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5 **IN THE COMPETITION**

Case No. : 1382/7/7/21

6 **APPEAL**

7 **TRIBUNAL**

8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

13 Wednesday 30 March 2022

14  
15 Before:  
16 The Honourable Mrs Justice Bacon  
17 Professor Robin Mason  
18 Justin Turner QC  
19 (Sitting as a Tribunal in England and Wales)  
20

21  
22 **BETWEEN:**

23  
24 Consumers' Association

**Applicant**

25  
26 v

27  
28 Qualcomm Incorporated

**Respondent**

29  
30  
31  
32 **A P P E A R A N C E S**

33  
34 Jon Turner QC, Ciar McAndrew, P J Kirby QC and George McDonald (On behalf of  
35 Consumers' Association)  
36 Mark Howard QC, Tony Singla QC, Nicholas Bacon QC, David Bailey and Alexandra  
37 Littlewood (On behalf of Qualcomm Incorporated)  
38  
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50

1  
2 **Wednesday, 30 March 2022**

3 **(10.30 am)**

4 MRS JUSTICE BACON: Good morning, everyone. These proceedings are being live  
5 streamed so I must start with the usual warning. These are proceedings in open court  
6 as much as if they were being heard before the Tribunal physically in Salisbury Square  
7 House. An official recording is being made and an authorised transcript will be  
8 produced but it is strictly prohibited for anyone else to make an unauthorised recording,  
9 whether audio or visual, of the proceedings and breach of that provision is punishable  
10 as a contempt of court.

11 Mr Turner.

12  
13 **Submissions by MR TURNER QC**

14 MR TURNER: May it please the Tribunal. This is the Consumers' Association's application  
15 for an opt-out collective proceedings order, CPO, in a proposed claim against  
16 Qualcomm.

17 The Consumers' Association is commonly known as Which? And I shall start with  
18 appearances. I appear for the proposed class representative, the PCR, with  
19 Ms McAndrew on the eligibility condition issues and the uncontentious authorisation  
20 condition issues.

21 Mr PJ Kirby QC appears with Mr McDonald on the discrete issue of the adequacy of the  
22 funding arrangements, which is something that goes to the authorisation condition.

23 For Qualcomm Mr Howard QC, Mr Singla QC, Mr Bailey and Ms Littlewood appear for  
24 Qualcomm as my counterparts and Mr Bacon QC is going to be dealing with the  
25 funding issue.

26 In terms of housekeeping, the Tribunal should have six bundles in electronic format and at  
27 your request the core bundle's been provided to you in hard copy. I don't know if you  
28 each have one set of those.

1 The bundles comprise in the core bundle the claim form, Qualcomm's response and the reply  
2 and the expert and factual evidence. The large supplemental bundle, extending to  
3 almost 3,000 pages, has the annexes, exhibits and court orders to date. Then there  
4 is a correspondence bundle, and three authorities bundles.

5 Turning to the road map, there is a timetable for this hearing which was agreed between the  
6 parties, and I believe that Quinn Emanuel will have written to the Tribunal yesterday  
7 after office hours with that proposal.

8 MRS JUSTICE BACON: Yes. We did want to discuss that with you. The costs point seemed  
9 to be relatively short and we wondered if it would be possible to conclude the cost  
10 submissions in an hour and we understand that the reason for pushing this into Friday  
11 is that Mr Bacon isn't available – or somebody from the defendant's team isn't available  
12 today – which we understand, but we are still wondering whether we need an hour and  
13 a half, which has been currently scheduled, on Friday.

14 MR TURNER: Now, my Lady, perhaps we can take advice on that over the short adjournment,  
15 because I think neither Mr Bacon is here today, nor Mr Kirby or Mr McDonald, and they  
16 will be the people who will need to address you on that. So, if we may, we will get back  
17 to you mutually on that after the short adjournment.

18 MRS JUSTICE BACON: All right.

19 MR TURNER: I propose then, subject to that point, to deal with the main issues this morning,  
20 focusing on the key points that have been placed in contention. Qualcomm will then  
21 have the afternoon. We're grateful to the Tribunal for your agenda for the hot tub and  
22 the hot tub will begin, as you've asked, at noon tomorrow and will last about two hours,  
23 including clarificatory questions from counsel at the end, and that will take us to around  
24 3 o'clock. Then the parties will make closing submissions on the hot tub and I'll give  
25 a short reply.

26 The funding arrangements issues will be addressed discretely on Friday morning subject to  
27 the point that, my Lady, you've just made.

1 Now, the way that I propose to organise my opening submissions is as follows. First, some  
2 preliminary remarks. Second, a very brief introduction to the substance of the quantum  
3 case and I'll take you to the draft order. Third, I'll address the relevant legal principles.  
4 Fourth, very briefly I'll look at the uncontentious authorisation condition about which  
5 you need to be satisfied. And fifth, I'll deal with the eligibility condition, which is where  
6 the argument has focused.

7 So, I begin then with the preliminary remarks.

8 This intended collective claim is a stand-alone action for abuse of dominance. At the heart of  
9 the case is that Qualcomm has leveraged a dominant position in the supply of physical  
10 chipsets to force handset manufacturers who need those chipsets, and that includes  
11 Samsung and Apple, to pay artificially high royalty rates in respect of its 4G cellular  
12 patents, and that practice, which is directed at the handset manufacturers, is  
13 buttressed by a second practice. The second practice is that Qualcomm refuses to  
14 license its patents to rival chipset suppliers on an exhaustive basis or subject to  
15 pass-through rights and that prevents rivals from being able to exert competitive  
16 pressure on Qualcomm and drive down the royalties which the customers pay.

17 MRS JUSTICE BACON: Yes. Well, Mr Turner, how much of that is non-contentious, because  
18 I note that Qualcomm says that the characterisation of the arrangement is very much  
19 in contention, and it rejects the acronyms that have been used in the proposed claim.

20 MR TURNER: Well, the substance of the allegations I'm sure will be very much contentious.  
21 The complaint about the acronyms and the use of them I'll deal with in just a few  
22 moments, but we say that the acronyms are a convenient shorthand and there's no  
23 reason to shy away from using them.

24 MRS JUSTICE BACON: When I meant how much is contentious, how much of the description  
25 of the commercial activities is contentious. Obviously, your characterisation of them  
26 as abusive and so on is very much going to be contested, but in terms of the broad  
27 description of what is going on, is that agreed or not agreed?

1 MR TURNER: Well, they will say it's not agreed. I will show you where it has been effectively  
2 accepted elsewhere, that is the practice in fact regardless of how it's characterised  
3 legally.

4 Now, my Lady, Which?'s case is that the royalties which are charged by Qualcomm to the  
5 handset manufacturers are then passed on in the form of higher prices to consumers,  
6 including final consumers in the United Kingdom. Now, we say that the case is solid  
7 and there is no application before you either to strike it out or for reverse summary  
8 judgment.

9 The allegations of anti-competitive practices, you will have seen mirror allegations in cases  
10 brought against Qualcomm by competition authorities in the public interest elsewhere  
11 in the world, and that includes the United States, Korea and Taiwan in particular.

12 It's true, my Lady, that at the outset of their skeleton Qualcomm does describe the  
13 characterisation of their behaviour or, rather, the labelling "no licence, no chips" and  
14 refusal to license other manufacturers as tendentious. But those terms are used  
15 themselves in a number of the foreign decisions and judgments and, as I say, they are  
16 a convenient shorthand. The practices concerned I will show you have been  
17 acknowledged by Qualcomm itself as a fact and it is the characterisation which is  
18 disputed.

19 If we can please turn up Ms Boyle's first statement in support of the order, which you have in  
20 the core bundle at tab 11, page 411. Page 411 is in the body of the statement and if  
21 you have that you'll see towards the bottom "Other material information. Foreign  
22 regulatory action and class actions against Qualcomm".

23 If you then go over a couple of pages to page 413, I'll just pick out two of these foreign  
24 proceedings.

25 I start with the first in time, Korea. Korea is at subparagraph (c) on that page:

26 "... the Korean Fair Trade Commission fined Qualcomm ... for antitrust infringements including  
27 the no licence no chips and refusal to licence policies [in 2016]."

1 And a convenient way to see that is to go to the press release, which you have at supplemental  
2 639, if we can call that up, please.

3 I think it's coming up on the screen in a moment. It's tab 3, 639.

4 So here you have the press release of the Fair Trade Commission and if we can look at the  
5 bottom of the page, please.

6 The practices are described beginning at the very bottom point:

7 "(1) Despite requests by competing modem chipset companies [that's the rivals], Qualcomm  
8 has refused to license, or imposed restrictions on the licence for the cellular SEPs that  
9 are necessary for the manufacture and sale of chipsets."

10 So there is refusal to licence. If we can go to the next page, please, the top:

11 "(2) By linking the chipset supply with patent licence agreements, Qualcomm has coerced the  
12 execution and performance of unfair licence agreements by using its chipset supply as  
13 leverage, while circumventing FRAND commitment."

14 So those are the essential elements that we're relying on here too. Qualcomm did appeal to  
15 the Seoul High Court. That was largely unsuccessful.

16 If we go to the press release, which is at page 666 in this same bundle.

17 There we are, 666.

18 Essentially the two elements that we're relying on or proposing to in this case were upheld.

19 The following year -- I should say that there's a pending appeal to the Korean Supreme  
20 Court.

21 The following year, 2017, I move to Taiwan, the Taiwan Fair Trade Commission fines  
22 Qualcomm for infringements, including both the "no licence, no chips" and refusal to  
23 licence policies, and there was a settlement decision in 2018 which was based on  
24 commitments given by Qualcomm. If we go, please, to the next page, 667 in this  
25 bundle.

26 You'll need to scroll down so we can see the bottom of the page, and commitments 1 to 4  
27 show you the behaviour. 1, to renegotiate the license terms with customers in good  
28 faith. And this is with the Taiwanese handset manufacturers. 2, no termination of chip

1 supply during those negotiations, if the handset manufacturer continues to perform its  
2 obligation. That's the linkage between chipset supply and the licence.

3 If we can go over the page, please, to 3 at the top:

4 "Non-discriminatory treatment with respect to the licensing of cellular SEPs."

5 That's just between Taiwanese manufacturers and others. But 4, the treatment of the chip  
6 suppliers, the rivals in Taiwan, Qualcomm agrees that, upon the request of a chip  
7 supplier, it will offer an agreement.

8 "The agreement provides that Qualcomm will not assert any cellular SEP [standard essential  
9 patent claim] against the chip supplier without first offering it a licence to such claim on  
10 [FRAND] terms and conditions."

11 So, again, same points that we're raising here, settled by commitments in Taiwan.

12 Now if we go back please to page 412 -- I'm sorry, this is in the core bundle. This is where we  
13 were in Ms Boyle's first statement.

14 There were enforcement proceedings also in the United States of America by the Fair Trade  
15 Commission and the story there is that the Fair Trade Commission prevailed in the  
16 District Court antitrust decision of Judge Koh in May 2019. Her ruling was explicitly  
17 based on the "no licence, no chips" and refusal to licence policies but it was reversed  
18 by the 9th Circuit Court of Appeals in August 2020. That reversal was controversial.  
19 On it for the moment please go to Ms Boyle's second statement, which is in the core  
20 bundle, next tab, 12, page 427.

21 If you look at paragraph 30 at the very foot of the page and you read from the bottom line on  
22 that page:

23 "I note that the FTC Appeal Judgment has in fact been subjected to significant criticism from  
24 eminent antitrust scholars ... as a matter of both US law and competition policy. For  
25 example, in the claim form, Which? referred ... to the amici curiae brief submitted by  
26 46 law and economics scholars in support of the FTC's petition for a rehearing of the  
27 appeal en banc."

1 Then a reference to an adverse article by Professor Hovenkamp. And then finally, you will  
2 see the formal statement of the FTC's acting chairwoman which accompanied the  
3 announcement of their decision not to appeal to the US Supreme Court:

4 "Given the significant headwinds facing the Commission in this matter, [they] will not  
5 petition the Supreme Court to review the decision of the Court of Appeals ...  
6 [Qualcomm] continue to believe that the District Court's conclusion -- "

7 Sorry, it should say:

8 "I continue to believe that the District Court's conclusion that Qualcomm violated the antitrust  
9 laws was entirely correct and that the Court of Appeals erred in concluding otherwise."

10 MRS JUSTICE BACON: How much do we have to get into this, because you said anyway in  
11 your claim form that irrespective of the judgment of the Court of Appeal for the 9th  
12 Circuit, which I've briefly looked at, you say that the particular points on the conduct  
13 were upheld or largely upheld?

14 MR TURNER: On the existence of the conduct. That's right.

15 MRS JUSTICE BACON: On the existence of the conduct, yes.

16 MR TURNER: Absolutely.

17 MRS JUSTICE BACON: And its characterisation under the rule of reason, which was in doubt.

18 MR TURNER: Yes, it was most specifically, and I can and will show if necessary, that the  
19 concept that we have in our system of an exploitative abuse directed at customers  
20 according to the US 9th Circuit Court of Appeals doesn't apply there and they were  
21 only focusing on exclusionary abuse directed at rival manufacturers. So for those  
22 reasons they said that the court below had erred. The reason why I mention it only in  
23 that preliminary brief fashion is because I apprehended on the other side it would be  
24 said that this is something that this Tribunal may wish to take into account. But I take  
25 it no further than that. It does feature in one aspect of the skeleton argument advanced  
26 by Qualcomm and I'll come to that as necessary.



1 MRS JUSTICE BACON: And how relevant is it, for example, in looking at the economic  
2 methodology, because I ascertain that part of what's been done is to look at the  
3 hedonic regression that was done in the United States.

4 MR TURNER: It's not relevant to that at all.

5 MRS JUSTICE BACON: That's not relevant.

6 MR TURNER: No, because that goes only to infringement, whereas we're concerned with  
7 pass-on as a contentious point and damages.

8 MRS JUSTICE BACON: So we're not looking at the US for anything other than what you say  
9 were the findings made at first instance, which were untouched or largely untouched  
10 on appeal?

11 MR TURNER: It's the evidential record which we've referred to because Judge Koh in her  
12 judgment, apart from the findings which we make and the characterisations we gave  
13 to it, she described the policies and she referred to the evidence including Qualcomm's  
14 admissions as to what was actually being done, and we refer to that as well.

15 The way that it applies in these proceedings perhaps is also this, that for your purposes today  
16 you need to decide if this is an opt-out or should be an opt-in case if you do grant  
17 certification, and it's established that the strength of the case is relevant in that  
18 connection, although at a high level.

19 MRS JUSTICE BACON: Yes. Well, are you going to come on to that later on, because we  
20 obviously wanted to hear from you on that.

21 MR TURNER: Very briefly I was proposing to deal with it shortly, yes.

22 Now, the allegations of anti-competitive practices are also materially similar, to pick up on your  
23 Ladyship's point, to those in consumer class actions currently being brought against  
24 Qualcomm in Canada in particular, there is also a live consumer class action in the  
25 States where certification was granted by Judge Koh, but following the Court of  
26 Appeal's decision there's been an order for that to be reconsidered and that hasn't yet  
27 happened.

1 So focusing on Canada, the up-to-date position is outlined in Ms Boyle's third statement in the  
2 next tab in the core bundle, 13, at page 450.

3 So if you turn that up. She deals with that at paragraph 14B on that page, and in a nutshell  
4 what you now have is a single consolidated consumer class action in British Columbia,  
5 David Barroquero v Qualcomm. That one is moving towards a certification hearing  
6 in September this year, at which Qualcomm is applying for reverse summary judgment,  
7 unlike what it's doing here. I can give you the references if you need them.

8 And then if you look at (iii) at the foot of the page, you'll see that there is another consumer  
9 class action also. That is in Quebec, Tenzer v Qualcomm. That was certified in  
10 April 2019 and is set for trial. Our understanding is that the parties are currently  
11 engaged in disclosure and that the trial may be either next year or in 2024.

12 The final part of the international regulatory context which is relevant to the Tribunal is that in  
13 the European Union the Commission made an infringement decision against  
14 Qualcomm in 2018 for abusing dominance on the worldwide market for LTE, which are  
15 essentially here 4G chipsets, by entering into an exclusivity tie with Apple, and the  
16 decision is in the supplemental bundle, if we go to that, at page 568, please, or at least  
17 the first paragraph. I'll show you two paragraphs in it. 568.

18 So on 568 you'll see at the top of the page recital 305.

19 So this is on dominance. The Commission concluded that Qualcomm had a dominant position  
20 in the worldwide market for LTE, the 4G chipsets, between 2011 and the end of 2016.  
21 If we go, please then to page 388.

22 Yes, page 388, because it's also recital -- right, okay. I have a false reference for that. I'm  
23 not going to take up time. Recital 388 refers to the abuse, which is the exclusivity tie.  
24 593. Thank you.

25 388, conclusory recital, the Commission concludes that they abused a dominant position by  
26 granting payments to Apple on an exclusivity condition.

1 MRS JUSTICE BACON: But again, how much relevance does that have to these  
2 proceedings? I understood you relied on the dominance finding but not on the abuse  
3 finding.

4 MR TURNER: Yes, to explain, we're not relying, as your Ladyship rightly apprehends, on this  
5 on a follow-on basis. It's a decision about exclusivity payments but we will be relying  
6 on the Commission's findings on dominance because that is relevant to our case, and  
7 it's relevant in terms of the strength of the claim that the European Commission has  
8 found in an overlapping period that there was dominance in one of the relevant  
9 markets; in fact two of the relevant markets, it refers also to the licensing market.

10 To complete the point on the European Commission, there is an appeal to the general court.  
11 That was heard, the oral hearing, was made last year, judgment is pending.

12 MRS JUSTICE BACON: Was there an appeal against the dominance finding?

13 MR TURNER: I believe it was. Mr Singla nods.

14 Against that context, I am now going to respectfully impress the following preliminary points  
15 on the Tribunal. There are five.

16 First, in the line of case law on collective proceedings in this jurisdiction since Merricks in the  
17 Supreme Court, and I include Merricks on remittal, Gutmann, the rail tickets case, and  
18 McLaren, the recent vehicle case.

19 The firm emphasis of the Tribunal has been on the need to make this very new class regime  
20 workable and effective.

21 Second, the Tribunal's been very clear that it is not the Tribunal's role at the certification stage  
22 to resolve disputes between the experts nor to carry out a full evaluation of merits and  
23 the robustness of a proposed expert methodology, and indeed that reflects the fact  
24 that at this early point in time the expert methodology is necessarily provisional, only  
25 provisional, and it will be subject to refinement after data has been gathered.

26 Third point, crucially, this is a case where Qualcomm's challenge to the methodology appears  
27 to us to proceed on two false premises in order to generate an objection. Both of those

1 are focused on in Qualcomm's skeleton, if you have that to hand, and go in it to  
2 paragraph 44.

3 If I read from the second sentence:

4 "The question at this stage is whether Mr Noble's methodology satisfies the Pro-Sys test even  
5 though it is not based on any factual evidence. Which? accepts that it could in theory  
6 seek third party disclosure from Apple and Samsung, but for its own reasons it is  
7 unwilling to do so. Which? is entitled to make that choice, but it must live with the  
8 consequences, namely that its proposed expert methodology must be scrutinised by  
9 the Tribunal on the footing that it is not (and will not be) supported by any factual  
10 evidence."

11 Now, the first false premise is that Mr Noble's approach is to eschew, they say, any factual  
12 evidence. He does not. Econometrics is not economic theory. It is thoroughly  
13 grounded in the facts of a case.

14 The second false premise is that Mr Noble and/or Which? are setting their face against  
15 obtaining relevant factual evidence which is vital to assess the extent of pass-through  
16 to consumers. They do not for one moment do that. Mr Noble is entirely willing to  
17 obtain additional information after certification if indeed it is vital, as Qualcomm says,  
18 for assessing the extent of pass-through to consumers. There is simply not  
19 an argument and to see that straight away, if you could please turn up Mr Noble's third  
20 report or statement.

21 It's in the core bundle at tab 7 and if you go in it please to page 331, you'll recall that one of  
22 Dr Padilla's criticisms of Mr Noble is that he hadn't considered the need to investigate  
23 whether handset manufacturers like Apple and Samsung take into account fixed costs  
24 like research and development in their handset pricing decisions, and Mr Noble deals  
25 with that at paragraph 3.12, top of the page.

26 So he says:

27 "However, this does not exclude the possibility of seeking to further understand the relevance  
28 of fixed costs, such as R&D, to the OEMs' handset pricing decisions, given Dr Padilla's

1 view (although I note that Dr Padilla does not base this view on information from his  
2 client about the working of the industry which might have suggested that it is grounded  
3 in the facts rather than a purely theoretical objection). In the - as I currently see it,  
4 unlikely - event that these costs affect handset pricing decisions, then it will be possible  
5 to gather the relevant information from the OEMs in order to further inform the  
6 specification of my model. If - contrary to my expectation - it was to become necessary  
7 to reflect fixed costs in my model, I would gather further information and data that might  
8 be included. While it is difficult to speculate the precise information or data that this  
9 might include, I would expect that it would be possible to examine and consider public  
10 domain information (such as the OEMs public accounts which detail capital  
11 expenditure categories) as well as seeking disclosure from the OEMs of specific data."

12 So he is entirely willing to investigate and take into account facts if there is a solid reason for  
13 doing it. He is a self-described fact enthusiast, his term.

14 If we go forward, please, to the core bundle to page 336 and look at the final paragraph on  
15 that page, 3.31, he says:

16 "... having said this, there is also no reason to rule out in advance making specific targeted  
17 requests for information from OEMs, [which includes Apple and Samsung], MNOs and  
18 other retailers should a particular point arise that demands it."

19 So there is no opposition to gathering more data to operationalise his regression more  
20 effectively. This is not therefore, as we see it, a real objection.

21 That's my third point and it leads to the fourth. Proportionality. Proportionality is the  
22 watchword in large scale competition cases.

23 The Tribunal has placed particular emphasis on proportionality in the collective proceedings  
24 context. It applies when one is considering at the certification stage a proposed  
25 methodology. And to paraphrase a remark made by Lady Rose when she was the  
26 presiding judge in Air Cargo in the Chancery Division, if you're faced with a  
27 methodology which will yield results that are broadly accurate at low cost and effort  
28 and another one which will give results that are claimed to be more precisely accurate

1 at much higher cost and effort, it may well be the appropriate thing to do to choose the  
2 former. And I'll develop that and show you where in the McLaren ruling that point has  
3 been crystallised in their judgment.

4 That takes me to the fifth and last preliminary remark. Why are Qualcomm urging on the  
5 Tribunal today that the only appropriate way to examine pass-through to consumers in  
6 this case is to engage in substantial third party disclosure exercises?

7 Without prejudging this, I emphasise, all or some of the cost of those exercises, leave aside  
8 the time, might be laid at the door of the proposed class representative, Which?.

9 In this connection, may I invite you please to look at the judgment of the Tribunal on funding  
10 the Trucks claim in 2019. If you have the authorities bundle, if you can go in it please  
11 to tab 17, page 847 and go please to page 875. I'll wait for it to come up on the screen.  
12 It's 875.

13 875. Yes.

14 So if you look at the bottom of the page, picking it up really from the fourth line beginning "On  
15 the contrary" at the end:

16 "... the Tribunal seeks to facilitate the access to justice for claimants achieved by properly  
17 constituted collective proceedings. In that regard, the concern of the Tribunal when  
18 reviewing a [litigation funding agreement] is (a) that the terms of the funding agreement  
19 do not impair the ability of the class representative to act fairly and adequately in the  
20 interests of the class members and (b) that adequate funding has been arranged to  
21 pursue the litigation effectively in the interests of the class members. By contrast, the  
22 concern of the OEMs, inevitably, is not to ensure the effective advance of the claims  
23 against them; indeed, it is in their interest to make the pursuit of these claims as  
24 burdensome as possible."

25 That was said in a particular context with a dispute about litigation funding, but the wider point  
26 applies and applies here. In consumer class claims in this Tribunal, it's going to be  
27 common place for the issues before you to involve pass-through of overcharges to  
28 consumers and the assessment of them. Qualcomm's position in this case, with the

1 plea for substantial third party disclosure where there are multiple sales channels,  
2 threatens to undermine the judicial policy of the Tribunal about ensuring access to  
3 justice of consumers and it requires for that reason alone anxious scrutiny. That's all  
4 I wish to say by way of preliminary remarks.

5 I'll turn, secondly, to the substance of the quantum case, which is the focus, the terrain of  
6 debate today, and the draft order.

7 I've already outlined to the Tribunal the architecture of the infringement claim and it's  
8 unnecessary to say any more about that unless you wish me to do so. I emphasise  
9 again there is no application today for strike-out or reverse summary judgment.

10 So what I will now do is focus on the contentious element of Which?'s case, the proposed  
11 approach to showing that the aggregate loss suffered by the consumer class is  
12 problematic and specifically what proportion of the antitrust overcharge imposed by  
13 Qualcomm on Apple and Samsung, the two relevant handset manufacturers, will be  
14 passed through. I'll begin with the class definition itself and if you please go to the  
15 collective claim form, that's in the core bundle, first tab, page 38.

16 If you look at the foot of the page, the definition is set out there and over on page 39. The  
17 class is:

18 "All consumers who purchased one or more affected products in the United Kingdom during  
19 the relevant period ...

20 "Consumers [are] natural persons who purchased affected products other than wholly for  
21 business use."

22 And the red text shows an amendment which was permitted by order of the chair without  
23 objection from Qualcomm. That, if we can call it up, is in the supplementary at 2809,  
24 if we can have that on screen.

25 The order was dated, when it comes up, 5 January 2022. 2809.

26 So this was your Ladyship's order and if we go to page 2810, you'll see from paragraph 3 that  
27 the amendment was made, it was ordered to take effect from 24 December 2021, that  
28 being the date of the application to amend. And the purpose of this amendment, if we

1 go back then to the claim form, was to bring in the personal representatives of people  
2 who died after buying the phone to the extent which is permitted by the six-year  
3 limitation rule. That's the reference to 24 December 2015.

4 The effect of that second block of red text is to exclude any consumer who died after buying  
5 the phone but before the issue of the claim form if that date of purchase was more than  
6 six years back from the date when the amendment of the claim form adding the  
7 personal representatives took effect.

8 The affected products are Apple and Samsung 4G phones, LTE-enabled phones, and they're  
9 included on a list at Appendix A, which perhaps we don't need to go to, or any  
10 subsequent models which come in which are 4G-enabled after that time.

11 If we go then please back into the core and look at paragraph 78 at the top of page 38:

12 "For the purposes of certification, Mr Noble has applied the above methodology [which we're  
13 going to look at] on the basis of the information currently available to him ... to conduct  
14 the preliminary analysis, [he] does not conduct a full hedonic regression analysis, [he]  
15 instead applies the pass-through rate of 88 per cent relied upon by the plaintiffs in the  
16 US class action proceedings as a reasonable proxy, based on certain similarities  
17 between the US and UK markets for the supply of smartphones ... On the basis of his  
18 preliminary assessment, [he] estimates the aggregate losses ... at £482.5 million  
19 (including simple interest at 8 per cent)."

20 So that's as until the end of December 2020. Mr Noble's provisional analysis demonstrates  
21 that his proposed methodology is plausible and credible."

22 MRS JUSTICE BACON: So as part of that, I suppose we need to have some view on the  
23 plausibility of the pass-through rate of 88 per cent because that informs his provisional  
24 analysis.

25 MR TURNER: Well, that informs the calculation which leads to the £482.5 million and he has  
26 taken that, if we go back one page to core 37, I can develop this as necessary later,  
27 he says in the last four lines there:



1 "Mr Noble's proposed use of hedonic regression analysis ... consistent with the approach  
2 adopted by the plaintiffs in the US class action."

3 MRS JUSTICE BACON: Is that the class action that was certified on the back of the District  
4 Court first instance judgment, which is now under appeal because of the 9th Circuit  
5 Court of Appeal's ruling on the initial case?

6 MR TURNER: Yes, it's been sent back for reconsideration in view of the Court of Appeal's  
7 judgment. Yes.

8 MRS JUSTICE BACON: So how much reliance can be placed on that in those circumstances?

9 MR TURNER: Well, the remand relates to the point that was found by the US Court of Appeals  
10 which was on infringement. It did not address in any way the certification insofar as it  
11 related to the assessment of pass-through. So it was entirely separate. So therefore  
12 Judge Koh's assessment of the evidence produced by the expert there,  
13 Professor Flamm, with his hedonic regression analysis, was not any part, as  
14 I understand it, of what was criticised by the US Court of Appeals, and you've seen  
15 their judgment.

16 If I may then, I will go directly to Mr Noble's primary report on this point, Noble 1, as we call it.

17 MRS JUSTICE BACON: Just before we move on from there, is there anything in the bundles  
18 as to the expert evidence before the US court other than what is referred to in the  
19 judgment which is cited here?

20 MR TURNER: You have, I believe in the supplemental bundle, and we can go to this if you  
21 would like, the description of the methodology that was used there by the class  
22 representative and their expert, Professor Flamm, the criticisms that were made of  
23 Professor Flamm and why the judge did not accept those criticisms as standing in the  
24 way of certification and why she found that his methodology was sound and permitted  
25 certification under the US system.

26 MRS JUSTICE BACON: Can you just give me the references to the supplemental bundle so  
27 that we can have a look at those, perhaps in the adjournment.

28 MR TURNER: Yes, I will do that. I will get those to you in the adjournment.

1 MRS JUSTICE BACON: But what we don't have, as I understand it, is the expert report of  
2 Professor Flamm.

3 MR TURNER: We don't have that in the bundle. Should your Ladyship wish to see it, we can  
4 get that to you very rapidly, we do have copies.

5 MRS JUSTICE BACON: I think we would like it.

6 MR TURNER: We have that available to us in a redacted format necessarily, but it shows the  
7 methodology and we will provide that.

8 Now, if the Tribunal would please turn up Mr Noble's first report, we'll look at the explanation  
9 of his methodology and go in the core bundle to tab 5, page 250.

10 So if I look at paragraph 7.37 on that page, he says:

11 "My proposed approach to assessing pass-on combines economic theory with an empirical  
12 analysis (a 'hedonic pricing model') and is applicable across the consumer class."

13 And then a few lines down:

14 "In terms of the empirical component of my proposed analysis, this applies the same  
15 methodology and has the same data requirements for assessing pass-on for the entire  
16 class. While the overall methodology for estimating pass-on may result in a level of  
17 pass-on that varies depending on (for example) device-only versus  
18 device-plus-contract sales and for Apple versus Samsung phones, the overall  
19 methodology for arriving at an aggregate damages figure is the same for all members  
20 of the class."

21 Then in the next section he outlines his proposed hedonic regression analysis. If we go to  
22 page 252 and if you look at 7.44 he refers there to the utility, the use, of the hedonic  
23 pricing approach in the US proceedings, that Qualcomm itself and the class plaintiffs  
24 use that type of method. Qualcomm does not attack Dr Flamm's use of hedonic  
25 regressions and the same methodology was relied upon by Qualcomm's own  
26 economists. So this methodology at least, the framework of analysis, was common  
27 ground.

1 So, pausing there, there can't be said to be any fundamental defect with the methodology per  
2 se. What we're concerned with is the specification as to which, as I say, Mr Noble is  
3 not closed-minded.

4 Then keeping it open, if you go over to page 253, look at the foot of the page, section 7D.2,  
5 "My proposed hedonic regression analysis for pass-through". 7.48, he proposes: "...  
6 to calculate pass-on from OEMs to consumers using a hedonic regression that  
7 examines all the stages of the value chain in a single calculation - in other words, my  
8 analysis will directly analyse the linkage between handset costs on the one hand, and  
9 consumer prices on the other."

10 As we understand it, this paragraph may crystallise the point being made to you by Qualcomm  
11 today, because it records that Mr Noble proposes at this time to calculate pass-on in  
12 the regression which encompasses all the stages of the value chain from Apple and  
13 Samsung to the consumer, whether it's a direct sale to the consumer or through one  
14 of the other sales channels. He goes on to amplify that at 7.49, the following  
15 paragraph, and he makes clear in that, you have to go over the page, that he's  
16 developing the methodology. If you look at the last sentence of the first paragraph on  
17 page 254:

18 "I will evaluate empirically what controls are required once I have gathered the necessary  
19 data."

20 He's intending to gather the data to decide what controls are required. This is not yet set.

21 Same page, 7.52, he describes the various sales channels, as you see, and if you go back  
22 a few pages to 249, those are pictorially represented in figure 7.2 on that page.

23 So you see the different sales channels. And if you return now to 254 at paragraph 7.52, he  
24 says, five lines up from the bottom, he will gather data on as many of these channels  
25 as possible.

26 So he is intending to look into that by gathering as much information as he can on those selling  
27 channels. And on the same page you'll see a footnote, 176 at the bottom:

1 "Note that I may undertake two regressions, one for device-only and one for  
2 device-and-contract, or it may be that I need to undertake two groups of regressions,  
3 again, one for device-only and one for device-and-contract. The group-based  
4 approach may be needed if I identify that there are significant differences between the  
5 sales channels used within each of these two modes of sale."

6 In other words, he might therefore have multiple horizontal regressions, looking at these  
7 different sales channels and doing a regression analysis for each, and then combine  
8 them.

9 If you go over to page 256, you have 7.60, "Data availability" at the bottom, and you will see  
10 that Mr Noble refers there advisedly to:

11 "... data that I have identified so far and anticipate using for [the] pass-on analysis".

12 He sets that out on the facing page, page 257, in Table 7.1.

13 Finally for present purposes, if we can go over to page 258, you have paragraph 7.61. He  
14 says there:

15 "I have a good degree of confidence that sufficient cost and price data exists and can  
16 reasonably be obtained to perform the analysis robustly - as indicated in Table 7.1  
17 above, such data would be obtained from a mix of commercial providers of data and  
18 via disclosure from Qualcomm. Indeed, I already have access to several items of this  
19 data. If needed in order to fill any information gaps and/or produce sufficiently robust  
20 estimates, further data could potentially be obtained at the post-CPO stage through  
21 third party disclosure from major retailers and network operators in the UK."

22 MRS JUSTICE BACON: Is there somewhere a description of what is meant by his references  
23 to various sources of data, for example, IHS Benchmarking, IHS Market, Pure Pricing,  
24 IDC? Are those explained anywhere?

25 MR TURNER: I will need to check whether -- I mean, there are certain references throughout  
26 his report. I'm not sure they're dealt with comprehensively in one place. If you go back  
27 to 7.54, for example, a few pages on --

1 MRS JUSTICE BACON: He just refers to the Pure Pricing database and I wondered is there  
2 an explanation of what all of these data sources are, where they get their underlying  
3 data from and so on?

4 MR TURNER: I'm not sure there is a specific place where that is set out, but we will check  
5 and I will revert to you after the adjournment.

6 MR HOWARD: I think it might be page 257 in the table on the right-hand side.

7 MRS JUSTICE BACON: Yes, I'm referring to that table and I just wondered --

8 MR TURNER: It's what they mean, what they comprise of.

9 MR HOWARD: I think there may be some references but --

10 MR TURNER: We will dig that out if there is -- in answer though, candidly, I'm not aware of it  
11 and it may be something that needs to be explained in the hot tub.

12 MRS JUSTICE BACON: Or I would imagine that an agreed note with just a sheet of paper  
13 can be handed up explaining what all of these are.

14 MR TURNER: Yes, that can be done, but Mr Noble will be here. One of the questions in the  
15 hot tub is about the data, so perhaps it can be explained.

16 MRS JUSTICE BACON: But if it's a matter that can just be agreed by a short note, then we  
17 don't need to take up questions of Mr Noble by that. I assume there is a short  
18 explanation of what Pure Pricing --

19 MR TURNER: It can be given and we'll deal with that. We will deal with that.

20 So I was looking a moment ago at 7.61 and what he says at the end of that paragraph. He  
21 refers there to major retailers and network operators. He does not mean to rule out  
22 getting information from Apple and Samsung as a matter of principle, although note  
23 that they are of course also retailers in their own right. If information from Apple and  
24 Samsung is shown to be plausibly relevant, he will want to have it, and Mr Noble made  
25 that clear in the third report, which we have already seen briefly and I won't go back to  
26 that now.

27 I would recall that back in paragraph 3.12 Mr Noble specifically envisages obtaining disclosure  
28 from the OEMs of data on their pricing decisions -- this is in the third report -- if a proper

1 case is made out that it's needed. And he also said, as I showed you earlier, that  
2 there's no reason to rule out an advance making specific targeted requests for  
3 information from the OEMs as well as others should a particular point arise which  
4 demands it.

5 So finally, please, in Mr Noble's first report, if we could go to page 278, here you have  
6 section 9B, "Estimate of the Class Size". In this section, he estimates the class size  
7 and the average loss per class member up to December 2020. And if you look at  
8 page 279, paragraph 9.5 gives the estimate of a class size there as 29 million  
9 individuals. And then if you go over to 281, page 281, and look at paragraphs 9.10  
10 and 9.11, Mr Noble estimates the average damages per class member, including  
11 simple interest at £16.64 as at December 2020.

12 Now, my Lady, conscious of the time, I propose to move on to my third topic, the relevant legal  
13 principles, in slightly greater detail.

14 MRS JUSTICE BACON: Yes, do you want to have a five-minute break in 10/15 minutes or is  
15 now a better time for you?

16 MR TURNER: The best time for me, if it's convenient to the shorthand writer, would be after  
17 I have finished this and before we turn to the eligibility condition, because this shouldn't  
18 take too long and then we might have a pause.

19 MRS JUSTICE BACON: All right.

20 MR TURNER: Subject to your guidance as to what will most assist you, and please hurry me  
21 up if I'm saying anything that's too bread and butter, what I'll do is this. I'll first  
22 summarise the case law on the nature of your role in a certification case.

23 Second, I will very briefly lay out the certification criteria of concern today.

24 And last, I will make some observations on the test which applies to the scrutiny to be given  
25 to a proposed class representative, PCR's, intended methodology for establishing  
26 class-wide loss.

27 I begin with your role at certification. Although this is a very young jurisdiction, this Tribunal  
28 now does have the benefit of a recent stream of case law and it does set out clearly

1 and authoritatively the nature of your task. There are three key points which come  
2 from the case law. The first point is this. In deciding whether the certification  
3 requirements are met, the Tribunal has to have regard to the purpose of the collective  
4 proceedings regime. There are two purposes, one, ensuring access to justice and  
5 effective redress for consumers. That's in the -- if we can bring up the Merricks  
6 Supreme Court judgment, it may be handy just to have that. That's authorities, tab 19,  
7 page 929. If I may, I'll continue while this is going, because this is a rather basic  
8 proposition. The point is that the collective proceedings requirements shouldn't be  
9 interpreted in a way that places unnecessary obstacles in the path of consumers  
10 who've suffered loss.

11 And there is a second purpose, which you see from page 94 -- if we go to this one now, at  
12 page 946 in authorities tab 19. 946 and look at the bottom of the page. This is  
13 paragraph 53 in the judgment.

14 If we look at the bottom of the page, please.

15 Unresolved question about whether the benefit of the doubt should be given to the claimant  
16 or the defendant.

17 If we go over the page, please:

18 "... it is clear ... that justice requires that the damages be quantified for the twin reasons of  
19 vindicating the claimant's rights and exacting appropriate payment by the defendant to  
20 reflect the wrong done. In the present context that second reason is fortified by the  
21 perception that anti-competitive conduct may never be effectively restrained in the  
22 future if wrongdoers cannot be brought to book by the masses of individual consumers  
23 who may bear the ultimate loss from misconduct which has already occurred."

24 So the corollary of a PCR who's got a good case being refused certification is in effect a  
25 windfall for a defendant wrongdoer.

26 That was the first point. Second point, in accordance with this purposive approach to the  
27 regime, the Tribunal isn't required to conduct an assessment of the merits of Which?'s

1 case at this stage. That's stated authoritatively in the judgment you have on the screen  
2 in front of you, paragraphs 59 to 60, page 948 is the reference.

3 In the absence of there being a strike-out or summary judgment application, merits are  
4 relevant only to the opt-in/opt-out decision that you have to make. But even then your  
5 decision on opt-in/opt-out requires only a high-level assessment of the strength of the  
6 claims. The Tribunal isn't required to conduct a full merits assessment and the parties  
7 aren't required to make submissions as though that were the case. This is in the guide  
8 for the Tribunal. It's endorsed in the Gutmann case, authorities 24.

9 MRS JUSTICE BACON: Can you give me the reference to the Tribunal guide and the  
10 Gutmann case.

11 MR TURNER: Yes, it's in the guide at 6.39, which is in your authorities bundle, tab 6, page 61.  
12 That is endorsed in Gutmann at paragraph 51, which you will find at tab 24, page 1092,  
13 and I'm grateful because I can move at greater speed if I don't have to call everything  
14 up at the same time.

15 The third point is this. The question for the Tribunal at this point is whether there is some  
16 factual basis for thinking that the certification requirements are met. By analogy with  
17 the Canadian test which Lord Briggs found persuasive, this is not something today that  
18 you are going to be deciding on the balance of probabilities or anything near it.  
19 Perhaps we should call that one up, authorities tab 19 at 942.

20 MRS JUSTICE BACON: So how does that relate to the consideration of the merits for the  
21 purposes of opt-in/opt-out?

22 MR TURNER: The merits for the purposes of opt-in/opt-out is relevant to deciding the strength  
23 of the case at all points, both the infringement and whether there's a good case, the  
24 theory being that, if someone is opting in, they're more likely themselves to be carrying  
25 out that assessment. Where that isn't happening, it's really the Tribunal's function to  
26 consider that there is a solid case and to do that at a high level because consumers  
27 are merely there on an opt-out basis.

28 At all events, what Lord Briggs has made clear is that one is -- yes.



1 MRS JUSTICE BACON: Is this Merricks, paragraph 16?

2 MR TURNER: Merricks -- it's in a number of places but I was going to go to paragraph 39,  
3 which is on page 942.

4 If you look at the end, from letter G to H, the question is -- he's quoting the Canadian  
5 jurisprudence:

6 "... the question was whether the applicant [can] show there was some factual basis for  
7 thinking that the procedural requirements for a class action were satisfied, so that the  
8 action was not doomed to failure at the merits stage by reason of a failure of one or  
9 more of those requirements..."

10 And he refers to Pro-Sys and says at the end the standard came nowhere near a balance of  
11 probabilities. And over the page at 42, letter D, that's what I was referring to earlier,  
12 he says:

13 "I regard the Canadian jurisprudence as persuasive in the UK."

14 So with that, my Lady, I turn to the certification criteria of concern for today and I'm going to  
15 deal with these very quickly. There's no need, I apprehend, to rehearse the legislative  
16 framework in detail. It's all very clearly set out in McLaren, which is the Tribunal's most  
17 recent judgment on a CPO application. That judgment was handed down only on  
18 18 February this year. But perhaps if we could open it up, it's at tab 26 in the authorities  
19 bundle and perhaps have open straightaway page 1170 because there you have the  
20 rules set out in paragraph 28.

21 In short, there are two aspects you have to be satisfied about: those who have become known  
22 as the authorisation, and the eligibility conditions. The authorisation condition involves  
23 you being satisfied it's just and reasonable for the collective claimant to act as the PCR,  
24 and rule 78(2)(d) --

25 MRS JUSTICE BACON: I think -- is this the right judgment?

26 MR TURNER: You should have at tab 26 in the authorities McLaren.

27 PROFESSOR MASON: I think you're on 1171.

1 MR TURNER: Yes, I am now on 1171. 1170, it's entitled "Legislative framework" at the  
2 bottom. And on 1171 at paragraph 28 you'll see the Tribunal setting out the relevant  
3 rule, rule 78. Last line on the page you see there, "Will it be able to pay the defendant's  
4 recoverable costs if ordered to do so", that's the focus of the argument about the  
5 adequacy of the funding arrangements by Which?, which is going to be addressed  
6 separately by the costs counsel.

7 The eligibility condition is the real focus of the dispute raised in Qualcomm's main skeleton  
8 and if we go, please, to page 1173 and look at paragraph 31, it's conveniently set out  
9 there. You'll see in rule 79(1) at the top of the page, there are essentially three limbs  
10 referred to: 1, proceedings brought on behalf of an identifiable class of persons; 2,  
11 raise common issues; 3, suitable to be brought in collectible proceedings.

12 There's no debate about 1. As regards the second, it's now clear that pass-on is regarded as  
13 a common issue. You'll recall in Merricks when it was first decided by the Tribunal, the  
14 Tribunal decided it wasn't and that was reversed by the Court of Appeal and not argued  
15 further, but accepted in the Supreme Court.

16 The principles for assessing common issues are conveniently summarised in McLaren at  
17 page 1182 of the authorities bundle in paragraph 64 where the Tribunal summarises  
18 Gutmann, cites Gutmann, and if you look at 4 in particular at the foot of the page,  
19 Qualcomm's essential argument is that the Pro-Sys test, which is outlined in point 4,  
20 isn't met, and this is the first incarnation in which the Pro-Sys point arises before you.

21 Next, there's the third requirement from rule 79 that the claims are suitable for determination  
22 in collective proceedings. If we can please go back to page 1173, paragraph 31, in  
23 McLaren, you'll see that the cited text of rule 79(2) lays down that what you must do is  
24 take into account all matters you think fit and then seven of them are specifically  
25 mentioned at letters A to G. Of particular relevance today are factors (a), whether  
26 collective proceedings are appropriate as a means for the fair and efficient resolution  
27 of the common issues, so that includes pass-on; (b) costs and benefits of continuing

1 the collective proceedings; and (f) whether the claims are suitable for an aggregate  
2 award of damages, because these are the focus of Qualcomm's response.

3 So I take them in turn before the short break.

4 (a) whether collective proceedings are an appropriate means for the fair and efficient  
5 resolution of the common issues. Lord Briggs addressed that in Merricks back in  
6 tab 19 of the authorities bundle, page 949 at paragraph 62, and he says there, 949, if  
7 you can magnify that:

8 "Thirdly, although the existence of common issues is a hurdle ... in the sense that if none is  
9 raised the CAT may not make a CPO, it is also a factor relevant to suitability under  
10 79(2). There the question is not whether there are common issues but whether  
11 collective proceedings are an appropriate means for the fair and efficient resolution of  
12 such common issues as are identified. At first sight this second inclusion of the  
13 common issues question ... seems a little odd. It may contemplate a situation where  
14 a common issue may more fairly and economically be resolved by a procedure other  
15 than collective proceedings, perhaps by an individual test case."

16 Is how he explains it. So then we go to (b), the costs and benefits of continuing the  
17 proceedings, the second factor that's been placed in dispute. Costs and benefits. This  
18 has been the subject of recent consideration by the Tribunal both in McLaren and in  
19 Gutmann and the following four principles can be distilled from the cases. One, the  
20 value of the claims, both for individual class members and in the aggregate, are  
21 relevant to the assessment of benefits. I'll give the Tribunal the references and I'll try  
22 to be quick. It is authorities 24, Gutmann, 1139.

23 MRS JUSTICE BACON: I think it will be helpful to have the paragraph references of the points  
24 that you make.

25 MR TURNER: 165 is the paragraph.

26 MRS JUSTICE BACON: I'm sorry?

27 MR TURNER: 165 is the paragraph reference.

28 MRS JUSTICE BACON: Of Gutmann?

1 MR TURNER: Of Gutmann, yes, paragraph 165, authorities tab 24, page 1139.

2 MRS JUSTICE BACON: All right. That's up now.

3 MR TURNER: Yes. So in that paragraph, and it's implicit, the Tribunal looked both at the  
4 claim on an individual basis and in an aggregate way.

5 Second, the Tribunal will also have regard to the likely costs of bringing the proceedings, and  
6 on the facing page, paragraph 166 in Gutmann, this is 1140, there the Tribunal  
7 considered the costs of the collective proceedings at the top.

8 The third point, while it's appropriate to have regard to the level of the funder's return, that is  
9 subject to two considerations. If we can go, please, to Gutmann paragraph 176,  
10 page 1143.

11 The first is that the Tribunal's recognised that third party funding is a prerequisite for bringing  
12 many collective proceedings and funders require an adequate incentive to  
13 compensate them for the very sizeable risks of funding this sort of claim.

14 Second, the Tribunal's also recognised that any payment to a funder is made only after all  
15 proposed class members have had a chance to claim their share of the settlement pot  
16 or aggregate award and the size of the sum awarded is at the Tribunal's discretion.  
17 For that if we can go please to McLaren at paragraph 150 and that is authorities tab 26,  
18 page 1209 at the very bottom of the page, last line:

19 "Further, it would be for the Tribunal to determine whether [over the page] Woodsford [the  
20 funder] should be permitted to recover from [the] undistributed damages and the level  
21 of its recovery... and the Tribunal would also have to approve any proposed settlement  
22 ..."

23 Fourth point, it's also appropriate for you to have regard to the extent to which proposed class  
24 members are likely to come forward and claim their share of any aggregate damages.  
25 That's referred to in the case law as take up. So, for example, where the consumer  
26 claim losses resulting for significant or -- refer to significant or memorable purchases  
27 so that they're likely to think that it is worthwhile claiming or they're likely to be able to  
28 produce evidence of what they bought, that's a factor indicating that a high level of take

1 up is probable as a matter of common sense and so it weighs on the benefit side of  
2 the cost benefit analysis. And you see that, if you're in McLaren, at paragraph 149,  
3 which is on page 1209.

4 MRS JUSTICE BACON: Are you going to at some point address the Tribunal on exactly how  
5 you think that consumers are going to be notified in the present case and the  
6 mechanics for distribution?

7 MR TURNER: I wasn't proposing to address that because of the law that that's something  
8 that can be dealt with in detail after and it's not in contention here. I can take you to  
9 references to it at the end when I've concluded so that you can be satisfied about it.

10 MRS JUSTICE BACON: I understand that the detailed arrangements aren't for us now, but it  
11 would be useful to see what there is.

12 MR TURNER: Yes.

13 MRS JUSTICE BACON: And do you say that having regard to the value of the purchases by  
14 consumers are -- there's going to be significant take up of damages claims if what is  
15 been recovered is £16?

16 MR TURNER: Yes, we do say that because the purchase of a mobile phone is a significant  
17 purchase for many consumers, a 4G-enabled smartphone, and bearing in mind that  
18 these are fairly recent purchases, it is probable that the consumers will be able to  
19 produce evidence of their purchase of that by way of a receipt. It stands in contrast to  
20 the Gutmann case concerning rail ticket purchases where, if you look back at  
21 paragraph 149 in McLaren, that was contrasted with the position there and we say  
22 contrasted with the position here too. Rail tickets are not something for which you  
23 would have been expected to have retained that sort of information.

24 But the Tribunal, as I say, has recognised that the precise level of take up in a given case is  
25 dependent on the method which is chosen for distributing any aggregate damages  
26 award and that is something which can be developed later on in the case during the  
27 course of the proceedings.

1 If we go in that regard -- I can give you a reference showing you that. It's Gutmann, tab 24, at  
2 paragraphs 170 to 175, beginning at 1141.

3 MRS JUSTICE BACON: All right. Thank you.

4 MR TURNER: And you'll see there how that's explained. I shan't take you to that now.

5 My Lady, that gives factor (f), whether or not the claims are suitable for an award of aggregate  
6 damages.

7 The Supreme Court in Merricks held that suitable in this context means suitable in a relative  
8 sense, suitable for an aggregate award rather than an individual award of damages.

9 I shan't take you to it. The reference is paragraph 56 in the Merricks Supreme Court  
10 judgment.

11 So with that general explanation, I turn to the test applicable to your assessment of Mr Noble's  
12 methodology, specifically -- this is still the legal principles -- all parties agree the test is  
13 the one laid down in Pro-Sys at paragraph 118 of that case. That test was applied  
14 both in Gutmann and in McLaren. In the light of the purpose of the regime which I've  
15 described, the Pro-Sys test represents a deliberately low threshold and a number of  
16 short points fall to be made about its application. Number 1, consistent with the  
17 approach to certification generally, which I've already described, it doesn't involve a  
18 detailed appraisal of the merits and robustness of the proposed methodology. The  
19 Supreme Court and the Tribunal have been at pains to emphasise that in the recent  
20 case law. If we can go to McLaren, 105 through to 108, that's in authorities tab 26 at  
21 1184.

22 MRS JUSTICE BACON: Well, you can perhaps just give us the references at this point?

23 MR TURNER: All right. I shan't go through that now. The reference -- I think I have a false  
24 page reference I'll need to correct -- it's --

25 PROFESSOR MASON: 1194 I think.

26 MR TURNER: Thank you, 1194. 105 to 108. I'll need to come back to that shortly. But what  
27 I would say is that, if you do have that open, you'll see that the following paragraph  
28 after 108, 109, contains a rejection by the Tribunal of the reliance by counsel in that

1 case for the defendant on a recent Canadian case called Jensen, and that's relevant  
2 because you will have seen from their skeleton that Qualcomm relies -- I'm sorry, in  
3 their response, they rely on the same case quite heavily at paragraphs 47 to 51 of their  
4 response, apparently to suggest that the Tribunal should apply a strict scrutiny at the  
5 certification stage, and that was the argument rejected in that paragraph of McLaren  
6 where the Tribunal found Jensen was entirely consistent with the principles that I have  
7 outlined. That's the first point.

8 Number 2, determining whether a proposed methodology meets the standard is not a relative  
9 exercise. The reference here is McLaren, paragraph 97, and that is important and  
10 something which you should see now very briefly. The Tribunal's role at certification  
11 is not to determine what the best method would be in theory, it's to assess the one that  
12 has been put forward by the applicant.

13 Point 3, and it's the necessary corollary of this second point, the Tribunal isn't required to  
14 choose between the rival approaches of the parties' economists at this stage. That's  
15 said in explicit terms and I'll merely give you the reference; in Gibson v Pride, the first  
16 collective case to reach judgment, at paragraph 106. That's authorities tab 11,  
17 page 552.

18 The point is that conflicts between the two experts are there to be resolved by the trial judge,  
19 not today. And if I may, on that, I will give you one illustration directly from Pro-Sys  
20 itself and that's authorities 29, and this is worth looking at now because it sets the  
21 framework also for the argument to come after the hot tub. If we go to authorities 29  
22 and go in this, please, to 1513, everybody always refers when talking about Pro-Sys  
23 in this jurisdiction to paragraph 118, which set out the test that the Supreme Court  
24 approved. But then if you go on, you see how it was applied in Pro-Sys. So at  
25 paragraph 120 on 1513, there briefly the two economists are referred to, so you see  
26 that, Professor Brander and Dr Janet Netz. Go over the page to paragraph 124.

27 This paragraph summarises the PCR's expert evidence including on pass-through. She  
28 testified regression analysis could be employed to ascertain the extent of the

1 passing-on. Paragraph 125, you see that the opposing expert then said, well, there's  
2 a lot of flaws in that, lack of evidentiary basis, alleged flaws in the benchmark product  
3 that's been selected, lack of workability, and the judge found that, despite those  
4 criticisms, Dr Netz had demonstrated a plausible methodology for proving class-wide  
5 loss, so he didn't go on to address Professor Brander's proposed methods, and then  
6 over the page at 126 is the correct approach:

7 "It is indeed possible that at trial the expert evidence presented by Microsoft will prove to be  
8 stronger and more credible than the evidence of Dr Netz and Professor Brander.  
9 However, resolving conflicts between the experts is an issue for the trial judge and not  
10 one that should be engaged in at certification."

11 My fourth and last point is this. The Tribunal will have regard to the data required to implement  
12 the proposed methodology and the extent to which the data is likely to be available at  
13 trial and in doing so you'll bear in mind that in the light of the purpose of this regime,  
14 it's not appropriate to be unduly exacting about the quality or quantity of data needed  
15 at the certification stage. Just like in a non-collective case, the Tribunal is required to  
16 do what it can with the evidence which is reasonably available and forensic difficulties  
17 and potential shortcomings in data shouldn't lead to a conclusion that claims with a  
18 real prospect of success should be denied at trial. The reference there is Merricks  
19 Supreme Court 72 to 74, in authorities 19, beginning at page 951.

20 But moreover, and importantly, a proportionate approach to data is critical. There's no  
21 requirement to get all potentially relevant data if the costs of doing that are excessive.  
22 And it's now been said that a methodology which relies on data which will only be  
23 available at disproportionate cost is unlikely to meet the Pro-Sys hurdle, and that is  
24 said in McLaren at paragraph 74, which is authorities 26, page 1185. I'll just give you  
25 the reference.

26 The last point is that an expert methodology proposed at certification is also necessarily  
27 provisional. It can be adapted, it can be improved and refined during the course of



1 proceedings as required, and that includes as respects the data to be used. That is in  
2 McLaren, for your reference, paragraph 75.

3 So, my Lady, in the remaining time after the short break, I will address the arguments, and  
4 I will need to be quick, the contentious arguments, on eligibility including costs and  
5 benefits.

6 MRS JUSTICE BACON: All right. We'll rise for five minutes.

7 **(12.01 pm)**

8 **(A short break)**

9 **(12.10 pm)**

10 MR TURNER: May it please the Tribunal, Mr Coates the technician has explained that there's  
11 a software problem preventing him from being able to get up the authorities references  
12 quickly, but he's expecting that to be fixed. But at all events, I'm going to move faster  
13 than I have done before, although we are entering the terrain of dispute.

14 Authorisation condition first and this is essentially formal. I will take it very briskly because it  
15 is not contested other than in relation to the funding arrangements, which Mr Kirby is  
16 going to deal with.

17 If you turn up the claim form in the core bundle and go in it to tab 1, page 44, paragraph 88  
18 sets out all the reasons why Which? passes the necessary standards, meets the  
19 necessary standards with flying colours: it's the largest consumer organisation in the  
20 country, as you see on page 45, it's got an exemplary governance structure and  
21 processes, and it has substantial expertise communicating with and representing the  
22 interests of consumers. If you take the Tribunal to just two references. Tab 10 in the  
23 core bundle is Ms Averty, the general counsel's statement, and in Ms Averty's  
24 statement at page 403, you have paragraph 37 and that's where she refers to the  
25 expertise and institutional resources of the organisation, which are exceptional.

26 Then in Ms Boyle's third statement, core bundle, again, tab 13, page 444, if you go to  
27 paragraph 9B.

28 So that's page 444, 9B.

1 This now comes back to a point, my Lady, that you raised with me about take up. She refers  
2 here at the bottom of that page to Which? being very well placed to ensure notifications  
3 regarding availability of damages are effective. And going over the page she gives  
4 an example, that in the first 36 hours following the announcement of the claim there  
5 were 131 related news items with a very wide reach, broadcast, there was radio  
6 interviews, national and local newspaper coverage, hard copy and online, and it was  
7 the most-read news item that day on the BBC News.

8 Perhaps as your Ladyship asked, I have been given a note with references on notification and  
9 distribution. I'll give you those references in the interests of speed. The litigation plan  
10 which is exhibited to Ms Averty's statement is set out in supplemental bundle  
11 page 999. The methods of communicating with the class are in her statement,  
12 paragraphs 20 and following, page 1006, and she refers to the proposed distribution  
13 at paragraph 60 and following at page 1018.

14 MRS JUSTICE BACON: Which bundle are we talking about? The supplemental bundle?

15 MR TURNER: Yes, I am. The supplemental bundle.

16 So I shan't go through the authorisation condition further unless there are questions, I will  
17 move directly to the contentious area of eligibility, and I propose to tackle it by  
18 reference to the points made in Qualcomm's skeleton, if you would please pick that up.

19 The first point is to remind you of the two straw men in the skeleton who appear throughout.  
20 The first straw man crops up at paragraph 7 where they say that the application raises  
21 a narrow but important point of principle about whether factual evidence is required for  
22 a proposed quantum methodology. It's not the case that there's reliance by Which? or  
23 Mr Noble on the methodology lacking a factual basis. There is no important point of  
24 principle. There is a specific question about whether the elements referred to by  
25 Qualcomm are needed for there to be a credible methodology in this case.

26 And the second straw man crops up at paragraph 16, saying that Which? doesn't intend to  
27 gather critical factual evidence, and at paragraph 20, which says that Mr Noble rejects  
28 the need to get vital factual information. I've sought to explain already those

1 well-founded points. The issue you've got before you is really one of proportionality  
2 and need. If it's demonstrated that the methodology in this particular industry context  
3 needs additional information to be gathered and processed, Mr Noble will do that.

4 And that leads to a further point. Qualcomm are complaining about something that's fixable if  
5 it's at all well-founded. If you look at paragraph 31 of their skeleton, they refer to  
6 gathering information so that Mr Noble's analysis can be tested against the facts,  
7 against certain facts, and that suggests that what they are saying is you have to have  
8 some corroborative support for the outputs from the regression to give comfort that the  
9 outputs are credible. And paragraph 38 in their skeleton seems to confirm that that  
10 must be their argument. If you look at the top of the following page at the end of  
11 paragraph 38, what they say there is that Mr Noble's approach is not credible because  
12 it's not corroborated by a robust understanding of OEM and retail pricing decisions in  
13 the real world. And I've already shown you that Mr Noble explains clearly he intends  
14 to develop and refine the model as the case goes ahead. If a serious point is made  
15 out that the additional data's indispensable, Mr Noble will want to examine it. So I go  
16 straight to the nub of the criticism. Look at paragraph 5 of their skeleton. The heart of  
17 their point is simply that there isn't a plausible and credible methodology for assessing  
18 aggregate pass-on to consumers unless Mr Noble takes account of the pricing  
19 decisions made by Apple, Samsung, mobile network operators and other retailers as  
20 well as a group of our matters which are referred to later on in their skeleton, and that  
21 requires at the very least a great deal of information requests and, of more concern  
22 than that, extensive third party disclosure from multiple sources. The question that all  
23 of this goes to is to what extent do these firms choose to pass on their relevant costs  
24 or absorb them or else mitigate them or counter them such as by negotiating harder  
25 with their suppliers of other components, other inputs. Qualcomm's proposition you  
26 can see from paragraph 14 of their skeleton. It's that unless information on third party  
27 pricing decisions, they're thinking is gathered, the results of the regression analysis  
28 could be highly misleading or even meaningless. It wouldn't be fit for purpose. And

1 they need to say this is something which the Tribunal is in a position to decide  
2 conclusively now. That is going to be explored with Mr Noble tomorrow in the hot tub.  
3 Our firm position is that there's no basis for the Tribunal reaching that conclusion.  
4 Hedonic regression is a respected empirical tool. It's well-known that it involves  
5 controlling the factors that may be responsible for observed prices to consumers with  
6 a view to isolating the effect of the variable of interest, Qualcomm's royalty burden. In  
7 that connection, if we go to core bundle-tab 7, page 322.

8 MRS JUSTICE BACON: This is Noble 3?

9 MR TURNER: You have Noble 3, paragraph 2.5. He summarises in very general terms, and

10 I shan't read the whole paragraph out, that he's looking to see whether the prices paid  
11 by consumers are likely to have been higher in the presence of higher input costs and  
12 specifically the higher charges by Qualcomm. And he says in the last three lines:

13 "[What he does] will enable me to reasonably draw inferences about causation, because I will  
14 be able to conclude that any change in price will have been caused by the change in  
15 input costs, and not by the [ceteris paribus] 'all else' [equal] factors."

16 And as respects the factors which are referred to by Dr Padilla, which are summarised in their  
17 skeleton at paragraph 32, Mr Noble works through each of those in turn in the third  
18 report. So you have that, if you still have the third report open in front of you, beginning  
19 at paragraph 3.20 on page 333 at the foot of the page under the heading "Dr Padilla's  
20 four categories of data", and Mr Noble responds essentially that the analysis is capable  
21 of answering these questions, look at 3.21 and 3.22, it will tell you whether these  
22 questions are answered to the extent necessary.

23 One of the matters which Dr Padilla raises, and that's at 32E in the skeleton, is the point that  
24 the retailers may use focal pricing and that that specifically has to be taken into account  
25 by Mr Noble. The argument on there is developed by Qualcomm in the skeleton at  
26 paragraphs 53 and 54.

27 If you look at those under the heading "Focal pricing", the key point is made really at 54C.  
28 Qualcomm is saying that Mr Noble's model:

1 "... seeks to measure the level of pass-on, irrespective of the conditions of competition and  
2 the nature of price-setting."

3 What is meant is not that the conditions of competition and the nature of the price-setting are  
4 ignored. What is meant is that those are matters inherently taken into account by the  
5 regression approach. The results that the regression produces in other words reflect  
6 market conditions. They're incorporated. There's no ignoring of market conditions.  
7 And on the issue of focal pricing, it's perhaps instructive to see how a materially similar  
8 point was dealt with by the Tribunal in McLaren.

9 If the Tribunal would please take up McLaren again, it's at tab 26 in the authorities bundle and  
10 go to page 1203, at the foot of the page you have paragraph 129 and there the Tribunal  
11 records a submission that's actually very similar to the focal pricing point argument by  
12 Qualcomm in our case:

13 "First [they say], even on the basis of the applicant's expert evidence, the proposed  
14 methodology could not demonstrate that delivery charges would be lower but for the  
15 cartel. This was because the industry experts had explained that, in setting delivery  
16 charges, NSCs undertook a benchmarking exercise against equivalent brands and  
17 also rounded up to the next £5 or £10. They also 'often' increased delivery charges in  
18 line with increases in those of competitors, even if costs had not increased."

19 Any overcharge could readily be lost in this exercise, in the benchmarking or increasing  
20 exercise.

21 The Tribunal rejects this and the way it does it is in paragraph 133 on the next page, 1204.

22 So they say it's clearly a matter for trial:

23 "The applicant will need to meet any challenge that benchmarking and rounding had such a  
24 material effect in practice that it is not possible fairly to apply the methodology either  
25 at all or in respect of particular brands to give a reasonable determination of the amount  
26 of the loss ... But at this stage we do not see that this challenge prevents the  
27 methodology from offering a realistic prospect of establishing loss on a class-wide  
28 basis. We reiterate that the focus is on the loss to the class, that is on an aggregate

1 basis. It is not necessary for the methodology to provide an accurate assessment of  
2 loss on an individual basis, provided that the aggregate award provides a just level of  
3 compensation."

4 And in our case Mr Noble has drawn attention to a reason for doubting that the focal pricing  
5 applied by Apple in its direct to consumer retail prices will lead to a flawed estimate of  
6 the aggregate loss.

7 So if you look in his third report, which is core tab 7 at paragraph 3.17, page 332, the first  
8 sentence, second sentence, first line:

9 "... it is not clear to me that focal point pricing does, in fact, lead to no pass-on."

10 Then there's a footnote:

11 "The economic theory on this indicates that, on average, focal pricing has no impact on  
12 pass-on. See Alexandrov."

13 So that's the reference that he gives and in Qualcomm's skeleton they respond to that at  
14 paragraph 54A and their response is internally rather odd. If you look at 54A, they  
15 declare in the second line robustly the issue is not whether there is no pass-on, and  
16 then, six lines down, Qualcomm also says:

17 "Far from supporting Mr Noble's view, the article [by Alexandrov] argues that, depending on  
18 the size of the cost change, focal pricing may prevent the pass-through of any  
19 overcharge."

20 So that seems the intention with the first point, the issue is not whether there's no pass-on.

21 But more important, it does not grasp that Mr Noble was referring to the aggregate  
22 picture and what Alexandrov says about that. In summary, we say that Mr Noble has  
23 shown some basis in fact for concluding that the proposed analysis will yield plausible  
24 results sufficient for today.

25 Now look at paragraph 47 and following of Qualcomm's skeleton. This is under a heading  
26 "Mr Noble's reference to other materials".

27 It's addressing Mr Noble's own use of corroborative material for his regression analysis and  
28 it's seeking to say that it's all junk. In passing, I should mention that the material in

1 question was in fact produced by Mr Noble in his second report. Why? Well, that was  
2 a response to Qualcomm's jurisdiction challenge where Qualcomm argued there's no  
3 real prospect of the Consumers' Association showing pass-on and then Qualcomm  
4 withdrew the jurisdiction challenge. The point is now raised here again today in this  
5 context.

6 Be that as it may, none of these criticisms have any force. I'll take you through some of them  
7 as illustrations given the time.

8 At paragraph 49 you'll see Qualcomm refers to the fact that Mr Noble had pointed out that in  
9 the private damages action by Apple against Qualcomm in our High Court, Apple's  
10 amended case, their pleading, was that they did pass on higher royalty charges from  
11 Qualcomm to their customers and that their own resulting loss was a volume effect,  
12 higher prices but they sold fewer items because of it.

13 And that point appears most conveniently back in the core bundle at tab 12 in Ms Boyle's  
14 second statement, which was for the jurisdiction challenge at page 431,  
15 paragraph 41C.

16 As you see there, what happened is that Mr Justice Morgan in that case set out a key  
17 paragraph in the draft amended particulars of Apple recording Apple's intended case  
18 before the court, and it read:

19 "By reason of the abuses pleaded above, the claimants have suffered loss and damage ... By  
20 reason of the charging of excessive royalties by Qualcomm, as well as its overpricing  
21 of chipsets, the price of such devices over the period to which these proceedings relate  
22 was higher than it otherwise would have been."

23 Then if you go over, you'll see the other emboldened text:

24 "... because the price of the devices was higher than it would otherwise have been, such  
25 claimants will have lost sales they would otherwise have made and suffered loss  
26 thereby accordingly."

1 So you see that Apple was in that case indeed saying: we are going to be relying on the fact  
2 that we do pass on the loss in higher prices and we suffer a volume effect. If you return  
3 to Qualcomm's skeleton, paragraph 49, look at what they say about that.

4 They say the allegation of Apple losing sales due to an overcharge is simply irrelevant. The  
5 Pro-Sys test did not apply in that case. It doesn't matter that the Pro-Sys test did not  
6 apply in that case. In fact, the test being applied was plausible evidential basis, which  
7 is not a million miles away from it. But what Mr Noble is referring to is a fact that Apple  
8 itself had said in a pleading, or the intended amended pleading, that it passed on the  
9 royalty overcharge.

10 That was Apple. And then in paragraph 50 of the skeleton Samsung is referred to, the other  
11 OEM, and Qualcomm pours cold water on comments which were made by Samsung  
12 in the American FTC proceedings, that Qualcomm's conduct harms end users who  
13 pay higher prices for the handsets, and Qualcomm dismisses that as pure assertion  
14 by Samsung.

15 It's direct evidence from the affected OEM. It was produced in court proceedings and therefore  
16 it has significance and weight.

17 And the final point in paragraph 50 is that the 9th Circuit of the Court of Appeals held that  
18 Qualcomm's chip selling and licensing practices were not anti-competitive. Insofar as  
19 that is meant to mean that it didn't lead to higher charges to the customers as a result  
20 of their behaviour, that is profoundly misguided and it is worth at this point very briefly  
21 turning up that judgment to show you in a few references what exactly was said.

22 So that is authorities bundle at tab 31 and it begins at page 1759. If I could invite you just to  
23 see a few things from the judgment, you immediately get the flavour of the theme that  
24 they were addressing.

25 The first reference is page 1783, internal 272, if have you that. You'll see five lines down from  
26 the top of the page, the citation of the law:



1 "The mere possession of monopoly power [and then it goes on], and the concomitant charging  
2 of monopoly prices, is not [itself] unlawful; [instead] it is an important element of the  
3 free-market system."

4 So the charging of monopoly prices as a proposition of law they said under their system was  
5 not a problem.

6 Go to page 1788 and look at the bottom of that page beginning "Moreover":

7 "Moreover, throughout its analysis, the District Court failed to distinguish between Qualcomm's  
8 licensing practices (which primarily impacted [their customers] OEMs) and its practices  
9 relating to [the] chip sales (the relevant antitrust market)."

10 So there they distinguish what affects the customers through the licencing from the chip sales,  
11 which they said was the relevant antitrust consideration.

12 If you go to page 1802, in the middle of the page:

13 "Finally, even assuming that a deviation between licensing royalty rates and a patent portfolio's  
14 'fair value' could amount to anti-competitive harm in the antitrust sense, the primary  
15 harms the District Court identified here were to the OEMs who agreed to pay [the]  
16 royalty rates - that is, Qualcomm's customers, not its competitors. These harms were  
17 thus located outside the 'areas of effective competition' - the markets for [the modem  
18 chips] ..."

19 Then page 1806, immediately under letter D:

20 "As with its critique of [the] royalty rates, the District Court's analysis of Qualcomm's 'no  
21 licence, no chips' policy, [so that's an example of the US appeal court referring to it as  
22 such] focuses almost exclusively on alleged "anti-competitive harms" to OEMs - that  
23 is, impacts outside the relevant antitrust market."

24 I can give you further references, but you see the point, that the 9th Circuit judgment relies on  
25 harm to customers being irrelevant, and in this context harm to the OEMs because of  
26 the exploitation of the monopoly position and monopoly pricing being applied as  
27 irrelevant.

1 Finally look at paragraph 52 of Qualcomm's skeleton. This refers to documentary evidence  
2 apparently showing that Qualcomm itself understood that its high royalty rates were  
3 passed through to consumers. So what is Qualcomm's response? Qualcomm's  
4 response is that this was reported by Professor Flamm, Dr Flamm, and his opinion, his  
5 opinion of Qualcomm's alleged understanding is irrelevant. The point though is that  
6 this isn't opinion; this is a reference indirectly to documentary support for pass-through  
7 from a key player located within the industry, Qualcomm itself.

8 Generally, standing back, all of these factors are corroborative at this early stage of Mr Noble's  
9 preliminary conclusions. These are not things that are operationalised internally within  
10 the regression analysis but that does not mean, as Qualcomm says at paragraph 58C,  
11 it's that last three lines of 58C, that Mr Noble is renouncing these facts. Putting it in  
12 context, they're merely not part of the internal mechanism of the regression analysis.

13 So in summary, there is nothing that is said that should deter this Tribunal from concluding  
14 that the methodology for showing pass-on is plausible and credible and meets the Pro-  
15 Sys test.

16 There is a second limb of the attack on us and that relates to cost and benefits. The final  
17 complaint that Qualcomm makes about the Consumers' Association's complaint is  
18 under the heading "Suitability". If you look in their skeleton it is above paragraph 60  
19 and their key point is at paragraph 62, the costs of permitting the proposed  
20 proceedings to continue outweigh any benefits. I've already trailed the answer to that  
21 in the discussion of the law. As a general point, you come back to the twin purposes  
22 of this regime explained by Lord Briggs. The first is that the regime is designed to  
23 address situations where each individual consumer has suffered a modest loss which  
24 is effectively impossible to recover in an individual case. That's the access to justice  
25 justification for the regime. The second justification you'll recall is to prevent a potential  
26 wrongdoer from walking away with a windfall amounting to many millions of pounds of  
27 illegally obtained sums. Both of those justifications stand as context to frame any  
28 specific cost-benefit analysis in a given case.

1 Now, the points made in paragraph 62 of the skeleton by Qualcomm are bad ones. They are  
2 referred to and addressed in Ms Boyle's third statement, if I can invite you to return to  
3 that, in the core bundle, tab 13, beginning at page 442 at the bottom. And despite the  
4 fact that Ms Boyle deals with these points in detail systematically, Qualcomm has not  
5 deigned to engage with them in its skeleton argument. There is a very brief reference  
6 to Ms Boyle's third statement and that's it. At page 443, go to paragraph 9, that is  
7 where Ms Boyle systematically runs through each of the points. Now, can you read  
8 that for yourselves. There has been no answer to it on each of the points, claim value,  
9 claim take up, costs, the funding return. You will have read this to yourself, but she  
10 places in context the level of the costs at stake here, the nature of the funding return  
11 she places in context and explains.

12 MRS JUSTICE BACON: Is there any consideration of the take up when set against the value  
13 to the consumer of making its claim for, say, £16 or £17? I mean, what she says about  
14 take up really relates to whether they remember the purchase that they made, but there  
15 is a different point there, isn't there, about the value of the return to them?

16 MR TURNER: Yes. If you look at the paragraph above on page 444:

17 "The average claim value of ..."

18 This is under "Per consumer losses", just beginning at the last line on the previous page:

19 "... £16 or £17 ... was calculated by Mr Noble ... based on data available to him at that point.

20 This is a meaningful sum and the value of individual claims will continue to rise as the  
21 ... proceedings progress ..."

22 And as new consumers become part of the Class, and so forth.

23 MRS JUSTICE BACON: Is the point being made that if an individual has purchased a number  
24 of phones in that period, that will increase the value of claim to them?

25 MR TURNER: Yes, and thereby also the aggregate value. That point is made there.

26 MRS JUSTICE BACON: Well, I'm not talking about the aggregate value across the report, I'm  
27 talking about the value to each consumer.

1 MR TURNER: Yes, that point is sought to be made here, the value of individuals claims will  
2 continue to rise.

3 MRS JUSTICE BACON: Because they will purchase more phones during the period and they  
4 might have bought them for family members?

5 MR TURNER: Absolutely, yes.

6 MRS JUSTICE BACON: So the point is that individual consumers won't necessarily have just  
7 purchased one, so their making a claim will not just necessarily be £16, it may be 32  
8 or a multiple of that. Is that what she's saying?

9 MR TURNER: That is right, and, my Lady, in the short break that we had, because of your  
10 query earlier, I say on instructions that this is regarded by Which? as certainly a  
11 meaningful sum. It does matter to people, particularly against the context of the current  
12 cost of living crisis, and they do therefore expect there to be significant take up.

13 My Lady, the conclusion to this is that the benefits of this collective claim far outstrip the costs.

14 My Lady, in the remaining time, I've gone more quickly than I thought I would, I will briefly  
15 address opt-in/opt-out --

16 JUSTIN TURNER QC: Can I before you do that just ask a question, Mr Turner. As  
17 I understand the cost per phone, although it is £16 for the consumer, cost per phone  
18 is £8, have I got that right? Or it's sort of the average consumer will have had two  
19 phones --

20 MR TURNER: That's 2.2 smartphones on average.

21 JUSTIN TURNER QC: Okay.

22 MR TURNER: Absolutely.

23 JUSTIN TURNER QC: And so we're talking about, as against the cost of a phone we are  
24 talking about 1, 1.2 per cent, that sort of thing, the cost of a phone, and the tests  
25 that -- the Microsoft test, I paraphrase, for the matters we have before us, is whether  
26 there is a realistic prospect of establishing that £8 per phone is passed on to the  
27 consumer.

28 MR TURNER: Well --

1 JUSTIN TURNER QC: Have I got that right or have I got that wrong?

2 MR TURNER: Only subject to the tedious caveat that it is avowedly a preliminary analysis.

3 So it's not the target at the trial that we will be seeking to hit.

4 JUSTIN TURNER QC: I understand that, but ballpark is sufficient for present purposes. And  
5 there's a lot of debate around whether hedonic regression analysis is appropriate, but  
6 let us assume in your favour for the moment that it is -- obviously we've got the hot tub  
7 tomorrow -- so there's no difficulty, or at least it's acceptable, that that's an appropriate  
8 way of determining whether that's passed on or not.

9 But that analysis hasn't taken place yet and we don't know what it will reveal even if the method  
10 is suitable. So I understand that if the increase in costs to the phone were 20 per cent  
11 rather than 1.2 per cent, then as a matter of common sense, if you prefer to call it  
12 economic theory, as a matter of common sense that's going to get passed on to the  
13 consumer, I understand that.

14 MR TURNER: Yes.

15 MRS JUSTICE BACON: But if it's only 1 per cent, with the evidence we've got before us  
16 today, what is the evidence that just 1.2 per cent or something would get passed on to  
17 the consumer? What have we got in the materials before us today prior to that hedonic  
18 analysis to take any comfort that there's a realistic prospect that that was passed on?  
19 And I'm conscious you made reference to materials in the US, but we don't have  
20 the -- at least as of this moment, we don't have the expert report in the US, we don't  
21 have the analysis from the US. So what materials -- and I appreciate you may pass  
22 that on to us later today, but what can we actually point to of substance to show that  
23 that 1 per cent is likely or there is a reasonable prospect it was passed on to the  
24 consumers?

25 MR TURNER: Sir, the answer to that is that there isn't in the materials a range given. This is  
26 a sort of minimum point and this is a maximum, with a central estimate being the £16  
27 reflecting the two phones bought by consumers up to December 2020. So in no sense  
28 at this point is Mr Noble in a position to arrive at something which is a range with any

1 assurance. Precisely because of the early stage that we have reached today, what  
2 he's done is to try to give a feel for the likely level of pass-through and individual  
3 recovery, assuming take up, on the basis of the information that he's got at the  
4 moment.

5 So that's as far as he's been able to take it. He hasn't therefore tried to explore whether, with  
6 the data available, one would go down to a smaller level of recovery or indeed go up  
7 to a higher level.

8 And may I on that note perhaps just return to a point that my Lady raised earlier with me  
9 concerning Dr Flamm. I should be quite clear in case there's any doubt that the way  
10 that Dr Flamm is relied on essentially is not by way of support to the hedonic regression  
11 analysis, for the use of that. There's a reference, which I've taken you to, to the fact  
12 that both Dr Flamm and Qualcomm had no problem with that form of analysis. The  
13 way in which it is used specifically in Mr Noble's first report specifically concerns the  
14 amount of the money at the end. So what he does is he says there are certain  
15 similarities between the US and the UK markets. In that case, based on the analysis  
16 that Dr Flamm produced, he found a pass-through rate in that geographic context --

17 MRS JUSTICE BACON: 88 per cent.

18 MR TURNER: Yes.

19 MRS JUSTICE BACON: That's what I thought. So he relies on the report to get the  
20 88 per cent but he also seems to rely on the report, if I've understood it correctly, to  
21 derive some of the inputs to his analysis that are set out in his table, 7.1, which set out  
22 some of the control factors. Because those seem to be the control factors that  
23 Dr Flamm used.

24 MR TURNER: Well, he will need to address you directly on that in the hot tub, but what I would  
25 say is that I'm not conscious that he has simply lifted those and is relying on the same  
26 factors. He's reached his own independent view about how to address things. One of  
27 the differences, indeed the specific difference that Qualcomm relies on between  
28 Flamm and himself is that Flamm at each stage of the value chain where there were

1 multiple steps, Qualcomm to Apple and Samsung, then to an indirect retailer, or  
2 Carphone Warehouse, high street retailer, then selling to the consumer on the basis  
3 of either a direct handset sale or a device plus contract sale, Dr Flamm did a regression  
4 specifically for each of those vertical slices and then combined it to reach his result;  
5 whereas what Mr Noble is proposing to do, as he said in the paragraph I took you to,  
6 is to do a regression that looks at the input on the one side and the output in terms of  
7 prices, to use the well-known control approach for this form of analysis to isolate the  
8 effect of the overcharge from other factors and to produce a relationship which he will  
9 say is a causal relationship and to do it, as he says, in a single calculation.

10 So that's the key difference. But one point which is perhaps similar, although I will need to  
11 check whether Dr Flamm definitely does this as well, is that although Mr Noble is not  
12 going to have a vertical segmentation for his regression approach, doing it in a single  
13 calculation, he is proposing, as I showed you in that footnote, 173, to have potential  
14 horizontal separations.

15 MRS JUSTICE BACON: Groups of regressions.

16 MR TURNER: Yes, and then combine them. I believe, and Mr Noble will clarify, that  
17 Dr Flamm did do something along the same lines, but at all events Mr Noble is making  
18 up his own mind about what information will be needed in our context, and those  
19 specific inputs and those pricing sources about which you asked me, my Lady, I'm not  
20 sure that Dr Flamm went to each of those or whether they covered the US context for  
21 his purposes. So that will be elaborated.

22 PROFESSOR MASON: Could I just check one aspect that you just mentioned so that  
23 I understand completely what use is being made of Professor Flamm's analysis.  
24 I thought I heard you say that it was primarily being used as a basis for the 88 per cent  
25 figure in the calculations that Mr Noble provides. Are you also though using the fact  
26 that both Qualcomm and Professor Flamm used this particular approach and that has  
27 not been contested in the US --

28 MR TURNER: Yes.

1 PROFESSOR MASON: You are relying on that fact?

2 MR TURNER: I'm sorry. I did mean to say that earlier. The main way in which he relies on it  
3 is for the 88 per cent but in the passage that I took you to, it's referred to by Mr Noble  
4 that both Dr Flamm and Qualcomm were happy with the hedonic regression approach  
5 for assessing consumer pass-through in the US context as a methodology. Yes.

6 PROFESSOR MASON: And hence in the fullness of time, should things proceed, the reliance  
7 on the 88 per cent will fall away because that will be replaced by estimates that come  
8 from the hedonic regression. Are you then saying that -- and I don't want to go into  
9 issues that we'll explore in more detail in the hot tub tomorrow. Will any further reliance  
10 be placed on Professor Flamm's work or will it be a completely ab initio approach by  
11 Mr Noble? I'm just trying to work out what weight and reliance is being placed on  
12 Professor Flamm's work.

13 MR TURNER: Yes, I fully understand. It's a good question. It's somewhat above my pay  
14 grade and Mr Noble will refer to that. As I stand here today, I understand, as, sir, you  
15 say, that what Mr Noble is going to do is his own approach and, although he will see  
16 what Dr Flamm has done by way of giving him a comfort or cross-checking his  
17 approach, he's not going to be specifically relying on and simply incorporating any  
18 findings made by Flamm in the US context in the UK. The only way in which he is  
19 directly doing that is at this certification stage for the 88 per cent.

20 PROFESSOR MASON: Thank you.

21 MRS JUSTICE BACON: You were going to address us on opt-out and perhaps you'll then  
22 come to my question about to what extent we do need to get into the merits for this  
23 particular point, because obviously we've got the test of a realistic basis and the facts  
24 in relation to the methodology, but then we also -- it seems to be overlaid by some  
25 consideration of the merits for the purposes of opt-out.

26 MR TURNER: Yes. So opt-in/opt-out. If we go to authorities tab 6, page 61, you will have  
27 paragraph 6.39 of the guide and under the heading "Strength of the claims" in italics,  
28 you'll see the explanation given for why there is a strength assessment by the Tribunal



1 at all, which I adumbrated a little bit earlier, that in the opt-in proceeding context you  
2 would expect people to do their own assessment before they plunge into the  
3 proceedings.

4 Now, we say it's plain that these proceedings, given their context and their structure, ought to  
5 be opt-out rather than opt-in, very, very large aggregate claim estimated currently as  
6 in excess of £482 and a half million as at today's date, 29 million consumers estimated  
7 to have been affected, modest levels of recovery but at a level that we say are  
8 meaningful and significant.

9 The strength of the claims, my Lady, is sufficient. We refer to the fact that there have been  
10 on the infringement side multiple courts and authorities worldwide engaged with the  
11 allegations of anti-competitive practices, and I've shown you the findings in Korea,  
12 settlement in Taiwan. I haven't gone through Judge Koh's decision but what I have  
13 shown you is the specific way in which the appeal court reversed her ruling, and so we  
14 say that there is a very good basis under our system for saying that these practices  
15 are contrary to European and national competition law and, moreover, and I can take  
16 you to the -- were there time, I would take you in Judge Koh's ruling to the evidential  
17 element that she refers to, Qualcomm's admissions and the documents, slide  
18 presentations and so forth.

19 MRS JUSTICE BACON: Aren't there basically three elements to this. One is establishing that  
20 it was in breach of the relevant competition rules. The second is the FRAND analysis  
21 looking at comparables or whatever to establish what you say the royalty should have  
22 been. That's part 2. Then the part 3 is pass-on.

23 MR TURNER: Yes.

24 MRS JUSTICE BACON: So do we have to have regard to the strength of the claims on  
25 pass-on and therefore does that require us to do a bit more than just looking at the  
26 factual basis of the methodology.

27 MR TURNER: Well, I say that you have sufficient and you don't need to go into things in  
28 greater detail. I've given you the example of how in McLaren, the most recent judgment

1 of the Tribunal on this, the point that was raised by one of the defendant's concerning  
2 something akin to focal pricing was addressed by the Tribunal there.

3 MRS JUSTICE BACON: Yes, I'm asking about really the test. Starting with the test, does it  
4 have to be a bit more than simply the Pro-Sys test, when you're looking at the strength  
5 of the pass-on claim?

6 MR TURNER: No, it does not. It is the pass-on. It is the Pro-Systest. You're asked to look  
7 at whether there is a plausible and credible basis for the methodology such that it is  
8 likely to produce meaningful results. That is the level of the test.

9 MRS JUSTICE BACON: For both opt-in and opt-out? Because if that's the case, then what's  
10 the difference between the two?

11 MR TURNER: The -- well, for opt-in -- well, for opt-in, as well as for opt-out, one is concerned  
12 with seeing whether the material provides a plausible basis. That is true. And it is also  
13 the case that -- we saw in McLaren too -- there is a distinction to be drawn between  
14 satisfying the certification requirements, which is the Pro-Sys test, and that involves  
15 showing you that there is a plausible and credible methodology, on the one hand, and  
16 merits on the other, and that is why strike-out and summary judgment are thought of  
17 as separate and the two are conceptually different.

18 However, having said that, in my submission the two converge for your purposes in this sort  
19 of case because if we pass the Pro-Sys test and establish to your satisfaction that  
20 there is a plausible basis for considering that there will be this significant level of  
21 pass-on to consumers, and that the methodology is equipped to show that, that is  
22 sufficient to satisfy you that the opt-out test is passed insofar as you need in that  
23 context to examine strength.

24 So we say that there isn't a difference. If you have shown that there is a plausible methodology  
25 which will yield that result, then it follows that the test is passed also for strength on  
26 the opt-out basis.

27 MRS JUSTICE BACON: And you are saying that really there isn't any difference between  
28 opt-in and opt-out when you're considering that limb of your case?

1 MR TURNER: That is so, when you -- well, when you're considering that limb of the case,  
2 that is so.

3 MRS JUSTICE BACON: Then what does the point about the strength of the claims add?

4 MR TURNER: The strength of the claims becomes important certainly on the other two  
5 elements that your Ladyship has just outlined where, before you plunge into court  
6 proceedings concerned with something of this kind, the court will want to be sure that  
7 there is something which has a significant -- a realistic prospect of succeeding.

8 MRS JUSTICE BACON: So why does that apply for infringement but it doesn't apply equally  
9 to pass-on, because you've got to come good on all three elements of your case,  
10 infringement, the FRAND analysis and pass-on, before anyone gets any money.

11 MR TURNER: Yes, what I'm saying is that for the pass-on analysis, in showing you that there  
12 is a realistic plausible methodology which will produce significant pass-on, and that  
13 has been done in this case by adopting realistic assumptions, including the 88 per cent  
14 which is adopted from the US context, that that is sufficient to demonstrate to you that  
15 the claims have a sensible basis for concluding that you will see aggregate recovery  
16 and, by extension, individual recovery at high and, in individual terms, meaningful  
17 levels.

18 So, my Lady, the very last point -- I'm conscious of the time -- that I will make is this. The US  
19 certification judgment concerning Dr Flamm, you asked me about that and the use that  
20 had been made of it, may I at least give you the references before concluding. You  
21 can perhaps call that up on screen and you will see it for yourself. Supplemental  
22 bundle, tab 3, page 437. This is where Judge Koh is beginning to consider Dr Flamm's  
23 material and her conclusion in relation to Dr Flamm you will find if you go to page 487.  
24 487, lines 8 to 14, where you will see "Conclusions on Antitrust Impact" is the heading:  
25 "In particular, plaintiffs' theory and methodology of demonstrating pass-through to consumers  
26 on a common basis withstands scrutiny. Of course, Qualcomm has submitted  
27 evidence purportedly contradicting plaintiffs' pass-through theory and has launched  
28 attacks on the completeness and accuracy of Dr Flamm's pass-through studies.

1 Nevertheless, the persuasiveness of Qualcomm's evidence and arguments is an issue  
2 to be decided on the merits, not at class certification."

3 That was her conclusion and then for your reference we can go back and just show you the  
4 points. First is page 481, line 16 to 17, and you'll see there first Qualcomm argues that  
5 Dr Flamm doesn't account for and by how much focal point pricing affects the alleged  
6 pass-through rate. And then she discusses that and dismisses the argument.

7 484, page 484, lines 1 to 3, at the top:

8 "Second, Qualcomm argues that Dr Flamm has not accounted for instances in which retailers  
9 and carriers offered a variety of rebates, discounts, promotions ... [and so forth]."

10 And then she deals with that and that complaint that that undermined the pass-through  
11 analysis.

12 And then lastly, 485, at line 7 to 8:

13 "Qualcomm lastly contends that plaintiffs' proposed class includes a large number of members  
14 who have suffered no impact as a result of Qualcomm's conduct."

15 All of that then led to the conclusion that I showed you at the outset over the page where she  
16 said that that doesn't stand in the way of the certification.

17 And finally, my Lady, you asked about the remittal judgment by the Court of Appeal. I'll merely  
18 give you the reference. It doesn't affect anything that I was saying because they did  
19 not deal with any criticisms of Flamm at the appeal level. That is authorities tab 32 at  
20 page 1815.

21 MRS JUSTICE BACON: All right.

22 MR TURNER: My Lady, I'm very grateful. Those are our submissions and we would  
23 respectfully ask the Tribunal to make the requested order.

24 MRS JUSTICE BACON: Thank you very much.

25 All right. We will come back at five past two.

26 **(1.07 pm)**

27 **(The luncheon adjournment)**

28 **(2.05 pm)**

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**Submissions by MR HOWARD**

MRS JUSTICE BACON: Just one moment, Mr Howard, while I plug myself in. All right.

MR HOWARD: Of course.

As you know, Which? seeks to bring collective proceedings on behalf of about 29 million consumers who are said to have sustained losses of approximately £482.5 million as a result of Qualcomm's alleged anti-competitive behaviour and overcharge of royalties for LTE SEPs. Now, this is a stand-alone action, thus Which? must prove breach, causation and quantum of loss. Everything is in issue.

Now, for present purposes we accept that there is an arguable claim relating to breach. Just to get one thing out of the way at the outset, we do not accept that you can rely on the District Court's judgment in the United States, and the reasons we say that is of no relevance at all are set out in Ms Vernon's affidavit, which is at core 488 at paragraphs 80 to 85. I'm not proposing to go through that now, but I can just give you that reference.

Now, for present purposes, the critical feature that is in dispute is, even if there was a breach as alleged resulting in alleged overcharge of royalties, were such overcharges of royalties passed on to consumers? Now, as has been noted this morning, the claim is for approximately £8 per phone. Now, that £8 in fact includes interest, so the amount of overcharge is in fact less than £8 because it includes interest at 8 per cent.

MRS JUSTICE BACON: Just before you get there, you say that we can't rely on the District Court judgment.

MR HOWARD: Yes.

MRS JUSTICE BACON: Do you accept the broad description of the fact of the commercial arrangements, if not the characterisation or the acronyms?

MR HOWARD: Well, for present purposes we're not disputing that, so I'm not accepting it, other than, as it were, at this stage I accept that is the basis on which the Tribunal's entitled to proceed.

1 MRS JUSTICE BACON: All right.

2 MR HOWARD: We haven't put that in issue for present purposes.

3 MRS JUSTICE BACON: So the description in very broad terms of the conduct in dispute as  
4 set out in, for example, paragraph 6 of the claim form -- well, in fact all of the  
5 subparagraphs of that, you don't for these purposes put in issue the dominant position  
6 or the abuse, as you have you just confirmed, or I'm looking at paragraph C and D,  
7 which is the broad descriptions of the commercial terms which are in dispute. So that's  
8 not an issue for the purposes of today?

9 MR HOWARD: Not an issue for present purposes. Exactly.

10 MRS JUSTICE BACON: All right.

11 MR HOWARD: If one were looking at it in normal civil law terms, I accept they have a good  
12 arguable case on those points, as it were.

13 MRS JUSTICE BACON: And going beyond that, as a matter of fact, is it in dispute that you  
14 do have those terms in your licences?

15 MR HOWARD: That is in dispute, yes.

16 MRS JUSTICE BACON: Right.

17 MR HOWARD: But that's not a matter you have to form a view on today --

18 MRS JUSTICE BACON: No.

19 MR HOWARD: -- is the simple point.

20 So the issue that we are focused on, and for the purposes of today essentially the only issue  
21 that we're focusing on, is this question of pass-on and the methodology that is  
22 proposed for proving pass-on. To put this in context, as one has seen, the claim is for  
23 alleged overcharge per phone, per Apple and Samsung phone of £8, although it's  
24 actually the actual overcharge would be less because that already includes interest,  
25 and the £16 or £17 per consumer is on the premise that people have bought more than  
26 one phone and of course it's not really rocket science to realise that even if you multiply  
27 this through and you say during this period by the time the matter comes on for trial  
28 there's an opportunity for people to have brought another phone, you're at most talking

1 about three phones in reality; in other words, per consumer, if they bought three  
2 phones on the claimant's case, it's £24.

3 Now, what is important is to bear in mind the empirical research in the United States about the  
4 take up by consumer of settlements, and we've referred you, and I'd just like to show  
5 you that, at tab 36 of the authorities bundle at page 2027 to a retrospective analysis of  
6 settlement campaigns by the FTC in the United States. At page 2041, they summarise  
7 the results of the analysis and you can see that they say there -- this was in 2019, so  
8 this is relatively up-to-date -- that:

9 "This analysis represents the first systematic, empirical examination of a broad set of  
10 consumer class action cases, and the findings represent the most reliable quantitative  
11 descriptions of consumer class action settlements to date."

12 "This study reveals several relationships between aspects of the class action cases in the  
13 sample, such as claims rates, notice types, check cashing rates, and redress  
14 amounts."

15 And the study found, and it's the first bullet point I'm interested in:

16 "Overall claims rate. Across all cases in our sample requiring a claims process, the median  
17 calculated claims rate was 9%, and the weighted mean (i.e., cases weighted by the  
18 number of notice recipients) was 4%."

19 So what one sees is that on a weighted mean basis approximately 4 per cent of consumers  
20 actually take up sums that would be due to them.

21 Now, obviously there is no -- I'm not suggesting there's absolute precision in this, but one we  
22 would respectfully suggest has to bring an element of common sense to bear. In  
23 relation to the cost of a phone, if you buy it outright, as it's been said, it's something  
24 like £500, so we're talking about approximately 1 per cent or something. Of course  
25 a lot of people get their phones bundled up, because they go to a mobile network  
26 operator and they have a contract which includes the price of the phone, so to a lot of  
27 people, majority of people who get their phones in that way, this is not a cost they'll  
28 even really be aware of. We would suggest it is implausible to think that the take-up

1 rate by consumers will be significantly above what the empirical research in the United  
2 States shows. Now, if it is 4 per cent and if the claim is worth what the claimant  
3 currently says, then consumers out of this litigation are likely to recover something of  
4 the order of £20 million, and that has to be contrasted at this stage with the cost budget,  
5 which is £25 million, and the litigation funder's intended recovery, which is 15 to  
6 20 per cent of the damages, which is, in other words, up to around £100 million.

7 Now, these factors we would suggest are relevant on a stand-alone basis when one is  
8 considering the suitability of these proceedings for collective proceedings and whether  
9 the costs outweigh the benefits and are disproportionate, but they also put into context  
10 the first and main issue which I wish to address today, whether the methodology that  
11 Which? and its funders propose for establishing loss is capable of satisfying the  
12 so-called Pro-Sys test.

13 MRS JUSTICE BACON: Mr Howard, you say very little about suitability towards the back end  
14 of your skeleton argument. Are you now putting the point about the cost benefit much  
15 higher?

16 MR HOWARD: No, I'm not, but it's -- the reason I have mentioned it right at the outset, my  
17 Lady, is this. You've heard submissions today from Which?, and we'll come on to the  
18 detail of this, which is that it is disproportionate essentially for them to investigate the  
19 matters that we say require investigation and it's perfectly suitable for them to  
20 essentially adopt Mr Noble's hedonic regression analysis as a means to prove the  
21 case. Now, we say that isn't a suitable means, but insofar as one's looking at  
22 proportionality, here this is a claim for a very large sum of money, £500 million, and we  
23 suggest that one needs to in that context consider ultimately whether the funders, if  
24 they wish to pursue this, because this is litigation ultimately we say really being  
25 pursued for the benefit of the funders, whether they shouldn't be required, if they're  
26 going to do it, to do it properly.

27 MRS JUSTICE BACON: So doesn't that rather cut across the point that you've just made.  
28 You're saying this is already very expensive compared to what consumers are going



1 to get. So actually you're saying you should spend even more in order to get the same  
2 rate of return.

3 MR HOWARD: You've got to remember, the claim -- and I don't think there is an inconsistency  
4 at all -- the claim is I'm bringing this case on behalf of consumers, 29 million consumers  
5 in the United Kingdom, and it's their claim that is sought to be vindicated. There's a  
6 separate point when you're considering whether this is all worthwhile as to whether or  
7 not consumers will actually take up any sums that are awarded, in other words, what  
8 is the point of this if it's really just to benefit the funders.

9 But if you discount that or say, well, that's not a relevant factor, it is still relevant to see how  
10 much is being claimed when you're considering proportionality and why it is that  
11 Which? and the funders are not willing to go about the exercise in the way that we say  
12 is the proper way to do it. And when you're being told, well, it would be  
13 disproportionate, disproportionate to what, you have to ask. In the context of a claim  
14 for £5 million, we'd say it's not disproportionate to actually seek to investigate pass-on  
15 in the obvious way, which is to test what Apple and Samsung actually did, how they  
16 actually pass on costs.

17 MRS JUSTICE BACON: Yes, I was just trying to tease out the relationship between your two  
18 points. I can see that they're separate points but I thought that you had said that now  
19 the question of consumer recovery and the take-up rate was relevant to the  
20 methodology, but the way you put it just now you're suggesting that it's the overall  
21 aggregate amount of the claim that is relevant to methodology.

22 MR HOWARD: Yes. Sorry, I shouldn't have run the points together perhaps in the way I did  
23 in opening. What I was submitting to your Ladyship is that when you consider what is  
24 an appropriate approach, the proportionality, you have to look at the claim that is being  
25 made and you've got a claim for £500 million which is being brought with the assistance  
26 of litigation funders, who stand to make £100 million out of the case, and all I'm saying  
27 is, if you get to a stage where you have to consider proportionality, there is nothing

1 disproportionate in saying that the litigation funders should go about this in the proper  
2 way.

3 Insofar as one is considering, on a standalone basis, is this suitable, in our submission a factor  
4 to consider is the likelihood that consumers ultimately will be interested in this and will  
5 be the beneficiaries or whether this is litigation which is really being brought for the  
6 benefit of the funders. We suggest that, when you look at the -- and that's where the  
7 disproportionality comes in of the costs and the benefits, the benefits ultimately to  
8 consumers are very limited indeed whereas the costs are obviously high.

9 MRS JUSTICE BACON: Well, I mean, you're not saying that ultimately objectively the benefits  
10 are limited but what you're saying is the likely take up is limited.

11 MR HOWARD: Exactly. Exactly.

12 Yes, I'm not saying that the mere fact that it is £8 per phone is a reason why -- in other words,  
13 saying £8 per phone is a trifling amount, therefore it's not worth it. The whole point of  
14 collective proceedings is that you should be able to bring a class action to recover what  
15 may be per head a relatively limited amount, but in our submission the Tribunal does  
16 need to assess in these situations the extent to which actually consumers will be  
17 interested and will benefit and the extent to which the case is actually in reality being  
18 brought for the benefit of funders.

19 MRS JUSTICE BACON: In any case where the ultimate claimant or the claim is being brought  
20 on behalf of a large group of consumers, you will run into presumably the same  
21 argument about the average take-up rate. So are you saying that in any case that's a  
22 reason in itself to deny certification?

23 MR HOWARD: I am saying it is a factor that the Tribunal need to take into account in its  
24 assessment.

25 MRS JUSTICE BACON: So if you didn't get home on your methodology point, do you say  
26 that you would get home on the consumer take-up point?

27 MR HOWARD: Well, I say firstly, I should get home on my methodology point, that's the first  
28 point.

1 MRS JUSTICE BACON: I'm trying to tease out whether it's really a stand-alone point.

2 MR HOWARD: Secondly I say this, because there are, as it were, shades. If you thought,  
3 well, the methodology point is, as it were, just about there, it's pretty weak but it's just  
4 about there, and also the evidence about whether or not as things stand there has  
5 been any pass-on but one said, well, it just about gets over the Pro-Sys hurdle but one  
6 then looks at the disproportionality in terms of costs and benefit, it in our submission  
7 ought to sway your judgment.

8 Now, insofar as one is looking at it as a stand-alone point, i.e. in other words you say, well,  
9 I'm firmly satisfied that they have passed the Pro-Sys hurdle, should I nevertheless  
10 refuse to certify because it's not suitable on this basis, in our submission on the facts  
11 of this case you should still refuse to certify on that basis.

12 But it is a matter of discretion and a matter of assessment on the particular facts of each case.

13 I mean, ultimately I think you heard from Mr Turner he asserts that the sums involved in this  
14 case are significant to consumers. In our submission, in the real world that is actually  
15 unlikely to be the case and so that one is unlikely to be vindicating interests of large  
16 numbers of consumers in fact.

17 Now, of course there remains the point, and I'm going to come to the authorities in a moment,  
18 there remains the point that part of the purpose of such proceedings is not only to  
19 recover sums for the consumers but also to deter anti-competitive conduct in the future.  
20 So I accept you have to consider that. But you have to look at the matter in the round.

21 On where we stand on the Pro-Sys test, we submit that the methodology that Which? has  
22 proposed is not sufficient because it's not grounded in the facts and we submit that it  
23 is noticeable and remarkable that, notwithstanding the considerable sums at stake,  
24 there is a marked reluctance to take basic and obvious steps to prove loss if there is  
25 any.

26 Now, before considering this further, it's worth reminding you at the outset of what Which? is  
27 seeking to prove. So it seeks to prove that the allegedly inflated royalties charged by

1 Qualcomm caused proposed class members -- would you like me to pause for  
2 a moment while that's set up?

3 JUSTIN TURNER QC: Thank you very much.

4 MR HOWARD: Thank you. It's seeking to prove that the allegedly inflated royalties charged  
5 by Qualcomm caused proposed class members to pay higher retail prices for  
6 respectively Apple and Samsung smartphones.

7 Now, before considering how Which? proposes to go about the exercise, it's important to set  
8 the matter in context, and the first thing to note is the complexity of the distribution  
9 chain. So firstly, we are dealing with two different manufacturers, Apple and Samsung.  
10 Secondly, in the case of Apple, it didn't have a direct licence with Qualcomm until 2019.  
11 Before that, its third party contract manufacturers in China and Taiwan had  
12 royalty-bearing licences with Qualcomm. For your reference, you can see that in  
13 Vernon 1 at paragraph 34 in the core at page 71.

14 Thirdly, whether Apple was affected by the alleged overcharge in royalties prior to 2019 will  
15 depend on the extent to which the manufacturers in China and Taiwan passed on the  
16 overcharge to Apple.

17 So the fourth point is there is no obvious homogeneity between the Apple and Samsung chains  
18 since it can't be assumed that they bore the alleged excessive royalties at the same  
19 rate.

20 Fifthly, in any event Apple and Samsung then distribute through various different channels.  
21 So each of them sells directly to consumers, then each of them sells to MNOs, mobile  
22 network operators, who in turn supply them to consumers bundled up with contracts,  
23 and each of them sells to retailers and other resellers, who sell them to consumers.

24 Now, it is perhaps a statement of the obvious but nevertheless in the light of Which?'s  
25 approach it does need to be said, each of Apple and Samsung may have different  
26 costs, may have their own pricing policies and they may have different pricing policies  
27 for different distribution chains and so too may the OEM supplying Apple, the mobile  
28 network operators and the retailers and resellers.

1 Now, despite these facts, Which? does not propose to investigate the actual costs of Apple  
2 and Samsung or the pricing policies of each of Apple and Samsung or the OEMs who  
3 supply Apple or the retailers and resellers of the MNOs. Instead what is said is that,  
4 through Mr Noble's hedonic pricing regression model, it can establish pass-on.

5 Now, we suggest that this approach is flawed and will not be capable of producing a plausible  
6 estimate of aggregate consumer harm. In very simple terms, we say that the approach  
7 is flawed for the following reasons. Firstly, the model is not based on factual evidence  
8 about the respective supply chains and, in particular, how the respective parties in the  
9 chains set prices. Secondly, the model is concerned with the correlation between the  
10 variable costs of Apple and Samsung in the aggregate and sale prices for phones. It  
11 entirely ignores other costs and even in relation to variable costs it does not seek to  
12 isolate royalty costs and the alleged excessive royalty costs to demonstrate how those  
13 costs are passed on. In essence, it ignores all non-variable costs and simply assumes  
14 that all variable costs are treated equally and passed on in precisely the same way.

15 Now, before I develop those points further, I want to say something very briefly about the legal  
16 framework that guides the Tribunal.

17 Now, the process of certification requires Which? to persuade you that the authorisation and  
18 eligibility conditions are satisfied. The following points are worthy of emphasis.

19 First, as Lord Briggs explained in Merricks, the Tribunal is given an important screening or  
20 gatekeeping role over the pursued proceedings. The court will find Merricks at tab 19  
21 of the authorities at page 930 and the part I was referring to is in paragraph 4 of his  
22 Lordship's judgment, the judgment with which Lord Thomas agreed and --

23 MRS JUSTICE BACON: So what page of the PDF?

24 MR HOWARD: It's page 930, my Lady, paragraph 4:

25 "The CAT is given an important screening or gatekeeping role over the pursuit of collective  
26 proceedings."

27 Do you have that?

28 MRS JUSTICE BACON: Yes.

1 MR HOWARD: And the role, this gatekeeping role, I'm going to look at the Jensen case in a  
2 moment, but in the judgment of Lord Sales and Lord Leggatt -- now, of course I accept  
3 they were dissenting in Merricks on the result, but what they said about certification  
4 and the process I would respect is of importance and weight and that is at page 958,  
5 at paragraph 98, where, under the heading "Certification", you can see that they said  
6 at 98 that:

7 "A class action procedure which has these features provides a potent means of achieving  
8 justice for consumers. But it is also capable of being misused. The ability to bring  
9 proceedings on behalf of what may be a very large class of persons without obtaining  
10 their active consent and to recover damages without the need to show individual loss  
11 presents risks of the kind already mentioned, as well as giving rise to substantial  
12 administrative burdens and litigation costs. The risk that the enormous leveraging  
13 effect which such a class action device creates may be used oppressively or unfairly  
14 is exacerbated by the opportunities that it provides for profit. As the Court of Appeal  
15 observed in the present case, 'the power to bring collective proceedings ... was  
16 obviously intended to facilitate a means of redress which could attract and be facilitated  
17 by litigation funding'. Those who fund the litigation are, for the most part, commercial  
18 investors whose dominant interest is naturally to make money on their investment from  
19 the fruits of the litigation.

20 As noted earlier, to ensure that the substantial legal advantages afforded by the collective  
21 regime are conferred only in appropriate case, the regime contains a control  
22 mechanism of requiring collective proceedings to be certified by the CAT and the CAT  
23 is given a broad discretion in deciding whether, and if so in what form, collective  
24 proceedings may be pursued."

25 I refer you to that just because it highlights the importance of the role that you play at this stage  
26 as the gatekeepers and it's making points which are obviously right as a matter of  
27 common sense that collective proceedings can be used oppressively and there is a

1 point to your being gatekeepers, which is to ensure that only appropriate proceedings  
2 are allowed through the gate.

3 Mr Justice Gascon in the Jensen case in Canada has provided a useful summary of the  
4 principles and can I take you to that. That's at tab 33 of the authorities bundle.

5 MRS JUSTICE BACON: Is that the case that was rejected in McLaren?

6 MR HOWARD: I think that's wrong when it was said it was rejected in McLaren. I think  
7 Mr Turner corrected himself. What he said was that the submission that was being  
8 made by reference to the case was rejected but the principles set out in that case were  
9 not disputed.

10 If we go to it, it's at page 1854.

11 At page 1877 his Lordship sets out, and it's from 1877 to 1882, he sets out the general  
12 principles with which we're concerned regarding certification, and at 54, I'm not going  
13 to read it out, but at 54 he explains the policy of class actions, and what you get from  
14 54 is that essentially the policy is to facilitate access to justice and ensure that  
15 wrongdoers modify their behaviour. So on 1878 you can see about three lines down  
16 he says:

17 "First, foremost consideration should be given to the fact that class actions serve judicial  
18 economy ... avoids unnecessary duplication of fact-finding and legal analysis."

19 And a few lines further on he says:

20 "Second, class actions improve access to justice by making it more economical to prosecute  
21 claims that any one class member would find too costly to initiate and bring forward on  
22 his ... own..."

23 and third:

24 "... serve efficiency and justice by ensuring that wrongdoers modify their behaviour..."

25 So that's the general purpose and at 56, he explains that the purpose of a certification motion  
26 is to determine whether a class action is appropriate. And at 57, on page 1879, he  
27 says that:

1 "It is well established that the onus on a party seeking certification is not an onerous one and  
2 the threshold for the certification has generally been described as low."

3 But:

4 "That said, a plaintiff must nonetheless come forward with sufficient pleadings and with a  
5 sufficient evidentiary basis to support certification."

6 On page 1880, at 59, he adverts to the "some basis in fact" standard which came out of the  
7 Pro-Sys case. So he says at 59:

8 "For the remaining four certification criteria, the plaintiffs have the burden of adducing  
9 evidence to show 'some basis in fact' that the requirements have been met. This  
10 some-basis-in-fact standard means that for all certification criteria, except the cause of  
11 action, some evidentiary foundation is needed to support the certification  
12 requirements: however, the use of the word 'some' implies that the evidentiary record  
13 need not be exhaustive or be a record on which the merits will be argued."

14 And then a few lines on he explains that:

15 "The courts must refrain from assessing the sufficiency of the alleged facts on their merits,  
16 and they are not tasked with resolving conflicts in the evidence."

17 And then again he refers to, the next sentence, it's below the standard of proof on probabilities.

18 Then at the foot of the page:

19 "However, the some-basis-in-fact standard cannot be assessed in a vacuum, and it must be  
20 examined on a case-by-case basis, in the light of specific facts of each given case."

21 At 60 he says that, importantly:

22 "That said, it is important to emphasise that, even though it is a low one, there is still a threshold  
23 to be met at the certification stage, and that certification will be denied when there is  
24 no viable cause of action or where there is an insufficient evidentiary basis for the facts  
25 on which the claims of the class members depend. While a certification motion is not  
26 a merits-based screening intended to determine the actual viability or strength of the  
27 contemplated class action, it must nonetheless operate as a 'meaningful screening  
28 device'. In Pro-Sys, the Supreme Court expressly stated that the analysis into the



1 sufficiency of the evidence under the some-basis-in-fact standard cannot be so  
2 superficial that it would 'amount to nothing more than symbolic scrutiny' of the  
3 evidence. There must be sufficient facts to satisfy the certification judge that the  
4 conditions for certification had been met 'to a degree that should allow the matter to  
5 proceed on a class basis without foundering at the merits stage'."

6 Then at 61 to 62, he emphasised the importance of the screening role and that a lack of rigour  
7 at the authorisation stage can weigh down the courts with ill-conceived claims.

8 Then at 62, he underlined that:

9 "... the objectives of judicial economy and access to justice ... cannot be considered from the  
10 sole perspective of the plaintiffs."

11 And you see that he says five lines down that:

12 "The certification process is also there to prevent defendants, even deep-pocketed corporate  
13 defendants, from facing groundless suits and being forced to invest significant  
14 resources to contest large-scale, time-consuming actions that have no chance of  
15 success or do not have the minimal evidentiary foundation required. Stated differently,  
16 preventing baseless class actions from monopolising the judicial system to the  
17 detriment of other litigants' actions is also part of preserving access to justice for all  
18 litigants. Cases are interconnected, and class actions sit before the courts alongside  
19 hundreds of other needy cases. As Justice Stratas summarily put it, 'devoting  
20 resources to one case for no good reason deprives the others for no good reason'."

21 In our submission, that summary by his Lordship there is a good summary of the position.

22 Now, it's against that background I turn to consider, firstly, how Which? on the evidence  
23 proposes to establish pass-on and then why its methodology we say is lacking.

24 MRS JUSTICE BACON: Do you want to comment at this stage on the points that we were  
25 discussing at the end of the morning with Mr Turner about opt in/opt out and the overlay  
26 that that might bring in relation to the Pro-Sys test?

27 MR HOWARD: Yes. The difficulty -- as it were, as an intellectual exercise, one can see that  
28 there are arguably two different steps being taken. But it is very difficult, I would

1 accept, and to this extent I would agree with Mr Turner, to see in practice if you've  
2 passed the Pro-Sys test, particularly on the facts of our case. So if you were against  
3 me and you say, there is sufficient evidence in fact to satisfy us that this is  
4 an appropriate methodology, it would be extremely difficult to see that at the opt in/opt  
5 out stage that one would be applying some higher standard. So I'm not able to say,  
6 and I don't say, we have not said in our skeleton, that, as it were, there are two  
7 hurdles -- or it wouldn't actually be two hurdles, it would just be one hurdle because it  
8 just would be relevant to consider simply the Pro-Sys --

9 MRS JUSTICE BACON: So you're not saying that the Pro-Sys hurdle gets raised for  
10 an opt-out case. So you agree with Mr Turner that in relation to the question of  
11 pass-on, if the Tribunal were to be satisfied that the Pro-Sys test was met in this case,  
12 then for those purposes that would be sufficient, a scrutiny of the merits for the  
13 purposes of opt-out certification.

14 MR HOWARD: I do, subject to one minor wrinkle which is one of the questions that was posed  
15 by the Tribunal earlier today, that there's two questions actually that one needs to  
16 consider in this case. One is is there a sufficient evidentiary basis at the moment to  
17 believe actually there has been pass-on, because if one asks, well, what is the basis  
18 on which today it is being said there was pass-on, it's actually not by use of Mr Noble's  
19 hedonic regression analysis, because he says he hasn't done that. So it's actually by  
20 reference to drawing an analogy with the 88 per cent pass-on, which was the expert's  
21 opinion in the United States. And so the question that arises is whether -- which is, as  
22 it were, separate from the argument about methodology, is, well, is there any basis at  
23 this stage for drawing that analogy.

24 But what I recognise is that if the Tribunal came to the conclusion that the methodology was  
25 appropriate, contrary to my submission, if you came to that conclusion, then you are  
26 likely to say, well, even if there are problems with drawing this analogy, and we say  
27 there is, with the United States evidence, that all that you would actually be asking  
28 yourself is really is there sufficient evidence -- can I be satisfied that there has been or

1 is likely to be shown to be pass-on and if you accept Mr Noble's methodology, then  
2 essentially Mr Noble is saying, well, he's satisfied there is some pass-on and so it  
3 would be difficult for one to, as it were, throw the thing out at that stage.

4 So the argument entirely we recognise comes down to whether this methodology is  
5 appropriate and we say it isn't.

6 MRS JUSTICE BACON: That's very helpful, Mr Howard. So you don't take any separate  
7 point about whether the 88 per cent is a sufficiently robust figure because, as you've  
8 just said, if we were to accept that the methodology passed the Pro-Sys test, then we  
9 wouldn't be saying that the analogy relied on to derive the reasonable prospect, or  
10 however you characterise it, of establishing pass-on, a substantial pass-on, you  
11 wouldn't say that that's too shaky.

12 MR HOWARD: No, it becomes -- it would be trying to put too high a hurdle. The reality is that  
13 you've got -- if you're satisfied by Mr Noble's exercise and you're satisfied that his  
14 hedonic regression analysis methodology is sufficient, then I accept you're likely to be  
15 satisfied or you would be entitled to be satisfied that there is sufficient evidence to allow  
16 matters to go forward.

17 But we do say, as I think you know, that we say that the methodology is not satisfactory, and  
18 that's the key we say.

19 Now, it's necessary to first be clear as to precisely what it is Mr Noble in the evidence says he  
20 is proposing to do and if we take the core bundle and follow through what it is he is  
21 saying if we go to his first report, which is at tab 5, if we go to page 182, we there have  
22 his explanation at 2.21 of how he proposes to do things and at paragraph 7.8, which  
23 we'll find at page 243, he explains the steps that he's going to take. So he's going to  
24 first estimate what he calls the value of commerce. Then he's going to estimate the  
25 value of the damage to the OEMs. So, taking the first, that's obviously looking at the  
26 total value of commerce affected by Qualcomm's allegedly unlawful conduct. The  
27 second is estimating the extent to which what he calls all-in prices paid by Apple and

1 Samsung for the LTE chipset were inflated by Qualcomm's conduct. And what he  
2 means by "all-in prices" he defines at page 172 at paragraph 1.6. We see he means:  
3 "All-in' refers to the combination of the royalty rate ... and the price for the physical chipset,  
4 whether this is purchased from Qualcomm or from a rival chipset supplier."

5 Now, going back to page 243. Having assessed those first two steps, he will assess the extent  
6 of pass-on. And fourthly, he then applies an appropriate interest rate.

7 Now, the first step, estimating the total value of commerce, that's the total volume of  
8 LTE-enabled Apple and Samsung handsets bought by the class multiplied by the  
9 wholesale price of the handsets. And that calculation is to be done on the basis of  
10 data from IDC, which is a market intelligence firm. I think you were asking who they  
11 are or whether that is defined.

12 MRS JUSTICE BACON: Well, I'm hoping that at some point someone is going to just give the  
13 Tribunal a piece of paper with the definitions of all of these and some explanation.

14 MR TURNER: Sorry, my Lady, I should have said, Mr Noble has said that he's proposing to  
15 produce a two-pager but he'll do that after court, if that's sufficient.

16 MRS JUSTICE BACON: All right.

17 MR HOWARD: IDC, you'll see at page 175, is a market intelligence firm and they will give  
18 data concerning handset sales in the United Kingdom and baseband chipsets  
19 worldwide.

20 So this step, the first step, is not contentious for present purposes. So the second step, which  
21 is also not contentious, is essentially the comparison between the royalty rates which  
22 were paid by Apple and Samsung, which he has various sources of information for  
23 that, and what is said to be the rate that should have been paid, in other words the  
24 FRAND rate, and that's going to be passed upon Which?'s other expert,  
25 Dr Chowdhury.

26 Now, the third step therefore is the estimate of pass-on and that's the battleground.

27 Now, let's see actually what Mr Noble says in this report as to how he's going to do that, and  
28 that you find at page 200. Well, if you go to page 249 you see -- it starts at 248. This

1 is the section on pass-on to the consumer class and you can see at page 249 at  
2 paragraph 7.33 he refers to some economic theory. At 7.36 on page 250, he says that  
3 he is going to begin by setting out the methodology he proposes to use to assess  
4 pass-on and then he outlines a proxy approach based on the pass-on rate estimated  
5 in the US.

6 So at 7.37 his proposed approach to assessing pass-on combines economic theory with  
7 an empirical analysis and is applicable across the consumer class, the empirical  
8 analysis being the hedonic pricing model.

9 So at this stage of the analysis of his report, what we're told is it's based upon economic theory  
10 and empirical analysis in the form of the model.

11 Now, as to economic theory, Mr Noble made two points and they are set out, summarised  
12 back at page 184 in the introduction, in the overview, at paragraph 2.29.

13 The economic theory is that, at 2.29:

14 "Higher all-in prices paid by Apple and Samsung are likely to have been passed on to  
15 a substantial degree... As a matter of economic principle, this is because the value  
16 chain appears to be relatively competitive, and competitive markets tend to be  
17 associated with high rates of pass-on."

18 So that's the first point. Then:

19 "Furthermore, the high royalty rate is likely to have acted as a form of industry-wide 'tax' on  
20 handsets: All OEMs are aware that this royalty is payable to Qualcomm regardless of  
21 whether any given handset incorporates a Qualcomm chip or chip purchases from one  
22 of [the] rivals."

23 So those are the theoretical points that he relied on, and as one can see from paragraph --

24 PROFESSOR MASON: I don't mean to interrupt your flow, but let me just check. That's not  
25 my understanding of what's being referred to in paragraph 7.37.

26 MR HOWARD: Right.

27 PROFESSOR MASON: So the economic theory that underpins hedonic pricing is the theory  
28 that you can derive a utility and therefore a price based on product characteristics.

1 MR HOWARD: Yes --

2 PROFESSOR MASON: So I -- sorry, forgive me, you go ahead.

3 MR HOWARD: I didn't mean to interrupt you.

4 PROFESSOR MASON: You go ahead.

5 MR HOWARD: So if you go -- are you at 7.37 on page 250?

6 PROFESSOR MASON: Yes.

7 MR HOWARD: The first sentence is referring to the model. The second sentence, in terms  
8 of economic theory, is referring to what I've just referred to.

9 PROFESSOR MASON: No, I'm not sure that is the case. So you've referred to an earlier  
10 paragraph which refers to the level of competition and the likely degree of  
11 pass-through.

12 MR HOWARD: Yes.

13 PROFESSOR MASON: I think that is a separate point to the economic theory that's being  
14 referred to in 7.37, where in that paragraph the economic theory being referred to is  
15 that you can derive a utility and a price from product characteristics.

16 Now, I don't want to have a sort of pre-hot tub hot tub on economics, but I make the point  
17 because I wouldn't -- I just want to test whether you're arguing that the hedonic price  
18 approach relies on the statements made in an earlier paragraph that the degree of  
19 pass-through is likely to be high as a matter of economic principle.

20 MR HOWARD: The answer is simply this, and if I'm misreading it, it doesn't matter for the  
21 purposes of my argument. There's no question that in paragraph 2.29 in the first report  
22 Mr Noble has put forward two, as it were, economic theories. Now, in his third report  
23 he now says, well, he's actually not relying on those points, so that -- we say he was  
24 relying on them in his first report, but let's assume I'm wrong about that and he's just  
25 put them at 2.29, it doesn't in any way diminish my criticisms of the model. We criticise  
26 the model separately. We had read in the same before I get to the model I rely on this  
27 economic theory, in other words I have two building blocks. Now, as we read his third

1 report, he's actually made it clear he's not saying that and if we've misread it so be it,  
2 but that means we're then left with the model.

3 PROFESSOR MASON: Fine.

4 MR HOWARD: Now, the model, as he explains at page 251, what he says the model is doing  
5 is measuring the extent to which changes in component costs for smartphones are  
6 related or linked to changes in the quality adjusted prices paid by final consumers.

7 You see that at paragraph 7.42.

8 So he says in the third sentence:

9 "In this way, the hedonic pricing method takes into account changes in both the price and  
10 quality of the product (and, as noted above, it is necessary to allow for the possibility  
11 that OEMs will react to any increase in royalty rates through reducing phone quality,  
12 increasing downstream phone prices, or both)."

13 Now, what are we talking about here? Of course you will know more than I that a regression  
14 analysis is a statistical technique used to estimate the relationship between the  
15 variable of interest, the so-called dependent variable, and the variables that one  
16 believes could affect the dependent variable, and Mr Noble explains that at 7.39 at the  
17 foot of page 250, going over to 251.

18 Now, a hedonic regression analysis is only different in the sense that it specifically adjusts  
19 prices so that they are quality adjusted so the prices as used in the model take into  
20 account the monetary value of different features and functionalities of a phone. So, for  
21 example, camera, memory, data speed, things like that and, again, I don't think that's  
22 controversial.

23 So Mr Noble's hedonic pricing model aims to tell us its best estimate of the relationship, if any,  
24 between input costs and quality adjusted prices. And perhaps I can ask you to look at  
25 page 254 in paragraph 7.49. Perhaps if you could read 7.49, starting on page 253 to  
26 page 254. And if we also could go then to page 310, you'll see at paragraph 4.20 he  
27 explains in the second sentence that:

1 "This analysis [that's the hedonic price analysis] looks at the effect of a change in inputs costs  
2 (including royalties) on both the price and the quality of a handset."

3 He comes back to this at page 326 of his third report at paragraph 2.22:

4 "The essential point is that the hedonic regression analysis will allow me to examine the extent  
5 to which changes in the retail price of the handset ... are explained by changes in the  
6 cost or the quality of final handsets produced by the OEMs. It will allow me to control  
7 for the impact of the legitimate significant drivers of the final price, and to isolate the  
8 effect of the anti-competitive overcharge."

9 Now, what are we talking about here? Now, the variables in this case are as follows. The  
10 dependent variable will be quality adjusted retail prices paid by consumers for Apple  
11 and Samsung smartphones sold in the UK. That, you see at page 253 at  
12 paragraph 7.49. So there it says in terms that the dependent variable are prices paid  
13 by consumers.

14 Now, the independent variables he explains at 7.39. You can see that is things such as  
15 changes in market conditions.

16 Now, the key independent variable for our purposes is what he calls variation in cost and you  
17 see that on page 252. First sentence:

18 "Practically speaking, this is achieved by undertaking a regression analysis on end consumer  
19 prices and using the variation in costs as one of the independent variables."

20 Now, what we suggest is important to appreciate is that this approach in this model uses all  
21 input costs as an independent variable and not just LTE set royalties paid to  
22 Qualcomm, and that is clear from the references to input costs in various places. So  
23 by way of example, at 7.42 on page 251 you see he says:

24 "Of particular importance for the present case, the method can reliably measure the extent to  
25 which changes in input costs (such as, for present purposes, royalty payments) for  
26 smartphones are passed through the value chain..."

27 So the reference to royalty payments in parenthesis is just an example of an input cost, it  
28 doesn't mean the model is actually measuring changes in royalties. And there are



1 a number of other references, I'll just give them to you: paragraph 7.43, 7.48, 7.57 in  
2 his first report and paragraph 2.5, 2.10 and 2.24 of his third report.

3 So Mr Noble is proposing to measure whether there is a statistical relationship between input  
4 costs in the aggregate, on the one hand, and retail prices for smartphones on the other.

5 Now, the reason this is important is because it means that he is effectively assuming that the  
6 way in which royalties affect retail prices reflects, as it were, on a pound-for-pound  
7 basis how input costs generally affect retail prices, in other words on this approach all  
8 input costs are equal and have an equal effect.

9 Now whether or not that assumption holds true depends, as one might expect, on the facts of  
10 Apple and Samsung's respective supply chains and this foreshadows the central  
11 criticism that we make of this approach that the model is not grounded in the facts.

12 Now, one example we give, but it's not, as it were, the only point, but if on the facts Apple was  
13 carrying out focal point pricing, such as that it would never pass on small increases in  
14 costs such as royalties, then it would be entirely wrong to assume that the extent of  
15 pass-on in respect of royalties is the same as the extent of pass-on in respect of other  
16 input costs. Indeed, one can look at it separate to focal points and pricing and just  
17 think about the position more generally. As has been said, that what we are talking  
18 about in the context of a sale of a phone worth roughly £500 is a relatively small cost,  
19 here something on the claimant's case less than the order of £8 and it's a particular  
20 royalty cost.

21 Now, it is by no means obvious that, for instance, a Taiwanese seller to Apple will seek to pass  
22 on that £8 to Apple or that Apple will be seeking to pass that on to the next level down  
23 in the chain and so on.

24 Now, according to Mr Noble, if we go to the first report at page 184 in the bundle at  
25 paragraph 2.29, he expects that his model will show that higher all-in prices are likely  
26 to have been passed on to a substantial degree through the smartphone value chain  
27 to consumers. That's what he's seeking to do.

1 Now, as things stand, he hasn't actually done a regression analysis based upon the facts, he  
2 simply uses the 88 per cent pass-on rate that was calculated for certifying the US class  
3 action. That is said to be a proxy.

4 But it is important to note firstly that the 88 per cent in the US class action was based solely  
5 on US data, US supply chains and prices paid by consumers, but it was also based  
6 upon the expert there having done the type of exercise that we say is necessary.

7 Now, before we go any further, it is also important to be clear about what data is in fact  
8 proposed to be used for the model.

9 MRS JUSTICE BACON: Just before you move on, Mr Howard, you say that the 88 per cent  
10 was based on the expert doing the type of analysis that you say is necessary. Where  
11 do you get that from?

12 MR HOWARD: The reference to that is -- I'll just find it in my note -- it is in supplement 1 at  
13 tab 3 -- I've got a different reference but it's at -- I think there are probably a number of  
14 references -- page 470.

15 If you look at line 8 you'll see Dr Flamm proposes a methodology for measuring class-wide  
16 impact in which he analyses device sales data from each step of the chain and he  
17 examines data from six major OEMs, including the five largest OEMs in the US market,  
18 and then further on it's the retailers. So you've got the five largest OEMs, then, three  
19 lines on, six of the largest US retailers, including Best Buy, Amazon, Walmart and  
20 Target. Then two sentences on he also examines data from five wireless carriers,  
21 comprising the four major carriers: AT&T, Sprint, T-Mobile and Horizon, as well as one  
22 regional carrier. He finally examines data from the largest US distributor and a major  
23 contract manufacturer.

24 So in the United States Dr Flamm was -- I mean, we criticise ultimately his model but in terms  
25 of the steps that are to be taken, Dr Flamm was adopting a different approach to  
26 Mr Noble because he was examining things.

1 MRS JUSTICE BACON: Are you saying -- we might find the answer to this in the redacted  
2 version of Dr Flamm's report that we get, but are you saying that the data for the OEMs  
3 was built into the specifications of the hedonic model or something else?

4 MR HOWARD: What we say is what, as Dr Flamm did, was go and get that data at each level  
5 of the chain, we still criticise his approach because he was still adopting an approach  
6 where he aggregated costs rather than separating out specifically the royalty costs.  
7 So that remains a criticism of his model. But insofar as you look at Dr Flamm's report,  
8 what you will see is that he did obtain this data, as the judgment says.

9 MRS JUSTICE BACON: Well, he says it's device sales data. What is that? Again, we might  
10 get the answer if we look at his report, but what you're saying is that he got something  
11 else to what is proposed by Mr Noble. So it would be helpful to understand what is  
12 meant by that and how you say that it was built into the model. Are you saying that it  
13 was bolted into the model or was it a separate set of information which he used to  
14 corroborate his model?

15 MR HOWARD: If you go back to page 469 in the supplemental bundle, at the foot of the page  
16 you'll see that -- on page 469 you'll see at line 5 and following Dr Flamm described  
17 economic consensus about pass-through, and then at the foot of the page, at line 24,  
18 you'll see that he relied on documentary and testimonial evidence evincing that  
19 Qualcomm, OEMs and wireless carriers treated Qualcomm royalty as a known  
20 component cost and included the royalty in their calculations of the total costs of  
21 cellular phones.

22 So what was being said there was that --

23 MRS JUSTICE BACON: Well, that's just saying that the Qualcomm royalty was one of the  
24 costs, and then on the next page it says Qualcomm considered royalties as one  
25 component of the cost that would be incorporated in the price to retailers and then  
26 incorporated into the price to consumers. Well, that's Qualcomm's assumption as to  
27 whether there would be some pass-through. But when we're looking at the paragraph  
28 that you referred to, which was the third and finally, that's a different point in which

1 what is being said is that Dr Flamm analyses device sales data. Well, I am trying to  
2 ascertain if that's anything different in qualitative terms to the sales data that is  
3 proposed to be used by Mr Noble.

4 MR HOWARD: Well, it -- we suggest it is different.

5 MRS JUSTICE BACON: Well, is there a description of what that means? Again, the answer  
6 may simply be we have to look at the Flamm report, but you're making a submission  
7 on this and I'm just wondering if there's anything that you can point to in the  
8 supplemental bundle that explains what's meant by that.

9 MR HOWARD: If you look at page 471 at line 5, what one sees that Dr Flamm did -- we say  
10 his exercise in fact wasn't satisfactory, but what he was actually doing was getting  
11 prices and costs from -- you can see at the second line, for different market place  
12 actors. At line 7:

13 "For OEMs, this data 'captures the prices set with carriers as they negotiate the phone  
14 configurations... In the case of Apple, 'this data reflects the price selected for the  
15 features it included in the phones to be offered in its stores. Finally, with regard to  
16 retailers and wireless carriers 'using prices and costs from the first period shows the  
17 pass-through of their initial procurement costs."

18 Now, we say that this was still flawed in that it was still aggregating all costs and not seeking  
19 to identify the extent to which royalty costs in particular were passed through.

20 MRS JUSTICE BACON: So that was your second high level criticism where you say that this  
21 model, Mr Noble's model, is concerned with the general correlation between variable  
22 costs and prices, ignoring other costs. But the point that I thought that you were  
23 making based on this was your point that he had the factual evidence from OEMs that  
24 Mr Noble isn't proposing to get, and I'm just struggling to see in this where he has that  
25 evidence, because you described the first flaw as factual evidence about supply chains  
26 and how parties in the chains set their prices and I'm not sure Dr Flamm got that.

27 MR HOWARD: Well --

28 MRS JUSTICE BACON: But it may be that something else --

1 MR HOWARD: That is what surely he has got at 469 at the foot of the page.  
2 What he hasn't got -- so at the foot of page 469 it is saying that he relies on documentary and  
3 testimonial evidence, evidencing that they treat a royalty as a known component cost  
4 and included it in their calculations of total costs.

5 Now, what he didn't get, and he's fallen into the same trap, we say, as Mr Noble, is that he's  
6 treated all costs equally. But what he did get, in other words he did seek -- whether  
7 he did the exercise fully and properly, but he was seeking to go to and get information  
8 from the OEMs and we see --

9 MRS JUSTICE BACON: About what?

10 MR HOWARD: Well, what it appears to be about how they treated the royalty costs.

11 MRS JUSTICE BACON: As a component cost.

12 MR HOWARD: Well, that's -- when you say as a component cost, that's what the judgment is  
13 saying he relied on evidence showing them that and included it in their calculations,  
14 and the point that you make, which is right, that doesn't really inform you of very much  
15 because what you're really interested in is not saying, well, are the royalty costs part  
16 of your costs, but how specifically do you consider them? Do you consider them  
17 separately or do they just go into a single pot and wherever there's change, so if there's  
18 a change in your cost by 1 per cent, does that all get passed on?

19 MRS JUSTICE BACON: All right.

20 I can see it's 20 past three. Would it be a good time to rise for five minutes or are you in the  
21 middle of submission?

22 MR HOWARD: No, that's a perfectly good time.

23 **(3.19 pm)**

24 **(A short break)**

25 **(3.28 pm)**

26 MRS JUSTICE BACON: Yes, I think in light of the dialogue that we've just had, I think it would  
27 be very useful for us to get the Flamm report.

1 MR HOWARD: Yes. The parties will furnish you with that. Can I just say this, because I think  
2 there's a danger of going off at a tangent. The only point that we make is that Dr Flamm  
3 in fact sought more data than is proposed to be sought here. We certainly do not say  
4 that Dr Flamm's approach is the right approach and that it's simply sufficient to do what  
5 he did. We're just drawing a contrast between what he in fact did and what Mr Noble  
6 is intending to do.

7 And that takes me to the data that Mr Noble is intending to use for his model. If we go to  
8 page 257 of the core bundle, he sets that out at table 7.1. So you see the -- and what  
9 you get from that is that he's going to use data on prices, costs and product features.  
10 So prices, he gets the data from IDC and the internet about the prices for the phones  
11 sold in the United Kingdom and, in addition, he'll use a third party to obtain data on  
12 MNOs' pricing of devices and contract bundles. Input costs, he's going to use  
13 estimates of the wholesale costs of the phone components and assembling the  
14 handsets. He explains that at 7.57 on page 256, and that he gets from a company  
15 called IHS, which deconstructs and produces the so-called teardown estimates. And  
16 he's then going to add the royalty rates paid by Apple and Samsung to Qualcomm,  
17 and in the case of Apple the contract manufacturer's margins, so that the input costs  
18 are all aggregated.

19 Then he seeks to identify various product features in order that he can see the extent to which  
20 they will affect price.

21 So none of the data -- this is the important point if one looks at that -- none of the data that  
22 he's seeking to use in his model is based upon factual evidence or information about  
23 how in fact Apple or Samsung or anyone else in the chain sets its prices.

24 Now, as I understand it, Mr Noble's position is not that that material is irrelevant, because  
25 plainly it would be of obvious relevance, but his position is he can produce a model  
26 which will produce an estimate of pass-on rates which is reliable, credible and plausible  
27 without the factual material. And that is a point he makes in his third report at page 333  
28 at paragraph 3.19.

1 You'll see that he says midway down:

2 "I agree that conducting a separate disclosure review exercise alongside my proposed  
3 hedonic regression would provide further evidence on which to base any  
4 conclusions - indeed, this is a tautology, since having more evidence cannot help but  
5 improve the analysis. However, such evidence is not necessary for the effective  
6 implementation of my analysis, and thus for producing a reliable estimate of the losses  
7 suffered by the proposed class."

8 So his position is you don't need any -- you don't, for instance, need to get material from Apple  
9 and Samsung to understand how, for instance, they set the prices because his model  
10 will provide a sufficient basis to assess things.

11 MRS JUSTICE BACON: Do you take issue with the model itself in relation to the data on  
12 pass-on or are you simply saying that -- and this is the point made by Mr Turner -- that  
13 you should have the qualitative evidence from the OEMs on pass-on to corroborate  
14 the result of the model?

15 MR HOWARD: No, it's not simply to corroborate. We say you need the information and the  
16 data in order to decide how you're going to set up your model in the first place, that it's  
17 not -- it's two things that we say are the reasons why you need this: firstly, to design  
18 your model, and secondly, having properly designed your model, to corroborate the  
19 output of the model.

20 MRS JUSTICE BACON: So you say you need the evidence from the OEMs in two ways?

21 MR HOWARD: Yes, we do.

22 Now, turning to Dr Padilla's criticisms, both Dr Padilla and Mr Noble agree that a hedonic  
23 regression is capable of assessing the statistical correlation between variable costs for  
24 Apple and Samsung and retail prices.

25 The question of the disagreement between the parties is whether a statistical correlation is  
26 enough to establish causation of class-wide loss.

27 So we're not making a point that regression analysis could never allow you to infer causation.  
28 It will depend. And one sees that in the European Commission's pass-on guidelines

1 at authorities tab 7, page 108, where the point they make at paragraph 102, it says  
2 that:

3 "In a regression analysis, a number of data observations for the variable under consideration  
4 and the likely influencing variables are examined. The relationship is usually  
5 expressed in the form of an equation. This ... makes it possible to estimate the effects  
6 of influencing variables on the variable under consideration and to isolate them from  
7 the effects of the infringement. Based on a regression analysis, it is possible to  
8 estimate how closely the relevant variables are correlated ... which may in some  
9 instances be suggestive of a causal influence of one variable on the other."

10 Now, it perhaps is again stating the obvious that sometimes a statistical correlation will allow  
11 you to establish cause and effect and sometimes it will not, and so we accept that in  
12 some cases a regression model might be a sufficient basis from which to infer  
13 causation, however, we submit that in this case, and based on Dr Padilla's evidence,  
14 the model is not. And one of the reasons we say that, is because in this case assessing  
15 the extent of pass-on of royalties is complicated because of the indirect nature of the  
16 alleged pass-on. So the task for Which? proving their case is to track how the alleged  
17 overcharge in royalties imposed allegedly by Qualcomm flows down to the OEMs, the  
18 MNOs, the retailers and finally to the consumers.

19 Now, not only are there multiple levels to the supply chain, but there are also multiple routes  
20 to the market and so pass-on is much more complicated in this case than simply where  
21 you have a simple supply route and passing on from A to B to a consumer.

22 Now, what is it that we say needs to be done. We say that in order to investigate a causal  
23 relationship between the alleged inflated royalties and the price or quality of handsets,  
24 you need to consider the following matters which Dr Padilla had set out in his report.  
25 And the first and the pre-eminent one is how Samsung and Apple set retail prices for  
26 smartphones sold in the United Kingdom, because it's knowing that that will allow you  
27 to assess whether Apple and Samsung would have passed on an increase in their  
28 costs in the form of higher retail prices and, more specifically, whether retail prices are



1 set by reference to cost directly, by reference to features that might influence costs or  
2 other factors.

3 So we say there are two things in particular that one is interested in: documents and testimony  
4 from Apple and Samsung describing their approach to setting prices for devices sold  
5 in the United Kingdom over the relevant period with reference to the factors that  
6 influence their decision, including things such as focal pricing, setting different prices  
7 and different distribution channels, changes in prices due to different magnitudes of  
8 cost changes. So a fairly obvious point is how are small increases in costs, and that's  
9 what we're talking about here, dealt with? Are they immediately passed on or are they  
10 absorbed?

11 Similarly, we say it's necessary to look at the licence agreements signed between Samsung  
12 and Apple and licensors of LTE SEPs that were active during the relevant period.

13 Now, Mr Noble is proposing to request the licence agreement signed between Samsung and  
14 Apple and Qualcomm but in order properly to assess this, indeed to assess this at all,  
15 you need to know the full amount of LTE royalties being paid in order to understand  
16 how such royalties are generally dealt with and the extent of pass-on.

17 So that's the first area that we say -- just stopping there for a moment, one of the things I would  
18 respectfully say about this enquiry is ultimately the inquiry that we're embarking upon  
19 here, there's no particular magic to it that this is a competition claim. At the end of the  
20 day, this is a claim where a party is seeking to prove loss and what it is seeking to  
21 prove is what would happen in the counterfactual, and the natural way in which you  
22 seek to prove that is by looking at how the players have acted in the world prior to the  
23 counterfactual, because that informs you as to what is likely to happen in the  
24 counterfactual, and we are in an odd situation here where the way Which? seeks to  
25 approach this is to cut out what is actually that primary evidence, which we say is a  
26 misconceived approach.

27 PROFESSOR MASON: Mr Howard, I don't want to interrupt your flow, so take this later if you  
28 would prefer, but since you've taken us to the Commission guidelines already and

1 relating to the point you just made, what is your reading of what the Commission  
2 guidelines say in terms of the mix of quantitative and qualitative evidence?

3 MR HOWARD: Which part in particular were you --

4 PROFESSOR MASON: Well, you took us to page 113 of the authorities bundle,  
5 paragraph 102 in particular --

6 MR HOWARD: Yes, 108, yes.

7 PROFESSOR MASON: -- which referred to how regression outcomes may be suggestive of  
8 a causal influence. That's embedded in a section which discusses regression methods  
9 and when qualitative evidence may also be used, and I just wondered if you could give  
10 your view on what the guidelines are suggesting as to how to balance quantitative and  
11 qualitative evidence in that section.

12 MR HOWARD: Yes.

13 I think we addressed this, if I can remind you of it, at paragraph 28 of our skeleton argument.

14 We referred you at 28A to, if you see there, the quote there, that the -- and that's from  
15 back at paragraph 38 in the guidelines. Perhaps if we go to the guidelines themselves  
16 in authorities at 94 where they explain the role of evidence and it starts at 36:

17 "The legal assessment of passing-on typically requires a complex factual and economic  
18 analysis."

19 And then at 37:

20 "The type of evidence necessary to show and quantify passing-on will depend on which of the  
21 economic methods, described in sections 5 and 6 below, is used."

22 And then they say it's typically divided into qualitative and quantitative evidence. And then:

23 "Qualitative evidence, to understand a firm's business behaviour or pricing strategies ..."

24 And just stopping there for a moment, that's obviously what we are talking about being  
25 necessary.

26 Quantitative evidence relating to data for the use of economic techniques, which is the sales  
27 price, retail and end prices. So that's the type of thing that is being spoken about here.

28 And then at 38 on the next page, 95:

1 "As explained more generally in the practical guide, normally, the specificities of the case at  
2 hand and the evidence provided are the starting point for establishing if the  
3 infringement has in fact harmed the claimant, and, if this is the case, for determining  
4 the quantum of that harm."

5 So just stopping there for a moment and answering your question, in our submission the  
6 starting point is what those of us that are familiar with the civil litigation say is the  
7 starting point, that you look at what the parties have been doing. I can see you can  
8 have a situation, which is not our case, but, you know, you have a situation where, for  
9 instance, you have a claim by consumers and the alleged anti-competitive conduct  
10 has, for instance, affected hundreds of suppliers and so somebody might say, well, it  
11 is simply not practical to go to all the suppliers and so you may need to be selective.  
12 But would that mean you go to none? I would suggest no, you would normally go to a  
13 sample and that's where you start, because that qualitative evidence is of particular  
14 importance, and I would say here it's actually plainly fundamental to having  
15 an understanding of how Apple and Samsung actually deal in the real world with the  
16 royalty costs.

17 We say in fact that in this case, and that's as I go through things, we say both qualitative and  
18 quantitative evidence is missing. So we say they haven't just said, well, we can do it  
19 quantitatively, we are saying both are actually missing.

20 PROFESSOR MASON: Okay. So your, then, interpretation of the guidelines, you've taken  
21 us to an earlier section on the relevance of evidence.

22 MR HOWARD: Yes.

23 PROFESSOR MASON: There's nothing more that you would want to add relating to this  
24 particular section, which is about regression-based approaches, reference to internal  
25 documents describing a firm's pricing policy? There's no further interpretation that  
26 you'd want to give us on that section of the guidelines?

27 MR HOWARD: Yes. I'm told that 107 and 108 are relevant. Yes, 107:

1 "... techniques based on economic analysis may in certain cases entail considerable costs. In  
2 such cases, the court may find it sufficient to estimate the passing-on by  
3 simultaneously assessing quantitative data without the use of regression analysis and  
4 taking into consideration qualitative evidence. Moreover, the court may in most cases  
5 find it useful to assess qualitative evidence, such as direct evidence on passing-on,  
6 also when employing the quantitative methods described in this section."

7 Then:

8 "When estimating passing-on [evidence] based on qualitative evidence, internal documents  
9 describing a firm's pricing policy may be of particular relevance."

10 And you can read the rest of it yourself. We say -- we don't shrink from saying this -- that that  
11 is the starting point in a passing on case is to have evidence from the person who has  
12 supposedly been overcharged and has passed on, so that you understand how it is  
13 they set their prices.

14 Now, obviously one can see, sir, there can be a situation, but we're not in that situation, where  
15 for some reason that evidence simply is not available to a party and then one has to  
16 consider, well, if that's the case, what should be done? But we're in a situation here  
17 where the battleground is Which? are saying, no, we don't need that evidence, we can  
18 do this without that evidence, without what I would describe as the primary evidence  
19 from which you would establish the position.

20 Now, the other aspects, and I'll take them quite quickly, is evidence as to how Samsung and  
21 Apple decide which features to include in new models sold because that will allow one  
22 to assess whether any ability to increase prices as a result of new or enhanced product  
23 features was relevant to the decision to incur costs or pass on prices. So, again, you'd  
24 be looking for documents and testimony from Samsung and Apple that describe their  
25 decision-making process for features included in their devices, including consideration  
26 of the impact of the amount of royalties paid.

27 Then how Samsung and Apple manage their cost efficiency, and that would be relevant to  
28 understanding the extent to which they seek to mitigate cost increases on one

1 component through increased pressure on suppliers of other components. And, again,  
2 internal documents and testimony from Samsung and Apple would explain that. And  
3 then finally, how MNOs and other retailers set prices, choose which handsets to offer  
4 and manage their costs.

5 Now, Dr Padilla's opinion is that this factual evidence is vital for two main reasons. The first  
6 is it's crucial for the model to be sufficiently credible or a plausible method of estimating  
7 loss suffered by the class.

8 Now, Mr Noble, as we've seen, is proposing to use his hedonic regression model in order to  
9 calculate the case-specific pass-on rate, as he calls it, but what he envisages is a  
10 one-size-fits-all rate of pass-on and that, as I've already said, ignores the realities of  
11 the different positions of Apple and Samsung, the different supply chains and the  
12 different levels of each supply chain.

13 So the factual evidence that we have been highlighting would tell us whether a plausible  
14 method, for instance, of establishing pass-on requires you to have multiple  
15 regressions, for instance, that distinguish between the position of Apple and Samsung,  
16 because they may set retail prices differently, may need to distinguish between  
17 different sales routes that each of them use, and indeed Mr Noble appears to accept  
18 that to an extent since he accepts he will have to do two regressions, one for  
19 handset-only sales and the other for bundle device and contract sales.

20 But you might -- the evidence will tell you whether you need a different model for different  
21 types of handsets, for different time periods, for different measures of costs.

22 Now, a different way of putting the same point is that the single rate of pass-on produced by  
23 Mr Noble's proposed model is apt to mislead and it will not, and it necessarily will not,  
24 reflect the complexity and realities of the supply chains. So in our submission the  
25 factual evidence is crucial to ensure that the correct modelling approach is adopted.  
26 The factual evidence informs the experts how to set up their model to ensure that the  
27 pass-on figure which is produced is reliable, plausible and credible.

1 Now, secondly, the factual evidence of the type I've been adverting to will allow the Tribunal  
2 to corroborate the statistical relationship between prices and costs predicted by the  
3 model using the facts which have been obtained, in other words, it both allows you to  
4 design the model and operates as a reality check on the results. And the focal point  
5 pricing example provides a good illustration of the flaw in the current approach.

6 If, for instance, Apple charges £999 for an iPhone in 2018 and royalties go up by £10, now,  
7 Mr Noble's model, assuming it comes up with the same result as Dr Flamm's, would  
8 predict that 88 per cent of the £10 was passed on to consumers. In other words, the  
9 price goes up for £999 to £1,007.80. But that ignores the fact that it is inherently  
10 unlikely in a world where Apple is keen on the £999 pricing point that it would move  
11 away from that and pass on that type of small increase.

12 You were referred to the McLaren case at tab 26 of the authorities at page 1203 and Mr Turner  
13 said, well, that had dismissed this type of point based upon the difficulties of focal  
14 pricing. That's not, I would respectfully say, a fair reading. You were taken to  
15 page 1203, which is where reference was made to something which is said to be  
16 similar to focal pricing, and you were then taken to paragraph 133, where the court  
17 said that counsel's point was clearly a matter for trial.

18 But it's important to understand in that case paragraph 132 where the evidence that the court  
19 had was from -- we'll just see what it says:

20 "It must be borne in mind that the central evidence of the industrial experts is that shipping  
21 costs, and therefore overcharges, would have been passed on in full via the delivery  
22 charge."

23 In other words, the court had expert evidence that costs were in fact in that case, the particular  
24 type of cost, was passed on in full via the delivery charge and so that is what is being  
25 referred to at paragraph 133 when it says with this point in mind.

26 Now, we don't have that sort of material here.

27 That takes one to ask, well, what is actually going on here? And I respectfully say, suggest  
28 that the Tribunal does need to ask itself that question, which is why are we having this

1 debate at all? Why is it that Which? is so resistant to investigating these points in trying  
2 to prove its case? Why is it so resistant to investigating what Apple and Samsung did  
3 in fact? And the paradox in this case is that Which? is prepared -- not really Which?,  
4 it's the funders, if we're truthful about it, the funders are prepared to spend a large  
5 amount of time and expense investigating the first part of the case, namely the extent  
6 of the alleged overcharge of royalty, but they seem to be unwilling to spend time and  
7 trouble to investigate the facts relating to pass-on, instead preferring to rely on the  
8 model.

9 And it's important to remember what we are talking about here. The main evidence we're  
10 talking about that needs to be obtained is from Apple and Samsung.

11 JUSTIN TURNER QC: Mr Howard, can I ask you questions, this is harking back perhaps to  
12 a few minutes ago.

13 MR HOWARD: No, not at all. I'm here to answer your questions.

14 JUSTIN TURNER QC: It's relevant to what you're submitting at the moment. One  
15 understands that mere correlation does not of itself prove a causation. And the  
16 example that always used to be given in the 1980s was the rabbit population of  
17 northern France, which tracked almost perfectly sunspot activity. That was one of  
18 them, there are many other examples. You say there that that doesn't prove that  
19 sunspot activity was having a direct or for that matter an indirect effect on the rabbit  
20 breeding in northern France.

21 Nevertheless where you have a theory, and the theory here would be that, if your input costs  
22 increase, your price may have to respond, where you have a theory where it is  
23 legitimate to consider a correlation as evidence of that relationship, and I just wanted  
24 to -- I'm so sorry, I'm just putting that as a suggestion, feel free to disagree with me  
25 of course. I just wanted to find out how far your submissions are going. Are you saying  
26 in these circumstances, and there is at least a basis of logic in economics for the  
27 relationship, but are you saying that a correlation is not evidence of causation at all

1 and cannot be and in that sense is almost inadmissible or are you saying it's a question  
2 of weight, of the weight to be attached to the correlation?

3 MR HOWARD: I hope I made it clear, obviously I didn't from your question, that I am not  
4 saying, as it were, that there is a hard and fast rule that a correlation could never  
5 establish causation, not least one sees in the European Commission guidelines they're  
6 essentially saying sometimes it can, but when you say is it a question of weight, what  
7 you've got to envisage, and the question one's asking is, if one certifies and you  
8 assume that Mr Noble does the regression analysis that he's currently referring to, and  
9 I'll come on to they're saying, no, no, he's going to get more evidence, I'll come to that  
10 in a moment. If we take what appeared in his first and second and indeed his third  
11 report, the question ultimately comes down to this. If you do that regression analysis  
12 and you then say, well, okay, this is what I've done, I haven't gone to ask Apple and  
13 Samsung for their data and for evidence about how they do things and you haven't  
14 done the other things per se, then would that model, let's say it says there's  
15 an 80 per cent pass-on for sake of argument, would that model prove their case? And  
16 ultimately we say, no, that wouldn't, because the answer to it would be at that stage  
17 that all you've got is this statistical correlation, you haven't gone to get the material that  
18 is out there and so based on that material that is not sufficient to discharge your burden  
19 of proving your case.

20 JUSTIN TURNER QC: So I understand your point. If you don't test the model against real  
21 data, it's just a model. But let's assume that those are the circumstances, you don't  
22 have the real data to test it against. Are you then saying that no weight can be attached  
23 to it or are you saying --

24 MR HOWARD: No, I beg your pardon.

25 JUSTIN TURNER QC: No, that's the question.

26 MR HOWARD: I didn't mean to interrupt.

27 JUSTIN TURNER QC: No.

28 MR HOWARD: I have a habit of jumping in and I need to restrain myself.



1 The problem is again I certainly don't want to give the impression that I am making a blanket  
2 submission that applies in any circumstances, so that if one had a situation where it is  
3 impossible to get the information, for instance, from the OEM as to -- and the court  
4 says yes, that's impossible, then the court has to look at the model and ask itself, well,  
5 does that model of itself prove this?

6 Now, we would say it all depends on the circumstances and it goes back to how complicated  
7 the situation is.

8 So where you have a relatively simple situation, a correlation may be sufficient. But where  
9 you have a rather complicated situation as here, even if you can't get the evidence, the  
10 answer may be, well, you simply can't prove your case. I mean, I'm afraid one can't,  
11 as it were, give an answer that covers all situations.

12 JUSTIN TURNER QC: No, we're only concerned with this situation. I'm not asking you to  
13 give an answer against the world.

14 MR HOWARD: In this situation, we would suggest that this model is not sufficient on its own.  
15 We would suggest that is our position. It's not going to -- going back to your example,  
16 one could give lots of examples where you can say, well, I can correlate these two  
17 things, does one prove the other. Now, there are some situations, as you say,  
18 whatever the example of the rabbits in France, where you just have to apply common  
19 sense to say, well, obviously I can see a statistical correlation but actually I know there  
20 isn't a causative relationship. Obviously we're in a more complicated situation where,  
21 as you say, well, what if I think there is a tendency to pass on. Remember, what we're  
22 interested in is actually how much is passed on both -- it is not sufficient even to say,  
23 well, I think at some points these costs will be passed on, but precisely how much is  
24 being passed on and why and how. And so we do say in a complicated chain like  
25 we're involved in here that a model is itself purely a model and it's not sufficient. But  
26 we say when you're in a situation where you are choosing not to actually get the  
27 material, because that's actually what it amounts to, then there is absolutely no reason

1 why the court, as it were, would lean over backwards to assist you and to say we've  
2 got to do to the best we can in this situation.

3 That's part of the point I was making.

4 We're talking about getting information and documentation from Apple and Samsung.

5 Well, we haven't heard anything as to why that is a difficulty.

6 In terms of MNOs, in this country there are four MNOs who account for 90 per cent of the retail  
7 consumer customer market, and that one sees from the Virgin O2 merger decision,  
8 and so there's no particular difficulty in obtaining the sort of evidence that we say is  
9 necessary. And we heard from Mr Turner that this would all be disproportionate, those  
10 were his oral submissions. But no consideration has been given as to what steps  
11 would be necessary or at what cost, and I would respectfully suggest it is very, very  
12 difficult to see how it could be disproportionate to obtain critical and relevant evidence  
13 in a claim for £500 million, and to say it's disproportionate one would have to consider  
14 what factual evidence is required, where it would be obtained from and how much time  
15 and cost would be involved.

16 Now, at this stage the truth is that Which? have chosen to make their bed on saying this is  
17 unnecessary and so that is the question you have to ask yourself, whether simply  
18 producing this model is going to be sufficient and whether at this stage the case is  
19 sufficiently grounded in the facts to satisfy the Pro-Sys test, and so we make two  
20 related points.

21 The first is that we say that what Which? has put forward to date is inadequate, that the  
22 pass-through issue, whether and to what extent Apple and Samsung passed on any  
23 inflated royalty rates, is a fact-sensitive question which requires one to go out to  
24 investigate the facts.

25 The Pro-Sys test requires that if you're going to rely on an expert report, it must have some  
26 basis in fact to show how a change in one item of costs affected Apple and Samsung's  
27 wholesale prices for their smartphones and how in fact that then affected retail prices.

1 So Which? has proposed to put forward Mr Noble's model, which we suggest is devoid of any  
2 factual underpinning. They have not put forward, as you saw in McLaren for instance,  
3 an industry expert saying that it is customary to pass on all these costs. They could  
4 have done if that were the position but they haven't done so.

5 Now, by disregarding the salient facts as to how prices are set at each level of the supply  
6 chain, the model is inevitably prone to over or underestimating the rate of pass-on.

7 Now, there is no serious suggestion before you that factual evidence from Apple and Samsung  
8 and indeed the MNOs and retailers would be available at the trial. Quite the contrary.

9 Now, you weren't taken to it, but we have the litigation plan in the bundle and the litigation  
10 plan, which is obviously an important part of this exercise, and its costing, there are no  
11 plans, there is no costing for conducting an exercise of obtaining the material from  
12 Apple and Samsung.

13 Now, just the litigation plan is in the supplementary bundle at 6 at pages 1015 to 6.

14 It does refer to third party disclosure but that is not aimed at the third party disclosure that we  
15 are talking about here. That is third party disclosure relevant to essentially the FRAND  
16 question.

17 Now, there are references in Which?'s skeleton argument and Mr Noble's third report to the  
18 fact that they might seek to obtain further disclosure in due course if necessary, and  
19 you see that in Mr Noble's third report at page 331, and it's important to look at what is  
20 actually being said at paragraph 3.12 of Mr Noble's report.

21 It's all very carefully worded.

22 This is not a party coming before you saying: I am intending to go out to get what we say is  
23 the necessary and relevant evidence.

24 MRS JUSTICE BACON: No, he says he expects it won't be necessary but if, when we work  
25 on it further, he thinks that it does become necessary, he would gather further  
26 information at that stage.

27 MR HOWARD: Well, the difficulty with that is he has seen Dr Padilla's criticisms and he is  
28 taking the line, as are Which?, that it is not necessary for me at this stage to go and

1 get this information. In other words, to construct my model, I don't need this  
2 information. So you then have to ask, well, what are you saying -- in what circumstance  
3 would it be necessary? And so the truth is this is just in response to a criticism, the  
4 criticism that, well, what you're doing is you're not going out to get the information from  
5 Apple and Samsung amongst others. What is then said is, well, I don't need to, but as  
6 a sort of last-ditch argument to say, well, if I'm wrong about that, somehow -- not now,  
7 I'm not saying I'm going to do it now, but if it somehow becomes apparent. It's totally  
8 unclear as to on what basis he is saying it would ever become apparent because he  
9 says his model is sufficient. So, with respect, this is a -- we would say it's half-baked,  
10 but it's not even half-baked. In reality, this is an empty promise or assertion which is  
11 designed to get round the difficulty that we are pointing to.

12 If it were really the case -- I mean, of course, a possibility would have been for Mr Noble to  
13 say, well, I've seen what you say and you're right, we should do this in order to  
14 construct my model. And then he would have to go back to the solicitors and say, you  
15 need to go and get this information from Apple and Samsung and so on, and then they  
16 would have to come up with a plan, a litigation plan, and a budget to do that. And that's  
17 the truth. What are we actually debating here? They want to bring this case and to  
18 sue Qualcomm for the best part of £500 million on the basis that they say: I can prove  
19 my case through this model. And these answers that are now put forward in Mr Noble's  
20 third report and in Which?'s skeleton argument don't in fact answer our criticisms and  
21 in order to do that they would have to accept that we are right and come up with a plan  
22 and budget, and there is no such plan or budget as things stand.

23 So in our submission the Tribunal should not certify this case on the basis that the debate  
24 about the model is a matter for trial because one can see what the issue is and there  
25 is a stark issue here as to whether simply based upon a model which is looking at the  
26 correlation between costs in the aggregate and prices, whether that is sufficient.

27 Now --

1 PROFESSOR MASON: Mr Howard, just I'll make one more attempt to just see if I understand  
2 fully the argument that you're putting forward. Suppose we were to have a hedonic  
3 regression model that had separate cost components, that had separate stages in a  
4 vertical supply chain, along some of the lines that you've suggested. Would that be  
5 sufficient or are you arguing any regression model needs to be supplemented by the  
6 other evidence that you've spoken about, internal pricing policy documents and so on?

7 MR HOWARD: Well, the model that you're assuming would have the benefit of the type of  
8 material that we're talking about, as I understand your question.

9 PROFESSOR MASON: It wouldn't be based, just for clarity, it wouldn't -- it would be blind to  
10 particular price-setting policies, so it would ignore that entirely. It would be a statistical  
11 exercise but augmented to have different cost components and successive stages of  
12 pass-through.

13 MR HOWARD: Yes. So what you are saying is, if we had a purely quantitative model but with  
14 more data, is that satisfactory? In my submission, on our facts, no.

15 PROFESSOR MASON: Okay, thank you.

16 MR HOWARD: We say you need -- you can't put on blinkers to the qualitative evidence when  
17 it's available, as it is in this case. Now, as I've sought to recognise, in any case  
18 where -- I mean, there is nothing -- I mean, I'm probably uniquely in this room not  
19 particularly a competition lawyer as opposed to a commercial law lawyer, but I don't  
20 think there is anything different in proving a loss in a competition environment and  
21 proving a loss in any other environment and that the primary port of call is in fact  
22 qualitative evidence. In these cases, one also uses quantitative evidence, but if you  
23 have a situation where you're solely seeking to prove via quantitative evidence,  
24 particularly where you've got a complicated supply chain, we would suggest that is  
25 unlikely to be sufficient. But certainly on the facts of our case, where you've got two  
26 different manufacturers, you've got above Apple prior to 2019 other manufacturers.  
27 You come down the chain to -- you have different outlets selling directly, selling to  
28 MNOs, selling to retailers. There are so many different chains that you then need

1 to -- it's very difficult to envisage a situation where you could have a reliable model  
2 which would tell you how a particular small component of costs has been passed  
3 through without properly analysing and understanding actually the decisions that are  
4 being made at every level. I mean -- it's the setting up of the model. The qualitative  
5 material, as I've said before, allows you to design the model appropriately.

6 PROFESSOR MASON: That final statement, I thought I understood your argument until that  
7 final statement, so I just need to -- because the way that you frame that final sentence  
8 made it sound as if there is a model specification that would be sufficient. I had  
9 understood you to say there is no model specification that will be sufficient, only  
10 necessary, but it always needs to be augmented by qualitative evidence. That's what  
11 I took your argument to be.

12 MR HOWARD: We are saying that, in order to have -- we say there are two things. You can  
13 have a model, but you also need to have material that corroborates it. But in designing  
14 your modelling, you need to have the qualitative evidence in the first place. You can't  
15 have a model that's going to be satisfactory for proving pass-on which doesn't take any  
16 account of the qualitative evidence.

17 MRS JUSTICE BACON: In any case?

18 MR HOWARD: In this particular case. As I say, one needs to be careful. I mean, this is a  
19 complicated case. As with any case, any use of statistics, how reliable the use of  
20 statistics are depends upon the particular circumstances. So here we're looking  
21 at -- we're not arguing a case by reference to the next case you have to deal with,  
22 we're just dealing with this particular case and the complex situation of the various  
23 levels of the supply chain.

24 MRS JUSTICE BACON: Are you coming to the end of your submissions, Mr Howard?

25 MR HOWARD: Yes, I am. Have I overrun? I apologise if I have. Sorry.

26 So if I can just make a couple of points, we say that if the model is not suitable for purpose, if  
27 it fails the Pro-Sys test, then pass-on is not a common issue.

28 Can I just take you back to the McLaren judgment at volume 2 at tab 26 of the authorities.

1 MRS JUSTICE BACON: I'm not sure that's disputed, is it?

2 MR HOWARD: Yes, I think it was said that it's accepted that pass-on is a common issue. We  
3 say it's obviously not a common issue if you can't prove your pass-on loss through the  
4 model. But if I just give you the reference, it's in the authorities at tab 36 and the  
5 relevant part is at paragraphs 66 to 68 on page 1183.

6 And it's essentially saying what I have just said.

7 MRS JUSTICE BACON: So my understanding was that Mr Turner accepted that the Pro-Sys  
8 test came in relation to common issue in one way and then eligibility.

9 MR HOWARD: That's fine.

10 So we submit by way of conclusion that you have an important gatekeeping role and we  
11 suggest there is no plausible or credible methodology here for establishing pass-on to  
12 the class, and we also say that that the costs of permitting the proposed proceedings  
13 to continue outweigh the benefits, and particularly the benefits to the class. So for all  
14 the reasons that I've been adverting to and set out in our skeleton argument, we submit  
15 that it is not appropriate or suitable for certification.

16 MRS JUSTICE BACON: Thank you, Mr Howard.

17 Mr Turner's got one question which I think applies to everybody.

18 JUSTIN TURNER QC: Yes. So the way things are narrowed it may not be relevant to today  
19 but it is a question for both of you, and it may be that it can't be answered today or  
20 tomorrow, and of course if certification is not granted then it may well fall away, but  
21 I just wanted to raise it anyway.

22 If you just go to the claim form and turn up paragraphs 36 and 37. I think that there's no  
23 dispute of the broad facts, but at 36 it says:

24 "Qualcomm also maintains a commercial policy whereby it refuses to license its SEPs to  
25 competing chipset manufacturers on an exhaustive basis."

26 The next paragraph it says:

1 "Instead, at most, Qualcomm enters into limited non-assertion agreements with rival chipset  
2 manufacturers, pursuant to which those rivals are restricted to selling chipset only to  
3 authorised purchasers..."

4 I just was interested to understand why it is that a non-assert agreement is not a licence. Is  
5 there a material difference between a non-assert agreement and a licence?

6 My next question was: is it permissible to restrict onward sale of chips if there is a licence?

7 My third question was: why are patent rights not exhausted by these licences/non-assert  
8 agreements? So why does the non-assert not give rise to an exhaustion of rights?

9 And those questions may involve some complex jurisdictional issues I realise and how it's  
10 analysed under the European/UK law may be very different to how it's analysed under  
11 the law of other regions. Anyway, I just wanted to leave you with those questions.

12 MR TURNER: Sir, if I can make a brief initial response to the question. The question is your  
13 second point, is it permissible to restrict the onward sale of chips if there is a licence -  
14 Do you mean as a matter of competition law is that problematic?

15 JUSTIN TURNER QC: Yes. It's a legal question. So normally, certainly analysing from a  
16 European basis, if you license somebody, you can't then go and assert your patent  
17 rights as against the customers of the person you've licensed. That's the point.

18 MR TURNER: Yes, I understand. Would you like me to address this perhaps at the time of  
19 reply?

20 JUSTIN TURNER QC: I think it's quite a complicated question and probably needs some  
21 thought, so there's no need to address it tomorrow. But just if this matter is  
22 certified -- and please don't for a moment think that any decision has been made on  
23 that, it hasn't -- but if it is certified and this progresses, I think it's something the parties  
24 ought to be addressing.

25 MR TURNER: Sir, I understand.

26 We will provide the note on sources that my Lady has asked for. I don't have that with me  
27 now, but we'll send that by email after the hearing.



1 The only version that we have of the Flamm declaration and it may be sensible for us to hand  
2 that to you, because it's all that we have. I understand, I've just been told, it's disputed  
3 that this is correct, but it appears to be the Flamm declaration. Perhaps it would help  
4 at least if we do hand the Tribunal our copies of this that we've prepared for us.

5 MRS JUSTICE BACON: Are you giving it to us in hard copy?

6 MR TURNER: Yes, if that's convenient. We can otherwise -- we do have hard copies here  
7 and I have in mind that, because there's the hot tub tomorrow, you may want to see  
8 this before you have your questioning.

9 MRS JUSTICE BACON: Well, perhaps you can give us the hard copies but also can you send  
10 them through in an electronic format to the Tribunal so that we've got them that way  
11 as well.

12 MR TURNER: My Lady, that's all I had to say.

13 MR HOWARD: Could I suggest, there's a question mark about what the document is and  
14 where it comes from, that the parties seek to sort that out before --

15 MRS JUSTICE BACON: Oh, before giving it to us ?

16 MR HOWARD: Yes, because it's subject to a protective order in the United States.

17 MRS JUSTICE BACON: All right. Well, why don't you do that and we can have submissions  
18 on it at some point if necessary.

19 Yes, we would ideally like it before tomorrow for the purposes of the hot tub --

20 MR HOWARD: I think it's just the version that you're about to be given may be one that we're  
21 not authorised to give to you, but I think we'll be able to give you a version that we can.

22 MRS JUSTICE BACON: Yes. All right. Well, if a version overnight and by first thing tomorrow  
23 morning could be sent that the parties are content with between themselves, then that  
24 would be helpful.

25 MR TURNER: Yes, my Lady. If Qualcomm provides to us the version they have, if it's different  
26 from this, after this court hearing, we can look at it straight away.

27 MRS JUSTICE BACON: All right.

28 So the hot tub will commence at 12 tomorrow.

1 MR TURNER: Yes.

2 **(4.30 pm)**

3 **(The Tribunal adjourned until 12.00 pm on Thursday, 31 March 2022)**

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### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?