Excerpt from the keynote address of Mr Justice Birss at the MIP IP Strategy Summit on 10 September 2020

Sir Colin has been promoted to the UK Court of Appeal which will take effect on a date to be announced 2021.

This morning what I want to focus on is four themes: one is the impact of the pandemic on the Intellectual Property Courts; the second one is what I call the "acronyms" and I'll explain that; third is the global nature of intellectual property itself, and fourth and finally what strategic importance of intellectual property in in our current world.

So, the first thing, the impact of the pandemic on the IP Courts. Well, the IP Courts in London, that is the Patent's Court IPEC and the Chancery Division itself, are all part of the Business and Property Courts and we used to say that they were in the Rolls Building on Fetter Lane in London, but now what we should say, is that their physical seat is the Rolls Building, but where are they now is an interesting question.

Well, the answer, right now at any rate, is that they're online mostly. Like almost everyone else, from the start of the lockdown, which for us was the end of March, in the UK, in my case from then until mid-July, I spent only three days in that Rolls Building and the rest of it has been working from home. We already had an electronic document filing, which was absolutely critical, and it's quite a thing that, the IP Courts as part of the Business and Property Courts, and it was really the BPCs as a whole, the whole BPC operation effectively moved online within a matter of days, in March. There were some cases that couldn't be dealt with, but the vast majority, and the vast majority of cases continued without really breaking step.

And looking at the position today, in the Business and Property Courts, there is no backlog at all. Essentially we've carried on. A small number of cases, as I've said, had to be adjourned, but that was a small number. Some of them were big, but even big cases haven't been. In terms of time, I was doing a virtual hearing almost every day for 3½ months, and I did some maths and that adds up to about something like 70 virtual hearings, for me, in that period and that's just one judge and when you replicate that across the piece, you see what an enormous number of hearings have been done that way and that was all sorts of things – case management, appeals, preliminary injunctions, a patent trial has been done wholly online, at least one.

And we're also doing what is – it's a horrible word – but we're also doing what we've been calling 'hybrid hearings', which is where it's partly in a physical court and partly online and I did a hybrid patent trial in July and I'm scheduled to do another one in October. Those are, those cases are sort of stalwarts of what you see in the Patent's Court in London – one was a medical device and the other was a telecoms standard essential patent. And funnily enough, the hardest thing in hybrid cases is has been the audio - of all the parts of it, you thought might be difficult, I think no-one really thought the audio would be the difficulty, but it works, but it's not perfect.

But reflecting on this, it's incredibly significant for access to justice, because, we've shown that the Courts can and have kept going, but that's not true of the whole of the English law

and across the world. It's obviously been difficult in many cases, for courts to continue to function but for business cases, in this jurisdiction, we've kept it going. And it's clear that video hearings of some sort are going to be a permanent feature and a much bigger feature than they ever were. Exactly what the role will be, if we don't have to be concerned with social distancing, is a matter for the future.

And what's the significance of this for intellectual property strategy? Well, I think it leads to three reflections, which are related to the way the Business Courts operate in the UK, and London as a successful international centre for commercial dispute resolution, it needs to maintain that position and to do that it needs to be responsive to the needs of Business Court users and to be able to show that it can adapt.

And so the first thing that I want to reflect on, is that the response to Corona shows that how things are done is remarkably tractable, and what I mean is, that we changed things that we thought were unchangeable. No-one ever thought that we could do what we've done, and we never planned it. And it can be done extremely fast, because we have a reason to do it. It also shows that a certain perfectionism in the law, and it applies to judges, lawyers, all sorts of participants, has taken a bit of a dent. You don't need super perfection to make a system work, you don't need beautifully prepared bundles, you don't need to, you can cope if the signals drop out a little bit, and there is a tolerance, I think, that we've seen, at least in my experience, over the last, you know five months, a tolerance of what are really minor imperfections, which in the Courts before, people were very intolerant of that kind of thing and we've learned that that really isn't necessary and to that extent, we've got over ourselves. And I think that's a very significant step actually and its implications are only just being felt. But the second reflection is that most business don't want to come to Court if they can avoid it. But commercial disputes do come to court and there's a value in being able to resolve it promptly and timeliness is very important, it's not the only feature that matters, but it is an important one and the way that we've managed to keep the timetable of trials going, I think is of real significance.

And the third reflection, it's not really arising from Corona, but it relates to the way the IP Courts function in this jurisdiction generally, is to emphasise that the Courts have shown that they're adaptable in another area, and that's the area of remedies' Now one topical example of remedies is this whole business of FRAND and standard essential patents and global licences and I'll come back to that in a minute.

But another example of adaptability is the ability of the Courts to do something called 'Arrow Declarations'. Now I won't go into those in any depth, but they're an example in which a Judge-made remedy allows the party to get a binding freedom to operate decision in this jurisdiction and that's a tool which allows businesses to deal with what are sometimes called 'patent thickets'. And it's now being picked up in other countries around the world and it's another example of the innovative way in which our jurisdiction can adapt in this area. And I think it's an important thing to be aware of.

Now I've strayed a bit from the pandemic, and so I want to come back to that in my second theme of the morning, which I mentioned was the 'acronyms'. Now I don't know about you, three letter acronyms used to dominate my life. TLAs like PDQ, FYI, CYA and all that. But it's now five letter acronyms, or abbreviations which dominate my life. And if you're involved in IP strategy anywhere in the world today, you know them both, they are 'COVID' and 'FRAND'.

And what I want to do is think about how they relate to intellectual property. Now what linked COVID and FRAND together is a need for collaborative research. A bold statement maybe, but if pandemics are the problem, dare I say it, maybe there are lessons from FRAND which can help illuminate how to work towards a solution, and I want to try and explain what I mean by that. It seems that we need to facilitate collaborative research to fight pandemics like COVID and examples that you can pick up from the press, one that caught my eye, was there

were two pharmaceutical companies collaborating to make a vaccine, one of them had the best, or so they thought, or a good antigen, say some sort of engineered virus, but the other had the best adjudvant and the adjudvant is the thing which makes your immune system wake up and smell that something bad's happening. And as a society, of course, what we want is the best antigen and the best adjudvant to be in the same pot. And in order to do that, you needed the companies to collaborate.

Well, how is this collaboration going to take place? Now what I saw in the MIP Summit is a theme called "The Open COVID Pledge" which sounds very interesting and essentially is, as I understand it, an open access IP licencing scheme and that should sound familiar to anyone who is involved with FRAND, because that's really what FRAND is as well. And FRAND comes really from the telecommunications industry in the 1990s and there are some lessons there.

Users needed market access to make products, and inventors needed an incentive to invent the platform technologies in the first place and the FRAND system, which is an obligation to grant fair reasonable and non-discriminatory licences to all comers, allows for two kinds of collaboration. The first is market access by the implementers who now want to make, let's say, a 3G, 4G or 5G product. They're allowed to start selling the product without a licence, they don't need to go around and get pre-clearance for their use of the platform technology. Now this is the part of this area which has attracted a lot of noise recently, a lot of attention, I don't mean noise in the negative sense.

Fights have been taking place between the holders of intellectual property and the implementers, to actually get the implementers to sign up for licences, having used the technology, sometimes for some years. And that's what the Unwired Planet case and others is about. And at its heart, the problem is that one person's platform is another person's invention. Somebody had to invent this 3G or 5G in the first place, and just as implementers are entitled, and I mean "entitled" as of right, to use the invention, so rights holders are entitled, in the same sense, to a fair return on its use. So the problem is that just because it looks free to start using it, doesn't mean it is free.

And that takes me to the second aspect of collaboration. Although I've put it second, it's actually not second, it's actually first, but it's not what's attracting so much attention. And it's crucial. It's the collaboration which allowed the inventors to pool their ideas in the first place and build something complex, like a 4G telecommunications system, from the intellectual property of different companies. And it's all the better because it's more than one company's effort.

In other words, the whole thing was set up on the basis that inventors would receive a fair return - that's how they were able to pool their ideas together. And this decision of mine in Unwired Planet, which was recently upheld by the Supreme Court, and I'm not betraying any secret, that as Judges we like being upheld and we don't like being overturned.

What the Supreme Court upheld was the idea that the United Kingdom Courts can, as a remedy, in an IP case, settle the terms of a global FRAND licence. Now, and this is important, it's only on the basis that a global licence is indeed FRAND. Now as you know, my decision was that a global licence was FRAND, but that's an important aspect to all of this, it's not imposing global licences, if they're not fair, reasonable and non-discriminatory. But if it is fair, reasonable and non-discriminatory, it's hard to see why rights holders shouldn't be entitled to it, which is how the Supreme Court's judgment goes.

Now I read a comment, on the internet, that said that the Supreme Court's decision was bad news for implementers, because it means they can't delay licences. Now to me this is a strange attitude, because all that's happened, is that the Courts have held the implementers to their side of this FRAND bargain. Yes, you can have market access, but you do have to sign up to a licence someday. The fact that the FRAND system means there's no barrier to

practical market entry is a different thing from saying that it's a free lunch. And as a society we could have set up a system for designing complex things like telecommunications systems, without any IP, we could have passed laws like that and arranged it in that way, or to say it should all have been done by one company and allowed the IP to sit in, in different companies and not be collaborated and relayed there, and not be put into a collaboration. And I'm pretty sure that those sorts of ideas were considered. But it was felt, and I must say, I think that that was the right decision, that that wouldn't have resulted in the best ideas being used together. Now, that's what these arrangements allow for that to take place.

Now, there are specific issues today with FRAND, there's a question of what people outside Court refer to as patent trolls, when they come into Court they always refer to non-practicing entities or patent assertion entities, but we all know what they're talking about. And I've come across discussion where, and particularly it seems to be in the motor industry, where companies feel like they're at risk of having to pay 10% of the value of their car, just for a mobile phone which is fitted into their car. Now, putting it like that, it doesn't seem very sensible. And now what is clear, is that what's really going in that industry, in all these industries, is a negotiation about what a fair royalty should be. And I am bound to say, I don't think it's a particularly difficult problem. It takes a lot of effort, if you look at the Unwired Planet cases, there's a lot of material to go through, and think about very carefully, what a fair royalty is, but Intellectual Property Courts around the world, have been assessing what a fair royalty, a fair reasonable royalty in terms of damages should be for years and years and years, and conceptually, the problem isn't a different one. And it's not a reason why the fundamental system is wrong.

Now the other thing about non-practicing entities. I'm well aware that there have been practices by some entities of that kind, which can be severely criticised. But there are difficulties about complaining about the concept of a company which holds intellectual property and doesn't manufacture, as if that in itself is some inherently bad thing. Now universities are a very good example of that. But also, fundamentally, the way the system works, is that patent rights are not inalienable, in other words they can be traded, and actually it's quite important that patent rights are not inalienable, because it will be problematic if patent rights were rights that couldn't be divorced from the inventor or from the manufacturer, who came up with a product in the first place. Because, the importance of intellectual property is as an asset in many businesses, against which finance can be raised and if you can't trade those rights, then it becomes very difficult to use them for all of their key purposes, which is to act as assets in businesses, for the reason I've just described.

Now, it may be that the Supreme Court's judgment will accelerate a move in the standard setting of organisations, to put a choice of forum clauses into the arrangements and as the Supreme Court pointed out, yes your FRAND system sets up a scheme for the global use of IP, but it doesn't set out a mechanism for settling the licence terms. When you look at it that way, it's not very surprising that the Courts, in that case, have taken on that burden, because there's no-one else to do it, unless both to agree to arbitration.

Anyway, I'll come back to the beginning, maybe this FRAND system, which is not perfect, I'm not suggesting it is, but it does have features, maybe if it can be made to work, it will show that there is a way of sharing IP to solve problems, which still allows the problems to be solved, preserves a fair return for inventors and can be a framework to allow for collaborative solutions to some of our current problems, like pandemics. You can say, wouldn't that be a great thing?

And what about the global nature of IP? Well, what the two five letter acronyms COVID and FRAND reinforce, is that although IP rights are intrinsically territorial in nature, they're part of the way humanity is addressing global problems and the problems are international. And it's worth us reflecting on what is in fact really the international nature of intellectual property rights.

If you stand back and look, it's actually remarkable how uniform the intellectual property laws around the world actually are. And it's important to bear in mind that that's not an accident. The history of the treaties on which that's all based. There are treaties that go back to the 19th century, the anti-discrimination treaties like the Paris Convention and the Berne Convention and it's something that people have worked very hard to achieve and it is a great prize. It means that it meaningful to talk about just in the context of patents, and talk about patents as families, you can meaningfully refer to a patent family which relates to one basic in fact invention as having been patented in the major jurisdictions of the world, taking Europe as a whole and that's not just the EU, if you're thinking about the European patent system. Such as the USA, Japan and China and those patents in those different places all work in essentially the same way and you can, at a certain level of generality, treat them as the same. And that is a situation which is the result of a great deal of work by people and it allows the international system to operate and it allows intellectual property to be used to solve these international problems, because it means that you can go from one jurisdiction to the other without the whole thing radically changing and we obsess about the differences, between intellectual property laws in different countries and they do exist, but it is worth reflecting on the similarities and we don't want to lose sight of that, because it is a valuable thing.

And in the context of Courts, what happens more and more, is that Judges handling intellectual property cases throughout the world are meeting each other and this is something that started in Europe some years ago and has grown and grown and grown. WIPO now has a forum for intellectual property judges around the world and it is enormously gratifying to be involved in that and to see and learn from colleagues in other countries, about how they deal with intellectual property and that is a trend which I welcome.

So, finally, what is the strategic importance of intellectual property? Well, of course it depends on what sort of business you're in - pharma is different from telecoms and they're both different from the car industry, and things like that are obvious points. What I suggest to you, is that IP is the best tool we have, to allow for investment, to foster innovation and to solve these problems and that is its strategic importance.

Mr Justice Birss
10 September 2020