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Case Nos: HC12A02048, HC12C02909

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PATENTS COURT

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 December 2013

Before :

THE HON MR JUSTICE ARNOLD

Between :

HTC CORPORATION
- and -
NOKIA CORPORATION

Claimant

Defendant

Guy Burkill QC (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Michael Tappin QC and **Miles Copeland** (instructed by **Bird & Bird LLP**) for the **Defendant**

Hearing dates: 28, 29 November 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON MR JUSTICE ARNOLD

MR JUSTICE ARNOLD :

Introduction

1. On 30 October 2013 I gave judgment in these claims, concluding that the Claimant (“HTC”) had infringed the Defendant’s (“Nokia’s”) European Patent (UK) No. 0 998 024 (“the Patent”). On 28 November 2013 I heard argument on a number of issues with regard to the order that should be made in consequence of that conclusion and made decisions in respect of those issues. In particular, I decided to grant Nokia a final injunction to restrain infringement of the Patent, to grant HTC permission to appeal (albeit on more limited grounds than HTC had sought permission in respect of) and to grant HTC a partial stay of the injunction (and of an order for delivery up) pending the judgment of the Court of Appeal. I clarified the scope of the stay pending appeal at a further hearing on 29 November 2013 and also granted HTC a further stay until 4 pm on 6 December 2013 in order to enable HTC to apply to the Court of Appeal for permission to appeal against my refusal of a wider stay. These are my reasons for deciding to grant a final injunction and for granting a partial stay.

Final injunction

2. Nokia sought a final injunction in order to restrain HTC from continuing to infringe the Patent. HTC did not dispute that it intended to continue to commit the acts which had been found to infringe if it was not restrained, but contended that the court should exercise its discretion to refuse an injunction and to award damages in lieu.

Applicable principles

3. *General principles.* An injunction is an equitable remedy. Even if the claimant establishes that his legal rights have been infringed, and that there is a threat by the defendant to continue the infringing acts, the court has a discretion as to whether or not to grant an injunction. The court may in an appropriate case award damages in substitution for an injunction in the exercise of the jurisdiction originally conferred by section 2 of the Chancery Amendment Act 1858, commonly known as Lord Cairns’ Act, and now found in section 50 of the Senior Courts Act 1981.
4. Section 2 of the Chancery Amendment Act 1858 provided:

“In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages may be assessed in such manner as the Court shall direct.”
5. As was explained in *Jaggard v Sawyer* [1995] 1 WLR 269 by Sir Thomas Bingham MR at 276D-27A and by Millett LJ at 284B-F, the principal purpose of this provision was to enable the Court of Chancery to award the claimant damages instead of

sending him to the common law courts to obtain them, but from the outset it was recognised that it did more than this: it also enabled damages to be awarded in respect of future acts.

6. Section 50 of the Senior Courts Act 1981 now provides:

“Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance”.

7. The two leading authorities on the exercise of this discretion are the decisions of the Court of Appeal in *Shelfer v City of London Lighting Co Ltd* [1895] 1 WLR 287 and *Jaggard*.

8. *Shelfer* establishes that a claimant is *prima facie* entitled to an injunction to restrain a person from committing an act which invades the claimant’s legal right. The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant’s right on payment of damages assessed by the court. Accordingly, it is only in special circumstances that the court will exercise its discretion to award damages in lieu of an injunction. AL Smith LJ said at 322-323 that it was “a good working rule” that:

“(1) If the injury to the plaintiff’s legal rights is small,
(2) And is one which is capable of being estimated in money,
(3) And is one which can be adequately compensated by a small money payment,
(4) And the case is one in which it would be oppressive to the defendant to grant an injunction: –
then damages in substitution for an injunction may be given”.

He went on to make it clear that what constituted a “small money payment” was a relative matter. Subsequent cases have emphasised that AL Smith LJ’s good working rule is only that: it is not a statute or straightjacket.

9. In *Jaggard* Sir Thomas Bingham MR stated at 283B-C:

“It is important to bear in mind that the test is one of oppression, and the court should not slide into application of a general balance of convenience test.”

Similarly, Millett LJ stated 288B-C:

“The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is *prima facie* entitled?”

10. As Millett LJ explained at 286B-D and 287B-F:

“It has always been recognised that the practical consequence of withholding injunctive relief is to authorise the continuance

of an unlawful state of affairs. If, for example, the defendant threatens to build in such a way that the plaintiff's light will be obstructed and he is not restrained, then the plaintiff will inevitably be deprived of his legal right. This was the very basis upon which before 1858 the Court of Chancery had made the remedy of injunction available in such cases. After the passing of Lord Cairns's Act many of the judges warned that the jurisdiction to award damages instead of an injunction should not be exercised as a matter of course so as to legalise the commission of a tort by any defendant who was willing and able to pay compensation. ...

Nevertheless references to the 'expropriation' of the plaintiff's property are somewhat overdone, not because that is not the practical effect of withholding an injunction, but because the grant of an injunction, like all equitable remedies, is discretionary. Many proprietary rights cannot be protected at all by the common law. The owner must submit to unlawful interference with his rights and be content with damages. If he wants to be protected he must seek equitable relief, and he has no absolute right to that. In many cases, it is true, an injunction will be granted almost as of course; but this is not always the case, and it will never be granted if this would cause injustice to the defendant. Citation of passages in the cases warning of the danger of 'expropriating' the plaintiff need to be balanced by reference to statements like that of Lord Westbury LC in *Isenberg v East India House Estate Co Ltd* (1863) 3 De G J & S 263, 273 where he held that it was the duty of the court not

'by granting a mandatory injunction, to deliver over the defendants to the plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make, but to substitute for such mandatory injunction an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained.'"

11. There is a considerable body of authority on the application of these principles in real property cases. It is clear from this case law that, in considering whether the grant of an injunction would be oppressive, the extent to which the claimant asserted his rights, what knowledge the defendant had of the claimant's rights when and what the defendant did when faced with the problem are particularly relevant considerations. Whether the claimant sought an interim injunction and whether the defendant sought negative declaratory relief appear to be relevant factors, but the weight of these factors appears to vary from case to case. A potentially decisive factor is if the claimant makes it clear that all he is really interested in is money. This is illustrated by *Gafford v Graham* [1999] 77 P & CR 73. In that case the plaintiff's solicitors had written a letter making it clear that the plaintiff would be prepared to accept a payment of £100,800 in settlement of the dispute. In those circumstances, Nourse LJ said at 85-86:

“His willingness to settle the dispute on payment of a cash sum can properly be reflected by an award of damages. Nor, once that is established, can it be an objection that the amount of damages may be large. The injury to the plaintiff's legal rights must be adequately compensated. In such a case the first and third conditions of the good working rule do not apply.

I summarise the position as follows. The essential prerequisite of an award of damages is that it should be oppressive to the defendant to grant an injunction. Here that prerequisite is satisfied. It would be oppressive and therefore unfair to the defendant to allow the judge's injunctions to stand. The plaintiff should receive an award of damages instead.”

12. As both Sir Thomas Bingham MR at 280H-281A and Millett LJ at 285F-286B made clear in *Jaggard*, where damages are awarded in lieu of an injunction, they are to be assessed “once and for all” in respect of all future infringements, so that any further claim in respect of future infringements would be struck out as *res judicata*. The quantum of such damages will be the amount of money which could reasonably have been demanded by the claimant for his consent to such acts (sometimes referred to as “negotiating damages”), in accordance with the principles which I reviewed in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), [2012] RPC 29 at [383]-[386].
13. It follows that the principles which are applicable to the assessment of damages in lieu of an injunction are essentially the same as those which are applicable to the assessment of damages for past acts of infringement where the claimant does not, or cannot, claim lost profits. There is a key difference, however. Damages for past acts of infringement will be assessed as the sum which would have been agreed between a willing licensor and a willing licensee in respect of the acts which have been actually committed by the defendant. Damages in lieu of an injunction will be assessed as the sum which would be agreed between a willing licensor and a willing licensee for any future acts of infringement which the defendant might commit.
14. Where the right in question is a patent, and the patent has a considerable period to run, this poses an obvious problem if damages are assessed as a lump sum. A possible solution to this problem is to order payment of a running royalty in lieu of an injunction. As counsel for HTC submitted and counsel for Nokia accepted, I consider that the court would have jurisdiction to make such an order. Leaving aside the potential difficulties in assessment of the royalty rate and royalty basis, the question arises as to whether such an order should contain other terms. Should the defendant have a duty to account? Should the claimant have the right to inspect the defendant's books? What if the defendant becomes insolvent? Such questions can easily be multiplied. In the case of consensual patent licences, these questions are generally addressed these days by licence agreements of considerable sophistication. Is the court to include similar terms in its order? If so, the effect of such an order would be almost indistinguishable from a compulsory licence. I shall return to this point below.
15. The alternative would be to require the defendant to pay a high upfront lump sum licence fee. But this would be even more difficult to assess, and would inevitably incur the risk that the fee turned out to be too small or too high.

16. *Intellectual property cases prior to the Enforcement Directive.* The application of the principles laid down in *Shelfer* and later authorities to injunctions to restrain infringements of intellectual property rights has been considered in a number of cases. For reasons that will appear, it is important to distinguish between cases decided before and after the Enforcement Directive was required to be implemented. So far as authorities before the Directive are concerned, two cases in which an injunction was refused and an order made for damages to be assessed are of particular note.
17. The first is *Banks v EMI Songs Ltd (No 2)* [1996] EMLR 452, where the claimant was the author of, and owner of the copyright in, the majority of the lyrics of a pop song which had been recorded and released by the defendants without her consent. Jacob J made an order for damages to be assessed in lieu of an injunction for reasons he expressed at 459 as follows:

“It seems to me that I have to consider the position as of today. In theory the copyright may last another one hundred years. Who is to know whether or not it is likely to be valuable or not? Certainly the defendants wish to press more records. I, accordingly, do not think that this is a case which falls within head (3) of *A.L. Smith LJ*, one to be adequately compensated by a small money payment. It does not follow, however, that this is a case for the grant of an injunction. As I have said, it stands out a mile that what the plaintiff wants is a monetary payment commensurate with the amount of use of her work.

I have found it difficult to decide which way to go. On the one hand, if I grant the injunction the parties will be left to negotiate the payment. On the other hand, if I do not grant the injunction, damages will have to be assessed on the basis that this was an exclusive right of the plaintiff and the defendants were paying for invasion of that exclusive right.

In the end, I have come to the conclusion that the better course is to withhold the injunction. In so doing, I wish to make it absolutely clear that I regard this as a wholly exceptional case outside head (3) of *Shelfer*. The fact is that here the defendants have been exploiting these lyrics for now eleven years. Probably most of the commercial use has already occurred. That seems to be accepted by both sides. There is a large element of trying to shut the stable door after the horse has bolted. The plaintiff having made it plain that what she really wants is money, I think the best way to proceed is that there should be a claim as to how much that sum should be. I therefore refuse to grant an injunction.”

18. The second is *Navitaire Inc v EasyJet Airline Co Ltd (No. 2)* [2005] EWHC 282 (Ch), [2006] RPC 4. In that case Pumfrey J held that the defendants had infringed the claimant’s copyright by copying the names of the columns in a table in a database. He refused to grant an injunction for reasons he expressed as follows:

“101. ... the grant or refusal of a final injunction is not merely a matter of the balance of convenience. Justice requires that the court observe the principles enunciated in *Shelfer*’s case and remembers that if the effect of the grant of an injunction is not oppressive the defendant cannot buy his way out of it, even if the price, objectively ascertained, would be modest. My understanding of the word ‘oppressive’ in this context is that the effect of the grant of the injunction would be grossly disproportionate to the right protected. The word ‘grossly’ avoids any suggestion that all that has to be done is to strike a balance of convenience.

...

113. Is it oppressive, in the sense that I understand that word is used in *Jaggard v Sawyer*, to require the database to be altered so as to accommodate this finding? The evidence is that the work can be done: data can be migrated from the old table into the new in the live database. The whole process is described in Mr Pritchard’s fourth witness statement. On the other hand, much testing and checking must be done, and the operation is attended with some risk. Mr Arnold Q.C. submits that the fault is slight, and the cure grossly disproportionate. Because I consider that easyJet are entitled to know what the data stored in the OpenRes history table was and are entitled to require BulletProof to design a journal-type database table that will accommodate the existing data after migration, I think that this submission is justified. The breach is small. Damages can be assessed upon a willing licensor/licensee basis, on the footing that the licensee is entitled to receive the information that I have described in respect of the data to be migrated into the new database. I will order an enquiry accordingly.”

19. *The Enforcement Directive*. Articles 3 and 12 of European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (“the Enforcement Directive”) provide:

“Article 3

General obligation

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Article 12

Alternative measures

Member States may provide that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this section if that person acted unintentionally and without negligence, if execution of the measures in question would cause him/her disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.”

20. There has been considerable debate amongst scholars as to the relationship between the mandatory requirements of Article 3 and the option granted by Article 12. For present purposes, this debate is academic, for two reasons.
21. First, the United Kingdom has not specifically implemented either Article 3 or Article 12. As I understand it, the United Kingdom’s position is that the court’s general powers under our law are sufficient to ensure compliance with Article 3 and to enable pecuniary compensation to be awarded instead of an injunction where appropriate.
22. Secondly, the Court of Justice of the European Union has repeatedly held that Article 3(2) requires courts to consider the proportionality of injunctions to restrain infringements of intellectual property rights: see in particular Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271 at [68], Case C-235/09 *DHL Express France SAS v Chronopost SA* [2011] ECR I-2801 at [58], Case C-324/09 *L’Oréal SA v eBay International AG* [2011] ECR I-6011 at [140]-[144], Case C-70/10 *Scarlet Extended SA v Société Belge des Auteurs, Compositeurs et Editeurs (SABAM)* [2011] ECR I -11959 at [36] and Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 at [34] and see also the recent opinion of Advocate General Cruz Villalón in Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film GmbH* (26 November 2013) at [75]-[76].
23. Consistently with this, in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2011] EWCA Civ 424 Jacob LJ said at [56]:

“I should add a word about the Judge’s references to proportionality and the passage of time. Whether or not conventional English law principles as to the grant of an injunction embody that concept (I rather think they do, though the now fashionable word ‘proportionate’ is not to be found in the older case law), in the case of enforcement of an intellectual property right, the requirement is explicit. The Enforcement Directive (2004/48/EC) by Article 3(2) *inter alia* requires that measures to enforce intellectual property rights shall be proportionate. It is accepted that a claim for misuse of technical trade secrets such as the present is a claim to enforce an

intellectual property right. So the Judge was right to consider proportionality.”

24. On the other hand, in the earlier case of *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors Group* [2009] EWCA Civ 1513, [2010] FSR 15 at [23]-[25] Jacob LJ expressly approved Pumfrey J’s test in *Navitaire* as being consistent with Article 3 of the Enforcement Directive.
25. Counsel for HTC submitted that, in the light of Article 3(2) of the Enforcement Directive and the jurisprudence of the CJEU, Pumfrey J’s formulation of the test in *Navitaire* required revision. He submitted that an injunction should be refused if it would be significantly disproportionate, and not merely if it would be grossly disproportionate. Counsel for Nokia supported Pumfrey J’s formulation of the test.
26. In my view, the time has come to recognise that, in cases concerning infringements of intellectual property rights, the criteria to be applied when deciding whether or not to grant an injunction are those laid down by Article 3(2): efficacy, proportionality, dissuasiveness, the avoidance of creating barriers to legitimate trade and the provision of safeguards against abuse.
27. So far as proportionality is concerned, it should also be recognised that the proportionality of an injunction to restrain infringement of an intellectual property right may depend on which, if any, other rights are in play. A number of the CJEU cases referred to above have concerned conflicts between intellectual property rights and other fundamental rights guaranteed by the European Convention on Human Rights and/or the Charter of Fundamental Rights of the European Union, such as the right to respect for one’s private and family life, home and communications. In those circumstances, the correct approach is that I stated in *Golden Eye International Ltd v Telefónica UK Ltd* [2012] EWHC 723 (Ch), [2012] RPC 28 at [117], which was approved by the Supreme Court in *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55, [2012] 1 WLR 3333 at [45] (Lord Kerr of Tonaghmore JSC).
28. In the present case, however, HTC does not rely upon any countervailing rights of that nature. Therefore it is not a question of balancing one right against another. Furthermore, as I have pointed out, Article 3(2) does not merely require that remedies for infringement should be proportionate and avoid creating barriers to legitimate trade, it also requires that they should be effective and dissuasive. As the jurisprudence of the English courts summarised above recognises, the effect of refusing an injunction to restrain future infringement is, to that extent, to deprive the claimant of its legal right. That is particularly true in the case of patents, which are monopolies and thus the essence of the right is the patentee’s right to give or withhold his consent to another person’s exploitation of the patented invention. Thus the grant of damages in lieu of an injunction is inevitably less effective and dissuasive than the grant of an injunction.
29. *Compulsory licences and TRIPS*. A further consideration in the case of patents is that there are very limited circumstances in which patentees can be compelled to grant licences of their patents. In the United Kingdom, compulsory licences are only available in accordance with section 48 to 48B of the Patents Act 1977. Since Nokia is incorporated in a state which is a member of the World Trade Organisation, section 48A is the relevant provision. This gives effect to the United Kingdom’s obligations

under Article 31 of Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), which forms Annex 1C to the Agreement establishing the World Trade Organisation signed in Morocco on 15 April 1994, to which the European Union and all its Member States are parties.

30. The CJEU has repeatedly held that, in a field of intellectual property law where the European Union has legislated, national courts must interpret both European and domestic legislation as far as possible in the light of the wording and purpose of relevant international agreements to which the EU is a party, and in particular TRIPS: see Case C-53/96 *Hermès International v FHT Marketing Choice BV* [1998] ECR I-3603 at [28]; Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v Tuk Consultancy BV* [2000] ECR I-11307 at [47]; Case C-89/99 *Schieving-Nijstad VOF v Groeneveld* [2001] ECR I-5851 at [35]; Case C-49/02 *Heidelberger Bauchemie GmbH* [2004] ECR I-6152 at [20]; Case C-245/02 *Anheuser-Busch Inc v Budejovicky Budvar NP* [2004] ECR I-10989 at [55]-[57]; and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co Inc* [2007] ECR I-7001 at [35]. It follows that Article 3(2) of the Enforcement Directive must be interpreted and applied consistently with Article 31 of TRIPS.
31. Article 44(2) of TRIPS permits WTO members to limit remedies available against use authorised by governments in accordance with Article 31 to payment of remuneration in accordance with Article 31(h). It does not follow that an injunction to restrain infringement of a patent can never be withheld and damages awarded in lieu where no compulsory licence is available, however. Article 30 of TRIPS provides:

“Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”

In my view Article 30 permits the recognition of a limited jurisdiction to withhold an injunction in special circumstances. In considering whether there are special circumstances, account may be taken of the legitimate interests of third parties, but not so as unreasonably to prejudice the legitimate interests of the patent owner.

32. *Conclusion.* Drawing these threads together, I consider that Article 3(2) of the Enforcement Directive permits and requires the court to refuse to grant an injunction where it would be disproportionate to grant one even having regard to the requirements of efficacy and dissuasiveness. Where the right sought to be enforced by the injunction is a patent, however, the court must be very cautious before making an order which is tantamount to a compulsory licence in circumstances where no compulsory licence would be available. It follows that, where no other countervailing right is in play, the burden on the party seeking to show that the injunction would be disproportionate is a heavy one. I suspect that the practical effect of this approach is little different to Pumfrey J’s test of “grossly disproportionate”.

Assessment

33. Between them, the parties relied upon a considerable number of factors as bearing on the court's determination of this issue. In reaching my decision I took all of those factors into account, but the following factors are the ones which I considered most significant. As will become apparent, some of these are more relevant to the question of a stay pending appeal than to the question of whether a final injunction should be granted at all. Nevertheless it is convenient to address them here.
34. *The Patent.* The Patent will expire on 28 October 2019. It thus has nearly six years to run. If an injunction is refused, HTC will be able to commit any act which would otherwise infringe the Patent for the whole of that period. It follows that damages would have to be assessed sometime in 2014 on a basis which would have to cover the possibility both of HTC marketing different products to those considered down to that date and of HTC doing so in different technological and commercial circumstances to those prevailing down to that date. This would require the court to undertake a difficult task in futurology. It is not a complete answer to this point to submit, as counsel for HTC did, that parties frequently agree consensual patent licences with lengthy terms.
35. The Patent is not essential to any telecommunications standard. Accordingly, the considerations that need to be considered in the case of standard-essential patents are not relevant here.
36. *Chronology of the litigation.* HTC has been a licensee of Nokia's portfolio of standard-essential patents since 2003. For the reasons explained in Confidential Annex 3 to my previous judgment, HTC has known since October 2008 that Qualcomm customers were not licensed under Nokia's patents without a separate licence from Nokia and that Nokia was offering licences for certain Nokia patents to Qualcomm customers. There is no evidence that HTC had any reason to believe that its position would be any better so far as Broadcom chips were concerned. At some point in 2011, Nokia communicated to HTC its belief that HTC was infringing a number of Nokia's non-essential patents and asked HTC to stop using the technology or alternatively to take a short term licence to give HTC time to work around the patents. HTC did neither of those things, however.
37. On 2 May 2012 Nokia sued HTC for infringement of the Patent (and other patents) in Germany. (It also brought proceedings in the USA in respect of various patents.) Nokia's complaint of that date alleged infringement by HTC phones containing Broadcom BCM4239 and BCM4330 chips. The allegation of infringement was supported by circuit diagrams showing the features of the claims. These were based on reverse engineering analyses (so-called "teardowns") of the chips conducted on behalf of Nokia by a company called UBM TechInsights. (I interpolate that HTC's position at earlier stages of these proceedings were that these analyses were unreliable, yet at the hearing on 28 November 2013 counsel for HTC submitted that they were indicative, if not definitive).
38. In response to the German proceedings for infringement, HTC commenced these proceedings by claiming for revocation of the Patent on 17 May 2012 (it also applied to revoke other Nokia patents). Nokia brought a cross-action for infringement on 23 July 2012 (it also brought claims for infringement of other patents). Originally, Nokia

complained of infringement of the Patent by various HTC phones incorporating Broadcom BCM4329 and BCM4330 chips (i.e. the same chips as in Germany). No application was made by Nokia for an interim injunction.

39. In November 2012 HTC launched its 8S and 8X phones containing the Qualcomm WTR1605 chip in the UK. In December 2012 HTC launched its One SV phone containing the Qualcomm WTR1605(L) and Broadcom BCM4334 chips in the UK. Nokia commissioned teardowns of these chips from UBM TechInsights. On 22 March 2013 (Broadcom BCM4334) and 30 April 2013 (Qualcomm WTR1605(L)) Nokia wrote to HTC alleging infringement of the Patent by phones containing these chips. Also on 30 April 2013 Nokia sent HTC copies of the UBM TechInsights reports. On 16 May 2013 Vos J granted Nokia permission to amend its Particulars of Infringement to raise these allegations. At the same time, Nokia also obtained permission to amend its claim to allege infringement by phones containing Qualcomm RTR6285 and RTR6285A chips.
40. In the meantime, HTC launched its One phone, which contains the Qualcomm WTR1605L chip, in March 2013. This phone also contains a Broadcom BCM4335 chip. As described below, the One is currently HTC's flagship phone.
41. HTC subsequently counterclaimed for a declaration of non-infringement in relation to phones containing Qualcomm RTR6285 and RTR6285A and Broadcom BCM4335 chips. On 17 September 2013 Nokia admitted that the Bluetooth transmit path of the Broadcom BCM4335 chip did not infringe the Patent. On 25 September 2013 Nokia admitted that the transmit path from the baseband input to the output of the radio frequency upconverter of the Qualcomm RTR6285 and RTR6285A transceiver chips did not infringe the Patent. There is no evidence that these three chips infringe in any other way.
42. HTC launched its One Mini phone in August 2013. This phone contains a Qualcomm WTR1605L chip and a Broadcom BCM4334 chip. HTC has revealed that the decision to include the Broadcom BCM4334 chip in this phone was taken on 2 January 2013 (i.e. about eight months after Nokia started the German proceedings).
43. HTC launched its One Max phone in October 2013. This phone also contains a Qualcomm WTR1605L chip. It does not contain any of the Broadcom chips I have mentioned. It appears that by this point in time HTC had stopped selling the One SV in the UK.
44. The trial took place on 7-11 October 2013 and I gave judgment on 30 October 2013. By that date HTC had known of the allegation of infringement by the Broadcom BCM4329 and BCM4330 chips for nearly 18 months and had known of the allegation of infringement by the Qualcomm WTR1605(L) and Broadcom BCM4334 chips for six months. In my judgment I concluded that the Broadcom BCM4329 and BCM4334 chips and the Qualcomm WTR1605(L) chips infringed. Nokia's evidence is that there is no material difference between the Broadcom BCM4329 and BCM4330 chips for this purpose, and HTC has not adduced any evidence to the contrary.
45. HTC is close to launching the successor flagship model to the HTC One. HTC has not revealed the launch date. Nokia has adduced evidence which suggests that the launch date is in the first quarter of 2014 and possibly as early as February 2014. HTC has

not contradicted this. HTC's evidence is that the new phone will not contain any chips which have been found to infringe the Patent. HTC's witness Brad Lin claims in paragraph 11 of his first witness statement that "The features of the chips selected by HTC [for the new phone] are unknown to HTC, and hence I do not know if they infringe EP 024". As expressed, the first part of this sentence is simply incredible. I shall assume that what Mr Lin means is that HTC does not know if the chips have the features of claim 1 of the Patent. The significance of that assertion, even assuming it is correct, depends on what efforts HTC has made to find this out, which neither Mr Lin nor any other witness reveals.

46. *General characteristics of the market.* The relevant market in the present case is the UK smartphone market. This market is both valuable and growing rapidly. It was worth about \$7 billion to device vendors in 2012, and is projected to be worth \$9 billion in year ending 31 December 2013. The market is presently dominated by Apple (which has 39% of the market) and Samsung (which has 33% of the market). Both Nokia and HTC are relatively small players: Nokia has 6% of the market and HTC has 3% of the market.
47. Nokia's phones are based on the Microsoft Windows operating system, while most of HTC's phones are based on the Google Android operating system which is used by about 48% of phones sold in the UK. HTC contends that for this reason, among others, there is no direct competition between HTC's phones and Nokia's phones. Nokia disputes this.
48. HTC contends that the invention the subject of the Patent is not, in itself, a feature which affects consumer choice. Nokia does not suggest otherwise.
49. *Nokia's commercial position.* Nokia's flagship range of smartphones is the Lumia range. At least some of these phones incorporate the patented invention. Nokia contends that HTC's One family which I have found to infringe the Patent competes with the Lumia range, particularly in the sector of smartphones whose unsubsidised retail price is over the sterling equivalent of \$550. Nokia believes that it has lost sales of Lumia phones since the launch of the One range. Nokia does not suggest that the loss of sales is one-for-one, however. As I have said, HTC disputes that its phones are in direct competition with Nokia's phones.
50. *Nokia's licensees.* In December 2010 Nokia brought proceedings against Apple for infringement of the Patent in this country. At some point Nokia also brought proceedings in respect of equivalents of the Patent in both Germany and the USA. In April 2011 the disputes between Nokia and Apple were settled upon confidential terms which evidently include a licence to Apple under the Patent.
51. In April and May 2012 Nokia brought proceedings against Research In Motion Ltd ("RIM", which markets phones under the Blackberry trade mark) for infringement of non-essential patents in Germany. In November 2012 Nokia also brought proceedings in Canada, the USA and the UK. In December 2012 these proceedings were settled on confidential terms which included the grant of a licence by Nokia to RIM. HTC has asserted that the patents licensed include the Patent, and Nokia has not denied this.
52. *Other infringers.* HTC has adduced evidence that, in addition to Apple and RIM, Google/LG, Samsung and Sony are also marketing phones (or, in Sony's case, a

tablet) containing infringing chips in the UK. In the case of Samsung, Nokia and Samsung are presently engaged in arbitration in relation to Nokia's patent portfolio, but as yet that dispute has not led to either a determination or a settlement. So far as Google/LG and Sony are concerned, there is no evidence that Nokia has yet brought proceedings against either party. Nokia points out, however, that its resources for patent enforcement are finite, and accordingly it needs to prioritise.

53. *Nokia's sale of its business.* As has been widely publicised, Nokia has agreed to sell its mobile phone handset business to Microsoft. The agreement has been endorsed by Nokia's shareholders, but remains subject to regulatory approval by various competition authorities and other closing conditions. It is expected to complete some time in the first quarter of 2014. Unless and until it does complete, Nokia bears the profits and losses of the business. After completion, Nokia will retain its network business, its mapping and location business and its patent portfolio.
54. *Is Nokia only interested in money?* Counsel for HTC argued strongly that Nokia was only interested in money and therefore no injunction should be granted. Stated in that way, the argument is untenable, since it would mean that no injunction would ever be granted to restrain patent infringement. All patent owners are only interested in money. The whole purpose of a patent is to enable the proprietor to extract money from exploitation of the patented invention. A patent is not like the rights considered in the real property cases, such as rights to light, which are rights that have an amenity value which is of non-monetary significance to the proprietor.
55. In reality, what counsel for HTC meant was that Nokia was not interested in extracting money from exploitation of the patented invention by obtaining a monopoly price for its own goods as opposed to granting licences. But why does this matter? Whether the test for granting damages in lieu of an injunction is oppression (*Shelfer/Jaggard*), gross disproportionality (*Navitaire*) or even plain proportionality, the key question is the impact of the injunction on the defendant (*Shelfer* question 4). Of course the effect of denial of the injunction on the patentee must be considered (*Shelfer* questions 1-3), but why does it matter whether the effect is to deprive the patentee of the ability to charge a monopoly price for his own goods or merely to deprive him of the ability to charge an enhanced royalty in respect of the defendant's goods?
56. It seems to me that the answer to the question may be the opposite to that contended for by counsel for HTC. Where the patentee is intent on charging a monopoly price for his goods and for that reason refuses to grant consensual licences, the effect of an injunction may be to exclude the defendant from the relevant market unless the defendant has a non-infringing alternative. In some circumstances, that may be grossly disproportionate. Where, on the other hand, the patentee is willing to grant consensual licences, and seeks an injunction to compel the defendant to accept his commercial terms, the effect of the injunction will not be to exclude the defendant from the relevant market even if the defendant has no non-infringing alternative. Indeed, where the patentee has already granted licences to third parties, the effect of an injunction may simply be to prevent the defendant from exploiting the patented invention more cheaply than the third parties. It will be observed that, in either scenario, the effect of the injunction is crucially dependent on the availability of non-infringing alternatives. I shall return to this point below.

57. In the present case, I accept that it is relevant to consider the effect of refusal of an injunction on Nokia. As I see it, the effects would be as follows. First, while Nokia retains its handset business, the refusal of an injunction would not deprive Nokia of the opportunity to charge a monopoly price for its smartphones, but it would deprive Nokia of an element of competitive advantage against HTC. The extent of that competitive advantage is hotly contested – HTC says that it is negligible. Quantifying it in financial terms will be very difficult. Secondly, and more importantly for this purpose, looking beyond the time when Nokia retains its handset business, the refusal of an injunction would deprive Nokia of the ability to license exploitation of the Patent on terms of its own choosing. Instead, it will be forced to accept financial terms imposed by the court, in all likelihood on the basis of a running royalty, but without all the safeguards of a consensually negotiated licence. Assessing the appropriate royalty rate will again be a very difficult exercise, particularly because of the remaining term of the Patent and the fast-changing nature of the smartphone market both technologically and commercially.
58. *HTC's commercial position.* The UK is HTC's largest market in Europe. HTC's current flagship model is the HTC One. The HTC One, One Mini and One Max currently account for approximately 70% of HTC's sales in the UK. The other phones currently being sold by HTC in the UK are the 8S and the Desire 500. In December 2013 HTC will begin selling the Desire 300 and Desire 601. The One, One Mini, One Max, 8S and Desire 601 all contain infringing chips. It is not clear whether the Desire 300 does or not.
59. HTC sold approximately 715,000 smartphones in the UK in the period January to September 2013 with revenues of £221 million. HTC expects to achieve a significantly increased turnover from sales of the One, One Mini and One Max in the coming financial year. Accordingly, substantial quantities of phones by both number and value are affected by the findings of infringement.
60. *HTC's ability to pay.* There is no dispute that HTC is able to pay whatever damages may be awarded for past infringements of the Patent. Nor does Nokia dispute that, at present, it appears that HTC would be able to pay damages in lieu of an injunction. Nokia points out, however, that if an order is made for payment of a running royalty in lieu of an injunction, there can be no guarantee that HTC will be able to pay in, say, five years' time. Indeed, HTC made a loss in the last quarter.
61. *Only a small component.* Counsel for HTC argued strongly that an injunction would be grossly disproportionate because the infringing circuits were only very small components of much larger and more complicated commercial products, viz. HTC's smartphones. For example, the Qualcomm WTR1605 chip is just one component out of about 670 components in the HTC One phone, and the chip contains other circuits in addition to the infringing one. I entirely accept that this is so. But why does it matter? I shall leave on one side the effect of the order for delivery up which normally accompanies an injunction, because that is a one-off effect which can, if appropriate, be addressed in other ways. So far as the future effect of an injunction is concerned, I cannot see that the mere fact that the injunction only relates to a small component of a larger whole is significant.
62. Counsel for HTC relied on the traditional analogy of a patented rivet (or sometimes it is a whistle) on a battleship. An injunction to restrain infringement of that patent by

the battleship manufacturer (as opposed to the rivet supplier) would be disproportionate, he argued. But this depends on what the effect of the injunction actually is. If the battleship manufacturer has immediate access to a non-infringing alternative rivet, then the effect of the injunction on him will simply be the cost, if any, of switching from the patented rivet to the non-infringing one (both any one-off costs such as changing the production line and any ongoing cost differential in the component price). Of course, if the cost of switching from the patented rivet to a non-infringing rivet is prohibitive for some reason, then in practice the non-infringing rivet will not be a realistic alternative. Thus whether the injunction is disproportionate depends on the availability and cost of non-infringing alternatives.

63. *Only a small royalty.* HTC also relies on the fact that the royalty payable by HTC, whether for past or future infringement of the Patent, is likely to be small in relation to the selling price of its phones. I accept this, but I do not see that it is relevant. As can be seen from the figures set out above, even a relatively small royalty per phone is likely to yield a substantial sum over the course of a year, let alone six years.
64. *Part of a larger dispute.* HTC points out that the present claim is part of a larger dispute between Nokia and HTC, involving other patents and other countries. I entirely accept that, but I do not see how it assists HTC with regard to the present issue. I can only make orders with regard to the UK (strictly, England and Wales). The only patent that HTC has so far been found to infringe is the Patent. HTC disputes infringement of the other patents that Nokia alleges it has infringed in the UK; and, for all I know, HTC is right to do so. It follows that I can only consider the position in respect of the Patent.
65. *Non-infringing alternatives.* As I have said an important consideration, and perhaps the single most important consideration, in assessing whether the grant of an injunction to restrain patent infringement would be disproportionate is the availability and cost of non-infringing alternatives.
66. The problem of “patent hold up” which has been much studied by economists generally arises either where there is no non-infringing alternative or where the cost of switching to the non-infringing alternative is prohibitive. The paradigm example of the former situation is the standard-essential patent. Because it is essential, there is no alternative for products which comply with the standard. That is why standards-setting organisations like ETSI (the European Telecommunications Standards Institute) require owners of standard-essential patents to undertake to grant licences on FRAND (fair, reasonable and non-discriminatory) terms. An example of the latter situation is where a manufacturer has invested a great deal of money in developing and marketing a complex product only to discover, to its surprise, that a vital component of the product infringes a patent, and by the time it discovers this it is too late to switch to a non-infringing alternative except at prohibitive cost. This was one reason why the former phenomenon of so-called “submarine” patents in the USA could be so dangerous.
67. If non-infringing alternatives are available at non-prohibitive cost, however, then there is unlikely to be a problem of patent hold up. Accordingly, other things being equal, an injunction is unlikely to be disproportionate.

68. In the present case, the patented invention is an improved modulator which is of particular utility in mobile phones. Modulators have been known for several decades. There can be no doubt whatever that it would be easy to design and construct a mobile phone without an infringing modulator circuit.
69. Furthermore, Nokia has formally admitted that (i) the transmit path from the baseband input to the output of the radio frequency upconverter of the Qualcomm RTR6285 and RTR6285A transceiver chips and (ii) the Bluetooth transmit path of the Broadcom BCM4335 chip do not infringe the Patent. There is no evidence that any other parts of those chips infringe the Patent. It follows that HTC already has certain non-infringing alternative chips available to it. It also follows that it can rely upon these admissions in sourcing further alternatives.
70. HTC does not dispute that these non-infringing alternative chips are already available to it (although it says that the Qualcomm RTR6285 and RTR6285A transceiver chips are outdated), or it will be able to source other non-infringing alternatives given sufficient time. Nor does it suggest that the cost of switching to a non-infringing alternative is prohibitive given sufficient time. Rather, HTC's evidence is that it will take (a) an unknown length of time for it to source a non-infringing alternative to the Qualcomm WTR1605(L) chip and (b) between 4 and 12 months to rebuild its phones around non-infringing chips. It is also HTC's evidence that the Broadcom BCM4335 cannot be swapped pin-for-pin for the BCM4334, and that it would take about 12 months to rebuild the One Mini with the BCM4335. There are two points to be noted about this evidence.
71. First, HTC does not suggest that it could not render all its phones non-infringing within a maximum of two years, yet the refusal of an injunction would allow HTC to commit infringing acts for nearly four more years.
72. Secondly, it is probable that, starting from scratch now, HTC could render all its phones non-infringing within 18 months. Yet it will be observed from the chronology I have set out above that HTC has already had more than 18 months since the launch of the German proceedings to source non-infringing alternative chips and re-design its phones. (It has also had nearly seven months since Nokia alleged that the Qualcomm WTR1605(L) and Broadcom BCM4329 and BCM4334 chips infringed.) As I shall explain when I come to the question of a stay, HTC's evidence says very little about what, if anything, it has been doing to develop non-infringing alternatives during this period.
73. It is convenient, however, to address at this juncture the fact that, as explained in my previous judgment, Broadcom and Qualcomm both regard their chip layouts as highly confidential and are vigilant to protect that confidentiality. HTC suggests that this has somehow handicapped HTC in ascertaining whether the chips in its phones infringe the Patent and in obtaining non-infringing alternatives. There is no evidence, however, that HTC ever asked either Broadcom or Qualcomm whether any of the chips in issue had the features of claim 1 of the Patent and was met with either a denial or a refusal to answer. Nor has HTC revealed whether or not either Broadcom or Qualcomm has expressly indemnified it against infringement of the Patent, or, if not, whether it considers that either Broadcom or Qualcomm had impliedly done so.

74. *Conclusion.* Taking all of the factors relied on by the parties into account, and in particular the ones discussed above, I am not persuaded that this is a case in which I should exercise my discretion to award damages in lieu of an injunction. Nokia has a legitimate interest in seeking a final injunction to prevent further exploitation of the patented invention by HTC without its consent. This is not a case in which the injury to the patent is small, capable of being estimated in money and adequately compensated by a relatively small money payment. If an injunction were refused, it would have to be on the basis of an order for a running royalty. In those circumstances, refusal of an injunction would be tantamount to imposing a compulsory licence on Nokia in circumstances where HTC could not obtain a compulsory licence by the proper route. Most importantly, the grant of a final injunction would not be disproportionate. The grant of an injunction will not deliver HTC over to Nokia “bound hand and foot, in order to be made subject to any extortionate demand” Nokia may make, because HTC already has some non-infringing alternatives available to it, could have had more non-infringing alternatives available to it by now if it had acted promptly when first sued by Nokia and will in any event have more non-infringing alternatives available to it in a period which is significantly shorter than the remaining term of the Patent.

Stay pending appeal

75. HTC sought a stay of the injunction pending appeal and offered an undertaking to pay a sum per phone into an escrow account by way of security for damages in the event that its appeal was unsuccessful. Nokia opposed a stay and offered a cross-undertaking in damages.

Applicable principles

76. The correct approach to an application for a stay of an injunction pending appeal was explained by Buckley LJ in *Minnesota Mining & Manufacturing Co v Johnson & Johnson Ltd (No.3)* [1976] RPC 671 at 676:

“It is not in dispute that where a plaintiff has at first instance established a right to a perpetual injunction, the court has a discretion to stay the operation of the injunction pending an appeal by the defendant against the judgment. On what principles ought such a discretion to be exercised. The object, where it can be fairly achieved, must surely be so to arrange matters that, when the appeal comes to be heard, the appellate court may be able to do justice between the parties, whatever the outcome of the appeal may be. Where an injunction is an appropriate form of remedy for a successful plaintiff, the plaintiff, if he succeeds at first instance in establishing his right to relief, is entitled to that remedy upon the basis of the trial judge’s findings of fact and his application of the law. This is, however, subject to the defendant’s right of appeal. If the defendant in good faith proposes to appeal, challenging either the trial judge’s findings or his law, and has a genuine chance of success on his appeal, the plaintiff’s entitlement to his remedy cannot be regarded as certain until the appeal has been disposed of. In some cases the putting of an injunction into

effect pending appeal may very severely damage the defendant in such a way that he will have no remedy against the plaintiff if he, the defendant, succeeds on his appeal. On the other hand, the postponement of putting an injunction into effect pending appeal may severely damage the plaintiff. In such a case a plaintiff may be able to recover some remedy against the defendant in the appellate court in respect of his damage in the event of the appeal failing, but the amount of this damage may be difficult to assess and the remedy available in the appellate court may not amount to a complete indemnity. It may be possible to do justice by staying the injunction pending the appeal, the plaintiff's position being suitably safeguarded. On the other hand it may, in some circumstances, be fair to allow the injunction to operate on condition that the plaintiff gives an undertaking in damages or otherwise protects the defendant's rights, should he succeed on his appeal. In some cases it may be impossible to devise any method of ensuring perfect justice in any event, but the court may nevertheless be able to devise an interlocutory remedy pending the decision of the appeal which will achieve the highest available measure of fairness. The appropriate course must depend upon the particular facts of each case."

77. In *Novartis AG v Hospira UK Ltd* [2013] EWCA Civ 583 at [39] and [41] Floyd LJ emphasised that whether a stay should be granted, and if so upon what conditions, was dependent on the balance of hardships or convenience and that the court should endeavour to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal is heard.

Assessment

78. *Period of the stay.* Absent expedition by the Court of Appeal, it seems likely that an appeal from my previous judgment would be heard in July or October 2014.
79. *Harm to Nokia if the injunction is stayed but the appeal is dismissed.* Nokia contends that, if the injunction is stayed but the appeal is dismissed, it will suffer damage which will be impossible accurately to quantify. As is common ground, the pre-Christmas period is an important period for smartphone vendors. Both parties are anxious to take maximum advantage of it. If the injunction is stayed, it will not be possible to determine what share Nokia has lost as a result. Even after Christmas, Nokia says that it will be impossible accurately to determine to what extent it has lost sales of its phones to infringing HTC phones. Furthermore, Nokia relies on the fact that, if the sale of its handset business to Microsoft proceeds, it is likely to have left this market by the end of March 2014. If an injunction is stayed pending appeal but the appeal is dismissed, Nokia will have lost the opportunity to gain from an injunction. I accept these points.
80. *Harm to HTC if the injunction is not stayed but the appeal is allowed.* There is no dispute that Nokia will be in a position to pay damages on its cross-undertaking. HTC's evidence for the hearing on 28 November 2013 was focussed on the harm which it would suffer if an injunction pending appeal wrongly prevented it from

continuing to sell the HTC One during that period. At the hearing on 29 November 2013, HTC adduced further evidence regarding damage it would suffer if prevented from selling the HTC One Mini. I will consider those in turn below. HTC has adduced very little evidence that it will suffer irreparable damage if prevented by an injunction from selling its other infringing phones pending appeal.

81. So far as the One is concerned, HTC's evidence is that the consequences of an immediate injunction will be catastrophic for its UK business because the One is its flagship model. HTC paints a dramatic picture of what will happen. I am bound to say that I am somewhat sceptical about this evidence given that HTC will shortly be launching its new flagship phone which cannot be assumed to infringe and therefore to be caught by the injunction. Nevertheless, I accept that there is a period between now and February or March 2014 when HTC is vulnerable. Furthermore, I accept that the damage which HTC will suffer if prevented from selling the One during this period will be both considerable and very difficult to quantify.
82. As to the One Mini, I do not accept that the damage which HTC will suffer if it is wrongly prevented from selling the One Mini pending appeal is as serious as in the case of the One. I do accept that it would be difficult to quantify.
83. *What contingency plans did HTC make?* HTC has not adduced any evidence as to what contingency plans it made in case there should be a finding of infringement of the Patent. HTC had over 18 months from the commencement of the German proceedings on 2 May 2012 to the hearing on the form of order on 28 November 2013 in which to make contingency plans. Even from the date of Nokia's cross-action on 23 July 2012, HTC had over 16 months. HTC's evidence is almost entirely silent as to what it was doing in this period to prepare for any injunction. It does not reveal whether, or if so when, HTC asked Broadcom or Qualcomm whether the chips which HTC was buying from them had the features of claim 1 of the Patent. Nor, save in one respect, does it reveal whether, or if so when, HTC asked Broadcom or Qualcomm to design non-infringing alternatives or, if so, with what result. All that is said is that, at the time that Nokia introduced its allegation that the Qualcomm chips infringed (which I take to mean late March 2013), HTC asked Qualcomm to provide a workaround and (so it is said) Qualcomm refused. According to HTC, it is only on 26 November 2013 that Qualcomm changed its position and agreed to look into the possibility of a workaround.
84. *Status quo.* HTC relies upon the fact that the status quo is that its infringing phones are on the market. Different phones have been on the market for different periods of time, however. In my view this is a weightier consideration the longer the phone has been on the market. Furthermore, it has to be viewed in conjunction with the point discussed in the preceding paragraph.
85. *Conclusion.* In my judgment, in the case of the One, the balance comes down in favour of granting a stay. The potential harm to HTC outweighs that to Nokia, the One has been on the market for some time and the impact of HTC's apparent lack of contingency planning is less significant. In the case of the One Mini, the balance comes down in favour of refusing a stay. In this case the potential harm is more evenly weighted, but importantly the phone was launched much more recently and HTC designed and launched it at a time when HTC knew it was facing a claim for infringement of the Patent and apparently without making any contingency plans.