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Claim No. HC 06 C03489

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**PATENTS COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 27/02/2007

**Before:**

**MR. JUSTICE PUMFREY**

**Between:**

**SANDISK CORPORATION**  
**(a Delaware Corporation)**

**Claimant**

**- and -**

**(1) KONINKLIJKE PHILIPS ELECTRONICS N.V.**  
**(a Dutch Corporation)**

**(2) FRANCE TELECOM (a French Corporation)**

**(3) TDF (a French Corporation)**

**(4) INSTITUT FUR RUNDFUNKTECHNIK GmbH**  
**(a German Corporation)**

**(5) SOCIETA ITALIANA PER LO SVILLUPPO**  
**DELL'ELETTRONICA S.P.A. (an Italian Corporation)**

**Defendants**

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**MR. AIDAN ROBERTSON** (instructed by Messrs. McDermott Will & Emery)  
appeared for the **Claimant**.

**DR. BRIAN NICHOLSON** (instructed by Messrs. Freshfields Bruckhaus Deringer)  
appeared for the **First to Fourth Defendants**.

**MR. MEREDITH PICKFORD** (instructed by Messrs. Cleary Gottlieb Steen &  
**Hamilton**) appeared for the **Fifth Defendant**.

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**Approved Judgment**

Transcript of the Stenographic Notes of Marten Walsh Cherer Ltd.,  
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**MR. JUSTICE PUMFREY:**

1. The question now is what is the order for costs which I shall make in relation to the proceedings against the five defendants.
2. As I have indicated in the judgment which I have handed down, the first four defendants were commonly represented and appeared in court by two junior counsel. The fifth defendant was represented by leading and junior counsel instructed by separate solicitors.
3. The action failing for want of jurisdiction, the question arises as to whether I should make a special order for costs limiting the recovery by the defendants collectively to one set of costs or whether I should make the usual order in respect of their costs perhaps accompanied by an order for simultaneous assessment (if that is necessary) so as to ensure fairness as between the defendants on the one hand and the claimant on the other and to ensure in particular that the claimant is not made to pay an unreasonable sum in relation to the defendants' costs, which appear to be very substantial.
4. The first question is the basic principle upon which I should proceed. Mr. Robertson on behalf of the claimant submits that the basic rule is to be found in the principle stated by Lord Lloyd of Berwick in Bolton Metropolitan District Council v Secretary of State. This case, which is a judgment in the House of Lords dealing with the question of costs alone, concerned the appropriate cost order in conjoined appeals in which the Secretary of State for the Environment was the appellant supported by the Manchester Ship Canal Company and the Trafford Park Development Corporation.
5. The Secretary of State for the Environment, the Manchester Ship Canal Company and Trafford Park Development Corporation were separately represented as appellants in the House of Lords and the respondents to the appeal were a number of local authorities. The appellants were successful. The question arose as to how many sets of costs they should recover. Lord Lloyd of Berwick said this at page 1178:

"There can, I think, be no doubt that in the past there has been a practice in the lower courts to award two sets of costs in certain types of planning appeal under section 288 of the Town and Country Planning Act 1990, and its predecessors, notably where a decision of the Secretary of State in favour of a developer is challenged by the local authority, and the Secretary of State successfully defends his decision. In such cases the developer has usually been regarded as having a separate interest which he is entitled to protect at the local authority's expense. This practice was recognised by Simon Brown J in Waverley Borough Council v Secretary of State for the Environment [1988] 3 P.L.R. 101."

Lord Lloyd then refers to Wychavon District Council v Secretary of State for the Environment [1994] 69 P & CR, 394 and asks at letter F:

"What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. The

costs are always in the discretion of the court, and the practice, however widespread and longstanding, must never be allowed to harden into a rule. But the following propositions may be supported.

"(1) The Secretary of State, when successful in defending his decision, will normally be entitled to the whole of his costs. He should not be required to share his award of costs by apportionment, whether by agreement with other parties, or by order of this court. In so far as the Court of Appeal in the Wychavon District Council case may have encouraged or sanctioned such course, I would respectfully disagree.

"(2) The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue covered by counsel for the Secretary of State; or unless he has an interest which require separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.

"(3) A second set of costs is more likely to be awarded at first instance, than in the Court of Appeal or House of Lords, by which time the issues should have crystallised, and the extent to which there are indeed separate interests should have been clarified.

"(4) An award of a third set of costs will rarely be justified, even if there are in theory three or more separate interests."

6. Mr. Robertson suggests that these principles are of general application. Having regard to the warning given by Lord Lloyd of Berwick that in matters of costs the basic rule is that there are no rules, I only accept that, making the necessary changes for different classes of proceeding, the factors which are listed by Lord Lloyd of Berwick are the sort of factors which must be taken into account when deciding on the proper approach to costs, bearing in mind also the warning that it is more likely that at an early stage in proceedings the question of the necessity of separate representation will not necessarily have been worked out.
7. What I may call a slightly different approach is referred to in the context of patent proceedings where there are two defendants in Bristol Myers Squibb Company v Baker Norton Pharmaceuticals [2000] RPC 1. In this case the question was whether two generic companies, defendants in the same set of proceedings, should both recover their costs. The judge at first instance had awarded one set of costs from a date on which he formed the view that separate representation could no longer be justified. He stated his governing principle as follows:

"It seems to me that the governing principle should be that where there are two or more parties fighting a common enemy, unless there are special circumstances, the court should lean in

favour of one set of costs. One can always say that the second party might be better off if they had their own particular legal team. I am not always sure that that is true: too many cooks often spoil the broth. Even assuming that a party might be slightly better off, unless there is a real conflict, genuinely justified by separate sets of lawyers, I think the better view is the parties should be under pressure to agree there should be one set of lawyers to face the common enemy. I think the court should be reluctant to grant two sets of costs.

"Often the position may be that initially separate sets of costs are justified before it is fully clear that what the issues are and that the issues are indeed common. Such was the position, for example, under the old patents extension cases where opponents, however many there were, normally only receive one set of costs shortly after the opposition had been entered."

8. In paragraph 70 of his judgment, with which Buxton LJ and Holman J agreed, Aldous LJ said this:

"In my view the governing principle enunciated by the judge is too broadly stated. The governing principle is that the losing party should only be required to pay the costs reasonably incurred by the other party or parties. No doubt parties should be under pressure only to instruct one set of lawyers to face a common enemy, as to do otherwise could result in an unreasonable expenditure of costs for which the losing party should not pay. But it does not follow that successful defendants, even if they adopt a common approach, should be invariably deprived as part of their costs.

"In the present case the appellants chose to fight the issues of infringement and validity against two defendants. No complaint was made, nor could it have been made, that both instructed solicitors and counsel to advise them and to serve defences. The complaint upheld by the judge was that sometime in February, before the trial in July 1998, that position changed and it became unreasonable for the defendants to be represented by their own solicitors and counsel. That being so, it was not reasonable for the appellants to pay both sets of costs. What was it that meant that it was unreasonable for one of the parties to continue to be separately represented? The judge did not answer that question, except to say that he was not saying that the solicitors acted improperly. His conclusion depended upon what he thought was reasonable for the losing party to pay, not upon an assessment as to whether one of the respondents had acted unreasonably. That became evident in the discussion after judgment when Mr. Whittle, who appeared for the respondents, raised the difficult questions as to how the respondents were to split the one payment of costs between them in the absence of agreement. That resulted in the

judge ordering that how the one set of costs was to be split between them 'was a matter for them'".

9. Every case is different. The factors in the present case are these. First, the successful parties are defendants. Secondly, it is plain that the first four defendants formed a group of patentees for these purposes who have jointly placed the administration of their patents covering MP3 technology for the purposes of enforcement and licensing in the hands of the fifth defendant. Thirdly, it is obvious that the activities of the fifth defendant may well have caused embarrassment to the patentees. Perhaps it does not require much imagination to see that Mr. Sharpe's submission at the hearing before me for interlocutory relief, which was to the effect that it was in consequence of the activities of the fifth defendant that this application for interim relief was ultimately undertaken by reference, in particular, to enforcement proceedings in Germany accompanied by the comments made by representatives of the fifth defendants and companies associated with the fifth defendants after that intervention might well be at least a matter for discussion between the patentees on the one hand and the fifth defendant on the other.
10. I think one of the temptations at this stage of any proceedings is to say it is quite plain that the only real issue in dispute for the purposes of this application was the question of jurisdiction, which is strictly for the first to fourth defendants and the fifth defendant to deal with, and, secondly, the matter of interlocutory relief which is directed to the fifth defendant only. Accordingly, at this stage it makes sense that for the purposes of these applications everybody ought to be represented by whomever the fifth defendant selects since the fifth defendant has to deal with all the issues at this stage.
11. There is a great deal of attraction in such a proposition, but it seems to me that there is rather more to defending even an application for interlocutory relief and seeking declarations in relation to the jurisdiction of the court than purely those baldly stated issues. When parties approach their advisers, they not only wish to discuss their immediate problem, but they wish also to discuss what is to be done with the action as a whole.
12. I think that unless the parties ignore any potential for any claim between them for the purposes of giving information and for receiving advice, there would be a small chance of the patentees on the one hand and Sisvel on the other being capable of employing the same representation. In other words, it is far from clear to me that for Sisvel and the patentees to choose separate representation for the purposes of this action when it commenced was unreasonable. At this point it seems to me that if I were to take a broad axe to this particular tree and say only one set of costs is to be recoverable it would be inappropriate. The jurisdiction exercised by the costs judge on the other hand is much more fine grained. The costs judge can consider the reasonableness of the expenditure of particular sums as between the defendants and the claimant on a detailed basis and can, moreover, exercise a degree of pressure, and, when the expenditure concerns matters the subject of privilege can insist that the receiving party either waives privilege or justifies the sum sought by reference to adequate non-privileged material. I can do neither of these things today.
13. I am concerned, as one always is concerned when there has been very substantial expenditure in an action, to ensure that only that expenditure which was reasonable is

recovered. I do not, however, believe that the material available to me today is sufficient for me to be fair without knowing a lot more about the internal running of this action than I can know.

14. In those circumstances, I think justice is to be done by ordering an assessment of the defendants' costs but by making sure -- I do not think a direction is necessary -- that the sets of costs incurred by both sets of solicitors are assessed at the same time and that the master has due regard to the reasonableness of the costs sought to be recovered from the paying party having regard to the context of that expenditure in the action as a whole. I shall not make that a direction because that is what the costs judge has to do anyway.
15. The application for one set of costs only must I think be refused and the order for costs will be as I have indicated.

MR. ROBERTSON: My Lord, the second of the matters that Dr. Nicholson referred to is our application for permission to appeal.

MR. JUSTICE PUMFREY: I am not going to give you permission to appeal on interim relief. I regard that as an exercise of judicial discretion and, to be quite frank with you, it seemed to me to be almost nothing, that particular head of interim relief. On the other hand, I will listen with interest to what you have to say about jurisdiction. What do you say I got wrong?

MR. ROBERTSON: My Lord, if one stands back and looks at the overall context of this action, it appears to us that the outcome seems unusual.

MR. JUSTICE PUMFREY: When I stand back, what am I falling into? Why?

MR. ROBERTSON: I will just outline ----

MR. JUSTICE PUMFREY: If I stand back, where do I end up? Do I end up in Germany?

MR. ROBERTSON: The position is we have the defendants with UK patents ----

MR. JUSTICE PUMFREY: Yes, all right, they have UK patents.

MR. ROBERTSON: They do. They say we require licences in order to trade in the UK.

MR. JUSTICE PUMFREY: I do not think they are terribly worried about trading in the UK. They are worried about trading in what they call EMEA -- Europe, the Middle East and Africa, as I understand the licensing structure. Have I got that wrong?

MR. ROBERTSON: My Lord, we say that is beside the point, and I know I am not answering your question, because what locates this action here is that it is enforcing UK property rights necessarily which can only be enforced in the UK. That is why we say that the harm is actually located here in the UK. It is not located in Delaware where SanDisk's profit and loss account might be filed. We say when we have a claim that is based upon directly effective treaty rights, Articles 81 and 82, and upon the breaches of the 1998 Competition Act, breaches of chapter 1 and 2 of the prohibitions, UK Act of Parliament, the outcome of your Lordship's judgment is to say that this court is not

seized to adjudicate that case because SanDisk accounts for profits in Delaware and we would have to sue possibly in Delaware or in one of the Article 2 countries.

MR. JUSTICE PUMFREY: You have to sue in an Article 2 country. This is, as it were, the overarching problem with this case, that we are dealing only with exceptional jurisdiction. It is not the only case where people have said, but do bear in mind this is not something over which one must weep because the Article 2 countries are all there. It is not as if you did not have a choice of Article 2 countries. If you like quick solutions, you can go to Holland. Hold on. Do we have a Dutch company? We have, have we?

MR. ROBERTSON: Philips.

MR. JUSTICE PUMFREY: Of course, Philips. One tends to forget that. If you want a careful and detailed assessment, you can go to Germany. You have all the choices available to you. If you want a slow assessment, you can go to somewhere else. In fact, it is a splendid spectrum of involuntary jurisdictions. They cannot duck it. Not only that, but I cannot believe any of them are going to say that -- forgive the words "necessary" or "proper party", but you know what I mean -- the other defendants are not necessarily proper parties to the one duly served under Article 2. What is the correct term? I have forgotten. Anyway, it does not matter. You know what I mean.

MR. ROBERTSON: My Lord, all of that is self-evident on the face of the Brussels Regulation.

MR. JUSTICE PUMFREY: Not only that, you get compensation for all countries. Whereas if you sue here, you get it only for one.

MR. ROBERTSON: All of that was weighed up in advance and taken on the risks of those arguments running against us.

MR. JUSTICE PUMFREY: It is just that English courts are very touchy about using this sort of method of enforcing patents which are in play. There is a strong element of that because we tend rather to take the view that once a patent is in play nobody is allowed to wave it around with too much enthusiasm until a court has pronounced on its actual validity, but that does not appear to be the rule elsewhere. As I say, I have to tell you the fact that there are criminal sanctions in Germany came as a huge surprise to me.

MR. ROBERTSON: My Lord, it came as a surprise to me. The last time I practiced intellectual property law was as a solicitor back in 1988 to 1990, so this was quiet a rapid tutorial of how things have ----

MR. JUSTICE PUMFREY: I now understand why it is that the enforcement directive which we have to deal with did contain criminal sanctions which were removed before it came into effect. Now there is another proposal to reintroduce them.

MR. ROBERTSON: My Lord, to get permission to appeal I have to show a real prospect of success in the Court of Appeal.

MR. JUSTICE PUMFREY: Is your real prospect of success really on the basis of a wrong assessment or is it on the basis of a legal error? If it is on the basis of a wrong

assessment, I refuse. If it is on the basis of what you say is an identifiable legal error, then I give you permission. What at the moment you have told me is that I have assessed wrongly. You have not told me what the legal error is.

MR. ROBERTSON: The legal error is wrong interpretation of harmful event for the purposes of Article 5, paragraph (3) of the Brussels Regulation.

MR. JUSTICE PUMFREY: Too narrow view of harmful event.

MR. ROBERTSON: Yes. You have identified the harmful event as essentially. I am slightly over-simplifying here, but essentially is located in ----

MR. JUSTICE PUMFREY: In so far as it is possible to locate it, it is located. It is not here. I think every time I state it in the judgment, I actually state it in a negative way. That is what I had intended to do. I did not actually ever locate it. I just said wherever it is, it is not here. Have I forgotten the judgment? I may well have done. I wrote it a little time ago.

MR. ROBERTSON: I think you particularly focused on the payment of royalties. SanDisk would have to pay royalties. Since SanDisk is a Delaware corporation that is where the damage is suffered. We say that is too narrow a view. These are UK property rights which the defendants are seeking to enforce. Necessarily, they cannot be enforced outside the UK. So extracting a toll for someone to trade in the United Kingdom, that we say as a matter of law is sufficient damage to constitute a harmful event for the purposes of Article 5(3).

MR. JUSTICE PUMFREY: I am not asking for a concluded submission here, but can you tell me, is there any case which supports such a wide view of what the place of the harmful event is?

MR. ROBERTSON: My Lord, there is not any case on anti-competitive injury. This is ----

MR. JUSTICE PUMFREY: Forget anti-competitive. Is there any case on economic loss? I have tried to ignore, as I normally do ignore, all English problems relating to recoverability of economic loss. This is a pure economic tort, is it not? Competition is a pure economic tort. Chapter 1 and 2 impose separate duties. It is a breach of statutory duty having economic consequences only.

MR. ROBERTSON: There is debate as to whether it only sounds as a breach of statutory duty. That aside, it certainly does sound as breach of a statutory duty.

MR. JUSTICE PUMFREY: It only sounds as a breach of statutory duty and it is difficult to see where it came from if it is not, as it were, looking at the domestic provisions just for a moment.

MR. ROBERTSON: Domestically that is correct, my Lord. For Articles 81 and 82, that ----

MR. JUSTICE PUMFREY: In fact, that is a breach of statutory duty, but a slightly odd one. OK. Is there any case on the location of pure economic loss which I have not looked at? Is it only really the misrepresentation cases? I am genuinely surprised if there is because I would have thought one side or other would have brought them out.

MR. ROBERTSON: Our researches have turned out what we see. The most relevant case we say is the **IBS** Technology case where you get the comment, admittedly in passing in the judgment, that copyright infringement in the UK would found jurisdiction Article 5(3).

MR. JUSTICE PUMFREY: Yes. Copyright infringement may well do because then you can say that is the English copyright which is being invaded. That is the problem with this, you see, because the copyright damages sound as an invasion of the right itself. It is not the same with a licensing dispute relating to a patent. OK. Thank you. So it is basically where was the harmful event and has that legally been approached correctly?

MR. ROBERTSON: Yes, it is encapsulated in that way, my Lord.

MR. JUSTICE PUMFREY: OK, who wants to go next?

MR. NICHOLSON: My Lord, I will keep this relatively short. My Lord correctly asked my learned friend what is it that was wrong with the decision that your Lordship made. The problem with what was wrong as identified by my learned friend is in the first part it was an attempt to repeat what was said before your Lordship and he did not manage to convince your Lordship in the circumstances where there is not an authority which goes anywhere near the proposition which would give a real prospect of success.

There was a further limb in my learned friend's submissions in saying, look, the problem with this judgment is it feels wrong. These are UK patents. The harm should be here. Mr. Sharpe was perhaps a little clearer in avoiding that circumstance at the original hearing and we say with good effect, the reason for it being that the vast majority of the events which the claimant complains of are not turning upon the UK patent. They turn upon the German patents or the Italian patents because those were the relevant ones in issue and it is centred on those events that the complaints arise from.

MR. JUSTICE PUMFREY: Yes. The link of course was the wretched interview, was it not? If the BBC had not carried that interview with Mr. Dini, then you could reasonably argue that nothing relevant had happened in this jurisdiction at all, except the breath of problems outside.

MR. NICHOLSON: Exactly, my Lord, but even that turned upon the German IFA, which was based on the German patent and not the English patent. The representations need to be considered under the law as already has been considered, but they do not tie back to the English patents. So this is not an unusual effect of UK property being determined in another jurisdiction. I am sure my learned friend Mr. Pickford will have slightly more to say on the scope of Article 5(3).

The other matter that I would ask your Lordship to consider is on discretion as regards the appeal. Your Lordship has already mentioned at trial and commented on in your judgment that there is a proper jurisdiction, in fact several of them, sitting there, waiting under Article 2 for the claimant to bring his case.

MR. JUSTICE PUMFREY: I am very unhappy to say that I have thrown out something under the Regulation on discretionary grounds. I am not sure to what extent once a rule is satisfied that there is any discretion. In any event, this sort of judicial discretion to

reject a claim all together is I think perhaps unique to us, or at least unique to common law traditions. I am not happy about that.

MR. NICHOLSON: My Lord, I do not differ from what your Lordship has said, but the point that I am making to your Lordship does have a discretion as to whether or not it is appropriate to allow an appeal and the fact that there is a perfectly good jurisdiction elsewhere. If what the claimant really wants to do is to have these competition issues determined, your Lordship by refusing the appeal is not shutting him out just merely saying what has been said many times before, which is that you should go elsewhere. My Lord, I have nothing further.

MR. PICKFORD: My Lord, I can be similarly extremely brief. I have two points. The first is to establish some reasonable prospect of success, we say Mr. Robertson would have needed to have taken your Lordship through paragraphs 20 to 25 of your judgment dealing with the cases of Dumez and Marinari. I am simply saying that in order to establish some reasonable prospect of success, one would have need to have subjected that analysis to some forensic scrutiny to demonstrate where the error, as a matter of law, could be found and there was no such ----

MR. JUSTICE PUMFREY: I see what you mean, yes, OK.

MR. PICKFORD: The second point is that ----

MR. JUSTICE PUMFREY: Yes, OK.

MR. PICKFORD: The second point is that Mr. Robertson tries to bring the case together with the tying factor of there being an alleged forcing into taking a licence in the UK because of the abusive conduct. That was a point that your Lordship dealt with at paragraph 42 of the judgment. As your Lordship identified, it rests on the allegation that Sisvel's conduct could amount to abusive conduct within the meaning of Article 82. That was a submission that was rejected at paragraph 57, where your Lordship said: "In other words, the only part of this dispute which could conceivably support the grant of the interlocutory relief is unarguably bad." It is the linking factor that Mr. Robertson relies on for the entirety of his claim 1 jurisdiction. I would submit that his appeal in relation to jurisdiction would be academic in any event because the hook on which he seeks to place it is unarguably bad. It does not even matter, even if he is right.

MR. JUSTICE PUMFREY: There is going to be no relief in these proceedings unless he can get over **ITT Promedia** essentially.

MR. PICKFORD: Indeed.

MR. JUSTICE PUMFREY: That is the long and the short of it, is it not?

MR. PICKFORD: Absolutely.

MR. JUSTICE PUMFREY: But that is true generally. That is litigation, but he has to get over for the purposes of relief (1) **ITT Promedia** and (2) he has got to get over the highly exceptional nature of any relief granted against a functioning patentee. He has got to get over **McGill**. There are two major obstructions in the way of this claim, that is to say **McGill** and **ITT Promedia**, forgetting the question of jurisdiction all together.

MR. PICKFORD: Absolutely, my Lord.

MR. JUSTICE PUMFREY: I understand that.

MR. PICKFORD: As that point is unarguably bad, it is pointless to have a debate to go to the Court of Appeal on the jurisdiction.

MR. JUSTICE PUMFREY: Yes, OK. Thank you very much. Do you want to add anything?

MR. ROBERTSON: Only to deal with the point that at one point I thought Dr. Nicholson was traversing. Mr. Hoskins did submit to your Lordship that when it comes to jurisdiction, "rules is rules" and what we are talking about here ----

MR. JUSTICE PUMFREY: Yes. I am not quite sure whether Mr. Nicholson was sliding out of it, was ducking and weaving, or what he was doing, but he certainly caught that and substituted a separate discretion on the fly, was what I thought. That may be unfair.

MR. ROBERTSON: What we are dealing with here is a threshold issue. "Is there jurisdiction or not? How does one interpret Article 5(3)?" That is the basic point.

MR. JUSTICE PUMFREY: But both your opponents make, in their own way, this particular point. First of all, you have a number of welcoming jurisdictions. Secondly, in any of those jurisdictions, if we follow what is said in **ITT Promedia** and in **McGill**, which we did not really look at at the hearing, but was, as it were, the great unspoken, you are going to lose anyway. That is the problem.

You may have a series of technical points upon the agreement, and I still have not seen the comfort letter. I assume you have, have you?

MR. ROBERTSON: No, my Lord.

MR. JUSTICE PUMFREY: In relation to the four patentees, as it were?

MR. ROBERTSON: No. I think it was left that ----

MR. JUSTICE PUMFREY: It was left.

MR. ROBERTSON: ---- the defendants would consider whether or not to disclose it, and we have not seen it.

MR. JUSTICE PUMFREY: Subject to those points, which are comparatively minor and curable, I suspect, what is one going to end up with? The fact is that you want a compulsory licence, which means **McGill** has to operate, up against a set of offers which they say are FRAND. Then you have to get over **ITT Promedia**. This is extremely difficult, is it not? You are not required to say yes to that. The fact is that those are obviously obstructions in the path.

MR. ROBERTSON: The case law in this area, there is relatively little of it. It is relatively unexplored in litigation.

MR. JUSTICE PUMFREY: That may be a good reason ----

MR. ROBERTSON: The Court of Appeal said in **Intel v. Via** that that is one of the reasons why you should be careful about exercising jurisdiction in this case equivalent to granting summary judgment.

MR. JUSTICE PUMFREY: Yes, but the result of the Court of Appeal's decision in **Intel v. Via**, if you will forgive me for saying so, was enormously expensive litigation was undertaken and eventually compromised because the scope of the investigation was having to be done under those broad, broad competition questions. It was going to be out of all proportion to this. It was a nightmare. I can well understand how it was **Intel v. Via** got into the case. We have to face the law now. We have a better understanding, even than we did in **Intel v. Via** days, of what to do.

MR. ROBERTSON: We say it is certainly a novel issue. The nearest we get to it is **IBS** technology. As your Lordship has pointed out, that is not on all fours, but there is not any case. We are left trying to argue by analogy cases relating to negligent misstatement, and so on. This is a case about collective action, trying to force us, we say, to take a licence on anti-competitive terms of UK property rights. If that is not located in the UK, that damage is not located in the UK, and it is located apparently in Delaware, we think that looks odd. We say certainly we have a real prospect of showing that your Lordship has taken too narrow an approach in your Lordship's judgment. That is the point that we make in relation to real prospect of success.

MR. JUSTICE PUMFREY: Thank you. First of all, what I am going to say now will be the reasons which will be on the little white form which otherwise you would receive. It is always difficult to identify where in a judgment there appear statements, or there appear propositions, which give rise to a reasonable apprehension of a prospect of success in any appeal.

The present case is a particularly difficult one. The case falls into two parts. The first one on which I indicated there was no chance of any prospect of permission to appeal is that which relates to the interim relief since I considered that it was a simple exercise of judicial discretion and most unlikely to be challenged successfully in the Court of Appeal. Mr. Robertson did not press me on that. More difficult is the question of substantial jurisdiction under the exceptional jurisdiction provided by Article 5(3) of the Brussels Regulation in relation to the claims made in this case.

I think it is important not to exercise this discretion to refuse permission to appeal on too broad a basis. I may well feel that not only is there no jurisdiction to entertain this case, as I do feel, for the reasons I have set out in the judgment, and, moreover, not only is there no jurisdiction but no triable issue in relation to the complaints made, that a grant of permission to appeal is really unnecessary.

I am rather of the view, however, that where the question is whether this decision is liable to be impugned with a reasonable prospect of success or not is not quite such a broad question. Mr. Robertson places his submissions really upon the existence of a reasonable prospect of success in challenging the approach which I took in the judgment to the place where the harmful event occurs. He is unable to indicate to me that there is any case inconsistent or even arguably inconsistent with what I have said in the judgment, but he does submit that this jurisdiction is in an early state of development. There are few cases. Accordingly, the jurisdiction as a whole needs to be worked out.

I am of the view that if this jurisdiction needs to be worked out and if there is no substantial challenge to my approach to the cases such as they are, then this is a matter where the Court of Appeal should themselves decide is a suitable occasion for working out such principles as need to be worked out. I am not satisfied that on the materials that are available there is a reasonable prospect of success. I must acknowledge that further refinements in the statements of the law by the Court of Appeal might create a prospect of success where there is none. That possibility cannot be excluded, but it is not for me to exploit it and the application for permission must be made to the Court of Appeal.

I think, at first instance, unless one is satisfied that there is an arguable case on the present state of the authorities, one refuses leave and one leaves it to the Court of Appeal to see if they want to have to say anything about it. It may be that in fact the one point which is slightly vulnerable, maybe -- I do not know -- is **Domicrest**. That is a first-instance decision. None of the rest can I see even them doing anything, but I am bound by it. I am certainly bound by **Domicrest**, and that is a matter for the Court of Appeal, whether they wish to take it or not.

MR. NICHOLSON: My Lord, there is just one very short further matter which I just need to bring to your Lordship's ----

MR. JUSTICE PUMFREY: Do you not want interim payments?

MR. NICHOLSON: I understand there is no contest to that.

MR. JUSTICE PUMFREY: By the way, all I am going to do on that little white form is say "see transcript". Can you make sure that the relevant page or couple of pages of the transcript is made available to the Court of Appeal if you make an application for permission.

MR. ROBERTSON: Yes, my Lord. We were not contesting the interim payments.

MR. JUSTICE PUMFREY: Thank you very much. You want 21 days and you are prepared to pay those rather odd sums. Why they were not rounded, I do not know. There it is. You have to find 30 pence, or something. Yes, Mr. Nicholson?

MR. NICHOLSON: I think the issue has probably gone away. My learned friend suggested a reference to a reply to a letter in paragraph 32 of your Lordship's judgment.

MR. JUSTICE PUMFREY: Yes. What do we do about that?

MR. NICHOLSON: I notice that that has not been mentioned in the judgment, not been taken on board.

MR. JUSTICE PUMFREY: Was it not taken on board? Which paragraph is it?

MR. NICHOLSON: I believe it was paragraph 32.

MR. JUSTICE PUMFREY: "Has never been effectively replied to". The word "effectively" was inserted with malice aforethought. I took the view that unless it was submitted to me that there had been a reply, there cannot have been an effective reply. That was never challenged. There is a reply.

MR. NICHOLSON: That is the problem.

MR. JUSTICE PUMFREY: Why?

MR. NICHOLSON: The problem is that the letter has never been seen by my clients, that being D1 to D4, until we received my learned friend's ----

MR. JUSTICE PUMFREY: What about Sisvel?

MR. NICHOLSON: I understand that Sisvel have never seen it either.

MR. JUSTICE PUMFREY: Is it to solicitors?

MR. NICHOLSON: It is. All I want to do is put down a marker that if there is to be an issue on this, that something turns upon it, then there is a distinctive issue as to exactly how that letter should be dealt with. It may well be, my Lord, that if my learned friend wants to rely on it for the purposes of appeal, it needs to be some form of barrel application plus the fact of consideration of that letter itself.

MR. JUSTICE PUMFREY: Are you telling me now you want him to make a barrel application in relation to this order?

MR. NICHOLSON: No, my Lord.

MR. JUSTICE PUMFREY: In relation to this letter?

MR. NICHOLSON: We say that nothing turns on that.

MR. JUSTICE PUMFREY: Anyway.

MR. NICHOLSON: Exactly, my Lord. We do not know why the claimant has put it forward at this stage when it was common ground at the hearing that the letter did not exist.

MR. JUSTICE PUMFREY: Mr. Sharpe told me why it did not exist.

MR. NICHOLSON: Exactly, my Lord.

MR. JUSTICE PUMFREY: He said that everybody hated each other so much it would hardly be surprising that the letter was not replied to.

MR. NICHOLSON: Exactly.

MR. JUSTICE: Nobody replies to letters that were sent on the day on which bag loads of MP3 players are being lugged away by the German police. There it is. He was wrong.

MR. NICHOLSON: At this stage, I want to put down an application that should my learned friend want to do anything more with it, he is going to have to do something about it properly.

MR. JUSTICE PUMFREY: That is all right. I will say no more about this at all. That is why the word "effectively" is there. I had assumed it was common ground that the letter had been sent. If it is not common ground that the letter had been sent, you are

free to tell anybody that that is the position. The word in the judgment was carefully chosen, but not with that in mind.

MR. NICHOLSON: I am grateful.

MR. JUSTICE PUMFREY: I think it covers this particular eventuality. Who was it sent to? It was sent to Cleary Gottlieb. Who had written the letter? Had Cleary Gottlieb written the letter?

MR. PICKFORD: It was a letter written by McDermott Will & Emery to Cleary Gottlieb.

MR. JUSTICE PUMFREY: Cleary Gottlieb had written the preceding letter setting out the terms of the licence.

MR. PICKFORD: Yes.

MR. JUSTICE PUMFREY: Thank you all very much.

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