



Neutral Citation Number: [2023] EWCA Civ 113

Case No: CA-2020-000263/000283

IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2023

Before :

LORD JUSTICE LEWISON

LADY JUSTICE ASPLIN

and

LORD JUSTICE ARNOLD

Between :

(1) VODAFONE GROUP PLC

(2) VODAFONE LIMITED

(3) VODAFONE UK LIMITED

- and -

IPCOM GMBH & CO KG

Applicants

Respondent

Thomas Hinchliffe KC and Stuart Baran (instructed by Hogan Lovells International LLP)
for the **Applicants**

Brian Nicholson KC and Adam Gamsa (instructed by Bristows) for the Respondent

Hearing dates : 02/02/2023

Approved Judgment

This judgment was handed down remotely at 11.00am on 10.02.2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction and facts in outline

1. IPCOM was the registered proprietor of European Patent (UK) No 2 579 666 (“the patent”) relating to the allocation of access rights within a telecommunications network. A granted European patent has effect as a bundle of national patents for each of the states for which it is designated. The national courts and the European Patent Office (“EPO”) exercise concurrent, and to some extent overlapping, jurisdictions over such a patent.
2. IPCOM alleged that Vodafone was infringing the patent. The trial judge held that the patent was valid and that some of Vodafone’s acts had infringed the patent, but others had not, in particular due to a defence of Crown use. On 19 February 2021 this court (Lewison, Asplin and Arnold LJJ) dismissed Vodafone’s appeal, but allowed IPCOM’s appeal, holding that the defence of Crown use was not made out. This court (among other things) declared that Vodafone had infringed claims 1 and 7 of the patent by additional acts to those which the judge had declared to infringe those claims; and ordered Vodafone to pay a substantial proportion of IPCOM’s costs. Permission to appeal to the Supreme Court was refused.
3. On 19 March 2021 Vodafone applied to the Supreme Court for permission to appeal. The permission to appeal form identified the point of law of general public importance as the extent of the Crown use defence which was said to be “a crucial part of the relationship between the government and the third parties whose help it might need to engage”; and that it was “an issue of significant public importance on which there [was] a dearth of authority.”
4. While the litigation was working its way through the English courts, there were parallel opposition proceedings before the EPO. On 23 July 2021 the Technical Board of Appeal revoked the patent on the ground of added matter. The effect of that decision is that the patent is retrospectively invalidated in all countries which are party to the European Patent Convention (including the United Kingdom): see Patents Act 1977, section 77 (4A). But the Board of Appeal does not sit on appeal from this court. Nor does the EPO (or the Board of Appeal) have jurisdiction over questions of infringement, which are matters for the national court.
5. On 17 November 2021 Vodafone applied to the Supreme Court for permission to amend its grounds in support of the application for permission to appeal, seeking an order for its costs. The amended grounds said that if the amendments were to be permitted, then the original grounds could be deleted. Mr Hinchliffe KC, on behalf of Vodafone, confirmed that the original grounds of appeal had been abandoned, as they had become academic.
6. Vodafone’s application for permission to amend and for permission to appeal was referred to a panel consisting of Lords Kitchin, Hamblen and Burrows. On 5 April 2022 they gave directions to the effect that:

- i) The application for permission to appeal was adjourned generally with liberty to restore, and time for making the application and for the application to amend was extended.
- ii) The parties were directed to consider whether it was appropriate in the first instance to apply to this court to vary or discharge the whole or any part of its order.

The more detailed procedural history so far

7. In his fifth witness statement Mr Brown of Vodafone's solicitors sets out some of the procedural history of this case. This was supplemented by a chronology. The patent was granted by the EPO on 19 October 2016; and was due to expire on 14 February 2020. There is a nine month window in the EPO within which to object to the grant. That window closed on 19 July 2017, by which time the opposition was in being. These proceedings were issued on 26 October 2018 claiming an injunction among other things. It also asked the court to determine the terms of a FRAND licence. The opposition in the EPO was thus a continuing backcloth to the national proceedings.
8. On 20 March 2019 ICom issued an application seeking expedition, with a view to preserving its ability to claim an injunction if questions of validity and infringement could be determined before the patent expired. Vodafone resisted that application and, in addition, sought a stay both on jurisdictional grounds and also on the ground that there were pending opposition proceedings in the EPO. ICom opposed the grant of a stay, saying that Vodafone was free to pursue its opposition proceedings and asserting that the UK is more than able to deal with allowing for any outcome in the EPO as it routinely does in relation to appeals in the provision of any final order. On 10 May 2019 Birss J ordered an expedited trial to be heard in November 2019: [2019] EWHC 1255 (Pat). Although he mentioned the opposition in the EPO, it does not appear from his judgment that it played a significant part in the argument. We were told that the application for a stay, although mentioned in Vodafone's skeleton argument, was not in fact pursued in oral submissions.
9. A hearing before the Opposition Division of the EPO took place in September 2019. The Opposition Division upheld an amended form of the patent as valid. An appeal was launched to the Board of Appeal.
10. Shortly before trial in the High Court Vodafone modified its network, which had the effect that its network did not infringe the patent. On 13 November 2019, in the light of these developments, ICom applied to adjourn the trial. Recorder Campbell QC dismissed that application on the day before trial. He continued with the trial of the action in November 2019 and gave judgment on 28 January 2020. He decided, among other things, that Vodafone had established its Crown use defence. At a subsequent hearing he made a number of declarations concerning infringement; ordered an inquiry into damages (or an account of profits); and ordered Vodafone to pay 60 per cent of ICom's costs. Permission to appeal to this court was granted, in part by Recorder Campbell QC himself and in part by Floyd LJ.
11. On 1 September 2020 Vodafone wrote to ICom requesting a postponement of the hearing of the appeal until the decision of the Board of Appeal was known. ICom

refused to agree. But no formal application to adjourn the hearing of the appeal was made to this court.

12. This court heard the appeal between 16 and 18 January 2021; and gave judgment on 19 February 2021. We dismissed Vodafone's appeal on validity and IPCom's appeal on the interpretation of the patent; but reversed Recorder Campbell QC on the question of Crown use. We ordered Vodafone to pay a further 12 per cent of IPCom's costs at first instance and 80 per cent of the costs of the appeal. The order for an inquiry into damages remained undisturbed.
13. In satisfaction of the costs orders Vodafone have paid IPCom £926,000-odd.

The problem

14. The problem is that, despite the revocation of the patent, the declaration of infringement, the order for the inquiry into damages and the costs order made by this court still stand, even though the fundamental basis for those orders (infringement of a valid patent) has been falsified. Not only that, but Vodafone has actually paid the costs. What, if anything, can or should this court now do about it?
15. Two possible routes have been suggested:
 - i) An application under CPR rule 3.1 (7) to revoke or vary the orders made by this court and Recorder Campbell QC.
 - ii) An application to re-open the order of this court under CPR rule 52.30.
16. When Vodafone first intimated an intention to apply to vary this court's order under CPR rule 3.1 (7), the court's provisional view was that CPR rule 52.30 was the way forward. But Vodafone have continued to press CPR rule 3.1 (7) on the basis that, while the application to the Supreme Court is still pending, the decision of this court cannot be a final order; and it cannot be said that there is no effective alternative remedy. I will touch on that question in due course. Somewhat surprisingly, to my mind, despite the court's provisional view, Vodafone have not made an alternative application under CPR rule 52.30. The two points are to some extent inter-related; and it will be necessary to consider both.
17. CPR rule 52.30 has gone through several iterations. Some of the authorities to which I refer concern earlier versions, but I have referred to CPR rule 52.30 throughout.

The rules

18. CPR rule 3.1 (7) provides:

“A power of the court under these Rules to make an order includes a power to vary or revoke the order.”
19. CPR rule 52.30 provides:

“(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—

- (a) it is necessary to do so in order to avoid real injustice;
- (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
- (c) there is no alternative effective remedy.”

The effect of revocation of the patent

20. The Supreme Court considered the effect of the limitation by the Board of Appeal of claims in a patent in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 463, [2014] AC 160, where the patent had already been litigated in the UK courts. In 2009, the Court of Appeal had found that Virgin’s patent was valid, rejecting Zodiac’s claim that it was invalid over the prior art. The Supreme Court refused permission to appeal. Following that judgment, but before the assessment of damages, the EPO Board of Appeal amended the patent so as to remove, with effect from the date of grant, all the infringing claims on the basis that they were invalid over prior art. Virgin asserted that it was still entitled to recover damages for infringement in the forthcoming inquiry, arguing that the court’s declaration of validity was *res judicata* and Zodiac could not rely on the EPO’s subsequent, retrospective decision.
21. As a result of the decision of the Board of Appeal, further applications were made by Zodiac to the Court of Appeal to vary the Court of Appeal’s order and to discharge the injunction. The injunction was discharged by consent on 1 December 2010. But the Court of Appeal refused to vary the declaration that the patent was valid and infringed; decided that the order for an inquiry into damages would stand; and refused to order repayment of some £3.6 million which Zodiac had already paid. The Court of Appeal also refused to re-open the appeal under the then equivalent to CPR rule 52.30: *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd (No 3)* [2011] EWCA Civ 163, [2011] FSR 27. Zodiac appealed to the Supreme Court.
22. The Supreme Court considered in detail the related principles of *res judicata*, issue estoppel and abuse of process. The actual decision in that case was that Zodiac were entitled to rely on the retrospective limitation of the patent claims in the inquiry as to damages which had been ordered by the Court of Appeal. The order for the inquiry, however, still stood. Both Lord Sumption and Lord Neuberger (who gave the only reasoned judgments) proceeded on the basis that the substantive decision of the Court of Appeal could only be challenged by an appeal. But Zodiac was not barred by cause of action estoppel from relying on the partial revocation of the patent in the forthcoming inquiry into damages because that question had not (and could not have) arisen in the Court of Appeal because it had not then happened. The Supreme Court further held that what was relevant was the fact of revocation (which operated in *rem*) and not the reasons for the revocation. The effect of the revocation was that, to that extent, the patent was treated as never having existed; and everyone was entitled to conduct their affairs on that basis. Lord Sumption said:

“[35]. ... Accordingly, where judgment is given in an English court that a patent (whether English or European) is valid and infringed, and the patent is subsequently retrospectively revoked or amended (whether in England or at the EPO), the

defendant is entitled to rely on the revocation or amendment on the inquiry as to damages.

[36] Once the inquiry is concluded, different considerations will arise. There will then be a final judgment for a liquidated sum. At common law, that judgment could be challenged on the ground that the patent had later been revoked or amended only by way of appeal, and then only if an appeal is still open. I doubt whether an implied statutory right to reopen it could be derived from the scheme of the Patents Act 1977, but that is a question which will have to await a case in which it arises.”

23. At [53] Lord Neuberger said:

“On the facts of this case, Zodiac are not seeking to challenge any of the conclusions reached by the Court of Appeal in the English proceedings. They accept that they cannot say that the patent, in its unamended form, is susceptible to attack on the grounds raised in the English proceedings, or that Zodiac's product did not infringe the patent in that form, or that Virgin is not entitled to an assessment of damages. All that Zodiac are seeking to do is to contend that the damages on the assessment should be assessed at nil (or, perhaps, a nominal figure), because, as the patent has been amended in the course of the EPO proceedings, it is now retrospectively to be treated as amended, so that Zodiac's product does not infringe, and so Virgin have suffered no damage.”

24. He went on to say:

“[66] As to the temporal limit of Zodiac's right to rely on the amendment of the Patent in the assessment of damages, I have no doubt that they could raise the amendment until judgment for the assessed damages had been drawn up, or passed and entered to use the time-honoured legal expression. While the court would, I think, have power to refuse to do so, I would expect it normally to agree to reopen such a judgment if any revocation or amendment was raised before the assessed damages had been paid.

[67] If the Patent had been amended after the order had been formally passed and entered, but before the damages had been paid, I suspect that the only course open to Zodiac would have been to seek to appeal against the award of damages, relying on the amendment as new evidence, as strict cause of action estoppel (indeed merger) would apply. Once the damages had been paid, it seems to me that an alleged infringer would have to try and raise a restitutionary claim if it wished to recover the damages on the ground that the patent had been revoked or varied. I express no view on the strength of such a claim, which

may well be highly dependent on the facts of the particular case.”

25. It is also necessary to consider the impact on costs of a decision by the Board of Appeal to revoke a patent where that patent has already been the subject of contested proceedings in the UK courts. This court considered that question in *Neurim Pharmaceuticals (1991) Ltd v Generics UK Ltd* [2022] EWCA Civ 359. The simplified facts were as follows. Neurim was the proprietor of a European patent, granted in 2017, concerning the use of prolonged-release melatonin, for the treatment of primary insomnia characterised by non-restorative sleep. The allegedly infringing product was called Circadin. The patent was subject to opposition proceedings before the EPO. In November 2019, the Opposition Division found that the patent was invalid for lack of novelty and revoked it on that basis. Neurim filed a notice of appeal against that decision in January 2020, which had the effect of suspending the revocation. In February 2020, Neurim issued proceedings against Mylan alleging threatened patent infringement. Mylan counterclaimed for revocation of the patent on the ground of obviousness. Marcus Smith J found that the patent was valid and infringed; but granted permission to appeal. Just over two weeks later, the Board of Appeal announced their opinion that the patent was invalid for insufficiency. Neurim consequently withdrew its appeal before the Board, rendering the patent retrospectively invalid. Before any order was sealed giving effect to the judgment the judge revoked his earlier orders. He ordered Neurim to pay Mylan’s costs of the proceedings on the basis that, although the effect of the original judgment was that Neurim was the successful party on all issues except one, the effect of the patent’s revocation by the EPO was that Mylan were the successful parties, and there was no reason to depart from the principle that the unsuccessful parties should pay the successful parties’ costs.
26. Neurim appealed on three grounds:
- i) The judge was wrong to conclude that Mylan’s success in the EPO meant that Mylan were the successful parties in the English proceedings, or at least was wrong to conclude that Mylan’s success in the EPO should be determinative of the incidence of costs in the English proceedings.
 - ii) The judge should not have reversed his previous costs order.
 - iii) Even if the judge was correct to conclude that Mylan were the successful parties overall, he should have made an issues-based costs order which better reflected the reasons for Mylan’s overall success.
27. Neurim did not dispute that the judge had jurisdiction to re-consider his costs order in the light of the subsequent revocation of the patent by the EPO, but they contended that there had been no material change of circumstances because the revocation was not material to the assessment of the costs of the English proceedings and therefore the judge should not have changed his order. Arnold LJ (with whom Newey and Birss LJ agreed) rejected that argument. He said at [49]:
- “I do not accept this argument. I will assume that the premise for the argument, namely that Mylan had to demonstrate a material change of circumstances since 16 December 2020, is

correct, although the contrary is arguable given that no order had been sealed. In my view the revocation of EP702 was plainly a material change in circumstances since the Claimants' objective in these proceedings was to enforce the monopoly conferred by EP702 and thereby exclude a competitor from the market in order to be able to continue to charge a monopoly price for Circadin. The revocation of EP702 meant that the Claimants could not achieve that objective. More specifically, it meant that they could not obtain the relief against Mylan (namely an injunction, delivery up of infringing goods and an inquiry as to damages alternatively an account of profits) which they claimed in these proceedings. Both legally and commercially, therefore, revocation meant that the Claimants had failed. The fact that EP702 was revoked after the judge had given the December Judgment does not alter this.”

28. He added at [52]:

“The question cannot depend on timing, at least if the revocation happens prior to a final order of the English court being sealed. It is the sealing of the order which matters for these purposes, because that is the stage at which the first instance court becomes *functus officio* (meaning that it ceases to have authority to decide the case) for most purposes and thus the stage at which considerations of finality bite. In saying this, I am deliberately leaving out of account questions, which do not arise in this case, as to the circumstances in which a final order may be re-opened. I am also leaving out of account the question, which does not arise in this case either, as to whether a party in the position of Mylan would have some other remedy if the final order was sealed before the patent was revoked.”

29. At [54] Arnold LJ held that the judge had been right to regard Mylan as the successful party because, as a result of the revocation, Neurim failed to obtain any of the relief they sought. But he went on to say that the judge had erred in principle in not considering whether to depart from the general rule that the unsuccessful party should pay the successful party's costs. Having considered the detailed facts and procedural history of the case, Arnold LJ came to the conclusion that Mylan should pay the costs of an issue on which they failed but that otherwise there should be no order for costs.

30. It is to be noted that Arnold LJ expressly said that he was not considering questions about when a final order may be re-opened. Of course, in the case of re-opening a final order it is highly likely that the order will have been sealed. Yet it cannot be said that the mere sealing of an order excludes the court's jurisdiction to consider an application under CPR rule 52.30.

What could Vodafone have done?

31. Clearly, the combination of the revocation of the patent, and this court's order on the appeal leaves Vodafone in an uncomfortable position; but Mr Nicholson KC, for IPCom, says that it could have protected its position. First, he says, Vodafone could

have asked for a stay. In fact it seems that Vodafone did ask the Patents Court for a stay before the trial at first instance; but as I have said that application seems to have faded away, and Birss J did not deal with it in his judgment fixing the trial date. Where there are concurrent proceedings in the national court and opposition proceedings in the EPO the default position is that a stay of the national proceedings will be granted; although ultimately it is a question of justice whether a stay should be granted or refused. Floyd LJ set out a number of relevant factors going to the exercise of the discretion to grant or refuse a stay in *IPCom GmbH & Co KG v HTC Europe Co Ltd* [2013] EWCA Civ 1496, [2014] RPC 12 at [68]. He said (among other things):

“One important factor affecting the exercise of the discretion is the extent to which refusal of a stay will irrevocably deprive a party of any part of the benefit which the concurrent jurisdiction of the EPO and the national court is intended to confer. Thus, if allowing the national court to proceed might allow the patentee to obtain monetary compensation which is not repayable if the patent is subsequently revoked, this would be a weighty factor in favour of the grant of a stay. It may, however, be possible to mitigate the effect of this factor by the offer of suitable undertakings to repay.”

32. An undertaking to that effect was in fact given in that case: see [88]. This practice has been followed subsequently. In *Coloplast A/S v Salts Healthcare Ltd* [2019] EWHC 1979 (Pat), [2019] FSR 38, for instance, a stay was refused in circumstances where the patentee offered an undertaking to repay any damages awarded in the event that the patent were held by the EPO to be invalid. In the present case, although Vodafone did initiate an application for a stay, it did not press it to a conclusion; and there is no evidence that it requested any suitable undertakings from IPCoM. Nor did it request that IPCoM gave such undertakings when Recorder Campbell QC made his order, or request the inclusion of a liberty to apply in the event that the patent was subsequently revoked by the EPO. Nor did it make any application to this court for a stay of the appeal or for the appeal to be adjourned pending a decision of the Board of Appeal (compare *Samsung Electronics Co Ltd v Apple Retail UK Ltd* [2014] EWCA Civ 250, [2015] RPC 3 where an appeal to this court was adjourned pending amendment proceedings in the EPO).
33. Following the decision of this court on the appeal, Vodafone could have asked us to adjourn the question of costs and other relief pending the decision of the Board of Appeal; or asked for any order for costs to be made contingent on the final outcome of the opposition in the EPO; or it could have asked for liberty to apply to revoke our order in the event that the patent were revoked by the Board of Appeal. Following our judgment Vodafone did, however, ask for a stay of the inquiry into damages until the conclusion of the validity proceedings in the EPO; and an undertaking to repay any damages awarded. We declined to make that order without prejudice to any further application that might be made to the Patents Court. Vodafone did not make any application to stay the costs order.
34. Although these are well-trodden paths for experienced patent litigators, in fact Vodafone did none of these things.

CPR rule 3.1 (7)

35. CPR rule 3.1 (7) appears in a part of the rule headed “Case management.” One would not expect a rule intended to deal with case management to apply to final orders. Nevertheless, there is no authority which absolutely precludes the invocation of CPR rule 3.1 (7) in relation to final orders.

36. In *Roult v North West Strategic Health Authority* [2009] EWCA Civ 444, [2010] 1 WLR 487 a claim for damages for personal injury was settled on the basis that the claimant would live in a local authority group home together with other disabled adults. The claimant’s parents removed him from that home because they thought it unsuitable and sought to re-open the settlement on the basis that the claimant would live in privately obtained accommodation with privately engaged carers. At first instance, the judge held that he had no power to re-open the settlement. But this court seems to me to have taken a more nuanced view. The submission for the claimant was that:

“...the words of rule 3.1(7) are wide enough to cover the case, that the overriding objective of the CPR requires that the rule be interpreted flexibly so as to do justice which might be denied to the claimant if his damages had to be assessed on a basis falsified by events.”

37. At [15] Hughes LJ said that “in its terms the rule is not expressly confined to procedural orders”. Nevertheless, the claimant’s submission was rejected. Hughes LJ went on to say:

“I am however in no doubt that CPR r 3.1(7) cannot bear the weight which Mr Grime’s argument seeks to place upon it. If it could, it would come close to permitting any party to ask any judge to review his own decision and, in effect, to hear an appeal from himself, on the basis of some subsequent event. It would certainly permit any party to ask the judge to review his own decision when it is not suggested that he made any error. It may well be that, in the context of essentially case management decisions, the grounds for invoking the rule will generally fall into one or other of the two categories of (i) erroneous information at the time of the original order or (ii) subsequent event destroying the basis on which it was made. The exigencies of case management may well call for a variation in planning from time to time in the light of developments. There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue—an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to reopen any decision. In particular, it does not follow, I have no doubt, where the judge’s order is a final one disposing of the case, whether in whole or in part. ...The interests of

justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist.”

38. In view of Mr Hinchliffe’s submission that exercise of the court’s power under CPR rule 3.1 (7) is engaged where there is an incontrovertible fact subsequent to judgment which undermines the basis of that judgment, it is to be noted that that was exactly the position in *Roult*. In addition, in *Roult* it seems to me to have been accepted that the subsequent event must have been unforeseen (and possibly unforeseeable) in order to revisit a previous order intended to be final: see *Roult* at [12]. The possibility of revocation of the patent by the EPO is entirely foreseeable in a case of this kind.
39. In the case of an interlocutory injunction, which Hughes LJ mentioned, if it turns out at trial that the order should not have been made, the defendant will almost always be protected by the cross-undertaking in damages that is the usual price for the grant of an interlocutory injunction. In the case of interim payments ordered by the court, there is a specific power to vary or discharge the order and to order repayment contained in CPR rule 25.8.
40. In *Kojima v HSBC Bank Plc* [2011] EWHC 611 (Ch), [2011] 3 All ER 359 the bank issued proceedings to recover monies from Mr Kojima. Mr Kojima admitted liability for part of the debt and the bank applied for judgment on the admitted amount. To avoid Mr Kojima’s career being adversely affected by a county court judgment against him, the district judge ordered that unless he executed a charge over his flat for the admitted liability, the bank could enter judgment for that amount. That order was intended to be a final order, in substance if not in form, as regards that part of the case. Mr Kojima, who had acted as a litigant in person, executed the charge. However, he was later informed by solicitors that he had a defence to the bank’s claim. He consequently applied to have the unless order revoked under CPR rule 3.1(7) so as to seek permission to withdraw his admission as to the amount due. His application was refused.
41. Briggs J said:

“[29] My conclusions are as follows. First, although Mr Stone has in his favour the description in its headnote of the Court of Appeal’s decision in *Roult* as one about jurisdiction, I do not read the judgment of Hughes LJ (with which Carnwath and Smith LJJ agreed) as going quite that far. Nonetheless it does in the passage which I have quoted, clearly establish that, to the extent that there exists any jurisdiction in the court to review its own final order, that is not to be justified on the alternative grounds first enunciated by Patten J, and approved in *Collier v Williams*, in the context of procedural or other non-final orders.

[30] In my judgment once the court has finally determined a case, or part of a case, considerations of the type first identified by Patten J in *Lloyds v Ager-Hanssen* will generally be displaced by the much larger, if not indeed overriding, public interest in finality, subject of course to the dissatisfied party’s qualified right of appeal.”

42. An appeal to this court was dismissed: [2011] EWCA Civ 1709, although the appeal was argued in a slightly different way.

43. In *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422, commenting on these and other cases, Hamblen LJ said:

“[75] In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality.”

44. Hamblen LJ then referred to a limited class of case in which a final order could be set aside under specific provisions of the CPR. In *Terry* the order in question was a default judgment; and Hamblen LJ regarded the existence of specific procedure for setting aside a default judgment as a “further hurdle” to the application under CPR rule 3.1 (7): [79]. He continued at [80]:

“This was an issue considered in *Samara v MBI & Partners UK Ltd* [2016] EWHC 441. In that case, as here, there was an unsuccessful application to set aside a default judgment under CPR 13.3. A further application to do so was then made in reliance upon CPR 3.1(7) on the grounds of further evidence which had subsequently come to light. It was held that there was no power to consider a second application under CPR 13.3, that this could not be circumvented by reliance upon CPR 3.1(7) and that CPR 13 is a self-contained regime for the variation or setting aside of default judgments. We agree with that approach.”

45. Conformably with that approach, where CPR rule 52.30 is potentially engaged, there is little, if any, room for the exercise of a power under CPR rule 3.1 (7). In *R (Gregory) v City University London* [2016] EWCA Civ 898 Arden LJ refused permission to appeal against an order of the Divisional Court. The Appellant then tried to have the order varied under CPR rule 3.1 (7). Briggs LJ (with whom Moore-Bick LJ agreed) said:

“For my part, I have had no difficulty in concluding that the power might be found in Part 3.1(7), but in no circumstances, in relation to an order of this kind, could it be exercised otherwise than in conformity with the very strict framework and conditions imposed by Part [52.30].”

46. In *McWilliam v Norton Finance UK Ltd* [2014] EWCA Civ 818 a claim against Norton Finance was dismissed in the county court. Permission to appeal to the Court of Appeal was granted, but the appeal was dismissed by consent because Norton Finance was then in administration and there was little hope of any meaningful recovery. Subsequently, it passed from administration into liquidation. An application

was then made to re-open the appeal under the then equivalent of CPR rule 52.30. In the alternative, the application was made under CPR rule 3.1 (7). The liquidators consented to the dismissal order being set aside. In those circumstances it was argued that the court could exercise its power under CPR rule 3.1 (7) without the need to clear the hurdles imposed by CPR rule 52.30. Floyd LJ (with whom Maurice Kay LJ agreed) said at [10]:

“For my part, I have very grave doubts as to whether this case could be brought within CPR [52.30], particularly having regard to what Lord Woolf said about its application to a litigant who is the “author of his own misfortune”. A further point, however, is whether there has, in the present case, been “a final determination” of the appeal in the sense required by paragraph 1 of the rule. It seems to me, as at present advised, that in the present case, permission to appeal having been granted and the appeal having been dismissed by consent, there has been no final determination in the relevant sense. At least as at present advised, it seems to me that a final determination, consistently with the purpose of the rule, is one where the court adjudicates finally on its merits. That has not happened in the present case.”

47. But he went on to say:

“The strict constraints which part [52.30] imposes do not apply directly under CPR part 3. The case for inviting the court to revoke its previous order by consent is reasonably compelling.”

48. The court does not appear to have been referred to any authority other than *Taylor v Lawrence* (not even *Roult* on the proper ambit of CPR rule 3.1 (7)). In addition, as noted, *Terry* concerned a default judgment rather than an adjudication on the merits yet the application under CPR rule 3.1 (7) in that case was rejected. But in any event, in the present case Vodafone’s appeal was determined on the merits. More to the point, in *McWilliam* the dismissal was set aside *by consent*.

49. In *R (Akram) v Secretary of State for the Home Department* [2020] EWCA Civ 1072; [2021] Imm AR 471 Hickinbottom LJ referred to CPR rule 52.30 at [2] and said:

“Therefore, unless each of these criteria is satisfied, the court has no power to reopen an appeal.”

50. That was followed in *Ceredigion Recycling & Furniture Team v Pope* [2022] EWCA Civ 22, in which an attempt was made to outflank CPR rule 52.30 by reliance on CPR rule 3.1 (7) in order to re-open a refusal of permission to appeal.

51. At [41] Sir Julian Flaux CHC (with whom Newey and Edis LJJs agreed) rejected an argument that the court had an inherent jurisdiction to review a decision by a single Lord Justice refusing permission to appeal. He went on to consider the applicability of CPR rule 3.1 (7):

“[42] Furthermore, contrary to Mr Adams’ submission, the jurisdiction for which he contends cannot be derived nor does it receive any support from the power given in CPR 3.1(7). In *Tibbles v SIG plc* [2012] EWCA Civ 518; [2012] 1 WLR 2591, this Court made clear that, whilst an exhaustive definition of the circumstances in which the discretion could be exercised was not possible, as a matter of principle it may normally only be exercised: (a) where there has been a material change of circumstances since the order was made or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated: see per Rix LJ at [39]. Mr Adams had not addressed this principle in his opening submissions and really had no answer in reply to the point made by the Court that he could not bring this case within it.

[43] In other words, rule 3.1(7) will not avail the first defendant and any application to reopen the appeal can only be made under CPR 52.30 .”

52. The decision in that case seems to me to have greatly weakened such authority as *McWilliam* may have. But in so far as there is a conflict between *Ceredigion Recycling* and *McWilliam*, we are free to choose between them. In my judgment, *Ceredigion Recycling* is to be preferred.
53. The order that Vodafone seeks to set aside or vary is contained in this court’s final order which has, of course, been sealed. Does the fact of sealing make any difference? This question was considered (obiter and without any citation of relevant authority on the scope of CPR rule 3.1 (7)) in *Re L (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634. That case concerned findings of fact in a fact-finding trial held as a preliminary to the making of a welfare order under the Children Act 1989. In care proceedings, as Lady Hale pointed out, it is well-settled that the fact-finding judge is entitled to revisit findings at the welfare stage if that is warranted. At [372] she briefly mentioned CPR rule 3.1 (7), although she did so by saying that the court’s wide “*case management* powers” under the CPR include the power to “vary or revoke their previous *case management* orders.” (Emphasis added) It was in that context that she said that there was “no magic” in the sealing of the order. I do not consider that this can be taken as a considered view on the variation or revocation of a sealed final order in civil proceedings: see *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16, [2022] 1 WLR 3223 at [18] to [28].
54. The overwhelming thrust of the authorities is that the court’s power under CPR rule 3.1 (7) to vary or revoke orders either cannot or should not be used to discharge a sealed final order. The only limited exception thus far even contemplated in civil proceedings is the case of a continuing order (such as a final injunction).
55. In the present case it is common ground that, if IPCom were to proceed with the inquiry into damages, Vodafone would be entitled to rely on the revocation of the patent in order to argue that IPCom had suffered no loss. In all other respects (and in particular the payment of costs) the order has been fully worked out.

56. I would hold, therefore, that Vodafone's only available route to challenging the final order made by this court is either through CPR rule 52.30 or by an appeal to the Supreme Court.

CPR Part 52.30

57. Since Vodafone have not made any application under CPR rule 52.30 I will say as little about it as possible. But there are a few observations (necessarily obiter) that I believe to be pertinent.
58. The principal question arising under CPR rule 52.30 is whether there is no alternative effective remedy in the light of the fact that Vodafone have asked the Supreme Court for permission to appeal. Curiously, it is Vodafone who argue that there is (or may be) an alternative effective remedy, with the result that there is no jurisdiction under CPR rule 52.30; whereas ICom argue that the mere fact that Vodafone have asked the Supreme Court for permission to appeal does not deprive this court of jurisdiction under that rule.
59. The origins of CPR rule 52.30 begin with the decision of this court in *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528. In the course of the judgment at [46] to [48] the court considered the question of a possible appeal to the House of Lords. They pointed out that in some cases (e.g. where a party has been refused permission to appeal to this court) there is no further right of appeal. But in other cases, there would, at least in theory, be the possibility of a further appeal. The question in those cases is whether the right of appeal is "theoretical" or "real". In deciding that question this court must recognise the reality of the situation, and also have in mind that permission to appeal to the House of Lords (and now the Supreme Court) will not be given unless the appeal raises a question of law of general public importance.
60. At [55] the court said:
- "Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave."
61. The first point is that, in the light of these observations, I agree with Mr Nicholson that the mere fact that Vodafone have applied to the Supreme Court for permission to appeal does not, without more, deprive this court of jurisdiction under CPR rule 52.30. If this court takes the view that for practical purposes the ability to appeal is "theoretical" rather than "real", the applicant is not required actually to apply to the Supreme Court for permission to appeal and wait for the application to be refused. There seems to me, therefore, to be a spectrum of cases. In some this court is able to say that permission to appeal to the Supreme Court is likely. In others it will be able to say that that prospect is only theoretical. But as with any spectrum, there is a group of cases which fall into neither category.
62. As the court also said in *Taylor v Lawrence*, the Supreme Court is the best judge of those cases which merit its attention and resources. So this court must be especially

careful not to second-guess the outcome of an application to the Supreme Court for permission to appeal. The parties to this application, predictably, disagreed about the prospect of Vodafone obtaining permission to amend its grounds of appeal and then obtaining permission to appeal. But the Supreme Court has not (yet) rejected Vodafone's application to amend its grounds of appeal or its application for permission to appeal. The debate between the parties on this topic is not one that I consider we should join.

63. Second, if the Supreme Court were to refuse permission to amend and permission to appeal, then it seems very probable that this court's jurisdiction under CPR rule 52.30 would arise (or revive). Alternatively, under rule 34 of the Supreme Court Rules, Vodafone could withdraw its application for permission to appeal, in which case this court would also have jurisdiction.
64. As far as the remainder of CPR rule 52.30 is concerned, since Vodafone did not attempt to make an application under that rule, I say no more about it.

Result

65. I would refuse the application under CPR rule 3.1 (7).

Lady Justice Asplin:

66. I agree that Vodafone's application should be dismissed for the reasons which Lewison LJ gives. I also agree with Arnold LJ that even if there were jurisdiction, it would not be appropriate to exercise it in this case. Vodafone could have taken steps to protect itself but failed to do so.

Lord Justice Arnold:

67. I agree with Lewison LJ that Vodafone's application should be dismissed. For the reasons he gives, this court does not have jurisdiction under CPR rule 3.1(7) to open its sealed final order of 19 February 2021. Even if there were jurisdiction, it should not be exercised because Vodafone is the author of its own misfortune through failing to take steps which were open to it to protect itself against the foreseeable events which have transpired.