

IN THE SUPREME COURT OF THE UNITED KINGDOM

UKSC/2025/0058

ON APPEAL FROM

THE COURT OF APPEAL (CIVIL DIVISION)

Neutral citation: [2025] EWCA Civ 193

BETWEEN:

(1) TESLA, INC.

(2) TESLA MOTORS LIMITED

Appellants/Claimants

- and -

(1) INTERDIGITAL PATENT HOLDINGS, INC.

(2) INTERDIGITAL HOLDINGS, INC.

(3) AVANCI, LLC

Respondents/Defendants

INTERDIGITAL'S WRITTEN CASE

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(Terms defined in the Statement of Facts and Issues ("SOFI") are used herein)



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INTRODUCTION AND OVERVIEW

1. This is the written case of the First and Second Respondents (“**IDPH**”, “**IDH**”, together “**InterDigital**”). The Appellants (“**Tesla**”) appeal the Court of Appeal’s judgment (“**CAJ**”) and order of 6 March 2025, dismissing Tesla’s appeal against Fancourt J’s judgment of 15 July 2024 (“**HCJ**”) and order of 12 July 2024. Fancourt J held there was no serious issue to be tried on, and no jurisdiction over, Tesla’s “**Licensing Claims**” which seek declarations as to what it claims are the FRAND terms of a licence from the Third Respondent (“**Avanci**”) which operates a worldwide platform (“**Platform**”) licensing Standards Essential Patents (“**SEPs**”) for 5G connectivity for vehicles. Tesla seeks a bespoke FRAND rate for the Platform which is lower than the fixed rate offered by Avanci.
2. When before Fancourt J the Platform covered 170,000+ SEPs worldwide belonging to 66+ independent licensors (“**Licensors**”) and those numbers have increased (SOFI §§12-13). **[1/12-13]** IDH deals with licensing for the InterDigital group and is one Licensor among many. IDPH is another InterDigital group company that owns Platform SEPs. Tesla’s real target is Avanci and the Platform, but it accepts it has no legal right against Avanci. Tesla sues InterDigital alone among the Licensors, as a device aiming to get jurisdiction over Avanci.
3. Tesla claimed against IDH as purported representative of all Licensors, but Fancourt J rejected this. Tesla’s appeal on this failed and is not pursued. Tesla is left with a claim against InterDigital alone among Licensors for declarations as to the alleged FRAND terms of the Platform licence from Avanci covering the SEPs of all Licensors. This claim is about the obligations of all Licensors. The Court of Appeal rightly held that Tesla’s claim could not be properly heard without the others being parties. This is the subject of **Ground 2**. Whatever the outcome of the other grounds, Tesla’s claim fails because it has not sued the right defendants and it makes no sense to sue InterDigital alone.
4. Further, **InterDigital NITP Ground 1** shows there is no proper claim or useful and legitimate purpose for the declarations against InterDigital alone, since: (1) InterDigital has no dispute with Tesla and is targeted without justification, as a device to get at Avanci; (2) only Avanci can grant the Platform licence; (3) declarations against InterDigital would not assist Tesla, because InterDigital cannot grant or procure the licence Tesla seeks; (4) it is unfair and disproportionate to make InterDigital bear the huge costs of defending the Licensing Claims; (5) InterDigital cannot properly defend them, and takes no position on

the Platform rate. Further, (6) if Tesla has a valid claim against Avanci, this achieves all Tesla really seeks. There is no useful and legitimate purpose to sue InterDigital as well.

5. The Court of Appeal also dismissed Tesla's appeal for the independent reason that Tesla has no real prospects of establishing that the ETSI Undertakings of the Licensors oblige the Platform licence to be FRAND. **Tesla Ground 1** challenges this. The Court of Appeal rightly found that the Licensors' ETSI Undertakings do not create obligations to license collectively. That Licensors voluntarily place their SEPs on the Platform as a commercial alternative does not oblige them to do so.
6. Tesla has never sought, makes no claim as to, nor undertakes to take, a bilateral licence from InterDigital, which it admits is not what it wants. As an artificial device, to seek jurisdiction for its Platform claim through the back door, Tesla says the contrary under **Tesla Ground 3**. The reality, as both Fancourt J (HCJ §9) and the Court of Appeal (CAJ §§240-241) held, ^[15/310] _[12/295-297] is that Tesla's claim is not as to a bilateral licence but only as to the Platform licence.
7. Further Tesla fails on (1) gateways/CPR 63.14, (2) *forum conveniens* as Fancourt J found, and (3) discretion to serve out (**InterDigital NITP Grounds 2-7; Tesla's appeal**). Properly characterised the claim is as to worldwide licensing through the Platform. It is a contractual claim, under the French law ETSI Undertaking. Insofar as the claim relates to patents at all, it relates to all Platform SEPs worldwide. So it is not within Gateway 11 or 63.14. It is not most closely connected to the UK. It is more closely connected to the USA, where all parties are based, and most patents are located, only 7% being in the UK. It is unreal to say the claim is about InterDigital's UK patents. Tesla's case would create universal jurisdiction over FRAND if only one patent is here, however limited the connections to England. Further, Tesla has no ground of appeal on Gateway 11, 63.14 or discretion to serve out, but needs to appeal on them, as jurisdiction was not upheld by Fancourt J.
8. Tesla's claim is unjustified once its nature is properly understood. Tesla creates complexity by the various permutations of its pleading, which are artificially constructed in an attempt to fit gateways; and by the shifting nature of its case, which is internally inconsistent and characterises the claim differently for different purposes. But it is unable to articulate a coherent claim, still less one which also fits within gateways.

BACKGROUND: FRAND, THE PLATFORM, INTERDIGITAL, TESLA'S CASE

9. FRAND is explained in *Unwired Planet v Huawei* [2018] RPC 20 (CA) (*UP CA*) and [2021] [172] [173] 1 All ER 1141 (SC) (*UP SC*); also *Optis v Apple* [2023] RPC 1 (*Optis F CA*) [1-15, 31, 38-39, 69, 73]. ETSI Undertakings are given pursuant to the ETSI IPR Policy which is a contractual document governed by French law (cl. 12). Clause 6.1 of the Policy provides:

“When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory (“FRAND”) terms and conditions under such IPR... The above undertaking may be given subject to the condition that those who seek licences agree to reciprocate.” [52/727]

10. The ETSI Undertaking is a *stipulation pour autrui*, a contract between the SEP owner and ETSI which can be triggered by third parties who want and seek a licence from the SEP owner. The form of the Undertaking is (as annexed to the ETSI IPR Policy):

“the Declarant hereby irrevocably declares that (1) it and its AFFILIATES are prepared to grant irrevocable licenses under its/their IPR(s) on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy... to the extent that the IPR(s) are or become, and remain ESSENTIAL” A box can be and often is checked providing: *“This irrevocable undertaking is made subject to the condition that those who seek licences agree to reciprocate.”* [52/735]

11. The Platform (SOFI §§9-24) is governed by the Master Licence Management Agreement (“**MLMA**”) agreed between Avanci and each Licensor separately. The MLMA allows Avanci to negotiate and enter into the Standard Patent Licensing Agreement (“**SPLA**”) with licensees, with certain pre-authorised modifications (“**PAMS**”) in Avanci’s discretion (SPLA cl. 2.1; MLMA cl. 4.5.1-2). The SPLA is a contract between Avanci and the licensee (SPLA header, cl. 1.16; SOFI §17). It covers all relevant SEPs of all Licensors whichever they may be without identifying them (SPLA cl. 2.1, 1.8, 1.11). Avanci has no authority to license [58/880] [58/851] [58/876, 878] [1/13] subsets (SOFI §18). Licensors can leave on 6 months’ notice (MLMA cl. 7.3, SOFI §20). [1/13-14] Tesla accepts Licensors’ ETSI Undertakings do not prevent them leaving (Hopewell 3 [35/558] §52(k)). Avanci distributes licensing revenue to Licensors by a points formula, taking a fixed percentage commission (MLMA cl. 5.2, 5.3). [58/857] [58/880, 877-8] [58/862] [1/14]

12. Outside PAMS, Avanci cannot vary the SPLA terms without Licensors’ consent. If Avanci considers revised terms should be put to Licensors, it proposes them, and the approval of Licensors with [REDACTED] of total base shares, and each Licensor with a threshold share of [REDACTED], is [1/13] [58/851-2] required (SOFI §16 and Annex, MLMA cl. 4.5.3). InterDigital does not have a threshold [1/16] [18/373] share (SOFI §30; PoC Annex 2, p.7). Tesla has a bilateral licence with one Licensor, L1, for

5G SEPs. L1 appears to have a threshold share (SOFI §14). InterDigital cannot procure or prevent an offer of revised terms by Avanci (SOFI §30).

13. InterDigital takes no position on the appropriate rate for the Platform and does not intend to (SOFI §31). Tesla has given no particular reason for targeting InterDigital alone among the Licensors. InterDigital has never sued or threatened to sue Tesla or any other vehicle manufacturer for patent infringement and confirms it has no intention to (HCJ §121; SOFI §36; Brodie 2 §75.1; Brodie 3 §35). Tesla complains that it and other vehicle manufacturers were sued by licensors of the Avanci 4G Platform, before Tesla took an Avanci 4G licence in 2021, but InterDigital had no part in that (SOFI §§26, 35). Prior to this claim, Tesla sought to negotiate a 5G licence with Avanci but InterDigital knew nothing about this. Tesla has never sought a bilateral 5G licence from InterDigital (SOFI §§34, 38).

[1/16]
[33/526] [40/592]

[15/333]

[1/14, 16]

[1/16-17]

14. Tesla's case. Tesla's Licensing Claims are about what it says are FRAND terms for the Platform. Its sole cause of action is about licensing terms from Avanci over the whole Platform worldwide seeking to enforce the ETSI Undertakings of all Licensors (HCJ §§9, 58, 131; CAJ §§240-243). As to relief, Tesla made clear that Declarations (5), (6), (9), (10) are central (CAJ §246). They all relate to its single cause of action. Tesla accepted Declaration (4) is an ancillary determination of a step in the logic, with no independent life (CAJ §§241, 246; HC Day 2/p. 227). Declarations (7) and (8) are abandoned.

[15/310,
320, 335]

[12/295-7]

[12/298]

[12/296-8]

[66/996]

15. Tesla also claims revocation of and declarations as to the validity and essentiality of three UK patents of IDPH (PoC §37-38, Prayer 1-3; the "Patent Claims" and "Challenged Patents"), out of 170,000+ in the Platform (SOFI §13) and c. 7500 of InterDigital's (Brodie 4 §7.1). The Patent Claims are separate to, and make no difference to, the Licensing Claims, and were stayed by consent. Tesla does not rely on them for jurisdiction before this Court.

[16/352-3, 359]

[1/13]

[44/615]

NO SERIOUS ISSUE TO BE TRIED

16. Tesla needs to establish a serious issue to be tried on the Licensing Claims, that is a real prospect of success. As per *Kawasaki v Kemball* [2021] 1 CLC 284, [16-18]: (1) It is not enough that the claim is arguable, it must carry some degree of conviction. (2) The pleading must be coherent and properly particularised. (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct.

[131/1980]

(1) The SPLA terms do not have to be FRAND (Tesla Ground 1)

17. The Court of Appeal rightly found the ETSI Undertaking did not oblige Licensors to license through the Platform on FRAND terms. They can discharge their ETSI Undertakings by offering bilateral licences. The Platform was just a convenient commercial alternative (CAJ [12/292] §§222-255). Tesla’s case has had many permutations, but its final yet unpleaded attempt is: (1) the only licence that can be FRAND is a Platform licence; and/or (2) Licensors are obliged to “*ensure*” the Platform licence is FRAND. Neither articulates a coherent cause of action, still less against InterDigital, still less one supported by Tesla’s pleading and evidence.

18. Tesla’s case is illogical. First, the ETSI Undertaking only requires a declarant to be “*prepared to grant*” licences to its and its affiliates’ SEPs (“*its/their IPR*”) on FRAND terms. It does not require a declarant to license the patents of others (*Apple v Qualcomm* [2018] FSR 27, [47]; [173/3004-5] [1/10] *UP SC* [14]; SOFI §3), which it cannot do. The words do not require or cover collective [12/293] licensing: CAJ §228. Second, more than one offer can be FRAND, given that FRAND is a range, and the owner can choose how to discharge its ETSI Undertaking within that range: [172/2961-2] [173/3008] *UP CA* [121-127]; *UP SC* [29]. So even if the Platform licence could discharge the ETSI Undertaking, which is not the case, the declarant can discharge it by offering bilaterals.

19. MLMA cl. 4.3 and SPLA cl. 9 say Licensors can license bilaterally whilst in the Platform. [58/850] [58/886] There is no suggestion any Licensors decline to license bilaterally on FRAND terms (CAJ [12/293-4] §§227, 233). InterDigital has always made clear it is willing to license bilaterally, and that it does not rely on the Platform licence as discharging its ETSI Undertaking. The Platform licence is just a commercial alternative (Brodie 3 §14; SOFI §32). [40/588] [1/16]

20. Tesla’s arguments that the ETSI Undertaking should not be read as “*ceasing to be engaged*” if an owner joins a platform, or that Licensors cannot “*designate*” an offer as “*non-FRAND*”, miss the point. The ETSI Undertakings can always be discharged by being prepared to grant bilaterals, even if alternative commercial licensing structures are also offered alongside.

21. Tesla has to say that only the Platform licence can be FRAND, whose corollary is bilateral licensing is non-FRAND. Tesla gives no coherent reason, still less a pleaded and evidenced case, why only a Platform licence can be FRAND. Tesla accepts: (1) owners are not obliged [3/40-41] to form or join a platform (TWC §44); (2) Licensors are entitled to leave (Hopewell 3 §52(k)). [35/558] Anything else would be an interference with contractual freedom for which there is no basis in the ETSI Undertaking. Together this makes it illogical to say Licensors cannot license bilaterally in discharge of ETSI Undertakings. Tesla says *being in the Platform* changes

everything and prohibits bilateral licensing while within it. But since there is a bilateral offer which would be FRAND if the Licensor left, or if offered by another in a parallel situation outside the Platform, there is no basis to say the same is non-FRAND while in the Platform.

22. Tesla's supposed negative corollary would mean InterDigital (1) could not discharge its ETSI Undertaking by a bilateral offer, and could license its own patents *only* by the Platform licence; (2) was unable to enforce its patents against automotive implementers on the basis of a FRAND licence to its own patents; even though (3) it cannot grant a Platform licence, nor procure or prevent changes. InterDigital could be left unable to enforce its patents due to decisions of Avanci. All this supposedly happens, because the Platform exists as a commercial alternative. There is nothing in the ETSI Undertakings which effects this (CAJ [12/293] §§228-229). The ETSI Undertaking involves only a limited derogation from the owner's rights, which does not affect the owner's freedom to exploit its rights in any other legitimate [12/293] way, on its own, or jointly with others: CAJ §229. Indeed, Tesla concluded bilaterals with licensors in both the 4G and 5G platforms, and other Licensors have established bilateral licensing programmes (SOFI §§14, 26(f), Rajendra 2 §19, Brodie 2 §46.4, not contested). [1/13, 15] [39/582] [33/522]
23. The same defeats any (unpleaded) obligation to "*ensure*" the Platform is FRAND. No basis for any such obligation is identified. The ETSI Undertaking requires only that InterDigital be prepared to grant a licence on FRAND terms to its patents. It does not require InterDigital to ensure Avanci complies with FRAND, *a fortiori* not as to the patents of others, which it could not do. The uncontradicted evidence is that InterDigital does not even know the value of the others' portfolios (Brodie 2 §45). [33/520-1]

Unpleaded and unsupported

24. Such cases are also unpleaded and/or unsupported. Tesla's case went through multiple permutations, initially pleading Avanci owed a contractual obligation to license on FRAND [16/358] terms (PoC §59), now abandoned, then arguing for claims in tort/good faith (HCJ §§19, 56), [15/311-2, 319-20] [12/297] [1/18] now also abandoned (CAJ §244, SOFI §42). But this was not replaced by pleas of obligations on Licensors to ensure the Platform licence is FRAND, which were not mentioned below. Tesla abandoned Declaration (7) which made different conduct claims as to how Licensors [1/18] should behave towards Avanci (SOFI §41).¹ There is no plea, nor evidence of French law

¹ A claim for obligations "*to ensure*" would be inconsistent with Tesla's case on gateways. It would be a contract/breach claim as to worldwide French law obligations. It could not fit the *Vestel* logic Tesla relies on, and so is even more clearly not within Gateway 11/63.14. This shows the internal inconsistency of Tesla's case.

which supports ideas that the ETSI Undertaking compels Licensors to offer a collective licence to Tesla on FRAND terms, nor only to offer a Platform licence while in the Platform [12/293, 297] (CAJ §§228, 245). There is no agreement by the MLMA that Avanci should fulfil any owner's ETSI Undertakings, and instead it permits Licensors to license bilaterally (CAJ §249). [12/298]

Supposed impracticality of bilateral licensing; Tesla's arguments of supposed commercial difficulties

25. Arnold LJ said it is arguable the Platform must be on FRAND terms because it is arguable that “*negotiating bilateral licences with more than 65 SEP owners is impracticable*” (§95). This cannot [12/261] impose an obligation to license collectively. If supposed impracticality can require platform licensing, it would mean a duty to join and stay in platforms, which cannot be right. Platforms do not exist in other sectors like 5G handsets (§95). The ETSI Undertaking assumes bilateral licensing so the inevitable practicalities of licensing from individual owners cannot make it non-FRAND. Nor can the creation of a platform as a convenient additional option make non-FRAND something *ex hypothesi* FRAND in its absence: CAJ §§229-230. [12/293-4]
26. Nor could this create a cause of action against InterDigital or support any idea that InterDigital, or any individual Licensor, can only license on FRAND terms through the Platform. There was nothing to suggest it would be impractical for Tesla to take a bilateral from InterDigital – around the 10th largest Licensor (PoC Annex 2, p. 7). [18/373]
27. There is no practical problem with the Court of Appeal's result. Tesla can seek FRAND bilateral licences, as it has done in some cases, and/or take the convenient alternative of a [12/289-90] Platform licence (CAJ §§249-251). There is no issue of owners avoiding ETSI Undertakings by platform licensing. The implementer can always seek a FRAND bilateral. So there is no possibility of supra-FRAND exactions or hold up: *UP CA* [196-197]; *UP SC* [12]. [172/2977] [172/3003-4]

SEP owners relying on platform licences

28. Tesla says the Court of Appeal's result creates asymmetry, because owners *can* arguably rely on a Platform licence to discharge their ETSI Undertakings (although InterDigital does not). This misconstrues the ETSI Undertaking, which is about the declarant's patents. An owner cannot discharge its ETSI Undertaking by requiring an implementer to take a licence over the patents of others, and the implementer can always ask for a bilateral over the owner's patents alone. Tesla say the contrary was held arguable in *Mitsubishi v Oneplus* [2021] [147/2391, 2397] EWHC 1541, [14, 32, 33]; but the point was uncontested there; the judge said entitlement was unclear, and the decision was about a procedural joinder issue [44]. The German caselaw [147/2399]

mentioned was in a different framework (see Avanci's Written Case). In any event, the point does not matter. Even if, which is not accepted, a SEP owner can rely on a platform licence to discharge its ETSI Undertaking, it is not obliged to, as it is FRAND to offer a bilateral. InterDigital has not relied on a Platform licence in discharge of its ETSI Undertaking.

29. Tesla objects to a supposed procedural asymmetry because, it says, if the Court of Appeal is right, the owner can sue for infringement *choosing* to rely on the Platform licence, but implementers cannot get anticipatory declaratory relief. But InterDigital does not do this and so Tesla has no case against InterDigital on such a basis. Not being able to obtain declarations as to whether Platform licences are "FRAND" against licensors who do not rely on them as discharging the ETSI Undertaking is natural and unproblematic.

Tesla's case of "commercial practice"

30. Tesla relies on "*commercial practice*" which it says transforms the ETSI Undertaking into an obligation to license collectively. But in **UP SC**, commercial practice was relevant to identifying which terms were *capable* of being FRAND, on which the owner could insist: [60-62] **[137/3014-5]**. There, commercial practice illustrated a worldwide offer could be FRAND. Yet (1) that did not involve reliance on practice to expand the ETSI Undertaking beyond its words; (2) there is a difference between owners relying on practice to support an argument that an offer can be FRAND, and implementers contending licensing of one kind cannot be FRAND, for which a mere common practice of doing something else cannot suffice.
31. Tesla identifies no principle of French law that could let commercial practice expand the scope of the ETSI Undertaking beyond its terms to the patents of others. Its case is only that there was no evidence "*that commercial practice in this industry does not involve pool licensing*" **[3/41]** (TWC §46). Clearly practice in the automotive sector includes platform licensing but this does not indicate collective licensing is required to be FRAND. Yet Tesla does not plead, evidence, or argue that commercial practice is inconsistent with relying on bilaterals as FRAND. There are many SEP owners not in platforms. Here, Licensors currently own slightly less than 90% of declared 5G SEPs (Rajendra 2 §30; Brodie 3 §14). Nor is there **[39/585]** **[40/588]** evidence that commercial practice is inconsistent with bilateral licensing while in the Platform. The Platform allows Licensors to enter into bilaterals alongside the Platform²; this

² MLMA cl. 4.3; and SPLA clause 9, as explained in Avanci Letter to DOJ, 21.11.19 (PoC Annex 3), p. 10.

was central to the US DOJ when it gave initial anti-trust clearance, observing licensors do license bilaterally³; and Tesla itself concluded bilaterals with licensors.

32. Tesla relies on Fancourt J's comment that "*in practice, many of the Patentees will rely on an Avanci offer to discharge their obligation to offer a licence of their SEPs to automotive makers on FRAND terms*" [15/310] (HCJ §13) and Arnold LJ's comment, not accepted by the majority, that it was arguable that [12/261, 294] "*most*" Licensors do this (CAJ §§95, 233). Tesla's evidence at its highest asserted only that "*a small number*" of the licensors under the 4G Platform did so with the 4G Platform licence [1/14-15] (SOFI §26). There is no evidence any Licensors of the 5G Platform have done so with the 5G Platform licence. Further, whatever others may do, InterDigital has never so relied on the 4G or 5G Platform licence to discharge its ETSI Undertakings and makes clear it has no intention to do so. Tesla identifies no evidence that it would. Thus, Tesla's own evidence fails to support any idea that commercial practice is inconsistent with Licensors relying on bilateral offers as FRAND, and so cannot support a case that the Platform licence is obliged to be FRAND, still less that InterDigital is obliged only to offer a Platform licence while in the Platform. Nor would Fancourt J's statement, even if accurate, support either point.
33. Tesla relies on the statement (CAJ §232) that "*At [95] Arnold LJ relies upon the arguable [12/294] contention that, as a matter of "commercial reality" the only licence of UK SEPs covered by the Avanci 5G Platform licence is a global platform licence. That may be so, but it does not justify the English court engaging in the extensive exercise of determining FRAND terms in relation to foreign SEPs as against parties who have not given any relevant contractual undertaking.*" Tesla calls this an acceptance that it is arguable that in commercial reality the only FRAND licence of any Licensor's SEPs is a Platform licence. That is not what Phillips LJ was saying. He was referring to Arnold LJ's [12/261] assertion at §95 about the impracticality of bilateral licensing, specifically that it would be impractical to do bilaterals with all Licensors, and saying that even if arguable ("*that may be so*"), it would not justify the supposed obligation. He did not accept commercial practice showed that only the Platform licence was FRAND, which would contradict his reasoning.
34. Finally, Tesla relies on three cases. None support it. In *Lenovo v Ericsson* [2025] RPC 11, [134/2010-1] [42-44], both parties were SEP owners who had made their ETSI Undertakings conditional on reciprocity, and it was common ground a FRAND licence would be a single cross-licence. [99/1318] In *Alcatel v Amazon* [2024] RPC 26, [59-61], under a different SSO framework under different law, it was held (just) arguable that non-discrimination required the owner to offer

³ DOJ Business Review Letter, 28.07.20 (PoC Annex 4), pp. 16-17, heading 2(a).

a licence to its non-essential patents bundled with its SEPs. No such point arises here. [121/2046-50] *Lenovo v InterDigital* [2024] RPC 23, [19-45], was about the same non-discrimination issue [23]. None show commercial practice changing the scope of the ETSI Undertaking.

Tesla's reliance on Vestel

35. The supposed “roadmap” Tesla seeks to rely on in *Vestel v Access* [2021] 4 WLR 60, [71] does [174/3055] not assist. Birss LJ did not say there is a legally enforceable right (in a different SSO framework under Swiss law) but made an *obiter dicta* about whether a claim can pass through Gateway 11 if there is a right. Here Tesla has identified no right to a collective licence.

Tesla's points on its specific declarations

36. Tesla contends (TWC §§42-45) that the Court of Appeal held only that Declaration (6) is [3/40-41] unarguable and did not comment on Declarations (5), (9) and (10). This is wrong. Tesla has only one claim, about FRAND applying to the Platform licence. All its licensing declarations are relief for that claim. The Court of Appeal’s reasoning applies to all of them, as stated at [12/298] CAJ §246. If Tesla is suggesting Declaration (4) survives the Court of Appeal’s result, that is wrong. It is a step of reasoning, not a freestanding claim, as Tesla accepted (§14 above). Tesla never identified any freestanding useful purpose of Declaration (4). Absent rights to FRAND terms to the Platform, there is no separate useful/legitimate purpose in a declaration as to whether in abstract Tesla is a beneficiary of Licensors’ ETSI Undertakings, still less could this be a useful freestanding claim against InterDigital.

InterDigital's stance below

37. Tesla incorrectly says InterDigital conceded this point was “arguable” below. InterDigital made clear that it did not accept FRAND applied to platform licensing (Brodie 3 §§16-17), [40/590] but for economy chose not to advance the point below, while saying there was no serious issue to be tried on other grounds. That did not involve conceding a real prospect of success. But now it is live on this appeal it is appropriate for InterDigital to advance its case on it.

(2) Claim about the interests, rights and obligations of others (Tesla Ground 2)

38. In principle, save in “very special circumstances”, the Court should not make declarations which affect the rights, obligations and interests of persons in their absence: *LPTB v* [138/2091, 2097] *Moscrop* [1942] AC 332 (HL), 345, 351; *Tyne v National Union* [2025] AC 1222 (SC) [148/2427-31] (“*Nexus*”), [56]-[68]; *Darwall v Dartmoor* [2025] AC 1292 (SC) [54]-[59]; CAJ §237. This is [112/1594-6] [12/295] a *fortiori* where there is no legal right against the defendant: *Nexus* [55].

39. Arnold LJ wrongly rejected this. First, he said *Nexus* was about rescission and did not [12/261] consider the principles or authorities on declarations (§92). But *Nexus* confirms a “*basic* [1148/2427-8] *principle of procedural justice*” [56, 60] equally applicable to declarations, engages with central authority on declarations, *Moscrop* and *Rolls Royce v Unite* [2010] 1 WLR 318, and reasons [1148/2429-31] the same applies [64, 67]. Both *Moscrop* and *Darwall* are declaration cases.

40. It is untenable to say the authority of *Nexus* is vitiated because *Messier Dowty v Sabena* [145/2364-5] [2000] 1 WLR 2040 [39-43], or other authorities Arnold LJ mentions, were not cited⁴. The Supreme Court does not need to engage with every lower court authority, would have been well aware of the main decisions on declarations, and asked for submissions on *Rolls Royce*, which recapped many. Further, determination in absence did not arise in any of the authorities mentioned save *Rolls Royce*. And *Messier* [41], contrary to Arnold LJ’s reading, is not holding useful purpose is the sole criterion for declarations, but was about a narrower topic, loosening the old restrictions on negative declarations. Indeed [43] says useful purpose is not the only criterion, and there can be other reasons of principle not to grant declarations.

41. Second, Arnold LJ treated the *Moscrop* principle as only a factor in discretion. His approach (1) makes a binary division between *jurisdiction* constraints and general discretion, (2) holds the discretion to grant declarations is limited only in *jurisdiction* by the need for a useful purpose and justiciability (§§59, 64-65, 82-83), so (3) all other factors are just “*considerations*” in discretion. This meant (4) citing *Rolls Royce* [120(6)], that the importance of ensuring all [162/2757] affected were heard was just a factor to “*consider*”, and he interpreted *Nexus* in the same way: [12/250-2, 258-9] §§70, 83(iii), 92-93, 102(vi). He combined this (5) with an approach to serious issue/real prospects under which a declaration could proceed if it was possible, at trial, that a declaration could be granted, because of speculations now as to why it might in the future [12/253-4, 258, 261, 263] [12/262] be appropriate in discretion to do so (§98). The overall result is to remove any effective threshold screen for the making of declarations at the serious issue/real prospects stage.

42. This is not the law. First, Arnold LJ’s division between *jurisdiction* and *discretion* ignores *principle*. The discretion to grant a declaration is a structured discretion in which some principles have greater weight: *AIC v Federal Airports Authority* [2022] UKSC 16, [37]. For example, [96/1267-8] declarations should not be granted, even if factually *useful*, if this would be unfair or unjust; or contrary to comity: see *TQ Delta v Zyxel* [2020] FSR 10 (CA), [37]; *Teva v Novartis* [170/2885] [169/2868-70] [2023] Bus LR 820 (CA), [51], [64]. The *Moscrop* principle is basic, must be given heavy

⁴ *Broome v Cassell* [1972] AC 1027, 1054B-1055A, 1106H-1107D, 1121D, 1132B, 1135G.

- weight, and is to be departed from only in “*very special circumstances*”: *Nexus* [64, 67]. If *Rolls* [148/2429-31] [162/2757] *Royce* [120(6)] states the principle more weakly, that is corrected by *Nexus* [67]. Aikens LJ’s (*obiter*) formulation is incomplete, because absent very special circumstances it is wrong to decide a person’s rights and obligations, in ways which affect them, in their absence.
43. Second, the Court will reject declarations at the serious issue/strike out stage if it is sufficiently clear they are wrong in principle, or clearly inappropriate in discretion: *Teva v Novartis* [64], *Ace v Howden* [2012] 2 CLC 969 (CA), [31-39]); *TQ Delta* [50, 57]; *Nexus* [170/2887-8] [148/2415] [2]. It is insufficient to say something *might* turn up at trial that could make a declaration appropriate: that is “*surmise and Micamberism*”: *Sussex v Associated Newspapers* [2021] 4 WLR [167/2845] 35, [14-17]; *TQ Delta* [57]. Further, the true comparison is not to what might happen at later trial, but to an early preliminary issue of the appropriateness of a declaration.
44. Tesla argues that fairness is “*protean*” so that *Moscrop* may not apply (TWC §51). But none [3/42] of the cases it cites are relevant. *Nexus* and *Moscrop* have identified the basic general principle of procedural justice for civil litigation. This is not undermined by saying that concepts of fairness in other fields are flexible. Tesla is saying *Nexus*, *Moscrop* and *Darwall* are all wrong, and there should be no principles of procedural justice in civil litigation.

The Facts: Unjust to Proceed without the other Licensors being joined

45. The claim is inherently about the rights and obligations, and affects the interests, of all the Licensors. First, the essence of Tesla’s claim is to obtain a determination of the rate for the Platform affecting all Licensors: CAJ §§240-241, HCJ §§9, 58. Second, since InterDigital [12/295-7] [15/310, 320] cannot license the SEPs of others (SOFI §29), and its ETSI Undertakings relate only to its own SEPs, Tesla’s claim as to the Platform rate is necessarily about the ETSI Undertakings of all Licensors. InterDigital’s ETSI Undertakings on their own could not support it. Third, Tesla’s PoC is centrally about the alleged FRAND obligations of all Licensors: PoC §§1-2, [16/341-2, 353-5, 357-60] 5, 41, 46, 48, 54-55, 58, Declarations (4), (5), (6), (9), (10). Fourth, the aim and function of the claim is to force Avanci to revise the terms of the Platform licence offered in respect of the patents of all Licensors, or to pressure the Licensors as a whole to agree this. Tesla’s case is that a declaration against Avanci that different terms are FRAND would make it untenable

for the Platform to maintain the current terms (TWC §5.3, Hopewell 3 §51(c)).⁵ Tesla's claim [3/30] has never really been about InterDigital, but attacks the Platform, and all Licensors together. [35/554]

46. It would be contrary to basic principles of procedural justice for the Licensing Claims to be heard without the other Licensors. Even if this consideration were only a factor in discretion, there is no real prospect of the declarations being made at trial in the face of it. Tesla led no evidence to suggest that these issues might realistically be viewed differently at trial.
47. The Court of Appeal was right to hold (CAJ §§237, 243) that it was not realistically arguable [12/295, 297] that the claims could properly and fairly be heard without the other Licensors being joined. Likewise Fancourt J was right to hold (HCJ §98) that it would not be fair and just to grant [15/328] the declarations sought in the absence of the other Licensors. No reason has been identified why an appellate court could have properly interfered with that assessment. The Courts below made a straightforward application of basic principle and were obviously right.
48. Arnold LJ used the wrong framework, (1) not applying *Moscrop* and (2) saying it was “*not inevitable the Court would decline to exercise its discretion*” for three reasons (§98). This [12/262] misunderstands the structured discretion; and “*not inevitable*” is not the right test. But whichever framework is used, the points he made are insubstantial, and insufficient.
49. First, Arnold LJ said the Licensors have “*little to contribute*” because the rate was devised by Avanci and no Licensors had a say in the choice of the rate (CAJ §99), so that in his opinion [12/263] the “*proper defendant*” is Avanci not Licensors. Yet the alleged obligations Tesla seeks to rely on are the ETSI Undertakings of all Licensors. It is wrong to discount the right of a party to be heard on a decision about its duties where *without hearing that party* a Court speculates it may not have much evidence or “*little*” to say. Different parties defend themselves in their own ways and have the right to do so. Similar arguments failed in *Nexus* [57-60]. [148/2427-8]
50. Arnold LJ looks only at how the rate was set. The issues would be wider, including the principles of FRAND, and (if FRAND applies to the Platform) the *objective valuation of*

⁵ InterDigital accepts that if a binding declaration based on legal obligations is made against Avanci then it would likely be untenable for the Platform to continue to licence at an inconsistent rate: IDG CA Skel §§17, 27; Brodie 3 [28/492-3] [40/593] §39. But as it has made clear, that does not apply if declarations are made against InterDigital alone. In that case, other Licensors, and Avanci, could and likely would ignore such a declaration. HCJ §§94, 97 is perhaps ambiguous on this. [15/327-8] If Fancourt J was saying that InterDigital accepts that a declaration against InterDigital *alone* would have such impact on the Platform, he misunderstood InterDigital's position and evidence.

Licensors' portfolios. The idea that this group of the major 5G SEP owners, many of whom have been litigating against each other worldwide about FRAND as the case law shows, have nothing to say about their ETSI Undertakings or valuation of their portfolios, is not credible. Licensors would have evidence to give and different cases, on FRAND, comparables, valuation methods, and valuation of their competing portfolios (Brodie 2 §46.2). **[33/552]**

51. Fancourt J found the other Licensors had cases to advance (HCJ §98) and Arnold LJ **[15/328]** identifies no reason to interfere. His only basis for speculating they would have “*little to contribute*” was that (1) while there were detailed discussions with prospective licensors, Avanci then set the rate and presented it on a take it or leave it basis; and (2) InterDigital does not know how the rate was set.⁶ He inferred (2) must be the case for other Licensors, but had no basis. But none of this suggests the Licensors would have little to contribute on the wider issues, which go beyond the history of setting the rate. Indeed Tesla argues that all Licensors are obliged to ensure Avanci’s offer is FRAND (TWC §37). **[3/38-39]**

52. Second, Arnold LJ said it was “*open*” for Licensors to apply to join or intervene and some **[12/263]** might join (§100). This is just speculation, and wrong in principle. The inappropriateness of seeking declarations against one party that affect other parties not sued cannot be cured by speculating that some *might* join; they might not for good reasons. That approach would circumvent the restrictions on representative actions, and wrongly pressure affected third parties to join litigation in which jurisdiction is not established over them.

53. Third, Arnold LJ said declarations “*would not necessarily*” adversely affect the Licensors, because if the Court sets only a slightly lower rate, Avanci “*might*” absorb the loss and not **[12/263]** pass it on to Licensors (§101). This is speculation, and never raised below. It first arose in Arnold LJ’s judgment, so it is unfair to say “*there was no evidence that Avanci could not or would not take the hit*”; there was no reason to anticipate this odd idea. It is contrary to MLMA **[58/857]** clause 5.2 which sets a fixed commission for Avanci which cannot be varied unilaterally by Avanci; and the evidence of Avanci’s business model (Rajendra 1 §9), which gives no hint **[32/505]** of Avanci not passing on rates. Further, the suggestion is based only on hypothesising a minimal reduction of \$1, and so is irrelevant, since Tesla’s claim seeks a reduction of over **[16/351]** \$22 (PoC §31). Tesla is seeking greatly to reduce the rate paid to all Licensors, alleging rights under all their ETSI Undertakings; and this directly affects the rights and interests of all.

⁶ Brodie 2 §29.2; Rajendra 1 §9-10; Arnold LJ at §§17, 92.

[33/518] [32/505] [12/240, 261]

54. Tesla argues (TWC §53) that there is no injustice because Avanci proposes to participate if [3/43] the action proceeds against InterDigital.⁷ This misses the point as the problem arises from determining the rights and obligations of the other Licensors in their absence.

55. Tesla now argues there is no unfairness because the case can proceed against InterDigital as [3/43] a “test licensor” (TWC §53). This is new. Tesla’s case was that IDH was sued as representative [16/348] (PoC §26), but failing that, InterDigital was sued in its own right. Tesla never pleaded or mentioned that InterDigital could be a test defendant, nor has it sought to satisfy the [74] requirements under CPR 19(III) or at common law. This is just an attempt to circumvent the failure of the representative claim; it is wrong in principle and procedurally incoherent. First, it does not deal with the inherent inappropriateness of claiming as to rights of others in their absence. Tesla is not claiming as to InterDigital’s separate obligations to test issues of principle, still less in ways that do not affect other Licensors. Instead, it brings a claim inherently meant to decide the obligations, and affect the positions, of all Licensors. Second, an appropriate test defendant is chosen by the Court; it is not the claimant’s choice. The test defendant must be able and likely to advance the others’ positions. It is generally inappropriate to select an unwilling candidate. Third, the facts which defeated the [15/328, 331, 333] representative claim (HCJ §§98-99, 109, 113, 120-122) mean a “test licensor” structure would be inappropriate, in particular: (1) It is unfair to impose on InterDigital the burdens of defending the claim. (2) InterDigital cannot properly advance the cases of the others (HCJ [15/328, 331-3] [33/520-1] [35/564] §§98-99, 109, 113, 120; Brodie 2 §45, Hopewell 3 §70 did not disagree). (3) There would likely be conflicts of interest between InterDigital and the others, given their competing [15/331, 333] portfolios (HCJ §§112-113, 122; see also the undisputed facts in Brodie 2 §46). [33/521]

56. Finally, as InterDigital always said, it is unfair to make InterDigital bear the heavy burdens, in effort, in costs, and costs exposure, of defending the others. This is not InterDigital’s fight. It is wrong to target it to get at the Platform (Brodie 2 §15, 50, 52-3). See further below. [33/517, 523-4]

(3) No proper case for declarations against InterDigital (InterDigital NITP Ground 1)

57. Tesla seeks to use claims against InterDigital as a hook to bring in Avanci. But that requires a valid free-standing claim against InterDigital (*Erste v Red October* [2015] 1 CLC 706, [38]; [113/1615] [15/324, 328] HCJ §§79-80, 98). If there is no independent claim against Avanci, it would be circular to assume Avanci is a defendant, when assessing claims against InterDigital. This is not changed

⁷ Rajendra 1 §23, HCJ §20, SOFI §25.

by Avanci's expressed willingness to join the action if going forward against InterDigital, as that (again) assumes a valid claim going ahead against InterDigital (Rajendra 1 §23). Yet with [32/508] the representative claim dead, the idea Tesla can get declarations about the whole Platform, by a claim against one Licensor alone, makes no sense. Such claim is unfair, unjust, has no useful and legitimate purpose against InterDigital, and is unfairly and disproportionately burdensome to InterDigital. This adds to the problem that the claim is about, and affects, the obligations and interests of the other Licensors.

58. Furthermore, if there is a valid claim between Tesla and Avanci that will proceed, and if (contrary to the arguments on Ground 2) the Licensors do not need to be parties, all Tesla needs is Avanci. The presence of InterDigital as co-defendant is unnecessary, and there is still less of a case for declarations against InterDigital (see §77 below).

Legal Principles

59. The discretion to grant declarations is a structured discretion, governed by principles, not limited to "*useful purpose*". Arnold LJ accepted the purpose must be useful and legitimate [12/252] (CAJ §64; *Teva v Novartis* [64]). That is right: factual utility cannot be enough. But [169/2870] additional principles include, non-exhaustively, those identified at §38 above, and further: (1) Absent special circumstances declarations should only address real and present disputes between the parties, not speculative or hypothetical issues: *Rolls Royce* [120(2)]; *CIP v TFL* [162/2757] [109/1503-4, 1508] [2012] EWHC 259, [24, 26, 40]; *Pavledes v Hadjisavva* [2013] EWHC 124, [40]. (2) Any [158/2694] utility must not be disproportionately small given the burdens of the litigation: *TQ Delta* [170/2887-8] [50, 52]. Another analysis is that if claims are inconsistent with such principles their purpose is not useful and legitimate, as utility is not just factual: *Ace v Howden* [21-22, 31, 37, 39]. [93/1134, 1137-9]

60. Further, it is wrong in principle, at least absent very special circumstances, to seek a declaration for the purposes of influencing a foreign court determining an issue before it under its own law, or influencing the foreign court's approach to infringement proceedings: [169/2863-4, 2868-70] *Teva v Novartis* [35, 49, 51, 59, 63-64]; and the minority judgment of Phillips LJ in [157/2682] *Panasonic v Xiaomi* [2025] RPC 2, [104(iii)] which Arnold LJ agreed with in principle at [157/2664-5, 2680] [29, 30, 95], but which in any event is to be preferred.

Facts: No Proper Claim for a Declaration; No Useful and Legitimate Purpose

61. There is no proper case for a declaration against InterDigital. First, what Tesla wants is a [1/18] lower rate from Avanci (SOFI §43) and it seeks declarations as to alleged FRAND terms for

- a Platform licence. InterDigital cannot grant such a licence, only Avanci can. Nor can InterDigital procure or prevent the grant of a licence by Avanci. It is only one of 75+ [58/851-2] Licensors. Under MLMA cl. 4.5.3, [REDACTED] of base shares are required to authorise a variation, and [REDACTED] to block one, and InterDigital's share is less than [REDACTED]. (SOFI §11-12, 16, 29, 30). In [1/12-13, 16] contrast L1 which does have a blocking share (SOFI §14) would not be party. [1/13]
62. Second, this is not InterDigital's fight. Tesla does not seek a bilateral from InterDigital, only a Platform licence from Avanci (HCJ §9, CAJ §§240-241). Tesla never approached InterDigital as to the Platform licence either. Instead it approached only Avanci and engaged in negotiations with Avanci about which InterDigital knew nothing (SOFI §§34, 38; PoC [1/16] [21] Annex A.) It attacks InterDigital solely as a springboard to get at the Platform. [15/310] [12/295-7]
63. Third, the cost of litigating FRAND for the Platform licence would be vast, in the tens of millions. InterDigital takes no position on the rate for the Platform. It has no significant commercial interest in a rate for Tesla (the claim seeks a Tesla bespoke rate: PoC §4; PoC [16/342] [21/450-1] Annex A, Section III). The cost of the litigation would be far more than InterDigital's share of platform revenues from Tesla, *a fortiori* far more than the maximum difference Tesla's claim might make to them. See Brodie 2 §§47-53, uncontradicted on this; SOFI §31. It would [33/523] [1/16] be unfair to impose on InterDigital the burden of defending the Platform rate: HCJ §121. [15/333]
64. Fourth, Tesla has never given any valid reason why it sued InterDigital, who is "*simply perplexed as to why it has been singled out as a target*" (Brodie 2 §52). InterDigital has never [33/524] threatened to sue Tesla, confirms it does not intend to, and there is no evidence to indicate it might do so. Some other licensors sued Tesla for infringement under 4G before the 4G licence between Tesla and Avanci, but InterDigital did not (SOFI §§34-36). InterDigital does [1/16] not rely on the Platform licence as discharging its ETSI Undertaking, says it will not, and there is nothing to suggest it would (whatever other Licensors did on 4G): Brodie 3 §14. [40/588-9]
65. Fifth, declarations against InterDigital alone would be ineffective. They would not bind Avanci or other Licensors and InterDigital cannot grant the Platform licence. Avanci acts independently under the MLMA when dealing with licensees. InterDigital cannot control it.
66. Sixth, as Fancourt J found, InterDigital could not effectively defend the Licensing Claims, which would be unfair and unjust for that reason also: HCJ §§98-99. [15/328]
67. On these facts there is no useful and legitimate purpose for a claim against InterDigital alone; and it would be unfair and unjust for it to proceed. It is not legitimate to impose this burden

on InterDigital, as a way of attacking Avanci, nor would any trial of the Platform rate against InterDigital be fair, still less without the other Licensors. Even if utility can be identified, there is no legitimate purpose, or any utility is disproportionately small “*given the poverty of Tesla’s case, set against the potential time, cost and complexity of the proposed litigation*” (CAJ §254). [12/299]

68. This conclusion follows applying Arnold LJ’s approach of viewing all considerations as only factors, and *a fortiori* if the discretion is correctly viewed as structured by principles. It can be assessed with clarity now: there are no real disputes of fact as to the building blocks of the analysis. Nor did Tesla adduce any evidence to say matters might be different at trial, or (more relevantly) at a preliminary issue as to the appropriateness of declarations.

Arnold LJ’s arguments and Tesla’s points

69. First, Arnold LJ said a declaration against InterDigital that a FRAND rate for the Platform would be lower would be useful because (i) Tesla “*is exposed to the possibility of future infringement claims by InterDigital*”, as InterDigital has not undertaken not to sue (§§30, 166); (ii) a [12/242, 280] declaration would mean “*InterDigital could not rely upon the availability of the current SPLA as discharging their FRAND obligations*” (§164), (iii) this could “*affect InterDigital’s ability to enforce its [12/279] SEPs against Tesla*”, it having a significant portfolio (§166). [12/280]
70. This is unreal speculation. Nothing suggests InterDigital will sue Tesla for infringement or seek to rely on the Platform licence to discharge its ETSI Undertaking, and it makes clear it does not intend to. Tesla cannot confer risk from the lack of an undertaking (*Merck v Teva* [144/2351-2] [2012] FSR 24, [30-37]). There was no reason to offer an undertaking. InterDigital has no fight with Tesla. Tesla says other Licensors *might* sue it or might rely on the Platform licence to discharge their ETSI Undertakings, but what others do does not justify suing InterDigital.
71. Indeed, these points are not Tesla’s purpose at all, and Tesla does not say they are. (1) The purpose of Tesla’s claim is to get a Platform licence at reduced rate, not to protect itself against hypothetical infringement claims by InterDigital or to affect any ability of InterDigital hypothetically to rely on the Platform licence in discharge of its ETSI Undertaking. (2) To the extent Tesla is concerned about infringement claims, this at most relates to claims by other Licensors and abroad (some did sue Tesla under 4G abroad). But anticipating claims in foreign courts by others is not a legitimate purpose. (3) Tesla accepts it needs a licence to the whole Platform (PoC §44, fn 7), which includes nearly 90% of the [16/354-5] world’s 5G SEPs. It is not realistic to suggest that taking InterDigital’s portfolio off the table would make a material difference to Tesla’s position and Tesla never suggested this.

72. Second, Arnold said a declaration against InterDigital might cause Avanci to reconsider its position, and so might lead to Avanci proposing and Licensors accepting a revision (CAJ [12/279] §164). This is yet more speculation untethered by any evidence. If the claim is against InterDigital alone, there is no reason to think Avanci or other Licensors would care about a declaration made against one Licensor. It is not legitimate for Tesla to sue InterDigital on its own to get declarations to “persuade” or pressure Avanci and the other Licensors; and still more illegitimate when there is no real independent fight with InterDigital, and the real purpose of suing InterDigital is to drag in Avanci, in turn to affect the other Licensors.
73. Alternatively, any possible legitimate utility is at best marginal; and insufficient to justify dragging InterDigital into major litigation; when the real target is Avanci and the Platform.
74. Third, at §§174-178 Arnold LJ sought to unpick Fancourt J’s factual conclusion that InterDigital could not properly defend the claims (HCJ §§98-100). But he had no basis to [12/281-2] interfere with Fancourt J’s findings consistent with proper appellate restraint.⁸ The evidence [15/328] at Brodie 2 §45, identifying the difficulties, to which Fancourt J refers, was not contradicted [33/520-1] by Tesla’s evidence (Hopewell 3 §70), and the points Arnold LJ raises were not advanced by [35/564] Tesla before Fancourt J. To the extent they need to be addressed, they are all unsound:
- (i) He says InterDigital would have no difficulty in defending a bilateral rate (§174). But [12/281] there is no bilateral claim (CAJ §§240-241). Defending the Platform rate over the [12/295-7] portfolios of all Licensors is a different exercise. He also says that if InterDigital chooses not to defend the Platform rate, there will be no evidential difficulty (§176). [12/281-2] That cannot assist Tesla. InterDigital takes no position on the Platform rate, but it is inherently unjust to sue it as to matters it cannot properly defend. Where the unfair burdens and difficulties of defending lead InterDigital not to defend issues,⁹ that only increases the inappropriateness of the declarations, which affect the others.
 - [12/282] (ii) He says (§177) he does not accept InterDigital is “*wholly*” unable to defend the Platform rate. This does not deny it is unable *properly* to defend the Platform rate

⁸ *Iconix v Dream Pairs* [2025] RPC 15 (SC), [94, 110-116].

[124/1865, 1868-1870]

⁹ Phillips LJ asked if it followed from the fact that it took no position on the Platform rate that InterDigital would not contest the action, and InterDigital responded it was an option (CA Day 2, pp. 172-173). Yet not defending would [68/1002] likely expose InterDigital to costs and the risk of judgments being used against it, not least on issues of principle, or by issue estoppel as to other issues. Further, contrary to Arnold LJ §175, the exchange related only to a Platform claim. [12/281] There has never been any issue as to InterDigital needing to defend a bilateral claim, which would be a different trial.

without constraint. It cannot: HCJ §99, adopting Brodie 2 §45. InterDigital does not know the other Licensors' comparables nor their portfolios or how they value them. Arnold LJ speculates InterDigital could do a top-down valuation on the Platform but does not explain how it could assess the other portfolios, the aggregate total royalty stack, nor their shares of the stack, nor why it could fairly be expected to do this burdensome exercise for the whole Platform. Further, top-down is only one tool of valuation in the case law, where valuation has often centrally turned on comparables.¹⁰ [15/328] [33/520-1]

- (iii) He says Avanci would be a defendant and could provide any information needed. But this is circular: it assumes Avanci is a party, to establish a freestanding claim against InterDigital. In any event, it is not sufficient. The claim is made to enforce the ETSI Undertakings of all Licensors over their portfolios. So a proper defence would deal with the valuations of their portfolios, their undertakings, and their conduct¹¹. Avanci's information is not enough: while InterDigital cannot be prescriptive as to what other Licensors would say, there is no suggestion Avanci has their comparables or knows how they value their portfolios. Arnold LJ stressed the SEP owners did not themselves set the rate for the Platform licence (§99), but this confuses the historical setting of the rate with the valuation of the portfolios, and ignores the Licensors' own conduct. [12/263]
- (iv) Further, the suggestion that a claim against InterDigital is fair because Avanci might provide the information is wrong in principle. It is unfair to advance a claim for declaratory relief against A, which A cannot properly defend and which will cause it great cost and adverse costs risks, when the real target is B, on the basis that suing A might pressure B to participate. A would face litigation which was not its fight, at the mercy of B, with no way of controlling what assistance B would give.
- (v) The same points defeat the idea that a claim might exist against InterDigital because Avanci might assist voluntarily even if not a party (§178). Arnold LJ further speculates Tesla could use a provision of US law (s.1782) to compel Avanci to provide information. Possible use of this discretionary and limited remedy before the US Courts was never mentioned by Tesla. It cannot justify interfering with Fancourt J's [12/282]

¹⁰ Valuation has only been done in bilateral cases. See e.g. *Unwired Planet v Huawei* [2017] RPC 19 (UPHC), [170-176], on comparables; and *Optis v Apple* [2025] RPC 18 (CA), [19-20], on comparables and top-down. Comparables are generally considered the best guide, where apt: *InterDigital v Lenovo* [2024] RPC 24 (CA), [41]. [171/2917-8] [153/2581-2] [128/1938]

¹¹ FRAND is a process and scrutinises the parties' conduct: *InterDigital v Lenovo* [2024] RPC 24 (CA), [39]. [128/1938]

findings. There is no basis to assume, without evidence, that it would work or solve all difficulties. Still less could it be used against Licensors worldwide. This cannot justify burdening InterDigital with this claim, to get at Avanci.

(vi) He said (§178) that it is uncertain how FRAND valuation would be proven at trial, [12/282] and speculated that e.g. “*a representative selection*” of comparable licences from others might do. This was never advanced by Tesla. It cannot rebut that InterDigital would be prejudiced in defending the claim. It is no answer to say the exact harm is unknown now. Whatever might be done with representative licences, InterDigital would not have the comparables of the other licensors or knowledge of their portfolios; it could not select the licences they would say are representative or “unpack” them. This gives no reason to interfere with HCJ §§99-100, and the uncontradicted evidence at Brodie [15/328-9] [33/520] 2 §45. He added that confidentiality difficulties are common in FRAND disputes. But this ignores the evidence that confidentiality issues are serious here because anti-trust issues prevent information sharing between Licensors (Brodie 2 §45.1; HCJ §99). [33/520] [15/328]

(vii) Finally, he argues Tesla would be also disadvantaged, but that is not an answer to the fact that InterDigital could not properly defend the claims.

75. Tesla mostly ducks the issue of useful purpose (TWC §58) and says vaguely that “*there is obvious utility in determining the terms on which InterDigital is currently offering its patents for licence through the platform?*” (TWC §39), but does not identify any concrete utility. As discussed, Tesla [3/39] has no real interest in the abstract question of the FRAND-ness of the terms on which InterDigital offers its portfolio. It is only interested in a Platform licence (see PoC §§1-6). [16/341-2]

76. Finally, Tesla refers to HCJ §123 on *forum* where Fancourt J said the claim is one “*Tesla has a legitimate interest in pursuing and which would in principle serve a proper purpose?*”. This is out of context. §123 refers back to §§97-102, which says a claim for declarations against Avanci [15/328-9] (not InterDigital alone) might serve a factually useful purpose, but it was not “*fair and just*” - that is, there is no *useful and legitimate* purpose - to make declarations against InterDigital.

(4) If there is a claim against Avanci, there is no proper claim against InterDigital

77. Tesla contends that it has an independent case for declarations against Avanci in the inherent jurisdiction, even though it accepts it has no legal right against Avanci (TWC §38). Whether [3/39] that is so is a question between Tesla and Avanci. However, if there is a valid claim against

Avanci, it is yet clearer that there is no appropriate claim for declarations against InterDigital. The points in the previous section apply, and in addition:

- (i) What Tesla seeks is a lower Platform rate. Declarations against Avanci would make it in practice untenable for the Platform to maintain a contrary rate. The Platform would need to change, or Licensors would leave. So the claim against Avanci achieves what Tesla wants, or anything any claim could legitimately achieve. Adding one Licensor among 75+ does not help Tesla.
- (ii) Arnold LJ's reasoning for why it is not unfair to sue InterDigital alone depends on the idea that all that is required for a proper defence of the claims is Avanci's information [12/263, 282] (§§99, 177). If true, this just reinforces that InterDigital is unnecessary as a defendant.
- (iii) Tesla identified nothing concrete that is useful and legitimate which adding InterDigital as a co-defendant, alone among Licensors, would add; nor any incremental benefit proportionate to the massive costs of forcing InterDigital into litigation which is not its fight. It would not assist with approval of a revised licence, as InterDigital does not have a threshold share. A decision in abstract as to whether the Platform licence is FRAND against InterDigital alone does not assist Tesla.
- (iv) The only bases for incremental benefit identified by Arnold LJ (§§165-166) are those [12/279-80] addressed, about preventing InterDigital from enforcing its SEPs against Tesla. But the same answers apply. Only unsound speculations as to their relevance are floated. They are not Tesla's real purpose, which is only about the Platform licence's terms.

TESLA HAS NO CLAIM FOR A BILATERAL (Tesla Ground 3)

78. InterDigital has always made clear it is willing to license bilaterally to Tesla on FRAND terms if requested (Brodie 2 §46.4; SOFI §32). Tesla has never requested a bilateral from [33/522] [1/16-17] InterDigital (SOFI §§34, 38). It approached only Avanci and only for a Platform licence. It has never engaged InterDigital's ETSI Undertaking in relation to a bilateral.

79. Naturally read, Tesla's claim is as to the terms of a Platform licence from Avanci. Fancourt [15/310] J so found (HCJ §9) which was not appealed (CAJ §240(viii)). The Court of Appeal found [12/296] Tesla makes no claim as to a bilateral, and this "*is not an issue that Tesla genuinely seeks to be [12/296-7] determined*" (§§240-241). The substantive pleas in the PoC identify no cause of action for a bilateral, but only as to a Platform licence (§§1-2, 58-59, prayer (6), (9), (10)). Tesla [16/341-2, 358-60]

- undertakes only to accept a Platform licence (§44). The pleas on rates are only about the [16/354-5] Platform; no alternative claim as to a bilateral is made: §§31-32. Tesla's service out evidence [16/351] makes no reference to a bilateral (Hopewell 1 §§71-72). A bilateral claim would be a different [31/502] trial, about InterDigital's portfolio alone, with different evidence (including conduct *inter se*). This was not a slip but a choice. Tesla does not want a bilateral licence from InterDigital [1/18] (SOFI §43; CAJ §§241, 243). It deliberately never sought or claimed a bilateral from [12/296-7] InterDigital, as this (1) would have defeated its representative claim, and its new idea that InterDigital is a "test licensor", as it would demarcate InterDigital from other Licensors; and (2) would undermine Tesla's claim that only a Platform licence can be FRAND.
80. Arnold LJ and Tesla float the idea of whether the PoC "*embraces*" a claim for a bilateral. But [12/280-1] neither can identify where such a claim is made. Arnold LJ §171 relies on PoC §59 but fails [16/358] to quote the conclusion, which shows the only claim made is as to "*a licence covering the Avanci 5G Pool on such terms as are determined by this Court (see paragraph 44 above). Avanci accordingly owes a contractual obligation to grant such a licence.*" Tesla relies on §40, but that identifies InterDigital's [16/353-4] ETSI obligations, while §41 identifies the obligations of all Licensors. Tesla's claim is then [16/358, 353-4] made at §58 based on §§40-41 together, and is only to a licence from Avanci.
81. Tesla relies on the parenthesis of prayer (5), "*as to the terms which are FRAND for those patents [16/359] (alternatively such patents within the pool as are owned by InterDigital)*". But as Phillips LJ said at CAJ [12/295-6] §240, read in context, this is a claim as to a Platform licence from Avanci. The only kind of licence for which Tesla is seeking declarations as to "*the terms which are FRAND*" is a Platform licence. This is clear from the above, and (1) §§42-43; (2) prayer (6) which seeks declarations [16/354, 359] that only the Platform licence is FRAND; (3) the words "*such patents within the pool*". The purpose of the parenthesis is not to claim as to a bilateral, but to track the wording used in [174/3053] *Vestel* [49] in an artificial attempt to argue, for gateways, that the Platform licence it seeks is about InterDigital's UK patents. A real claim as to a bilateral would have involved specific pleas about it against InterDigital.
82. In any event, no cause of action capable of supporting a bilateral claim can be found in the substantive pleas in the PoC, even as an alternative. So even if 5(iii) had a wider reading, it would be empty, strikeable, and incapable of supporting service out.
83. Tesla's undertaking at PoC §44 is deliberately only as to a Platform licence (Hopewell 1 §68). [16/354-5] Arnold LJ says that in oral argument on appeal, Tesla made clear its undertaking "*embraced a [31/502] bilateral*" (§172). This is wrong: Tesla only orally and conditionally floated something it might [12/281]

be “*prepared*” to undertake in ambiguous terms which did not mention a bilateral (Day 1/p. [67/999] 49); it was not explaining its pleaded undertaking which is clearly confined to a Platform [12/281] licence and is unamended (CAJ §240(ix)). Whatever was said about undertakings, no actual claim to a bilateral was made. As Phillips LJ said, this obscure tactic cannot assist Tesla. Even were a wider undertaking floated, this was “*too late and not properly before the Court*” and “*the belated raising of a bilateral licence cannot save a claim (and an appeal) entirely directed at obtaining a declaration in relation to all the SEPs on the Avanci 5G Platform*” (CAJ §§240-241). There is no [12/295-7] appeal against that procedural finding; and Tesla does not pursue this point.

84. Tesla seeks to frame the issue as whether its claim is “*arguably*” as to a bilateral. But this is not a disputed question of fact, but a binary question about the reading of Tesla’s PoC, which should simply be grasped. Tesla cannot profit from obscurity.

85. The only reason to float the possibility of a bilateral claim is as a device to get jurisdiction over its Platform claim through a back door. Even if a pleaded basis were found, that cannot work. If there is no jurisdiction over the main claim, a hypothetical jurisdiction over an alternative claim (not clearly advanced, if advanced at all) could not save it, especially where the substantive pleas are about the Platform claim; and there is no separate cause of action as to a bilateral. Jurisdiction is assessed by reference to the substance (see under gateways).

86. Finally, Arnold LJ said that, even if a bilateral claim was not pleaded, “*it would be pointless to make Tesla start again*” (§173). This was new. Tesla never said that if jurisdiction was rejected over this claim, it would start a new bilateral claim against InterDigital. It would be a different claim, with different issues, over which jurisdiction would need to be assessed separately (InterDigital reserves all its rights). It is too late for any such idea to save jurisdiction over [12/296-7] the pleaded claim: see CAJ §241. It would be wrong to allow suggestions of a possible bilateral claim, not Tesla’s real claim, to procure jurisdiction over a Platform claim over which the Court *ex hypothesi* rejects jurisdiction. What would be tried in reality is the Platform claim.

PERSONAL JURISDICTION: CONTEXT AND FRAMEWORK

87. Tesla says infringement claims raising FRAND are “*symmetrical*” to implementer FRAND claims. This is false. In *UP* and *Conversant* the owners sued for patent infringement and claimed (1) an injunction for infringement of UK patents, which the implementer defended by relying on ETSI Undertakings to seek a FRAND licence in lieu of the injunction; (2) declarations as to the terms of that licence, (3) related claims. The owner had no right to a

FRAND licence, only to an injunction in tort, if its patents were held valid and infringed and the implementer was not a willing licensee. So the declaration was about the licence the defence raised, and “dependent” on, “embedded” within, and inseparable from the infringement claim.¹² Thus the overall claim was about infringement of UK patents. *UP CA* [27, 52, 58]; [172/2940, 2945, 2947] [111/1549, 1553-4, 1560, 1564, 1567-8, *Conversant v Huawei* [2019] RPC 6 (CA) [3, 18-22, 40-41, 64, 81, 95-110]; *UP SC* [3, 61, 1570-4] [173/3000, 3015, 3017, 3021, 3023-7, 3039] 66, 78, 85, 90, 96, 151]; *Lenovo v Ericsson* [2025] RPC 11 (CA), [12]. As to gateways, not [134/2006] live on appeal, it was conceded the injunction claim if arguable fell within Gateway 2 (injunctions in England), and the other claims fell within Gateway 4A (same or closely connected facts): *Conversant v Huawei* [2018] RPC 16 (*Conversant HC*), [100]. Henry Carr [110/1535-6] [110/1537] J held Gateway 11 applied to the overall claim because it was about infringement of UK patents: [109-110]. If this included the FRAND declaration, which is unclear as it was not analysed separately, that would have been because it was a “dependent” part of infringement.

88. It is necessary to distinguish personal territorial jurisdiction, whether a court can hear a claim against a defendant, established by service here or through a gateway, and “jurisdiction” in the sense of power or justiciability, sometimes called “subject matter jurisdiction”¹³. The appeals in *UP* were not about personal jurisdiction, but power, justiciability and FRAND: whether the Court could declare worldwide FRAND licence terms. It was held: (1) the Court could grant an injunction to restrain infringement of the UK patent unless the implementer raised a FRAND defence and entered into a FRAND licence over that patent, which (on the evidence there) the owner could insist was on worldwide terms; (2) there was nothing wrong in principle with the Court declaring terms of the worldwide licence, as this did not involve determining the validity or infringement of foreign patents: *UP CA* [19, 26-29, 38, 44, 47, 52-58, 74-129]; *UP SC* [15, 48, 58, 63, 66-67, 84, 90, 93, 151]. [172/2939-47, 2951-62] [173/3005, 3012, 3014, 3016-7, 3022-6, 3039-40]

89. Implementer claims for FRAND declarations are different. There is no problem in principle with bilateral implementer claims, if there is jurisdiction to hear them. But they are independent claims about contractual obligations under the ETSI Undertaking (CAJ §§222, [12/292-3] 227). They do not depend on claims for infringement, invalidity, or inessentiality¹⁴ of UK

[132/1983, 1985-6] patents. *Kigen v Thales* [2022] EWHC 2846, [9, 20, 27, 30]; *Nokia v Oneplus* [2024] RPC [135/2509, 2532]

¹² If the implementer doesn't rely on the owner's ETSI Undertaking, the owner has no right to FRAND declarations: see *TQ Delta* [26, 33, 37-38, 41-44, 46]. [170/2883-6]

¹³ Briggs, *Civil Jurisdiction and Judgments* (8th ed 2025), §§1.01, 1.05-1.07, 2.03, 2.05, 2.12. [179/3253-60, 3262-9]

¹⁴ A declaration of inessentiality holds that a declared patent is not in fact essential to the standard, because the standard can be implemented without using the technology of that patent.

1, [159-161, 361]; *Lenovo v Ericsson* [2024] EWHC 1734, [22-25]; *Lenovo v Ericsson* [2025] [133/1992-3] [134/2006] RPC 11, [15]. They are justiciable not because of any patent claim but because the Court has power to decide contractual obligations and this would not involve determining validity of foreign patents: *UP SC* [58, 63]. FRAND trials in large portfolio cases assess terms for [173/3014, 3016] worldwide portfolios by comparables and/or global valuation methodologies, and do not address the validity/essentiality of individual patents (*UP SC*, [60], and fn 15 below). [173/3014-5]

90. If Fancourt J thought implementer declarations can only be brought in the alternative to invalidity/inessentiality claims (HCJ §32), he was misled by a false analogy to infringement [15/314] claims, and none of the authorities he cited supports this. Success on such patent claims would just show those patents did not need to be licensed. Nor is there any reason why the implementer must bring such claims in order to fail. Instead (if there is personal jurisdiction) the implementer can claim as to a FRAND licence while parking what patents are valid [173/3014-5] SEPs: *UP SC* [60-61]. It also follows it is wrong (HCJ §§1, 63, 65) to describe the Licensing Claims as an “*alternative*” and to say “*the patent claim ... enables [Tesla] to seek to claim a licence in the alternative*” (Tesla does not rely on this). Sometimes implementers have for tactical reasons combined licensing with invalidity/inessentiality claims but this was unnecessary. [15/309, 321-2]

91. Irrelevance of the Patent Claims. The Patent Claims and Licensing Claims are separate as [12/266-7, 277] Arnold LJ says (§§115, 157). The Licensing Claims do not require determination of the Patent Claims, as Fancourt J accepted (HCJ §63), and are unconnected to them, and not [15/321-2] pleaded as alternatives. Tesla accepts it needs a Platform licence and pleads the Licensing Claims should be decided first (PoC §§6, 44-45, fn 7). They claim over the whole Platform [16/342, 354-5] and are the same, whether the Patent Claims as to 3 patents out of 170,000+ succeed or fail. Validity or essentiality of a few patents is irrelevant to valuation in a large portfolio case,¹⁵ and the Challenged Patents are of no particular significance: HCJ §64. The Platform licence [15/321-2] licenses all SEPs of the Licensors [REDACTED] [REDACTED] (SPLA §§2, 1.11, 1.5). The Patent Claims were disconnected attempts at a [58/878, 880] spurious jurisdictional hook. Tesla had no need to bring them. Fancourt J held there was no need to pursue them, saying only they *might* be pursued later. They are unlikely to be pursued: [15/321-2] HCJ §§63, 66. They were stayed by consent¹⁶ as Tesla never wanted to pursue them.

[150/2474, 2531]

¹⁵ *Nokia v Oneplus* [2024] RPC 1, [15, 356-357]; *InterDigital v Lenovo* [2020] EWHC 1318, [7-8]; *Panasonic v [126/1882] Xiaomi* [2024] EWCA Civ 1143, [13]; Brodie 2 §67.2. This was accepted by Tesla: HC T2/p. 221. [33/525] [66/995]

¹⁶ Order of 12 July 2024, §16. [13/303]

GATEWAYS

92. This is a claim in contract. The natural framework is Gateway 6. ETSI Undertakings are governed by French law¹⁷ so Tesla cannot use this gateway. It seeks to squeeze its claim within two gateways which do not fit: Gateway 11 for IDH and IDPH (and Avanci), and CPR 63.14 for IDPH. Gateway 4A was abandoned below.
93. To justify service out a claimant must show its claim fits within a gateway.¹⁸ If facts are disputed as to conditions of a gateway, the claimant must show a “good arguable case”, that is, the better of the argument.¹⁹ But if the issue is one of law or interpretation of gateways the Court should normally just resolve it: *Altimo v Krygz* [2012] 1 WLR 1804, [81]; *Brownlie II SC*, [31-32]. That is the right approach here (Arnold LJ §107). [101/1345] [118/1706] [12/265]
94. The Court interprets the gateways starting with their natural and ordinary meaning, understood in context, and is guided by the objective purpose of the Rules Committee.²⁰ A claim must be “clearly within both the letter of the rule and the spirit of the head”: *Fong v Ascentic* [2022] HKCFA 12, [107], [117]-[121].²¹ This is a question of interpretation not just discretion to serve out. Further “the court must consider the substance of the matter” (*Fong*, [117]). Artificial reframing of claims to fit within gateways does not work.²² [178/3245, 3248-50]

(1) Gateway 11

95. Gateway 11 applies where: “*The subject matter of the claim relates wholly or principally to property within the jurisdiction*”. This was introduced as CPR 6.20(10) in 2000, and revised in 2015 to add “*or principally*”. The Final Report of the Chancery Working Group explains (§28): “*The proposed words “or principally” prevent the risk of exorbitant claims where only a small part of the subject matter of the claim relate to property within the jurisdiction.*” [88/1105] [187/3401]

[52/731] ¹⁷ IPR Policy §12; and terms of the ETSI declaration.

[118/1704-5] ¹⁸ *Cairo v Brownlie* [2022] AC 995 (*Brownlie II SC*), [25], [28].

[97/1279-80] ¹⁹ Summarised in *Airbus v Generali* [2019] 1 CLC 903 (CA), [49]-[53].

²⁰ *Brownlie II SC*, [51, 54, 76, 77, 81], also per Lord Leggatt (dissenting on the result) at [175, 177, 191-197]. [118/1747-8, 1752-3]

[179/3271-2] ²¹ Briggs, *Civil Jurisdiction and Judgments*, §8.07. For previous authorities, see *Johnson v Taylor* [1920] AC 144 (HL), 153, 154; *Ocean Steamship v Queensland Wheat* [1941] 1 KB 402, 407; *George Monro v Cyanamid* [1944] 1 KB 432 (CA), 437, 442; *Mackender v Feldia* [1967] 2 QB 590 (CA), 599F-G (Diplock LJ), *Metall & Rohstoff v Donaldson* [1990] 1 QB 391 (CA), 401F, 434H, 437E; *Mercedes-Benz v Leiduck* [1996] AC 284 (JCPC), 299D-F, 303D, 304F. The contrary view in *Sharab v Al Saud* [2009] 2 Lloyds Rep 160, [35] was *obiter*, and *per incuriam*: see *Fong* [117]. “*Letter and spirit*” was not addressed in *Brownlie v Four Seasons* [2018] 1 WLR 192 (*Brownlie I SC*), *Brownlie II SC*, or *Lungowe v Vedanta* [2020] AC 1045, because it was not relied on there. [129/1960-1] [120/1775, 1780] [143/2329, 2333-4] [165/2807]

²² *Johnson v Taylor*, 153, 160-161; *Rosler v Hilbery* [1925] Ch 250, 260-261, 263; *GAF v Amchem* [1975] 1 Lloyds Rep 601, 604-606. [129/1960, 1967-8] [163/2770, 2780-1, 2783] [119/1761, 1764-6]

- [110/1537] 96. “Property” includes patents (*Conversant HC*, [109]), and it can cover claims based on non-proprietary rights if “wholly or principally” about property here: *Pakistan v Zardari* [2006] 2 [155/2643] CLC 667, [157-159]. Thus, it can cover claims in contract about sale of a UK patent, or to rent from land in Wales. But it only applies where the substance of the claim is wholly or principally about property here: *Shahar v Tsitekios* [2004] EWHC 2659; *Zardari* [159]. [164/2797] [155/2643]

Gateway 11 does not apply to this claim, with regards to both InterDigital and Avanci

97. Tesla’s claim does not fall within Gateway 11. Its substance and subject matter are not wholly or principally about property here. Nor does it fall within the spirit of the gateway.
98. The subject matter of Tesla’s claim is alleged rights as to FRAND licensing terms for the Platform licence from Avanci over all disclosed SEPs worldwide in the Platform, based on the French law ETSI Undertakings of all Licensors. It is not in substance a claim as to a licence of the UK SEPs in the Platform, nor InterDigital’s UK SEPs, still less the Challenged Patents. This is the natural reading of the PoC: §§1-6, 41, 58. [16/341-2, 353-4, 358]
99. It is also the necessary logic of Tesla’s claim, since: (1) Tesla seeks a licence from Avanci to all Platform SEPs. Individual Licensors can leave or join. The Platform licence is to all relevant SEPs owned by Licensors from time to time not any particular patents. (2) Tesla expressly says that licence is global: prayer 6. (3) Avanci can only license the whole Platform and not any subset. It cannot offer a licence to InterDigital’s patents alone nor UK patents of Licensors alone. (4) The ETSI Undertakings of each Licensor only apply to its own patents, so the claim is necessarily based on all ETSI Undertakings of all Licensors over all Platform SEPs worldwide. InterDigital’s ETSI Undertakings alone (even if they apply to the Platform, which is denied) could not support the Platform licence from Avanci. (5) ETSI declarations are made on a global basis²³. So (6) a claim to a Platform licence of UK patents or InterDigital’s UK patents or the Challenged Patents, would be meaningless, and liable to be struck out, and is not the true subject matter of Tesla’s claim.
100. The Court of Appeal viewed the claim as about “*determining FRAND terms in relation to foreign SEPs*” (§232), “*entirely directed at obtaining a declaration in relation to all the SEPs on the Avanci 5G Platform*” (§241). See also HCJ §131. This is how a reasonable businessperson would view it. [12/294] [12/296-7] [15/335]

[171/2914] ²³ *UPHC*, [87]; *UP CA* [26, 80]; *UP SC* [11, 12, 14, 44, 48, 62]. The SEP owner must declare its global portfolio, but [172/2940, 2953] declarations are made on a single patent per family on the basis that this declares the global family (absent express [173/3004-5, 3011-2, 3015] exclusions, which are rare). ETSI IPR Policy §§4.1-3, 6.1, 6.2, 15(13). InterDigital’s declarations applicable to the [52/727-8, 733] Challenged Patents declare either an international application under the Patent Cooperation Treaty or the US [56/818, 825] patent/application in the global family (declarations ISLD-201906-026, rows 38, 131; and ISLD-202206-017, row 8). [57/834]

101. The UK patents of all Licensors are only c. 7% of the whole (SOFI §12). InterDigital's UK [1/12] portfolio is much smaller: it was 1 member out of c. 65+, and about 10th largest. The Challenged Patents are 3 out of 170,000+ (or 11,900 in the UK) and of no particular [15/332] significance (HCJ §64). Thus, the subject matter of the Licensing Claims is not wholly or principally about UK patents. It is about French law contracts, and worldwide licensing, and insofar as it is about patents, the UK patents are only a very small part.

The Particulars of Claim

102. Tesla's PoC tries contorted wording in an artificial attempt to fit within gateways. These do not change the substance. The essence of Tesla's claim is it has rights "to a FRAND licence covering the entirety of the Avanci 5G Pool" (PoC §1(iii)) and is "seeking to enforce their contractual [16/341] obligation to an Avanci Pool Licence on FRAND terms" (§5). §40 says it is "entitled to a licence on [16/353] FRAND terms covering InterDigital's International SEP Portfolio", expanding at §41 "Tesla is a beneficiary of the FRAND commitments of all the Avanci 5G Pool Members ...it is, accordingly, entitled to a licence on FRAND terms covering the Avanci 5G Pool". It undertakes at §44²⁴ to take a licence [16/354-5] "covering the entirety of the Avanci Pool", and asserts at §46: "All the patents in the Avanci 5G Pool (including the Challenged Patents) are encumbered by FRAND declarations ..." and so (§54): [16/357] "InterDigital and each other Avanci Pool Member ... entered into a contract with ETSI whereby each Avanci 5G Pool Member (including InterDigital) is bound to grant licences of its IPR". §58 concludes: [16/358] "Tesla is entitled to enforce the FRAND commitment of each Avanci 5G Pool Member, including InterDigital, by seeking a licence from and/or through Avanci covering the entirety of the Avanci 5G Pool".
103. Thus the cause of action is as to the licensing of all Platform patents worldwide enforcing all ETSI Undertakings of all Licensors. See also Declarations (9) and (10), claiming as to [16/360] FRAND terms of "a licence between Tesla and Avanci covering the Avanci 5G Pool (including the Challenged Patents)". "Including" changes nothing. Declaration (6) says the licence said to be [16/359] FRAND, is "a licence (i) between Tesla and Avanci?" that "covers the entirety of the Avanci 5G Pool".
104. §59 says Tesla has "relied upon and invoked InterDigital's and Avanci's obligation to grant a licence [16/358] covering the Avanci 5G Pool (and/or the Challenged Patents), and has given an unconditional undertaking to take a licence covering the Avanci 5G Pool on such terms as are determined by the Court (see paragraph 44 above) Avanci accordingly owes a contractual obligation to grant such a licence." Tesla may rely on "(and/or the Challenged Patents)". But the concluding words show the claim is against Avanci

²⁴ To get a FRAND declaration, an implementer must (at least generally) undertake to take the licence settled by the Court: see *Lenovo v Ericsson* [2025] RPC 11 (CA), [15]; *Kigen* [27, 30]. [134/2006] [132/1986]

“to grant” a “licence covering the Avanci 5G Pool” (InterDigital cannot grant this). The earlier “invocation” of obligations “covering the Avanci 5G Pool (and/or the Challenged Patents)” does not make a separate claim as to Challenged Patents. Further, Tesla only “sought to negotiate with Avanci the terms of an Avanci 5G licence” (§30), so it never “invoked” any obligation as the [16/350] Challenged Patents.²⁵ The substance of the claim remains as to the Platform as a whole.

105. Tesla refers to Declaration (5), which claims (numerals added) “(i) A declaration that the terms [16/359] of the SPLA in so far as they relate to any patents in the Avanci 5G Pool which designate the United Kingdom are not FRAND ... alternatively (ii) a declaration as to the terms which are FRAND for those patents (alternatively, (iii) such patents within that pool as are owned by InterDigital”. These permutations attempt to replicate the wording used in *Vestel* [49], but are an artificial device. [174/3053] They are disconnected from the cause of action in the substantive pleas which do not make a claim as to a licence to UK patents alone and could not logically do so. They are incoherent, and not what Tesla really claims. As is clear from the PoC, the claim is only to a Platform licence. But with that in mind, as to (i), it is artificial to seek a declaration of the FRAND-ness of the terms of the Platform licence “in so far as they relate to” Platform patents which designate the UK. The Platform licence can only relate to the whole Platform. As to (ii), this supposedly concerns UK patents of all Licensors; again, the Platform licence can only relate to the whole Platform, and InterDigital cannot license the patents of others. As to (iii), again Tesla’s claim as to a Platform licence is not, and could not meaningfully be, as to the FRAND terms for InterDigital’s UK patents, because Avanci cannot license a subset, nor could InterDigital grant a licence to the Platform. No cause of action is pleaded to underlie these permutations distinct from the real worldwide claim.

106. These artificial permutations do not affect the substance. The substance of Tesla’s claim, that would be tried if jurisdiction was upheld, remains as to the terms of a Platform licence over all the SEPS worldwide of all Licensors.

Authorities relied on by Tesla

107. Tesla relies mainly on the *obiter* logic of Birss LJ in *Vestel* [71] and Arnold LJ’s dissent. It [174/3055] also relies on Fancourt J’s *obiter* application of *Vestel* (HCJ §127) and later first instance [15/334] [99/1326] [142/2241-3, 2279] decisions: *Alcatel v Amazon*, [119-120], *MediaTek v Huawei* [2025] EWHC 649, [121-122, 184], *Acer v Nokia* [2025] EWHC 3331, [311]; *Amazon v InterDigital* [2025] EWHC [94/1205] [102/1357, 1363, 1372-7, 1391]

²⁵ SOFI §34. Tesla’s approaches to Avanci are set out at PoC Annex A Section III.

3334, [15, 56-57, 61-65, 132].²⁶ Yet the other first instance judges were really applying Birss LJ's logic, its application by Fancourt J, and/or its adoption by each other, by a combination of deference and accretion. Apart from Arnold LJ, and a paragraph in *Alcatel*, both driven by *Vestel*, there is no real independent reasoning (and only *MediaTek* concerned ETSI and French law). Tesla's idea there is a prior "*well-established line of authorities*" is incorrect.

108. Birss LJ said *obiter* in *Vestel* [71] that if an implementer "*did claim to have a legally enforceable right against a patentee or a licensing agent of a patentee, whereby Vestel were entitled to be offered a FRAND licence under the UK SEPs in the HEVC Advance pool, then the subject matter of that particular claim would be the UK SEPs. The question that claim would be concerned with is the licence terms which are available to license those UK rights.*" This was *obiter* as no legal right was pleaded [66, 69]. So he did not need to address how a legal right as to "UK SEP" could arise in a platform case. [71/3055]
109. Arnold LJ said such logic applied here: "*it is necessary to distinguish between the property on the one hand and the FRAND obligation which affects it on the other hand ... a licence to a single UK SEP on FRAND terms can be, and often is, a global licence to all corresponding SEPs (and indeed all other families of SEPs in the same portfolio) ... Thus the Licensing Claims relate wholly to UK SEPs even though it is Tesla's case that the FRAND obligations attaching to them carry with them an obligation to grant a licence of global, and not merely UK, extent.*" (§§108-9, 116). Thus Gateway 11 applied: §§156, 214. This is an artificial characterisation driven by a false analogy to infringement claims. It fails to consider the actual cause of action claimed in implementer cases and *a fortiori* here. [12/265, 267, 277, 290]
110. In infringement cases, jurisdiction is based on the UK patent in suit; the owners' remedy against the implementer is an injunction (*Optis F CA*, [73]); the ability to obtain a declaration as to licence terms arises within the infringement claim where the implementer raises a FRAND defence relying on the owner's ETSI Undertakings. That declaration declares what licence would be FRAND which would cover the patent in suit. The basis of the owner's claim is the UK patent, which must be licensed to avoid an injunction. It is artificial to call this a claim as to a licence to the UK patent which "*extends*" worldwide: it is (where a worldwide licence is FRAND) a claim as to a licence over the worldwide portfolio relating [152/2561]

²⁶ *Warner v Nokia* [2025] EWHC 2888, [26]-[27] was a without notice decision which should not be cited: *PD Citation of Authorities* [2001] 1 WLR 1001, §6(b). There is no independent reasoning.

- to all patents equally. The contractual obligation being declared arises equally out of all the ETSI Undertakings as to all patents worldwide: *UP CA* [114-115, 44, 80]; *UPSC* [58, 66]. [172/2959-60, 2944, 2953] [173/3014, 3017]
111. In an implementer claim as to the terms of a worldwide licence, the implementer is *not* in reality claiming as to a licence of UK patents which extends worldwide. The implementer approaches the owner seeking a worldwide licence, and triggers the ETSI Undertakings to the worldwide portfolio, not to UK patents alone. In turn the claim is made as to the worldwide obligations: that is what the implementer wants and the contractual rights it is really engaging. The UK SEPs are not the basis for the worldwide licence: *UP CA* [115]. [172/2960] The substance does not change, even if the implementer, to seek UK jurisdiction, artificially frames its claim as about UK patents. That is just a device. The assessment of gateways turns on the contracts really relied on: *Global v Wadhawan* [2012] EWCA Civ 13, [61]-[63]. [121/1787]
112. The artificiality of Arnold LJ's analysis is demonstrated by the fact that, if *Vestel* were correct, the same claim to a contractual right to a worldwide licence could equally be described as "*wholly or principally*" about the SEPs in any country in the world, just by the device of formulating a claim as to a licence to the SEPs in that country, but extending worldwide. This has wide consequences. Take a contract for the leasing of aircraft worldwide, some in the UK, with terms applying worldwide, and a dispute as to worldwide rates. Tesla's logic would allow a claimant to get jurisdiction over the worldwide dispute by artificially framing its claim as about a rate for aircraft in the UK, which extends to aircraft worldwide, and saying this was "*wholly or principally*" about aircraft in England. Examples can be multiplied.
113. The Rules Committee in 2000 or 2015 did not intend to extend jurisdiction over claims in reality about foreign property through this sort of device.
114. The unreality of Arnold LJ's characterisation is still more clear in respect of the Platform claim here. This claim is not wholly or principally about property in England, because:
- (i) Tesla never approached InterDigital, only Avanci, to seek a Platform licence (PoC Annex A, Section III). When doing so it never mentioned the UK patents in the portfolio, nor InterDigital, still less the Challenged Patents. Tesla was engaging all the ETSI Undertakings of all Licensors globally (if they apply to the Platform). [21/450]
 - (ii) A claim as to the UK patents in the Platform, *a fortiori* as to the Challenged Patents, is not what Tesla is really claiming for. What Tesla wants is a different rate, and what it claims is a claim about the FRAND terms for the *whole Platform licence*. The same claim

would continue even if all the UK patents were revoked. The Licence is not to specific patents but to whatever patents are in the Platform; and a claim only as to UK patents, or the Challenged Patents, would also be incoherent, as explained.

- (iii) Arnold LJ (§109) thought it was irrelevant that the vast majority of Platform patents were foreign. But this depended solely on the characterisation of the claim as about UK patents. Once that fails, it follows that, to the extent this claim is about patents at all, it is only in small part about UK patents and so cannot be within Gateway 11. [12/265]
115. Tesla also relies on Zacaroli J's reasoning in *Alcatel* to suggest a case like InterDigital's "confuses the subject matter of the licence and the subject matter of the claim" [120]. That is incorrect. InterDigital's case is that Tesla's cause of action is worldwide. Zacaroli J was again applying the same *Vestel* logic, as he viewed the claim before him as being to enforce the (ITU-T and Swiss law) undertakings under two UK patents only. But in reality the claim, *a fortiori* here, is to enforce all ETSI Undertakings as to all Platform patents worldwide. [99/1326]
116. Arnold LJ said InterDigital's case has "*superficial attraction*" (§109). In truth it reflects the ordinary meaning of the Gateway and the natural analysis of Tesla's claim. If the claim was really about UK SEPs, its focus would be the UK. But Arnold LJ accepted "*the 'fundamental focus' of the litigation is not the UK*", so the US was equally connected (§§154(vi), 155). [12/265] [12/277]
117. Finally, Tesla has failed to plead a legal claim against InterDigital to a licence to the UK SEPs, or InterDigital's UK SEPs, in the Platform, and thus cannot satisfy Gateway 11, applying Birss LJ's logic in *Vestel* [69, 71]). Nor does it have a legal claim against Avanci. [174/3055]

(2) CPR 63.14

118. Part 63 relates to "*Intellectual Property Claims*". 63.1 says: "(1) *This Part applies to all intellectual property claims, including – (a) registered intellectual property rights such as (i) patents; (ii) registered designs; and (iii) registered trade marks ...*". By 63.1(2)(e) "*'patent' means a patent under the 1977 Act*", and so a UK patent or an EP UK.²⁷ (See 63.1(2)(b)-(c), (j) for trade marks and registered designs). [75/1059]
119. Patents Rules 2007, r. 103 (formerly r. 30)²⁸ provides "*For the purposes of any proceeding under the Act or these Rules*", an address for service ("**AFS**") must be furnished by an applicant for a UK patent, or by participants in patent proceedings, and may be given by a proprietor. [71/1045]

²⁷ Patents Act 1977, s. 77. For EP UKs, see *Terrell on the Law of Patents* (20th ed 2024), §§1.61-1.62. [70/1041] [183/3300]

²⁸ See r. 30 of the Patents Rules 1978, 1982, 1990 and 1995, and then 103 of the Patents Rules 2007. [78/1086] [79/1087] [80/1088-9] [81/1090-1] [82/1092-3]

“Proceeding[s] under the Act” include proceedings before the Comptroller (e.g. to determine ownership: s.8) and proceedings in Court (e.g. actionable threats, declarations of non-infringement, or revocation: ss. 70-70A, 71-72). The AFS under the Trade Mark Rules 2008 [76/1047] r. 11, Trade Mark Act 1994, Registered Design Rules 2006 r. 42, and Registered Designs Act [73/1050] 1949, is similarly for “proceedings under the Act and Rules”.

[75/1064] 120. CPR 63.14 provides:

“(1) Subject to paragraph (2), Part 6 applies to service of a claim form and any document in any proceedings under this Part.
 (2) A claim form relating to a registered right may be served –
 (a) on a party who has registered the right at the address for service given for that right in the appropriate register at—
 (i) the United Kingdom Patent Office;²⁹
 provided the address is within the United Kingdom.”

121. The AFS under 63.14 is that given under the relevant Rules, “for the purpose of proceedings under the Act or these Rules”. That shapes the meaning of 63.14. Its intended function is to permit service of proceedings, or about registered rights arising under, the relevant Acts and Rules: that is “Intellectual Property Claims” within 63.1(1), not more broadly. It is a technical provision intended for service of claims that are properly UK patent, trade mark or registered design proceedings, about UK IPR. It is not meant for claims under other legal rights.

122. This is supported by *Actavis v Lilly* [2013] RPC 37, where Kitchin LJ held 63.14 “is intended [95/1253-4] to provide a means for service of claims concerning patents under the 1977 Act and in respect of which an address for service has been given in the UK Patent Office register. ... CPR 63.14 is specific in its terms and correspondingly limited in scope.” [81]. 63.14 “only provides a means for service in so far as [the claim] relates to the UK designation”, otherwise its provisions “could be circumvented by ... conveying claims in respect of foreign patents with a claim in respect of a corresponding UK patent.”: [80], [82].

123. This is explained by the legislative history:

(i) In 1992 the assumption that revocation claims did not need to be served was rejected [159/2697] (*Pfizer v Napp* [1993] FSR 150). But RSC Order 104 dealing with patent proceedings [83/1094] as to UK patents (header, and rr. 1, 2) had no equivalent to 63.14. *Symbol v Opticon* [168/2847] [1993] RPC 211 then held that court proceedings including for revocation could not be served on the AFS, as Patents Rules r. 30 (the predecessor of r. 103) “only applies to [81/1090]

²⁹ This includes the Trade Mark and Design Right registers, held at UKIPO; the “United Kingdom Patent Office” is the old name of UKIPO: UKIPO Website, “About Us”. See CPR 63.1(1)(j). The Registrar under the Registered Design Act, s. 44(1) and the Trade Marks Act, s. 62 is the “Comptroller General of Patents, Designs and Trade Marks.”

proceedings before the comptroller and the business of the patent office". This was not so for trade marks.³⁰ The contrast was "odd" but "*the appropriate course is amendment of Order 104 of the Rules of the Supreme Court rather than an attempt by me to bend the rules as they now stand.*"

- (ii) In 1996 new Order 104 r. 24 provided claims could be served on the AFS in the [86/1100] register "*for the purpose of any proceedings relating to a patent or registered design (including proceedings for revocation, declaration as to non-infringement or groundless threats of infringement proceedings or any other proceedings of a kind mentioned in this Order)*" (also r. 4). This is about [85/1099] patents/design proceedings. Parallel change was made in Order 100, r. 5. The [87/1102] parenthesis showed "*relating to*" was meant to cover proceedings properly about UK patents and registered designs, not claims under other rights. When the CPR was introduced, CPR 49E §3.2 was in similar terms (see also §§1.1, 1.3); and §§21-25 did [91/1113-9] the same for trade marks.
- (iii) When CPR 63 replaced CPR 49E, it included 63.16, in relevantly similar terms to now, [89/1106-08] which with minor modifications³¹ became the modern 63.14. This remained a technical provision, for the purpose of Part 63 about "*intellectual property claims*", in a context where the Patents, Trade Mark and Registered Design Rules required the AFS "*for the purpose*" of proceedings under the Acts and Rules. There was no suggestion that 63.16/63.14 was intended to do something new, and create a much expanded scope of jurisdiction including claims to enforce rights outside those Acts.³²

124. "Related to" has two relevant possible meanings. It can mean substantially or really about Y – "*the Scott Report related to the export of arms*". Or sometimes it can have a looser meaning, in the sense of "*X has a connection to Y*", including a partial or non-central connection.

125. Understood in context, in 63.14(2), a "*claim form relating to a registered right*" uses "*related*" in the first sense. It covers claims substantially about "*the right*" (see 2(a)), not claims really about other rights. Thus, it does not cover claims in contract. Further, it means a claim related to that right more than other rights. A claim partly about the registered right with the AFS but just as much or more about other IP rights, e.g. patents with a different AFS or no UK AFS, is not a claim "*relating to*" the right, because it is mostly unrelated to the registered right. In

[130/1971, 1973-4] ³⁰ *Johnson & Johnson's Application* [1991] RPC 1, pp. 3, 5-6.

³¹ In 63.16 and 63.14 as amended in 2004, 2008, 2009, 2014 and 2020.

[186/3385] [187/3400-2] ³² This was not envisaged when considering the implications for intellectual property of expanding Gateway 11: Mance Report 1 December 2014, §7; Final Report 12 June 2015, §§27-29.

addition, a claim substantially about non-UK registered rights would not be an “*Intellectual Property Claim*” within Part 63, as by 63.1(1) Part 63 is meant for UK registered rights.³³

126. If “*relating to*” in 63.14 had the broader sense of “*connected to*”, and 63.14(2) covered claims under other rights, this would cut across the boundaries of PD 6B. CPR 63.14 would cease to be a specific limited provision for Part 63. This would create unintended distortions.

127. It would give a far wider jurisdiction for registered rights than unregistered rights, and mean that claims under other rights like contract/tort had a far wider jurisdiction if *partly* connected to UK registered rights, outflanking Gateways 11, 6 and 9. A French law claim as to licensing of worldwide copyright including UK copyright would fall outside gateways because it was not principally about UK property. But there would be jurisdiction over a claim under a licence to a worldwide trade mark portfolio affecting some UK marks because it was partly “*related to*” registered rights and could be served under 63.14. All claims merely *connected* to UK registered rights could be served in England reversing the burden of proof on *forum*, and without a discretion to refuse service out, carving a large hole in PD 6B. This would have dramatic consequences if Arnold LJ were also right on his (incorrect) view [12/275-6] (§152) that there is no natural forum for FRAND (see §§171-174 below).

128. In contrast, if 63.14(2) is interpreted as InterDigital proposes, as a limited provision meant for proceedings really about UK registered rights, the jurisdiction rules work as intended.

Application of CPR 63.14

129. Tesla purported to serve the claim on the UK addresses of two patent agents used by InterDigital which are the registered AFSs of the three Challenged Patents (SOFI §44). It [1/19] did this by reference to the Challenged Patents only (see its service letter of 6 December [64/986] 2023) and Tesla relied only on those patents for 63.14 (SOFI §44). There was no suggestion [1/19] or evidence that the rest or most of InterDigital’s UK patent portfolio shared those AFSs,³⁴ nor was there any suggestion or evidence, and it is very unlikely, that other Licensors use those AFSs save perhaps by chance in an isolated case (which would not assist Tesla). There are many other patent agents. In any event, no foreign patents will have a UK AFS.

[117/1678, 1680-1, 1687-8] ³³ *Fridman v Agrofirma* [2026] EWCA Civ 139 [38-39, 47-51, 72-77] holds that provisions for service in England must be read in the light of their statutory basis, and the principle of territoriality, and not “*outflank*” PD 6B.

³⁴ If Arnold LJ suggests they did (§208), he had no basis for this and it was not a point of Tesla’s. Obviously some [12/289] might, but no reliance was ever placed on them. The details can be addressed if required.

130. In this situation, CPR 63.14 cannot apply to Tesla's claim. This follows from the characterisation of the claim, as already addressed under Gateway 11.
131. First, the claim is in contract as to French law ETSI Undertakings. It is not a claim under patent rights, nor under the Patents Act nor of similar nature, nor is it an "*intellectual property claim*" within 63.1(1). It is independent of the validity and essentiality of any UK patent. It does not fall within the intended "*specific*" and "*limited*" "*scope*" of 63.14.
132. Second, in substance it is a claim as to licensing of the Platform, so if it "*relates to*" patents at all, it relates predominantly to SEPs not registered at the AFS. It relates to the Challenged Patents at most minimally as a tiny fraction of the Platform. Tesla says the subject matter is "*UK patents in particular the Challenged Patents*" but its Licensing Claims are equally as to all Platform SEPs worldwide. No separate claim as to a licence to the Challenged Patents is attempted. If the Challenged Patents were revoked the Licensing Claims would not lapse. Thus (1) they do not substantially relate to patents with the AFS and so are outside 63.14, and (2) are substantially about rights that are not UK patents, and so are outside 63.1(1). Tesla's argument is an attempt to "*convoy*" other claims within 63.14 contrary to *Actavis*.
133. Third, Tesla's claim is about all Licensors' Undertakings and all Platform patents but 63.14 only permits service "*on a party who has registered the right at the [AFS] given for that right*" so it cannot support service of claims relating to the rights of others. Even if by chance other Licensors used the same AFS, it would be irrelevant for this reason.
134. The Rules Committee in 2003 would not have intended to bring non-patent claims like this within 63.16, still less based on the complex *obiter Vestel* logic which would not have been anticipated, nor were the revisions of 63.14 intended to expand it in a relevant way.

Authorities Relied on by Tesla

- [174/3055] 135. Tesla relies principally on Fancourt J's brief *obiter* comments, two later first instance decisions, and Arnold LJ's dissent. But the first instance decisions are applying the *obiter* comments in *Vestel* [71] to 63.14, and then each other, again by a combination of deference and accretion. The other cases were also bilateral cases not considering a platform situation. To the extent there is distinct independent reasoning, we address it below.
136. The main relevant reasoning is in Arnold LJ's dissent, which made two points. First, the claim should be characterised as "*wholly about UK SEPs*" applying *Vestel*, because it is about

a licence to UK SEPs even if that extends worldwide: §109. That is an unreal characterisation [12/265] as already explained. Arnold LJ's reasons for distinguishing *Actavis* also depend on his characterisation that the claims enforce the ETSI Undertakings “*attaching to InterDigital's UK SEPs*”: §§211-212. Again that is unreal: the claim seeks to enforce ETSI Undertakings of all [12/290] Licensors which are inherently global. Indeed the ETSI declarations over the Challenged Patents proceed by naming the US patents or international applications, which then apply to [52/728] the global families by IPR Policy §6.2.

137. Even that characterisation admits the claim is just as much about all the other c. 11,900 UK Platform patents. Arnold LJ said “*the issue would be the same with respect to all InterDigital's other UK SEPs*” (§208). It is not clear what he meant, but there is no basis for it (see above), and [12/289] anyway it ignores the UK patents of other Licensors. So even if the claim were about “UK SEPs” in the Platform, which it is not as it is worldwide, that would still just show it does not substantially relate to the Challenged Patents, nor any other patents of InterDigital, but instead substantially relates to UK patents of other Licensors.

138. Second, Arnold LJ argued it does not matter that the claim is contractual, because a licence would prevent infringement, and Tesla have undertaken to take a licence to “*(inter alia) InterDigital's UK SEPs*”, so the claim “*ensures they cannot be sued for infringement of those SEPs (among others)*” and thus “*the claim relates to*” InterDigital's UK SEPs (§210). [12/289]

139. However, first, characterising the claim as about protection from infringement of InterDigital's UK patents is unreal; *a fortiori* as to the Challenged Patents. The claim is really about the Platform licence; the idea of infringement claims by InterDigital is no more than speculation. As explained, the claim came out of the blue; InterDigital does not intend to sue Tesla, and there is no basis to suggest it will, still less in the UK, and still less under the Challenged Patents which are of no particular relevance (HCJ §64). Second, even if the claim [15/332] were viewed as about protecting against infringement, it would do so just as much towards and so “*relate*” as much to the whole Platform worldwide not only UK patents, nor the Challenged Patents. As “*(inter alia)*” and “*(among others)*” betray, the work is being done by a broad use of “*relate*”. Thus, third, Arnold LJ is seeking to fit within 63.14 a substantially contractual claim on the basis of (at most) speculative indirect *consequences* as to infringement worldwide: but these are not, and cannot reframe the cause of action. Nor can they circumvent the limited scope of 63.14. They cannot show the claim is an “*intellectual property claim*” as to UK patents, nor that it relates to UK patents with the AFS not other rights.

140. As to the first instance decisions, Fancourt J held there was no arguable claim against IDPH. Otherwise he would have applied 63.14 (HCJ §103). But his brief *obiter* reasoning was [15/264] confined to applying *Vestel*, and a comment that InterDigital's construction was "*restrictive*". It is submitted InterDigital's interpretation reflects the intentions of the legislator, and gives 63.14 its intended "*specific*" and "*limited*" scope as required by *Actavis*. Leech J's reasoning in [142/2270-1] *MediaTek* [161]-[163] applies Fancourt J's *obiter* comments and the *Vestel/Alcatel* logic to a bilateral, but otherwise said nothing concrete. ([164]-[167] are specific to that case.).
141. In *Amazon v InterDigital* [2025] EWHC 334 (Pat) [56]-[65], in a bilateral case on the ITU- [102/1363-77] T rules and Swiss law, Meade J applied the previous decisions. He added one point: if patentees chose to have patents here, it is "*sensible that claims about patents can be served in the jurisdiction as of right*" and "*a patent in the UK*" can be regarded as "*sufficient connection*" because it is right the courts can determine the scope of the monopolies: [68]-[69]. This takes matters [102/1377] little further. (1) It does not engage with the limited scope of this rule. (2) The idea an IP monopoly requires service in the jurisdiction does not follow, as Gateway 11 is always available. (Indeed 63.14 does not apply to all UK patents, as not all need to have a UK AFS³⁵). Still less does it justify stretching 63.14 to allow service of claims really about other rights. (3) Any notion that service in should be available for claims "*about*" patents does not identify which claims are sufficiently "*about*" UK patents. The point comes down to characterisation: it only has force if the claim is really about the UK right. It does not give a reason to think that contractual claims mostly about foreign patents should be within 63.14.
142. Tesla also relies on *Apple v Qualcomm* [2018] FSR 27, which is not about FRAND licensing. Morgan J held a claim for exhaustion of rights under five UK patents was within 63.14: [58- [103/1425-6] 68]. However: (1) That claim wholly related to rights under the UK patents. It does not support any idea that 63.14 uses "*related to*" broadly to apply to claims largely about foreign patents. (2) While Morgan J's reasoning does not so clearly support InterDigital's separate point about 63.14 not applying to non-patent rights, Morgan J was it seems not addressed on this, nor on 63.14's limited purpose, nor was *Actavis* cited. (3) In any event, the case is very different. A claim for exhaustion, even if sometimes framed as an implied licence given by owners to initial purchasers, is in many ways *in rem* (*Betts v Willmott* (1870-71) LR 6 Ch [105] [123] App 239; *HTC v Nokia* [2014] RPC 19; *Terrell*, §16.51-16.52). It means patent rights do [183/3302]

³⁵ For example, EP UKs, which are numerous, are not required to have a UK AFS. Only the applicant for a UK national patent has to furnish an AFS under Patents Rules 2007, r. 103(1)(a).

not exist against subsequent purchasers, not in privity with the owner, but who take free if any limitation expressed was not notified to them. It is about the patent with the AFS in a way a declaration as to FRAND terms of licence over a worldwide portfolio is not.

(3) Tesla's arguments of "Asymmetry"

- [3/47] 143. Tesla makes a policy argument that InterDigital's construction creates an alleged asymmetry (TWC §68). It says SEP owners would be able to sue for infringement and connected declarations here, but implementers "*would be unable to approach the UK court unless the relevant UK SEP holder is itself also an implementer of the standards in the UK*" and thus would be unable to seek anticipatory determinations of FRAND licences. This is misconceived.
- [128/1943] 144. InterDigital's case on gateways does not prevent implementer claims for FRAND licence declarations being brought where the relevant SSO rules and law permit. Such a cause of action can be pursued if there is personal jurisdiction. But Tesla's idea that there must be some automatic right to an anticipatory declaration is not correct: the case law it cites (*InterDigital v Lenovo* [2024] RPC 24, [187]) says only that a willing licensee must commercially seek out a licence, not that it must pro-actively seek declarations.
- [133/1993] 145. There will be many situations where the English Courts do have personal jurisdiction, where relevant gateways or bases of jurisdiction exist: e.g.: (1) if the owner is here; (2) in a platform case, if the administrator is here (assuming a valid cause of action against the platform); or (3) the SSO rules are governed by English law like the GSM rules in play in *Kigen*, [3] (see [132/1982] *Lenovo v Ericsson* [2024] EWHC 1734, [24]). There would have been no gateway issue if Tesla had instead sued BT or Vodafone, both UK companies who are Licensors.
146. If the implementer is sued for infringement under a UK ETSI SEP in England, it can rely on ETSI Undertakings and seek a worldwide (bilateral) licence by way of defence. And if it wants an anticipatory declaration, it can sue a foreign SEP owner where it is incorporated, under the same ETSI Undertaking governed by the same law.
147. Conversely, the SEP owner infringement cases are closely linked to the UK because they are about infringement of UK patents as held in *Conversant/UP*. Jurisdiction over a FRAND declaration sought by the owner arises if it is embedded in the infringement claim by way of defence. (But Tesla are wrong to say an owner can necessarily achieve a FRAND declaration: if the implementer does not defend on ground of FRAND, the declaration as to FRAND terms will not proceed: *TQ Delta* [26, 33, 37-38, 41-44, 46]). [170/2883-6]

148. So Tesla's objection is really only that implementers might want to bring anticipatory claims based on the French law ETSI Undertaking in England rather than where the owner is (or in France), when the claim is not sufficiently connected to England. The gateways identify what is a sufficient connection to England: Lord Leggatt in *Brownlie II SC* [192].³⁶ The [118/1752] supposed "*asymmetry*" merely shows that the gateways do not establish universal jurisdiction. Tesla's arguments are not a justification unnaturally to distort the words of the gateways.

(4) Declaration (4)

[16/359] 149. Tesla characterises its claim inconsistently for different purposes. On gateways it presents its case as a single cause of action, supposedly about "*UK patents*", and does not disaggregate the declarations. But for serious issue to be tried it may be hinting it has a separate claim under Declaration (4) "*that Tesla is a beneficiary of the FRAND commitment(s) of InterDigital and/or the Avanci 5G Pool Members*". This adds further complexity, but does not assist Tesla. First, as explained above (§§14, 36), Declaration (4) is not a freestanding claim. Second, if Declaration (4) were regarded as a separate claim, it would clearly fail on gateways. Declaration (4) is obviously a claim as to the French law contractual obligations of all Licensors, not a claim about property in the jurisdiction. It does not fit within the *Vestel* logic, even were that right.

(5) Gateway 3

150. Tesla seeks to rely on Gateway 3 against IDH if it wins against IDPH, although this is not in its grounds. The point is not open to it, as it failed on this before Fancourt J, and did not appeal. On appeal Gateway 3 was not mentioned before the Court of Appeal in written materials; it was floated orally and InterDigital objected (CA Day 1/p.105, Day 2/p.243). [67/1000] [68/1003]

[113/1615] [101/1343] 151. Gateway 3 applies to permit service on a defendant if: (1) there is jurisdiction over the anchor defendant independent of Gateway 3; (2) there is a "*real claim which it is reasonable for the court to try*" over the anchor defendant; (3) the dependent defendant is a "*necessary and proper party*" to the claim against the anchor defendant. Step (2) requires a free-standing cause of action with real prospects of success against the anchor defendant in the absence of the dependent defendant: *Erste v Red October* [38]. Since this is an anomalous head, it is to be exercised with caution: *Altimo* [73]. The fact that the anchor defendant is only sued in order to bring in the dependent defendant is relevant to discretion: *Altimo* [81]. [101/1345]

³⁶ The majority did not disagree. See D. Foxton, *The Jurisdictional Gateways: Some (very) modest proposals* [2022] LMCLQ 70. The primary gateways like contract, tort, and property (6, 9 and 11) all establish a substantial connection to England. This is less so for dependent gateways like (3), which is why they are used with "caution": *Altimo* [73]. [185] [101/1343]

152. Tesla suggests (TWC §93) that HCJ §129 amounts to Fancourt J upholding Gateway 3, but that was only an *obiter* comment about bringing in Avanci under Gateway 3 if there was a good claim over which the Court has jurisdiction against IDH³⁷. As regards IDPH, Fancourt J held that there was no good claim against it, even if there was a claim with real prospects against IDH. See HCJ §103: “*There is no real prospect of the Court being willing and able to make FRAND declarations as to IDPH alone.*” So Gateway 3 could not have applied.

[3/53]
[15/334]

[15/329]

153. Fancourt J was right. This is a claim as to licensing terms to the Platform. The relevant ETSI declarant for the InterDigital group is IDH. IDPH was, at the date of service out, one of the patent holding companies in the group³⁸. But it is IDH that undertakes to ETSI on behalf of affiliates. Further, under the MLMA, it is IDH that is the Licensor which contracted with Avanci, and can act for the group towards Avanci, which is why Tesla claimed against IDH as representative (PoC §26). So a declaration against IDPH on its own would be pointless, and artificial, even if there was a valid claim against IDH, or IDH and IDPH together. This simply reflects the fact that Tesla’s real claim if it has one is against IDH. Contrary to Tesla’s suggestion, this point is made in InterDigital’s NITP: §2(v).

[23/466]

[16/348]

154. Arnold LJ said (§§167, 213) “*It is entirely proper for Tesla to bring their claim against IDPH as well as IDH in order to ensure that IDPH, which would be the primary claimant in any infringement claim, is bound by any declaration.*” This misses the point, which is that Tesla has not identified a valid free-standing cause of action against IDPH. Further, the claim is about licensing terms, so the speculative hypothesis of infringement litigation which InterDigital confirms it does not intend to bring does not create a freestanding claim against IDPH. In addition, Arnold LJ should not have addressed the issue when it was not properly before the Court of Appeal.

[12/280, 290]

155. It also follows that if there is no jurisdiction or valid claim over IDH, the claim against IDPH should be struck out, as it has no independent validity.

FORUM CONVENIENS AGAINST IDH (Tesla Gd. 5; InterDigital NITP Gd. 5)

156. Fancourt J held (HCJ §§130-142) that England was not shown to be clearly the appropriate forum, because: (1) the Licensing Claims should be characterised as about global licensing; (2) it had not been shown the US courts were not available, while his factual findings meant

[15/335-6]

[15/324] ³⁷ At §80, Fancourt J said there would be jurisdiction under Gateway 3 if there was a separate freestanding claim against “*InterDigital*”, but was considering IDH and IDPH together, not IDPH separately.

[1/11] ³⁸ SOFI §6. For completeness the position has changed, and it is now the sole one, but neither party relies on that.

[12/290-1] positively they were available; (3) the Licensing Claims were clearly most closely connected to the USA. Arnold LJ disagreed on each point (§§110-156; 215-217), also holding that IDPH's *forum non conveniens* stay failed and this would ground jurisdiction over IDH in England in any event (§217). In so doing he interfered with factual evaluations of Fancourt J without sufficient basis to do so. He was wrong on each point. [12/266-77, 290-1]

(1) Characterisation

[111/1556-9, 1570] 157. The Court characterises the case, the “*matter to be tried*”, to identify what is the most appropriate forum for the “*trial of the action*”. It looks at the real nature of the overall dispute. It is wrong to characterise in a way which prejudices *forum*, based on the relief sought here (the error identified in *Re Harrods*): *Spiliada v Cansulex* [1987] AC 460, 476A; *Conversant CA* [31-35; 95-97]; *UP SC* [94]. Characterisation is a question of substance, unaffected by tactically framed pleading: *Lubbe v Cape* [2000] 1 Lloyds Rep 139, 160-161. A yardstick is the “*fundamental focus*” of the litigation: *Erste v Red October* [149]. If claims are separable they can be separated for *forum*: *Pacific v Soccer* [2009] EWHC 1839, [112]. [166/2830] [173/3026] [139/2124-5] [113/1628] [154/335]

158. As Fancourt J held (HCJ §131), the Licensing Claims are to be characterised as about licensing of the worldwide Platform. Arnold LJ’s characterisation of the Claims as about terms for a licence of UK SEPs in the Platform (§§108-109, 217) is unreal and relies on the *obiter Vestel* characterisation logic, which is itself artificial. His analysis (i) wrongly focusses on the form in which Tesla chooses to plead relief and ignores the substance; (ii) does not engage with the actual nature of Tesla’s case, which even as pleaded is about a worldwide licence to the Platform: see under gateways above, and CAJ §§232, 241. Later Arnold LJ accepted the “*fundamental focus*” of the litigation was not the UK (§154(vi)), which acknowledges the reality. Tesla relies on the last limb of Declaration (5), but this is not the substance of Tesla’s claim, and at most is an (incoherent) alternative. The central matter to be tried is the licensing terms for the Platform worldwide. [15/335] [12/265, 290-1] [12/294, 296-7] [12/277]

159. The Patent Claims are separable; and irrelevant for *forum* over the Licensing Claims, as accepted by Fancourt J (HCJ §§131) and Arnold LJ (§115): see §91 above. Tesla does not rely on them. The claims cannot be characterised as about infringement in contrast to *UP*. [15/335] [12/266-7]

(2) Availability

160. A foreign forum must be an “*available forum*” to hear the case: *Spiliada* 476A. But a forum is “*available*” if it can hear the matter, which does not prejudice the result. As Fancourt J [166/2830]

[15/335-6] accepted (HCJ §§135-137), a difference of remedy does not make the foreign court “unavailable”. It is relevant under the second stage of *Spiliada*, making the foreign forum inappropriate only if it is shown substantial justice will likely not be done there: *Re Harrods*

[122/1834, 1839-41, 1843-4] [1992] Ch 72, 117, 122-124, 126-127; *Celgard v Shenzhen* [2020] FSR 37, [70-71]; Dicey, [108/1493-4] [182/3296] *The Conflict of Laws* (16th ed), §12-032.

[15/335] [49/674] 161. It was common ground that (i) the US courts have personal jurisdiction over the defendants, all US companies (HC §132; Kessler, fn 12); (ii) they could hear a claim for breach of contractual ETSI Undertakings and decide if Avanci’s terms are FRAND (HCJ §§134, 136). [15/335-6]

[15/335] [44/648-9] The dispute on availability concerned only the remedy of global rate setting. It was common ground that the US courts, particularly the Delaware Court of Chancery, had power to set a global FRAND rate, even without consent of the parties, and it was possible they would do so (HCJ §134; Contreras 2 §§12, 16-17). The difference was only as to the likelihood of this. Professor Contreras, Tesla’s expert, said it was likely they would not³⁹, but Avanci’s expert said US courts would set a global FRAND rate without consent on appropriate facts: Kessler

[49/675-86] §§27-63, citing *Cont’l v Nokia* (2023). Having evaluated the expert evidence, Fancourt J held there was a “risk” the US courts would not set a global FRAND rate but found this did not mean that Tesla could not obtain justice, particularly where the US courts would decide whether the Platform rate was FRAND when assessing breach (HCJ §136). He found further it would be “surprising” if the US courts would not set a global rate (HCJ §137). [15/336]

162. Arnold LJ re-opened the US materials, substituting his own view it was “likely” that the US court would not “exercise” subject matter jurisdiction over foreign patents (§149), basing himself on an argument as to subject matter jurisdiction which was not found in any of the experts’ opinions. This led him to hold the US courts were not an “available” forum, even if the claim was about global licensing (§149, last sentence). He gave three bases for re-opening Fancourt J’s factual evaluation of availability (§130). [12/275] [12/269]

163. The first was *Characterisation*, as Fancourt J had not characterised the claim as about a licence for UK SEPs. But Fancourt J was right on characterisation; and Arnold LJ’s point shows he makes the *Re Harrods* error of characterising the claim in a way that prejudices *forum*. Further, this provides no reason for re-opening Fancourt J’s factual evaluation of availability for the claim if characterised as about global licensing, nor his finding it would be surprising if the US courts did not determine global rates in an appropriate case.

³⁹ In academic writing he said they should do so: J. Contreras, *Global Rate Setting*, 94:2 WLRev 701, 723-24 (2019). [184/3326-7]

164. The second was *Burden of Proof*. Fancourt J held correctly that the burden of proof in the context of service out was on Tesla, but Arnold LJ thought (i) the burden of proof on availability for *forum* was on defendants (§125) and held (ii) this justified re-opening Fancourt J's factual evaluation (§130). This is wrong. For service out, a claimant always bears the burden of showing England is clearly the appropriate forum: *Spiliada*, 480G-481E; *Altimo* [101/1346-7] [15/334] [15/335] [166/2834-5] [137/2060-1] [175/3089, 3096, 3099] [180/3281-2, 3284-5] 2 AC 337, [44, 80, 99]; *Limbu v Dyson* [2025] 2 All ER (Comm) 994, [22-23]; Briggs, *Private International Law in English Courts* (2nd ed), 202-203, 214-215). The claimant must show that England is more appropriate than any other relevant candidate forum, including by showing it is not “*available*” to hear the claim. The without notice logic of service out applications is inconsistent with the burden of part of *forum* being on defendants.
165. Arnold LJ and Tesla rely on *UP SC* [96]. But *UP SC* says the burden remains on the claimant, but assessed by reference to relevant candidates, so that if a defendant identifies only country X as an alternative, the claimant must show England is clearly more appropriate than X, and need not address every other country: also *VTB v Nutritek* [190-191]. This does not shift burden. At the without notice stage, the claimant must identify the candidates likely to be raised, and show England is more appropriate than them. [173/3027] [175/3120]
166. Arnold LJ's final basis to interfere was to say Fancourt J wrongly understood Tesla's case to be that it could not obtain justice in the US courts (§130). This is an unfair reading of HCJ §§134-136, and shows Arnold LJ misunderstood *Re Harrods*. It is correct Tesla did not argue it could not obtain justice in the USA. The difference was as to the *relevance* of the possible difference of remedies (Tesla CA Skel §86). Fancourt J correctly applied *Re Harrods* to hold a possible difference of remedies is judged within the framework of whether substantial justice will be done. He held rightly that a risk the US court would not set a global rate did not mean justice would not be done, not least where (i) it is unclear the English courts would set a rate for the Platform (HCJ §137); (ii) the US courts would determine the FRAND-ness of the licence within the breach of contract claim (HCJ §134) [15/336] [15/335] [12/269] [15/335-6] [29/496-7]
167. Even if Fancourt J was wrong on burden or *Re Harrods*, that was no reason to interfere with his factual findings, including his finding that it would be “*surprising*” if the US courts did not determine global rates in an appropriate case (cf *Iconix* [94, 110-116]). This was a predictive assessment of an unsettled point, where neither the English nor US courts have set rates for platforms. *Forum* is pre-eminently a matter for the first instance judge and [124/1865, 1868-70]

appellate courts should be slow to interfere (*VTB v Nutritek* [93-94]). Thus Arnold LJ had [175/3098-9] no basis for interfering with Fancourt J's assessment of the expert evidence.

168. Further, Arnold LJ's re-evaluation was wrong. Tesla's expert did not opine US Courts would not have subject matter jurisdiction; he accepted they have power to set a global rate, and could and would hear a breach of contract claim as to global rates. Arnold LJ took passages from judgments in other first instance US courts and preferred them to the conclusions to be drawn from *Cont'l v Nokia*, a recent decision in the Delaware Court of Chancery, which dismissed a motion to strike out a global rate setting claim (HCJ §134). Arnold LJ brushed [15/335] over this, suggesting the question of subject matter jurisdiction was not argued (§147). In [12/274-5] fact, Nokia did raise such points and they were rejected by the Delaware Court, which upheld subject matter jurisdiction⁴⁰. Arnold LJ was wrong to seek to impose a different view to Fancourt J about *Cont'l v Nokia*.

[3/57] 169. Finally, even if it was appropriate to reconsider the facts and hold it was "likely" the US courts might not set a global rate, this does not make US courts not "available". A possibility, even if "likely", that they might not grant a particular remedy, when other remedies for the contractual claim would be available, merely shows US law may deal with FRAND differently. It is parochial to say that means the US courts are not an available forum to do justice. Tesla argues (TWC §110) that the Defendants analyse Tesla's claim here as a claim "for a global licence" and so the USA is not available if it will not set global terms. That is an incorrect description of InterDigital's position, which is that the correct characterisation is the case is about alleged FRAND terms for global licensing. Tesla is committing the *Re Harrods* fallacy of characterising the claim by reference to the remedy they seek. It follows that the evidence as well as Fancourt J's findings show the US courts are an available forum.

(3) Closer connection

170. Fancourt J evaluated the relevant connections and correctly held the Licensing Claims clearly have a closer connection with the USA. All material connections point to the USA: the parties, their places of business, and the Platform, are all in the USA, the majority of the patents are in the USA and only 7% in England, the Platform is administered in the USA,

[177/3192-3,
3197]

⁴⁰ Pp. 53-54, 58. "Nokia has argued at various points that the relief Continental seeks as part of its FRAND Claims is something no federal or state court has ever granted" (p. 58). Fn 205 quoted from Nokia's argument: "Continental is asking this Court to do something that no United States court, no U.S. Federal court, no U.S. state court, has ever done without the consent of all the parties, namely set a global FRAND rate"; "Courts have recognized they should not attempt to impose global license terms absent mutual consent in the context of FRAND disputes". Other claims were rejected for lack of subject matter jurisdiction (p. 26).

[177/3165]

[15/336] the MLMA is governed by New York law, and the Platform was submitted to the US DOJ for anti-trust clearance (HCJ §141). It is also obvious from the above that the core of the evidence would be in the USA as well. And the ETSI Undertaking is governed by French law, not English law, which can be assessed just as well by US courts.

[12/275-6] 171. Arnold LJ conducted his own analysis but had no proper basis to interfere with Fancourt J's evaluation. His ground for interfering was errors of principle, derived from his *obiter dicta* in *Nokia v Oppo* [2023] FSR 11. They were, first, that there is no natural forum for FRAND cases (CAJ §§152-153); second, that the connections of the parties, rights and relevant contracts to a foreign forum were in principle of little weight “*in a dispute of this kind*” (CAJ, [12/276-7] §154). These led him to discount the weighty connections to the USA.

[166/2832-3] 172. The idea there is no natural forum for FRAND cases is wrong. There may be individual cases where there is no natural forum as connecting factors balance out (*Spiliada* 477C). [166/2831] But it is wrong to say there is a type of case which *a priori* has no natural forum. Further, it is wrong to discount the connections of the parties, rights and contracts to the foreign forum. Instead, it is well established that the substantial places of business of the parties are of major significance: *Spiliada* 477G-478B; *Limbu* [34]; so too are the *situs* of the relevant [137/2065-6] rights and the applicable law (*Lungowe v Vedanta* [2020] AC 1045, [66]). The underlying [140/2158-9] error in *Nokia v Oppo* and here is Arnold LJ views *forum conveniens* as solely about adjudicatory convenience, saying FRAND disputes can be determined just as well anywhere because they mainly involve expert evidence (§152). This commits the error of viewing *forum* [12/275-6] *conveniens* as about convenience. Yet it is an assessment of appropriateness from an [166/2828] international perspective (*Spiliada* 474F; *Brownlie II* [78]). The location of the parties, *situs* [118/1723] of rights, and applicable law, has force beyond adjudicatory convenience, because it engages adjudicatory sovereignty: the place where the parties or rights belong is as a matter of comity generally most appropriate to rule on their rights. As said in *Limbu* [34] the location of the [137/2065-6] parties is “*an important connecting factor in relation to jurisdiction ... because presence here is the basis for establishing the court's jurisdiction, and domicile here connotes a degree of permanence and allegiance to the country's institutions, including its courts, which means that the party can reasonably expect, and be expected, to meet claims against it in such courts in the absence of sufficient countervailing factors.*”

173. Further, the location of the parties will presumptively indicate the likely location of most evidence, and decision makers, without needing specific evidence thereon. And while Arnold LJ suggested that only expert evidence would be relevant, in fact FRAND disputes frequently involve evidence as to conduct (fn 11 above); and Arnold LJ elsewhere suggested

that disclosure from Avanci in the US would be central (§178). Consequently, Arnold LJ was [12/282] wrong to discount, as he did, the location of the parties and the Platform (§154). Likewise, [12/276-7] Arnold LJ was wrong to discount (1) the Platform patents being dominantly in the US, (2) the MLMA being governed by US law, and (3) the US DOJ initially clearing the Platform. Each show that US courts are the more appropriate courts to exercise authority.

[149/2443,
2461]

174. *Nokia v Oppo* was a fact-specific assessment on different facts where parties were spread across the world (§§1, 66). Arnold LJ was wrong to solidify his approach there into a principle that FRAND has no natural forum and to use Fancourt J's omission to cite *Nokia v Oppo* as grounds to interfere. Applying the correct view of the law, Fancourt J's assessment is unchallengeable and the factors pointing to the USA are overwhelming.

FORUM NON CONVENIENS STAY BY IDPH (InterDigital NITP Ground 6)

[15/336]

175. This only arises if Tesla wins on (1) serious issue to be tried against IDPH and (2) 63.14. But if so, the claim against IDPH should be stayed on *forum non conveniens* grounds. If IDPH is served here, it has the burden of showing there is another available forum which is clearly more appropriate. The burden on substantial justice then shifts to Tesla (*Spiliada* 476D-F). [166/2830] Although Fancourt J's findings on *forum* in the context of service out on IDH are focussed on the burden on Tesla (HCJ §§138, 142), the substance of his findings positively discharges IDPH's burden. §§136-137, 141 find the US is an available forum and that there is no injustice in proceeding in the US; and §§140-141 finds the claim clearly has a closer connection with the USA. There is no basis to interfere with those findings as discussed.
176. Fancourt J was asked, if IDPH was validly served under 63.14, to stay the claims on *forum* grounds. He declined, "*Given that it was not established that a US court would be any more likely to entertain proceedings against IDPH as the sole defendant?*" (HCJ §143) and instead struck out the claims against IDPH, on grounds that there "*is no real prospect of the Court being able and willing to make FRAND declarations against IDPH alone?*" (HCJ §103). It is unclear whether Fancourt [15/337] J was rejecting the *forum* stay by IDPH, or thought he need not decide it. If the former, this was not a good reason. That the US court may not consider IDPH to be an appropriate sole defendant is irrelevant to *forum* here, and simply means that claim may fail in the appropriate forum. Further, none of the evidence suggested IDPH would be treated differently in the USA to here or indeed went into differences between the position of IDH and IDPH. [15/329]

177. Arnold LJ thought that (if the US courts were “*available*”) IDPH’s forum stay failed on the burden of proof because the USA was not shown to be more appropriate (§217). This was [12/290-1] due to his errors of principle which led him to ignore the connections to the USA.
178. The consequences of Arnold LJ’s approach are dramatic. Taken together his reasoning on 63.14 and *forum* mean: (1) if one patent in a global portfolio of thousands is in the UK, worldwide FRAND licensing claims are characterised as about the UK patent; (2) can always be served under 63.14; (3) stays on grounds of *forum conveniens* almost inevitably fail, however strong the connections to another forum, because “*there is no “natural” forum for FRAND*” and connections to other fora are discounted. The result is near-automatic universal jurisdiction over FRAND for any country with patents. This departs from the “*civilised*” “*self-restraint*” which is the heart of *forum conveniens*: *Airbus v Patel* [1999] 1 AC 119, 141G. [98/1303]

Gravitational Effect (InterDigital NITP Ground 6(ii))

179. Having held IDPH’s forum stay failed, Arnold LJ held the gravitational effect of the claim against IDPH made England the appropriate forum against IDH, although otherwise service out against IDH failed, as England was not more appropriate (§§155, 217). This is the wrong way round. The tail wags the dog. Where D1 is served out and D2 served in, the question of *forum* must be looked at “*holistically and in the round*”. The situation of the primary defendant must be analysed first and should dominate for *forum*, so that if service out should be refused against the primary defendant, that reinforces the ancillary defendant’s *forum* stay: [137/2065-6, 2074] *Limbu v Dyson* [32-36, 65]; *Pacific v Soccer* [112]. *Lungowe*, [68] on which Arnold LJ relied, [254/2614] [140/2159] was a different case where the Brussels regime precluded a forum stay against “*anchor defendants*” and does not support his conclusion. [12/277, 290-1]
180. The centre of the Licensing Claims against InterDigital is the claim against IDH. IDH is the ETSI declarant and the contracting Licensor with the relationship with Avanci (SOFI §§6, 28), who permits Avanci to make InterDigital patents available on the Platform, and whose approval is relevant to decisions under the Platform. IDH was the proposed representative (PoC §26). The heart of the claims concern IDH. IDPH’s role was at most ancillary. In the circumstances, *forum* should be assessed first by reference to IDH and if service is rejected against IDH that should be another decisive factor in favour of IDPH’s *forum* stay. [16/348] [1/11, 16]

DISCRETION TO SERVE OUT (InterDigital NITP Ground 7)

181. Under CPR 6.36-6.37 the Court has a power to grant permission and so a discretion (“*may*”) [76/1078-9] to refuse service out (*Dicey*, §§11-099, 11-100). This is not confined to assessing whether [182/3293-4] England is the proper place to bring the claim under 6.37(3), which is only a condition. Here service should be refused in discretion for three further reasons. (1) Tesla’s Licensing Claims do not fall within the spirit of Gateway 11 (if this is analysed as a matter of discretion not interpretation). Even if a partial variation of the pleas might fall within it, the substance is worldwide (see authorities at §94 above). (2) Tesla cannot show “*solid practical benefit*” from the Licensing Claims against InterDigital: *Insurance Corp v Strombus* [1985] 2 Lloyd's Rep [125/1877] 138 (CA), 144. Even if any arguable useful and legitimate purpose can be identified, the benefits of suing InterDigital are insubstantial, the targeting of it unjustified, the costs disproportionate, and so given the “*poverty of Tesla’s case, set against the time cost and complexity of* [12/297] *the proposed litigation*” (CAJ §245) service should be refused in discretion. (3) It would be inappropriate to use Gateway 3 where IDPH is sued to get at IDH (see §§152-155 above).
182. Tesla argues these points should not be heard because this was not a formal Respondent’s [15/320-1] Notice point before the Court of Appeal. But the point was argued below (HCJ §60; CA [68/1004] Day 2/p.270). Further, no court has exercised its discretion to uphold permission to serve out. Thus, it is for Tesla to justify the exercise of the discretion (although it fails to identify this as a ground of appeal). In resisting that, InterDigital can advance the points above.

CONCLUSION

183. It is submitted the appeal should be dismissed for the following reasons:
- (i) There is no serious issue to be tried on Tesla’s Licensing Claims and/or they have no real prospects of success.
 - (ii) Tesla’s Licensing Claims do not fall within Gateways or CPR 63.14, and the UK is not the appropriate forum.
 - (iii) The Licensing Claims should not be served out and/or should be stayed or struck out.

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23 March 2026