo v Ericsson* at [106]: first, the only role for an injunction in the FRAND regime is to enforce the SEP owner's entitlement to financial compensation for the implementer's exploitation of its SEPs; and secondly, the implementer is entitled to an uninterrupted licence from day one provided that it is willing to take a licence on FRAND terms. These submissions do Judgment Approved by the court for handing down. *Samsung v ZTE* 59. 60. 61. 62. 63. not assist Samsung in the present case because the parties are agreed that there should be an interim licence, and the only dispute is as to which court should determine FRAND terms for the final cross-licence. I agree with Samsung and the judge that the starting point here is that the English courts were first seised of the dispute as to what terms for the final cross-licence are FRAND. Although counsel for ZTE criticised Samsung for commencing the proceedings when and in the manner they did, the judge did not accept this criticism and there is no challenge by ZTE to that aspect of his decision. Counsel for Samsung submitted that the Patents Court was a suitable forum for the determination of the dispute because (i) it is a neutral forum in the sense that neither of the parent companies is domiciled here and (ii) it is experienced in FRAND determination. I accept that submission, but it does not follow that other fora would not be equally suitable for the determination of the dispute. In that regard I would point out that the fact that a particular forum does not yet have experience in FRAND determination does not mean that it would not be perfectly competent to do so. For example, there can be no doubt that the Munich I Regional Court and the UPC would both be entirely competent (in every sense) to undertake FRAND determination as well as being neutral fora. The judge rejected Samsung's criticisms of the Chongqing Court, and there is no challenge by Samsung to that part of his decision. It follows that, subject to the question of neutrality, it is also a suitable forum for the determination of the dispute. The judge made no finding that Chongqing was not a suitable forum because it is located in ZTE's home state. Samsung contend by their respondents' notice ground 1 that it is inappropriate for ZTE to insist upon determination by a court in their home state. In support of that contention Samsung rely upon (i) the general practice in the arbitration of international commercial disputes of appointing arbitrators of neutral nationality and (ii) the agreement by the parties that this would be appropriate in the present context (see paragraph 39 above). Samsung are careful to make it clear, however,

that they do not suggest that the Chongqing Court is liable to be biased. As counsel for ZTE submitted, Samsung's contention is contrary to commonly-accepted principles of private international law. By virtue of Article 4 of European Parliament and Council Regulation 1215/2012/EU of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels I Regulation), the normal rule of jurisdiction is that a defendant should be sued in the courts of the Member State in which it is domiciled. Other bases of jurisdiction are exceptions to that normal rule. Similarly, applying common law principles in both the service out and forum non conveniens contexts, the location of the parties is a factor favouring forum, not against it. It is true that ZTE is the claimant in the Chongqing Court, not the defendant. It is also true that, on this basis, the courts of South Korea would be an equally suitable forum. The point remains that there can be no objection of principle to a party's desire to litigate in the courts of its home state. Furthermore, as the judge recognised at [108]-[109] (see paragraph 46 above), in the present case there are considerations of practicality which favour this, at least when viewed from ZTE's perspective. Judgment Approved by the court for handing down. Samsung v ZTE 64. 65. 66. 67. 68. 69. 70. 71. As Samsung emphasise, ZTE have not challenged the jurisdiction of the English courts. Furthermore, as the judge noted, although the interim licence terms proposed by ZTE in March would have required the dismissal or stay of all other proceedings pending the determination of the Chongqing Court, revised terms proposed by ZTE in April excepted these proceedings from that. It follows that the Patents Court will determine what terms are FRAND at the trial scheduled for 12 January 2026 whether the declarations made by the judge stand or not. Samsung contend by their respondents' notice ground 2 that ZTE's proposed interim licence terms amount to a forum non conveniens challenge by the back door. As ZTE submit, however, this argument relies on a non sequitur. It is undisputed that the English courts have jurisdiction to determine Samsung's claims, including their claim for a FRAND determination. It does not follow, however, that ZTE are obliged to commit, in advance of the English FRAND trial, to be bound by the FRAND terms set by the English courts in preference to the terms set by the Chongqing Court. As ZTE emphasise, Samsung's challenge to the jurisdiction of the Chongqing Court has failed. Hence the Chongqing Court is already engaged in FRAND determination. This means that, as the judge rightly concluded, the proceedings brought by ZTE in Chongqing are unnecessary and duplicative. At best, they have led to a significant increase in costs for both parties for no good reason. Worse, this creates a real risk of inconsistent decisions. These are precisely the problems I identified in *Nokia v OPPO* at [16]. It is important to recognise, however, that, if ZTE had commenced proceedings in the Chongqing Court first, the boot would have been on the other foot. In those circumstances, any proceedings brought by Samsung in England would have been equally unnecessary and duplicative. ZTE contend that, although the judge said that "first seised" was "a tie breaker in an appropriate case" rather than a "trump card" ([119] quoted in paragraph 48 above), in reality his reasoning depends on treating which court was first seised as determinative of the question of whether ZTE is acting in bad faith by attempting to force Samsung to agree to determination by the Chongqing Court. I agree with this, as I shall explain. Against that

background, I can now turn to the issue of principle. In my judgment, unless there is a legitimate and substantiated objection to the forum in question, it does not constitute bad faith for a SEP owner to seek to force an implementer to accept determination of FRAND terms by the SEP holder's preferred court rather than the implementer's preferred court. If (and I emphasise if) there is a legitimate and substantiated objection to determination of FRAND terms by the forum in question, then there may (and I emphasise may) in an appropriate case be a remedy by way of an anti-suit injunction. In the present case, however, both parties have laudably refrained from seeking anti-suit injunctions: Samsung have not applied to the English courts for an injunction restraining ZTE from pursuing the proceedings in Chongqing, nor have ZTE applied to the Chongqing Court for an injunction restraining Samsung from pursuing the English proceedings. (ZTE's application in respect of Samsung's ETSI complaint stands in a completely different position.) Judgment Approved by the court for handing down. Samsung v ZTE

72. Whether or not anti-suit relief would be available if there were a legitimate and substantiated objection to determination of FRAND terms by the Chongqing Court, Samsung have not substantiated any legitimate objection to this. Indeed, as the judge noted, Samsung have not seriously attempted to do so. 73. 74. If it is not illegitimate for the Chongqing Court to determine FRAND terms, I do not see how it can be bad faith for ZTE to use legal proceedings which it is not suggested are not otherwise properly open to ZTE to put pressure on Samsung to agree to that course. Such conduct is unattractive, and I should not be taken to endorse it, but that is not sufficient to constitute bad faith. As I have explained in numerous judgments, a SEP portfolio will typically include patents which subsist in multiple jurisdictions. Patents are territorial, but the contractual defence provided by the FRAND obligation is global. It follows that the possibilities both of parallel SEP infringement proceedings and parallel FRAND determinations in multiple jurisdictions are inherent in the current system. The principled answer to this might be that the court first seised should determine what terms are FRAND, but that answer has a number of negative consequences. One of these is that it encourages forum shopping by pre-emptive commencement of proceedings. As the judge recognised, forum shopping is to some extent inevitable in this context, but it should be discouraged rather than encouraged. Even if the English courts consider that jurisdiction should be exercised by the court first seised, this cannot be said to be an answer that commands universal assent: as I pointed out in *Nokia v OPPO*, there are no internationally agreed jurisdictional rules applicable to FRAND disputes. If the principle of ceding jurisdiction to the court first seised was internationally accepted, the Chongqing Court would have declined jurisdiction as the court second seised. The fact that the English courts were first seised is therefore not a sufficient basis for a conclusion that ZTE have acted in bad faith. Given that ZTE were otherwise entitled to bring the infringement proceedings of which Samsung complain, there is nothing else to support the conclusion that ZTE have acted in bad faith. 75. I would add that another problem which this case illustrates is that, if jurisdiction is not ceded to the court first seised, the court first seised is not guaranteed to be the first to decide. As the parties agreed during the course of argument,

the consequences of this will have to be worked out in due course. Ground 3: unduly extensive relief 76. This ground was not developed by counsel for ZTE in oral argument, and it is unnecessary to say anything about it. Appeal ground 4: comity 77. ZTE contend that the declarations made by the judge, and in particular declarations 3 and 4, contravene comity. ZTE's argument is a straightforward one. The useful purpose identified by the judge for making these declarations was to force ZTE to reconsider its position as to its preferred forum. ZTE submit that this is a blatant interference with the Chongqing Court, because it is intended to discourage ZTE from pursuing proceedings there which the Chinese courts have held to be entirely proper from a jurisdictional perspective. ZTE argue that this goes significantly further than Judgment Approved by the court for handing down. *Samsung v ZTE* this Court did in either *Panasonic v Xiaomi* or *Lenovo v Ericsson*. It is no answer to say, as the judge did, that it is for the Chongqing Court to decide what to do, because Samsung's objective is to get ZTE to abandon the Chongqing proceedings. 78. It is not necessary to decide whether to allow the appeal on this ground given that I would allow it on grounds 1 and 2. It is sufficient to say that it seems to me that comity is a real concern in this case.

Conclusion

79. For the reasons given above I would allow the appeal. The only question which remains is whether all the declarations made by the judge should be set aside, or only declarations 1, 3 and 4. Declaration 2 simply reflects what is agreed between the parties, and is jurisdictionally neutral because it leaves open whether, and if so by which court, the terms of the interim licence should be adjusted to reflect the terms of the final cross-licence. For example, one possibility would be for the sum paid for the interim licence simply to be treated as a credit against whatever sum is found payable for the final cross-licence. Although a declaration would not normally be made merely because the parties agreed to it, the question here is whether to set aside a declaration that has already been made. In any event, this case is rather exceptional. During the course of argument neither party raised any specific objection to leaving declaration 2 standing, but they had not had the chance properly to consider the matter. I would therefore give the parties the opportunity to file brief written submissions on this question. 80. I would add that I agree with the observations of Birss LJ in his judgment, and in particular what he says in paragraphs 84 and 85. Lord Justice Birss: 81. 82. 83. For the reasons given by Arnold LJ, I also would allow this appeal. Given the importance of this matter and the fact we are disagreeing with a judge of significant experience in this field, I will add a few observations of my own. As my lord has explained, this case is quite different from the previous cases concerned with interim licences in a FRAND context. In this dispute there are two competent courts both seised with the issue of making a global FRAND determination as between these two parties. The judge rejected Samsung's criticisms of the Chongqing Court and there is no appeal from that conclusion. The judge also found (and again there is no appeal) that the behaviour of ZTE which was said to be in bad faith was not directed to extracting supra-FRAND rates. These points alone make the case very different from *Panasonic v Xiaomi* and *Lenovo v Ericsson*.

Rather, as the judge held, what ZTE were doing was directed at trying to force Samsung to agree to a FRAND determination in Chongqing rather than London. To “force” ZTE to reconsider was the reason for making the interim licence declarations below. A striking aspect of ZTE’s case on this appeal was that a flaw with the scheme of the declarations and interim licence made by the judge was, conversely, that it was not just designed to force ZTE to reconsider Chongqing, it has the effect of forcing ZTE to agree to a FRAND determination in London instead. Despite counsel for Samsung’s best efforts to submit to the contrary, in my judgment there is a Judgment Approved by the court for handing down. *Samsung v ZTE* 84. 85. 86. significant degree of symmetry between the positions of the two parties in this case. I can see that this aspect will not have been as apparent to the judge below given the range of issues the court had to address, but as matters now stand on this appeal, it is stark. At this stage it is worth taking a step back. The concept of an interim licence is inherent in the 2015 landmark decision of the Court of Justice of the European Union C-170/13 *Huawei v ZTE* [EU:C:2015:477]. There at [67] the CJEU identified the idea that in some circumstances it might be for the implementer, in advance of a final resolution of the dispute between the SEP holder and the implementer, to provide appropriate security for the royalties which will end up being due in a licence agreement. Naturally, the CJEU did not need to dwell on this point in detail or work through all the possible permutations, many of which have only emerged in the decade since that decision was given. The key thing was to identify the principle. Once that principle is identified, one is then entitled to ask: what is it that the implementer is getting in return for the financial commitment they are making? Although not spelled out explicitly by the CJEU, the answer is fairly simple. The implementer is demonstrating their willingness to pay for the licence, once the terms can be agreed or resolved, and so, in the meantime the SEP holder ought not to be able to take the implementer’s products off the market by means of an injunction. In other words what the implementer gets in return for the financial commitment is, at least implicitly, a form of licence pending the final resolution of the dispute. It could be called an interim licence. Assuming the sum being committed or paid is calculated on a global basis, then the willingness of the implementer which it embodies is also global in nature. I would have thought that in most cases, if it was required, a simple determination by a court of the appropriate financial terms to operate in the interim until the parties had signed a final agreement, is all that would be needed, with the sum paid (or committed as security) being taken into account appropriately in the terms of that final agreement. That would apply whether the final terms were agreed in negotiation or settled by any competent court or arbitration. No problem related to alleged bad faith or a lack of comity ought to arise. One would also have thought an interim licence settled in circumstances like these ought to be jurisdiction-neutral, e.g. by providing expressly that any competent court can take its terms into account and by not forcing jurisdiction on unwilling parties. The difficulty in this case is that the terms of the interim licence itself and the declarations made are designed to seek to force one party to do something they clearly do not wish to do and have no intention of doing. Ground 3 of the appeal was that the particular declaratory relief granted went beyond what was necessary to respond to the mischief identified, even if the judge had been right to

identify that mischief. As Arnold LJ has explained, this ground was not developed in oral argument. I will only say that I believe there was scope for argument about the terms of the declarations in this case even if some form of response to what ZTE were doing was appropriate. These terms will always be highly fact-specific and I would have liked to hear full argument about the merits and proportionality of declarations designed to force a party to do or not do something they are clearly unwilling to do, even if their conduct is to be deprecated. I can see utility in a simple declaration of what the terms of an interim licence should be as between the given parties. I use the term “should” Judgment Approved by the court for handing down. Samsung v ZTE advisedly because it does not force anyone to do anything but it may help later to expose and clarify what the motives of one party really are. It might not be necessary or appropriate to go any further. I would also like to have heard full argument about declarations which refer to a willing licensee or licensor in general rather than the parties themselves, and declarations which contain conditional clauses like declaration 4. 87. 88. The consequences of how to deal with more than one court being seised with the issue of determining what is FRAND will have to be worked out internationally over time on a case by case basis, but the helpful possibility of payment or security from the paying implementer in advance of that determination, and the interim licence implicit in it, ought not to be turned into a tool to force that issue. If a party really is acting in bad faith, then it can hardly complain if the court seeks to take steps to prevent it, but there may nevertheless still be grounds for a graduated response. For example one would generally wish to avoid creating an impression of a lack of comity, even if analytically a given response does not in fact amount to that. However as I have explained, these issues do not arise in this case because, as my lord has explained and I agree, there is no bad faith here. Lord Justice Peter Jackson: 89. I agree with both judgments.

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