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**IN THE COMPETITION**

Case No. : 1382/7/7/21

**APPEAL**  
**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Tuesday 9<sup>th</sup> January 2024

Before:  
The Honourable Mrs Justice Bacon  
(Chair)  
Professor Robin Mason  
Justin Turner KC

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

Consumers' Association

Class Representative

v

Qualcomm Incorporated

Defendant

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**APPEARANCES**

Jon Turner KC, Rob Williams KC, Ciar McAndrew and David Ivison (instructed by Hausfeld & Co. LLP on behalf of Consumers' Association)

Daniel Jowell KC, Nicholas Saunders KC, Jonathan Scott, David Bailey and Sophie Bird (instructed by Norton Rose Fulbright LLP and Quinn Emanuel Urquhart & Sullivan LLP on behalf of Qualcomm Incorporated)

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1

2 (10.30 am)

3 MRS JUSTICE BACON: Good morning. Some of you are joining  
4 us live stream on our website so I will start with the  
5 customary warning. An official recording is being made  
6 and an authorised transcript will be produced but it is  
7 strictly prohibited for anyone else to make  
8 an unauthorised recording whether audio or visual of the  
9 proceedings and breach of that provision is punishable  
10 as contempt of court.

11 Yes, Mr Turner.

12 MR JON TURNER: May it please the Tribunal. I appear today  
13 for the Consumers' Association with Mr Williams,  
14 Ms McAndrew and Mr Ivison. For Qualcomm you have  
15 Mr Jowell, Ms Bird, Mr Saunders, Mr Bailey and Mr Scott.

16 The Tribunal knows this claim was certified  
17 in May '22 and at today's hearing there are a number of  
18 important decision points for the Tribunal. Those were  
19 outlined in the letter from the parties, essentially  
20 jointly, which you have at tab 1 of the core bundle. It  
21 is at tab --

22 MRS JUSTICE BACON: Yes. That is essentially the agenda.

23 MR JON TURNER: Yes. Now, within paragraph 2 of the letter  
24 the first matter is whether to order a split trial and  
25 if so the structure of a split. We see that as the most

1 critical point.

2 MRS JUSTICE BACON: Yes and we did propose to deal with that  
3 first.

4 MR JON TURNER: It goes together with the final matter on  
5 the list, which is over the page, letter K, that is the  
6 timetable.

7 MRS JUSTICE BACON: We propose to deal with that last after  
8 we have dealt with everything else.

9 MR JON TURNER: We agree. Absolutely.

10 There are a number of other important points on the  
11 agenda so you see permission --

12 MRS JUSTICE BACON: Yes we know what is on the agenda. Can

13 I just let you know the order in which we propose to  
14 take things after the question of the split trial?

15 I think it is important that we deal with the more  
16 substantive issues before we get into procedural  
17 logistics. So our proposal was that after dealing with  
18 the split trial issue we should deal with the Hollington  
19 v Hewthorn issue, which effectively circumscribes the  
20 compass of what is going to be referred to, followed by  
21 the question about experts and that is necessarily  
22 contingent on how the split is made but we would like  
23 some clarification of what expert evidence is going to  
24 be necessary for trial 1.

25 Then dealing with applications for disclosure by

1 Which? the Class Representative then dealing with the  
2 question about disclosure of correspondence and anything  
3 else between the Class Representative and Apple and  
4 Samsung followed by the point about Qualcomm's approach  
5 to rate setting -- I think that is a clarification of  
6 the case that is sought -- amendment of the class  
7 definition and finally trial timetable.

8 I think that encompasses everything but if there is  
9 anything I have missed off then please let me know.

10 MR JON TURNER: My Lady I think that is comprehensive.

11 MRS JUSTICE BACON: All right. As regards the split trial,  
12 I think it would be helpful if I indicate the Tribunal's  
13 provisional view, which is that there should be a split  
14 trial but that that would not include the Padilla  
15 comparator analysis. If we were to do that, however,  
16 I think we do need some clarity on what issues are going  
17 to be determined. We have looked at the parties'  
18 proposed lists of issues.

1           If we did follow our provisional view, the starting  
2 point would then logically be the list of issues set out  
3 by the Class Representative but I think there are still  
4 some questions in our mind as to whether those do  
5 reflect the somewhat more circumscribed scope of the  
6 first trial that is proposed by the Class  
7 Representative. And in particular whether some of the  
8 questions assume an effects analysis which on Which?'s  
9 proposal wouldn't be being carried out.

10           So we do need to understand what it is we are being  
11 asked to determine.

12           That goes to a point as to whether we are going to  
13 be determining enough at that point that it would be  
14 meaningful. We are obviously in favour of a proposal  
15 that hives off the FRAND et cetera effects issues if we  
16 don't need to determine those initially but we want to  
17 be determining enough and we don't want to arrive at  
18 a situation where at the trial we are told, well, you  
19 can't decide this because we don't have any effects  
20 evidence.

21           So I think those are our general questions as  
22 regards the compass of the first trial. Obviously you  
23 have heard our provisional view and if you want to try  
24 and persuade us otherwise then please do.

25 MR JON TURNER: My Lady, I am grateful. To update the

1 Tribunal, we have been handed -- I now have in court --  
2 a letter from Qualcomm's solicitors with a mark up of  
3 our list of issues. So this is an advance on their  
4 original version in the bundle. I don't know if you  
5 have a copy of the Qualcomm version yet? If one hasn't  
6 been supplied to you can I invite --

7 MRS JUSTICE BACON: No.

8 MR JON TURNER: Can I invite my friends please to provide  
9 copies for the Tribunal?

10 MR JOWELL: We will certainly do that. Just to explain,  
11 I apologise you have got this late, the chronology is we  
12 provided our list of issues in December.

13 MRS JUSTICE BACON: That is the one that we have in our  
14 tab 10?

15 MR JOWELL: I think that is right. We received last night  
16 or the night before a revised version from the Class  
17 Representative. It is that revised version we have  
18 marked up this morning or late last night.

19 MRS JUSTICE BACON: So we received a revised version during  
20 the course of yesterday afternoon.

21 MR JON TURNER: Yes. What you received was our version.

22 MRS JUSTICE BACON: Yes.

23 MR JON TURNER: And what has now come from Qualcomm -- and  
24 I am still going to need to digest this -- what they  
25 have done very helpfully is a mark up of ours rather

1           than adhering to their original.

2   MRS JUSTICE BACON:  Yes, all right.

3   MR JON TURNER:  That really narrows the scope of the  
4           dispute.

5   MRS JUSTICE BACON:  Let's see that because I certainly  
6           haven't had that.

7   MR JON TURNER:  It has only just come to me as well.

8   MRS JUSTICE BACON:  All right.

9           (Document handed).

10  MR JON TURNER:  If I may then I will dive into the split  
11           trial issues.  You should each have a copy of the  
12           skeletons, the core bundle in hard copy and then there  
13           is a range of supplemental bundles and authorities  
14           bundles, electronically.

15  MRS JUSTICE BACON:  Yes, which I hope are going to come up  
16           on the EPE screens if you refer to them.

17  MR JON TURNER:  Yes.  I think that Mr Turner may have the  
18           pleadings available in hard copy format as well and  
19           finally you have the proposals for the split trial.

20           Now split trial, it is common ground, I need spend no  
21           time on it, that the Tribunal has to exercise the power  
22           to order a split trial by reference to the governing  
23           principles in the rules and that entails -- we don't  
24           need to go into it -- dealing with the matter justly and  
25           two particular points that I would pick out as well as

1 the point, my Lady, that you refer to about the need to  
2 ensure that enough is covered for it to actually have  
3 a real impact are: A, ensuring the parties on an equal  
4 footing, and B, dealing with the matter in the way that  
5 it takes account of the complexity of the issue and the  
6 importance of the case.

7 At the end of the day, as I will develop, what you  
8 have before you is complex litigation brought in the  
9 interests of UK consumers where there is a pronounced  
10 asymmetry between the Consumers' Association on this side,  
11 Qualcomm on the other, in terms of the parties' access  
12 to the information about the facts of the case, not  
13 least what Qualcomm does take into account when it sets  
14 these patent royalties and more generally industry  
15 knowledge which is going to be needed to try the case  
16 justly.

17 That does include information which the Consumers'  
18 Association is seeking from Apple and Samsung which  
19 bears on the assessment of quantum, which we understand  
20 is not within the control of the UK subsidiaries and  
21 which in the absence of getting active voluntary  
22 cooperation from those undertakings we have to apply for  
23 in foreign jurisdictions.

24 MRS JUSTICE BACON: Yes. Well, that goes to -- that has  
25 a bearing on timing.



1 MR JON TURNER: It does, yes.

2 MRS JUSTICE BACON: Which we will come to. But I mean at  
3 the moment we need to just look at the principle of the  
4 two trial proposal and what it is proposed should be  
5 dealt with in the first part.

6 MR JON TURNER: Yes. So broadly speaking, and now I will  
7 develop it, the joint view is that the issues of the  
8 relevant markets, dominance on the part of Qualcomm in  
9 the markets and whether the contested practices amount  
10 to an actionable abuse, all of that is in trial 1.

11 MRS JUSTICE BACON: Yes. Is the principle of the legal  
12 argument and the theory of harm that is essentially --  
13 obviously market definition and dominance but when we  
14 come to abuse we are dealing with the theory of harm  
15 whether that is actionable but without, I understand it,  
16 a full-blown analysis of effects.

17 MR JON TURNER: Yes. And this now appears to be something  
18 that we will have to take quite carefully today because  
19 there is confusion about this and on the brief scan of  
20 Qualcomm's latest letter this morning that confusion  
21 persists. So what I would need to do is take a step  
22 back and invite you to look at quite candidly the basic  
23 architecture of the Consumers' Association's case as we  
24 have constructed it and what we intend to prove and how  
25 we intend to do it. That will be necessary to clear up

1 any misconceptions anywhere in this courtroom.

2 After I have done that I will turn directly to these  
3 competing lists of issues for the trial but we can look  
4 at them in that light.

5 If we open -- I will deal with the architecture of  
6 our case. If you open the core bundle and go in it to  
7 tab 6.

8 We have a version there of the claim form. This is  
9 the draft re-re-amended claim form to deal with the Sony  
10 point but it doesn't matter for present purposes.

11 MRS JUSTICE BACON: Yes.

12 MR JON TURNER: What I want to do is just walk you through  
13 the core logic of the Consumers' Association's case.

14 So if you go to page 159 in it, which is paragraphs  
15 5 and 6. Look at paragraph 6 which starts halfway down  
16 the page. I direct your attention to paragraphs (a) and  
17 (b) and over the page (ba).

18 There is a dominant position on relevant markets for  
19 supplying chipsets for use in smartphones and the  
20 licensing of standard essential patents. Over the claim  
21 period Qualcomm has been in a very strong market  
22 position in relation to the supply of the chipsets and  
23 that has enabled it to implement this policy which has  
24 been called in foreign jurisdictions and we have adopted  
25 the term no licence no chips.

1           Qualcomm says these are the patent terms that you  
2           should agree to, we are in the position otherwise to  
3           disrupt the supply of physical goods which you  
4           desperately need for your business purposes.

5           So the foundation of the case, the starting point,  
6           is that at all material times to the claim, Qualcomm has  
7           had a dominant position worldwide for the supply of  
8           these baseband chipsets to smartphone makers. As you  
9           know the chipset is what gives cellular connectivity to  
10          your mobile phone and that is why it is an indispensable  
11          requirement for smartphone manufacturers, specifically  
12          here Apple and Samsung.

13          You will have seen already from the materials that  
14          there are different generations of chipset and those  
15          reflect the different generations of the telecom  
16          standards set by the global and regional bodies and in  
17          particular for our purposes in these proceedings you  
18          will be faced with the 3G, 4G and now the new 5G  
19          standards.

20

1           There have also been  
5           different variants of the standards in different regions  
6           of the world. So in the USA, for example, which is  
7           important because both Apple and Samsung both have major  
8           commercial presences there, the 3G standard which is  
9           used by major carriers like Verizon and Sprint, that is  
10          called CDMA. And as you will see in a moment our case  
11          is that Qualcomm has been overwhelmingly dominant in the  
12          supply of the 3G CDMA chipsets. Both Apple and Samsung  
13          have been materially dependent on Qualcomm.

14                 In Europe the 3G standard is traditionally called  
15          UMTS.

16                 If you flick forward in the pleading to page 166 and  
17          look at the bottom of the page at paragraph 21 you see  
18          this distinction between the different variants of the  
19          standards in the different regions pleaded.

20   MRS JUSTICE BACON: Yes. I think for our purposes in terms  
21          of the boundaries of trial 1 we are most interested in  
22          how the abuse case is going to be advanced in trial 1.

23   MR JON TURNER: Yes. I am just trying to build it up  
24          because I will need to explain how it is constructed.  
25          Taking it very briskly, I do understand, we say that

1           there is the overwhelming dominant position in the 3G  
2           chipset side and if you look at page 187, look at  
3           paragraph 63(a) you see market shares of above 95  
4           per cent in 2010 and above 80 per cent in relation to  
5           2015.

6           We have references also -- which I needn't trouble  
7           you with -- for 4G where we say they have a particular  
8           power in the premium segment and that is going to be  
9           important because makers of phones such as Apple will  
10          want premium quality chipsets, they will not want to get  
11          a poorer quality one for their devices.

12          Finally, we have said that they also have market  
13          power in the current generation. So if you just turn  
14          the page to 188 you see paragraph 63B, and the figures  
15          there at 63B(a), again extremely high shares of the  
16          market in that.

17          Now our case will be these are areas worth  
18          monopolising and it enables a monopolist supplier such  
19          as Qualcomm in this case to engage in the leveraging  
20          with which this case is primarily concerned. And the  
21          basis of the abuse case is very simply this: the first  
22          component is Qualcomm has introduced the commercial  
23          practice which departs from normal competitive behaviour  
24          when selling its physical goods, the chipsets. Because  
25          suppliers of other components for smartphones like the

1 Wi-Fi chips and the near field communication NFC chips  
2 you have read about who don't have a dominant position,  
3 they just sell them to customers like Apple and Samsung  
4 without demanding that the customer has a patent licence  
5 as well.

6 In fact Qualcomm does the same thing with let's say  
7 the Wi-Fi chips and that is why the Consumers' Association  
8 has been seeking information about the different  
9 approach. So it is non-normal behaviour, that is the  
10 first part of the abuse allegation.

11 Then the second and critical part is that the non-  
12 normal behaviour inherently tends to produce higher  
13 levels of patent royalties that are influenced by the  
14 customer's dependence on the chipsets and not the value  
15 of the patents themselves. And because the customer is  
16 dependent on getting the chipsets, it does not challenge  
17 that arrangement. That is the heart of the abuse case.

18 On the other side they say, well, is this  
19 exclusionary or exploitative? The Tribunal knows you  
20 don't have to pigeonhole abuses routinely into those two  
21 categories.

22 MRS JUSTICE BACON: But you are not saying it is  
23 exclusionary.

24 MR JON TURNER: Yes, but we are saying here and we have put  
25 it in our first RFI response to them way back in I think

1           2022, this is exploitative, yes. It is leveraging that  
2           leads to these higher prices.

3           Now, both sides are gearing up to argue at trial  
4           about the relevant markets, about dominance and about  
5           whether Apple and Samsung have or have not been  
6           dependent on the chipsets from Qualcomm. As respects  
7           the abuse part, each side is proposing to rely at trial  
8           on bargaining theory to throw light on whether you would  
9           expect Qualcomm to be able to impose artificially high  
10          royalty rates in view of the outside options which the  
11          manufacturers Apple and Samsung and others have.  
12          Qualcomm wants -

13 MR JUSTIN TURNER: Sorry, can I just clarify? As  
14          I understand in your pleading you raise the NLNC  
15          approach and you also raise a point that pressure in  
16          some form or other is placed on Apple and Samsung not to  
17          have a FRAND determination from courts. Is your case of  
18          abuse dependent on that second point? So do you say  
19          inherently the NLNC policy, irrespective of everything  
20          else, can give rise to abuse? Is that an independent  
21          case? Or is it also dependent on your second part,  
22          which is that they put pressure on Apple and Samsung not  
23          to use the FRAND determination?

24 MR JON TURNER: Yes. The way we put it is along the lines  
25          that I was outlining just a moment ago here, which is

1           that because they have this dependence on the chipsets  
2           inherently there is pressure on them not to challenge  
3           the FRAND determination because they - not to challenge  
4           the rates imposed via a separate FRAND adjudication -  
5           because they fear disruption from chipsets. What we  
6           also apprehend is that in some cases either implicitly  
7           or explicitly, there is pressure not to challenge those  
8           rates by going off to -

9   MR JUSTIN TURNER: So even if Qualcomm said nothing, made no  
10          representations in respect of the FRAND safety valve, if  
11          I can put it that way, you would say the nature of the  
12          NLNC structure in the market means that that pressure  
13          will be there and that pressure is illegitimate.

14   MR JON TURNER: That's right.

15   MR JUSTIN TURNER: Just so that I understand it, you are not  
16          saying - with respect to Qualcomm chips, you accept  
17          that Apple and Samsung are obliged to be licensed. How  
18          they get licensed is a separate question but they are  
19          required to have these licences because they are  
20          incorporating SEP technology?

21   MR JON TURNER: Yes. Now there is two ways that that can be  
22          addressed. The first is that when you are buying  
23          products which incorporate patented technology, the  
24          point made by the US district court, whether it is  
25          a television or a chipset -



1 MR JUSTIN TURNER: I understand but the term used is FRAND.

2 MR JON TURNER: Well, you don't need a separate patent  
3 licence, you just buy the product and the patents are  
4 exhausted by buying the product.

5 MR JUSTIN TURNER: No, there is an implied - I'm not sure  
6 that is quite the right analysis but -

7 MR JON TURNER: Exhausted or - yes.

8 MR JUSTIN TURNER: Not necessarily exhausted but you are  
9 getting an implied licence when you are buying from  
10 Qualcomm. I don't want to get into that, that is a sub  
11 debate, I understand that.

12 But subject to that one way or another whether it is  
13 through franking or whether it is through a separate  
14 licence, a separately articulated licence, you do -  
15 Apple and Samsung do need a licence to those standard  
16 essential patents one way or another, whether it's  
17 through the sale of the product -

18 MR JON TURNER: In law, yes. Absolutely right.

19 MR JUSTIN TURNER: And then the other manufacturers - so if  
20 Apple and Samsung were to use chips from other  
21 manufacturers, they would need a licence from Qualcomm  
22 in respect of those standard essential patents.

23 MR JON TURNER: Yes. So I will come to that in a moment but  
24 absolutely right.

25 Now, if - the refusal to licence rivals I will deal

1 with in just a moment but in a nutshell, were rivals  
2 licensed, then Apple and Samsung could go to them if  
3 they didn't like Qualcomm's royalty terms that were  
4 being demanded and say, well, I will buy a licensed  
5 Qualcomm chipset from the rival. Because it has already  
6 been licensed by Qualcomm to the rival. The technology  
7 in question has been licensed.

8 MR JUSTIN TURNER: Yes. So they offer licences to the OEMs.

9 MR JON TURNER: No. If Qualcomm were to license its rivals,  
10 let's say -

11 MR JUSTIN TURNER: No, I understand, yes, that's fine.

12 Exactly.

13 MR JON TURNER: The only other point for completeness  
14 I should make is that the Korean High Court also made  
15 the point that even if you say, right, licensing at the  
16 level of the customer is appropriate, that doesn't  
17 require no licence no chips to be implemented. Their  
18 position is one way of doing it is that you could sell  
19 your chips to the customer like Apple and Samsung with  
20 no threat. And if there is no threat, then, Sir, Apple  
21 and Samsung could say, well, we do need to have a patent  
22 licence but we are not facing the risk of disruption of  
23 supply of this critical business input so we are now  
24 free to go and get a FRAND determination.

25 MR JUSTIN TURNER: Yes, I understand that case that if

1 Qualcomm is behaving in such a way that the safety valve  
2 of the FRAND system, FRAND determination is not  
3 available to Apple and Samsung, I understand that case.  
4 What I was just trying to establish is whether you have  
5 case independent of that and you have told me you do.  
6 But as I understand you accept that it is necessary for  
7 all the manufacturers to be licensed under the Qualcomm  
8 patents and it is really about the manner in which those  
9 licences are obtained which - or granted, rather -  
10 which is your objection.

11 MR JON TURNER: Yes. The only coda is that on the other  
12 side you may have seen from their case, they say on the  
13 issue of market power that the manufacturers don't need  
14 to be licensed because in practice in the raw commercial  
15 world, they can go ahead anyway and thumb their noses at  
16 the person asking for a licence.

17 So they say although in law you can say that  
18 a licence is required, as a matter of commercial  
19 practice implementers such as Apple and Samsung have the  
20 ability to hold out, a term that is used in the FRAND  
21 case law. But with that, Sir, I hope this position is  
22 clear. This is the central part, this is the engine of  
23 the case, the no licence no chip policy.

24 Before touching on the ancillary aspects of it I was  
25 beginning to explain when we're considering a split

1 trial how each side is proposing to deal with this part  
2 of the case. Each side proposes to rely on bargaining  
3 theory with economic experts that throw light on whether  
4 you would expect Qualcomm to be able to browbeat these  
5 customers, impose artificially high royalty rates or  
6 not.

7 MR JUSTIN TURNER: Why do you need bargaining theory for  
8 that? If pressure is being applied to Apple and Samsung  
9 such that they are unable to use the FRAND safety valve,  
10 because this is all contractual as I understand it, so  
11 you are effectively undermining their entitlements to  
12 those contracts, why do you need bargaining theory to  
13 explain that? That just seems to be self-evident.

14 MR JON TURNER: Well, we have taken the view that it is  
15 intuitively obvious. What is said is, looking at it in  
16 the cold light of an economist's eyeglasses, what you  
17 need to consider carefully is what are the outside  
18 options which are really available to Apple and Samsung  
19 in practice?

20 MR JUSTIN TURNER: That is really how the market is  
21 structured, isn't it, rather than economics?

22 MR JON TURNER: Well, an economist is going to bring in  
23 bargaining theory and they say Dr Padilla will do it, we  
24 say that Professor Shapiro will do it, to explain how in  
25 the light of the market structure which you will receive

1 evidence on at trial 1, you would expect inherently this  
2 practice to have the pressurising effect which, Sir, you  
3 have described as self-evident.

4 MRS JUSTICE BACON: Well, you are saying you are going to  
5 rely on bargaining theory in relation to the inherent  
6 part of your case? The part of your case that doesn't  
7 rely on any ancillary pressure? That is the core of  
8 your case, which you articulated at the start which is  
9 that the NLNC inherently tends to produce higher levels  
10 of royalties, that is what you need bargaining theory  
11 for, you say?

12 MR JON TURNER: That's right.

13 MRS JUSTICE BACON: All right.

14 MR JUSTIN TURNER: Just so you are saying by - is that  
15 because you are licensing the - you are not just saying  
16 because you are licensing the OEMs rather than the chip  
17 manufacturers royalties are going to be higher? That is  
18 not what you mean? Just explain your bargain theory in  
19 a bit more detail.

20 MR JON TURNER: I am going to give you the full picture  
21 because the position of the other chip makers is a part  
22 of it because one of the possible outside options for  
23 Apple and Samsung when they are faced with a demand from  
24 Qualcomm: here is our patent licence, you need to sign  
25 this in order to get the chipsets you need, is that

1 Apple and Samsung might be able otherwise to go to  
2 a rival chip maker were they licensed under Qualcomm's  
3 patents and say, well, I am sorry your demands are too  
4 high, commercially we are better off going to the rival  
5 who is licensed under your patents.

6 MR JUSTIN TURNER: Sure, sure. But again that is self  
7 evident and I don't think Apple, as I understand it -  
8 sorry, I don't think Qualcomm shy away from the fact  
9 that they obtain more revenues by taking the approach of  
10 licensing the OEMs. That seems to be the position from  
11 the US case.

12 MR JON TURNER: Well their case - and I will be corrected  
13 by Mr Jowell if I am wrong - but as I understand their  
14 case as it is pleaded, they say that they do not obtain  
15 higher revenues because of the no licence no chips  
16 practices. To come back to what my Lady introduced at  
17 the beginning of this hearing, their Padilla analysis  
18 which they have outlined is going to be an attempt to  
19 show that in circumstances where this policy in their  
20 words could have had no effect the royalties paid are  
21 the same.

22 So their position, and we will discuss whether this  
23 goes into trial 1 or trial 2, is that, no, it doesn't  
24 have that effect.

25 I should flag even as I say this, however, that one

1 can see that this may provide a reason why, if that is  
2 their argument, this should go into the first trial.  
3 Because we will be saying on our side that the behaviour  
4 does have this inherent effect of pushing up the royalty  
5 rates because of an anti-competitive dimension. They  
6 will be saying in practice its actual effect has not  
7 been to do that and you need to feed that into your  
8 decision on whether the behaviour has that effect or  
9 not.

10 MRS JUSTICE BACON: Well, I think as you will have gathered  
11 from our provisional view we are somewhat sceptical of  
12 a proposition that one would include some effects  
13 analysis in trial 1 and not other effects analysis. If  
14 you are going to be asking us to look at evidence of  
15 actual effects, then it is very difficult to separate  
16 that, it seems to us, from the defence case on FRAND.

17 And the question about whether the rates were within  
18 FRAND rates and the counterfactual case as to what the  
19 rates would have been. It seems to me that that was the  
20 reason why we raised at the last CMC the question about  
21 whether all of that effects analysis should effectively  
22 go over into a separate trial, because for my part I am  
23 not sure that one can logically separate one from the  
24 other.

25 MR JON TURNER: So, I appreciate that and with your

1 permission I am going to deal with that explicitly. But  
2 the short answer is this: that the legal question, the  
3 point of law whether they can say it is a defence to the  
4 abuse that whatever the rates ended up as being it still  
5 fell within the FRAND envelope.

6 MRS JUSTICE BACON: Yes, you propose that is a question in  
7 trial 1.

8 MR JON TURNER: Because if you clear that out the way that  
9 is going to really cut things down for trial 2.

10 MRS JUSTICE BACON: We don't have a problem with dealing  
11 with that legal question, the issue is how much does one  
12 get into what the royalties would have been or might  
13 have been in the counterfactual case, which is all part  
14 of the effects analysis which would need to be done for  
15 trial 2.

16 MR JON TURNER: Now, on that, and I am going to take you to  
17 the case law on this, our case is that it is perfectly  
18 clear that in order to find an abuse, one is concerned  
19 with whether a practice has - it is expressed in  
20 different ways - the capacity or capability or tendency  
21 or potential.

22 MRS JUSTICE BACON: And there is always a debate as to  
23 whether that means likelihood.

24 MR JON TURNER: Yes, exactly. Or likelihood.

25 MRS JUSTICE BACON: You have put it in both ways.



1 MR JON TURNER: Absolutely. There has been and I am going  
2 to take you to it in a moment but I will just finish  
3 this, an extremely recent decision of the Court of  
4 Justice on a reference where the national court said to  
5 what extent do you have to look at actual effects when  
6 you are assessing abuse. And the Court of Justice has  
7 given a very clear answer and also added a general round  
8 off which pulls together the previous case law and  
9 I hope will illuminate this point and give you  
10 satisfaction on it.

11 The other point though just to trail because I would  
12 like to develop this, is that on actual effects they  
13 propose to have the Padilla analysis in trial 1 because  
14 they say this will shine a light on whether it is  
15 actually true that this behaviour has the inherent  
16 tendency to lift up the royalty rates. You will take  
17 that into account in deciding whether it has that  
18 capacity in the first place.

19 On our side there is evidence of actual effects as  
20 well. They obviously need it for the purposes of the  
21 damages case but the way we see this is that trial 1 can  
22 deal with abuse in the manner that I am about to  
23 explain. If you do determine at the end of trial 1 that  
24 there is an abuse, we all move on to how much was  
25 damage, what was the level of abuse of overcharge, how

1 much of it was passed through to UK consumers. So that  
2 can be trial 2.

3 MR JUSTIN TURNER: So if they structure the market such that  
4 they receive higher royalties, a higher revenue, how do  
5 you decide, just explain to me how you get from there to  
6 the fact that this is abusive? Because a patentee can  
7 always - subject to assuming you weren't in the SEP  
8 territory - patentees can set royalties wherever they  
9 like. Why is it inherently wrong and abusive for  
10 Qualcomm to structure its dealings such that it  
11 increases the royalties? Why does that give rise to  
12 an abuse, provided the FRAND determination's safety  
13 valve is available?

14 MR JON TURNER: Well, there you are. The answer, Sir, is at  
15 the end of your question. There are really two points.

16 The first is that in this particular area, there is  
17 a regime which says that rates which are set by the  
18 licensor is essentially subject to a form of price  
19 controlled FRAND. The argument here is that by reason  
20 of the anti-competitive behaviour, they are bypassing  
21 that and not allowing that to function, and the correct  
22 measure of the loss that is incurred is the difference  
23 between the level of rates that but for this policy  
24 would have been charged in the market -.

-

11 MR JUSTIN TURNER: Sure, I understand that. Why does one  
12 need to look at the - why is one even asking structured  
13 this way. -''-  
24 I understand if you get on to quantum or overcharge or  
25 things like that but why is one even asking what the -

1           if this structure gives rise to higher royalties? Because  
2           that doesn't determine, as I understand from your  
3           answer, that doesn't determine abuse. What determines  
4           abuse is the lack of availability of a FRAND  
5           determination. Your case stands or falls with that in  
6           the answer you have just given to me, have  
7           I misunderstood?

8   MR JON TURNER: The reason is that one is asking whether --  
9           I mean there is a first question about whether asking  
10          for a separate patent licence from your customers for  
11          the physical goods is appropriate anyway. If there is  
12          a patent licence which you asked for from the OEMs to  
13          whom you sell the chipsets, the question arises whether  
14          saying you won't get chipsets unless you sign on our  
15          royalty terms leads to higher rates than would otherwise  
16          apply without that anti-competitive pressure being  
17          applied.

18   MR JUSTIN TURNER: But you are obliged  
19          to get a licence. Not you -- sorry I keep saying that.

21   MR JON TURNER: I personally haven't signed up.

22   MR JUSTIN TURNER: Apple and Samsung are obliged to take  
23          licences from Qualcomm and the fact that Qualcomm  
24          separates its business -- there are two odd things going  
25          on, you say. One is that they are seeking to license

1 the OEMs. That is the first thing.

6 MR JON TURNER: As opposed to the implicit situation, sir,  
7 you describe, yes.

9 MR JUSTIN TURNER: The second  
17 thing is they are requiring you to take a licence with  
18 regards to chips from other sources. But that could be  
19 the, with regards to Qualcomm chips they could just,  
20 rather than do that separate licence they could stick  
21 the price up of their chips so they end up at exactly  
22 the same place per chip you pay the same price. So  
23 separating it out isn't necessarily abusive without  
24 more.

Then the second thing is you have to take these

6           licences anyway so again it all seems to come back to

7           your narrower case that you don't have the FRAND

8           determination safety valve. The other things seem to be

9           not of themselves abusive. Am I misunderstanding again?

10   MR JON TURNER: Well,

21           separating it out would not necessarily, as you say,

22           lead to a higher all in price for the chipset. However

23           this is a practice that Qualcomm engages in only in this

24           situation where it has the power to do so, it doesn't do

25           so with the Wi-Fi or the NFC chips that it also supplies

1 to the customers, and nobody else does either unless  
2 they are in the dominant position. Which in itself --  
3 I mean I don't want to argue the case but I do need  
4 to -- shall I -- perhaps it may be sensible if I just  
5 continue with my train and then we can pick up at the  
6 end.

7 MRS JUSTICE BACON: I think it needs to be -- I think the  
8 train needs to reach the station quite soon.

9 MR JON TURNER: Quite.

10 MRS JUSTICE BACON: I would really like to understand what is your  
15 proposed split and is it different from the position set  
16 out in your skeleton argument? Which is as I said as  
17 the start the position that we are inclined to adopt.

18 MR JON TURNER: Yes, it is.

19 MRS JUSTICE BACON: Right.

20 MR JON TURNER:

My Lady, our position today, although

9           there has been a very recent development in the new  
10          letter from Qualcomm's solicitors this morning, is that  
11          for the reasons that I will now briskly explain, we are  
12          inclined to accept that the Padilla analysis goes into  
13          trial 1. That is A for reasons of principle which  
14          I will show you and B because it will enable you if we  
15          are right to do something that will have the impact that  
16          you need for trial 1, which is to make a finding on  
17          abuse. And that could have a big impact as we see it on  
18          the further progress of the case or even potentially  
19          settlement were you to reach that finding and then it  
20          were to be the case that people are only arguing about  
21          the magnitude.

22   MRS JUSTICE BACON: Right so contrary to the



1 position in your skeleton you now think the Padilla  
2 analysis should go into trial 1, despite the fact that  
3 you won't have your opposing analysis in there.

4 MR JON TURNER: Yes. Let me explain why. It is a question  
5 of balance but I would like to explain why, if I may.

6 MRS JUSTICE BACON: Right.

7 MR JON TURNER: Just to complete the position here, I have  
16 said that we would have the expert economic analysis to  
17 deal with the question of whether this is inherently  
18 likely to push up the rates abusively. Another part of  
19 the case that we will wish to address is whether  
20 Qualcomm had abusive intent.

21 In other words, whether it said to itself in  
22 response to what Mr Turner was saying a moment ago well  
23 we are splitting out a patent licence --

24 MRS JUSTICE BACON: All right, I think we understand that  
25 you are going to be looking at motivation but I think we

1           are all really interested in how precisely you propose  
2           to divide it up and in particular the expert evidence  
3           that goes into that.

4   MR JON TURNER: All right. My Lady, I will go to that.

5           I don't want to try your patience but I do want to show  
6           you the case law which explains the proposal that I am  
7           making.

8   MRS JUSTICE BACON: Yes.

9   MR JON TURNER: If you go to Servizio Elettrica, I don't  
10          know if you have yet looked at this. It is in the third  
11          supplementary bundle.

12   MRS JUSTICE BACON: Not in the authorities bundle?

13   MR JON TURNER: No, it has been put in something called the  
14          third supplemental bundle.

15   MRS JUSTICE BACON: All right.

16   MR JON TURNER: At tab 3.

17           If you go in tab 3 to page 142 you have the start of  
18          the judgment. It was a national court in Italy and  
19          there are two points of relevance, I'll only deal with  
20          one of them. It asked about the relevance on abuse  
21          assessment anti-competitive intent of the undertaking  
22          concerned. That for your reference is on page 151,  
23          paragraph 59.

24           Without spending time on it, they confirm that,  
25          where a competition authority, or in this case

1 a claimant, wants to look at the intent of the  
2 undertaking, that is a relevant factor to take into  
3 account.

4 It will be relevant in relation to the point, my  
5 Lady, that you said was on the slate for today, although  
6 there is no specific application because we are  
7 interested in how it is that Qualcomm sets its rates.  
8 Mr Turner put to me a moment ago, quite rightly, it is  
9 not necessarily the case that customers end up paying  
10 more if you have a separate patent licence. But in  
11 order to see whether that is actually what is going on  
12 here and whether indeed you are seeing a practice  
13 designed to lead to higher prices than you would  
14 otherwise get without this practice, you do want to look  
15 at the approach that they take to see whether, as they  
16 protest in their pleadings, what they do is only to take  
17 account of the value of the patents in the patent  
18 policy.

19 MR JUSTIN TURNER: Sorry, just say that last bit again.

20 They only look at the value of the patents?

21 MR JON TURNER: Well, you pointed out, Sir, we say quite  
22 correctly, the fact that they split off a patent licence  
23 from selling the goods doesn't mean that the composite  
24 or all in price paid by the customer is necessarily  
25 going to be higher. Qualcomm in its pleaded case says

1           essentially, no, the patent element, the patent licence  
2           element, we only charge for the value of our patents.  
3           We don't charge an element reflecting the fact that we  
4           have market power on the chipset side. So that is their  
5           assertion.

6   MR JUSTIN TURNER: Okay.

7   MR JON TURNER: The question of the intent of the  
8           undertaking when it puts in place a practice like this  
9           is relevant to whether it has behaved abusively.

11   That is why I wanted to go there.

12           So that is abusive intent and I will come back, if  
13           necessary, to the point that my Lady raised on what  
14           information is required from that at the end. Not in  
15           connection with the split trial.

16           But if you turn to the relevance of actual effects  
17           that is also dealt with in this important judgment and  
18           it is the discussion of the third question which begins  
19           on page 49. Paragraph 49, page 150.

20           Very briefly here. The question is to what extent,  
21           if you are going to be making a finding of abuse, do you  
22           look at actual effects? At paragraph 50 the Court of  
23           Justice refers to actually a case which was a reference  
24           from this Tribunal, the Paroxetine case in 2017, for the  
25           proposition that the test for abuse is the capability of

1 producing anti-competitive effects.

2 It goes on to say that a dominant undertaking can  
3 choose to argue, which is what Qualcomm is doing today,  
4 that its conduct is incapable of producing  
5 anti-competitive effects by adducing evidence which is  
6 designed to try to show that, in fact, there weren't any  
7 actual effects. So you reason backwards and say, well,  
8 there weren't any actual effects, you can infer that  
9 it wasn't capable of producing these effects.

10 MRS JUSTICE BACON: Yes.

11 MR JON TURNER: So that is where they are going with the  
12 Paroxetinecase. The relevant paragraphs in this judgment  
13 I shan't read, 55 and 56, in particular.

14 MRS JUSTICE BACON: Yes.

15 MR JON TURNER: So that is why it seems to us, given this  
16 statement of the law, it would be helpful if it was  
17 tractable because my Lady was concerned about  
18 manageability of this. If it is tractable then it would  
19 be suitable to throw into trial 1 so that you can take  
20 a full view of abuse and if you rule against them you  
21 can find that there was an abuse. There won't be  
22 something left over if you are against them.

23 MR JUSTIN TURNER: What evidence are we talking about?

24 MR JON TURNER: So Dr Padilla, who is an expert for  
25 Qualcomm, proposes to bring in a quantitative analysis

1           which is described in their methodology statement. Can  
2           I show you that?

3 MR JUSTIN TURNER: Yes, I have seen it. Yes.

4 MR JON TURNER: It is in the second supplemental bundle  
5           at -- sorry, it is the second volume of the first  
6           supplemental bundle is the way it is described at  
7           tab 43.

8 MR JUSTIN TURNER: Yes.

9 MR JON TURNER: If you open that up at page 1281.

10           Now if you have that and look at paragraph 4.6, you  
11           have to read it quite slowly, they say:

13           "... other licensees in circumstances in which the  
14           alleged NLNC Policy could not have had any effect."

15           4.7 elaborates this. 4.7(a) that they are going to:

16           "Review the set of Qualcomm agreements that grant  
17           rights under Qualcomm's patents to supply [the] mobile  
18           phones [in issue in this case] in order to extract  
19           information on the royalties, together with other  
20           information which may have the potential to affect the  
21           royalties".

22           Boil it down to an effective LTE -- that is 4G  
23           royalty rate -- and then they want to compare the rates  
24           that are paid by Apple and Samsung against the rates  
25           paid by other organisations, in which they say there are

1           circumstances where the policy could not have had any  
2           effect.

3   MRS JUSTICE BACON:  A more concise explanation is given at  
4   paragraph 16A of their skeleton argument but the  
5   question is, well, it seems to be two questions for me.  
6   First, is that going to give a balanced, is the evidence on  
  both sides on this point going to be sufficiently balanced that  
  we can reach a proper conclusion at the end of trial 1 and not  
  a conclusion that oh well one methodology effects have or  
  haven't been shown by there may be other methodologies which  
  are the ones you propose for trial 2 that we haven't looked at.  
  That is the first question.

7           Secondly, do we not have the problem which is  
8   highlighted in the Servizio Elettrica case which is that  
9   on its face this is simply empirical analysis of whether  
10  there were or were not actual effects but as the court  
11  says in paragraphs 55 and 56 by itself that evidence  
12  cannot be regarded as sufficient of itself to preclude  
13  the application of article 102 in order to draw the  
14  further conclusion that the conduct was not capable of  
15  producing the alleged exclusionary effects.

17  MR JON TURNER:  You are right to pick that up.  That element  
18   which the court emphasises is not obviously something  
19   that is included in the Padilla analysis.  However, one  
20   has to bear in mind here that this is a court case and  
21   it is a burden of proof issue.  Here, the dominant  
22   undertaking is saying how it proposes to tackle -- in  
23   its methodology statement it sets out in greater  
24   detail -- the question of abuse.





1 the facts, evidence from Dr Padilla on the bargaining  
2 theory about the capability, and we are going to add to  
3 that this effects analysis. So the dominant undertaking  
4 says we are going to rely on actual effects and this is  
5 how we propose to do it.

6 Our position is, if they do that and they fail, that  
7 is their problem. You are entitled to reach a decision  
8 that they have committed an abuse, because this is not  
9 a sort of inquisitive, inquisitorial investigation. If  
10 evidence is put forward that the behaviour has the  
11 capability or potential of raising prices, a dominant  
12 firm such as Qualcomm is entitled to say "we are going  
13 to bring in evidence of actual effects". They have said  
14 what it is; if it doesn't cut the mustard they will  
15 lose.

16 MRS JUSTICE BACON: What if they succeed in what they  
17 seek to do. Where does that go?

18 MR JON TURNER: If they succeed, then you will have to defer  
19 the final decision on abuse until trial 2 -- if they  
20 succeed -- because you will for a complete picture need  
21 to take into account our evidence on actual effects.

22 MRS JUSTICE BACON: Well, see that is the problem. On one  
23 case you say that if you succeed in rebutting Padilla  
24 then that is the end of it, there is an abuse. But then  
25 on the other hand, you say that the analysis which they

1 propose is not capable of demonstrating that there isn't  
2 an abuse without everyone getting into all of the other  
3 effects evidence which is going to be produced at trial  
4 2. So all we could conclude, if they are successful on  
5 that, you say, is that there might or might not be  
6 an abuse. And then we are going to have look at  
7 everything again at trial 2. That seems to be a very  
8 unsatisfactory position to end up in.

9 MR JON TURNER: Well, we have reflected this possibility in  
10 our list of issues, and I'll show you. You are  
11 absolutely right.

12 The advantage of putting Padilla into trial 1 rather  
13 than trial 2 is that it gives you the possibility of  
14 reaching, as we think you will, an abuse determination,  
15 a positive finding that they committed an abuse at the  
16 end of trial 1.

17 If you consider that the Padilla analysis has some  
18 traction, you are also right that, in those  
19 circumstances, you can't take a final decision on abuse  
20 until trial 2. But the question is, from the point of  
21 view of the Tribunal and trial management, which of  
22 those solutions is better? If all the effects analysis  
23 goes into trial 2 then, based on this case law and the  
24 way that the dominant firm is putting its arguments, it  
25 is very likely that you will only be able to reach

1 a final decision on abuse under any scenario at the end  
2 of trial 2, which is a long way away. Whereas if you  
3 say, well, the dominant firm wants to put forward  
4 evidence of actual abuse in trial 1, if it does so and  
5 we allow it in at that stage there is the possibility  
6 that we may reject it in terms of whether we say that it  
7 does persuade us that there is not a capability of  
8 producing (inaudible) effects.

9 MRS JUSTICE BACON: All right.

10 MR JON TURNER: So we are better off.

11 MRS JUSTICE BACON: So Padilla is going to come along, you  
12 say, and do his analysis. You are going to put up your  
13 own expert, Noble, to rebut his analysis?

14 MR JON TURNER: Yes, that's right.

15 MRS JUSTICE BACON: But you are not going to be doing, not  
16 going to be starting from scratch and doing the same  
17 thing yourself, you are simply going to look at  
18 Padilla's analysis and examine whether it is rebuttable  
19 or not is that what you are saying?

20 MR JON TURNER: Yes.

21 MRS JUSTICE BACON: So the primary analysis comes from  
22 Padilla, your expert Noble or another attempts to rebut  
23 that. How long is that segment of the trial going to  
24 last on your view? I will obviously hear from Mr Jowell  
25 as to how long he thinks it is going to last.

1 MR JON TURNER: So, to some extent this depends on  
2 information that has just been received just before this  
3 hearing. We asked them in a letter at the end of last  
4 week how many licences are we talking about here that  
5 Padilla is going to study? Is it 5, 10, 50 or 100? We  
6 also asked them you have said that he is only going to  
7 be looking at the explicit royalty terms and comparing  
8 those across the board. He is not going to be going  
9 into questions of the value of a cross licence or  
10 whether there are deals on other elements that might  
11 affect this.

12 MRS JUSTICE BACON: Yes.

13 MR JON TURNER: We said can you confirm these things? What  
14 they have done in a letter that has just come is they  
15 have said it is 40 to 60 licences and their position on  
16 whether they are going to be travelling into other areas  
17 such as the value of cross licences or other marketing  
18 arrangements is from their letter frankly rather  
19 unsatisfactory. Do you have copy of the letter that we  
20 have just received?

21 PROFESSOR MASON: How do we identify which letter you are  
22 referring to.

23 MR JON TURNER: It is dated 9 January.

24 MRS JUSTICE BACON: Yes we do that was handed up.

25 MR JON TURNER: If you go to the second page they call it

1 the leveraging analysis.

2 MRS JUSTICE BACON: Yes.

3 MR JON TURNER: So above paragraph 8 they say A they are  
4 going to be considering.

5 MRS JUSTICE BACON: Yes we can read paragraph 8.

6 MR JON TURNER: So it is C that is important there.

7 MRS JUSTICE BACON: All right. So on the basis of what you  
8 now know, what is your estimate -- your estimate -- as  
9 to how long this will take on both sides to deal with  
10 this point?

11 MR JON TURNER: So, I have literally only just received this  
12 and have not had time to discuss it with anybody.  
13 Therefore I am speaking without instructions. However,  
14 in terms of what this will involve at the trial itself,  
15 I believe that on the other side they say that it would  
16 require an extra week of trial time. Yes on their side  
17 they say a week. On our side I find that much too large  
18 because.

19 MRS JUSTICE BACON: So give me a number. How many days.

20 MR JON TURNER: From our point of view I would have thought  
21 at most one day because you will have--

22 MRS JUSTICE BACON: One day? Of trial time? Of trial time  
23 for all of this?

24 MR JON TURNER: Well.

25 MRS JUSTICE BACON: For Padilla to be cross-examined and for

1           your expert to be cross-examined or for them to be  
2           hot-tubbed and for you to be making submissions.

3   MR JON TURNER: Well if you add in submissions I would say  
4           a maximum of two days because you would envisage there  
5           being a hot-tub or individual cross-examination on this.  
6           It can't, on this particular piece I can't see how it  
7           could takeover more than two days.

8   MR JUSTIN TURNER: I still don't quite understand this  
9           exercise. These are the same patent families in both  
10          sets so you have obviously Apple and Samsung licence  
11          then you have these other people who don't purchase  
12          chips from Qualcomm.

13   MR JON TURNER: Well.

14   MR JUSTIN TURNER: These are the same patent families? That  
15          was a question are they the same patent families?

16   MR JON TURNER: We believe they are, yes.

17   MR JUSTIN TURNER: So at one level it is a very simple  
18          analysis and we don't need any economists if you are  
19          putting in a column of royalty rates and saying that is  
20          less that is more. That really doesn't need  
21          an economist. I can imagine it can get quite  
22          complicated if you then have to look at other cross  
23          licensing.

24   MR JON TURNER: Yes.

25   MR JUSTIN TURNER: Again that is not really a matter for

1 an economist, cross licensing seems to be a matter for  
2 well what is the value of the technology that has been  
3 cross licenced and is no doubt a commercial or technical  
4 matter. Can you just explain to me why an economist is  
5 going near any of this with the greatest respect to all  
6 economists in the room.

7 MR JON TURNER: An economist is going near it because in  
8 this sphere of litigation it is not merely the  
9 application of economic theory by economists that is  
10 admitted as economic evidence. They often carry out  
11 complicated numerical assessments, look at work with  
12 quantitative expertise.

13 MR JUSTIN TURNER: Right. As I understand you are just  
14 comparing royalty rates. Where is the complicated  
15 quantitative expertise required?

16 MR JON TURNER: Well they call it a simple correlation  
17 analysis. They are going to be to the extent that there  
18 is going to need to be some unpacking, let's say, of the  
19 licences in order to derive LTE effective royalty rates  
20 per unit.

21 MR JUSTIN TURNER: So there is 40 to 60 licences on the one  
22 hand, what about the licences we are dealing with in the  
23 other camp? The Apple and Samsung licences?

24 MR JON TURNER: Well the 40 to 60 I think includes the Apple  
25 and Samsung. This is the total.

1 MR JUSTIN TURNER: Just what is the class? How big is the  
2 Apple and Samsung class?

3 MR JON TURNER: Apple and Samsung there are two at any given  
4 time licensing arrangements between Qualcomm and Apple.

5 MR JUSTIN TURNER: I know but how many roughly of the 40 to  
6 60 how many are Apple and Samsung. If you are doing  
7 a correlation. The size in each population is highly  
8 relevant.

9 MR JON TURNER: I am afraid you will need to ask for  
10 clarification from my friend for that. At a minimum it  
11 is going to be two. But I don't know.

12 PROFESSOR MASON: Might I ask, it is a question on  
13 a slightly different tack so hopefully you don't mind  
14 that, although the bits that an economist might bring  
15 there will be some rudimentary statistics to apply  
16 because there will be a limited sample and you will want  
17 to apply so there will be a bit of statistical sophistry  
18 to apply.

19 MR JON TURNER: Yes.

20 PROFESSOR MASON: I just wanted to confirm one thing and  
21 then check the implications of it. So in this analysis,  
22 there will be a comparison between two sets of royalty  
23 rates to see if there is any difference. If there is no  
24 difference then that is one branch. If there is  
25 a difference there still remains the question of whether



1 the royalty rates with the policy in place were FRAND or  
2 not, is that correct? Because none of this will be  
3 based on any comparison with FRAND?

4 MR JON TURNER: Well, I was going to come to that because  
5 I have seen from the transcript of the last case  
6 management conference that there seems to be some issue  
7 about how FRAND fits in to this case.

8 MRS JUSTICE BACON: Yes, that's your case and not  
9 Mr Jowell's case. So --

10 PROFESSOR MASON: I ask because I am still trying to hear  
11 clearly why the Padilla analysis that we have been  
12 discussing necessarily should go in trial 1 rather than  
13 trial 2.

14 MR JON TURNER: Okay.

15 PROFESSOR MASON: That is the purpose of the question. In  
16 my mind, whichever branch you go down with that analysis  
17 you end up having to do subsequent work and therefore it  
18 may as well be deferred to trial 2. That's what I am  
19 trying to tease out with the question.

20 MR JON TURNER: I am giving you the answer based on the  
21 material that they have explained to us about why they  
22 want it. So for detail you will have to ask Mr Jowell  
23 but what I can say is this: the legal test--

24 MRS JUSTICE BACON: All right. Maybe it would be useful  
25 just before we break to hear from whoever on the other

1 side -- is it you, Mr Jowell -- who is dealing with it  
2 just for five minutes.

3 MR JOWELL: Yes, can I cover those but also a few other  
4 points? I will try to speak rapidly.

5 MRS JUSTICE BACON: I want to have a snapshot of your view.  
6 Obviously we have read your skeleton argument. Then we  
7 will rise and then we will discuss for a few minutes and  
8 come back and then let you know if there is any other  
9 questions. Because actually where we are now is we have  
10 taken one hour for Mr Turner to explain why he is in  
11 violent agreement with you. So let's just try and make  
12 quick progress.

13 MR JOWELL: If I can start off by sort of dealing with what  
14 we say should be in trial 1. And if you take up the  
15 list of issues it may just be convenient to go through  
16 that.

17 MRS JUSTICE BACON: Your list of issues? The latest draft?

18 MR JOWELL: Our list of issues, the latest draft.

19 So the starting point is 7A -- well, there is no  
20 distinction between our definition of dominance.

21 MRS JUSTICE BACON: Yes, we understand that.

22 MR JOWELL: -- issues with my learned friend's case. Some  
23 of which have been canvassed by the Tribunal today.

24 We say that it is impossible, logically impossible,  
25 for the mere requirement of a licence to amount to

1 an abuse.

2 MRS JUSTICE BACON: Yes, you don't need to develop your  
3 case. A and B seem to me to run together.

4 MR JOWELL: It is important to bear that in mind.

5 MRS JUSTICE BACON: Of course. You don't need to put down  
6 a marker that you challenge it as a matter of law.

7 MR JOWELL: The second question then is whether the NLNC  
8 policy is capable of or likely to have the alleged  
9 leveraging effect of increasing LTE SEPs and whether it does  
10 so buttressed by RTL.

11 There are essentially three different types of  
12 evidence that one could -- more than three -- at least  
13 three types of evidence that it is important to consider  
14 that go to that question.

15 MRS JUSTICE BACON: Yes.

16 MR JOWELL: As you will see from our defence, we say that  
17 when you look at the factual chronology and the factual  
18 and the circumstances of the negotiations, it is simply  
19 impossible to see how any leveraging effect.

20 MRS JUSTICE BACON: That is the point in your footnote 5, we  
21 have read it.

22 MR JOWELL: Indeed.

23 MRS JUSTICE BACON: We have read footnote 5.

24 MR JOWELL: Very well. We say that is an important part of  
25 the case and on top of that, one has as it were this

1 bargaining analysis which is really perhaps possibly  
2 unnecessary but if you like is an economist formalising  
3 and seeking to model the position of the parties in that  
4 negotiation and draw some conclusions on that.

6 The next set of evidence and I think it is common  
7 ground both that factual material and also the  
8 bargaining analysis will go into trial 1.

9 One then gets into the areas that are more  
10 difficult. So the first area is the Padilla, what we  
11 call the leveraging analysis, which has been the subject  
12 of this discussion. This is essentially simply intended  
13 to be a simple correlation between on the one hand the  
14 royalty rates charged for licences across the industry  
15 and then on the other hand the degree of dependency of  
16 the counterparties to the licences on Qualcomm's  
17 chipsets.

18 So we look at how many chips effectively they buy  
19 from Qualcomm, whether they are dependent, and whether  
20 that correlates with the royalty rates charged. We say  
21 that when you look at that, it will, if you like, give  
22 you even more comfort than you take from the factual  
23 analysis in showing that, actually, there is nothing to  
24 this case because there was no leveraging effect in  
25 increasing the rates.

1           We say that that should go into trial 1, it is  
2           distinct from much larger more complex brand analysis  
3           that may or may not be necessary.

4   MRS JUSTICE BACON:   Yes.  How much time at the trial will  
5           the Padilla leveraging analysis add?

6   MR JOWELL:   We have said conservatively a week.  By that  
7           I meant -- I was rather optimistic --

8   MR JUSTIN TURNER:   By "conservative" you mean less than, not  
9           more than.

10   MR JOWELL:   Exactly.  Yes, absolutely.  I was thinking of  
11           a four day week at trial.

12   MRS JUSTICE BACON:   So not more than four days.

13   MR JUSTIN TURNER:   All that time is going to be taken up  
14           with trying to factor out the licence -- the cross  
15           licensing, isn't it?

16   MR JOWELL:   There will no doubt be disputes between the  
17           parties as to whether the analysis is fair, what  
18           licences should go in, what licences should go out,  
19           whether the cross licences can affect anything, are  
20           there any considerations which can affect anything.  
21           I am sure we will have those debates, it shouldn't take  
22           forever.  And as I said it isn't -- the central evidence  
23           is going to be, we say, the factual evidence.  This is  
24           a buttressing analysis but one which we think is  
25           important.

1           I should just lay down a marker. My learned friend  
2           took to you the recent case that he showed you. We  
3           don't accept that the burden is on us to show that there  
4           is no actual effect, at least if that was his  
5           suggestion. We say that, actually, it is necessary  
6           evidence to consider whether there is or was  
7           a likelihood of an actual effect.

8   MRS JUSTICE BACON: Do you accept his point that if the  
9           Padilla analysis is in principle accepted by the  
10          Tribunal that still would not be the end of the matter  
11          and the Tribunal couldn't reach a final determination of  
12          whether there was an abuse until it had --

13   MR JOWELL: No, we don't. We say the Tribunal could decide  
14          there is no abuse on the factual material buttressed by  
15          the Padilla analysis and also indeed it might say it  
16          would reach that conclusion entirely independent of the  
17          Padilla analysis.

18   MRS JUSTICE BACON: On the basis of your legal argument at  
19          7A.

20   MR JOWELL: The legal argument and indeed the factual  
21          circumstances surrounding the negotiations with Apple  
22          and Samsung.

23   MRS JUSTICE BACON: All right. So it will come down at  
24          trial 1 to a question of submissions as to whether  
25          depending on the conclusions we reach that is the end of

1           the day or not. But we are certainly not being told by  
2           both sides that if the Padilla analysis is accepted that  
3           still won't be the end of the day because that is not  
4           your position.

5   MR JOWELL: No, indeed. I should just mention one point  
6           importantly on that legal question of the role of actual  
7           effects. It comes down to this final set of evidence, it  
8           is necessary to mention that. And that is the case my  
9           learned friend took you to is a case of exclusion.

10   MRS JUSTICE BACON: Yes.

11   MR JOWELL: This is alleged and I think he made clear --

12   MRS JUSTICE BACON: Not exclusionary.

13   MR JOWELL: Not exclusionary. This is purely  
14           an exploitative abuse, and in an exploitative abuse --

15   MRS JUSTICE BACON: Which is why I was a bit puzzled by your  
16           amendments to E.

17   MR JOWELL: That is what I am going to come to.

18   MRS JUSTICE BACON: You have inserted a point about  
19           exclusionary effect.

20   MR JOWELL: Let me come on to this.

21   MRS JUSTICE BACON: We won't come on to that because we need  
22           to decide at the start whether we are going to have  
23           a split trial or not and then look at the issues.

24   MR JOWELL: May I just conclude my point on exploitative  
25           abuse. We would say the effect is actually of the

1 essence of the abuse. You can't have excessive prices,  
2 for example, without somebody actually charging them.  
3 Similarly, if the allegation is that people are actually  
4 paying more, you can't establish that type of abuse  
5 unless you actually establish that they did in fact pay  
6 more. So we say it is of the essence of an abuse so to  
7 leave it out entirely would not be appropriate.

8 On our exclusionary point, we don't need issue E  
9 provided it is understood that it is no part of the case  
10 that they will be advancing that chip makers, rival chip  
11 makers, are foreclosed or excluded in anyway. If that  
12 is part of their theory of anti-competitive harm then we  
13 need to have an analysis of that effect as well.

14 MRS JUSTICE BACON: I think Mr Turner has confirmed -- in  
15 any event as I said we will get on to that after.

16 MR JOWELL: That is important because that comes onto the  
17 question of whether Mr Snyder's evidence is needed  
18 and also the ambit of Professor Shapiro's evidence.

19 MR JUSTIN TURNER: Can I just ask one question, comparing  
20 the licences, the -- is there cross licensing from Apple  
21 and Samsung too?

22 MR JOWELL: There is some degree of cross licensing. But  
23 whether it is of any value or not is another question.

24 MR JUSTIN TURNER: Okay.

25 MR JOWELL: Of course Qualcomm doesn't make phones so most



1 of the Apple cross licences are entirely valueless.

2 MR JUSTIN TURNER: Yes. So is it possible to do this  
3 exercise without taking licensed cross licenced licences,  
4 so you may lose ten or maybe you would lose, but then you  
5 could have actually a relatively simple inquiry and far  
6 less controversial.

7 MR JOWELL: Yes. Dr Padilla intends to look at it from  
8 a number of different perspectives. Effectively, he is  
9 saying look at simple correlation and we're going take  
10 out the cross licences, could these cross licences have  
11 had any effect. That will be the thrust of his  
12 analysis.

13 MRS JUSTICE BACON: Yes, thank you, Mr Jowell.

14 We will have a discussion. We will break for five  
15 minutes and then we will let you know if we have any  
16 more questions before deciding the point.

17 (11.55 am)

18 (A short break)

19 (12.10 pm)

20 MRS JUSTICE BACON: All right. So our understanding from  
21 the submissions that have been made this morning is that  
22 both sides are now agreed that the Padilla analysis and  
23 whatever rebuttal of that is put forward by the class  
24 representative should go into trial 1. There is  
25 disagreement as to how long that should take. We have

1 a concern that it is possible that one outcome may be  
2 that we can't reach any conclusion on the basis of the  
3 Padilla analysis, and on Mr Turner's case that would be  
4 if we were to accept it prima facie but he would say  
5 they still can't then preclude abuse.

6 I understand that that is not Mr Jowell's case but  
7 there is a possibility that one outcome might be that we  
8 find it inconclusive one way or the other.

9 However, if the time for evidence for that part of  
10 the case is strictly circumscribed then, given that both  
11 parties want this in, we are inclined to accept that.  
12 We have in mind that there should be a guillotine of  
13 a day in evidence, and then an appropriate amount of the  
14 time dedicated to the point in opening and closing  
15 submissions.

16 I should say we are unconvinced that it should take  
17 any more than a day given the nature of the exercise  
18 that is proposed.

19 On that basis, we would be inclined to accept this  
20 as part of trial 1. We would however want to see before  
21 it is done a somewhat more developed statement of the  
22 methodology, not least in order that we can make sure  
23 that it is confined to an exercise that can be carried  
24 out in one day and that we don't get to trial and have  
25 everyone tell us actually no we need an extra week to

1 deal with this. Because if we were in week territory,  
2 then I think that would make the case for introducing it  
3 at this point significantly less compelling given that  
4 we are not going to have other evidence of effects.

5 That is our view as to the Padilla evidence.

6 Are you both able to confirm that as matters  
7 currently stand you think this can be guillotined to  
8 a day of evidence? I am not suggesting that the  
9 submissions as well should be dealt with within that day  
10 but I am talking about the time needed for hot-tubbing  
11 or cross-examination of the experts on this point.

12 MR JON TURNER: My Lady, that matches what I said in  
13 submissions so I do agree.

14 Like you, we on our side aren't able to take a view  
15 because we don't know exactly what is involved and  
16 therefore further definition on Qualcomm's side will be  
17 important to make sure that that is robust and our  
18 position remains that if this is admitted and if you do  
19 find taking everything in the round that it doesn't cut  
20 the mustard that you can then decide abuse.

21 MRS JUSTICE BACON: Yes, all right. Mr Jowell?

22 MR JOWELL: Well, in principle, yes, but subject to this.

23 I take the rather old fashioned view I like to  
24 cross-examine my experts on the other side. Therefore  
25 it does somewhat depend on how long the Tribunal takes

1 in the hot-tub. I can say I could confine my  
2 cross-examination to half a day and I am sure I could  
3 squeeze into that but --

4 MRS JUSTICE BACON: We might not give you half a day.

5 MR JOWELL: Further down the line my preference would be to  
6 have a proper opportunity to cross-examine the other  
7 side's experts on the issue. But I will take what I am  
8 given, of course.

9 (Pause).

10 MRS JUSTICE BACON: The point is being made, I think it is  
11 probably too early to decide whether it needs to be  
12 hot-tubbed or otherwise. So it may be that you get your  
13 day in court Mr Jowell with whichever witness is put  
14 forward -- whichever expert is put forward for the class  
15 representative.

16 All right.

17 On that basis then, we can I think proceed on the  
18 decision that there will be a split trial with the  
19 Padilla analysis included, limited to a day of evidence  
20 in court. However, that is allocated on the day.

21 I think the next question is then how the basis on  
22 which the list of issues is agreed, given that we have  
23 rival drafts. I don't think it is going to be a useful  
24 exercise for us to try and draft by committee in this  
25 room.

1 MR JON TURNER: No.

2 MRS JUSTICE BACON: How do you propose the list of issues  
3 should be finalised?

4 MR JON TURNER: Well, I have not had a proper opportunity to  
5 look at these drafting changes that they have done.  
6 I will need to do that, in fairness. I would therefore  
7 propose if this hearing is going into a second day, to  
8 do that overnight. That is the most efficient thing.  
9 Then we can seek to resolve this tomorrow. That will  
10 avoid parties going away and continuing to bicker and  
11 needing this to be resolved anyway.

12 MRS JUSTICE BACON: Yes. As you say, it is going to have to  
13 be resolved one way or the other it may be most useful  
14 if we did so at the start of tomorrow. It may be that  
15 is the only thing that needs to be dealt with by the  
16 time we get to tomorrow.

17 MR JUSTIN TURNER: I just have one further area you can help  
18 me with. I understand market definition, I understand  
19 the chipset market, which is how the case ran in the US.  
20 Why is there dominance in a SEP market and what do you  
21 mean by that? I understand you plead that a monopolist  
22 necessarily has 100 per cent of the market but that in  
23 this context seems rather odd because we are not talking  
24 about selling patents, we are talking about products,  
25 consumer products.

1 MR JON TURNER: Yes. I am very glad, Sir, that you raised  
2 that because what I was covering in my initial address  
3 was the core spine of the case which is about the market  
4 power in chipsets being used as a leveraging force. The  
5 way that the SEP market for licensing Qualcomm's patents  
6 comes in relates to the other part of the case which  
7 I didn't explain but which is important for  
8 finalisation of this before the split trial parameters  
9 are decided, which is refusal to licence.

10 MR JUSTIN TURNER: That is because they are standard  
11 essential patents.

12 MR JON TURNER: Exactly. It is a market for standard  
13 essential patents and because Apple and Samsung does  
14 need licensed they can't go on to a rival chip maker and  
15 say, well, we are --

16 MR JUSTIN TURNER: But in terms of evidence that needs to be  
17 addressed on dominance in that market, you are just  
18 saying you don't need to -- there won't need to be  
19 an explanation of the extent to which standard essential  
20 patents overlap, the amount and number of standard  
21 essential patents owned by Qualcomm as against rivals.  
22 None of that will need to be looked at. It is just  
23 simply a starting point for this secondary argument that  
24 they are monopolists, they have patents.

25 MR JON TURNER: Well, my understanding from the pleadings is

1           that it comes down to this. Everybody essentially  
2           agrees that if you have standard essential patents and  
3           you are the licensor you are essentially in a sense  
4           already a monopolist. What is said on Qualcomm's case  
5           on the other side is that nobody licenses individual  
6           patents, they license whole portfolios, so it is right  
7           to look at portfolios. From our side we are not sure  
8           that that really matters very much but that is their  
9           first point.

10           A second point that they make, I think, is that in  
11           order to decide the question of dominance on the market  
12           for licensing, you need to take into account something  
13           I foreshadowed a little bit earlier which is this  
14           possibility of hold out that even if you have standard  
15           essential patents, if an undertaking says we are going  
16           to go ahead and work the patents anyway and we are  
17           simply not going to pay you, that that is  
18           a countervailing force exerting pressure on the dominant  
19           firm, they say.

20   MR JUSTIN TURNER: Right but that is nothing to do with  
21           dominance, as I understand it. I am just interested in  
22           just understanding what evidence we are going to have to  
23           deal with to determine dominance in that market.

24   MR JON TURNER: Oh, I see. It doesn't mean there is anybody  
25           else who is a potential licensor of these patents, no.

1           What it could mean according to them and I apprehend is  
2           that it does relate to dominance because if the  
3           purchaser has countervailing power, then it could  
4           counteract the relevant exercise of dominance against  
5           them. That is how they would say it features in the  
6           analysis.

7   MR JUSTIN TURNER: You are not going to be adducing any  
8           evidence as to what these licences -- the technical  
9           scope of these licences or how they interact with the  
10          technical scope of other licences or patents?

11   MR JON TURNER: No, I don't believe so. Thank you for  
12          raising that. I will think about it but I don't believe  
13          at the moment it is an element that either side has  
14          introduced.

15   MRS JUSTICE BACON: Is this really a big issue? Because  
16          what you are talking about is conduct and the conduct  
17          that may be engaged in which would buttress your primary  
18          case of leveraging. Is it really necessary for the  
19          Tribunal to explore exhaustively the question of market  
20          definition and dominance in relation to the SEP markets.

21   MR JON TURNER: I would not say that it is possible to just  
22          dispense with this part of the case. I think it is  
23          important because the buttressing aspect of the refusal  
24          to licence policy is part of a coherent overall  
25          commercial practice which needs to be looked at in the



1 round, is our case.

2 MRS JUSTICE BACON: Well, yes, I am not disputing that but  
3 the question is whether for that you need to look at it  
4 in a prism of dominance.

5 MR JON TURNER: Well, part of the question is do they have  
6 to license rival chip makers if they want patent  
7 licences, and is the decision only to license at the end  
8 device level itself problematic? If a component maker  
9 someone else, MediaTek let's say, wants a licence and  
10 Qualcomm was to say no, or indeed Samsung itself as  
11 a component maker, is that that part of an abusive  
12 practice?

13 MRS JUSTICE BACON: Are you saying that there is also  
14 an abuse on the SEP market?

15 MR JON TURNER: Yes. That's right.

16 MRS JUSTICE BACON: I thought you had eschewed any essential  
17 facilities analysis?

18 MR JON TURNER: Well, we don't need to rely on an essential  
19 facilities analysis, we are just referring to a market  
20 for the licensing of the patents and saying that their  
21 behaviour viewed in the totality of what they are doing  
22 with the no licence no chips policy in deciding that  
23 they will not license other component makers while  
24 demanding that other component makers license them by  
25 the way, is part of this holistic --

1 MR JUSTIN TURNER: Is it part of your case that they have  
2 refused to license other chip manufacturers?

3 MR JON TURNER: Yes it is.

4 MRS JUSTICE BACON: I am struggling to understand your point  
5 about holistic abusive strategy. An abuse on which  
6 market? Because your primary case is that there is  
7 an abuse by leveraging from dominance on the chipset  
8 market into conduct which is exploitative on the SEP  
9 market. I think you have just said that the RTL part of  
10 your case --

11 MR JON TURNER: Has an exclusionary aspect, yes.

12 MRS JUSTICE BACON: Well, not only that you seem to now be  
13 raising an exclusionary conduct which I thought that you  
14 had not abandoned but denied was part of your case.

15 MR JON TURNER: No, my Lady, I am sorry I must say I did not  
16 do that. I was explaining our case and taking you right  
17 from the start with no licence no chips.

18 MRS JUSTICE BACON: So NLNC you don't say is exclusionary  
19 but this you do say is exclusionary?

20 MR JON TURNER: Yes, it does.

21 MRS JUSTICE BACON: So I think that answers Mr Jowell's  
22 question about that part of his mark up. In any event,  
23 you are saying that this not only in some way supports  
24 your primary abuse but is also a separate and  
25 independent standalone abuse of dominance on the SEP

1 market, is that what you are saying?

2 MR JON TURNER: Well, first I should say just in terms of  
3 how this fits together, we did set this out in  
4 absolutely crystal clear prose in the first response to  
5 the request for information they made back in 2022. So  
6 it is absolutely clear how this fits together and our  
7 most recent response to the request for information  
8 makes it clear as well.

9 Essentially there is the abuse by leveraging, which  
10 has an exploitative outcome. It is not alleged that  
11 that is excluding other people.

12 MRS JUSTICE BACON: I see.

13 MR JON TURNER: But to support what they do, they take  
14 action against other chipset makers which prevents them  
15 from being able to market licensed chipsets to Apple,  
16 Samsung and other manufacturers. That is how it comes  
17 in as exclusionary and it is an abuse on the SEP market.

18 MRS JUSTICE BACON: All right.

19 MR JON TURNER: Just to complete the picture, we don't say  
20 that there is any independent effect from this and this  
21 is important in view of something Mr Jowell said just  
22 before the break. Because the way we are -- just to  
23 finish what I was saying to Mr Turner -- there are  
24 really three dimensions which are pleaded.

25 Number one, this exclusionary feature that because

1 the other people like MediaTek aren't licensed under  
2 Qualcomm's patents they can't offer an outside option  
3 and a form of competition to Qualcomm which would  
4 otherwise be available in the market.

5 Number two, what does in practice happen -- and  
6 again this is a factual matter which I do not think is  
7 disputed -- is that Qualcomm enters into non assert  
8 agreements with the rivals under which they agree that  
9 they will not -- they promise that they will not sell  
10 chipsets to people who have not already been licensed by  
11 Qualcomm. So in a way it is a sort of policeman  
12 activity supporting the no licence no chips policy.

13 The third piece, which I think is where Mr Jowell's  
14 question before the break comes in, is that he is right  
15 to say that we do also say that the wider impact of them  
16 refusing to license other chip makers under their  
17 patents is to weaken that market and the people who  
18 supply chips to customers more generally and in the  
19 longer run.

20 MRS JUSTICE BACON: Yes, all right. So that is a kind of  
21 somewhat developed explanation as to why you think in  
22 answer to Mr Turner's question that you do need to  
23 develop the case on market definition and dominance on  
24 the SEP markets.

25 MR JON TURNER: Yes.

1 MRS JUSTICE BACON: All right.

2 MR JUSTIN TURNER: Mr Jowell, in terms of the evidence of  
3 dominance -

4 MR JOWELL: I just want to observe one thing which is that  
5 they have amended their claim and you can see this in  
6 the supplemental bundle at page 10, paragraph 7, to  
7 change their claims such that RTL is no longer alleged  
8 individually to constitute an abuse. So when Mr Turner  
9 says that refusal to license or any device licensing is  
10 an abuse, that isn't their pleaded case any more.

11 MR JUSTIN TURNER: Just show us.

12 MR JOWELL: Paragraph 7 of their claim. It is in  
13 supplemental bundle 10.

14 They had said this - you can see at paragraph 7 -  
15 they had said separately and in combination and they  
16 changed it to say in combination alternatively  
17 individually as respects the no licence no chips policy  
18 these policies constitute an abuse.

19 And they made the same change in paragraph 72, which  
20 you see on page 46 of the supplemental bundle, where  
21 again they previously said taken together and separately  
22 and they now simply state:

23 "Therefore the NLNC policy as buttressed by the  
24 RTL".

25 MRS JUSTICE BACON: Is your point that on the basis of the

1 current pleading it is not said that there is  
2 a separate, individual abuse arising from the RTL.

3 MR JOWELL: That's correct. And that is very important  
4 because we say that, well, once you accept that refusal  
5 to license is lawful conduct, any device licensing is  
6 lawful conduct, then no licence no chips policy follows  
7 necessarily because otherwise you are licensing  
8 an infringer. That is why they are certain basic  
9 fundamental logical problems with their case.

10 MR JUSTIN TURNER: It is a bit of a jump to say it is  
11 accepted it is lawful.

12 MR JOWELL: Well, it's not alleged to be unlawful.

13 MR JUSTIN TURNER: That is in combination.

14 MR JOWELL: In combination, yes, but separately it is not  
15 alleged to be an abuse itself. We say it follows from  
16 that you must have NLNC. So we do say there is  
17 a logical problem in their case.

18 MRS JUSTICE BACON: Do you take issue on that basis with the  
19 proposition that it is necessary to look at market power  
20 on the SEP Market as distinct from the chipset market?

21 MR JOWELL: We accept their case is that we have market  
22 power on the SEP market. We also think it is a very odd  
23 thing to say that it's something to say we have market  
24 power in because effectively it is a patent. But we  
25 don't dispute it is an issue on the pleadings and we

1           have to deal with it.

2   MR JUSTIN TURNER:  In terms of evidence that will be  
3           addressed by Qualcomm on this issue, is it really  
4           a matter of argument or is it -- is there going to be  
5           technical evidence as to how these licences fit  
6           together?

7   MR JOWELL:  We are proposing to have some technical evidence  
8           on the --

9   MR JUSTIN TURNER:  I am so sorry?

10  MR JOWELL:  I am going to handover to Mr Saunders on the  
11           technical nature of the evidence.

12  MR SAUNDERS:  Sir, we are proposing to call  
13           Professor Andrews to give some background because there  
14           are a number of aspects of the technical background we  
15           are talking about different generations of standards  
16           different generations of chipsets.  So it is quite  
17           important that the Tribunal has its bearings when it  
18           goes through circumstances.

19  MR JUSTIN TURNER:  I understand that, yes.

20  MR SAUNDERS:  So that does go to both this question of  
21           definition to a certain extent albeit one doesn't need  
22           to get into the kind of intricacies of the individual  
23           chips but you do need to know how the structure of  
24           generations of the standards have changed over time and  
25           that how that whole process has evolved.

1 MR JUSTIN TURNER: Right but in terms of answering the  
2 question, the factual basis for the allegation of  
3 dominance in the SEP market, that won't require a --  
4 I understand the background points, that in itself won't  
5 require further technical understanding of how different  
6 SEP patents nest with each other, how they interrelate,  
7 what technologies they are claiming.

8 MR SAUNDERS: No, I don't think not to that level of  
9 individuality as it were.

10 MR JUSTIN TURNER: I understand.

11 MRS JUSTICE BACON: All right. So logically I am just going  
12 to take things slightly out of order because we have  
13 already got into a discussion on the experts. I think  
14 the experts is a matter which follows from the first  
15 point.

16 So my understanding is that there are two issues  
17 that we need to address. One is the question whether  
18 Shapiro should be called at all. Second is a more  
19 general question of what expert evidence is needed for  
20 trial 1.

21 Just to let you know our provisional view,  
22 provisionally we are not convinced that it would be  
23 necessary to call Professor Shapiro and indeed as a more  
24 general matter we think that it is necessary to keep the  
25 expert evidence for trial 1 confined to a minimum. We



1 are not attracted by the idea of having an array of  
2 different experts who all pop up and do their piece on  
3 whichever bit of the background you think that we need  
4 to be informed about.

5 It seems to us that a lot of what goes into trial 1  
6 will be either factual evidence or legal submissions.  
7 I obviously take it and we had the debate about what  
8 Dr Padilla is going to do and how that is going to be  
9 rebutted but leaving that aside can I have submissions  
10 from both parties as to the minimum expert evidence  
11 which they think is necessary for trial 1?

12 I really do need minimum because we are not going to  
13 go into trial 1 with reams and reams of evidence that  
14 turns out to be -- well, I say we are not -- we do not  
15 wish to go into trial 1 with reams and reams of evidence  
16 that turns out to be irrelevant. That may be what  
17 happens and it happens in many trials but we would  
18 prefer that to be kept under bounds at this stage to  
19 minimise the likelihood of a lot of evidence expensively  
20 produced which won't actually assist us.

21 So Mr Turner, what is your proposal?

22 MR JON TURNER: So, my Lady, for trial 1 the proposal is  
23 that there is not an array of experts all popping up.  
24 We do say that it is appropriate for Professor Shapiro  
25 to give evidence on what is actually going to be, in our

1 view, the central issue in the case, which is the  
2 capacity of the NLNC practice viewed in its context to  
3 produce anti-competitive effects.

4 That is the most important aspect of the case. He  
5 is the expert whom we wish to lead evidence from on that  
6 point. I will just run through the others and I will  
7 return to the question and the objections.

8 MRS JUSTICE BACON: Just to give you an idea about time

9 I would like to have both of your submissions about this  
10 before lunchtime so we can go and debate that over  
11 lunch. So you have a bit less than ten minutes,  
12 I think.

13 MR JON TURNER: Yes, all right. So that is essentially what  
14 Professor Shapiro is going to be doing. I might say at  
15 the outset that they have said, well, we don't  
16 understand what he is going to do and they say that it  
17 could be a freewheeling vast exercise. If that is  
18 a concern of the Tribunal's then I can put that to bed  
19 absolutely immediately, because what they didn't do is  
20 refer the Tribunal to the fact that we have listed the  
21 pleaded propositions which he will address quite  
22 concisely and said that this is the parameter of his  
23 evidence.

24 MRS JUSTICE BACON: What do you want us to look at?

25 MR JON TURNER: So we need to look at his -- it is a letter

1           of the 22nd --

2   MRS JUSTICE BACON:  Is this in the correspondence bundle.

3   MR JON TURNER:  -- of December.  Which I think is in the

4           second supplemental bundle.

5   MRS JUSTICE BACON:  Second supplemental bundle.  Page?

6   MR JON TURNER:  Let me just find it myself.  I think it is

7           going to be at page 167 in this.  I am sorry, can you

8           give me a moment to find this?

9   MRS JUSTICE BACON:  I only have 131 pages.

10           (Pause).

11   NEW SPEAKER:  106, I think.

12   MR JON TURNER:  Thank you, yes.  That's excellent, it is

13           106.

14           So here at paragraph 4 we say he is going to address

15           a number of the major conceptual issues in dispute

16           relating to the policy so he is really the engine of

17           this.

18   MRS JUSTICE BACON:  Well, no, the engine of this is you who

19           is going to be making legal submissions about this.

20           I don't really want to have legal submissions made by

21           way of economic expert.

22   MR JON TURNER:  I understand that.  He is not going to be

23           making legal submissions he is going to be explaining

24           the economic case on why the behaviour complained of is

25           liable to produce anti-competitive effects in the same

1 way that on the other side Dr Padilla is going to be  
2 doing the same thing in reverse.

3 MRS JUSTICE BACON: Why can't Mr Noble do that?

4 MR JON TURNER: Because -- well, we have identified this as  
5 a particular area of expertise for which  
6 Professor Shapiro is extremely well suited. Not only is  
7 he an eminent person who has given evidence in this  
8 Tribunal before and been commended, he has also given  
9 evidence for the FTC in the US proceedings and Qualcomm  
10 itself says in relation to Professor Snyder in its  
11 skeleton argument that that is a reason why Snyder  
12 should come in as one of their roster of six experts.

13 And this is a specific area of expertise in which he  
14 has already given evidence. It will be of greatest  
15 assistance to the Tribunal, of maximum value to the  
16 claimant in putting their case effectively and it is  
17 more firmly a matter for his expertise on these issues  
18 than Mr Noble.

19 MRS JUSTICE BACON: All right. So, Shapiro on the  
20 bargaining analysis, that is you, and then what else?

21 MR JON TURNER: If you turn over the page.

22 MRS JUSTICE BACON: Yes, I have read the letter.

23 MR JON TURNER: At paragraph 6 we listed a range of things.

24 So that is him. The only thing missing from that list  
25 is something which should have been included which is

1 departure from competition on the merits from an  
2 economic point of view, which is -- apart from that it  
3 is complete and there is no question about a free  
4 ranging analysis.

5 Apart from that you have Mr -- there will be no  
6 duplication.

7 Apart from Professor Shapiro, Mr Noble will deal  
8 with all of the other economic things that we have  
9 already outlined, the relevant markets, dominance,  
10 refusal to licence and the Padilla analysis. So that is  
11 the economist.

12 MR JUSTIN TURNER: Refusal to licence?

13 MR JON TURNER: Under Qualcomm's patents, that is the SEP  
14 market point.

15 MR JUSTIN TURNER: That is a fact, you say.

16 MR JON TURNER: Well, the question of -- they dispute on the  
17 pleadings that there is a relevant market, how it is to  
18 be defined and that they are dominant within it. So  
19 they dispute those features --

20 MR JUSTIN TURNER: I see. I understand.

21 MR JON TURNER: -- as part of their economic case.

22 So those are the economists. Then there are I think  
23 two technical experts only. There is Dr Ingers -- you  
24 have just heard from Mr Saunders about the experts that  
25 they are going to be producing -- he is an engineer who

1 will explain the features of the technology and the  
2 different generations of the standards from our side.

3 MR JUSTIN TURNER: This is high level stuff.

4 MR JON TURNER: Yes.

5 MR JUSTIN TURNER: Which shouldn't be controversial, at  
6 least in theory.

7 MR JON TURNER: Well, we will see. But that is what he is  
8 going to be addressing, the propositions in the  
9 pleadings on that.

10 Finally, subject to me being corrected on the other  
11 side, one more, which is Dr Matthias Schneider, who is  
12 the industry expert who is very knowledgeable having  
13 worked himself in the licensing area and he is going to  
14 be our industry expert. You will appreciate that we are  
15 the Consumers' Association and unlike the other side we  
16 do not have factual witnesses from the industry.

17 So on our side for trial 1 it is very spare. There  
18 are two experts I think then who are excluded, Dr Nedev,  
19 you have seen him mentioned. He is to do with the  
20 analysis.

21 MRS JUSTICE BACON: And Henkel.

22 MR JON TURNER: And Professor Henkel, yes. So they are  
23 trial 2.

24 MRS JUSTICE BACON: All right. So Shapiro, Noble, Ingers  
25 and Schneider, and you don't propose factual witnesses

1           because you will have Schneider.

2   MR JON TURNER: That's right. Yes. At the moment we don't  
3           have factual witnesses.

4   MRS JUSTICE BACON: All right. Thank you.

5           Mr Jowell or Mr Saunders?

6   MR JOWELL: Yes, so Shapiro. We say that the introduction  
7           of Shapiro at this stage is deeply concerning for two  
8           reasons.

9           First of all, the Tribunal laid down a specific  
10          timetable for the identification of experts and expert  
11          methodology. The other side have simply run a coach and  
12          horses through that by popping up on 22 December, the  
13          date the skeletons were due to be exchanged, with the  
14          identity of a new expert who is essentially intending,  
15          it seems, based upon the very wide ambit of the proposed  
16          topics he intends to cover, to cover the entirety of  
17          their abuse case. And it is not simply not acceptable  
18          and deeply unfair.

19          Now, if Professor Shapiro is simply intending to  
20          engage in a response to Dr Padilla's bargaining  
21          analysis, which is as you will have seen --

22   MRS JUSTICE BACON: That's not what he is going to do  
23          because I understand that Mr Noble is going to be the  
24          rebuttal for the Padilla analysis.

25   MR JOWELL: Well, if that had been the proposal then we

1 would have no objection to it but what is now proposed  
2 in this letter that you have seen is a completely free  
3 ranging analysis of all aspects of abuse. They say it  
4 will involve explaining the mechanism by which the no  
5 licence no chips policy can be expected to produce anti-  
6 competitive effect. It overlaps with everything Noble  
7 is already intending to do. If one turns over the page  
8 on the issues on pleadings they identify are simply  
9 every issue, it seems, on abuse. One sees -- and the  
10 position is made worse by two factors.

11 One is that they in their skeleton argument they  
12 refer to an article by Professor Shapiro where he puts  
13 forward an elaborate essentially exclusionary argument,  
14 detailed argument, in relation to the practices under  
15 consideration which does not correspond to their pleaded  
16 case because not least because it rests centrally on RTL  
17 as an independent abuse and not on NLNC. And also is  
18 essentially, as I said, an exclusionary case.

19 Now, their pleaded case on exclusion is deeply  
20 unsatisfactory because one sees, for example, and  
21 perhaps if you could turn it up in the supplemental  
22 bundle.

23 MRS JUSTICE BACON: I don't think we should get on to the  
24 pleadings. What I want to understand is what you say  
25 about the experts.



1 MR JOWELL: Well, we say it is entirely unfair to have  
2 effectively Shapiro overlaid on top of Noble covering  
3 all aspects of abuse.

4 MRS JUSTICE BACON: Do you say that all -- or do you accept  
5 that all of this is properly the subject of expert  
6 evidence? Indeed, are you proposing to put Padilla  
7 forward on all of these points yourself?

8 MR JOWELL: We don't accept that they are all properly the  
9 subject of expert evidence but the difficulty we have is  
10 that whilst they identify, if you like, issues at a high  
11 level, what they don't identify in this document, or  
12 elsewhere, are the methodologies that Professor Shapiro  
13 intends to adopt.

14 We have in in accordance with the Tribunal's order,  
15 we have identified methodologies by which the economists  
16 would actually seek to test their economic hypotheses  
17 and that is where you get Professor Shapiro's bargaining  
18 analysis that is why you have Dr Padilla's leveraging  
19 analysis, because he has set out in concrete terms what  
20 it is that he intends to do.

21 All we have is a list of issues from the pleadings  
22 that apparently Professor Shapiro intends to address and  
23 which cover effectively all of the issues around  
24 potential abuse. We have no methodology and that is why  
25 we are not in a position to say whether it is properly

1 the subject of expert evidence because we simply haven't  
2 had a proper statement of what the expert evidence would  
3 plan to cover.

4 MRS JUSTICE BACON: Right, so on your side you are proposing  
5 to put forward Dr Padilla to cover the issues of market  
6 definition, dominance and abuse, is that right?

7 MR JOWELL: That is correct but we have also stipulated  
8 precise methodologies.

9 MRS JUSTICE BACON: No, that is -- all right. Padilla on  
10 market definition, dominance and abuse. That is number  
11 one.

12 Number two? Other experts?

13 MR JOWELL: We then have insofar as they wish to maintain  
14 their exclusionary case, which I can show you if you  
15 would like from the pleadings but they do have  
16 an inchoate and undeveloped exclusionary --

17 MRS JUSTICE BACON: Well that is a SEP case, yes.

18 MR JOWELL: Then we do seek Professor Snyder because he  
19 would seek to address that exclusionary case.

20 MRS JUSTICE BACON: Why does Professor Snyder need to  
21 deal with that rather than Professor Padilla?

22 MR JOWELL: Simply for this reason because Professor  
23 Snyder dealt with the very same issue in the US  
24 proceedings.

25 MRS JUSTICE BACON: What is sauce for the goose is sauce for

1 the gander. You're now saying that because he dealt  
2 with that then you should be permitted to have another  
3 expert on that while denying Which? the same.

4 MR JOWELL: That is not quite right because  
5 Professor Snyder is not dealing with the whole case.  
6 He is simply dealing with evidence of exclusionary --  
7 whether there is any exclusionary effect. So he is  
8 looking at essentially the analysis and we have set out  
9 a clear methodology which is similar to the one he  
10 adopted in the United States proceedings which is  
11 considering whether the market --the development of the  
12 market structure over the relevant time can be  
13 attributable to simple ordinary industrial organisation  
14 principles and ordinary competition or whether it is  
15 attributable to this conduct that they identify as  
16 abusive. He will -- and we have set out a clear  
17 methodology.

18 Now if they wish to have somebody on their side that  
19 addresses that, we have no difficulty with it. But that  
20 is a confined issue and we simply propose that  
21 Professor Snyder for convenience addresses it.

22 If the Tribunal is against us on that and wishes  
23 Dr Padilla to do everything, I am sure Dr Padilla could  
24 do it. It is not efficient for him to do it, from our  
25 point of view, but I am sure he could do it and adopt

1 the same methodology that Professor Snyder has  
2 adopted. It is simply a matter of efficiency since  
3 Professor Snyder has already considered this it would  
4 be more appropriate for him to do so.

5 If they accept that there is no exclusionary case  
6 that they are running in the first trial, then we don't  
7 need Professor Snyder.

8 MRS JUSTICE BACON: My understanding from what Mr Turner  
9 just said is that they do rely on an exclusionary case  
10 in relation to the SEP point.

11 MR JOWELL: Then clearly we are entitled to and must  
12 consider whether there was any foreclosure and that is  
13 what Professor Snyder will intend to address.

14 So then we have people who correspond to the  
15 individuals that my learned friend mentioned. Our  
16 market definition and dominance expert from the position  
17 of SEP licences is Paul Melin, who I think is the  
18 counterpart to their Dr Matthias Schneider. We have  
19 Professor Andrews, as already mentioned, who will deal  
20 with the other technical aspects.

21 MRS JUSTICE BACON: Sorry, I mean what is the division  
22 between Melin and Andrews? Because if you say Melin is  
23 the counterpart to Schneider, Schneider is apparently  
24 the industry expert who is put forward by the class  
25 representative on the basis that it doesn't have factual

1 witnesses.

2 MR JOWELL: Melin is the industry expert who will look at  
3 the commercial business reality of how SEP licences are  
4 negotiated and industry evidence around end device  
5 licensing.

6 And Professor Andrews, on the other hand, is the  
7 technical expert who will deal with -- as already  
8 stated -- will deal with the features of each generation  
9 or at least the relevant circumstance.

10 MR JUSTIN TURNER: So at the level we need to understand for  
11 the case why is Professor Andrews necessary? Presumably  
12 Mr Melin has a pretty solid background in that if he is  
13 an industry expert?

14 MR JOWELL: Perhaps Mr Saunders --

15 MR SAUNDERS: Yes, Sir. So, Mr Melin is an ex Nokia  
16 licensing executive. He is not an expert on the  
17 technical issues of how the generations have split up  
18 and how they were supported and the equivalents between  
19 UMTS and CMDA.

20 MRS JUSTICE BACON: Why do we need expert evidence on that  
21 at all? Especially not expert evidence on both sides.

22 MR SAUNDERS: It is unlikely to be contentious, I suspect,  
23 but it is an underpinning I think everybody is going to  
24 need.

25 MRS JUSTICE BACON: Why don't you just provide us with

1 an agreed statement of facts?

2 MR SAUNDERS: That may be possible. It may be through the

3 joint report that is a more efficient way of  
doing

4 it because then the expert owes a duty to the Tribunal

5 and not getting the lawyers playing ping-pong back and

6 forth with a statement where they are all trying to

7 secure some kind of advantage.

8 MRS JUSTICE BACON: How long do you think these expert

9 reports are going to be? What you both seem to be

10 saying is that we are going to get an expert report on

11 each side which will no doubt take considerable time to

12 produce with considerable lawyering behind it, which you

13 say is likely to be uncontroversial so we are going to

14 get two not quite the same reports on something which

15 there may be no dispute about.

16 MR SAUNDERS: Well, it depends how one goes about it, Madam.

17 I mean one way of doing it is you could do this

18 sequentially in which case you have there may be very

19 little by way of dispute in reply. That is one

20 possibility. But I think these are issues on which the

21 Tribunal is going to need a bit of background because

22 actually when you get into the nitty gritty of it is

23 quite important to have that framework in mind before

24 approaching these questions of abuse.

25 MRS JUSTICE BACON: Yes, all right. And ditto with the

1 industry expert. Are you envisaging that on your side,  
2 Melin, is that likely to be very controversial?

3 MR SAUNDERS: Well, it may not be because it may be that --  
4 as it were Schneider and Melin are the equivalents of  
5 each other -- it may be that there is very little  
6 between Schneider and Melin on those principles as they  
7 apply to the abuse case, for example.

8 Now there may be other things relevant to FRAND down  
9 the track but for this phase of the proceedings there  
10 may be actually very little dispute between them.

11 Perhaps the way to deal with that is for Schneider to go  
12 first and Mr Melin can follow.

13 MRS JUSTICE BACON: I see. All right.

14 MR SAUNDERS: The other point just to mention is the  
15 Ingers/Williams pairing. So Ingers and Williams, one of  
16 the issues that the Class Representative has raised is  
17 the extent to which the technology is practiced in the  
18 base band chipset as opposed to in the phone. That as  
19 Mr Turner knows is critical to questions of exhaustion  
20 and where to license.

21 We don't know whether that is something they are  
22 pushing to have in the first trial but Dr Ingers is  
23 going to be dealing with that quite detailed technical  
24 question about how you build chipsets and what goes into  
25 them and what bits of the claims read on to them and so

1 on, which is quite a difficult issue. If that happens  
2 we want to have Dr Williams dealing with that as he is  
3 a semiconductor expert.

4 MRS JUSTICE BACON: Yes. I am, as you will have gathered,  
5 very reluctant to get into technical issues which aren't  
6 necessary for the level of debate that we are having in  
7 trial 1. All right.

8 So subject to that, your line up is Padilla,  
9 Snyder, Andrews, who is the counterpart to Ingers and  
10 Melin who is the counterpart to Schneider.

11 MR SAUNDERS: Yes so Noble/Padilla is one pairing,  
12 Shapiro/Snyder is the next pairing.

13 MRS JUSTICE BACON: That's not really right, is it?

14 MR SAUNDERS: Subject to the point my Lady made earlier on.  
15 Schneider/Melin are the industry experts,  
16 Ingers/Williams are as it were the semiconductor  
17 people, and then Andrews is the technical background  
18 which we suspect is not going to be overly contentious  
19 but it is an important part of the overall picture.

20 MRS JUSTICE BACON: Right. Okay.

21 MR JUSTIN TURNER: So why can't Williams deal with Andrews'  
22 material?

23 MR SAUNDERS: Because Williams is a chip man not a standards  
24 over generations man. I am afraid if you are talking  
25 about how you build chips you need a semiconductor



1 person.

2 MR JUSTIN TURNER: There is no pairing for Andrews at the  
3 moment, is that right?

4 MR SAUNDERS: At the moment there isn't, although I suspect  
5 Dr Ingers would pick up to the extent there is  
6 a dispute. Of course that is a matter for my learned  
7 friend. We strongly suspect there won't be but it does  
8 need to -- that underpinning is something that really  
9 isn't within the expertise of the other people.

10 MR JUSTIN TURNER: I have forgotten the answer to the  
11 question how substantial these expert reports are going  
12 to be?

13 MR SAUNDERS: That, yes, you may notice I didn't offer  
14 an answer to that. The answer is they needn't be that  
15 big for some of these points.

16 MR JUSTIN TURNER: That's not an answer to the question how  
17 big they will be.

18 MR SAUNDERS: The honest answer is we haven't given that  
19 thought to a page limit, as it were. But dealing with  
20 those kind of background points could be done relatively  
21 succinctly. It may be it is the kind of report which  
22 brings together some other material so it is presented  
23 in a convenient way.

24 MRS JUSTICE BACON: Relatively succinctly being what? Ten  
25 pages or 20 pages?

1 MR SAUNDERS: 20 or 30, I would have thought, or something  
2 like that.

3 MRS JUSTICE BACON: Can I -- before we rise for lunch can  
4 I just have Mr Turner's comments on the question about  
5 the relative counterpart to Ingers, whether it is  
6 necessary to bring Dr Williams in as well or whether  
7 actually we are not dealing with the finer points of  
8 chip making?

9 MR JON TURNER: Yes. So on that point it is actually  
10 an aspect of their case rather than ours because what  
11 they say is part of their case, their pleaded case, is  
12 that it would be no good -- you couldn't avoid licensing  
13 at the end device level by licensing the chip makers  
14 because there would still be a surplus of patents which  
15 read on not to the chipset with which the chip makers  
16 are concerned but the end device.

17 Here the debate is going to be, well, is that  
18 actually correct? Would there be a real impact if  
19 component makers were licensed? That is why I think  
20 unavoidably unless they are going to say it is no longer  
21 part of their case we are going to have experts on both  
22 sides dealing with that pleaded dispute.

23 MRS JUSTICE BACON: Is that Ingers for you?

24 MR JON TURNER: Ingers is our man for that.

25 MRS JUSTICE BACON: Are you saying that Ingers deals with

1           what both Andrews and Williams will separately be  
2           covering on their side?

3   MR JON TURNER: Well, I would need to have complete  
4           specificity with what Andrews and Williams are going to  
5           be covering. I have explained what he is principally --

6   MRS JUSTICE BACON: They have explained what they are going  
7           to be covering.

8   MR JON TURNER: Yes. Well, yes. Based on the discussion so  
9           far, Ingers is the person who is going to be dealing  
10          with those matters.

11   MRS JUSTICE BACON: So he is going to be dealing with both  
12          the point about the evolution of the technology and the  
13          various standards, and the even more technical chip  
14          points, is he?

15   MR JON TURNER: Yes, that is right. From a commercial  
16          aspect though in terms of industry knowledge and the  
17          point that has been introduced into the pleading by  
18          Qualcomm that these different standards bleed into each  
19          other there is what they call a chain of substitution,  
20          we will need evidence on the commercial side which  
21          Dr Schneider is able to provide. So he won't be dealing  
22          technically with those matters but he will be  
23          approaching it from a commercial angle.

24   MR JUSTIN TURNER: In terms of getting given -- do you have  
25          any comment on the focus that may be provided by having

1 sequential reports?

2 MR JON TURNER: No. We don't think that that is going to be  
3 helpful. For a start, we are dealing, as I say, with  
4 aspects of their pleaded case on these points and  
5 secondly the matter has crystallised and to have instead  
6 of sequential experts to have the two experts both  
7 addressing the same issue which is perfectly clear with  
8 the possibility of reply reports is going to be far  
9 better.

10 MRS JUSTICE BACON: Is that the case for all of the issues  
11 in the case? Because I can see that if you say that  
12 there is a particular point that arises on their pleaded  
13 case you may not want to go first but are there any  
14 other issues on which it would be beneficial to avoid  
15 duplication to have a single report that goes first?

16 I am thinking, for example, the point about the  
17 development and evolution of the 4G and 5G standards,  
18 I can't see that that is something that we need to have  
19 two competing narratives on rather than sequential  
20 reports?

21 MR JON TURNER: Well, we tend to agree that that is  
22 something that can be addressed differently. We were  
23 instinctively attracted to the suggestion, my Lady, you  
24 made that we could approach this by way of seeking to  
25 produce an agreed statement of facts. What is said on

1 Qualcomm's side is that this is helpful context for the  
2 debate. Your response was that we can deal with that  
3 efficiently with an agreed statement. It seems to us to  
4 be absolutely the right way to go.

5 MRS JUSTICE BACON: So who would that get rid of? There is  
6 only a meaningful purpose in having an agreed statement  
7 which would no doubt take a lot of work if that can  
8 dispense with either an entire expert or at least  
9 a large part of that expert's remit.

10 MR JON TURNER: It wouldn't -- yes, it would dispense with  
11 I apprehend only a part of the evidence probably of  
12 Dr Ingers on our side. On their side, just so that this  
13 has visibility they haven't mentioned another expert who  
14 they propose to adduce evidence from, including in trial  
15 1, which is a Qualcomm employee called Mr Lorenzo  
16 Casaccia. But they were proposing in their skeleton and  
17 in their witness evidence that this individual should  
18 give expert evidence in both trials on different issues  
19 and the potential overlap there is indeed one of the  
20 points not covered.

21 It may be that it is not now intended that there  
22 will be expert evidence from him but in case my learned  
23 friends inadvertently omitted to mention him I should do  
24 so.

25 MRS JUSTICE BACON: All right. Very quickly, Mr Jowell,

1           before we rise for the break, are you proposing to  
2           adduce evidence from Mr Casaccia which is technical or  
3           opinion evidence?

4   MR JOWELL:   We intend to adduce factual evidence from him.  
5           We hope that it won't be necessary for him to adduce any  
6           opinion evidence and that that will be provided -- that  
7           is covered by our experts.   Which we hope it should be.  
8           It may be unnecessary, particularly if we adopt  
9           a sequential approach and everything is agreed.

10  MRS JUSTICE BACON:   All right.

11                To what extent do you think it would be possible to  
12           hive off at least in part an agreed statement of facts  
13           on some of the background matters such as the  
14           development of the relevant standards and technology  
15           which seems to me to be perhaps one of the least  
16           controversial aspects of the case, but obviously we are  
17           going to need to understand it?

18  MR JOWELL:   Well, we are prepared to volunteer to put  
19           forward perhaps a statement in which Professor Andrews  
20           would have contributed for the other side to comment on  
21           and see whether we can reach agreement.   One's  
22           experience with statements of agreed fact is that they  
23           can sometimes be enormously time consuming and  
24           controversial and that in some ways it may be easier  
25           simply to let the expert process take its course and one

1           then finds that at the end of that process one has got  
2           an agreed statement of facts which largely covers  
3           everything but we are very much in your hands and we are  
4           perfectly happy to -- Professor Williams is perfectly --

5 MRS JUSTICE BACON:   Andrews, you mean.

6 MR JOWELL:   Forgive me, Andrews.   Yes Professor Andrews is  
7           perfectly content if we ask him to produce something.

8 MRS JUSTICE BACON:   All right that is something we can  
9           consider over the lunch adjournment.   Let's rise now  
10          until 2.05 pm.   Thank you.

11         (1.08 pm)

12                                 (The short adjournment)

13         (2.05 pm)

14 MRS JUSTICE BACON:   All right.   So we have considered your  
15          explanations of the economist that you want.   We are  
16          minded to allow each side one competition economist.

17                 Up to you who you instruct but we are not attracted  
18          by the idea of having multiple economists who are  
19          divided in different ways.   Or indeed having multiple  
20          economists at all covering the competition issues.   So  
21          we will not allow the introduction of for example  
22          Shapiro and Noble.   It has to be one or the other.  
23          Equally Padilla or Snyder, one or the other not both.

24                 As regards the technical experts, we understand that  
25          there are different areas of expertise and it seems

1 inevitable we are going to need different experts on  
2 those. We appreciate the difficulties in getting  
3 an agreed factual statement drafted. What we propose is  
4 that Andrews and Williams should go first on the issues  
5 they cover followed by Ingers because on the issues  
6 addressed by Andrews and Williams it seems to us that  
7 those are likely to be less controversial and more  
8 susceptible of if not agreement then efficiency to be  
9 gained by having one go first.

10 It seems to make sense to have Qualcomm's experts  
11 going first on this given that they have the relevant  
12 expertise. As in Qualcomm, you are the industry player.  
13 So we can see the benefit in sequential evidence on  
14 that.

15 As for Schneider and Melin, we can see that there is  
16 a case for those to go concurrently because there is  
17 likely to be a greater area of dispute.

18 Regarding the competition analysis we do not want  
19 a broad ranging exploration of all of the issues in the  
20 case, which is another reason for not wanting Shapiro.  
21 It seems to me that the issues need to be tightly  
22 constrained with methodologies identified, which we have  
23 for Padilla at least and also so far there seems to be  
24 some statement of what Mr Noble is going to be covering.  
25 It would seem to us logical to have those as the



1 experts, though if you want to come along and say you  
2 want to replace your experts in light of what we have  
3 said then that will be a matter for further discussion  
4 but it seems to us at the moment that the logical  
5 experts would be Mr Noble and Dr Padilla. The scope of  
6 whose evidence has been canvassed already.

7 In terms of sequencing of that, what I am going to  
8 suggest is that the Padilla licence royalty analysis  
9 should go first, because it wouldn't make sense -- given  
10 that has been put forward it wouldn't make any sense to  
11 expect Mr Noble, who I think is going to be the  
12 respondent, to deal with that before he has seen it. So  
13 that should go first.

14 Equally, on the other economic issues relevant to  
15 the competition law case, Qualcomm's position is that  
16 they either don't understand how the case is going to be  
17 made or vigorously dispute it and it would seem to be  
18 most efficient for the Class Representative's expert to  
19 go first. So what we had in mind was that we would  
20 start off with Padilla on the royalty analysis at the  
21 same time as Noble, assuming it remains Noble on the  
22 remainder of the case at the same time, then the  
23 responses to both of those.

24 That is our proposal.

25 It is not apparent to us that any of this at the

1 moment needs to await a large amount of disclosure.  
2 Certainly on the technical issues it is not clear to me  
3 what -- why that needs to wait until the end of the  
4 year.

5 Equally, on the competition issue from what we have  
6 seen so far it is not apparent that that would need to  
7 await for example some of the matters that are being  
8 sought from Apple and Samsung or anyone else. So that  
9 will have a knock on effect on the timetable.

10 I don't -- I think we need currently to be persuaded as  
11 to what of this evidence needs to be shunted out beyond  
12 the disclosure process and what actually could be  
13 commenced in relatively short order. I should just say  
14 this also, in terms of -- we will get on at the end of  
15 the hearing which may be tomorrow to the trial timetable  
16 and trial length, we have in mind that the trial ought  
17 to be capable of being dealt with in four weeks and that  
18 it ought to be capable of being brought forward to  
19 a point from some time mid next year. So we would be  
20 asking for availability from Easter onwards next year.

21 There doesn't seem to be any reason to us why this  
22 should need to wait until 2026, especially when one of  
23 the purposes of dealing with matters with a split trial  
24 is to enable the case to be progressed earlier rather  
25 than later. And particularly given the confined scope

1 of trial 1. So provisionally we are thinking along the  
2 lines of no more than four weeks and then asking for  
3 availability from Easter next year.

4 Now it may turn out that that is too early in terms  
5 of other procedural steps that need to be taken but you  
6 will need to explain that to us.

7 So that is where we have come out on experts. Is  
8 there anything else to go over in terms of the experts  
9 points?

10 MR JON TURNER: My Lady, we will need to think about some of  
11 what you have said on both sides, I imagine,  
12 particularly in relation to the timetable. May I just  
13 come back on two points on the experts related to the  
14 same issue which is the competition economists?

15 MRS JUSTICE BACON: Yes.

16 MR JON TURNER: First, the question of sequencing. You  
17 mentioned the Padilla analysis going first because it is  
18 their self-standing case on abuse and then we can see  
19 what they've said about it. I understand that.

20 So far as the consumer representative going first is  
21 concerned, there are these different elements of the  
22 competition economist case, they have market definition  
23 and dominance and the other, the SEP market and so on  
24 which are issues on which each side has got a positive  
25 case which has been defined on the pleadings.

1 MRS JUSTICE BACON: Yes.

2 MR JON TURNER: So at least in relation to those it would  
3 seem to us that there has to be or should be  
4 simultaneous exchange. I'll come back to the question  
5 of abuse in a moment because in their skeleton argument  
6 all Qualcomm have asked for is we need to go first on  
7 the abuse issues. Certainly before I touch on that --

8 MRS JUSTICE BACON: It may be that there can be further  
9 discussion between the parties overnight as to the  
10 precise sequencing. Obviously Padilla does need to go  
11 first and I would like to sequence the rest in a way  
12 that makes sense and is efficient. The suggestion of  
13 sequential exchange was made particularly in light of  
14 the comments by Mr Jowell as to his understanding of  
15 your case.

16 Now, it may be that you between you can now argue on  
17 the basis you can now agree on the basis of the  
18 clarifications given in this hearing that concurrent  
19 exchange would work but that was our thinking in terms  
20 of the sequencing, that if there was any lack of clarity  
21 as to how the case was going to be advanced, it would be  
22 better for Mr Noble to go first. So perhaps we can park  
23 the issue and come back to it when we are dealing with  
24 trial timetable.

25 MR JON TURNER: Yes. So far as how the case is put is

1 concerned, I was hoping that my explanation today was  
2 giving you a fairly clear picture of how the whole piece  
3 is assembled. I didn't myself hear anything from  
4 Mr Jowell that I wouldn't be able if I didn't do to  
5 respond to in a minute just to explain that point. So  
6 I don't feel that that should be a reason for saying,  
7 well, because the Consumers' Association's case is in some  
8 way ill-defined they need to go first in order to  
9 explain it. It is crystal clear in my submission and  
10 moreover it has been of course trailed in competition  
11 law rulings abroad on exactly the same matters. So the  
12 idea that this is novel or unanticipated is odd. But we  
13 can think about that overnight and I will speak to  
14 Mr Jowell about it.

15 The remaining point is just on the Shapiro issue.  
16 You mentioned in giving your reasons a point that  
17 actually Mr Jowell had raised about, well, we don't know  
18 what his methodology is. The methodologies were  
19 appropriate for experts when they were going to carry  
20 out some quantitative assessment relying on some  
21 particular data source.

22 If you take Dr Padilla where he says he is going to  
23 rely on bargaining theory, there is no methodology  
24 there. He merely talks about the techniques that he is  
25 going to use. It is precisely equivalent and on this

1 issue of the capability of producing anti-competitive  
2 effects, you have a discrete and well defined set of  
3 propositions.

4 MRS JUSTICE BACON: Yes, I mean you have made that argument.  
5 We are not going to allow more than one economist on  
6 each side on the competition -- more than one  
7 competition economist on each side in a trial of this  
8 compass. If you want to come to the court and say you  
9 want Professor Shapiro to deal with everything, then  
10 that would need to be explained and that application  
11 made.

12 You have made an application for Professor Shapiro  
13 to be brought along in addition to Mr Noble and we don't  
14 accept that. At the moment we have -- you have set out  
15 what you think Mr Noble ought to be covering, we don't  
16 think it is necessary to have Professor Shapiro in  
17 addition to that. It seems to us that the competition  
18 theory is something that is capable of being dealt with  
19 by Mr Noble in the same way that on Qualcomm's side our  
20 view is that the exclusionary case is -- to put it  
21 another way, Dr Padilla is perfectly capable of dealing  
22 with the exclusionary case and we don't want them to  
23 have two experts either.

24 MR JON TURNER: Understood. My Lady, that is understood.

25 Finally, and I think it is implicit in the ruling

1           you have just given, we are parking the trial 2 side of  
2           it and the experts completely at this point.

3   MRS JUSTICE BACON:   Yes.  We are not making any decision as  
4           to the experts on trial 2.

5   MR JON TURNER:   My Lady, I have nothing else.

6   MRS JUSTICE BACON:   Yes.  Anything else from you?

7   MR JOWELL:   The first is if the other side do decide to  
8           change horses and go with Shapiro rather than Noble of  
9           course as you indicated a moment ago they will need to  
10          apply for that and to provide a proper methodology of  
11          what it is that they propose Professor Shapiro to  
12          address.

13   MRS JUSTICE BACON:   Yes.

14   MR JOWELL:   If it is to be different.

15   MRS JUSTICE BACON:   In your case I think it would be very  
16          difficult for to you change horses because you have  
17          already explained what you want Dr Padilla to do but  
18          equally if you want to come along and say you want to  
19          switch Dr Padilla for Snyder then you will have to  
20          make that application.

21   MR JOWELL:   I am grateful.  I think we can assume -- we will  
22          to have speak to Dr Padilla formally but I expect he  
23          will have no difficulty covering the areas using the  
24          method that Professor Snyder anticipated would cover.

25                Just one other point, if I may.  On the last

1 occasion at the last CMC the Tribunal raised the  
2 question of whether there would be any objections to any  
3 of the experts. We take it that there are no -- it is  
4 agreed that there will be no objections taken to the  
5 experts on the basis of independence or expertise but if  
6 it is necessary to flush that out further then it is of  
7 course desirable that should be flushed out at an early  
8 stage as the Tribunal indicated on the last occasion.

9 MRS JUSTICE BACON: We really wanted to know if either of  
10 the parties had objections to the experts that were  
11 proposed by the other side on the grounds that you have  
12 just mentioned. Obviously we don't want to end up in  
13 a situation where the issue is raised for the first time  
14 at trial.

15 MR JOWELL: That was what we understood. For our part, we  
16 are prepared to give that confirmation provided it is  
17 mutual. Equally we are prepared to provide detailed CVs  
18 if it's necessary for that to be done.

19 MRS JUSTICE BACON: Well, the experts are well known in  
20 their fields. Do either of you say that you need  
21 further information before you can be comfortable with  
22 the independence or expertise of any of the experts on  
23 the other side? If so, what further information do you  
24 need?

25 MR JOWELL: We are prepared to agree to that on a mutual



1 basis.

2 MRS JUSTICE BACON: All right. Mr Turner?

3 MR JON TURNER: We are perfectly happy with Dr Padilla, whom  
4 we know well. In relation to the technical experts, we  
5 are not familiar with them and so at least  
6 an explanation of their backgrounds and connection with  
7 Qualcomm would be very helpful to us before we lose the  
8 opportunity to make any such point.

9 MRS JUSTICE BACON: All right. Well, do you want the  
10 Tribunal to order that that's provided on both sides,  
11 an explanation?

12 MR JOWELL: Absolutely. It doesn't need to be on the  
13 competition economists but the other experts.

14 MRS JUSTICE BACON: An explanation of the background of all  
15 of the technical experts of which there are five in  
16 total and their connection with either of the parties.

17 MR JON TURNER: Yes.

18 MR JOWELL: The only other point I should mention is we do  
19 have some reservations about the speed and compactness  
20 of the proposed trial but it may be that we can get on  
21 to that in due course.

22 MRS JUSTICE BACON: Yes. I wanted to raise that now in  
23 light of where we have got to on the other issues so  
24 that you have time to consider it before the end of this  
25 hearing.

1 MR JOWELL: I am grateful.

2 MRS JUSTICE BACON: By the end of this hearing I mean it  
3 could be tomorrow.

4 MR JUSTIN TURNER: Yes. We would appreciate that.

5 MRS JUSTICE BACON: All right. I think that deals with the  
6 expert issues.

7 I think the next issue on the agenda would be the  
8 Hollington and Hewthorn point.

9 Mr Williams.

10 MR WILLIAMS: My Lady, there is no application before the  
11 court in relation to the Hollington v Hewthorn issue  
12 but obviously the Tribunal is aware that there has been  
13 the decision of the Court of Appeal in Evans and it  
14 seems from exchanges between the parties the issue may  
15 have case management implications so we thought it was  
16 appropriate to put the issue on the agenda even though  
17 there is no specific application arising in relation to  
18 it.

19 MRS JUSTICE BACON: No. Am I right in thinking there was no  
20 application for permission made to the Court of Appeal  
21 in relation to the strike out ruling or was there  
22 an application made?

23 MR WILLIAMS: I don't think there was, my Lady, no.

24 MRS JUSTICE BACON: No?

25 MR WILLIAMS: No.

1 MRS JUSTICE BACON: So the strike out ruling stands?

2 MR WILLIAMS: Well, the strike out ruling stands but the  
3 pleading in this case was simply pleading as to  
4 a proposition of law. Now you may say, Madam, that we  
5 shouldn't really be pleading propositions of law but the  
6 point was pleaded given that the question of the status  
7 of those findings was a hot topic in debate between the  
8 parties so the proposition of law was pleaded and our  
9 short submission in relation to that is that the  
10 Tribunal will at trial need to apply the law as stated  
11 by the Court of Appeal and that is the case whether or  
12 not the pleading as set out in our reply is reinstated  
13 or not.

14 So really the question is: what is the legal  
15 position following the Court of Appeal's decision in  
16 Evans?

17 MRS JUSTICE BACON: The problem is that paragraph 32 of the  
18 judgment on strike out says although *Hollington v*  
19 *Hewthorn* is not binding we find it appropriate to adopt  
20 the same principle in these proceedings which means that  
21 we are adopting the principle that we will not permit  
22 reference to the reasoning and evaluation -- the  
23 evaluative assessments of other courts and tribunals.

24 MR WILLIAMS: Yes, that's right, my Lady. But the Tribunal  
25 reached that conclusion on the basis that it concluded

1           that as a matter of law, the principle in *Hollington v*  
2           *Hewthorn* ought to be applied by this Tribunal.

3           It wasn't a sort of finding --

4   MRS JUSTICE BACON:   In these proceedings.

5   MR WILLIAMS:   Yes, that is right.  But it is a question of  
6           the doctrine of the law of evidence, Madam, and what the  
7           Tribunal has done is reach a conclusion about how the  
8           Tribunal has ruled in relation to the admission of  
9           evidence ought to be applied.  So it is a question of  
10          the construction of the Tribunal's rules.  It wasn't  
11          a discretionary decision about whether a particular  
12          piece of evidence ought to be admitted or not in these  
13          proceedings.  It was a decision on the question of legal  
14          principle going to whether the evidence is admissible.

15                 So the way Qualcomm has approached this is to say,  
16                 well, what the Tribunal has done is in effect decide  
17                 that the evidence shouldn't be given any weight but the  
18                 Tribunal reached that conclusion because it took the  
19                 view on a prior question of law that the evidence was  
20                 inadmissible and we say that that isn't the position as  
21                 a matter of law following the judgment of the Court of  
22                 Appeal.  The evidence is admissible as a matter of the  
23                 proper construction of the Tribunal's rules.

24                 The Court of Appeal said there is no reason for the  
25                 Tribunal to be hidebound by a common law rule of

1           unfairness so one has to go back to what the effect of  
2           the rule is. The Court of Appeal has construed the  
3           rule, the effect of the rule is that the findings are  
4           admissible and on that basis the legal basis for the  
5           Tribunal's conclusion in the strike out ruling has been  
6           overtaken by the Court of Appeal's decision.

7           So I come back to the point, Madam, that when it  
8           comes to the trial the Court of Appeal will need to  
9           apply the law as stated by the Court of Appeal and that  
10          is the case irrespective of the strike out ruling.

11          It is probably important on this point just to look  
12          at --

13       MRS JUSTICE BACON: Is the effect of your submission that  
14          you proceed as if the ruling had not been given?

15       MR WILLIAMS: Well, we had contemplated making  
16          an application to reinstate the pleading. So we hadn't  
17          envisaged we would simply proceed on the basis that the  
18          strike out ruling hadn't been given because we thought  
19          in the interests of clarity it was important to make  
20          that application. Qualcomm made the point and we accept  
21          this that there is an application for permission to  
22          appeal to the Supreme Court in the FX case and we accept  
23          that as a matter of practicality it is not helpful for  
24          us to bring that application forward when the position  
25          is still in flux.

1 MRS JUSTICE BACON: Yes. Isn't this all -- leaving aside  
2 the question of whether your argument has any legal  
3 merit -- it is premature. No application has been made  
4 to reinstate the pleading, we have the Court of Appeal  
5 which could have but did not overrule this Tribunal's  
6 judgment, there was every opportunity for it to say if  
7 it considered the Tribunal's approach to be wrong that  
8 it considered it to be wrong but it didn't do that. It  
9 expressly referred to the Tribunal with approval for  
10 part of the reasoning which it adopted.

11 So in a way, we are -- the Tribunal's ruling stands  
12 unless and until you make an application to reinstate  
13 the pleading on the basis of what you say is the effect  
14 of the Court of Appeal's judgment. You are not going to  
15 do that at the moment so I am not sure it would be  
16 appropriate for the Tribunal to give case management  
17 directions on the basis of an application that you  
18 haven't yet made.

19 MR WILLIAMS: No. I hear what you say about that, Madam.

20 I do emphasise the point though that this was an unusual  
21 piece of pleading because it simply pleaded  
22 a proposition of law. The pleading said reasoned  
23 findings et cetera et cetera may be relied on in these  
24 proceedings and that was pleaded as a proposition as to  
25 the admissibility of the material as a matter of law and

1 with respect to the Tribunal that submission has now  
2 been held to be correct by the Court of Appeal in the FX  
3 case as a proposition of law.

4 Once the evidence -- if one proceeds on the basis  
5 that the evidence is admissible there are then  
6 subsequent questions as to the weight that ought to be  
7 attributed to the findings but those questions of weight  
8 are matters of fact and degree and one can see that from  
9 the decision in evidence.

10 So if the Tribunal had disposed of part of our claim  
11 on the merits then I would accept the point you put to  
12 me that there was a strike out ruling but it was  
13 an unusual proposition because it was in a way  
14 a preliminary issue on a point of law which has now been  
15 overtaken by a decision of a superior court.

16 I hear what you say, Madam, about the prematurity of  
17 the matter. The reason we raised it is simply for this  
18 reason. You indicated in your ruling that practical  
19 consequences would potentially follow from reliance upon  
20 findings of foreign courts or regulators and Qualcomm  
21 has picked up that theme and it has said, well,  
22 irrespective of the question of whether the decision of  
23 the Court of Appeal in FX is binding, the Tribunal  
24 reached these conclusions for practical reasons and  
25 those practical reasons are in play. So we didn't want

1 to let the matter drift because we don't know when the  
2 Supreme Court will make a decision in relation to FX and  
3 so on.

4 One of the steps that the parties have agreed ought  
5 to take place in relation to other aspects of the  
6 evidence in these proceedings is for Which? to identify  
7 the particular documents and so on that it relies on and  
8 findings of fact that it relies on in relation to  
9 decisions of the foreign courts.

10 We make the point that if the law is as stated by  
11 the Court of Appeal in FX, that we ought in principle to  
12 put Qualcomm on notice of reasoned findings that we rely  
13 on for the same purpose so it is on notice of the case  
14 that we advance in that respect.

15 MRS JUSTICE BACON: If all you are saying is that you may at  
16 some point down the line be making an application to  
17 reinstate your pleading and/or more generally to rely on  
18 this in light of what you say is the correct  
19 interpretation of the Court of Appeal and in order that  
20 you don't lose the opportunity in the meantime to  
21 identify what you would seek to rely on, you want to  
22 just crystallise that at a relevant point in time so  
23 that time is not wasted, then we don't need to give  
24 directions for that and it is of course open to you to  
25 do that. That then doesn't prejudge the debate that



1           may be had further on as to what one does with that.

2           But if all you are saying is you would like to give  
3           some more information in the event that you make  
4           an application to revive this, then I don't think it  
5           needs any intervention from the Tribunal, blessing that  
6           or otherwise.

7   MR WILLIAMS: No, I understand that. But we did think given  
8           that it has been a hot topic we thought it was important  
9           to ventilate it so that the Tribunal has visibility both  
10          of the debate and the potential practical consequences.

11   MRS JUSTICE BACON: Yes, all right. Thank you very much.

12          Mr Jowell did you want to say anything more about  
13          that?

14   MR JOWELL: Just two points. One is that I don't think we  
15          need to argue the point now but we say that it is  
16          absolutely clear that this Tribunal in its ruling has  
17          applied the law as found by the Court of Appeal and as  
18          it states in paragraph 23 we are of the view that at the  
19          trial of these collective proceedings it would not be  
20          appropriate to attach any weight to the findings reached  
21          by other courts, tribunals and regulators and it gives  
22          two reasons for that, the second of which the Court of  
23          Appeal expressly approves in evidence. It wasn't even  
24          argued in evidence that this judgment was wrong on its  
25          facts. It was distinguished.

1           So we think that the whole notion that this is  
2           somehow up for grabs is entirely misconceived.

3           That said, we don't object of course to them setting  
4           out reasoned findings with relation to some prospective  
5           application that they might seek to make, although we  
6           think it is a futile exercise. But what we have asked  
7           for are those records of fact which -- that is to say,  
8           things that simply reflect the underlying evidence that  
9           they rely on -- those pieces of evidence are admissible  
10          if it simply says on this date this email said this and  
11          this.

12          We do want to know what bits of those are admissible  
13          and we don't want those to be jumbled up with reasoned  
14          findings which we say have been ruled to be  
15          inadmissible. So if they are to do this exercise that  
16          is fine but it should be separate from the exercise we  
17          have asked for which are the records of fact.

18   MRS JUSTICE BACON: Yes, I can see there is an obvious  
19          reason for doing that.

20          I am not sure there is anything else we need to say  
21          apart from endorsing the point made by Mr Jowell just  
22          now that if you are going to provide additional  
23          references those should be clearly separate --

24   MR WILLIAMS: I understand Madam.

25   MRS JUSTICE BACON: -- from the specific references which

1 Qualcomm have asked for and which it is uncontested are  
2 admissible. All right.

3 MR WILLIAMS: Can I make one other point, Madam, which is  
4 again just to give the Tribunal visibility of this.  
5 We -- leaving aside the debates about the effective  
6 evidence, we fully understand the Tribunal's  
7 observations in its strike out ruling that it is not  
8 going to outsource fact finding to a decision maker in  
9 another court or a regulator and we certainly don't have  
10 in mind relying on findings from regulators to usurp the  
11 Tribunal's function. That is not what we had in mind at  
12 all.

13 What we have in mind is reliance -- potential  
14 reliance on evaluative findings in conjunction with  
15 other evidence where the Tribunal does have the material  
16 before it. I am not going to develop the point now but  
17 we fully see the force of the point the Tribunal has  
18 made and we will obviously take that on board in the way  
19 we present the case.

20 What it does mean to a degree it is going to  
21 potentially be an iterative process if we are right  
22 about the law because obviously the extent to which we  
23 rely on findings may depend on what other evidence is  
24 available to us, which findings corroborate what.

25 But what we can do and what we agree to do is set

1 out the position as clearly as we can at the particular  
2 point in time, which I think will be some time later in  
3 the year.

4 MRS JUSTICE BACON: Good. All right, thank you.

5 MR JOWELL: May I just highlight one other point which is  
6 about timing. If they are seriously going to pursue  
7 this application, it is going to have serious evidential  
8 implications because one of the things that my client  
9 feels very strongly about is it is important to  
10 understand the process by which some of those reasoned  
11 findings of other regulators were arrived at and indeed  
12 the legal status of those other findings, some of which  
13 were overturned on appeal.

14 So if they are going to do this, they do need to get  
15 on with it because we can't have the trial derailed if  
16 they apply and succeed which of course we think they  
17 shouldn't and then we are in a position where it is too  
18 late for us to adduce evidence say about the process  
19 which was adopted before the Korean regulator, for  
20 example.

21 MRS JUSTICE BACON: Yes. So how about if an application is  
22 going to be made it should be made at the next CMC?

23 MR JOWELL: Yes, at the very latest.

24 MR WILLIAMS: The only practical point is the reason we are  
25 holding back at the moment is because of the position of

1 the Supreme Court in Evans. We completely see from the  
2 point of view of moving the issue forward what you have  
3 suggested makes practical sense but if the position on  
4 permission is still outstanding at that stage that could  
5 have a practical impact on the proposal.

6 Our position is that at the moment Evans in the  
7 Court of Appeal represents the law and the reason why we  
8 have raised the issue at all is because we say that is  
9 the law today. We didn't want to precipitate work which  
10 might turn out to be overtaken by events.

11 MRS JUSTICE BACON: Yes, the trial of this case is not going  
12 to be set by reference to the Supreme Court hearing in  
13 Evans, that would be really the tail wagging the dog.  
14 So I think if an application is to be made it should be  
15 made before the next CMC. If at that CMC it is said on  
16 both sides that you both want to defer consideration  
17 until the Supreme Court has ruled then that is something  
18 we will need to consider but -- if that is possible  
19 without de-railing the trial timetable.

20 If it is necessary to just get on and decide it for  
21 the purposes of the trial timetable then we will have to  
22 do the best we can at the time as matters stand on the  
23 basis of the Court of Appeal.

24 MR WILLIAMS: Thank you, Madam. We are not trying to put it  
25 off. The point was made that there is a pending --

1 MRS JUSTICE BACON: Yes, of course.

2           So I think the order beyond saying that if any  
3 application is going to be made it should be made in  
4 time to be heard at next CMC I don't think it is  
5 necessary or even appropriate for me to make any order  
6 at this stage. But you have obviously heard my comments  
7 that in terms of the information that is provided it  
8 should be separated out. Thank you.

9           Then I think the next issue is then Which?'s  
10 applications for disclosure.

11           Applications for disclosure by Mr Williams.

12 MRS JUSTICE BACON: On that I have a list of six. The first  
13 of those is the rule 63 applications and it seems common  
14 ground that those can wait until trial 2. Or at least  
15 until there is some consideration of preparing for trial  
16 2. I think the suggestion is that the applications  
17 should be made at the next CMC, is that still the  
18 position?

19 MR WILLIAMS: Well, no. That was I think the Tribunal's  
20 provisional indication when we were debating  
21 timetabling previously.

22 MRS JUSTICE BACON: Yes.

23 MR WILLIAMS: But our suggestion was that if the Tribunal is  
24 splitting the trial partly to save cost and work  
25 associated with the quantum issues then logically that

1 would point to deferring disclosure applications  
2 relating to pass on until after trial 1.

3 The point we made is that seemed to be  
4 a particularly strong point to make in relation to third  
5 party disclosure. The parties have been put on notice  
6 of the application so there should be no document  
7 preservation issues there. They know the application is  
8 live. On that basis -- I think there was a joint letter  
9 or a joint position which indicated everyone made the  
10 point generally and we reiterated the point in our  
11 letter last week.

12 MRS JUSTICE BACON: Yes. Mr Jowell or Mr Saunders, I am not  
13 sure, are you content this should be parked generally?

14 MR SAUNDERS: I think so, my Lady. The only issue is the  
15 there is the point you will have seen we asked there is  
16 still a dispute about whether we should be kept in the  
17 loop on the communications.

18 MRS JUSTICE BACON: Yes, we will come on that. That is  
19 a separate point but in terms of timing I think we are  
20 happy. All right. We aren't then dealing with the rule  
21 63 applications.

22 Then there are the section 1782 applications.

23 MR WILLIAMS: Yes, that is really for the Tribunal's note to  
24 a degree, it is not an agenda item. If the Tribunal  
25 wanted to hear about them we could answer questions but

1           we have simply made the Tribunal aware they have been  
2           made, what they cover and the potential timescale for  
3           that.

4   MRS JUSTICE BACON: I wasn't suggesting making any order in  
5           relation to that but is there anything to be said about  
6           timing and how those applications interrelate with the  
7           trial timetable or other aspects of disclosure or  
8           evidence?

9   MR WILLIAMS: There is nothing specific to say beyond the  
10          general points that have been made in the submissions so  
11          far which is to say that the timing is to some degree  
12          uncertain but it is realistic to think that the  
13          application will take a year possibly more. We  
14          understand the Tribunal's position in relation to the  
15          way in which this Tribunal's timetable will interact  
16          with those applications, we've simply provided you with  
17          the information.

18   MRS JUSTICE BACON: Yes. How much of the evidence sought in  
19          those applications has a bearing on trial 1?

20   MR WILLIAMS: Well, I think part of the basis for our split  
21          trial proposal was that some of the evidence isn't  
22          needed for trial 1. Other evidence would be relevant  
23          for trial 1. Whether we have it in time is a different  
24          question, Madam.

25   MRS JUSTICE BACON: Yes.



1 MR WILLIAMS: But obviously we have endeavoured to move it  
2 forward with a view to obtaining the evidence and  
3 I think it is probably appropriate to come back to the  
4 specifics of that when you talk about timetable later on  
5 or tomorrow.

6 MRS JUSTICE BACON: Is there anything you want to say about  
7 that?

8 MR SAUNDERS: Just in terms of timing there is a bit of  
9 concern about that. Obviously the 1782 applications in  
10 the US are out of the Tribunal's hands and we have heard  
11 the time estimates they have raised. It does seem to us  
12 there are issues there that do go to trial 1 on my  
13 learned friend's case particularly because there are  
14 things like (inaudible) the FTC proceedings thereafter,  
15 where quite a lot of collection of documents from those  
16 proceedings they want to get from the filed 1782s.

17 Just saying they don't need that for the first trial  
18 that is one thing but that is not how we have understood  
19 those applications.

20 MRS JUSTICE BACON: I didn't understand Mr Williams to be  
21 foreswearing anything either. What he said is that some  
22 of it wasn't needed for trial 1 but some of it would be  
23 relevant but it was a different question as to whether  
24 it would be obtained in time depending on when trial 1  
25 is scheduled.

1 MR SAUNDERS: Yes, I think so. It does interrelate with the  
2 timing point. The other issue which I am not entirely  
3 clear about is the extent to which one can slice up the  
4 1782 in a way that some of it goes faster than the other  
5 part but that is a matter for my learned friends.

6 MRS JUSTICE BACON: Is there a possibility of accelerating  
7 the section 1782 application insofar as it relates to  
8 material required or desirable for trial 1?

9 MR WILLIAMS: Well, it is certainly right to say that some  
10 of the material that would be relevant to trial 1 is  
11 what we described as pre-packaged material because it is  
12 material that relates to the FTC proceedings. Some of  
13 the other material is not of the same nature. Without  
14 going too much into internal thinking one can see on the  
15 face of the application that there were different  
16 categories and different considerations apply to  
17 different categories, Madam, so it will be a matter for  
18 US counsel in dealing with that application to see where  
19 that goes but that is one way in which the applications  
20 could go, yes.

21 MRS JUSTICE BACON: So I don't need to make any order in  
22 relation to that. What is next? On my list I have the  
23 Korean material.

24 MR WILLIAMS: Yes, madam.

25 So I am going to make the application under three

1 headings, Madam. There is quite a lot of ground to  
2 cover and I will try and take it as quickly as I can.  
3 But the three headings are: what we are applying for and  
4 why. Under that heading I will cover the relevance of  
5 the material as well as our particular reason for  
6 pursuing this set of documents in the wider context of  
7 the case.

8 The second heading is: legal principles, which  
9 I hope will be a short topic because the principles are  
10 well established and Mr Turner in particular has  
11 recently dealt with a similar application in the PSA  
12 case. The crux of the point is the Tribunal clearly has  
13 jurisdiction to order disclosure. It is a question of  
14 discretion.

15 On that basis the third heading is: discretion.  
16 There are four points going to the exercise of  
17 discretion. One, the implications of disclosure under  
18 Korean law and the risk there will be adverse  
19 consequences for Qualcomm and the Tribunal see we say  
20 the risk of adverse consequences for Qualcomm is  
21 theoretical because it's based on the premise that the  
22 confidentiality ring will fail to do its job.

23 Secondly and relatedly, there is Qualcomm's  
24 suggestion that the disclosure should be subject to  
25 a cross undertaking in damages which we say is superfluous

1 given the protections of the confidentiality ring.

2 Thirdly, Qualcomm says there are other ways for  
3 Which? to obtain the material. I will deal with that.

4 And fourthly there is the suggestion that the  
5 application is overly burdensome and I will deal with  
6 that.

7 What are we applying for and why? The Tribunal is  
8 aware that Qualcomm was the subject of enforcement  
9 action in South Korea, the basis of which was very  
10 similar to the case advanced in these proceedings.  
11 Action was taken at three tiers; the Korean Fair Trade  
12 Commission, Seoul High Court and Supreme Court, and an  
13 infringement which is very similar to that which we  
14 allege was materially upheld at the conclusion of those  
15 three tiers of decision making.

16 We will look at the decision of the KFTC in a few  
17 moments but there isn't any dispute about the overlap  
18 between the Korean case and the present case and as  
19 a result Qualcomm has already given us disclosure in  
20 relation to the South Korean proceedings. So the  
21 question at this stage is how far back disclosure rules  
22 go.

23 Just to recap on what we have had so far, because  
24 I think that is important to understand, last January  
25 the Tribunal ordered that Qualcomm should disclose

1 documents and exhibits referred to in the decision of  
2 the KFTC and the Seoul High Court but that disclosure --  
3 I won't take you into all of this material unless you  
4 indicate you would like to see it, Madam, that  
5 disclosure was subject to the caveat that it only  
6 included such documents to the extent that they were  
7 within Qualcomm's control and Qualcomm's position for  
8 a long time was that the documents which we now seek  
9 which is essentially third party produced material are  
10 not within its control so they were carved out. I am  
11 going to come back to that point in just a moment.

12 After the hearing last January, Qualcomm provided  
13 its disclosure report and that provides a good summary  
14 of what else Qualcomm has in relation to the Korean  
15 proceedings and I do think it is just worth turning that  
16 up. The annex to the disclosure report is at  
17 supplemental bundle 1, page -- I think it is tab 6,  
18 page 4288. 63, sorry. Not tab 6.

19 Sorry, just go -- tab 64. Just go back a page.  
20 Paragraph 7.17 and 7.18.

21 (Pause).

22 MRS JUSTICE BACON: Yes. So Qualcomm disclosed around 500  
23 documents.

24 MR WILLIAMS: Yes, that's right. What one can see from 7.17  
25 is that they have a body of exhibits and submissions

1 relating to KFTC from third parties arising from  
2 different tiers. From 7.18 they only disclose that  
3 material to the extent it was publicly available or  
4 otherwise within Qualcomm's possession. So they  
5 excluded material that they only had -- third party  
6 produced material they only had as a result of the  
7 proceedings and at that time their position was that the  
8 material wasn't within their control.

9 I won't take up time going to it. At the last  
10 hearing the Tribunal had evidence from Ms Thomas in her  
11 third statement where she set out the proposition that  
12 the material wasn't within Qualcomm's control and it  
13 won't be lost on the Tribunal that Qualcomm doesn't take  
14 that point any more. So the basis on which they  
15 resisted this disclosure previously has fallen away.

16 The way this developed was very close to the last  
17 CMC we received the statement from Qualcomm's Korean  
18 lawyer Mr Choi who has also given evidence for this  
19 hearing. That was one of the statements that was  
20 submitted very late and the Tribunal actually excluded  
21 it because it was provided so late. But once we  
22 received that it was clear to us there was nothing in  
23 the control point but the point crystallised too late  
24 for to us make the application at the last CMC which is  
25 why we have brought it back now.

1           So the order that was made in July provided for  
2           Qualcomm to disclose all documents and exhibits relating  
3           to the Korean proceedings which are not referred to in  
4           the decisions i.e. going further than the order made  
5           in January but with a carve out for third party  
6           confidential material.

7           In fact we say that given that the material is in  
8           fact within Qualcomm's control that is not contested any  
9           more. Qualcomm is already in default of the order made  
10          last January for disclosure of all documents referred to  
11          in the KFTC decision and in the Seoul High Court  
12          decision. Because if the documents are within their  
13          control they should have disclosed them pursuant to the  
14          order made then. But the application we make today does  
15          go somewhat further than that.

16          So what are we applying for today? Essentially what  
17          the application is seeking to do is to reverse the carve  
18          out that was ordered in July in paragraph 5 of the  
19          order -- disclosure order made in July as it relates to  
20          the Korean materials. Qualcomm has given us disclosure  
21          of all documents and exhibits which it provided to the  
22          KFTC and the Korean courts, it insisted on a carve out  
23          for third party material, which is said to be within its  
24          control and on the basis that the material is within its  
25          control we say that that carve out should be reversed.

1           What we are now dealing with is a series of quite  
2 different arguments going to the question of discretion  
3 and we say that they are all weak arguments on the  
4 question of discretion.

5           Really the effect of our application would be to  
6 bring the position in relation to third party material  
7 into line with the position with Qualcomm material. So  
8 we will get the exhibits and the submissions on both  
9 sides of the argument.

10           We have a draft order that is at core bundle,  
11 section B, tab 4. 134. Paragraph 1 of the order deals  
12 with this topic and the core of it is in subparagraphs  
13 (a) and (b) which deal with exhibits and submissions --  
14 briefs and other submissions. Then there are three  
15 slightly ancillary categories.

16           (c) is reference materials. Qualcomm has told us  
17 that in the Korean proceedings additional reference  
18 materials were provided by various parties including  
19 third parties and Qualcomm characterised this as  
20 indirect evidence. It includes, for example,  
21 authorities and other precedents and so on. We say  
22 there is no reason why that shouldn't be provided.

23           (d) is a list of exhibits in the Seoul High Court  
24 proceedings. This hasn't been provided to us because we  
25 are told that even the disclosure of this list would be



1 in breach of the duty of confidence. We say that would  
2 be a useful resource and we don't think it is plausible  
3 that disclosing a list would breach a duty of confidence  
4 but if the argument isn't made out for the substantive  
5 documents it is not going to be made out for that list  
6 either.

7 And (e) deals with unredacted records and  
8 transcripts of hearings between the Seoul High Court  
9 which Qualcomm has also told us it has and that would  
10 potentially include records of evidence given in the  
11 Seoul High Court proceedings.

12 Finally, (f) is a sweep up provision which seeks  
13 copies of any documents or parts of documents which have  
14 previously been withheld on the basis of the carve out  
15 which we say ought to be reversed at this point.

16 Why are we applying for the material? I am going to  
17 make three outline points and then show you a few points  
18 in the KFTC decision.

19 The first point is the close similarity between the  
20 case made in South Korea and the case brought in these  
21 proceedings. The KFTC made findings which are very  
22 similar to the allegations which we advance and those  
23 findings were materially upheld by the courts. And we  
24 seek core material relating to the Korean case, exhibits  
25 and submissions which will assist us in understanding

1 the evidence put before the KFTC and the Korean courts  
2 and the way the case was argued by parties other than  
3 Qualcomm itself. As we only have the Qualcomm side of  
4 that at the moment.

5 MRS JUSTICE BACON: Why do you need to understand that? The  
6 case here is the case that is being put here. I am not  
7 sure why it is relevant for you to seek to understand  
8 the way in which the case was put in another  
9 jurisdiction. Because after all, we have to assess the  
10 case on the basis of the material before us, that is the  
11 Hollington v Hewthorn point.

12 MR WILLIAMS: Yes. So breaking that down, the exhibits will  
13 be substantive evidence and so we say that this is  
14 a source of evidence on which we may wish to rely for  
15 the purposes of our claim. The way that process would  
16 work is if we obtain documentary evidence, for example,  
17 through this file and we put that evidence to the  
18 Tribunal it will be evidence which the tribunal will be  
19 able to appraise for itself.

20 I think the Tribunal -- your point, Madam, probably  
21 applies more to submissions. As far as submissions are  
22 concerned this is material, in particular third party  
23 material, which would demonstrate the position taken by  
24 third parties in relation to the conduct and the effect  
25 the conduct had on them. We say that will be a useful

1 resource in understanding the documentary evidence.

2 I will show you in a minute that a number of the  
3 parties who were affected by the conduct actively  
4 participated in those proceedings and their position as  
5 to how they perceived the conduct and what they say the  
6 impact of the conduct was on them, those are relevant in  
7 these proceedings too, Madam. So it would be to  
8 contextualise the exhibit.

9 The primary point is I think the exhibits are  
10 substantive evidence which the Tribunal would then  
11 appraise for itself.

12 The second point is that the application is  
13 targeted. It is not a wide ranging fishing expedition.  
14 It is focused on a closely defined category of core  
15 material that was probative in the Korean proceedings  
16 and in particular material that was identified as having  
17 the status of an exhibit which we say gives it  
18 a particular probative status. We are not asking for  
19 wide ranging searches going to issues the application  
20 seeks documents which have a particular evidential  
21 significance.

22 MRS JUSTICE BACON: That is not the way it is framed. You  
23 are asking for unredacted copies of all exhibits filed  
24 by the KFTC and third parties, all briefs filed, other  
25 submissions made. You are asking for essentially the

1           totality of the documents and submissions filed by both  
2           the KFTC and third parties in the Korean proceedings.

3   MR WILLIAMS: Well, again breaking that down, paragraph (b)  
4           is all briefs filed and other submissions. Part of the  
5           reason we put it in that way is because otherwise we are  
6           requiring Qualcomm to parse the documents and consider  
7           the submissions and work out which have substantive  
8           relevance and which have, for example, procedural  
9           relevance.

10           One could narrow that down to briefs and submissions  
11           which set out that parties' position on the issues of  
12           substance in the proceedings. But given the complaints  
13           and concerns that have been expressed about reviewing  
14           the material we thought that putting the application in  
15           that more general way was appropriate. But that could  
16           be narrowed down on a relevance basis, I accept that.

17           The previous point, which is exhibits. We do say  
18           that a document that has been identified as having the  
19           status of an exhibit in the proceedings does mean that  
20           the document has a particular significance and of course  
21           what happened here is that the proceedings occurred as  
22           part of the regulatory process at first instance and  
23           then they went up through the courts.

24           In my submission, the identification of a document  
25           as an exhibited court proceedings by definition suggests

1           one isn't just seeking access to the file in that sense.  
2           What one is seeking is documents that were given that  
3           particular significance and status in the proceedings as  
4           they went through the court.

5           In my submission, what we have sought is not over-  
6           inclusive. If you think about it by comparison to the  
7           debates that we were having in July about the FTC file.  
8           The FTC file contains many millions of documents and  
9           what was required in relation to that disclosure was  
10          electronic search based disclosure, search terms and all  
11          the rest of it. We are not asking for any kind of  
12          onerous process of that sort. We are simply asking for  
13          these documents, the limited category of documents that  
14          are available to Qualcomm, which we understand is about  
15          a thousand, to be taken off the shelf.

16       MRS JUSTICE BACON: You understand this is about a thousand  
17          documents?

18       MR WILLIAMS: That is what Mr Choi says in his most recent  
19          witness statement.

20       MRS JUSTICE BACON: That is the totality of what you are  
21          asking for under paragraph 1 of your draft order?

22       MR WILLIAMS: Well, we have put it in paragraph 1 and they  
23          have said it is a thousand documents. So it is nothing  
24          like asking for the whole FTC. If one thinks about the  
25          volume of material the Tribunal was grappling with

1 in July, it is a different universe, Madam.

2 MRS JUSTICE BACON: What about the unredacted records and  
3 transcripts of hearings before the SHC. Why are those  
4 needed in addition to all of the briefs filed and  
5 submissions?

6 MR WILLIAMS: Well, I can give an example of that. I can't  
7 be exhaustive, Madam, because I don't have complete  
8 visibility but we know, for example, that when we look  
9 at the KFTC decision you will see the discussion of NLNC  
10 was focused on two particular case studies which were  
11 Samsung and LG. And LG participated in the court  
12 proceedings -- sorry, participated in the proceedings at  
13 all three levels and an LG witness gave evidence in the  
14 Seoul High Court and we anticipate that evidence will  
15 be captured in a transcript.

16 So it may well be that there is an awful lot of  
17 material that is argument and which we wouldn't in due  
18 course trouble the Tribunal with at all but we would  
19 hope to be able to extract from that material additional  
20 substantive evidence that the Tribunal would then be  
21 able to take into account.

22 That is the second point. It is targeted.

23 The third point is that this is a focused and  
24 proportionate way for Which? to obtain material relating  
25 to third parties to the extent that it is within

1 Qualcomm's control. The reasons why we want to see  
2 material produced by the KFTC will be obvious. It is  
3 the regulator that pursued a similar case and for  
4 example the KFTC's exhibits one would anticipate would  
5 be highly probative evidence.

6 And we say that it is also important for us to see  
7 the evidence adduced by third parties and as I have said  
8 the submissions made explaining that position in  
9 relation to the conduct.

10 I mentioned a moment ago that there are those two  
11 heads; the KFTC materials and the other third party  
12 material. The KFTC material will obviously reflect the  
13 case which was pursued by the regulator and it is  
14 important to make this point. The evidence will relate  
15 to dealings between Qualcomm and a range of third  
16 parties.

17 That is important because as things stand, the main  
18 source of material we have in relation to parties other  
19 than Apple and Samsung is disclosure arising from these  
20 regulatory decisions. The categories of disclosure that  
21 were ordered at the last CMC were in some respects  
22 focused on Apple and Samsung but the conduct wasn't  
23 focused solely on Apple and Samsung and to make  
24 an obvious point the refusal to license strand of the  
25 conduct was obviously focused on chipset makers not

1 Apple and Samsung, not in that category as OEM handset  
2 manufacturers in any event.

3 So if one is seeking to understand the basis for  
4 these decisions and to get to grips with the evidence  
5 which supported those decisions, that broader picture is  
6 relevant both in relation to RTL and NLNC. So as I have  
7 already said, this application is a focused and targeted  
8 way to obtain that broader picture in circumstances  
9 where there are limits on our ability to obtain third  
10 party material.

11 A number of third parties were actively involved in  
12 the Korean proceedings and many submitted evidence.  
13 Intel, MediaTek, Huawei and LG all participated in the  
14 High Court proceedings. So that is two chipset  
15 manufacturers and two OEMs. And of those four, all but  
16 Huawei also participated in the Supreme Court decision.  
17 So we know they were actively engaged and they have --  
18 there is material they produced that can usefully bear  
19 on the Tribunal's consideration of these issues.

20 I have already made the point -- we know that there  
21 is a significant body of material because Qualcomm  
22 itself has said there will be 1,000 documents, which in  
23 my submission is a material but proportionate volume of  
24 material for us to be seeking.

25 Just to look briefly at the KFTC decision. It is



1 supplementary bundle 1, tab 53, page 1561 and if I can  
2 pick it up at page 1594. The structure of this decision  
3 is that it sets out the factual background for --  
4 MR JUSTIN TURNER: Sorry, could you give me the reference  
5 again?  
6 MR WILLIAMS: Supplementary 1, page 1594.  
7 MR JUSTIN TURNER: Which tab?  
8 MR WILLIAMS: 53.  
9 MR JUSTIN TURNER: Thank you.  
10 My page 1594 looks different.  
11 MRS JUSTICE BACON: Do we need the previous page?  
12 MR WILLIAMS: It starts at paragraph 66.  
13 MRS JUSTICE BACON: Yes. Could we have the page before  
14 that?  
15 MR WILLIAMS: Did I misspeak?  
16 MRS JUSTICE BACON: I have 1594.  
17 MR SAUNDERS: We are on 1594.  
18 MR WILLIAMS: That does say 1593, which is troubling.  
19 PROFESSOR MASON: There is a discrepancy on the numbering.  
20 MR WILLIAMS: I am sorry.  
21 PROFESSOR MASON: If you read out the first words of the  
22 paragraph you are referring to that will make sure we  
23 are all in the same place.  
24 MR WILLIAMS: What I wanted to explain was that the  
25 structure of this decision, you can see at the top, is

1 the knowledge, facts and bases. So what you have for  
2 the different forms of conduct is a discussion of the  
3 factual material and then a bit later on one sees the  
4 discussion of the conduct. I wanted to explain to you  
5 the structure.

6 What I am going to do is just show you what I would  
7 describe as the case studies of the different forms of  
8 conduct. What I wanted to show you the shape of the  
9 case and why the material that would fall within the  
10 application is relevant. I am not going to show you  
11 lots of footnote references to documents because the  
12 focus of this application is not on documents referred  
13 to in the decision. That's what was dealt with  
14 last January.

15 So if one moves on to in my bundle 1597 but it is  
16 paragraph 77.

17 Okay, so one sees there conduct 1 refusing to  
18 license or imposing restrictions on licences for  
19 cellular communications/SEPs with competing modem  
20 chipset makers. That corresponds very directly to  
21 the RTL part of the case which Mr Turner explained  
22 earlier on. And what one sees there is a general  
23 description of the conduct.

24 If you then move on to 1600 you can see a series of  
25 case studies. The first is the case of MediaTek. I am

1 not going to take you through the detail I am simply  
2 illustrating how the decision is put together. 1611,  
3 which will be 1610, there is an example of Samsung.  
4 1618 here and then in the other cases.

5 So the way the decision is put together is one has  
6 general findings about the conduct and then a number of  
7 case studies and some of those case studies relate to  
8 third parties who as I have said were directly involved  
9 in the proceedings.

10 This conduct by its nature relates to third party  
11 chipset manufacturers so Qualcomm has suggested we  
12 should only get disclosure in relation to Apple and  
13 Samsung. In my submission, that really doesn't make any  
14 sense in the context of this part of the case at all.

15 Just to give you a sketch in relation to conduct 2,  
16 this starts at page 1618 in this bundle. The bottom of  
17 the page, demanding: conduct 2, demanding handset makers  
18 to execute and perform patent licence agreements as  
19 a condition to supplying modem chipsets. Again, that  
20 corresponds very directly to the NLNC part of the case.  
21 The discussion here is somewhat more brief but the  
22 structure is similar.

23 If we go forward a page, one can see a table which  
24 identifies the major handset producers as identified by  
25 the KFTC itself and if it helps the Tribunal the last

1 entry, Foxconn, is manufacturer for Apple, that is why  
2 one doesn't see Apple in that table.

3 On to page 1621, there were again two case studies.  
4 The first is LG and the second is Samsung, if one moves  
5 on a few pages. Of those two OEMs, Samsung is obviously  
6 central to our claim. The other example, LG, we say is  
7 illustrative of the conduct which was perpetrated  
8 against OEMs and the Tribunal may not recall but we  
9 looked at -- our reply at the last hearing was we plead  
10 reliance on the LG example in our reply. As part of  
11 fleshing out our case this wasn't isolated conduct, this  
12 was part of a market-wide strategy.

13 If we jump ahead in the decision from the factual  
14 discussion to the findings on illegality, page 1694,  
15 this is a redacted version but what one can see again in  
16 405 and 406 is reference to particular OEMs. I am  
17 afraid I can't give you the names. I thought those  
18 names would be visible on your version, they are visible  
19 on mine. Perhaps because this is a version for the  
20 hearing the names have been redacted, but you can see  
21 the OEMs and their position in relation to the conduct.

22 I will pause there. When the case reached the Seoul  
23 High Court, the case did in fact go wider than this  
24 because the application of conduct 2 to other parties  
25 was addressed. I won't take the Tribunal to it in the

1 interests of time but the Seoul High Court also  
2 addressed the position of others including Sony, ZTE,  
3 Lenovo and Huawei, and there are pleaded points in  
4 relation to all of those OEMs through the RFIs that were  
5 exchanged last year and to which responses were provided  
6 in September.

7 Qualcomm challenged us to explain why it is that we  
8 relied on conduct relating to other OEMs and we set out  
9 our position in our RFI response which is at  
10 supplemental bundle 1, tab 10, and the explanation is  
11 around 388.

12 There was in fact an issue before the Seoul  
13 High Court as to whether the court was entitled to find  
14 that the conduct was wider than the KFTC had found i.e.  
15 whether it could bring in these broader examples and the  
16 court found it was entitled to do that.

17 So the overall point is that the case the Korean  
18 case is addressing the same form of abusive conduct on  
19 which we rely which was deployed against a range of  
20 OEMs. There is a third head of conduct, which I won't  
21 go into. That differs somewhat from the way we put the  
22 case and in fact that aspect of conduct wasn't upheld on  
23 appeal but I wasn't going to go into that for present  
24 purposes. The key point is that conduct 1 and 2  
25 correspond very closely to our case and those findings

1           were upheld.

2           So overall, the reasoning relates to a course of  
3           conduct implemented vis à vis a range of parties and  
4           disclosure of the material will provide us with  
5           an important source of evidence in relation to that  
6           wider case and it is a focused and proportionate way of  
7           giving us access to that material. We already have the  
8           Qualcomm side of the case, this would provide us with  
9           the material relied on by the KFTC itself and the third  
10          parties.

11          It is probably appropriate for me to just deal  
12          briefly at this point with the suggestion that the  
13          disclosure should be limited to Apple and Samsung which  
14          is a point that Qualcomm have made. I have already  
15          addressed this to a large degree.

16          First of all, the RTL conduct by its nature wasn't  
17          focused on those two OEMs so the point doesn't make any  
18          sense in that context. Secondly, the fact that the NLNC  
19          case studies are Samsung and LG doesn't make the  
20          decision irrelevant to Apple. It is the same conduct  
21          and that is why disclosure has been given in relation to  
22          this decision to date and I have already made the point  
23          this application isn't just another way of pinpointing  
24          evidence about Apple and Samsung, it is a focused way of  
25          obtaining evidence on a broader basis going to findings

1 made by a regulator in a closely related precedent.

2 I do want to make this slightly wider point. The  
3 Tribunal is aware that Which? has faced challenges  
4 getting hold of relevant evidence relating to third  
5 parties. This is a case in which the conduct occurred  
6 internationally but we say it has significant  
7 implications for UK consumers. Some of the evidence  
8 that we want to obtain can be accessed through Qualcomm  
9 but other elements can't be.

10 Just to flesh that out slightly. We have  
11 encountered difficulty obtaining third party material  
12 relating to the FTC proceedings, both in terms of  
13 Qualcomm's control of that material and in terms of the  
14 risk of sanctions imposed by the US courts. We have  
15 applied for some third party material in this Tribunal  
16 which we discussed before I made these submissions but  
17 that is first of all in relation to issues of pass on  
18 and it is subject to considerations of territoriality.

19 We have applied for other material in the United  
20 States but those applications are only made against  
21 Apple and Samsung and they are focused precisely because  
22 in that case we are seeking disclosure on an extra  
23 territorial basis. So we are trying to capture the  
24 evidence we need to bring forward this case on behalf of  
25 consumers. The Korean material is an opportunity for

1 Which? to obtain relevant third party material directly  
2 from Qualcomm being a defendant to these proceedings and  
3 in our submission it is the appropriate first port of  
4 call for disclosure and for us to obtain that material  
5 in a practical and proportionate way.

6 Although I make the application on the basis of  
7 orthodox disclosure authorities which we will look at in  
8 just a minute, I do submit that the application is  
9 supported by the purposes and aims of the collective  
10 proceedings regime because there is in my submission  
11 an imperative for the Tribunal to grant our application  
12 to facilitate a claim for redress by UK consumers in the  
13 context of this kind of international complex fact  
14 pattern, which does nevertheless have implications for  
15 UK consumers.

16 Some of the evidence we would ideally want to obtain  
17 may be beyond the shores but this evidence isn't. It is  
18 available through the exercise of the Tribunal's  
19 jurisdiction and in my submission the Tribunal should  
20 take the opportunity to make it available to us.

21 MRS JUSTICE BACON: All right. Shall we break there for  
22 five minutes if you are going to then come on to the  
23 legal principles?

24 MR WILLIAMS: Exactly, Madam.

25 MRS JUSTICE BACON: I think we will need to speed up



1 significantly because I would like to deal with this  
2 point today, if possible.

3 MR WILLIAMS: Yes. I have done the slow bit I think, Madam.

4 MRS JUSTICE BACON: Right. You have set the scene so  
5 hopefully we will be able to be a bit shorter going  
6 forward. Thank you very much. Five minutes.

7 (3.19 pm)

8 (A short break)

9

10 (3.30 pm)

11 MR WILLIAMS: Madam I have reached the (inaudible)  
12 principles. I will take them out or not take them out  
13 depending on whether it will assist the Tribunal.  
14 I don't think I am going to say anything very surprising  
15 or controversial although I do want to look at the Al  
16 Wazzan case which my learned friend relies on. Shall  
17 I make my submissions about Bank Mellat and PSA? And if  
18 the Tribunal wants to look at anything it can do.

19 MRS JUSTICE BACON: Yes, all right.

20 MR WILLIAMS: The authorities we rely on are Bank Mellat and  
21 PSA and we say once the question of control is cleared  
22 out of the way, as it has been, it is clear the Tribunal  
23 has jurisdiction to order disclosure of this material  
24 notwithstanding that it might infringe a foreign law.  
25 The question is one of discretion and there are

1           essentially three questions: what is the nature of the  
2           prejudice on which Qualcomm relies? What is the true  
3           extent of that prejudice or the risk of that prejudice?  
4           Which may range from a theoretical risk to a likelihood  
5           or anything in between. And then the Tribunal must then  
6           balance that risk against the importance of permitting  
7           inspection of the material for the fair disposal of the  
8           case.

9           I have made my submissions on one side of the  
10          balance and in my submission there is not very much on  
11          the other side of the balance.

12          Classically in these cases the risk of prejudice is  
13          the risk of prosecution under a foreign law and in  
14          general terms obviously the risk of a prosecution is  
15          a serious matter but Bank Mellat and PSA illustrate that  
16          even a risk of prosecution will not be given weight if  
17          it is a theoretical or low risk and that even a risk of  
18          prosecution can be mitigated by disclosure into  
19          a confidentiality club.

20          Now there is no risk of prosecution in this case.  
21          Qualcomm have cited the Al Wazzan case as authority for  
22          the view that other serious prejudice may suffice. It  
23          isn't clear that that is what Mr Justice Henshaw decided  
24          in Al Wazzan. And I will just show you that very  
25          briefly. It is authorities 26. Page 1274.

1           You can see here it says: risk of prosecution or  
2 other prejudice. 152 says:

3           "there are two main strands to the applicant's  
4 arguments under this heading."

5           And then 153 says:

6           "there is an actual risk that they will be  
7 prosecuted".

8           Then if you then jump to 154 on the next page it  
9 says:

10          "secondly, in addition to the risk of prosecution  
11 the applicants risk restrictions on their right of  
12 access ..."

13          Then it says:

14          "although the Bank Mellat line of cases focuses on  
15 risks of prosecution other forms of serious prejudice of  
16 this kind must also be taken into account when deciding  
17 whether to require disclosure".

18          It isn't clear whether that is Mr Justice Henshaw  
19 recording the submission because he has set out the  
20 arguments or whether he is making a finding. The reason  
21 I say that is because if you look in 155 he says I do  
22 not find those submissions persuasive. Then towards the  
23 end of paragraph 156 he says --

24 MRS JUSTICE BACON: I think it is clear it is a submission  
25 because he says in 152 there are two main strands to the

1 argument. 153, first the applicant submits, secondly at  
2 154. So he is recording the submission.

3 MR WILLIAMS: Then he says at 156: a real risk of  
4 prosecution or arguably other prejudice. So I think  
5 that again fortifies the idea that what he is recording  
6 above is a submission.

7 I am not arguing our position on the basis that  
8 anything other than a risk of criminal prosecution is  
9 irrelevant in principle because I don't need to go that  
10 far but we do say there is an obvious difference between  
11 potential criminal sanctions and civil sanctions in two  
12 respects.

13 First of all, simply in terms of the severity of the  
14 matter, the seriousness of the matter. And secondly, in  
15 terms of the conditions that would need to be satisfied  
16 because a civil remedy will depend on proof of loss and  
17 that is certainly the evidence in relation to this case.

18 As I have said we know even the risk of criminal  
19 prosecution can be mitigated in these cases by the use  
20 of a confidentiality ring, that is Bank Mellat  
21 paragraph 63.5, and we say that is even more clearly the  
22 case where one is dealing with a risk of breach of  
23 confidence because that is precisely how this Tribunal  
24 deals with the risk of breaches of confidence in almost  
25 every case that it deals with.

1           So we say that even if such a risk can in principle  
2           ground an application to disclosure, we say it merits  
3           really minimal weight in the balance and in my  
4           submission the Korean law is consistent with that core  
5           point.

6           Again, I don't know if the Tribunal has had the  
7           chance to read the evidence on Korean law. Again, in  
8           the interests of time I wasn't going to go through it in  
9           detail, I am going to make the submissions. I don't  
10          think anything I am going to say is at risk of  
11          misrepresenting.

12        MRS JUSTICE BACON: Just so we understand it -- the risk of  
13          prosecution here is a risk of civil sanctions and not  
14          criminal sanctions?

15        MR WILLIAMS: It is not a risk of prosecution, Madam,  
16          exactly. It is a risk that civil action will be brought  
17          by a party whose confidence is said to be infringed.  
18          That is my understanding of the position, because the  
19          reliance is placed on the civil code.

20        MRS JUSTICE BACON: Yes.

21        MR WILLIAMS: So the Tribunal has the evidence of Mr Choi.  
22          There are two statements from Mr Choi. Supplemental  
23          bundle 1, tab -- I don't know if you are going to  
24          dispose of this today or if there is any chance of  
25          reserving. I was going to give references but I don't

1 want to waste time. There are two statements from Mr  
2 Choi, one from Ms Lee. I can boil the evidence down to  
3 four points and give you the references, if that is  
4 helpful.

5 The four points are these. The risk, as I have just  
6 said, is liability for a civil wrong under article 750  
7 of the Korean code and the conditions for liability are  
8 intentional or negligent wrongdoing and causation of  
9 loss. That is the first point.

10 Second point is there is a dispute on the evidence  
11 between Mr Choi and Ms Lee. Mr Choi is Qualcomm's  
12 Korean law expert and Ms Lee is Which?'s Korean expert.  
13 There is a dispute as to whether mandatory disclosure  
14 pursuant to an order of this court would be treated as  
15 an intentional or negligent breach of the implied  
16 undertaking.

17 And I can see that the Tribunal may not want to  
18 determine that issue and in my submission it doesn't  
19 need to given the next point which is causation of  
20 actionable loss, but I would make two points.

21 First of all, Ms Lee's view is much more  
22 commonsensical because doing something under an order of  
23 the court is not a common sense or as it's called in  
24 legal logic intentional or negligent wrongdoing, it is  
25 doing something because you have been ordered to do it.

1 Under Al Wazzan in paragraph 52 the court can use its  
2 own intelligence and common sense in considering the  
3 implications of foreign law. Paragraph 52 of Al Wazzan.

4 Secondly and perhaps even more significantly Mr Choi  
5 cites no precedent to support his view and there is no  
6 precedent for proceedings having been brought on this  
7 sort of fact pattern. So we say it is very doubtful  
8 whether there would be any wrong under the civil code at  
9 all.

10 Third point, even if there were intentional or  
11 negligent wrongdoing, the risk of action against  
12 Qualcomm would depend on proof of actionable loss and  
13 this is where we say the point really breaks down  
14 because here disclosure would be into a tightly  
15 controlled confidentiality ring. The material would  
16 then be treated as confidential as necessary in the  
17 proceedings. So the risk that any loss would be caused  
18 to the owner of the information in my submission is  
19 theoretical or at most very low.

20 Those acting in the case are all experienced  
21 professionals, the Tribunal's practice routinely depends  
22 on confidentiality rings working in this way to protect  
23 the confidence in material of this nature. I am not  
24 aware in the history of the Tribunal there has ever been  
25 an action for breach of confidence or breach of terms of

1 a confidentiality ring so one has a sort of theoretical  
2 risk at the level of the Korean law and a theoretical  
3 risk in terms of the practice of professionals acting in  
4 this Tribunal.

5 The fourth point really is -- it is a point I have  
6 made but no precedent has been cited where disclosure  
7 under an order of a foreign court has given rise to  
8 actionable loss and a claim for breach of the implied  
9 undertaking of confidence. We say that absent any  
10 precedent or practical support for the suggestion that  
11 prejudice may follow we say that the risk is somewhere  
12 between theoretical and very low.

13 So that is the first argument and in my submission  
14 it is the main issue and there is nothing in it.

15 MR JUSTIN TURNER: There may presumably be material that is  
16 highly confidential as against Qualcomm in these  
17 exhibits.

18 MR WILLIAMS: Highly confidential as against Qualcomm?

19 MR JUSTIN TURNER: Yes. If it concerns negotiations with a party  
20 that position internal documents for a position a party  
21 has taken in negotiations which Qualcomm might not be  
22 aware of at this stage.

23 MR WILLIAMS: That is right but the material could be  
24 disclosed into a confidentiality club consisting of  
25 external lawyers and experts in the first instance. And



1           that is -- that does happen in relation to the most  
2           sensitive material in proceedings of this nature all the  
3           time.

4   MR JUSTIN TURNER:  Yes, of course.

5   MR WILLIAMS:  And in that situation it is impossible to see  
6           how any loss could be caused.

7   MR JUSTIN TURNER:  Would you propose third parties have  
8           an opportunity to make representations as to  
9           confidentiality?

10  MR WILLIAMS:  I beg your pardon.  Ms McAndrew has just told  
11           me these are documents that are already in Qualcomm's  
12           possession as a result of the Korean proceedings.

13  MR JUSTIN TURNER:  In Qualcomm's possession or its legal  
14           advisers?

15  MR WILLIAMS:  I mean Qualcomm in the broader sense.  We  
16           don't know on what basis that material has been provided  
17           to Qualcomm, I don't think, at this stage but there  
18           could be no objection to the material being made  
19           available in these proceedings on the same basis as it  
20           was made available to Qualcomm in the Korean  
21           proceedings.

22           As I say, in accordance with the practice of this  
23           Tribunal it is normal for the most sensitive material to  
24           go into an externalised confi ring.  Indeed that is what  
25           happened to a great deal of the material in the US

1 proceedings which is why we can't access it because that  
2 material is not available. So disclosure to the  
3 participant in the ring in my submission it is  
4 a theoretical risk that that would cause loss.

5 That is a matter that even if there was a notional  
6 risk it is a matter that could be addressed through the  
7 terms of the ring and ensuring they don't go further  
8 than the equivalent arrangements in Korea.

9 So having dealt with the main argument in terms of  
10 the risk of a breach of confidence I will deal with the  
11 second issue which is Qualcomm's argument that there  
12 should be a cross undertaking in damages over and above  
13 the protections of the confidentiality ring.

14 I mean, just to go back on that point. The risk of  
15 prejudice that Qualcomm identifies is not the risk of  
16 disclosure into the ring would cause prejudice to it.  
17 The risk it identifies in its evidence is the risk that  
18 the confidentiality ring could fail and there might be  
19 leakage. That is the particular point we make and that  
20 is the point we say is theoretical.

21 MRS JUSTICE BACON: Yes. So cross undertaking in damages.

22 MR WILLIAMS: So I mean we say again there is nothing in  
23 this point. The basis for our argument that disclosure  
24 should be permitted is that the only risk to Qualcomm is  
25 the risk of breach of confidence and there are effective

1           protections in place to address the confidentiality of  
2           the material and we say if the Tribunal accepts that  
3           argument as the basis for exercising its discretion to  
4           order disclosure, there is no basis for a cross  
5           undertaking over and above the confidentiality ring  
6           which itself forms the necessary protection and the  
7           reason why disclosure is permitted.

8           And it is important to recall Which? is a charity  
9           bringing this action on a representative basis on behalf  
10          of consumers. The idea it should now give a cross  
11          undertaking in damages in favour of its defendant in  
12          support of disclosure is obviously going to put up  
13          barriers to Which? exercising its functions in the  
14          public interest and we say there is just no  
15          justification for that and instead it will have the  
16          effect of stymying the claim.

17          Indeed this case is really no different from many  
18          other cases where disclosure of third party material  
19          into a ring is ordered in circumstances where there may  
20          be a question as to whether that would infringe -- give  
21          rise to a technical breach of confidence in another  
22          jurisdiction. So really there would be a slippery slope  
23          with this sort of point if it was admitted in this case  
24          and there is no justification for that.

25          The third point made by Qualcomm is that there are

1 alternative routes for Which? to obtain the disclosure.  
2 There is a general response to this and then a number of  
3 specific points. The general response is that Qualcomm  
4 is the defendant to these proceedings and if there is no  
5 strong reason why it shouldn't give disclosure within  
6 its control -- relevant disclosure within its control --  
7 it should do so.

8 Qualcomm shouldn't be excused from giving  
9 disclosure, relevant disclosure which it can make  
10 available and put Which? to a great deal of effort  
11 seeking to obtain documents from elsewhere which may or  
12 may not succeed just to mitigate a risk which as I have  
13 said doesn't merit weight in the first place, that is  
14 the general response.

15 The specific responses go to the three routes by  
16 which Qualcomm says we could get the material. The  
17 first point they make is that we could apply against  
18 Apple and Samsung in the United States under 1782 but we  
19 are not only seeking material relating to Apple and  
20 Samsung, as I have explained, and the applications we  
21 have made against Apple and Samsung are for material we  
22 can't get from Qualcomm as the defendant to the claim.  
23 It is backwards for Qualcomm to suggest that we should  
24 be going against third parties for material we can get  
25 from Qualcomm.

1           The second possibility, they say, is that we try and  
2 work out from the court's filing system what documents  
3 each third party has and approach each one individually  
4 to ask them to provide the material voluntarily. We say  
5 even on its face that is not a practical suggestion. It  
6 is completely speculative to think that we will get the  
7 material that way. The likelihood is that we won't and  
8 it is obviously not more appropriate to require us to do  
9 that rather than ordering the defendant in the  
10 litigation to provide the material.

11           The third suggestion is that we apply to the Korean  
12 courts and I just wanted to clear something up on the  
13 expert evidence here because it is not clear that  
14 Mr Choi understands that Ms Lee agrees with him about  
15 how this would work. There is agreement between the  
16 experts that in principle article 162 of the Korean  
17 civil code could be available in relation to interested  
18 parties in litigation and there is agreement I think  
19 that the test would be a high one, which is that Which?  
20 would need to show a legitimate and compelling reason  
21 for the disclosure.

22           And I think it is also common ground that third  
23 parties would have a right of objection. So one comes  
24 back to the point I have already made, there is nothing  
25 at all to suggest those criteria would be met. Mr Choi

1 doesn't say that they would be met. He can't know what  
2 third parties would say, he doesn't opine on the  
3 likelihood the court would grant the application. We  
4 say it is just speculation and even if legitimate and  
5 compelling interests were made out, the third party  
6 could simply refuse consent.

7 Putting it at its lowest the alternative routes are  
8 complicated, unpredictable and there is a strong chance  
9 they wouldn't work out after what is likely to be a very  
10 considerable effort. In contrast we know that Qualcomm  
11 can disclose this material to us within a reasonable  
12 timeframe.

13 The final complaint then is that the request is  
14 burdensome because it says Qualcomm can only disclose  
15 this material by downloading each document individually  
16 from an electronic filing system. We are told there are  
17 1,000 documents, we say that is a material number but it  
18 is far from huge by the standards of litigation like  
19 this and as I have explained it is important core  
20 material which there are strong reasons to make  
21 available to us. It is really unclear to us why this  
22 should take two months -- why that process of  
23 downloading should take two months, which is what  
24 Mr Choi says about it.

25 In any event, the task isn't excessive, it's not

1 disproportionate and on that basis we ask the Tribunal  
2 to grant the disclosure.

3 MRS JUSTICE BACON: Thank you.

4 MR SAUNDERS: Can I just pick up few points by way of  
5 background? And I will come on to the substance of our  
6 individual objections.

7 The starting point in this is that my learned friend  
8 made various submissions about refusal to license and  
9 various other things. Refusal to license as applied to  
10 third parties i.e. people other than Apple and Samsung  
11 is outside of this case. It is not a freestanding  
12 abuse, they have disclaimed that. It is only in as  
13 a buttressing of the NLNC allegations.

14 Now, this is not a case by a regulator it is a case  
15 in damages and it relates to causation of loss they say  
16 to the UK consumer class as a result of overcharges to  
17 Apple and Samsung. That is what we are concerned with.  
18 We are not concerned with the position of third parties  
19 or at least those are of peripheral importance, relative  
20 to the core issues in relation --

21 MRS JUSTICE BACON: Yes. There will be some third party  
22 material there. We wondered whether it might be  
23 possible to splice it up but actually I think it would  
24 take more time for any paralegal to go through and try  
25 and fillet out the material that is not related to Apple

1           and Samsung than it would just to hand it all over and  
2           then have an argument about relevance.

3   MR SAUNDERS: My Lady, I think what we would say about that  
4           is actually there is an important point of principle  
5           here which is that we are not -- it is a question of  
6           scope, as much as anything else. At the last CMC the  
7           Tribunal heard submissions about whether there should be  
8           third party negotiations or not. One of the points made  
9           in relation to that is this is not a regulatory action,  
10          this is a damages claim. That was refused in a rather  
11          short -- I can take my Lady back to the ruling.

12   MRS JUSTICE BACON: There is a difference between asking for  
13          documents to be found which relate to third parties and  
14          saying: please can I have this stack of documents of  
15          which some might be material relating to third parties,  
16          granted. But the question is whether you try and fillet  
17          out that. I think that is a different issue, really.

18   MR SAUNDERS: Well, it isn't because there we were dealing  
19          in particular with the FTC documents. So in my  
20          submission it is actually a very similar question of  
21          approach because it is a question of whether it is  
22          appropriate -- or whether this material is sufficiently  
23          probative to the issues in dispute in this particular  
24          claim to warrant when you are taking that balancing  
25          exercise into account, whether it is necessary to take



1           it into account, you look at how probative this material  
2           is.

3           To take the example -- sorry, my Lady.

4   MRS JUSTICE BACON: How much of this material is likely to  
5           be outside the compass of this litigation?

6   MR SAUNDERS: My Lady, take for example my learned friend  
7           was talking about the transcript of an LG witness who  
8           gave evidence before the Seoul High Court. What does  
9           that have to do with the price of fish? The question  
10          is: how do you approach the evidence as it comes  
11          through? Do our witnesses then need to deal with LG  
12          documents, issues dealing with Qualcomm documents and  
13          our relationship with LG? So the question is: does as  
14          it were in the circumstances having made that ruling to  
15          confine the scope of the disclosure in relation to  
16          negotiation material what we say is that that is  
17          an appropriate course and should be applied to this too,  
18          as a matter of principle. I will come on to address the  
19          document numbers because there is some submissions on  
20          that too.

21          So the position in the order as it was made back  
22          in July is that so paragraph 5 of that order --

23   MRS JUSTICE BACON: Just to be clear, are you proposing that  
24          someone should go through all of this and weed out the  
25          material that doesn't relate to Apple and Samsung? That

1 is going to be an additional layer of work rather than  
2 just simply saying: here is a stack of documents on the  
3 server, download them all and hand them over.

4 MR SAUNDERS: All of them have to be downloaded one by one,  
5 they have to be reviewed but then we have to notify  
6 third parties who may make an objection. So I mean this  
7 process is -- if anything actually there is  
8 an efficiency because if it is limited to Apple and  
9 Samsung it means we don't have to engage third party  
10 confidentiality issues with LG, MediaTek and various  
11 others. So there is an efficiency in procedure albeit  
12 for the sake of the review that needs to be carried out  
13 at the point of download.

14 I will come on to address you on the amount of time  
15 it takes but it is not -- there isn't a pre-existing off  
16 the shelf block of material. It has to be downloaded as  
17 you have heard one by one, then the third parties have  
18 to be notified.

19 MRS JUSTICE BACON: Are you saying you wouldn't have to  
20 notify Apple and Samsung?

21 MR SAUNDERS: Well, I think if we were to provide the Apple  
22 and Samsung material that is one thing because obviously  
23 they are subject to disclosure applications in relation  
24 to these proceedings both here and in the US. That is  
25 another point which I make.

1 MRS JUSTICE BACON: Why would that mean the notification was  
2 any different?

3 MR SAUNDERS: We would have to notify them for this purpose  
4 as well but that is only two counterparties and not,  
5 whatever it is, six or seven.

6 Just to clear up the position in relation to the  
7 number of documents. The original disclosure schedule  
8 you were taken to slightly was out of date. There were  
9 500-odd at that date. In November 2023 there are  
10 another 4,762 documents produced from the Korean  
11 proceedings.

12 MRS JUSTICE BACON: So what is the total?

13 MR SAUNDERS: So whatever it is 4762 plus I think it is  
14 slightly shy of 500.

15 MR JUSTIN TURNER: Is that exhibits or including submissions  
16 and stuff like that?

17 MR SAUNDERS: They are submissions to the KFTC so not  
18 including exhibits. Not including exhibits.

19 MR JUSTIN TURNER: Not including exhibits. So category 1  
20 would be handling documents. 1A, I mean.

21 MR SAUNDERS: You are talking about the third party  
22 reference materials, exhibits filed by the KFTC and  
23 third parties. I don't think we know because the only  
24 way to get a number is to go through -- we think about  
25 approximately 300.

1           Now, to turn to the basis of the objection. There  
2           are three bases on which we object. As my learned  
3           friend has already picked up that disclosure requires  
4           the first of those is disclosure requires for breach  
5           Korean law and exposure to liability for damages.

6           The second is it is not necessary to get this  
7           material by ordering it from Qualcomm because there are  
8           other ways to get it and as I made the submission  
9           a moment ago this is not a regulatory investigation we  
10          are concerned about the damages claim in respect of  
11          Apple and Samsung, which are the only licensees which  
12          relate to this particular claim.

13          Now, there are extant 1782 applications in respect  
14          of those in the US. There are also the rule 63  
15          applications in the UK. This material can and should be  
16          sought in those applications thereby not putting  
17          Qualcomm at any risk whatsoever in Korea.

18          The final point we take is we say that the requests  
19          are disproportionately burdensome and broad. There is  
20          also a slight wrinkle which I need to address you on  
21          about some of the material which is also protected by US  
22          protection order. We will come on to that in a second.

23          Now the law. I don't think there is very much  
24          between us in terms of the principles established by  
25          Bank Mellat. Generally speaking, the court has to

1           conduct a balancing exercise it has to weigh the risk of  
2           the harm in the foreign state with the importance of the  
3           documents to the fair disposal of the English  
4           proceedings and our submission on that is not only that  
5           that the documents were not, as it were, a unitary block  
6           some are more likely to be more probative than others on  
7           my learned friend's case, quite how as I have already  
8           addressed you on how LG's witness statements in  
9           a different action by a regulator are relevant to the  
10          damages claim in respect of Apple and Samsung where  
11          there is no claim for a RTL abuse on a freestanding  
12          basis is highly questionable so that is a material  
13          factor when you are assessing that balance.

14                 The other point is as it were a preliminary one in  
15          relation to the point of law. Bank Mellat and those  
16          authorities are dealing with a slightly different  
17          situation. Those principles were established in the  
18          context where there was no other way of getting that  
19          material. Bank Mellat was concerned with the provision  
20          of banking data in respect of identifiable customers by  
21          that bank which had been redacted. That was said to be  
22          protected under Iranian law.

23                 But if you look at my learned friend's skeleton  
24          argument at paragraph 40 there doesn't actually seem to  
25          be any dispute that they could go and get the documents

1 from Apple and Samsung. It is not said that they can't  
2 do it, it is just they would rather get it through the  
3 Tribunal from Qualcomm. That is a difference of  
4 principle with the Bank Mellat balancing exercise. How  
5 do you take that into account?

6 Well, we would submit we don't dispute there is  
7 jurisdiction to order this but when you are approaching  
8 this question of a balancing exercise weighing the risk  
9 you also have to take into account the fact that this is  
10 not a necessity. It can be done another way. As it  
11 would appear between the parties, it is not said that it  
12 can't be done by asking for it from Apple and Samsung.  
13 It is said that they would rather get it from Qualcomm.

14 The price of getting it from Qualcomm is to put  
15 Qualcomm at risk. So that engages those authorities in  
16 what we would say is a rather different way.

17 MR JUSTIN TURNER: You wouldn't object to these documents  
18 being obtained if an application was made to Apple and  
19 Samsung you wouldn't object, you wouldn't be opposing  
20 that application?

21 MR SAUNDERS: You mean a 1782 application?

22 MR JUSTIN TURNER: Whatever, whatever application.

23 MR SAUNDERS: I would have to take instructions on that but  
24 yes, you can see if they were minded to make that  
25 application direct from Apple and Samsung then that is

1 a matter for them and there is a very limited basis on  
2 which we could object to the 1782 anyway.

3 MRS JUSTICE BACON: Would you be prepared to undertake not  
4 to object? It is all very well for you to say there is  
5 an easy way to get it 1782 and then if you were to  
6 object in the 1782 procedure then that would block off  
7 that route. Equally, if they were to make  
8 an application for third party disclosure in this  
9 Tribunal would you give an undertaking not to object?

10 MR SAUNDERS: My Lady, I will just take instructions.  
11 I can confirm we wouldn't object.

12 MRS JUSTICE BACON: To either a 1782 application or  
13 an application to this Tribunal?

14 MR SAUNDERS: That's correct.

15 MR JUSTIN TURNER: Those documents can be identified.

16 MR SAUNDERS: So the list of documents -- there is an index.  
17 Yes, so the Korean -- so they are on a sort of Korean  
18 docket system and so an index of those materials can be  
19 identified.

20 MR JUSTIN TURNER: So we could order you to provide those  
21 today. We could order Apple and Samsung subject to  
22 their position to make them available today in any  
23 event, if they were here that is.

24 MR SAUNDERS: I think it would be for my learned friend to  
25 make that application but I can confirm that we wouldn't

1 object to it.

2 As I say, that is when you are looking at the  
3 present application before the Tribunal, that is  
4 a fundamental point of distinction between the Bank  
5 Mellat line of authority.

6 MRS JUSTICE BACON: Are you saying in order to hand over the  
7 material that is in your hands you would procedurally  
8 have to ask for Apple and Samsung for their comments and  
9 any objections?

10 MR SAUNDERS: Yes because it is subject to confidentiality  
11 obligations to Apple and Samsung before our proceedings.

12 MRS JUSTICE BACON: Is that an objection to providing it or  
13 --

14 MR SAUNDERS: It is for them to take a point if they choose  
15 to do so. That is not a point for us.

16 MRS JUSTICE BACON: What would be the consequences of them  
17 objecting if we ordered for to you provide it anyway?

18 MR SAUNDERS: Well, my Lady, it would be that we would have  
19 to come back before the Tribunal to address you as to  
20 whether you should assist in that order. But that is  
21 a matter for them, not us.

22 MRS JUSTICE BACON: Section 1782 applications made, do those  
23 include this material in any event or not?

24 MR SAUNDERS: So the existing 1782 applications do not as  
25 I understand it include this material.



1 MRS JUSTICE BACON: All right. So the existing 1782  
2 application doesn't extend to this?

3 MR SAUNDERS: No, it doesn't. The scope of that application  
4 was a matter for the Class Representative. I think as  
5 you know we have been asking for some time for that to  
6 be made and to be clarified. But they have elected for  
7 whatever reason not to include it at present but there  
8 is no reason why they couldn't seek it via that method.

9 MRS JUSTICE BACON: If you say Apple and Samsung could  
10 object anyway and come back to the Tribunal, one way or  
11 the other are we not ending up in the position where the  
12 Tribunal may need to hear from Apple and Samsung and  
13 whether we use the route of this application or a rule  
14 63 application against Apple and Samsung, ultimately we  
15 end up in the same place and it is a question of the  
16 route that is followed to get there.

17 MR SAUNDERS: Well, it is not so there is a fundamental  
18 distinction between the two in that this route the  
19 present application puts Qualcomm at risk of civil  
20 liability under Korean law. The Tribunal, if it chooses  
21 to hear this via a rule 63 application obviously subject  
22 to who the respondent to that application is or the US  
23 courts via a 1782, Qualcomm doesn't incur any risk of  
24 liability in relation to that. The courts will order  
25 whatever they order and I can -- I have already

1 confirmed that we are not going to take a point.

2 MR JUSTIN TURNER: So there are two different classes of  
3 documents potentially. Let's assume there are Apple  
4 documents that you are in possession of anyway in the  
5 ordinary course of business which happen to be exhibits  
6 in the Korean proceedings.

7 MRS JUSTICE BACON: I think those have been handed over  
8 already.

9 MR SAUNDERS: So this is where the slight wrinkle comes in,  
10 that some of this material, understandably, is also  
11 subject to a US protective order and we are not in  
12 a position to provide it, because the same exhibit  
13 appears also in Korea, because we can't hand it over  
14 subject to the US protective order. So that is the  
15 wrinkle I mentioned a second ago in relation to the US  
16 protective order.

17 MRS JUSTICE BACON: So that applies -- does that prevent you  
18 handing this over in any event?

19 MR SAUNDERS: Not all of it. I think that is only just  
20 where some of the documents, as it were, within the Venn  
21 diagram of both the US protective order and also the  
22 Korean position as well.

23 MR JUSTIN TURNER: Even documents that pass between you in  
24 the ordinary course of business, between you and Apple?

25 MR SAUNDERS: I think that is a very small subset of the

1 overall material. I am not going to suggest that is  
2 a major part of it, but it is a concern on our part that  
3 we can't provide material when we are also going to be  
4 in a difficult position in the US.

5 Again, the solution to that is make the application  
6 to the US court so they can make a ruling and get on  
7 with it. That is what Which? seeks to do in the 1782s  
8 more generally in relation to the FTC proceedings,  
9 because they want to get that material released,  
10 notwithstanding the protective orders that exist.

11 MRS JUSTICE BACON: All right. So you say, essentially, all  
12 of this could be obtained through either or both of the  
13 section 1782 application or a rule 63 application, and  
14 you wouldn't object to either of those?

15 MR SAUNDERS: That is correct.

16 MRS JUSTICE BACON: Right.

17 MR SAUNDERS: That is, as it were, the second point.

18 The first point -- and also we made the point about  
19 the fact that it is also possible to file an application  
20 in relation to the Korean court, which doesn't seem to  
21 be a point of dispute (inaudible).

22 The first point, preliminary point, is that we say  
23 that disclosure would expose Qualcomm to civil liability  
24 under Korean law. My learned friend has already  
25 referred to the evidence on that, Mr Choi's first

1 statement. It may be worth very briefly turning that  
2 up, if we can just quickly turn it up. It is the  
3 supplemental bundle, page 1383. If we can pop that on  
4 the screen. That is the one but not the bit I was  
5 after. Look at paragraph 10 on the previous page.  
6 Thank you.

7 So what that establishes is that there is, firstly,  
8 during the KFTC investigation, there was a substantial  
9 amount of third party material that was never made  
10 available to Qualcomm. There is no access to the file  
11 in Korea. What Qualcomm did itself was make a 1782  
12 application in the US to try to obtain from those third  
13 parties that material. So that was Qualcomm's solution.  
14 Sorry, that is actually paragraph 9 at the top of the  
15 page.

16 The Korea Free Trade Commission itself intervened in  
17 those proceedings and objected to that. They were  
18 concerned in part about the chilling effect on third  
19 parties cooperating with them in the future and they  
20 were also concerned about using US procedure to bypass  
21 Korean procedure. Now, obviously those are points about  
22 an ongoing set of proceedings where there is an ongoing  
23 investigation which don't apply so acutely here.

24 Also, Qualcomm can't disclose material under Korean  
25 law, there is an obligation of confidentiality which

1 prevents the use other than for carrying out the  
2 litigation for which the material was originally  
3 disclosed. Paragraph 11 of the reports. There are  
4 risks of claims by both parties of liability and  
5 damages, and it is also mandated that the materials are  
6 confidential under Korean law. That can give rise to  
7 an actionable tort under article 750 of the Korean  
8 civil code.

9 There is no dispute about that, about those  
10 principles. If we look at Ms Lee's statement, that is  
11 core, tab 3, page 127. Can we look at page 129.

12 Paragraph 16, at the bottom of the page.

13 "I generally agree with Mr Choi that it is  
14 reasonable to assume recipients of third party material  
15 ... (Reading to the words) ... not at liberty to provide  
16 these documents without Tribunal order or court  
17 decision."

18 She also agrees that there is a risk of claims.

19 So it is common ground between the experts that  
20 there is that obligation, that there is a risk of  
21 claims.

22 She then says that the risk of those claims is low  
23 and she approaches that question of liability as if it  
24 is based on intention or on negligence. Mr Choi  
25 responded to that in his second statement and says that

1 he considered those to be two incorrect propositions  
2 because an unlawful act is not rendered automatically  
3 lawful by order of a foreign court; and secondly,  
4 liability under the Korean civil code for article 750  
5 is established by damages foreseeable. It doesn't  
6 require intention or negligence.

7 So, whilst providing material into the  
8 confidentiality arrangements in place of these  
9 proceedings provides some protection, there is still  
10 a risk. And it is not necessary for third parties to  
11 quantify their loss.

12 So the evidence before the Tribunal is that it is  
13 common ground that that potential liability exists.  
14 There is a dispute between the experts about the extent  
15 of the risk but there is an answer to that in Mr Choi's  
16 second statement, and that is the evidence. His  
17 evidence is that, notwithstanding disclosure into  
18 a confidentiality ring, that that still gives rise to  
19 future liability.

20 Now, what we said about that is, well, we said why  
21 not give a cross undertaking? Because if you think  
22 there is genuinely no risk, put your money where your  
23 mouth is. There is no real satisfactory answer to that  
24 from my learned friend. They say well, Which? is  
25 a charity, we don't obviously dispute that. But this is

1 an action that is funded by litigation funders. One way  
2 to deal with that might to be have the funders to back  
3 an amount capped at a certain figure, say 5 million or  
4 whatever, to cover that potential liability. That could  
5 be organised with the funders.

6 Alternatively, they could just not do it this way at  
7 all and get the material directly from Apple and  
8 Samsung.

9 Insofar as they are after material, as I said  
10 before, that is in relation to third parties like LG, it  
11 is obviously, we would submit, of significantly less  
12 probative importance to this case. That does make the  
13 balancing exercise a different one. Notwithstanding the  
14 fact there is an alternative route available for my  
15 learned friends to obtain the material.

16 The third point we make is that the requests are  
17 disproportionately burdensome. Now, they are not a well  
18 defined and organised set of documents; we don't hold  
19 a significant proportion of the material, it has to be  
20 obtained manually; and they request material produced by  
21 all third parties in all of the phases of the Korean  
22 proceedings, but there is no proper explanation as to  
23 why those documents are likely to be of particular  
24 probative importance to the issues in these proceedings.  
25 We say that, actually, the approach the Tribunal took

1 last time in relation to third party negotiation  
2 documents is the right one.

3 So we say that, against that background, this is  
4 a disproportionately burdensome request.

5 If you are against us, I have various points on  
6 timing which I can address you on, but those are our  
7 submissions on the points of principle.

8 MRS JUSTICE BACON: All right.

9 On timing, if the matter were to be pursued by  
10 a rule 63 application, presuming it came before the  
11 Tribunal at the next CMC or before, how quickly do you  
12 think that that is likely to be resolved in terms of  
13 handing over the documents? If the Tribunal were to  
14 order it at the CMC.

15 MR SAUNDERS: That is a question for the respondents of that  
16 application, Apple and Samsung.

17 MRS JUSTICE BACON: Yes. Okay.

18 MR SAUNDERS: They may have them in a convenient storage,  
19 I am not sure.

20 MRS JUSTICE BACON: All right.

21 MR SAUNDERS: That is ultimately a matter for them.

22 My Lady, I should just explain, the total time  
23 period, in summary what we expect it to take is  
24 approximately two weeks to pull all the material down  
25 and collate it; about a week to issue third party



1           notifications --

2   MRS JUSTICE BACON:  Wait a minute, let me make a note.

3   MR SAUNDERS:  Yes, sorry.

4   MRS JUSTICE BACON:  Two weeks for somebody to pull the

5           material down?

6   MR SAUNDERS:  Two weeks to pull it down, because it has to

7           be done link by link; one week to issue third party

8           notifications; three to four weeks to raise objections

9           and apply to the Tribunal to vary the directions of the

10          confidential ring if necessary; and then about one to

11          two weeks of upload of production via the discovery

12          provided.

13  MRS JUSTICE BACON:  All right.  Thank you.

14  MR SAUNDERS:  Just, again, in relation to the rule 63

15          application, one of the issues that you have already

16          seen is that we haven't got an entirely -- it is a

17          somewhat opaque picture on this side of the courtroom as

18          to exactly what discussions have been had with Apple and

19          Samsung.  I don't know whether they are taking a point

20          that the respondents to those applications, the entities

21          within this jurisdiction, have access to that material.

22          So it may be this is something via the 1782 process

23          rather than the rule 63 process.  That, again, is

24          something that I don't know the answer to because I am

25          not fully appraised of those discussions.

1 MRS JUSTICE BACON: Yes, all right. Thank you very much.

2 Mr Williams?

3 MR WILLIAMS: Just as a starting point, Madam and members of  
4 the Tribunal, I think it probably is helpful to just  
5 look at one paragraph in Bank Mellat in terms of the  
6 framework. It is authorities tab -- sorry, I have lost  
7 the reference -- tab 8 I think maybe. It is page 198 of  
8 the electronic bundle.

9 MRS JUSTICE BACON: Is it 9?

10 MR WILLIAMS: Tab 9, page 198. It is the first paragraph:

11 "In respect of litigation in this jurisdiction, this  
12 court has jurisdiction to order production and inspection  
13 of documents, regardless of the fact that compliance  
14 with the order would or might entail a breach of foreign  
15 criminal law ..."

16 MRS JUSTICE BACON: Which paragraph are we looking at?

17 MR WILLIAMS: 63.1. That is the jurisdiction point.

18 Then 63.2, on the next page:

19 "Orders for production and inspection are matters of  
20 procedural law, governed by the lex forei here, English  
21 law local rules apply; foreign law can't be permitted to  
22 ... (reading to the words)... English procedures and  
23 law."

24 Then I addressed you on the framework.

25 So, this is a matter for the discretion of this

1 Tribunal and, as I submitted earlier, the framework is  
2 that the Tribunal should balance the need for the  
3 material against the risk of prejudice to Qualcomm. On  
4 the basis of that framework, in my submission it is not  
5 appropriate for Qualcomm to overlay on to that balancing  
6 exercise a further requirement that the Tribunal should  
7 interpose a barrier to us getting disclosure if there is  
8 theoretical potential for us to get the disclosure from  
9 elsewhere. I do stress the word "theoretical". The  
10 idea that we can get this material from anywhere else  
11 is, at best, completely speculative and, in my  
12 submission, it is likely to be wrong.

13 The point that has been developed is that we can get  
14 it from Apple and Samsung. I will come back to the  
15 point that we are not only seeking material relating to  
16 Apple and Samsung for good reasons in a minute, but they  
17 are third parties to these proceedings, and of course  
18 the convention in relation to third party disclosure is  
19 that one only seeks disclosure from a third party where  
20 you can't obtain it from the relevant counterparty in  
21 the litigation. So we have properly applied for this  
22 material on the basis that it is within Qualcomm's  
23 control, and on the basis of the framework set out in  
24 Bank Mellat and which was applied in PSA, and we say we  
25 ought to have the disclosure on that basis.

1           On the basis that we can obtain it from Qualcomm and  
2           on the basis that English principles of disclosure  
3           favour giving it to us, there actually isn't a basis for  
4           us to seek it from third party in the proceedings at  
5           all.

6           Even leaving that general point to one side, it  
7           isn't remotely clear that we can get even the documents  
8           which relate to Apple and Samsung from Apple and  
9           Samsung, and that is for this reason: the two  
10          suggestions that have been made are that we could either  
11          apply under 1782 which is a United States form of  
12          procedure, or we could apply in this Tribunal. Now, as  
13          far as this Tribunal is concerned, this Tribunal can  
14          only order disclosure of the material if it is within  
15          the territory of this Tribunal. These are documents  
16          relating to Korean regulatory and court proceedings.  
17          There is really no reason particularly to think the  
18          documents are here and the Tribunal will be aware that,  
19          for the FTC proceedings, we have applied for those  
20          documents elsewhere because we can't get hold of --  
21          well, we don't make the application in this Tribunal.  
22          The documents relating to the American proceedings are  
23          not being pursued in this Tribunal.

24          As far as 1782 is concerned, we make the same point.  
25          These are Korean proceedings documents and it is, in my

1 respectful submission, complete speculation to suggest  
2 that if we make an application in the United States  
3 court, the United States court will make an order in  
4 favour of us for documents which relate to Korean  
5 regulatory and Korean court proceedings. So it is  
6 a completely speculative suggestion, it would involve  
7 putting us to considerable time and effort to pursue  
8 this material with no real level of assurance that we  
9 would obtain the material and in fact the strong  
10 likelihood is that we wouldn't.

11 In my submission, Qualcomm is trying to force us to  
12 make an application elsewhere which is likely to fail  
13 and we will be no further forward. That is quite apart  
14 from the time that would be taken if we were to make  
15 an application in the 1782. I have already addressed  
16 the Tribunal briefly on the likely timescale for the  
17 application that we have made, and we have talked about  
18 the implications of that in terms of the timetable for  
19 litigation. This is material that is accessible to the  
20 defendant of the proceedings and that can be ordered  
21 today. Mr Saunders has addressed you on the likely  
22 timescale for the giving of disclosure if that order is  
23 made. It is obviously not superior, in my submission,  
24 to send us away to make speculative applications in  
25 other jurisdictions on the off chance that that might

1 give rise to the disclosure. It is simply Qualcomm  
2 trying to put off the day.

3 That deals with the suggestion that we can get even  
4 the Apple and Samsung material through other routes.  
5 I have already made the point that this application is  
6 not just about Apple and Samsung. The suggestion that  
7 RTL is not part of our case is wrong. Mr Turner has  
8 already addressed you on that today. Qualcomm does make  
9 tendentious submissions about what our case is.

10 MRS JUSTICE BACON: The point was not made that RTL isn't  
11 part of your case, he was making the point that there is  
12 no freestanding case on RTL as regards third parties  
13 other than Apple and Samsung.

14 MR WILLIAMS: Yes. RTL is a case about rival chip  
15 manufacturers. The point made about Apple and Samsung,  
16 put at its absolute highest, is a point which says  
17 Qualcomm's negotiations with other handset manufacturers  
18 aren't relevant. That is the height of the point. They  
19 can't possibly say that Qualcomm's dealings with other  
20 chipset manufacturers are not relevant to the RTL part  
21 of the case, because that part of the case is, by its  
22 nature, about Qualcomm's dealings with third parties who  
23 are not Apple and Samsung, or at least Samsung in its  
24 capacity as a chipset manufacturer rather than as an OEM  
25 handset manufacturer.

1           We do plead an exclusionary effect in relation to  
2           the RTL policy as buttressing the effects of the NLNC  
3           policy, and Mr Turner addressed on you that today. It  
4           is simply wrong to suggest that third party material  
5           relating to that part of the case is somehow irrelevant  
6           because it doesn't relate to Apple and Samsung. It is  
7           just wrong.

8           As far as NLNC is concerned, you will be aware,  
9           Madam, that -- well, Mr Saunders reminded you that we  
10          had some argument at the last hearing about whether we  
11          ought to get negotiation disclosure in relation to OEMs  
12          other than Apple and Samsung, and the Tribunal didn't  
13          order that disclosure. I have accepted that point in my  
14          submissions. We accept the Tribunal didn't order, on  
15          that occasion, search based disclosure for documents  
16          held within a much wider document set for OEMs other  
17          than Apple and Samsung. I have already made the  
18          submission that we are not seeking that sort of  
19          disclosure here. We are seeking material, focused  
20          material, that related to findings relating to this form  
21          of conduct as part of an important precedent. So it is  
22          a much more targeted, much more focused application.

23          I already made my submissions about the importance  
24          of us being able to obtain that material on a focused  
25          and proportionate basis. It is relevant to our

1 understanding of the abuse, it is relevant to the case  
2 in a general sense, even if the question of causation of  
3 loss ultimately comes down to Apple and Samsung.

4 I mentioned it in my submissions earlier on.  
5 Qualcomm has pressed us on the relevance of the  
6 relevance of Qualcomm's dealings with OEMs other than  
7 Apple and Samsung to our NLNC case. We dealt with that  
8 in an RFI and I will briefly show you that we set out our  
9 position on that in some length.

10 MRS JUSTICE BACON: I just need to tell you, Mr Williams,  
11 that we are going to need to finish at 4.30 pm  
12 absolutely promptly today. We can't sit late.

13 MR WILLIAMS: I won't be very much longer, Madam.  
14 I promise.

15 Supplemental bundle 1, tab 10. The question is at  
16 383. It is request 5 in that RFI.

17 MRS JUSTICE BACON: Next page.

18 MR WILLIAMS: Sorry, previous page. Is it the previous  
19 page? Yes.

20 "Insofar as the class representative places reliance  
21 on allegations that Qualcomm threatened to cut off the  
22 supply of chipsets to OEMs other than Apple and Samsung,  
23 please explain the relevance of such allegations."

24 I won't go through this in detail. Turn on to 388.  
25 We provided a response to this request where we set out



1 the -- yes, it is paragraph 15. Just giving you the  
2 gist, we set out, first of all, the particular examples  
3 of threats to other OEMs that we rely on. Then, if we  
4 go on to the next page, you can see a number of examples  
5 of that. Go on to the next page again. Then we set out  
6 in a number of paragraphs why it is that we say that it  
7 is of relevance that the policy was of industry wide  
8 effect and not simply targeted to Apple and Samsung.

9 So this has been thrashed out, it is now the subject  
10 of developed pleadings, and for Qualcomm to come back to  
11 court to say we are not even allowed access to exhibits  
12 produced in regulatory proceedings which go to support  
13 these core allegations because this is a marginal issue,  
14 in my respectful submission they are just not  
15 acknowledging the fact that we have now set out  
16 a carefully developed pleaded case on this.

17 I have already made the case, these are documents of  
18 a different level of probative value from search based  
19 documents.

20 Just picking up a couple of other points, I think in  
21 the end Mr Saunders' argument about the burdens of the  
22 notification process, that it was a matter of notifying  
23 six or seven parties rather than two parties, in my  
24 respectful submission that is not a weighty  
25 consideration in the context of the wider argument. It

1 is simply a form of notice, for which there is  
2 a precedent in these proceedings. It is the same sort  
3 of process that we followed in relation to disclosure  
4 from the European Commission file. Our draft order sets  
5 out the sorts of process that would need to be followed.  
6 It is well trodden ground, even in the context of these  
7 proceedings.

8 The way Mr Saunders put it, in terms of the extent  
9 of the risk of prejudice, he says, well, there is  
10 a conflict on the evidence as to the extent of the risk.  
11 Really, what he means is Mr Choi has asserted that there  
12 is some risk but, for all the reasons I developed in my  
13 submissions, there is really no reason to think that,  
14 for all the reasons I gave, there is anything other than  
15 a theoretical risk that the disclosure of the material  
16 would give rise to an action against Qualcomm.

17 MRS JUSTICE BACON: Fine.

18 In terms of irrelevance, if you go through the  
19 order, what is the most important out of your list of A  
20 to F?

21 MR WILLIAMS: The exhibits are the most important.

22 MRS JUSTICE BACON: So that is 1A?

23 MR WILLIAMS: Yes, that is the most important material. You  
24 put it to me what is going to weigh with us, the  
25 exhibits are the most important material. We do also

1           certainly need subparagraph F, because that is the sweep  
2           up provision, which is everything previously withheld on  
3           this basis should now be disclosed. Because the  
4           Tribunal did order a year ago that we should have  
5           documents referred to in the decision. We say that  
6           those documents would have to be disclosed now, but  
7           there was also then a further order in July when there  
8           was a carve out. So at a minimum one needs to go back  
9           over that ground --

10   MRS JUSTICE BACON: So 1A and 1F as a minimum?

11   MR WILLIAMS: Those are the priorities.

12   MRS JUSTICE BACON: I am sorry, I am not going to be able to  
13           hear further submissions from you Mr Saunders. We are  
14           obviously not going to finish the point tonight. How  
15           much longer do you need, in terms of minutes?

16   MR WILLIAMS: I only have one other point, which is to say  
17           Mr Saunders raised for the first time this point about  
18           the overlap between the FTC document set and the Korean  
19           document set. I am afraid that is a new point. I think  
20           he said in the end it would only affect a small number  
21           of documents. I think we would like to understand that  
22           a bit better because the first time we heard about it is  
23           from Mr Saunders on his feet. But we understand the  
24           point. Where it goes I am not sure.

25   MRS JUSTICE BACON: All right.

1 All right, I am sorry to cut you off. We are going  
2 to have to leave it there. We will return tomorrow  
3 morning and hear any further submissions on this point  
4 then, if there is anything you want to add overnight.  
5 Then we will -- and if Mr Saunders wants to come back on  
6 something new that Mr Williams has said, that will be  
7 the time to do so. Then we will give a ruling and move  
8 on.

9 Thank you.

10 (4.30 pm)

11 (The hearing adjourned until 10.30 am the following day)

12

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14 Applications for disclosure by .....116  
15 Mr Williams.

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