IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1382/7/7/21

Salisbury Square House
8 Salisbury Square London
EC4Y 8AP

13 January 2023

Before

The Honourable Mrs Justice Bacon
Professor Robin Mason
Justin Turner KC
(Sitting as a Tribunal in England and Wales)

BETWEEN:

CONSUMERS' ASSOCIATION ("WHICH?")

Class Representative

-v-

QUALCOMM INCORPORATED ("QUALCOMM")

Defendant

Michael Armitage and Ciar McAndrew (Instructed by **Hausfeld & Co LLP**) appeared on behalf of the Class Representative

Daniel Jowell KC, David Bailey and Emma Mockford (Instructed by **Norton Rose Fulbright LLP and Quinn Emanuel Urquhart & Sullivan LLP)** appeared on behalf of the Defendant

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Friday, 13 January 2023

(10.00 am)

Discussion re housekeeping

MRS JUSTICE BACON: Can I just start with the live stream warning. Some of you are joining us live streamed on our website, so I start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of Court.

MR ARMITAGE: Madam, members of the Tribunal, just for the transcript, Michael Armitage for the class representative Which?, leading Ms McAndrew. My learned friends Mr Jowell KC, Professor Bailey and Ms Mockford appear for the defendant, Qualcomm.

In terms of housekeeping, if I just check that everyone is on the same page. You ought to have a core bundle containing the pleadings and application materials.

MRS JUSTICE BACON: Yes, we do, and I think that that's been recently updated.

MR ARMITAGE: I think that's right. I think we'll see if there's a problem as we go along, but everyone is working from the same document. I think it ought to also work, if people are working electronically, on a hard copy; page numbering ought to be identical.

There is then a rather full correspondence bundle.

MRS JUSTICE BACON: Yes, and I think we are all using the electronic version of that.

MR ARMITAGE: I'm grateful.

You may have confidential and non-confidential versions of these bundles. I don't think it's going to be necessary today to refer to any confidential material, so it ought to not matter which version is being worked from.

You should have, I think, three volumes of authorities.

MRS JUSTICE BACON: Yes.

Could I just pause there. I'm not sure if the transcript is working.

MR ARMITAGE: Oh, I'm sorry.

MRS JUSTICE BACON: We certainly do not have any advance on the transcript on our screens.

MR ARMITAGE: My one does appear to be working. But we'll of course wait. **(Pause)**

MRS JUSTICE BACON: Our transcript is still frozen. I don't know if anything should be on the EPE screens at the moment. **(Pause)** I think we're all right. Thank you. I'm sorry, Mr Armitage.

MR ARMITAGE: Not at all. I'm grateful.

Madam, we've set out in our skeleton argument a relatively full background section reminding the Tribunal of the essential issues in this case and setting out some points of context that we'd invite you to take into account in deciding on case management issues today. I wasn't proposing to take the Tribunal through that orally, unless the Tribunal has any questions.

MRS JUSTICE BACON: No. And I should say that we are absolutely intending to finish this case management conference today. We do not intend that this should spill over into another day, nor are we intending to hive off any issues to a separate hearing. So everyone needs to tailor their submissions to an end time of 4.30 today.

MR ARMITAGE: I'm grateful. I think that ought to be well achievable. As we'll see shortly, there has been substantial progress, in fact, in recent days.

To that end, we I think emailed this morning an updated draft order representing matters --

MRS JUSTICE BACON: Thank you very much. We all have that.

MR ARMITAGE: Does the Tribunal need hard copies or ...?

MRS JUSTICE BACON: No, we have hard copies of that.

MR ARMITAGE: As I say, pleasingly, there has been a lot of movement this week on both sides of the courtroom and there's a considerable measure of further agreement since applications were made at the end of last week. So, as I say, I think it will be well achievable to get through matters today, which is excellent.

Is it helpful for me to rapidly run through the draft order just to indicate, as I go through, what we will need to argue about today?

MRS JUSTICE BACON: I think we can see that from the colour-coding. We assume that nearly everything in the colour-coding remains for determination.

MR ARMITAGE: Yes.

So on that note then, under pleadings-related issues, do I infer the Tribunal does not need to hear submissions on the amendment issues? Those are consented --

MRS JUSTICE BACON: No.

MR ARMITAGE: -- in both directions.

MRS JUSTICE BACON: No. What I propose to do is that we will take the issues in turn. So I don't intend that you should make your submissions on everything, but we'll divide them up. I think that it would be sensible to deal with the pleadings-related issues in paragraphs 4, 5 and 6, deal with that, and then we'll turn to the strike-out separately.

MR ARMITAGE: That's exactly what I envisaged, Madam. So I'm pleased to hear that.

Submissions on pleadings-related issues

MR ARMITAGE: The first point of debate then is at paragraph 4, and as you say, paragraph 6 in particular is a related point, concerning the document that has been referred as to the "schedule of factual allegations". Just by way of very brief explanation for this.

The Tribunal knows this is not a follow-on case. There's no binding infringement of finding by the Commission or the CMA concerning the conduct that is in issue. But there are, we say, two extremely important foreign proceedings concerning the same conduct: the judgment of the US District Court in proceedings brought by the Federal Trade Commission; the judgment of the Seoul High Court largely upholding an appeal against a decision of the Korean regulator. And as Which? sees it, these decisions are of great importance in progressing these claims in a cost-effective and proportionate way.

We included in our suggested pre-reading a few short sections of the FTC judgment, as we've called it, and the Tribunal will have seen that that decision is replete with factual material that concerns the very policies that are the subject of Which?'s claim. That's why, as we'll come to, Which?'s disclosure focused on that factual material that's already been produced and referred to in these foreign decisions and also in the EC investigation, which is another issue for later.

Which? foresees a real possibility of cost savings if Qualcomm indicates whether the key factual points in the foreign judgments are admitted or denied.

MRS JUSTICE BACON: Yes, and there's been no dispute that Qualcomm will be responding.

MR ARMITAGE: Indeed.

MRS JUSTICE BACON: As far as I can see it, the only issue is whether we include the red text at the end of paragraph 4.

MR ARMITAGE: Indeed. So as a matter of principle, it's agreed now that the schedule will be responded to, and the date is agreed.

MRS JUSTICE BACON: All right. If you're dealing with paragraphs 4 and 6, why is there a dispute about whether paragraph 6 includes a cross-reference to paragraphs 3 and 4?

MR ARMITAGE: I think that's Mr Jowell's point.

Our position is simply that the response to the schedule of factual allegations should stand as a pleading in this case, hence the inclusion of the cross-reference to that in paragraph 6. It's agreed that the schedule of factual allegations should be verified by a statement of truth, and in those circumstances we don't see any issue and we would positively invite the Tribunal to order that it should stand as a statement of case in the proceedings.

MRS JUSTICE BACON: All right. So should I just hear Mr Jowell on the red text at the end of paragraph 4 and why he doesn't want the response to stand as a pleading?

MR JOWELL: Yes. May it please the Tribunal. The starting point is just to appreciate the circumstances in which we received this schedule of factual allegations. We received

it I think less than a week ago, or around a week ago: 97 factual allegations which are largely new, are not contained in the claimant's current pleadings.

MRS JUSTICE BACON: Yes, but you have agreed to respond to it by 5 March.

MR JOWELL: Yes, we have done so. And when we did so, we did so, understandably, on the basis of certain caveats, because we haven't had a chance to go back and consider each one of these 97 factual allegations in detail and consider whether they are relevant to the case, sufficiently particularised and so on.

So when we wrote back, we said, in the ordinary way, we said -- we sought to be cooperative. We said: well, yes, fine, we will respond to these, but it's without prejudice to our right to request further information, not to respond on matters that will be addressed in evidence or that are manifestly irrelevant, and not to repeat responses that we've already addressed in their previous RFI.

MRS JUSTICE BACON: I think the question is whether you need to spell that out in quite so granular detail in this paragraph.

MR JOWELL: Well, we didn't think it was necessary, but we include -- when we saw the order, we originally proposed that this should simply be a recital to the order, so it would say: and upon it being agreed that it's without prejudice to our rights.

MRS JUSTICE BACON: I mean, at the moment the order simply provides that you'll serve a response. And if your response is, "See above", "See other document", that is a response, isn't it?

MR JOWELL: Yes, Madam, as is, "This is completely irrelevant" or, "This is a matter for evidence and we will respond to it in due course, when we have" --

MRS JUSTICE BACON: Yes.

MR JOWELL: So if that's all understood, we don't need the wording. But what we were concerned with was that, us having suggested it as what we thought would be an uncontroversial recital, and they having resisted it, they would then come back on the next occasion and say, "Oh, well, we had this debate and they agreed to take it

out, and therefore they must now respond to every single one of these 97 factual allegations".

So we think really, with respect, they're being a bit petty about this. So if they'd accepted that, these natural caveats, then we wouldn't need it. Now, if we can all agree -- if they can agree -- that those caveats go without saying, we don't need the wording.

MRS JUSTICE BACON: All right.

MR JOWELL: That's the only position.

MRS JUSTICE BACON: What's your position on whether paragraph 4 is included?

MR JOWELL: Yes. Well, it's slightly unusual to specify that particular things should be treated as pleadings, and the reason that we apprehend that they're doing this in relation to this schedule of contended (inaudible) facts is that they want to later on say: well, this is a pleading, and as a pleading, if you joined issue on the pleading, then we're entitled to disclosure, or at least as a prima facie case we're entitled to disclosure in relation to the issue.

Now, first of all, the schedule of factual allegations is not a pleading. It's actually akin to what we used to call, I think, from what I remember, a notice to admit, a notice to admit facts. Possibly, actually, when one looks at it, it may be more like a notice to admit certain evidence.

But again, the question really is: why does one need paragraph 6 at all? And the answer is: we apprehend they're putting it in so they can use it as a foothold to then make their position stronger on disclosure. We don't accept that all of these 97 allegations are actually relevant to the issues in the case. Some of them relate to events that are extremely historic, relate to completely different OEMs and so on.

So the only reason we're having this debate is because we want to make it clear that we're not conceding that just because we answer and join issue with one of these factual allegations, therefore disclosure will be granted in relation to it. So that's what this -- again, it seems a rather petty debate to us, but we just need to forestall it

because we don't want it to be said somehow we've agreed that this is therefore a basis for disclosure. So that's the only concern.

MRS JUSTICE BACON: Okay.

Mr Armitage?

MR ARMITAGE: Yes. We don't agree these are petty points. They are important, and I'll just briefly explain why.

Looking at the red text, I think it is in particular (ii) and (iii) that are important. (i), we've agreed actually in correspondence that there will be a process whereby the other side will identify any allegations that they say are not properly particularised, and we can deal with that without the need to trouble the Tribunal, I hope.

On (ii), as drafted, the suggestion is that the defendant will not need to respond to matters that will be addressed in evidence. Well, the Tribunal will have seen the schedule. These are factual allegations. Of course facts will need to be addressed in evidence. But we would say it would not be an appropriate response to simply say, "We don't respond to this allegation"; in other words, we neither admit nor deny, nor even say it's not admitted, and don't give any reasons; we'll just leave that to be addressed in evidence. We need to know now what the position is, in order hopefully to realise the cost savings that may arise.

MRS JUSTICE BACON: Yes, but it seems a bit premature for us to be taking a view as to whether they have to respond to absolutely everything. As Mr Jowell has said, they've only just received the schedule, they need to look at it, and a response which says, "This is going to be addressed in evidence", is a response. All we're doing without the red text is asking them to respond, and if you have an issue with what they say, then that will be a matter for another day.

MR ARMITAGE: I understand that. I think it is important though for us to make clear that we will be saying that that's not an adequate response to clear factual allegations.

MRS JUSTICE BACON: All right.

MR ARMITAGE: But I understand the point, Madam. If there's not going to be a proviso in the order that permits them to do that necessarily, that's as may be.

The same point, incidentally, arises in relation to (iii).

MRS JUSTICE BACON: Yes. Well, if they respond saying, "See above", or, "See other document", and you don't like that, then you'll have to come back at a future date.

MR ARMITAGE: Yes. I'm so sorry, it was the second aspect of (ii) that I had in mind. (iii) is absolutely fine. That's of course a legitimate response. It's the point about manifest irrelevance.

The point is here, as you'll have apprehended, the parties disagree about some points of principle in relation to relevance. That's why we're inviting the Tribunal to consider a handful of those points today. And that's important not just for disclosure matters but also for responses to the schedule.

But in terms of this text, having made those points, we do say that a full and proper response to the schedule is essential to progress matters --

MRS JUSTICE BACON: Yes.

MR ARMITAGE: -- but --

MRS JUSTICE BACON: And you'll see what response you get, and you can then decide whether it's full and proper enough. All right.

What about the paragraph 6 point? Why does it need to be treated as a further pleading? Is this an ambush to try and use this to get more disclosure?

MR ARMITAGE: Well, first of all, I think if it were not provided in paragraph 6 that this is a formal pleading, we would not say that precludes us from seeking disclosure by reference to the document. Of course, any disclosure request will need to be justified, and Mr Jowell can make whatever points he wishes to make at that stage.

We say in circumstances where it's verified by a statement of truth and what the schedule will consist of is responses to allegations of facts, it makes sense for it to stand as a pleading.

MRS JUSTICE BACON: What difference does it make to anything?

MR ARMITAGE: Well, in a sense, that point goes both ways.

MRS JUSTICE BACON: Well, if it doesn't make any difference to anything, then we could simply have paragraph 3 and then leave it to be fought over at some later point if you say that, despite it not being formally treated as a pleading, you want to get disclosure on the back of it.

MR ARMITAGE: Yes. So as long as the understanding is that the removal of the text wouldn't preclude our ability to apply for relevant disclosure, then I can't see the issue. Likewise, in circumstances where, as I say, it's verified by a statement of truth and it takes the form of responses to factual allegations, that is in substance a pleading. That's the only point we're making.

MRS JUSTICE BACON: All right. Thank you, Mr Armitage. We'll just have a quick ... **(Pause)** We'll have paragraph 4 but without the red text. So you can strike the red text. I don't think it's necessary to spell that out. Then in paragraph 6, the reference will be as per the red text, just to paragraph 3.

So that deals with that. Let's move on to the strike-out application.

Application by MR JOWELL

MR JOWELL: The claimant, as I'll show you shortly, alleges in their pleaded reply that reasoned findings of fact of other Judges and Tribunals will be admissible at the trial of this matter, and they assert that the findings of those other Judges may be given persuasive weight by this Tribunal. We say, to the contrary, that the reasoned findings of other Courts or Tribunals or administrative bodies are inadmissible as a matter of English law.

MRS JUSTICE BACON: Yes.

MR JOWELL: That follows from the rule in Hollington v Hewthorn.

MRS JUSTICE BACON: I wonder if we can cut through this.

MR JOWELL: Yes.

MRS JUSTICE BACON: I will put a question to Mr Armitage.

Mr Armitage, paragraph 27(b) of your skeleton argument says that -- well, paragraph 27(a) and (b) say the same thing: they say that what you are seeking to rely on is simply matters of fact recorded in the foreign judgments. You say that you are not seeking to rely on assessments of the evidence made by the foreign Courts and regulators. That's your position in both paragraph 27(a) and 27(b).

Does that remain your position?

MR ARMITAGE: It remains our position, and I think -- so it's not in dispute in relation to paragraph (b), so the first element of that. We say the Tribunal may take into account matters of fact that are recorded in foreign judgments, according such weight as it considers appropriate to them. And we will be contending at trial that there are highly relevant matters of fact recorded in those judgments.

MRS JUSTICE BACON: I'm not asking for a lengthy submission. Do you still stand by paragraphs 27(a) and (b)?

MR ARMITAGE: Yes.

MRS JUSTICE BACON: All right. Well, if that's the case, can we just look at the way that your reply is pleaded, because your reply doesn't say "matters of fact", it says "reasoned findings". Now, if your position is as set out in 27(a) and (b), can you not replace the words "reasoned findings" by something which refers to "matters of fact"?

Then my question to Mr Jowell is: if they did that, would you be objecting?

But I'll ask Mr Armitage first. Because what you say in your 27(a) and (b) is not consistent with what is currently pleaded in paragraph 4. It may be unintentional.

MR ARMITAGE: So the point we're making at paragraph 27(b) of the skeleton -- sorry, if I may just turn it back up -- is not a point --

MRS JUSTICE BACON: Well, 27(b) reformulates paragraph 4 of the reply and explains what you mean. Having done that, I am asking you if you could then redraft paragraph 4 to be consistent with what you say you're doing in paragraph 27(b).

MR ARMITAGE: The position is as follows. We say that assessments of the evidence made by foreign Courts and regulators, as distinct from opinions of foreign Judges, or indeed

Judges in earlier civil proceedings, which may fall within the scope of Hollington v Hewthorn, we're not necessarily inviting you to accord any weight to those findings, but we say they are not inadmissible by virtue of the rule in Hollington v Hewthorn, for a number of reasons which I'll develop. So --

MRS JUSTICE BACON: I'm not sure that that's what you're saying at 27(a) and (b). Because what you are saying there is, if I look at the first sentence of 27(b):

"But that is as far as the first proposition in paragraph 4 of the Reply is intended to go."

And what you're referring to in that is simply the "record of factual evidence", as you've described it in 27(a), or, put in different words in paragraph 27(b), "matters of fact recorded in the foreign judgment". And you said categorically: that's as far as paragraph 4 is intended to go.

If that is your position, whatever else you may say about assessments of the evidence, if you are standing by 27(a) and (b), can you not simply reword paragraph 4 of your reply to be consistent with 27(a) and (b)?

MR ARMITAGE: Yes, so I think perhaps the distinction hasn't come out clearly from the skeleton argument. We apologise.

The distinction I think is between a record of fact, in the sense of, "Witness X said the following at the trial", and a finding of fact -- that's what paragraph 4 is concerned with -- which could be a finding by the Judge in relation to the matters of fact that are recorded therein. And we say those matters are admissible pursuant to this Tribunal's flexible approach to the receipt of evidence.

MRS JUSTICE BACON: That's not what you said in your skeleton argument. 27(a) and (b) say exactly the same thing, which is that a record of factual evidence or matters of fact recorded in the foreign judgment are what you rely on and you say are admissible, and assessment of the evidence, you say you "do not contend that the Tribunal should rely on or follow [it]".

So you are saying your paragraph 4 is not talking about an assessment of the evidence. A reasoned finding made by a foreign Court is, as far as I understand it, an assessment of the evidence.

MR ARMITAGE: I think the word to emphasise is that we aren't necessarily asking the Court to afford any weight to the assessments of the evidence that are made. So that's distinct from what we say about the matters of fact that are recorded in the foreign judgments, which unquestionably, we say, are relevant and we will be inviting the Tribunal to accord weight to those at trial.

All we say in relation to the second element of 27(b), in a sense we're reassuring the party on the other side and the Tribunal that, as I say, we're not necessarily going to be asking the Tribunal to accord any weight to those.

MRS JUSTICE BACON: If that's the case, then you don't need that in your second sentence of paragraph 4 of your reply.

MR ARMITAGE: So paragraph 4 of the reply ...

MRS JUSTICE BACON: Everything that you've said to me is consistent with my proposition that the second sentence of paragraph 4 of the reply should be reworded to reflect what you've said in the second sentence of paragraph 27(b) of your skeleton argument.

It might be helpful to bring up paragraph 4 of the reply on the Epiq EPE. That's core bundle 140.

If you are not asking the Tribunal to place weight on assessments of the evidence, then it seems to me that the second paragraph of paragraph 4 of the reply should be reworded as I've just suggested.

MR ARMITAGE: Madam, could I be clear on our position, if I haven't been so far. Apologies if that's the case.

I had hoped that that paragraph of our skeleton argument conveyed the point that while we aren't necessarily going to be inviting this Tribunal to afford weight to assessments of evidence both by foreign decision-makers, we do say that those matters are admissible

and that the Tribunal is permitted to do so, and that that's a matter for trial. That's why we go on in the next subparagraph of our skeleton to make the point about the Tribunal's approach to the evidence.

So ...

MRS JUSTICE BACON: Well, then I don't understand paragraph 27(a), because you say the opposite in 27(a). What you are saying is admissible is:

"... a 'record of factual evidence', as distinct from findings made following an assessment of the evidence."

And the next sentence of 27(a):

"... the rule in Hollington v Hewthorn does not prevent the civil Courts from having regard to matters of primary fact recorded in ..."

MR ARMITAGE: Yes, I'm sorry, it may just be -- 27(a) is dealing with the position in the High Court.

MRS JUSTICE BACON: Well, 27(a) and (b) are both explaining what you see as the scope of your paragraph 4 of the reply.

MR ARMITAGE: Yes. So the position I think is as follows. We say that in this Tribunal, hence subparagraph (c) of our skeleton argument, the strict rules on admissibility do not apply. These are matters that go to weight and are at best considered at trial.

The point we're making at (a) and (b) is that under the rule in Hollington v Hewthorn, even if this were in the civil Courts, certainly matters of primary fact recorded in these foreign judgments would be perfectly admissible. Then we go on to say that in this Tribunal, which applies a more flexible approach to the evidence, there's not even the restriction that one has under Hollington v Hewthorn.

MRS JUSTICE BACON: All right.

MR ARMITAGE: I apologise if that wasn't clear. I can see on the drafting that may be the case, but I --

MRS JUSTICE BACON: All right. Well, I now know what your position is.

MR JOWELL: I think the position, Madam, is that it may be that what my learned friend is saying is that it's his skeleton argument that needs to be really amended, rather than the pleading.

MRS JUSTICE BACON: That's my understanding.

MR JOWELL: It did confuse us as well. But 27(c), to be fair to my learned friend, does make clear that they do also take the position on admissibility, and that's also clear from their pleaded case.

If I could just show you that, because it's a little bit more than just paragraph 4 in isolation. So if I could invite you to take up the core bundle, please. Let's probably just start with the claim form, which is on page 16 of the core bundle.

What you'll see is in the claim form they sail very close to the wind but they don't, blatantly at least, offend the rule in Hollington v Hewthorn; they leave the position ambiguous. If you see at page 16, you see paragraph 41, they say:

"For the purposes of this ... application, Which? does not rely on these foreign decisions to prove the correctness of the conclusions of fact or economic assessment reached by the decision-makers concerned. Nor does Which? contend that the legal conclusions reached in those decisions amount in themselves to a sufficient basis for proceeding with the Claims under UK or EU competition law ...

"Rather, Which? contends that the Relevant Decisions are highly material to the question of whether the ... Collective Proceedings meet the threshold for certification."

And they say:

"... it is of ... relevance that the combined evidential record resulting from the ... Decisions provides significant information about Qualcomm's business practices [and so on]. The Decisions show that Which? is likely to be able to obtain disclosure of documents or the provision of information, which will materially assist in establishing the necessary factual, economic and legal elements of the Claims."

So they're really quite careful there not, at least blatantly, to offend the rule in Hollington.

MRS JUSTICE BACON: Yes. I suppose by referring to "the combined evidential record", that indicates that what they're looking at is what I understood them to be talking about, which is a record of the matters of evidence.

MR JOWELL: Yes, indeed. The position though, one does -- I don't need to take you through it, but of course they do then rely on lots of what are reasoned findings, and not actually just record, in the various decisions in their claim form.

So in our defence we took up the point, just to make our position very clear, and you'll see that if you go to page 59, please, of the core bundle. There we are. You'll see in paragraph 4 we say:

"The Claim Form has been pleaded exclusively by reference to certain foreign judicial and regulatory decisions, notwithstanding that (as pleaded below) those decisions have been fully or partially overturned by appellant Courts and/or are the subject of ongoing appeals, and/or are inadmissible as evidence of their findings."

If you go to page 88, please, of the same bundle, and you see paragraph 69, we say:

"... it is admitted that Qualcomm has been the subject of legal proceedings or administrative antitrust enforcement in the US, the EU, South Korea and Taiwan ..."

Then we plead the relevance. We deny the relevance of those foreign decisions for the reasons in paragraph 4. And we say, you see in 69.1:

"It is denied that the Foreign Decisions are admissible as evidence of their findings."

So we make our position very clear.

Then if one goes to the reply, which is really -- you've seen paragraph 4, which is on page 140 of the bundle, and it's the second sentence that's the offending sentence, where they say:

"Reasoned findings made by foreign courts and regulators may be taken into account in proceedings before the Tribunal, at least to the extent that such findings have not been specifically reversed on appeal."

And of course, "reasoned findings" is unmistakably an allegation that is contrary to the rule in Hollington v Hewthorn.

But the important point is: this was not a stray sentence that was a mistake, because one can see that if one goes forward to 166 in the bundle. You see at paragraph 42 they say:

"Save that the implicit allegation that the findings in the FTC Judgment are inadmissible is denied (as to which paragraph 4 above is repeated) ..."

And then they go on.

Then you see in 44:

"The first sentence of sub-paragraph 69.4 is admitted. As to the second sentence, it is denied (if [it is] alleged) that the Commission's factual findings are no longer relevant in the light of the annulment. Those factual findings remain admissible and persuasive before the Tribunal insofar as they relate to the subject matter of the present claim."

So they are saying quite clearly there in their pleading that those reasoned findings can be taken into account, and they also say that they are admissible.

That assertion has long been considered to be impermissible in English law, and of course the case from which the rule gets its name was a case in which the plaintiffs sought to rely in civil proceedings for negligence on the defendant driver's criminal conviction for careless driving as evidence of his negligence. I don't propose to take you to that case. In relation to criminal findings, of course it's been overturned by the Civil Evidence Act 1968.

What I would like to do is just to take you to what is generally regarded as the modern authoritative statement of the law in this area, which is the judgment of Clarke LJ in Hoyle v Rogers, which you'll find in the first bundle of authorities at tab 10. It's authorities page 374.

I think we have the wrong -- that's it. There we are, thank you.

If we could go, please, to paragraph 32 in the judgment. That's at page 384. Forgive me, that's a bad reference. I'm in the wrong judgment, that's why. Forgive me. It is paragraph 32, but it's on page 412, please.

Perhaps if the Tribunal, so as not to get bored by my voice, just reads perhaps paragraphs 32 to 41, please.

PROFESSOR MASON: Does this paragraph just start, "In this case, the Court of Appeal held ..."?

MR JOWELL: Yes, it does, and that's a reference to Hollington v Hewthorn itself. **(Pause)** Perhaps down to paragraph 40 is probably sufficient.

MRS JUSTICE BACON: 39 is the paragraph that you've cited in your skeleton argument, I think.

MR JOWELL: Indeed, Madam.

MRS JUSTICE BACON: Thank you.

MR JOWELL: So we take essentially three points from that.

First of all, notwithstanding some criticism of the rule, particularly in relation to criminal convictions, the rule still remains: it's alive and kicking, as I'll show you.

Secondly, the rule has been applied in relation to multiple different types of judicial and quasi-judicial decision-makers.

And thirdly, the point we take particularly from paragraph 39 is that the rule is based upon a principle of fairness, and the Judge or the Tribunal, and not some other Judge or Tribunal, as being the only arbiter of matters of fact and factual assessment.

Now, Clarke LJ in that particular case went on to consider whether on the facts of that case it applied, and he held it didn't because actually the matters that were relied on in that case were matters of expert opinion. And we don't suggest that the rule extends that far, to matters of expert opinion. But that's not what the debate is about, because they are squarely saying it's the factual assessments of the Court.

MRS JUSTICE BACON: Yes.

MR JOWELL: If I could take you briefly to two recent cases applying the rule.

The first is the Crypto Open Patent Alliance, which you'll see at tab 19 of the authorities bundle. It starts on page 839. It's the judgment of His Honour Judge Paul Matthews, sitting as a Judge of the High Court. The case related to the identity of the legendary Satoshi Nakamoto, the founder of Bitcoin.

The claimant sought to amend the pleading to include reference to findings made in US proceedings that were adverse to the defendant's credibility. You can see that if one goes to paragraph 20 on page 844. We see:

"Both the original and amended particulars of claim referred to [the] proceedings in paragraph 28 ... But there are further references. Paragraphs 63-65 are cross-headed 'Findings in the Kleiman Litigation'. Paragraph 63 begins 'The Claimant will rely upon a number of findings in the Kleiman Litigation which are probative of [the defendant]'s conduct ...'"

And then it cites from these adverse findings as to the credibility of the defendant.

If one picks up the discussion of the case law, it starts at paragraph 35 on page 848 and it goes through the various cases leading up to Rogers v Hoyle on 851. I don't propose to read it all out to you; no doubt you may wish to consider it in due course.

At paragraph 51 -- perhaps before then, if I just show you the case of Ward v Savill which is referred to first, forgive me, that's at paragraph 43, which postdates Rogers v Hoyle. So if we could go to page -- thank you. The previous page, please. That's right. You'll see "Ward v Savill":

"The final case to which I wish to refer ... is Ward v Savill ... a very recent decision of the Court of Appeal. Here, the claimants sought to trace money that they invested in a scheme that turned out to be a fraud into [the] property ... of the defendant. The defendant resisted this claim. The claimants sought to rely on declarations obtained in earlier civil proceedings between the claimants and the fraudsters ... At first instance the Deputy Judge, Robin Vos, dismissed their application, and the claimants appealed, unsuccessfully.

"The Court of Appeal considered a large legal canvas, including the effects of judgments *in rem*, with which I am not concerned. But it also concerned the rule in Hollington v Hewthorn. On this question Sir Julian Flaux [the Chancellor] (with whom Elisabeth Laing [LJ] and Warby LJ agreed) said:

"'... In Calyon [v Michailaidis ...] Mr Steinfeld QC, who also appeared for the claimants in that case, sought to persuade the Privy Council to depart from the established principles underlying Hollington v Hewthorn, but they declined to do so. In [paragraph 28] of the judgment, the Privy Council recognised that, whilst the actual decision in Hollington v Hewthorn had been criticised, it continued to embody the common law as to the effect of previous decisions. It was in that context that they referred at [paragraphs 30] to [31] to the Report of the Law Reform Committee and concluded, not just that the reasoning of the Court of Appeal in Hollington v Hewthorn on this aspect of the law was compelling, but that it was significant that, in passing the Civil Evidence Act 1968, Parliament made no change to this aspect of the law. In other words, the rule in Hollington v Hewthorn represents a well-established principle of law which this Court should follow.'"

Then if one goes forward to paragraph 51, please, on page 853, we see the Judge says:

"One argument for leaving matters as they are may be that reversing the rule would lead to even more satellite litigation about the circumstances in which the earlier litigation about the circumstances in which the earlier decision was come to, and how far it could properly be helpful in the later proceedings, and that there is a value for those involved in litigation as a whole in preventing such further disputes from complicating existing proceedings and making them even slower and more expensive."

MRS JUSTICE BACON: Yes. What he's saying is that the Court could have chosen not to have a bright-line rule and simply leave it to the trial Judge to decide the question of weight. That was an alternative path, but that's not the course that the law has taken.

MR JOWELL: Yes.

MRS JUSTICE BACON: And this is an explanation for why that may be desirable.

MR JOWELL: Yes, absolutely. And he concludes by saying -- and he says that it might make things slower and even more expensive. He says:

"Of course, looking at the matter from where I sit, at first instance, it makes no difference. The rule is binding upon me, none of the statutory exceptions applies, and so I will apply it."

So it's clearly a binding rule.

Actually the present case is a very good example of precisely why actually seeking to rely on these findings of other Judges is undesirable precisely for those reasons, because it would necessitate us putting in evidence about the unfairness or otherwise of proceedings in Korea or Taiwan, before regulators there, and so on, which would undoubtedly lead to a huge amount of additional burden on this Tribunal.

MRS JUSTICE BACON: Do you say that it follows from this that it is binding on this Tribunal, in relation to which the rules of evidence have historically been a bit more flexible?

MR JOWELL: I do, and the reason I say that is essentially because it's a foundational rule of fairness. It's not simply a technical rule of evidence; it's a rule about who is to be the judge. And to say that it doesn't apply in a civil tribunal of this nature is a bit like saying: well, because the CAT rules say it's not bound by strict rules of evidence, therefore it's not bound by, say, the basic rights of natural justice.

MRS JUSTICE BACON: Well, there are two distinct arguments. One is that, as a strict rule of evidence and judicial precedent, this is actually binding on the Tribunal.

MR JOWELL: Yes.

MRS JUSTICE BACON: The second is that, irrespective of whether it's binding on the Tribunal, you say it should apply to the Tribunal.

MR JOWELL: Yes.

MRS JUSTICE BACON: Which is your position?

MR JOWELL: Both. Both.

MRS JUSTICE BACON: So you're saying as a rule of judicial precedent, it is binding on the Tribunal?

MR JOWELL: We say it is binding, and we say in any event the Tribunal should follow it.

MRS JUSTICE BACON: Why do you say it's binding on the Tribunal when this arises as a rule applicable to the English Courts? Do you say that that extends to this Tribunal?

MR JOWELL: I say it does, just in the same way that -- because I say it's a foundational rule of fairness, which is the way it's put in Hoyle. And just as this Tribunal is bound by basic common law rules of fairness in other respects -- the right to a fair hearing, the right to cross-examine, the right to hear evidence against you -- so we say it's bound by Hollington v Hewthorn.

But if we're wrong about that, then we say that in any event this Tribunal certainly should follow it, because it's -- and this Tribunal typically does look to the rules of evidence. It's not that this is an evidence-rule-free jurisdiction; it's just that the CAT is not bound by the precisely the same technical rules of evidence as the High Court. But the CAT frequently looks to what the High Court does in order to create its own rules of evidence.

PROFESSOR MASON: For the transcript, I'm Professor Mason. So you're arguing about admissibility, not weight?

MR JOWELL: Correct. We say that the reasoned findings of the Court are, we say, inadmissible. We accept fully that this Court can take into account the underlying evidence that is before other Tribunals but it can't have regard to another Judge's finding of fact which says, "Well, I accept X's evidence and not Y's evidence".

MRS JUSTICE BACON: Yes. I mean, in other words, if the position had been -- as I had understood from Mr Armitage's skeleton argument -- that all that was relied on was a record of the evidence or a record of the fact, then you don't take any issue with it. But what you take issue with is the assessment of the evidence and the finding made on the basis of that assessment --

MR JOWELL: Yes.

MRS JUSTICE BACON: -- its evaluative assessment.

MR JOWELL: Yes.

I am reminded that of course the CAT does have certain rules. One of the rules is rule 4(1), which says that it must decide cases fairly. So insofar as Hollington is a rule of fairness, which it is, as we've seen, it's consistent with rule 4(1) for the CAT to follow it.

If I may take you just to one other recent case applying it, in tab 22, which is Jinxin v Aser which is on page 913 of the authorities bundle. This is the judgment of Mr MacDonald Eggers sitting as a Deputy Judge in the Commercial Court. The claim was a fraud claim which sought to rely on findings of the Italian Antitrust Authority, which found a violation of Article 101, and also certain findings of the Federal Criminal Court of Switzerland.

If we could go, please, to paragraph 56, which is on page 931, please. We see that:

"The application to strike out these passages [they say] is based on the fact that a decision of a (foreign) court or tribunal is as a matter of law inadmissible before the English Courts as evidence of the truth of those findings: this is the principle in Hollington v Hewthorn ..."

And it says that:

"The principle rests essentially on the basis of 'relevance' (though note the discussion of Leggatt J [at first instance] in Rogers v Hoyle ...). To admit in evidence the decision of another tribunal essentially to take account of an opinion based on the facts of the case and submissions made, which facts and submissions may not be known to the Court, and to allow the Court potentially to be influenced by a decision-making process which the Court itself must undertake."

Then it says in 57 -- it quotes from Rogers v Hoyle the paragraph that we cite in our skeleton argument, then the basis of it as a rule of fairness. Then 57:

"There are exceptions to the rule in Hollington ... (notably, the admission of expert opinion and the admission of convictions ...). One such exception arises for consideration in this case."

The exception considered in this case you see at paragraph 64 on page 932, and the exception is the exception in schedule 8A to the Competition Act, interestingly. The exception you see is in section 35, which you see on the next page, page 933. Yes, you see:

"'For the purposes of competition proceedings, a final decision of a member State competition authority or review court that there has been an infringement of Article 101 ... by an undertaking is prima facie evidence of the infringement.'"

So a specific statutory exception there for the decisions of other Member State competition authorities.

But it must be a final decision of the competition authority. So we see, if you look at (5) on the same page, please, if we could see a bit further up, you see that a decision only becomes final when either the time for appealing it expires or when an appeal has been brought and it fails.

If one then goes on to paragraph 74, which is on page 938, please. We see the Commercial Court decided that claim was not a competition claim because the decision of the Italian Antitrust Authority was not one in that case that was made against the particular defendant. Forgive me, let me explain that better.

There were two points that the Judge made. First of all, he said that the exception didn't apply, first because the claim in question was a fraud claim, not a competition claim. So that was reason one why it didn't apply. And secondly, the Judge decided that it didn't apply because the decision of the Italian Antitrust Authority wasn't against the particular defendant. So dual reasons why the exception didn't apply.

Then in paragraph 74 he then takes up more general reasoning about the case, and perhaps if I could just invite you to read paragraphs 74 to 84. **(Pause)**

MRS JUSTICE BACON: Yes.

MR JOWELL: You see then in 85, on page 939, we see that he concludes that paragraph 35 doesn't apply.

Now, in our case they haven't sought to rely on the section 35 exception, and they couldn't rely on the section 35 exception, and there are two reasons for that -- a number of reasons for that, really. But one is it's not just due to Brexit, it's also because the decisions they're seeking to rely on aren't decisions of Member State authorities or Courts, and they're certainly not final decisions because they've been appealed. So if the statutory exception had been sought to be relied on, it wouldn't apply.

Now, just before we leave this case, it's also just worth looking at certain other supplemental submissions that were made by the defendant in that case. We'll see them if we go to 937, please. You see in paragraph 72:

"Jinxin also submitted that it was proper for it to plead at length the findings and conclusions of the IAA and the Bellinzona Court because whether or not it is pleadable is not dependent on the admissibility in evidence of the matters pleaded: ..."

And they say these were the submissions that were made.

"(1) The admissibility of evidence is a matter to be determined at trial, not at an earlier stage ..."

And they say:

"(2) When pleading a factual case, it is open to counsel to rely on inadmissible material ..."

And they say:

"(3) It is legitimate to plead a finding of a foreign court ... to justify an allegation of fraud or dishonesty ..."

Now, those are dealt with and they are all rejected by the Judge at paragraph 87. We see that on page 940. If we could go up a little, please. Thank you. The Judge says:

"Second, the decision in Medcalf v Mardell ... was not concerned with what inadmissible evidence is or is not appropriate to plead. Instead, it was concerned with the separate question of what the pleader may legitimately take into account in deciding whether to plead a case of fraud or dishonesty; such a pleader may justify the pleading of a serious allegation of fraud or dishonesty by reference to inadmissible evidence. That does not mean however that such inadmissible evidence can be pleaded for any

purpose, including the purpose of demonstrating to the Court or the parties to the action that the case of fraud or dishonesty is properly pleaded."

You see it then goes on in 88 to disagree with one aspect of the decision in Crypto Open Patent Alliance and to find that the strike-out application is made out.

So this is a well-established rule of common law. There are statutory exceptions to it for certain types of competition decisions, but there's no statutory exception that applies in the circumstances of the present case.

So we say that it's important actually to establish at an early stage of this litigation whether the Tribunal is permitted or intends to depart from the rule in Hollington v Hewthorn at the trial of this matter.

The reason it's important is really obvious. But first of all, the claim form contains extensive citations from the findings and evaluations in particular of the overturned judgment of the District Court in the United States. The findings in that judgment are, to put it neutrally, highly controversial. Qualcomm considers that the judgment's assessments and evaluation of the factual evidence was profoundly flawed and unfair in multiple respects, as indeed were a number of the mixed assessments of factual and economic evidence.

The Court of Appeal overturned that judgment comprehensively; it didn't need to go into the facts. On top of that, one has the Korean and Taiwanese regulatory proceedings, which are also highly controversial in the procedure that's been adopted. If we have to adduce evidence that goes into all of the circumstances in which those judgments were reached, that is going to vastly increase the ambit of the evidence that's required in these proceedings.

The second reason why this actually matters is that at the moment one of the difficulties in this case is that we don't know -- neither side knows for sure -- how much third party evidence is going to be obtained. And the claimant -- we'll come to this in due course -- has shown remarkable reluctance to say what steps it is planning to take to obtain the third party evidence.

Now, if that evidence turns out at the end of the day to be scarce and witnesses are not called, then the factual evaluations of these other Tribunals or regulators, if they are permitted in as admissible evidence, they could be of significant importance in resolving the dispute. The parties need to know what is in and what is out, and they need to know that at an early stage.

If I then may briefly turn to the claimant's arguments.

The first argument they raise is they say, "Well, that isn't what we really meant". I think we have disposed of that argument.

The second point they make is that they say, "Well, this is a rule of evidence and the CAT is not bound by strict rules of evidence". Again, we've already canvassed that. We say this is not just a technical rule of evidence, this is a fundamental rule central to the fairness of civil proceedings, and it's based on the centrality, in our system of civil justice, of the Judge or the Tribunal as the only decision-maker. It's also based upon the policy considerations that we've considered as well. We say the CAT is obliged to follow basic rules of fairness and, as I've shown you, its own rules say so.

Now, the other argument my learned friend says is he says, "Well, the Competition Appeal Tribunal is concerned with general welfare", and he refers to a family law case in which it was held that Hollington didn't apply, and he seeks to draw a comparison between the family law case circumstances and the CAT's jurisdiction, and he cites a case which perhaps my learned friend will take you to.

I think it's sufficient really just to draw your attention to two points about that case. I don't intend to go to it myself. I may go to it in reply if it's necessary.

But the issue in that case was whether the previous convictions in Spain of sex abuse were admissible in childcare proceedings under the Children's Act. Now, that is obviously miles away from the circumstances of our case.

The fact that in quasi-inquisitorial family law proceedings the rule in Hollington v Hewthorn doesn't apply for good reasons of policy is not illuminating when it comes to the CAT. The CAT is a Tribunal that operates under an adversarial system of civil litigation. Its

rules and practices are closely modelled on the CPR in many respects, and certainly on other forms of civil litigation in this jurisdiction. It is not an exception to the basic rules of fairness that apply in civil litigation.

So in my respectful submission, the rule in Hollington v Hewthorn does apply, and it applies as a matter of law. And if it doesn't apply as a matter of law, we certainly say that the Tribunal, in its discretion -- it has a discretion -- should exercise it to apply it in this case.

So we say that the second sentence of paragraph 4 should be struck out and the claimant should make consequential amendments to reflect that fact, and that the Tribunal should rule it is not permitted to rely upon reasoned findings in other judgments at the trial of this action.

Those are my submissions. Thank you.

MRS JUSTICE BACON: Thank you.

Mr Armitage.

Submissions by MR ARMITAGE

MR ARMITAGE: Madam, I'm grateful.

Can I start by being completely clear about what Which?'s case is right at the outset of the discussion: it's that the rule in Hollington v Hewthorn has no application before this Tribunal. I hope that that is made clear -- indeed, expressly so -- at the first line of paragraph 27(c) of our skeleton.

The Tribunal adopts a flexible approach to evidence: it focuses on weight, not formal rules of admissibility. We also say that, leaving aside the question of whether the rule is binding -- we say clearly not binding on this Tribunal -- we say it also shouldn't be applied. And I'll develop those points.

So first, if I can structure my submissions in this way, I'll first make clear exactly what Which?'s position is on what the relevant sentence, the allegedly offending sentence in

paragraph 4 of the reply, actually entails. It has two aspects, and one of them I now believe to be uncontroversial.

Second, I'll develop the main submission that the reasoned findings in foreign judgments are prima facie admissible in proceedings put before this statutory Tribunal, in light of, as I say, the flexible approach to the evidence that it takes. We say that is both the starting point and in fact an endpoint for the Tribunal's assessment of this application.

Then I'll finally respond to the suggestion that, leaving aside that question of the CAT's general approach to the assessment of the admissibility of evidence, the Tribunal should decide in its discretion at this CMC once and for all that any reliance on reasoned findings in the foreign decisions should be excluded, and accordingly that the allegedly offending sentence of paragraph 4 should be struck out.

So those are the three points.

So, as I say, the allegedly offending sentence in paragraph 4 of the reply, the focus is on the words "reasoned findings". We say that in fact encompasses two separate senses of the word "finding".

It does include matters of fact recorded in foreign judgments and decisions, so that Qualcomm internal documents state that its royalties are driven by its market power in chipsets, or Samsung witness X testified that Samsung was dependent on Qualcomm's chipsets, so records of the evidence received in the foreign proceedings in that sense. And as I say, I now understand on that aspect of the paragraph in the reply to be uncontroversial.

We say it does also include findings in the sense of factual findings based on assessments of evidence made by foreign Courts and regulators. Of course, the distinction between the two senses may not always be hard-edged. If one looks at the decisions in the foreign proceedings, one sees that often findings in these two senses are intermingled. But again, to be crystal clear, Which? does not contend that the findings of foreign Courts and regulators in either sense are binding or even necessarily persuasive on this Tribunal.

In relation to foreign findings in the sense of assessments of the evidence -- and this is the reference in the skeleton argument that may have caused some confusion, for which I apologise -- we don't go as far as contending that the Tribunal should necessarily give any weight to such assessments. Our case is simply that the Tribunal may take such matters into account if the Tribunal at trial considers it appropriate to do so. The precise weight to be accorded to any particular findings falling into either category is entirely a matter for the Tribunal.

So I'd urge the Tribunal to bear in mind that the proposition in the sentence of the reply that we're concerned with is very limited in scope. It amounts to no more than saying this Tribunal is not required to ignore reasoned findings, in either sense, made by foreign Courts and regulators. We say that that limited proposition is entirely consistent with the Tribunal's non-technical and flexible approach to evidence.

So the starting point on that matter is that strict rules on the admissibility of evidence do not apply in the Tribunal. The Tribunal's power to admit evidence is provided for by statutory instrument: it's set out in Tribunal rule 55. Perhaps we could have that on screen. It's authorities 2, page 38. We see at 55(1):

"The Tribunal may give directions as to -- ..."

Then at (b):

"... the issues on which it requires evidence, and the admission or exclusion from the proceedings of evidence ..."

So in my submission, it's obvious on its face that that's a very broad discretion indeed. And the Tribunal has made clear on a number of occasions that it's not constrained by the sorts of technical rules of evidence which may apply in the ordinary civil Courts.

Now, to foreshadow a point I'm going to be coming on to, fairness is obviously a highly significant factor when considering the exercise of a broad discretion of this kind when it comes to the question of the admissibility of evidence. But fairness is a broad and varied concept that can encompass lots of different considerations. The particular instantiation of fairness referred to in Hollington v Hewthorn and subsequent

authorities is not the only relevant consideration when it comes to fairness, and I'll develop that a little later.

Now, on the question of the inapplicability of the strict rules of evidence in this Tribunal, we refer in our skeleton to a ruling by the now president of this Tribunal in the Agents Mutual litigation, a claim that concerned the lawfulness of exclusivity provisions in relation to online property portals, which some of the Tribunal may be familiar with.

This inadvertently was not included in the authorities bundle but I think we included, regrettably, the wrong judgment from that litigation.

MRS JUSTICE BACON: Yes. We've been sent the correct one.

MR ARMITAGE: I'm very grateful.

Do all members of the Tribunal have that to hand?

MR TURNER: Actually I'd quite like that.

MRS JUSTICE BACON: Could that be brought up on the EPE?

MR ARMITAGE: Yes, if it could be brought up on the screen, but I think we have a hard copy. **(Pause)** I'm afraid it's not in the bundle so it may be difficult to bring it up on the screen. Are we okay to work from the hard copies? I'm grateful.

You see it's a 2017 ruling on admissibility. I said "the now president"; you can see it was the full Tribunal, in fact. It's a short ruling. It was concerned with an application by the defendant to have a witness statement and certain exhibits admitted into evidence. The exhibits included audio files and accompanying transcripts.

If we could look at paragraph 8, which is the paragraph on which we rely in our skeleton argument. We see the Tribunal here says:

"As has been made clear on a number of occasions ..."

Then several authorities are cited:

"... strict rules of evidence do not apply before the Tribunal. The Tribunal will be guided by circumstances of overall fairness, rather than technical rules of evidence."

There then follows a discussion of the factors for and against admitting the late evidence in this case. We say it's actually quite informative because some of the details of that

analysis are striking as to the approach, bearing in mind that the approach is leaving one to be guided by circumstances of overall fairness.

So if we could look at paragraph 11. The Tribunal refers to "The governing principles we must apply in determining whether" to admit the evidence concerned, refers to the Tribunal's "overriding objective", which draws on the overriding objective of the Civil Procedure Rules. Then it says:

"More specifically, the factors that we have taken into account in determining the application are the following: ..."

If I could just show you few of these. So 11(2) -- I'm so sorry, let me go back a stage.

So 11(1) makes the point that the evidence is "sufficiently relevant ... to be disclosable". The Tribunal makes the point that at this stage, that's a relatively low standard. At this stage:

"We find it quite difficult to judge how important these documents could be ..."

It says that's unsurprising, given the nature of competition cases. And at the end of subparagraph (1):

"It is, no doubt, for this reason that the Tribunal's approach to admissibility is what it is: generally speaking, documents should be (and are) admitted. Any concerns relating to them affect weight, not admissibility."

That, in a nutshell, is the approach we say applies in relation to this issue as well.

Then if one looks at, if you like, the other side of the coin, the Tribunal identifies a list of factors pointing against admission. It says it's "a long one in this case". If I could just look at some of those.

11(2)(i), you see:

"The audio files are the result of covert recording of conversations whose protagonists (apart from the persons making the recording) did not know they were being recorded. It is quite possible that these recordings were in fact obtained in breach of ... local law (which is Northern Irish law) ..."

So it's hard to imagine a case in which the admission of evidence might be thought to be more unfair than that.

11(2)(v), if we could just turn on to page 7 of the judgment. This is a reference to the quality of the audio files that were sought to be admitted into evidence, see at subparagraph (b):

"Unsurprisingly, the audio files are of relatively poor quality."

And the Tribunal says that:

"... these [issues] are further reasons for treating the transcripts with especial caution."

Then, just briefly, at paragraph 11(2)(vi), reference to the evidence having been produced very late in the course of the proceedings.

Then at paragraph 12, just to show you the conclusion, despite these misgivings as to the character and lateness of the evidence, the fact they may have been unlawfully obtained and so on, the Tribunal held that fairness did not require its exclusion. The Tribunal concluded -- although it does say "by an extremely narrow margin" -- that the audio files and transcripts should be admitted. In so doing, the Tribunal is clear that it's not thereby making any comment as to the weight to be attached to the evidence going into evidence.

Actually we see that clearly from 11(2)(vi)(b), sorry, just to go back to that. We see reference to the audio files and transcripts being admitted "for whatever they are worth". In other words, it's a matter for weight.

We say it's precisely this approach that this Tribunal should take to reasoned findings of the relevant foreign Courts and regulators: they are admissible for whatever the Tribunal considers they are worth. And that's as far as we say paragraph 4 of the reply goes.

Now, on that basis alone, Which? contends that Qualcomm's application to strike out the challenged sentence paragraph 4 of the reply should be dismissed. We say it's clear beyond doubt, and certainly more than realistically arguable, bearing in mind this is a strike-out application, that the Tribunal was entitled to do what the sentence says it can do.

Now, I'd understood Qualcomm to accept that the CAT is not bound by the strict rules of evidence. I think it is clear that that's accepted as common ground. That's clear from paragraph 32 of my learned friend's skeleton argument. We say that the rule in Hollington v Hewthorn, notwithstanding that its underlying justification concerns fairness, is a strict rule of evidence that applies in the High Court.

What is said in my learned friend's skeleton argument -- and this is paragraph 32 -- is that the Tribunal should pay regard to the approach taken in the High Court; so not, as was suggested today, that this is a principle that is binding as a matter of precedent on the Tribunal.

The authority relied on for the proposition that the Tribunal should pay regard to the approach taken in the High Court -- and I don't dispute that as a proposition as far as it goes -- is the Tesco Stores case. Could I briefly turn that up. It's at authorities tab 8, page 223.

The context of this paragraph, just to summarise, is that the Tribunal was considering the sufficiency of the evidence that was being relied on by the Office of Fair Trading in defending an infringement decision which was challenged in the appeal proceedings by Tesco. Having summarised a number of principles which apply to evidence in the context of appeal proceedings, the Tribunal makes the point at the beginning of 125 -- the point we've seen from the Agents Mutual ruling -- that:

"... strict rules of evidence do not apply in proceedings before the Tribunal ..."

I think this is one of the cases cited for that proposition in Agents Mutual.

Then we see, in accordance with that starting point, the Tribunal explains that there had been no issue, it was common ground that -- I should say no issue as to the admissibility of the contemporaneous documents before it. Instead, as we see towards the bottom of the paragraph, I think the fifth line from the bottom of the page:

"Where the parties parted company with one another was as to the weight, if any, properly to be given to the documentary evidence relied on by the OFT. The Tribunal's approach has been to give each document what appears to be its natural meaning, and accord

it such weight as appears appropriate, taking into account when, and the circumstances in which, it was prepared ..."

Over the page:

"... the identity of the author, whether it contains hearsay or multiple hearsay and any other factors likely to affect its reliability. In that connection, whilst the technical rules of evidence do not apply in this Tribunal, we find section 4(1) and (2) of the Civil Evidence Act 1995 to be a helpful checklist for determining how much weight is to be attributed to what would ... be termed hearsay evidence [in the High Court]."

So when one looks at this paragraph that's relied on by my learned friend, we say it's clear that it's an expression of the very approach that Which? urges the Tribunal to adopt: that instead of excluding evidence ex ante based on its provenance, the better course is to admit the evidence and consider the appropriate weight to be given to it by reference to all relevant factors.

Now, we don't demur from the fact that one relevant factor may well be how similar issues might be approached in the High Court. But what this decision of the CAT in the Tesco Stores case makes clear is that that is a matter that goes to weight, and not admissibility.

There may well be other factors, other than the point underpinning the rule in Hollington v Hewthorn, that are in play. The CAT's discretion is, as we see, extremely broad: it can have regard to any factors it considers appropriate.

In short, we see that as a complete way through this application. Questions of admissibility are to be considered in light of all the evidence at trial. Leaving those questions to trial also has a substantial benefit in that it avoids the risk of interim disputes on such matters, potential for interim appeals and so on and so forth, and appeals and interim disputes in relation to a legal rule that, as we say, doesn't apply in this forum.

So that, we say, is a complete answer to the strike-out application.

If the Tribunal has any concerns about that, we also say that -- and this is turning to the third topic of my submissions -- the rules should not be applied as a matter of discretion.

Madam, you put to my learned friend two alternative points: one was that the rule in Hollington v Hewthorn was actually binding; the second way in which you put it was should it apply. So I have dealt with, I think, the first point; it's now the second point I'm on.

I think the argument that we say really underpins Qualcomm's application to strike out the allegedly offending sentence at paragraph 4 of the reply is an argument that notwithstanding the absence of any rule which requires the exclusion of such findings, the Tribunal should exercise a discretion to exclude it.

Paragraph 35 of my learned friend's skeleton, no need to turn it up, but we think that's clearly underpinning the application because what is said there is that at the Tribunal should now not only strike out paragraph 4 of the reply but make clear that any future reliance by the class representative on findings by foreign Courts or Tribunals is impermissible.

We say there is no good basis for such a decision to be taken at this stage, let alone at this stage of the proceedings. The argument advanced here we say rests on three pillars, each of which must be established in order for it to succeed. So I'll take you through what I say the pillars are and then tell you why I say they're not established.

First, Qualcomm has to show that despite the fact that Hollington does not directly apply on the Tribunal, the sorts of findings referred to in paragraph 4 of the reply do fall within the legal scope of the rule. He has to show you that Hollington prevents the High Court from taking any account of reasoned findings in earlier High Court judgments. We say there is actually real doubt even about that proposition, and I'm going to take you to the Otkritie case on that point. That's cited in one of the paragraphs of our skeleton argument that we looked at.

Secondly, Qualcomm has to show that the rationale for the rule in Hollington applies equally in proceedings before the Tribunal as it does to proceedings before the High Court. We'll come to that.

Finally, Qualcomm has to show that assuming it's right on both of the first two pillars, it is also necessary and appropriate for the Tribunal now to exclude the relevant evidence, at this first CMC in the proceedings post-certification.

As I hope to show, each of those pillars is wrong.

If the Tribunal would bear with me a moment. **(Pause)**

Yes, so on what I called the first pillar, which is the question of whether the sorts of findings referred to in paragraph 4 of the reply fall within the scope of Hollington v Hewthorn even if we were in the High Court, can I just show you the -- excuse my pronunciation -- Otkritie case, which deals with this point. It's at authorities tab 12, page 447. I think that's the first authorities bundle.

MRS JUSTICE BACON: Before we get into the weeds of this, at some point we need to break for the shorthand writers. Can you just consider when in the next 10 or so minutes would be good.

MR ARMITAGE: Yes, since we're about to go into a logical flow, I hope, of three pillars, now is a convenient time. I don't know if that suits the Tribunal.

MRS JUSTICE BACON: Well, why don't we do that, because we did start a bit early. All right.

(11.33 am)

(A short break)

(11.50 am)

MRS JUSTICE BACON: Yes, Mr Armitage, you were going to take us to Otkritie.

MR ARMITAGE: I was. That was the first, if you recall, of the three pillars, as I called them.

It's at authorities 12/447, the judgment of Eder J. It relates to two applications for contempt of Court. We're concerned here only with the application made against the second respondent, Mrs Jemai.

If we could pick the decision up at paragraph 21. I don't know if we can get that up electronically. It's page 451 of the bundle, just at the bottom of the page. We see here:

"Mrs Jemai has not served any evidence in relation to these contempt proceedings and did not participate in the hearing. I have considered carefully whether it would be appropriate to adjourn this hearing to give Mrs Jemai a further opportunity to participate. However, it seems plain to me ..."

Over the page:

"... that Mrs Jemai has deliberately decided to ignore these proceedings; and for that reason I have decided that it would not be appropriate to permit any further time."

Then at paragraph 22, the recognition that, notwithstanding this, the burden was on the applicants to establish that the contempt was committed by Mrs Jemai to the criminal standard.

Then we see what was relied on by the applicants, so those seeking the contempt finding, in relation to grounds 2 and 3 of the alleged contempt. They say it's reliance "on my Judgment dated 10 February 2014". And it's recorded that Mr Stanley, I think counsel for the applicants, "accepted that the Judgment did not create any issue estoppel", and that's because, as we see there, Mrs Jemai, the respondent to this aspect of the contempt application, was not named a party to the earlier judgment.

"[Counsel for the applicants] also accepted that the opinions expressed in that Judgment are not, as such, admissible by virtue of the rule in Hollington v Hewthorn ..."

So emphasis on "opinions".

"Notwithstanding, he submitted that the Court is entitled to have regard to matters of primary fact recorded in that Judgment and if those matters of fact justify the conclusions reached in that Judgment the Court is entitled to reach the same conclusion."

Now, just by way of background, the previous judgment that he refers to had been delivered following trial of a Russian bank's claim for fraud against a number of individuals, and as I say, the respondent here being a witness in, but not a party to, those proceedings.

So Hollington v Hewthorn is addressed at paragraph 23. So as I say, there's a central reference to the submission from counsel that "the Court is entitled to have regard to matters of primary fact recorded in that Judgment", but also "if those matters of fact

justify the conclusions reached in that Judgment the Court is entitled to reach the same conclusion". It's recorded that that submission was based on the analysis of Leggatt J, as he then was, at first instance in Rogers v Hoyle and then also the Court of Appeal's judgment. Then, importantly, last sentence of paragraph 23:

"I accept that submission."

So it's a finding by Eder J.

In my submission, what's interesting is how Eder J goes on to apply the position recorded in paragraph 23, because what we see is that the Judge relies on findings made in his previous judgment as probative evidence that the contempt did take place as alleged.

Can we just look at one example. It's paragraph 24. It says that:

"Ground 2 concerns disclosure statements."

The contempts are allegedly "making a positively misleading statement" and then a "failure to give disclosure". He says:

"As to ground 2(a) ..."

Which is about making a positively misleading statement:

"... Mr Stanley submitted and I accept that the following facts as detailed in his skeleton argument are beyond reasonable doubt ..."

So I emphasise "the following facts".

Then if we look at subparagraph (iv). This concerns an entry on the list of documents attached to the disclosure statement: it refers to a particular loan agreement. Then look at (v):

"In fact, for the reasons given at paragraph 509 of the Judgment ..."

That's the earlier judgment from February 2014 referred to at the start of paragraph 23, following the lengthy trial:

"... that agreement was a fake or sham. Mrs Jemai has not put forward any evidence or argument ... to the contrary."

So in my submission, that is a clear example of the Judge in this case placing reliance on a reasoned finding based on an assessment of the evidence from a previous

judgment, the finding being, the assessment being the agreement was a fake or a sham.

So that's a finding based on an assessment of the evidence, but it's not an opinion in the sense that is prohibited save in limited circumstances, as we see from Rogers v Hoyle. It's a finding of fact, but it's one which depends, of course, on consideration of matters of primary fact.

So applying that approach, we say there's at least real doubt that even the High Court is precluded from having regard to reasoned findings in the second sense identified at the outset of my submissions; that is, assessment of the evidence and conclusions on that as a primary fact.

So that's Otkritie.

Then the first pillar -- just to reiterate, I had said that as the first step in the argument, this Tribunal should adopt the same approach as in Hollington v Hewthorn. The first step in that argument is that the scope of that rule precludes the sorts of findings that are referred to in paragraph 4 of the reply. As I say, the approach taken by Eder J in Otkritie certainly appears -- indeed, it seems clear that he's taking account of findings not just in the sense of matters of primary fact but also reasoned conclusions of fact on the assessment of the evidence in the earlier judgments.

Before leaving the first pillar and the scope of Hollington, I just want to make one point in relation to opinion evidence. It's well established and clear from some of the authorities that the Tribunal have seen today that even in the stricter procedural environment of the High Court, expert opinion evidence is admissible in civil proceedings, and obviously is often (inaudible) in this Tribunal also.

That was a key part of the ratio in Hoyle v Rogers, where expressions of opinions in the investigation report were held to be admissible on the basis that they constituted legitimate expressions of professional opinion. It is only non-expert opinion, according to Hoyle, that may not be relied on for the truth of its subject matter.

But insofar as the foreign decisions to which we refer were issued by competition regulators who were applying economic expertise to the issues before them -- so that's in particular the European Commission and the Korean Fair Trade Commission. So I'm leaving aside for the purposes of this aspect of my submissions the findings of the foreign Courts' judicial findings. Insofar as we rely on, and paragraph 4 refers to, the foreign decisions of the regulators, we say again there's at least scope for real debate and real doubt, certainly sufficient to survive a strike-out standard, that those findings, insofar as they constitute matters of opinion on underlying evidence, are admissible on the basis outlined in Hoyle v Rogers in relation to the investigation report.

We say certainly it would not be appropriate for you to rule today that those regulatory decisions are entirely inadmissible. One would need, before making such a ruling, to work out the extent to which they constitute expressions of expert opinion.

MRS JUSTICE BACON: How could they be an expert opinion, a finding of a regulator or finding of a specialised Tribunal?

MR ARMITAGE: To be clear, it's the findings of a regulator and the not the findings of a specialised Tribunal.

MRS JUSTICE BACON: All right, findings of a regulator. But expressed as a final decision, not expressed as an opinion at all.

MR ARMITAGE: Well, my submission is that foreign regulators and the European Commission and so on are applying expertise to make findings on the matters before them. I say they're at least arguably equivalent to the body that was considered in the Hoyle v Rogers decision, the AAIB. And therefore, insofar as paragraph 4 of the reply relates to those sorts of bodies, we say they're in a separate category and separate consideration would be required.

MRS JUSTICE BACON: All right.

MR ARMITAGE: So turning to the second pillar of Qualcomm's argument. This is the point that, as I put it, Qualcomm has to show not only that we would be within the legal scope of the rule in Hollington v Hewthorn if we were in the High Court -- and as I say,

applying Otkritie, we aren't -- but that the rationale for the ruling in Hollington applies equally in these proceedings before the Tribunal, just as it does in proceedings before the High Court.

Now, the rationale which underpins Hollington is pithily summarised, if I can put it like that, in Hoyle v Rogers. To paraphrase, the central idea is that it may be unfair to a party if the Judge appointed to hear his case essentially outsources the fact-finding function to another Court or decision-maker.

MRS JUSTICE BACON: That's paragraph 39, isn't it?

MR ARMITAGE: Yes, indeed, I think 39 and 40. 40, we don't need to take that up, but what the Court of Appeal says there is that:

"... the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone."

So you've seen that.

Now, Qualcomm's position is that, just as it would in High Court proceedings, that consideration of fairness as articulated there requires this Tribunal to shut its mind to the reasoned findings of foreign Courts and regulators, at least in the second sense of evaluative assessments, factual conclusions reached on the basis of evidence and primary fact.

Which? disagrees, if I can put it like that, with that submission. The suggestion that Qualcomm's fair trial rights are prejudiced by the explicitly discretionary approach, which is all that Which? is proposing, is not credible for a number of reasons.

First, as I've emphasised in my submissions already, proposition 1 -- the first proposition, that is, from paragraph 4 of the reply -- goes no further than preserving the ability of the Tribunal to have regard to reasoned findings of foreign Courts and trials. It does not seek to dictate or even suggest anything about the weight which the Tribunal should accord to those findings.

So this is emphatically not a case in which the class representative is suggesting that the Tribunal should in any way outsource its decision-making function to the US District Court, to the Seoul High Court or to the European Commission for that matter.

MRS JUSTICE BACON: That would apply equally to the High Court. I don't understand why that proposition puts the Tribunal in any different position to the High Court. In this pillar you are saying that the Tribunal is in a different position to the High Court and that the rationale of a fair trial in the High Court somehow doesn't apply to this Tribunal.

MR ARMITAGE: The point I'm making is perhaps a slightly different one.

I referred at the start to the extremely broad discretion that this Tribunal has in terms of the admission of evidence. My submission is that Hollington v Hewthorn is a strict rule of evidence that is based on one matter that pertains to fairness, and that's paragraphs 39 and 40 of Hoyle v Rogers. So it's justified by the particular consideration, the particular aspect of fairness, that it's a matter for the Judge hearing the proceedings to decide the case on the evidence before him or her.

MRS JUSTICE BACON: You've rightly, I think, identified the central rationale of that. What I don't understand from the submission you've just made is why the Tribunal is different as regards that rationale from the High Court, because presumably you don't disagree that it's for the Tribunal equally to decide the case on the evidence before them.

MR ARMITAGE: I think the way I put it is: in the Tribunal, where the strict rule doesn't apply. So we have to distinguish, I think, respectfully, between the rationale for the rule, so the particular aspect of fairness that explains the rule as described by the Court of Appeal in Hoyle v Rogers, and the rule itself.

I've made the submission at the outset that the rule would not apply strictly in the Tribunal. As to the consideration that underpins it and explains why that rule has been adopted in the High Court -- it's a highly controversial rule. It's been suggested in cases it's wrongly decided. I accept it is clearly the law in relation to the High Court. It is just one aspect of fairness. But this Tribunal is not bound to consider only one aspect; it can take all relevant matters into account.

MRS JUSTICE BACON: All right.

MR ARMITAGE: I think that's the submission. **(Pause)**

Just to develop that point on why we say there's no unfairness arising to Qualcomm if the Tribunal does not, at this stage, close its mind to reasoned findings of the foreign Courts and regulators.

As I say, the first point: we don't seek to dictate or even suggest that the Tribunal should accord any particular weight to those findings at this stage. So that's the first point. So it's not as though the effect of not striking out paragraph 4 is that at trial there will be any, even, presumption that the findings in the foreign judgments are correct.

Secondly, as I say, it's worth emphasising that Hollington and the rationale for that rule, as described at paragraphs 39 and 40 of Rogers, is only concerned with one aspect of fairness, namely the potential of unfairness to Qualcomm if its strike-out application is refused in this particular case.

But if the first proposition in paragraph 4 of the reply is not caught by the rule in Hollington, if it's outside the scope of that rule, as I say, there's no reason for the Tribunal to limit its consideration of fairness to the particular issue of fairness which is cited in support of that rule. What, in my submission, the Tribunal needs to do instead is balance the remote likelihood of unfairness to Qualcomm if this particular proposition is not struck out and these findings are, in principle, all before the Tribunal at the trial against potential unfairness to Which? if this approach is taken.

In my submission, there are other relevant considerations which the Tribunal plainly can and should take account of when considering these questions of both admissibility, if it comes to that, or, in my submission more appropriately, weight at the trial. Such considerations might include the fact that Qualcomm was a party to the foreign decisions and had a full opportunity to be heard before findings were made against it; they may include considerations of whether there are evidential difficulties facing this Tribunal.

I note here that -- Madam, it's not an issue for today, but you may have seen Qualcomm's position in the correspondence is that there are severe procedural hurdles preventing the disclosure of what it describes as third-party-produced confidential documents from the US and Korean proceedings. We hope that that's a matter that can be resolved. It's a matter we say is not ripe for determination today, but we'll of course take that forward expeditiously in correspondence.

That at least raises the spectre that relevant documents from the foreign proceedings may never be before this Court. If that's right -- and which we profoundly hope is not the case -- there is a possibility that the reasoned findings in the foreign judgments may assume greater importance if there are missing underlying documents.

All we say is that if Qualcomm's application succeeds, the result will be that the Tribunal will be required necessarily to shut its eyes to findings which may turn out to be of relevance and importance to these proceedings. And all we say is that at this stage the Tribunal is not in a position to reach concluded views on that matter.

We rely in our skeleton argument, just as an overarching point, on the point made forcefully by Leggatt J, as he then was, at first instance in the Rogers v Hoyle case. I won't turn it up, but it's authorities 10 -- in fact, I will turn it up, because I don't have the paragraph reference to hand -- authorities 10, page 27.

I'm sorry, that's a wrong reference. Authorities 383.

As I say, Leggatt J, as he then was, is making some general points in this paragraph about relevance being the paramount consideration in the modern law of evidence. Then if we look at around letter C:

"... evidence that is relevant (or of more than minimal relevance) is generally admissible."

He refers to the former position on things like the rule against hearsay. Then this is the quotation in our skeleton argument:

"The tendency of the law has been and continues to be towards the abolition of such rules. The modern approach is that judges (and, increasingly, juries) can be trusted to evaluate evidence in a rational manner, and that the ability of tribunals to find the true

facts will be hindered and not helped if they are prevented from taking relevant evidence into account by exclusionary rules."

Now, if nothing else, the rule in Hollington v Hewthorn is an exclusionary rule. And we say applying that approach in this Tribunal, where the premise of the argument I'm making now is that you're not bound by Hollington v Hewthorn, we say there's also no good reason to (inaudible) as a strict rule of evidence that precludes reliance on particular categories of evidence or potential evidence at this stage.

Now, there is no authority cited by my learned friend, or that we've been able to identify, on the question of whether Hollington v Hewthorn should apply in this Tribunal, somewhat unfortunately for the purposes of today's application.

MRS JUSTICE BACON: I presume you have looked for the authority?

MR ARMITAGE: No, no, we've obviously looked. I think we may therefore be able to infer there is certainly no reasoned judgment of the Tribunal which addresses the point.

MRS JUSTICE BACON: Beyond that, have either of you found any examples where, even if the point wasn't taken as an issue in dispute, there is, for example, evidence of the Tribunal taking into account the reasoned findings of another regulatory authority or Tribunal?

MR ARMITAGE: I'm not sure we've done a sufficiently full trawl of it to answer that question, I'm afraid.

We do refer in our skeleton argument to the collective proceedings in the Gutmann case, the second Gutmann case, in which, prior to certification, in fairness, at that stage -- and at the outset of making this point, I infer that the response will be that Hollington v Hewthorn wasn't considered -- an application was made for disclosure of a decision by a French consumer body which touched on the issues that were raised -- I think they were to do with factories and iPhones -- and disclosure was ordered, one can infer, on the basis that it was relevant to the issues in dispute.

So that's at least one example of a Tribunal ordering disclosure and, one infers, admitting into evidence, if one likes a decision.

MRS JUSTICE BACON: But I don't know for what purpose it was used. Because as you have identified, there could be several different uses of a judgment: one is for the record of the fact and the other is for the reasoned conclusions.

MR ARMITAGE: No, I --

MRS JUSTICE BACON: Okay, so I presume you haven't found that. All right.

You'll need to go a little bit more quickly because we do need to conclude this point before lunch.

MR ARMITAGE: Yes. Yes, we will.

So that's the position on the authorities on the CAT.

One authority I did want to mention -- Mr Jowell sought to deal with it -- is the W-A case in the Court of Appeal. Could we just turn that back up briefly, because I do say it is at least instructive, although obviously a highly different context. You have it in the bundles at volume 2, tab 21.

One can see from the headnote, if I could just summarise, the question was whether a man's conviction for sexual offences in Spain was admissible as evidence of the relevant underlying facts in proceedings in the UK. The first instance Judge said yes. H -- the man was referred to by an initial -- argued on appeal that this was contrary to Hollington v Hewthorn. The Court of Appeal held, in summary, that the rule in Hollington v Hewthorn does not apply in family proceedings concerning children because that's incompatible with the welfare-based approach that that Court applies.

Now, if we could turn -- I'll deal with this briefly -- to paragraph 19 of the judgment. The Judge has just gone through examples of cases in family proceedings where the findings of previous judgments are admitted in evidence, with the Court giving such weight to earlier findings as it considers appropriate. And at 19 he says:

"Any other approach would severely conflict with the court's overriding duty to get at the truth in the interests of the child ..."

He makes the point, still at paragraph 19, that the factual issue in the two proceedings was exactly the same. And at the end of paragraph 19, refusing to admit the previous

conviction as evidence of the underlying facts would involve the Court blinding itself to reality.

Then at paragraph 20, the Judge says:

"As a matter of principle, I ... hold that the criminal conviction is plainly relevant evidence ..."

Then:

"[He] turn[s] to consider whether we are bound by authority to reach a different conclusion."

Then Peter Jackson LJ says:

"I can immediately say that in my view we are not. As I have explained, the rules of evidence in family proceedings are different to those in other kinds of civil proceedings because the rights and interests at stake are different. It might be said that family proceedings represent an exception to the rules of admissibility ... but the better analysis is that the purpose of the rules of evidence is to achieve justice, not injustice, and that strict evidentiary rules such as ... the rule in Hollington v Hewthorn have never applied in this welfare-based jurisdiction."

Then finally, just at paragraph 21, his Lordship says:

"I therefore agree with the [first instance] judge when she said:

"'... In my view, Hollington is not binding upon the court in the present case ... The law on the admissibility of evidence and the legal considerations ... are very different from those in issue ...'"

And at 59:

"'Hollington concerned inter partes litigation where there was no broader public interest (other of course than the administration of justice more widely).'"

Now, I entirely accept this is an entirely different context, it's a different part of the Court system. I'm not suggesting it's binding authority that Hollington v Hewthorn does not apply in this Tribunal. All I say is that there are some helpful parallels which should inform the approach that this Tribunal should take to the matters before it. So just to list five such parallels.

This was a case in which the relevant finding was of a foreign Court.

Second, the foreign Court was considering the very same factual issue.

Third -- we saw this from paragraph 20 -- the Family Court, like this Tribunal, is undoubtedly a context in which the rules of evidence differ from those in the High Court.

Fourth, this case concerns a context in which it's not just private inter partes issues but also public law issues that are at stake, and there are some parallels with this jurisdiction also.

Fifth, most significantly -- and this is really why I rely on this authority -- it is obviously a context in which the right to a fair trial right is extremely important, and that includes the particular aspect of fairness that underpins the rule in Hollington v Hewthorn, but the Court of Appeal here did not say that that one aspect of fairness justified the adoption of the rule in Hollington v Hewthorn in those proceedings.

So we say it's not binding authority, but it's a clear indication that a Tribunal to which the strict rules of evidence don't apply not only is not bound to but should not adopt the strict rule in Hollington v Hewthorn.

Finally, if I could just address the third pillar of Qualcomm's argument that the Tribunal should follow the Hollington v Hewthorn approach, and this is assuming against myself that if Which? is wrong on the scope of the Hollington rule and wrong on what the underlying considerations of fairness require, we say the third pillar of the argument is that it's necessary and appropriate for the Tribunal to exclude the relevant evidence now, at the first CMC following the certification of these collective proceedings.

Which?'s position is that this would be entirely inappropriate and indeed disproportionate, just to take those two points separately.

We say it would be inappropriate because the precise application of the Hollington rule is a matter that is most appropriately to be decided at trial. We don't need to turn it up, but it's of interest that my learned friend relied on the decision of His Honour Judge Matthews in the Crypto Open Patent case. If one were to look at paragraphs 70 to 75 of that judgment -- perhaps we could turn it up briefly, rather than me just telling you what they say. So it's authorities 19, page 860.

If one looks at paragraph 70, what was being sought here in advance of the trial was:

"... an order that evidence of findings of fact made in [other] Litigation be not admissible in these proceedings. This is the subject of the rule in Hollington v Hewthorn."

And the effect of the rule is summarised.

There's a point that's not relevant in these proceedings, which is that even under Hollington v Hewthorn, findings made in earlier civil proceedings are admissible for the purposes of proving that the Judge in the other proceedings actually said them, but that's not a point that detains us.

If we look at 71:

"... even in the narrower form of order [that carves out admissibility for those purposes], that the judicial findings from the US litigation be not admissible as evidence of the facts so found ..."

So that's what's being sought:

"... I do not consider that I should make the order."

Ie in advance of trial.

"The rule in Hollington v Hewthorn is clear, and it will be the duty of the trial judge to decide whether it applies to the particular evidence tendered. It would be unusual for another judge, long before the trial, and with less information than the trial judge will have, to bind the hands of the trial judge in this respect. If this limb of the order is made now, what is to prevent other orders being sought at this stage to prevent admissibility of evidence at trial which infringes other ... rules of evidence? These are matters best left to the trial judge."

We say: exactly.

I say it would be inappropriate and disproportionate to indicate and rule now that reasoned findings in the foreign decisions are inadmissible, and therefore strike out paragraph 4 of the reply. I say it would be inappropriate for the reason I've just given. I also say it would be disproportionate.

As Qualcomm admits, the relevant foreign decisions contain a mix of statements: they include records of facts, they include assessments of the evidence before the relevant foreign bodies. It may not always, in particular cases, be easy to distinguish between the two types of finding. So we say that's another reason why it's properly a matter for trial and not a matter for now.

Just to conclude, in my submission the real thrust of Qualcomm's application is: you should decide now that all of the reasoned findings in the foreign decisions are inadmissible. In my submission, you're simply not in a position to do that. The better approach, and the conventional approach in this Tribunal, is to admit the documents into evidence, or at least not rule their admission into evidence out at this stage, and then everything else is a matter for weight. If that is right, there is no basis to strike out the allegedly offending sentence of paragraph 4, and we invite the Tribunal to dismiss the application on that basis.

If you're against me on all of that, and you do rule that Hollington v Hewthorn rule either is binding or should be applied, the answer is not strike-out but it's an amendment. As, Madam, you indicated at the start, on any view, some findings of foreign Courts and regulators are admissible. So that would be the solution. We would ask for time, in those circumstances, to consider an appropriate amendment to reflect any ruling that the Tribunal makes.

MRS JUSTICE BACON: Yes. One question for you: given that we are an international Tribunal, has anyone looked at the position in Scotland and Northern Ireland on this point?

MR ARMITAGE: I don't know about anyone. I'm afraid I haven't.

MRS JUSTICE BACON: Do we need further submissions on that?

MR ARMITAGE: We would certainly be prepared to check and we can make further submissions as necessary. We may need a little bit of time.

MRS JUSTICE BACON: All right.

MR ARMITAGE: If it's informative.

MRS JUSTICE BACON: Well -- all right.

MR ARMITAGE: But yes, I'm afraid it's not a route we've explored.

MR TURNER: Sorry, can I just ask a question? You said "amendments".

MR ARMITAGE: Yes.

MR TURNER: Could you just elaborate what amendments you had in mind if we were against you, you said?

MR ARMITAGE: Without drafting on my feet, I think in the debates, the discussions with the chairwoman at the start of Mr Jowell's submissions, when I was asked about the point in my skeleton argument, I think -- paragraph 4, the relevant part says "reasoned findings of foreign courts and regulators". I made the point that "reasoned findings" could cover both records of primary fact, so things like testimony, documents and so on, and it's not in dispute that those matters are admissible.

So on the premise that the application succeeds insofar as we're concerned with findings that go beyond that, so reasoned assessments and conclusions on the evidence, it would be an amendment to reflect that, so to make clear all that is permitted is that which is uncontroversial, ie records of reference to primary evidence. We of course say it's not necessary. But that I think would be the answer, if the Tribunal is against us on the points I've made.

MRS JUSTICE BACON: All right.

MR ARMITAGE: Does that assist?

MRS JUSTICE BACON: Thank you.

MR ARMITAGE: I'm grateful.

PROFESSOR MASON: Mr Armitage, if I could just ask one question of you, and forgive me if you did cover it. And if you have, then repeat yourself, but perhaps clarify for me, since I missed it.

One point that arose earlier was the danger of encouraging satellite litigation, leading to proceedings that are even slower and more expensive. Did you address us on that point?

MR ARMITAGE: Perhaps not in a sufficiently discrete way.

What I said was that the approach of leaving these matters to be considered by the trial Judge was a sensible and efficient approach because it means that if there is to be an appeal, satellite litigation -- I'm not sure I'd put it like that -- but if there is to be an appeal, all relevant matters can be considered at one stage; whereas if one has interim decisions on admissibility of this kind, before one has full sight of the evidence and the ability to consider it in the round, necessarily that increases the scope for bifurcated proceedings, to have an appeal going on while matters are otherwise progressing towards trial, and that obviously gives rise to potential for costs and delay. So we would say Which?'s approach is the approach that best achieves the objective of avoiding that outcome.

Does that assist?

PROFESSOR MASON: At least partially.

MRS JUSTICE BACON: But that's inevitably the case for any strike-out application, isn't it? It's not an answer to say: well, if it goes a particular way, we're going to be off to the Court of Appeal and that's going to hold things up.

MR ARMITAGE: I accept that. On the other hand, strike-out is a discretionary decision. In my submission, when one accepts that there are good reasons pointing in favour of the matter being determined at trial -- so not just reasons to do with avoiding bifurcated proceedings, interim appeals and so on -- I simply say it's a balancing exercise, as in all of these cases. That's as far as I go with the points.

MRS JUSTICE BACON: But in that regard, have you addressed Mr Jowell's point about the evidence needing to be quite different if this point is allowed in? So it's not really a point to be argued at trial and it will go one way or other, but actually he says it will have a fundamental impact on the ambit of the evidence to be adduced.

MR ARMITAGE: Yes, in the sense that I suppose it's suggested that Qualcomm may want to put forward evidence on matters that are relevant to the way in which the foreign decisions were reached.

MRS JUSTICE BACON: Yes, exactly. That was exactly his point. Do you disagree with that?

MR ARMITAGE: It's difficult to assess in the abstract. I think it's ... Yes, I think the most I can say -- I obviously can't disagree with the proposition that if these matters are admitted into evidence, there is a possibility that Qualcomm will wish to lead evidence going to the points that were made in the foreign decisions in the circumstances in which they were reached.

But I suppose perhaps the answer or a partial answer to that is: well, no one is saying that these decisions are inadmissible at all. It's common ground that they are admissible for the (inaudible) received, and it may well be that that's going to be the subject of points that Qualcomm would wish to make.

MR TURNER: Also you're in the position that you need to know what evidence you can rely upon at trial. You make the point in your skeleton that you have an uphill struggle because all the information is within Qualcomm's knowledge and not yours, and what will be the effect of starting to pull bricks of your case away at your trial if you think you're entitled to rely on findings of Tribunals and at trial we formed a contrary view. How would you deal with that?

MR ARMITAGE: Well, I think the point I made earlier is that at this stage there is real uncertainty as to the scope of the documentary material that may be available at trial. That was why I said at this stage it's difficult to be clear or precise about the precise relevance that we may be inviting the Tribunal to attach to findings made in foreign Courts.

We're in a position -- we're at an early stage really in the litigation. It has been a long time since it was issued, but we're at the first CMC post-certification. As I say, we're really making a very limited point, which is that the Tribunal shouldn't decide now that these matters are totally inadmissible and there can never be any reliance on them. We don't see that there's any basis for that submission.

MRS JUSTICE BACON: All right. Do you have any questions? No, all right. Thank you.

MR ARMITAGE: Thank you. I'm very grateful.

MRS JUSTICE BACON: Mr Jowell.

Reply submissions by MR JOWELL

MR JOWELL: I will try to be as brief as possible, and certainly finish by lunchtime.

My learned friend took you to the Agents Mutual case and he noted that the CAT is guided by circumstances of overall fairness. But as you've seen, the rule in Hollington v Hewthorn is rooted in a concept of fairness. Therefore, the question really is: why would it not apply in a Tribunal that applies an overall rule of fairness? Particularly one of this nature that is not akin to a Family Law Court looking at welfare of individuals.

My learned friend posed three questions. He said, first of all: do the findings in question fall within Hollington? And he took you to the Otkritie case and the judgment of Eder J in that regard. But he then asked: does the rationale apply? And then he said: is it necessary to decide the question now? So let me deal with those, if I may, in turn.

First of all, does this fall within Hollington? It clearly does, because they have pleaded reliance upon the reasoned findings of the foreign Courts and Tribunals, not just the recorded findings of primary fact.

If one goes to Otkritie, I don't think we need to turn it up, but the Judge in that case was very careful in his language. He used the language of "primary facts", "recorded primary facts". And that is clearly not what my learned friend is relying on. He is relying on the reasoned findings.

PROFESSOR MASON: It would be helpful to make the point if we could see where you're going.

MR JOWELL: Yes. Page 452, please.

MRS JUSTICE BACON: Yes, but the point was rather developed not only with reference to paragraph 23 but also paragraph 24.

MR JOWELL: I'll come on to that.

You see the submission of Mr Stanley QC is that:

"... the Court is entitled to have regard to matters of primary fact recorded in [the] Judgment ..."

That is clearly permissible and clearly different from reasoned findings.

MRS JUSTICE BACON: What do you understand by "matters of primary fact"? How do you define that?

MR JOWELL: Well, it's a matter of -- it's a document that is cited, simply the terms of which are set out, or the evidence of a witness again that is in terms set out.

I accept also that in certain circumstances it might be permissible to have regard to summaries, possibly, of the evidence, as long as it is an unvarnished summary, an uncontroversial summary, that doesn't include any element of assessment. But what you're not entitled to do is to have anything that is infected by a process of evaluation of the underlying fact. In cases where you have the underlying factual material, one doesn't need, of course, to go to what the Judge cites from it, one should go just to the underlying documents. That's the proper process.

It's really only in those rare cases, which are pretty rare these days but may be a little bit more common historically, where you can't actually get hold of the underlying material because there are no, say, transcripts of what the witnesses have said.

MRS JUSTICE BACON: All right. So how does that square with paragraph 24(v)?

MR JOWELL: Well, the answer is if you look at everything -- all of the other findings are pure vanilla findings of primary fact. 24(v) on its face is not, but it's actually a cross -- there are two things one needs to appreciate about it. First of all -- actually, three things, forgive me.

First of all, there's a cross-reference here, and it cross-references to his previous judgment at paragraph 509. Now, unfortunately we don't have that in the bundle but we looked at it on the screen. Within that paragraph, 509, there are further primary facts that are set out. There's also some element of assessment in that paragraph, but there are, in addition -- but the first two or three sentences are just pure primary fact. So in a sense he is cross-referring to that previous judgment where there are matters of primary fact.

PROFESSOR MASON: Given your argument there, before you go on to your second of three, had we not better, therefore, have that paragraph in the bundle?

MR JOWELL: We'll provide you with the judgment.

The second point about this is that this is the same Judge, this is a rather unusual circumstance, because normally it's a different Judge who you are having regard to. This is his own judgment that he's given in a previous matter, so it's a very, very unusual circumstance. So he is, if you like, entitled perhaps to -- or arguably entitled to, if you like, use a shorthand here and say, well, "Look at my previous judgment, I referred to some primary facts there and I reach conclusions off the back of them; I reach the same conclusions now in relation to this fact, into this case".

The third point we make --

PROFESSOR MASON: Can that be right though? So can somebody refer to a completely different case that they've tried?

MR JOWELL: Well, they can't say -- they can't purely refer to -- they shouldn't refer to their previous assessment, but they can refer to previous primary facts by way of cross-reference, if you like, and that is legitimate. Then in this case then reach conclusions off the back of those primary facts. They shouldn't be, if you like -- but it's all a little artificial when it's the same Judge, it's the same decision-maker.

The third point is simply this. If Eder J overstepped the mark in 24(v), strictly speaking, he overstepped the mark, it doesn't change the rule. The rule is very well established indeed: it's Court of Appeal level. And reasoned findings -- it doesn't change -- it doesn't suddenly mean, well, if Eder J expressed himself poorly in that case, really in that particular instance, then it doesn't change the rule.

MRS JUSTICE BACON: Well, obviously we'll have to look at the paragraph for ourselves, but if I can just summarise what I think you are saying. You say by reference to that paragraph that his position was, "In my previous judgment I made the following five findings of fact" -- and expanding his reference -- "I made the following five findings of

fact. In that judgment I reached the conclusion that the agreement was a sham, I reach the same conclusion now."

MR JOWELL: Yes.

MRS JUSTICE BACON: Is that what you say he was doing by that cross-reference?

MR JOWELL: That's exactly what I say he was doing, but if he wasn't doing that, if he was going over the top -- in a sense he was going a little over the top, it doesn't change the law.

MRS JUSTICE BACON: I presume one has to read that together with that sentence in paragraph 23 in which he's describing that point. He's submitted that the Court is entitled to have regard to matters of primary fact recorded in that judgment, and if those justify the conclusions reached there, then this Court is entitled to --

MR JOWELL: Indeed.

MRS JUSTICE BACON: All right. That's why you say --

MR JOWELL: He clearly has the principle correct. The only question is: did he err in the application of it in that one instance? And I say not, because actually you need to read it in context. But if he did, he erred. It's not -- it's a very unusual circumstance where we have the same Judge.

So that is that case.

Now, the second question that my learned friend asked is: does the same rationale apply here? He put the burden effectively on us. But in fact really it's the other way round: it's for him to show that the rationale that has been adopted in all other civil Courts doesn't apply in the CAT. My learned friend notably failed to give any reason why it shouldn't apply in the CAT.

It's important to observe that the rule has been applied in a large number of different types of Courts and Tribunals. Indeed, a note has been passed to me that it has been applied in a judgment of the Employment Tribunal. If it's helpful to have that case, we can certainly provide that as well. But I'll show you this when we come to the list of the different cases in the family law case that my learned friend cites.

But the central point is this: that there is no reason why it shouldn't apply in the CAT that my learned friend has cited. All of the reasons why it should apply that are cited in the High Court, the basic notion of fairness and the Judge as the exclusive decision-maker, and the desirability of avoiding satellite litigation or satellite evidence about the findings of the other Tribunals, equally apply with equal force in the CAT, if not more so.

Now, I should mention two points. My learned friend says, well, does it apply -- are we sure that it applies to the findings of these regulators? Are they not akin, he says, he suggested, to experts? The answer to that is clearly not, they are operating plainly in a quasi-judicial capacity. The rule in Hollington's case has been applied, for example, to the report into the Bank of England's collapse in the Three Rivers case, it's been applied to the ruling of an expert arbitrator before the Land Tribunal in the cases that you'll see that are cited. So it's clear that a finding of the Taiwanese regulator, antitrust regulator and the Korean antitrust regulator squarely fall within its ambit.

If we could go back, please, to the family law cases decided which you find in the bundle at tab 21. My learned friend took you to certain passages in that case.

If we could start, please, at page 901. If we could go down to the bottom of the page to paragraph 18. The first important point to note is what is written there. It's settled law in family proceedings that the findings of previous Tribunals may be admitted in evidence, and that the Court will give such weight to the earlier findings as it considers appropriate in the circumstances of the case. So it was against a backdrop of a practice and settled law that one does, in a family law context, have regard to those previous findings.

Secondly, if one goes forward, at paragraph 38, you see -- I mentioned this earlier -- a list of the wide range of circumstances of Tribunals in which the rule has been held to apply, you see that on page 908. So we see a list: previous convictions and subsequent prosecutions; an arbitration award and a later arbitration, that's the expert land valuer that I was referring to earlier, that's a judgment of Hoffmann J; inquiry findings in civil proceedings, that's the Bingham Report into the Bank of England Inquiry that

I mentioned a moment ago; a civil finding in directors' disqualification proceedings; Family Courts finding of facts in criminal proceedings; findings of a disciplinary Tribunal in a civil action; a foreign judgment in civil proceedings; a foreign conviction in civil proceedings; and a declaration in civil proceedings in a subsequent tracing claim.

So it's applied particularly widely.

The fundamental basis on which the Court ultimately holds that it doesn't apply in family cases you see on page 910, and you see, paragraph 50, if we could go down a little, please, it says:

"50. The rule in Hollington v Hewthorn does not apply in family proceedings ... because such a rule is incompatible with the welfare-based and protective character of the proceedings.

"51. In family proceedings all relevant evidence is admissible."

So it's based upon a particular context of family law and the need to protect minors and the welfare of the particular individuals.

Now, my learned friend -- the final point -- he says, well, should you apply this now? He seemed to have a couple of strings to his bow. One was he said, well, you shouldn't be too specific about what it applies to. But actually it's very clear what you can do, and that is to strike out the second sentence of paragraph 4 of his reply, which is a proposition of law that is simply unsupportable. Once that is done he may then wish to make consequential amendments, no doubt in light of any judgment you give. That will make things very clear going forward.

The suggestion that it would be more appropriate and more convenient simply to leave this all to the trial Judge, in our respectful submission that would lead to the worst of all worlds because what will happen is that first of all both sides will proceed upon an entirely uncertain premise as to what evidence they're entitled to rely on and what evidence they're not entitled to rely on. Secondly, for our part as defendants we will have to adduce a swathe of evidence going to the circumstances of the Tribunal's decisions which may prove to be entirely wasteful and unnecessary. So we say that this is

quintessentially a case where trial management calls out for this matter to be resolved at an early stage and indeed on this occasion.

Questions from THE TRIBUNAL

MRS JUSTICE BACON: All right. So a couple of questions.

We've now been provided with a copy of the earlier judgment of Eder J, I think.

MR JOWELL: Oh, very efficient.

MRS JUSTICE BACON: Somebody has unearthed it. But if that's not the case, then you could just send it in.

You referred to a judgment or reading of the EAT.

MR JOWELL: Yes, I'm simply -- it seems to me an important -- it's the Employment Tribunal, I'm told.

MRS JUSTICE BACON: All right.

MR JOWELL: It's called Jhuti v Royal Mail. I have not read it, there's always a danger of referring to judgments --

MRS JUSTICE BACON: If someone could send that in because you referred to it in passing.

The other thing is what comments do you have on the issue of judgments of the Courts of Scotland and Northern Ireland?

MR JOWELL: Thank you for reminding me of that point, Madam.

The short answer to it is that this these proceedings have been already determined to be proceedings in the forum of England and Wales. That, I believe, is part of the order that has already been made. Therefore it shouldn't, we think, be necessary to look into the position in Scotland and Northern Ireland.

We have not looked into -- certainly for my part I'm not aware that we have looked into the position in those other jurisdictions. We can do so if you would find it of assistance but given that the forum is England and Wales, the judgment can be limited in that way.

MRS JUSTICE BACON: All right. Well, if, on reflection, we think that we would find that helpful then we'll let you know. In any event, can you make sure that we have the other cases to which reference has been made?

MR JOWELL: Of course.

MR JUSTIN TURNER: You are making the submission that Hollington is binding on this Tribunal. You are saying only in circumstances where the proceedings are in accordance with England and Wales, not --

MR JOWELL: Well, I don't need to go that far, I think.

MR JUSTIN TURNER: If the position in Scotland were different or nuanced, shall we say, you'd still say that it's binding on this Tribunal for these proceedings; is that what you're saying?

MR JOWELL: I think I would need to consider that. But we do say --

MR JUSTIN TURNER: We do need to consider it.

MR JOWELL: -- I think in a sense that one can usefully say is it binding on this Tribunal, it can be looked at in, if you like, two ways. We say, first of all, it is binding, we would say it is binding in the strict sense. But there's also another sense in which one could say, well, this is not a matter, if you like, of discretion of the Tribunal, the Tribunal must decide what rule it applies. But that is not a sort of discretion decision.

MR JUSTIN TURNER: No, I understand that distinction.

MR JOWELL: It's still a matter of law even if it's not, if you like, binding in the way that a statute would be binding. So perhaps that's a subtle difference, a distinction without a difference.

MRS JUSTICE BACON: Well, I'd sort of identified three ways of looking at your proposition. One, that it's binding as a matter of judicial precedent. You did say it was the case.

MR JOWELL: Yes, we do say that.

MRS JUSTICE BACON: Second, it's not binding as a matter of judicial precedent but it is a rule that the Tribunal is now deciding that it will apply to all proceedings before it. The third is that in this particular case the offending sentence should be struck out as a matter for the Tribunal's discretion in this case.

MR JOWELL: I think those last two -- the distinction between those last two is perhaps the distinction I was reaching towards. I do say that it's still a matter -- in that second

formulation it is still absolutely a matter of law that this Tribunal must apply Hollington v Hewthorn, because it is a principle that applies, a principle of justice and fairness that applies, and therefore that the Tribunal, without any good reason to depart from it, must apply.

MRS JUSTICE BACON: All right. Yes.

Well, you won't be surprised to know that we're not going to give an *ex tempore* ruling now, we will reserve judgment on this point, which will enable us to consider the other authorities which you are going to send.

MR JOWELL: Fully understood.

MRS JUSTICE BACON: All right. Would that be a convenient moment to break?

MR ARMITAGE: There may be a possibility for discussions over lunch on some of the outstanding matters as well, so perhaps if we could break now and pick up disclosure issues.

MRS JUSTICE BACON: If we picked up at 2.00, are you confident we will get through the remaining issues by 4.30?

MR ARMITAGE: Yes.

MRS JUSTICE BACON: We have a fairly hard stop at that point.

MR ARMITAGE: I'll have another look at my submissions and see if any economies could be made, but I don't think there's any issue.

MRS JUSTICE BACON: In that case I think it's sensible to break until 2.00, and if that enables further discussions to be had between the parties to narrow the issues then all the better. All right.

(12.53 pm)

(The short adjournment)

(2.00 pm)

MRS JUSTICE BACON: Where are we on the outstanding issues then?

MR ARMITAGE: Certainly I think having dealt with all the pleading-related matters to questions of disclosure and other matters, shall I just give a quick progress update on some further developments over the short adjournment?

MRS JUSTICE BACON: Yes.

MR ARMITAGE: Does everybody have the composite order with the blue and red text somewhere convenient?

MRS JUSTICE BACON: Yes.

MR ARMITAGE: This is quite fast-moving, so I'll be shouted if I misrepresent the position. I think 8(a), Commission disclosure, that is still a point that needs to be argued fully.

Points 8(b) to (d), happily it's now agreed that the defendant will provide these documents. There was a debate at one stage about that.

MRS JUSTICE BACON: All right.

MR ARMITAGE: Paragraphs 9 and 10 -- sorry, just on paragraph 9 for the avoidance of doubt, the "paragraph 8", the number 8 shouldn't be blue.

MRS JUSTICE BACON: We assumed that.

MR ARMITAGE: Happily that one's not a disputed point.

There is a small debate, if I can put it like that, over the red text at the end of paragraph 9, "already readily available and are able to be disclosed". And at paragraph 10, the equivalent wording, "readily available and identifiable". I can deal with that now or later, whichever -- it concerns the preliminary disclosure that is agreed to be given.

MRS JUSTICE BACON: We'll just come to it in order, I think.

MR ARMITAGE: Yes. Also on paragraph 10, the words "licensing agreements" that are in blue text: we have agreed to defer that request, without prejudice to the ability to come back to it. But for the purposes for today --

MRS JUSTICE BACON: That's no longer on the table.

MR ARMITAGE: I think that means the words "licensing agreements and" are just removed. I'm seeing nodding.

Paragraph 12: there is now agreement on the timing for the provision of the defendant's disclosure report and EDQ, and the agreed date is 6 April.

Paragraph 13, in relation to the proposal by Qualcomm that Which? should file their disclosure report, that is still a point we'll need to have argument on.

Finally, 14, listing of the next case management conference, I think it is agreed also, and I think it's agreed that it's the first available date from 13 May.

MRS JUSTICE BACON: All right. Why don't I deal ...

MR ARMITAGE: Oh, I'm so sorry. 13 June.

MRS JUSTICE BACON: I see.

MR ARMITAGE: So in fact, on the one you have, it was the defendant's proposal.

MRS JUSTICE BACON: All right.

I had been going to ask about your availability on 12 May. Is it possible for it to be on that day? Some of the Tribunal have problems after that.

MR ARMITAGE: 12 May? Could I just turn round --

MRS JUSTICE BACON: That's a question to both sides. **(Pause)**

MR ARMITAGE: From our side, you'll see that's sparked a bit of discussion and consideration. I don't know if it's possible to come back to that and for those behind me to consider it.

MRS JUSTICE BACON: All right. Yes. Well, I'll have submissions on both sides as to whether that's too early in the light of the dates you've agreed.

MR ARMITAGE: Yes. The only concern is having sufficient time with the materials from the defendant.

MRS JUSTICE BACON: Yes.

MR ARMITAGE: But of course we want to make -- as a general rule, sooner is better.

MRS JUSTICE BACON: Yes. That may be the first date this side of July that we're able to offer.

MR ARMITAGE: I see.

MRS JUSTICE BACON: The only date this side of July that we're able to offer that has all three of us. So there may be problems if it has to go after that.

MR ARMITAGE: Yes, okay.

MRS JUSTICE BACON: If the answer is that actually that is too early, then we'll consider that. All right.

MR ARMITAGE: Yes.

MRS JUSTICE BACON: So let's take the issues from the start then of paragraph 8(a).

Disclosure application by MR ARMITAGE

MR ARMITAGE: Yes, so disclosure of EC materials. You'll see from the order in the blue text the nature of the request that Which? is making. It's a limited request and there's been considerable movement on this in the correspondence, on both sides, I should say.

So Which? seeks:

"A copy of all documents quoted from or cited in Sections 9 ... and 10 ... of the confidential version of the decision of the European Commission ... in [the Qualcomm] Case ..."

So those are the sections dealing with market definition and dominance.

We say that those documents are likely to be of great assistance to both Which? and the Tribunal, given the substantial overlap between the equivalent issues in the present case and those considered by the Commission.

Qualcomm's position having initially been one of flat-out refusal to give disclosure of any Commission materials, it has now agreed in principle to disclose any pre-existing documents, in the sense of contemporaneous documents that pre-existed the Commission investigation, to be distinguished from things like requests for information and responses thereto which are created for the purposes of the investigation.

We say it's a welcome offer but it doesn't go far enough, because we do say it excludes highly relevant documents such as RFI responses by chipset suppliers and chipset customers that are relied on extensively in the decision. I'll show you that in due course.

So that's the scope of the application. There's a dispute there.

Then there's a point about process. So if one looks at the second paragraph in the red text --

MRS JUSTICE BACON: Well, we've seen that. What's your submission made on the point made by Qualcomm about its inability to disclose without the permission of the Commission and without the Commission file being closed?

MR ARMITAGE: There are two points there. So taking the second one first.

The Commission's file has been closed. This, I think, has been confirmed in correspondence. It's a slightly unusual situation. My best understanding is that our side were made aware of this by the Commission in, I think, November last year and reference was made in our skeleton argument to the fact that the case file had been closed.

Qualcomm's skeleton argument, as you will have seen, Madam, says that Qualcomm is unaware of whether the case file has been closed. That was something that was received with some surprise on our side because, as I say, our side has been informed by the Commission that the case file has been closed, following the proceedings in the --

MR JOWELL: Forgive me. It shouldn't have come as any surprise that that was our understanding because they wrote to us and asked us, and we told them that we were not aware of whether it was closed or open.

MRS JUSTICE BACON: To be honest, it doesn't really matter to the Tribunal who was surprised at whatever submissions that were made. What we really want to know is whether the case file has been closed or not.

MR ARMITAGE: I believe we've provided in correspondence the confirmation that we received, and we can turn it up if --

MRS JUSTICE BACON: Right. So --

MR ARMITAGE: But in light of having seen the materials which we have provided now in correspondence, I don't know whether Qualcomm seeks to suggest that the case file has not been closed, despite seeing that. So I suppose that's the question.

MRS JUSTICE BACON: All right. Yes.

MR ARMITAGE: If there's no dispute over that, then that objection falls away.

But there's another element, which is: notwithstanding the fact that the case file has been closed, should we ask the Commission? And in my submission, that's an unnecessary step. And I'll show you a decision of Roth J in the National Grid litigation over a decade ago which makes that very clear.

PROFESSOR MASON: Just to clarify the first point, are both parties in agreement that the case file has been closed now? What is the situation?

MR JOWELL: The position is that we received very late last night copies of correspondence -- the position is this. We were asked whether we were aware that the case file was closed. We responded in correspondence and told them we had not received any notice of it being closed and we didn't know whether it was closed or not. We then wrote to them and proposed that we should write to the Commission, at which point, very late last night, they then write to us and say, "Well, we've known all along that it's closed because -- and here is the correspondence we have with the Commission".

That's why -- forgive my interruption -- we were effectively ambushed with this information. Now, we have not had the opportunity to double-check that with the Commission directly. But unless the documents are wrong, they do appear to suggest that the Commission's view is that the file is now closed. But we've not had an opportunity, given the time that it was provided to us, very late after hours yesterday night, to be absolutely 100 per cent sure. But it certainly appears that from the correspondence that they've had with the Commission which they've not previously revealed to us.

MRS JUSTICE BACON: All right.

MR ARMITAGE: I'm a little perplexed. I don't think the correspondence is in the bundles. We can hand up the confirmation. Mr Jowell says it appears that the case file has been closed; I mean, there's no ambiguity.

MRS JUSTICE BACON: Why don't you hand up the correspondence you have?

MR ARMITAGE: Yes, Ms McAndrew is going to do so. **(Handed)**

I'm not sure exactly -- are you looking at the cover letter at the moment or the enclosures?

MRS JUSTICE BACON: Well, we just have the email that says --

MR ARMITAGE: Oh, I see.

MRS JUSTICE BACON: -- "I can confirm that the case is closed".

MR ARMITAGE: Yes.

MRS JUSTICE BACON: And then the email that preceded that.

MR ARMITAGE: Yes. I'm told to make clear there's obviously no waiver of privilege in any other communications.

But in my submission, leaving aside questions of timing, I think our skeleton argument referred to the fact that the investigation had closed and there was no query at that stage. We've now provided this extremely clear email. So in my submission, that point falls away.

MRS JUSTICE BACON: Yes. All right.

Do you want to then continue with your submissions? You are presumably going to address us on the other question about whether the CAT should ask --

MR ARMITAGE: Yes, is it a good idea to contact the Commission for its view?

In terms of the relevance of the material sought to the pleaded case, Qualcomm has accepted in correspondence that the parts of the decision dealing with the issues of market definition and dominance are, I think they say, arguably relevant to Which?'s claim. There is a suggestion then in its skeleton argument that the documents sought are in fact not relevant to the present claim. Now, the skeleton argument was served prior to the progress we've seen this week, where Qualcomm does now offer to disclose at least the pre-existing documents.

In the circumstances, it's not clear to me whether relevance is pursued as an objection to disclosure of the other categories of document, ie the RFI responses and the other documents prepared in the course of the investigation. So I was going to propose, rather than going through the pleadings to show you why all of this is highly relevant -- I'll address that in reply if necessary.

We say, in short -- and I can perhaps just show you in the Commission decision a couple of points just to make clear that this is a consideration of a key issue of infringement that arises in the present case. So can I turn then to the Commission decision and the findings and evidence referred to therein on market definition and dominance. I'll do this briefly.

What I want to emphasise is not just the clear relevance of the findings to the disputed issues in the present claim, but also the extent to which the Commission relies on non-pre-existing documents, so things like RFI responses in particular, of which Qualcomm resist disclosure, and in fact subject to its suggestion -- well, in fact resist disclosure altogether. I think the suggestion is that those documents should never see the light of day: it's not permissible for this Tribunal to order disclosure of those documents.

The non-confidential version of the decision is at authorities volume 3, tab 28. If we could go there, please. Sorry, back at volume 2, I think, at tab 28. Yes. So you see it's the 2018 decision in case Qualcomm (Exclusivity payments). I'm so sorry, it's page 1158 for the electronic display.

The Tribunal may recall it's an abuse of dominance infringement decision. The abusive conduct as found in the decision -- and I make clear at the outset: the decision has been annulled in its entirety. It may be, it will be -- we'll come back to that. But just in terms of what the Commission found, the abuse concerned exclusivity arrangements with Apple.

Now, a point has been made in correspondence that that's different from the conduct that is at issue in the present claim. In my submission, that isn't a good point on relevance because in fact those arrangements are relevant to pleaded issues in the present claim, including the amended claim, to which Qualcomm has consented. You may have seen reference to the Apple exclusivity amendments in that draft re-amended claim form. But that's not an issue for today because in the spirit of cooperation, if you like, Which? has sought to focus its requests on market definition and dominance.

Can I show you the key finding, just to remind you of it. It's at page 1223, recital 305. The Commission here says:

"For the reasons set out [above, essentially], the Commission concludes that Qualcomm held a dominant position in the worldwide market for LTE chipsets between 1 January 2011 and 31 December 2016 ..."

A point has been made that there isn't a complete overlap there with the period covered by the claim. I may need to make submissions about that point if it's pursued as a relevant point. I can come back to that in reply. But on any view, it does overlap with the claim by at least a year and a quarter, because the claim seeks damages suffered on or after 1 October 2015. So there's on any view that overlap. But as I say, I may need to come back if that point is pursued.

The short point here is that the Commission is considering making conclusions on market definition and dominance in relation to the same chipset supply market that is at least provisionally identified in Which?'s claim form as the relevant market in this case, so LTE chipsets, fourth generation chipsets, and considering and finding that Qualcomm is dominant on that market.

So again, Qualcomm has said "arguably relevant" in the correspondence. We say that's an understatement. It is a consideration of the same issue, and that issue is a critical step in establishing any infringement of competition law in Which?'s claim.

So just at a very high level, and subject to the procedural points that my learned friend has raised, it is surely sensible that the Tribunal, applying the same provisions of competition law to the very same issue, should have access to the factual material that the Commission considered when dealing with it. It's easy to see, in my submission, how that would save time and reduce costs, and that's the reason these documents have been sought.

Now, my instructing solicitors have looked at sections 9 and 10 of the Commission's decision. By their reckoning, there are 327 footnotes in the decision in total. Some of them refer to publicly available documents and there are references to some pre-existing

documents, so the sorts of documents that Qualcomm has indicated that it's prepared to disclose.

About 140 of them, so going on for half of them, make reference to one or more requests for information, responses to requests for information, particularly by those chipset suppliers, so entities that are in the same market as Qualcomm, and chipset customers, so the downstream entities, the OEMs, like Apple and Samsung.

Can I just show you one example of the way in which the Commission bases its decision on responses to requests for information in relation to key disputed issues in this case.

MRS JUSTICE BACON: What category do Qualcomm's responses to the statement of objections fall into?

MR ARMITAGE: I think Qualcomm would say that those are documents prepared in the course of the investigation and therefore they are not within the scope of -- I don't want to do myself out of a category they've offered, but I believe --

MRS JUSTICE BACON: So you think they're not offered in their first red paragraph?

MR ARMITAGE: I see nodding. So according to Qualcomm, those are -- well --

MRS JUSTICE BACON: All right. Do your 140 include those, or are they --

MR ARMITAGE: They may overlap. But the specific point I was making was about responses to RFIs. I think there are also references to Qualcomm's response to the statement of objections, I've seen at least a couple of those, and we do see those as well. But I think the major category is the RFI responses.

I said I'll just show you one example of the way in which documents of that kind are critical, rather than reliance on contemporaneous documents, in relation to, as I say, key disputed issues on market definition and dominance in this case.

There are a number of disputed issues I could have picked out by reference to the pleadings, but one of them is the issue of self-supply. On the pleaded case between the parties, there is a debate as to whether self-supplied chipsets -- so, for example, Samsung, for some of its phones, manufactures its own chipsets rather than getting them on the merchant market. There's a question as to whether the relevant market for LTE

chipsets includes self-supplied chipsets or only includes, as I say, those sold on the open market.

Obviously, if Qualcomm were correct that the relevant market extends to self-supplied chipsets, that would have implications -- I put it no higher than that -- for dominance. The market would be broader, there would be an effect on market shares. And so one sees how the debate arises.

Which?'s pleaded case -- maybe I don't need to turn it up -- is that self-supplied chipsets are not within the scope of the relevant market. It's obviously an issue that's going to be addressed in the expert economic evidence -- it's an issue of relevant market, so it's at least partly an economic issue -- but obviously the determination of that issue will be informed by factual evidence in the ordinary way. We say the decision refers to evidence that is going to be useful in resolving that issue.

So if we could look at page 1217 of the decision. Do you see at 9.2.9 the heading "The competitive constraint exerted by captive production of baseband chipsets"?

MRS JUSTICE BACON: Yes.

MR ARMITAGE: So "captive production" is a synonym for self-supply. So it's a consideration. And this is in the -- I'd better check -- yes, in the market definition section of the decision.

If we look at recital 276, so immediately below that heading. The Commission begins by setting out its conclusion, in fact, and says:

"... captive production of baseband chipsets by certain OEMs, namely [blank], [blank] and [blank] ..."

It's well known that Samsung has a significant proportion of self-supply, otherwise we don't know who precisely is being referred to here, "certain OEMs".

"... [self-supply] does not exert a competitive restraint on merchant market sales of LTE chipsets."

In other words, self-supplied chipsets are not part of the same market as merchant market sales of LTE chipsets, as is being suggested here. And that is precisely Which?'s case in this claim: self-supplied chipsets are not part of the relevant market.

Now, if we look at 278. This is part of the reasoning in support of that finding. One sees the finding is that:

"... OEMs with captive production still rely to a significant extent on sales of baseband chipsets by third party suppliers."

Now, in light of this morning's debate, there may be argument about -- or there will be argument about the status of the finding itself. If one looks at footnote 325 though -- well, 325 actually is not an example of the category I was -- well, it may not be an example, because we see:

"See, for example, [blank]."

So it's not clear actually if that's citing a contemporaneous document.

MRS JUSTICE BACON: Well, the previous footnotes refer to "non-confidential answer to" --

MR ARMITAGE: Yes, I'm sorry. Because they were on the same page, I thought that they were related.

MRS JUSTICE BACON: Well, you can see there are number of footnote references to responses to requests for information. All right.

MR ARMITAGE: Yes, indeed. Indeed. They relate in fact to recital 277, which is another point relied on insofar as the conclusion. So you'll see multiple references to answers to "request[s] for information [...] to baseband chipset suppliers", so other suppliers active in the same relevant market as that pleaded by Which?

In fact, what one also notices is that the footnotes appear only to refer to requests for information and responses in relation to these points. So it's not as though contemporaneous documents are referred to as well as; it seems to be the sole evidential basis. And of course the request for information responses may well refer to lots of pre-existing contemporaneous documents. But as it stands, it appears that the RFI responses are critical here.

That is just one example, as I say.

I may return to the question of relevance; it may be necessary to show you some other points. But perhaps I can leave it there on the decision. I think I've shown you the point that we're making.

The high-level point arising out of that is that if disclosure is limited in the way that Qualcomm proposes -- as I say, it's a once-and-for-all limitation, because Qualcomm is not saying we can go to the Commission and ask about these documents; it's saying the Tribunal is prohibited from disclosing these documents under any circumstances -- that will result in what is evidently relevant material never being available in these proceedings, with obvious implications for both Which?'s ability to prove its case and also costs implications, because Which? will have to consider other ways, including potentially third party disclosure, in order to prove these elements of its case.

So we say, overall, this calls for very anxious scrutiny of the objections that Qualcomm has raised to disclosure of material of this kind.

Can I briefly tell you the headlines in terms of our responses to the objections in the skeleton argument from my learned friend. I'll obviously develop the points in reply. But I do want to show you two authorities which I say are highly material on the points raised before handing over to my learned friend.

So if we could take my learned friend's skeleton argument, which is at core bundle --

MRS JUSTICE BACON: I have it.

MR ARMITAGE: I'm grateful. If we could have it on the screen. It's A43, paragraph 54.

Now, as I've said, these objections were formulated at a time when I think the proposal was opposed in its entirety. So there is a question as to the extent to which all of them continue to apply, and particularly the points on relevance.

But 54(a) -- and there are five reasons in total. 54(a), and the substance of the objection is in the final sentence of that paragraph, which is that:

"To order the disclosure of the confidential version of those sections of the Decision, or materials cited therein, would in such circumstances ..."

And the circumstances -- I'm sorry, I should have read the earlier bit -- the circumstances are essentially the annulment of the decision.

"To order the disclosure ... in [those] circumstances [would] breach Qualcomm's fundamental rights."

Then the case cited in support of that is the General Court's decision --

MRS JUSTICE BACON: Do we need to go there? Because as I understand it, you're not asking for the confidential parts of the decision itself; you're just asking for the documents cited there.

MR ARMITAGE: Well, respectfully, I agree. Pergan does not apply to anything other than potentially to the findings in the decision. But that sentence says "those sections of the Decision". So at one stage Which? was seeking disclosure of the confidential version of the decision. That's been deferred for the time being.

MRS JUSTICE BACON: Yes.

MR ARMITAGE: But it's also all material cited therein, yes. And I do understand my learned friend to be saying that RFI responses and the like are also subject to the principle in Pergan; I think that's right. And we say that is simply incorrect as a matter of law: Pergan does not apply to documents falling in that category.

I think I can deal with this conveniently for the purposes of my submissions by reference to the Emerald Supplies decision in the Court of Appeal, which is authorities tab 13, page 469, which includes a very detailed consideration of the Pergan case in the context of the air cargo follow-on damages litigation.

This was an appeal, along with one other point which is irrelevant for today's purposes, against a decision by the first instance Judge, Peter Smith J, to order disclosure of the confidential version of the air cargo infringement decision into the confidentiality ring in its entirety, notwithstanding objections that had been made by both addressees and non-addressees of the decision to the disclosure into the confidentiality ring of aspects of the decision that formed no part of the operative part of the decision, no part of the findings of infringement, but nevertheless suggested potential liability or infringement

on the part of the airlines concerned. The issue was that there was no opportunity to challenge findings that are not essential bases for the operative part. So I'm summarising, just by way of background, the context for that decision.

But one can see immediately from the headnote, in fact, on page 470, next to letter D, the summary of the appeal:

"On the first appeal of the addressee and non-addressee airlines against the disclosure orders ..."

Ie the order that I've just mentioned. And then "Held", at (I), which was dealing with the Pergan issue:

"... where a claimant for damages for alleged breaches of article 101FEU [sic] applied for disclosure in national court proceedings of an unredacted version of a confidential commission Decision, the provisional non-confidential version of which was redacted to protect a party's right to the presumption of innocence ..."

That's the Pergan point, as we'll come to:

"... the national court ... was obliged, by virtue of [the duty in] article 4(3) [of the Treaty on European Union], to afford the same protection to that Decision as afforded at Community level ..."

So the point I make there is that this was only about disclosure of the confidential version of the Commission decision. That's what this case was about.

Then if we could go to paragraph 20, please. I think this is the passage from the Pergan case that my learned friend cites in his skeleton argument in relation to the presumption of innocence principle of EU law, and indeed English law. We see recitation of what the Court at first instance held in Pergan on this point.

Now, Pergan was about not disclosure but publication of a non-confidential Commission infringement decision in relation to the peroxides cartel. What had happened was that an entity that was mentioned in the decision, but was not ultimately made the subject of any infringement finding, said, "Please don't publish anything about us that would be suggestive of liability, may give rise to damages exposure and so on". So that was

the issue: did the publication of the decision in those circumstances offend the presumption of innocence?

MRS JUSTICE BACON: Your short point is that Pergan is about findings in the decision; it's not about the underlying documents.

MR ARMITAGE: Yes, exactly. So within the quote, we see "the presumption of innocence". And then it's the italicised words at the bottom of 479, going on to 480:

"'[The presumption of innocence] precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement ... unless that person has enjoyed ... rights of defence ...'"

So exactly: it's findings of liability or allusions of liability, and it's in the decision.

If we go on in the judgment, that distinction is drawn, the distinction between findings of or allusions to liability in a decision and other documentary evidence. Can we look for that purpose, please, at paragraph 89 of the judgment, which is on page 508.

The Court of Appeal is here considering a submission from the Emerald claimants about another judgment in the Pfleiderer case from 2011. That was a case about disclosure, some in this room may recall, of leniency materials, ie material voluntarily submitted prior to a Commission investigation or in the course thereof.

What the Court of Appeal says is:

"... Pergan is not even mentioned in Pfleiderer ..."

And then at letter B:

"That, in our view, is not surprising since the Pergan issues simply did not arise in relation to the court's consideration ... as to whether documentary materials voluntarily supplied to the regulator by a party seeking leniency should be disclosed ... These documents were of a very different character from adverse findings by a national or European regulator that there had been an infringement, or allusions in the relevant report to ... liability ... for an infringement, which were the subject of the absolute protection conferred in Pergan."

So that's the point. It's distinguishing there between findings of liability in a decision and leniency materials, but in my submission that distinction applies with equal force to RFI responses and other materials prepared in the course of an investigation which are not, on any view, findings of liability or allusions thereto.

So in my submission it's not necessary to read it, but paragraph 90 of Emerald reiterates that distinction, there talking about a distinction between findings and contemporaneous documents. Now, RFI responses are, on one view, not contemporaneous documents. But again, the point is not whether RFI responses are contemporaneous documents, it's: are they findings of liability or allusions thereto?

So in my submission, the suggestion that Pergan prevents the disclosure sought is simply wrong, and it's wrong on the authority of the Court of Appeal.

The second objection, returning to paragraph 53(b) of my learned friend's skeleton argument, is about relevance. I've made my points on that; I'll address it in reply if necessary. We say: clearly relevant, and I've shown you an example.

The third objection concerns the case closure, and again, I hope I've made my submissions on that. The clear communication with the Commission shows that the case has been closed.

Now, were that not the case, I accept that there would be a potential issue with disclosure of some of these categories of documents because there are particular procedural rules now on disclosure of documents prepared during the course of a Commission investigation. In other words, there may be a prohibition -- I think there is a prohibition on disclosure of those documents before the investigation is formally closed.

So the point is not about the rule; it's about the fact that the Commission's investigation has closed. So in my submission, that one falls away.

Then at paragraph 53(d), the fourth objection, Qualcomm says here that since the decision has been annulled:

"... the proper course would be for the Commission formally to close the case file ..."

They have done that:

"... and [then] erase the record ..."

And Qualcomm says:

"It would be inappropriate and probably impermissible for Qualcomm itself to disclose material it received from the file."

Well, we say whether the Commission erases the record is a matter for it. What Which? is seeking are documents held by Qualcomm. My learned friend cites no principle of law for the proposition that it would be inappropriate and, as he puts it, "probably impermissible" to disclose such documents.

Further, this submission is what animates the procedural proposal we see at paragraph 8(a) of the red text, the idea that: well, assuming that the case file has been closed, even for the documents that we agree to disclose, we ought to contact the Commission and ask if it has any objection to this form of disclosure.

We say the law on this point is that it's not necessary to involve the Commission in disclosure issues of this nature at the national level. That's clear from a decision of Roth J in the first National Grid litigation, the gas-insulated switchgear follow-on claims. That judgment is at authorities volume 1, tab 6, page 132. If I may, I'll just take you through that, and then that largely completes my submissions on this point, just to indicate where I'm going.

Just by way of context for the ruling, this was obviously an extremely long-running litigation. At the time of this ruling in July 2011, there had been appeals to the General Court, concluded appeals to the General Court, against the underlying Commission infringement decision, but appeals to the Court of Justice, onwards appeals, were still pending. That of course, in this litigation, gave rise to all sorts of procedural questions about how to progress the domestic proceedings while the EU appeals were still ongoing; issues which at the time were perhaps rather novel, in a way that they are not today.

The specific procedural issue that arose in this judgment was a disclosure application by National Grid, the claimant in the damages litigation, against the addressee defendants

for disclosure of documents from the Commission's file, documents falling into different categories, as I'll show you.

If we could pick this up at page 137 of the judgment, under the heading "The present application". It's paragraph 9. So Roth J records here:

"There is no dispute that the document of which disclosure is sought ..."

I'll come to what they were:

"... are relevant to these proceedings and [that they] are documents to which [National Grid] would be entitled by way of standard disclosure under English rules of procedure in the absence of some supervening provision of EU law."

Now, the important point:

"It is commonplace that the victim of a cartel will not have all the information necessary for it to assess whether, and if so to what extent, the prices it has been charged were inflated as a result of the operation of the cartel."

Then he emphasises the importance of satisfactory disclosure in cartel damages cases to avoid them becoming difficult and one-sided to pursue.

Now, I said I wouldn't repeat material from the introductory parts of our skeleton argument, but we've obviously made some points there about the information asymmetry that exists in this case. It's not a cartel case, but we say there are some parallels in terms of, as I say, information asymmetry. Which? is not an industry participant in this market, obviously.

Then at paragraph 10 we can see the nature of National Grid's disclosure application. It's slightly fiddly, as it were, but if I can seek to summarise what was happening.

National Grid were seeking to obtain documents from the Commission's file that emanated from two of the addressees of the decision, Alstom and Areva. These included both pre-existing documents and responses to RFIs, importantly, so both of the categories of documents that are raised by Which?'s application for this Commission disclosure.

These companies, based in France, said that they were prohibited from giving the disclosure by something called the "French blocking statute". Madam, you might recall that that

was a subject of a subsequent ruling in the litigation. It's not an issue that needs to detain us today. It is somewhat redolent of the procedural barriers that Qualcomm has referred to in correspondence in relation to disclosure of some of the foreign materials, ie, "We are prohibited by foreign law for giving this sort of disclosure". But, as the Tribunal has seen, that is not a matter for today.

Now, as a way round the issue, National Grid sought disclosure of the French domiciled companies' documents from two other addressees, so ABB and Siemens, who were not based in France and therefore the French blocking statute argument, which was later dismissed, held not to be a hurdle, but they couldn't even avail themselves of the argument in principle. ABB and Siemens obviously had copies of Alstom and Areva documents in their possession as a result of the Commission's investigative procedure, so through the access to file process.

Now, at the end of paragraph 10 -- and as I say, I'm afraid this is slightly fiddly -- there's a reference to:

"... ABB and Siemens did not receive from the Commission copies of Alstom's and Areva's responses to the [statement of objections]."

So National Grid was inviting the Court to ask the Commission to provide these documents, pursuant to Article 15 of the modernisation regulation, regulation 1/2003. And the Court -- that isn't of direct relevance today, but the Court agreed to make that request directly to the Commission.

But importantly, that's a request for documents not possessed by the relevant defendants. So there was no other way, in short, of obtaining those documents. Obviously our request for disclosure is for documents in Qualcomm's possession; it's not an argument that has been raised that it doesn't possess copies of the relevant documents. Qualcomm has said, "We can only disclose, even in principle, documents in the form in which we possess them, which may have some redactions"; that's obviously true.

Now, if we could look over the page at paragraph 14, we see:

"As regards those documents emanating from Alstom and Areva of which disclosure is sought directly from ABB and Siemens ..."

Alstom and Areva didn't consent to the disclosure but they didn't object, in short. They only sought a mechanism in order to ensure that the leniency materials were not disclosed, and that was not disputed.

So the parties responsible for producing the documents didn't oppose it, but ABB and Siemens, from whom disclosure was being sought -- I should go back. The parties from whom the documents emanated didn't object to ABB and Siemens disclosing their documents; they did object to their own disclosure under the French blocking statute. But ABB and Siemens did object to giving that disclosure. So to be clear, they were saying they would not provide disclosure of relevant Areva and Alstom documents that they had received in the course of the investigation.

Now, ABB are said to have raised a number of objections under EU law. And Siemens -- this is paragraph 15 -- is recorded as having suggested that these documents needed to be obtained from the Commission via an Article 15 request. And it's the Court's consideration and disposal of that issue that's central, so the suggestion that this needed to go via the Commission, essentially, this request for disclosure of pre-existing documents and RFI responses and so on.

Now, we see at paragraph 16 actually that in this case the solicitors for National Grid had written to the Commission to see if it had any objection to the order sought. And if we could go over the page to subparagraph [4] in the quote from the Commission's letter, we see --

MRS JUSTICE BACON: The Commission wouldn't object.

MR ARMITAGE: Yes, the Commission wouldn't object, subject to appropriate confidentiality protections being in place.

Now, that letter is not making a case-specific point. The Commission was there setting out a general position in relation to disclosure of Commission materials, materials from its investigations in national proceedings: provided they are subject to suitable

confidentiality protections, so a confidentiality ring, the right for third parties to make submissions on that ring to the extent necessary, the Commission doesn't object.

Now, we then see the objections that were made by ABB and Siemens. There's a heading just above paragraph 18, "The objection to disclosure of documents obtained by access to the file". Then paragraph 20, if we could pick it up there. As we see:

"The objections, advanced ... by ABB, were placed on several grounds."

The first objection is the point that disclosure would undermine an ongoing investigation. Now, that is not a point that is open to Qualcomm in the present case, even if it were otherwise good. In fact, if one looks at paragraph 22 of the judgment, Roth J makes the point that he cannot begin to see how disclosure into a confidentiality ring would do anything to undermine an ongoing investigation.

MRS JUSTICE BACON: Well, it's not ongoing in this case, so --

MR ARMITAGE: Yes.

MRS JUSTICE BACON: I need to speed you up a little bit because we need to conclude this hearing today.

MR ARMITAGE: I understand that. I'm very nearly done.

The key point, skipping over some of these objections which in fairness are not raised by Qualcomm, is at paragraph 26. So Roth J is dealing with the submission that -- sorry, if we could look at 25. So it's the third submission:

"... it is more appropriate for these documents to be obtained by way of an art. 15(1) request from this court to the Commission than by way of disclosure."

So that is a version of the procedural point that is being made by Qualcomm here. That's not quite what's being proposed, that's it's the Court that would do it, but it's a proposal that the Commission should be involved in the process. And what Roth J says at paragraph 26 is key.

MRS JUSTICE BACON: All right. Well, I've read that paragraph. Is that the paragraph you rely on then?

MR ARMITAGE: Indeed:

"... neither appropriate nor necessary to involve the Commission in the provision of documents in the hands of parties to English proceedings ..."

So that's the position adopted by Roth J in 2011. It's subsequently become very common in competition claims for defendants to give disclosure of documents in their possession obtained during Commission investigation with no involvement of the Commission.

Now, just to deal with the final point. My learned friend will no doubt say that the position is different here because the Commission decision has been overturned. But in my submission, that does not make a difference. It doesn't make a difference to the application of Pergan; it also doesn't make a difference to the procedural point.

The reason why the national Courts have been willing to give disclosure is to facilitate claims for damages by potential victims of anticompetitive conduct. It's true, of course, that the decision has been annulled, but it wasn't annulled by reference to any of the points in sections 9 and 10. It's true that Qualcomm appealed against the findings on market definition and dominance, but that wasn't considered by the General Court.

But Which? is still pursuing a claim: it needs to obtain the documents that are necessary. And where the defendant possesses them, the clear principle from Roth J's ruling is that they should be provided, absent any supervening rule of EU law. We say there is no such rule and this disclosure should be provided.

That's us.

MRS JUSTICE BACON: Right, thank you very much.

Mr Jowell.

Submissions by MR JOWELL

MR JOWELL: Madam, one of the unfortunate consequences of the fact that we were sprung with this information late last night is that our skeleton argument proceeded on the assumption that there is a very straightforward answer to this application, which is namely that the file might still be open. And as my learned friend conceded, if that had

been the case, then there would have been an absolute bar to the provision of these documents, other than the ones that we have volunteered.

The result of that is that our skeleton argument on this alternative hypothesis which has now arisen was not as fulsome as it might have been. But we wrote to the other side last night, and perhaps the letter reached them this morning, and we set out our arguments in more detail on this particular hypothesis. If I may, I think what might be most convenient is for the Tribunal first to read the relevant paragraphs of that letter and then for me to walk you through the key points as we see them, because it's not actually as straightforward a matter as my learned friend seeks to portray.

MRS JUSTICE BACON: Do you want to hand it up?

MR JOWELL: Yes, please. Thank you.

PROFESSOR MASON: Just while it's being handed up, you referred to it as a "hypothesis" there. You're indicating that (inaudible) --

MR JOWELL: No, we don't --

PROFESSOR MASON: -- or do you accept the email that has been handed up?

MR JOWELL: Well, if we are going to write to the Commission, as we propose is the appropriate course, then we would like to double-check and get confirmation of the fact that the file is indeed closed. But we're prepared to proceed on the basis that that is correct. We're not suggesting they have engaged in some forgery or that the Commission has got it completely wrong. We find it a very unusual situation that a third party should obtain this information and a notice should not go, but we are where we are. **(Handed)**

It's paragraphs 5 to 8 of the letter that are the relevant ones. **(Pause)**

MRS JUSTICE BACON: I'm not sure that the fact that the decision was annulled takes you as far as you need to go. Whether or not the decision was annulled, we're not talking about the content of the decision but simply the documents that have been referred to in it, and the fact that the decision was annulled doesn't seem to have prevented you

from agreeing to hand over your own pre-existing documents. So the main points seem to be your ones about confidentiality of third parties.

MR JOWELL: Madam, I hear what you say. I'll develop my arguments, if I may, in due course to seek to persuade you that it goes a little further than that.

MRS JUSTICE BACON: All right, so we have your letter. So do you want to develop your arguments on it?

MR JOWELL: Yes.

There are essentially two critical matters that take this situation out of the norm, out of, if you like, the National Grid type of situation that my learned friend showed you. The first is the fact that the United Kingdom is no longer an authority or Court of any EU Member State. And this claim is not only for the application of Articles 101 and 102; this claim is also concerned with the application of chapter II for two years of the period.

The position that is set down in both the regulation that we referred to in 5(a), which is regulation 773/2004 at Article 1601, is that the information to which you are granted access in the context of a Commission investigation can be used only for the application of Articles 101 and 102 by authorities or Courts of EU Member States.

That's underlined by the document that we received with the statement of objections, which you see set out in -- the relevant parts of it are underlined in paragraph 5(c):

"You should use the information contained in this Statement of Objections solely for the purpose of judicial or administrative proceedings for the application of 101 and [that should be Article 102] of the Treaty."

Then you see below that:

"This also applies to your reply to the Statement of Objections insofar as it contains information derived from the Statement of Objections or obtained through access to file."

So this is the first difficulty we have, is that this information has been provided -- we received this access to information from third parties and to the Commission's allegations under conditions which are not met here because, whether it's a matter of regret or not, we

are no longer a member of an EU Member State and we are not, for the purposes of this claim, applying chapters I and II.

So that is the first concern. It's a genuine concern on the part of Qualcomm because it's being asked to hand over not only its own information but it's being asked to hand over third party information, confidential third party information.

MRS JUSTICE BACON: So your first point is the conditions under which you obtained the material.

MR JOWELL: Access. That's absolutely right.

MRS JUSTICE BACON: All right. Point number 2?

MR JOWELL: Number 2 is that it's important -- there are really two parts to this.

First, we say that Pergan goes somewhat further than my learned friend suggests. It's a general principle, and it applies not just to allegations that are contained in Commission decisions but also to allegations or allusions that may be contained in other Commission documents, such as a statement of objection, or indeed potentially other documents, such as a statement of facts and even an RFI.

Authority for that you will find in a regretfully very short judgment of Birss J in the Vodafone v Infineon case, if I could hand up copies of that, please. My learned friend has received copies already. **(Handed)**

Now, as I said, the reasoning is very short. You see it's in paragraph 3. Birss J held:

"I will not direct disclosure of the statement of objections and replies at this stage. In my judgment, the logic of the Court of Appeal's judgment in Emerald means that Pergan considerations can apply to an SO and replies, and a national Court should bear that in mind."

If I may take you back to Emerald briefly to show you that that actually is a good reading of the Pergan principle as expanded by the Court of Appeal in Emerald. In particular, if one looks at -- one sees it perhaps most clearly in paragraph 84, which is in the authorities bundle at page 504:

"As Mr Beard and Miss Ford submitted, while a confidentiality ring may protect an enterprise from wider reputational repercussions it may suffer if allegations about its conduct in Commission Decisions are widely publicised, it does not protect an enterprise from the harm that arises when adverse statements by the Commission are used to support private claims for damages by third parties."

The provisions of the order don't offer any sufficient protection in this regard. The Judge goes on to explain, for example at subparagraph (iv) on the next page, he says:

"The claimants' undertakings do not provide any absolute protection to the addressee and non-addressee airlines against the use of the information by the claimants either: (i) to inform their decisions whether to commence new proceedings in this or other jurisdictions; (ii) actually to bring new proceedings in this or other jurisdictions; or (iii) to use the information in extant proceedings in this or other jurisdictions. For example, the order does not restrict the claimants from making a without notice application for permission to use such information for such purposes ..."

And so on.

"That in our judgment is inconsistent with the protections to which the addressee and non-addressee airlines are entitled by the virtue of the Pergan decision.

"(v) The claimants' undertakings do not provide any protection against the risk of the claimants' solicitors and economic advisers (who are also advising other claimants on other claims in respect of the cartel ...) being influenced in their conduct of those ... proceedings by their knowledge of the information contained in an unredacted copy of the Decision."

And you see earlier in the judgment, in paragraphs 79 to 80, you see there is a stress on the fact that effectively -- so Pergan doesn't depend on whether the information is admissible in the UK proceedings, it doesn't turn on the fact that the addressees can defend themselves. It's predicated on the notion that a mere allegation by the Commission, wherever that may be, whether that's in a decision or a statement of objection, can have a prejudicial and unfair effect in a wider sense.

So that's the first point. That's what underlines Pergan.

MRS JUSTICE BACON: The primary request here, as I understood Mr Armitage's submission, was not for the SO response, although he said that was part of his request, but primarily he's after the RFI responses.

MR JOWELL: Yes.

MRS JUSTICE BACON: How could that contain any Pergan-protected material?

MR JOWELL: Well, it depends, because we're not in a position to say precisely -- well, two points on that.

First of all, he did -- as you rightly identify, Madam, his application does extend to the statement of objections, to the statement of facts and responses to those, and those, in my submission, are clearly arguably covered by Pergan.

So then the question is: well, what about the RFIs? He puts that at the top of his agenda because he thinks that's least likely to engage Pergan. Well, they may or may not engage Pergan; it depends, it may depend.

This is where we come to the second point which is crucial here, and that is that this is an unusual case because the decision was not just annulled; the decision was annulled on fundamental procedural reasons. That there was a real unfairness in the way that this investigation by the Commission proceeded, and that, in a sense, shoots through the whole process, including the requests from the Commission.

So if I could just show you that briefly. It's in the bundle at 1832, tab 32, the judgment of the General Court which overturns in its entirety the Commission's decision, and it does so on the basis that this was an unfair investigation. So it's not just, "You made a wrong assessment of the market", or something like that. The investigation itself was fundamentally unfair.

You can get a flavour of that if one goes to, say, page 1855. You see there were meetings and collections of information from third parties as part of the investigation. You see at paragraph 187 they say:

"First, from a procedural perspective, the meeting and the conference calls and questions were held after the Commission had commenced the investigation ... and ... after the first information requests ... had been sent ... the notes drafted by the Commission all refer to the administrative procedure which led to the adoption of the contested decision ... [and] the exchanges which the Commission had with the applicant when it forwarded those notes ... bear [the] same reference and refer ... to [the case number].

"188. Second, from a substantive perspective, those notes all indicate that the meeting and the conference calls in question concerned the chipsets market, the applicant's position on that market or certain of the applicant's business practices on that market."

So these interviews, these interactions with third parties, are about this very issue of market definition and dominance.

Then you see in 189:

"Since the meeting with [X] and the conference calls with [Y], [Z] and [Q] were conducted for the purposes of collecting information relating to the subject matter of the investigation, as regards the relevant market, the applicant's position on the market or [their] business practices ... they fell within the scope of Article 19 ..."

And you see more of it if one goes to page 1859.

MRS JUSTICE BACON: Well, it's talking about inadequacy of the notes taken by the Commission.

MR JOWELL: Yes, that's right. But the information obtained by the Commission is effectively skewed by absences, if you like. If you look at paragraph 212 on 1859, you see they say:

"Therefore, in such circumstances, as the applicant argues, it must be held that the information obtained by the Commission from those third parties during the interviews in question, and particularly from the competitors who were allegedly foreclosed, might have been relevant for its defence."

So in other words, there was a material absence of potentially exculpatory information.

MRS JUSTICE BACON: Yes.

MR JOWELL: So there is more than a question mark on the propriety of this whole investigatory process.

If one goes to 1879, one sees --

MRS JUSTICE BACON: But I don't think that anyone's ever suggested that the documents that you are disclosing are going to be the full set of documents that is relied upon at trial. It's simply that that is a source of documents. And of course it will be open to you to make whatever submissions you like about the completeness or otherwise of the responses to the requests, the context in which they were obtained and so on, but I'm not sure that that prevents you from disclosing those at all.

MR JOWELL: Well, if one goes to -- one sees -- if I may just -- may I just finish what I was going to, the last part of the case, and then if I may answer that point.

If we go to 1879, at paragraph 344 we see that they find that:

"... the examination of the first plea ... that the administrative procedure which led to the adoption of the contested decision is vitiated by a number of procedural errors which affected the applicant's rights of defence."

Now, you can see that there is a strong argument, to say the least, that information obtained in those circumstances by a procedurally unfair process is, first of all, not reliable information. Madam, you say to me, "Well, you can make that point when it comes to us".

But there's also another point, and this is the critical point: is it really proper that the Commission should be providing information which is, on a prima facie basis, relevant to other proceedings in circumstances where it was obtained by an unfair process?

Of course the European Court is not going to overturn the Commission decision for some trivial reason. These were multiple, profound procedural failings by the Commission. And we say there is at least a question mark -- at least a question mark -- as to whether it's proper for the Commission to be providing information that was obtained in this way and information that may give a clue as to allegations that were arrived at by a profoundly unfair procedure. The Commission may well consider that this is actually

a matter where these documents are potentially misleading documents and they should go no further.

So we say that therefore one should proceed with caution here. We have offered what we think we can properly offer, which is the pre-existing documents, because they are untainted and not subject, we think, to any prohibition on disclosure by the Commission. But we say that documents that might reveal allegations or allusions by the Commission to its allegations can't be provided, nor can third party documents be provided, nor is it right at the current stage for us to even provide information that we have provided to the Commission in response to these allegations because they might give an indication of the allegations that were made against us or respond to allegations of third parties in circumstances where the whole process was profoundly flawed and unfair as well.

So we say one should proceed step by step. We don't say we do nothing, and we don't say we don't ever produce anything. We simply say that the sensible thing at this stage is to write first and obtain the Commission's view on this. It's a rather unique set of circumstances and it's not helpful to look at previous cases where the circumstances were entirely different.

So those are our submissions on this point.

MRS JUSTICE BACON: Thank you.

Mr Armitage.

Reply submissions by MR ARMITAGE

MR ARMITAGE: Very quickly, if I may.

You'll correct me if I'm wrong, but I don't think you'll be assisted by anything on the background to the closure of the investigation. It's not now, I think, disputed that the investigation is closed, so that objection has, on any view, fallen away.

The first substantive point Mr Jowell made was that this Court is no longer a Court of an EU Member State. But there's a restriction on the use of documents Qualcomm received

in the course of the investigation, referring to them only being used for the application of Articles 101 and 102. At least two points, perhaps two and a half.

The first is that, as I understand it, that objection would apply to the disclosure that Qualcomm has offered to provide; it would also apply to any pre-existing documents referred to in the decision which are not Qualcomm documents but which have been received by Qualcomm in the course of the access to file procedure.

The second point, more fundamental point: this is a claim --

MRS JUSTICE BACON: Why would it apply to documents that Qualcomm had provided? If I'm looking at paragraph 5(c), what they're saying is they're bound by an obligation to the Commission not to disclose documents obtained via access to the EU file. If they have provided them already, then they haven't obtained them by access to the file.

MR ARMITAGE: I maybe wasn't clear.

As I understand it, the offer, if you like, is all pre-existing documents referred to in the relevant bits of the Commission decision. Insofar as those are not Qualcomm's documents, they are other parties' documents obtained by the Commission in the course of its investigation and referred to and relied on.

MRS JUSTICE BACON: No, I think that the offer refers to documents produced by Qualcomm that constitute -- so "the documents that were produced by Qualcomm and constitute pre-existing evidence not produced for the purposes of the investigation". So they're carving out anything that they only produced for the purposes of the investigation, and they are saying that they will disclose the pre-existing documents that they produced, with two conditions.

MR ARMITAGE: Yes. Well, this may be a -- I haven't seen --

MRS JUSTICE BACON: That's the wording of the order.

MR ARMITAGE: I'm so sorry. I'm so sorry, you're quite right. I will gently retract that point.

The more fundamental point, if I may, is that the claim period in this case begins in October 2015. So there is, I think, a four-year period, at least a four-year period, in which Article 101 and Article 102 had direct effect. And the claim relies on Articles 101

and 102, so that is precisely what is being sought: disclosure of documents to assist them in the determination of a claim based on those provisions of the treaty.

Then -- I said two and a half points; I think it is a substantive further point -- we don't see that the prohibition referred to concerns an order by the Tribunal requiring Qualcomm to disclose the documents concerned. And we saw in the National Grid case an order for disclosure of precisely this kind of document. So in my submission, that isn't a good objection.

MR TURNER: Sorry, I'm sure I'm being slow. But the documents that fall inside your category and outside Qualcomm's category which you're interested in, you refer to responses to RFIs. Just in terms of the practicalities, what are the other types of documents that you're anxious to obtain?

MR ARMITAGE: I think impressionistically it's -- I think I gave you the statistic at the start that almost half of the footnotes referred to RFI responses. So it is very largely those documents.

MR TURNER: Okay.

MR ARMITAGE: I think there are some --

MR TURNER: But you're not seeking third party documents?

MR ARMITAGE: Yes, because --

MR TURNER: Sorry, yes, you are, or yes, you're not?

MR ARMITAGE: Yes, we are, because many of the responses are from third parties, so chipset providers and chipset customers. Yes. Yes, very much so.

I think we see a real potential benefit in that because it may well avoid the need, or at least limit the need, for us to obtain third party disclosure and/or evidence from third parties in the prosecution of our claim. So it's extremely important and it is third party materials.

MR TURNER: I understand.

MR ARMITAGE: So, yes, it does cover that.

MR TURNER: Third party responses to RFIs?

MR ARMITAGE: Yes. I think there are also Qualcomm responses to the statement of objections, so that's another category. I had asked those behind me to check if the footnotes refer to the statement of objections itself. In my submission, the statement of objections is not covered by the Pergan principle either.

But yes, certainly the principal basis on which the application is put, or the principal driver for the application, and the reason there's an argument today about the scope, is the RFI responses; and indeed, particularly those from third parties, so the customers and the competitors.

MR TURNER: And the confidentiality of those responses, third party confidentiality?

MR ARMITAGE: Yes.

MR TURNER: How are you proposing to deal with that? The third parties aren't here today.

MR ARMITAGE: Yes. So this is something that perhaps I can see we should have provided for.

There's no issue there. It's standard in relation to these -- let me take a step back. There is an issue there: third party confidentiality may arise. But there's a well recognised way of dealing with that, which is that any order for disclosure can provide a short and proportionate opportunity for those third parties to comment on the existing regime for the protection of confidentiality. They can make any comments they wish within a reasonable period of time -- a short and reasonable period of time -- and of course they can make submissions if they wish on the adequacy of the existing regime.

We don't have it in the bundles but there's an order made, I think relatively recently, in the follow-on litigation in this Tribunal by Cockerill J in the Jaguar Land Rover claims which provided for disclosure of exactly these kind of documents, documents as from the Commission's file, as distinct from the Commission decision itself, and it made exactly that provision. So there's almost a model order in fact.

In fact, I see it was a deficiency for us not to have made that provision. But that's something that could be, we say, sorted out. And it's at most a practical point; it's not an absolute

objection to disclosure. We of course recognise that third parties, if there are confidentiality issues, should have an opportunity to raise them.

MRS JUSTICE BACON: Would that include objections on Pergan grounds by those third parties?

MR ARMITAGE: Well, in my submission Pergan does not apply to any of the materials we are seeking.

So, taking them in turn, RFI responses, they are obviously not findings of liability. Insofar as Pergan covers allusions to findings of liability, well, RFI responses precede a Commission decision.

So insofar as it's suggested that one can infer anything about findings that the Commission has made from the responses, perhaps because they refer to the text of the request, that isn't an allusion to a finding of liability; it's antecedent to that. So it's just not covered.

In fact, interestingly, Madam, that you mention that: the Cockerill J order that I mentioned, it provided -- perhaps it would be useful to supply a copy -- it provides for disclosure of both the confidential version of the Commission decision and makes provision for Pergan redactions, if sought by third parties, to the Commission decision prior to disclosure, but the provision in relation to disclosure of the underlying documents on the file makes no such provision. And in my submission that's for obvious reasons: Pergan does not apply to documents falling in that category.

Now, in support of the proposition that Pergan extended beyond findings in the Commission decision, reliance was placed on a short, largely unreasoned ruling of Birss J, as he then was, in a case called [Vodafone]. That was relied on, I think, if I understood it correctly, as authority for the proposition that statements of objections and replies -- ie further replies to the statement of objections -- are potentially within the scope of Pergan.

I accept that does seem to have been suggested by Birss J. In my submission, that was wrong. And the authority that reliance was placed on, which Mr Jowell took you to,

was the Emerald case, paragraph 84. But I showed you Emerald. It's very clear: it's findings of liability in a Commission decision or allusions thereto.

Insofar as there is any basis for redactions to be made to underlying documents, RFI responses and so on, on Pergan grounds, the answer to that is that the order provides for third party observations to be made. I say in my submission this is not necessary because it's not a permissible basis for redactions by third parties. But if it were, that would be something just to be built into the order, in the way that is conventionally done when a Commission decision is disclosed in domestic proceedings. It would be then for the third parties to seek to make redactions on Pergan grounds, and then the Tribunal could consider whether they were appropriate.

So again, that is, at most, a practical point; it's not a complete bar to disclosure. But I say it's not even a practical point.

Then finally, my learned friend obviously placed reliance on the fact that the decision has been annulled. In my submission, it's a non sequitur to say that that means that disclosure of these materials is prohibited or that it's necessary or appropriate to involve the Commission.

Yes, the General Court found that the procedure was not fair in certain respects. But the question is: why does disclosure of factual material from the investigation, notwithstanding the findings of the General Court, affect the presumption of innocence or affect Qualcomm's fair trial rights?

Qualcomm has every opportunity in this Tribunal, as you observe, Madam, to have a fair trial and say whatever it likes. As you said -- I respectfully adopt it -- no one is suggesting these are necessarily the sum total of the evidence that you're going to be deciding the case by reference to.

So I come back to Pergan itself. It is a very limited principle.

MR TURNER: Sorry, a very basic question: why does Pergan apply today at all?

MR ARMITAGE: In my submission, on our application, it doesn't apply at all. We are not seeking any documents to which the Pergan principle applies. Because that would

only be -- in my submission, it's difficult to see how it would apply to even disclosure of the Commission decision in this case, but that's not an argument for today. Sometimes Pergan does arise.

Pergan is limited even in relation to a Commission decision: it's limited to findings that the relevant undertaking --

MR TURNER: I'm thinking more post-Brexit.

MR ARMITAGE: Oh, I'm so sorry. I think -- well, that's an interesting and difficult point. I think it's not a point we've made in support of that. I don't need to go that far, in my submission.

MRS JUSTICE BACON: No, you don't say that in principle Pergan doesn't apply at all. There would be interesting questions about when the documents were obtained and whether that was a pre-exit day and so on. But that's not a point you've taken, is it?

MR ARMITAGE: No. I think Pergan is pre -- I can't remember the statutory phrase -- but pre-exit date case law, binding in relation to claims issued before Brexit, I think.

MRS JUSTICE BACON: Yes.

MR ARMITAGE: Then you may get into some interesting questions about the scope of the claim. But yes, it's not -- I don't dare to go there today, and in my submission I don't need to.

MRS JUSTICE BACON: A point about the embargo, if you like, that's referred to in the letter sent last night:

"You should use the information contained solely for the purposes of proceedings for the application of Article 101 and [presumably that should say Article 102] of the TFEU."

Do you accept that the embargo does in principle govern what Qualcomm can do with the documents? Leaving aside your question about whether these are proceedings for the application of 101 and 102, are you content that you should be bound by that? If not, why not?

MR ARMITAGE: I think my position may require a bit of further articulation by reference to -- the relevant regulation, which is a 2004 regulation, would presumably have

applied to all of the documents referred to in the National Grid litigation and so on and so forth, irrespective of whether it binds Qualcomm. I'm not in a position today to say whether I accept that or don't, I'm afraid.

But the point is it doesn't bind this Tribunal in making disclosure orders; certainly not when it's a claim that is for the application of Article 101 and 102.

MRS JUSTICE BACON: So your primary position is that this Tribunal is not bound by the embargo at all, so we can order disclosure notwithstanding the terms of the embargo. And secondly, in any event, you say: even if we were bound by it, these are proceedings for the application of 101 and 102.

MR ARMITAGE: Absolutely, yes. That's very helpful. That's our position.

MRS JUSTICE BACON: All right.

Yes, Mr Jowell.

Reply submissions by MR JOWELL

MR JOWELL: Could I quickly just comment on that last point, which is that whether or not you are absolutely bound by it or not, nevertheless we say that it's a very important consideration of comity.

MR TURNER: (Inaudible words)

MR JOWELL: Yes, and we think that that's an important consideration to bear in mind.

MRS JUSTICE BACON: Were you just talking about Pergan or were you talking about the embargo?

MR JOWELL: The embargo.

MR TURNER: Oh, sorry. I misunderstood.

MRS JUSTICE BACON: The point is being taken that the embargo doesn't bind us.

MR JOWELL: Yes. The embargo may bind the Court, but nevertheless it's important that one should bear in mind the interests of comity, if this is how the Commission chooses to do things and how it protects third party information, and it's very important that this

Court treads carefully and considers carefully the considerations of comity if it starts making orders that violate that.

I mean, for example, if one could imagine the shoe was on the other foot and there were proceedings in this jurisdiction before the CMA, and the CMA gave assurances to third parties, and a particular applicant then found itself in front of an American Court, say, facing a class action, and all the documents of the third party suddenly ended up in the American Court, that wouldn't be particularly desirable. It would be important that the American Court should take into account the interests of comity.

MR ARMITAGE: I'm not here making any point whatsoever about timings. The point about the 2004 regulation is a point that appeared in a letter which I saw for the first time just before court today. If the Tribunal would be assisted by any further points on that -- I've set out my position. But it's a regulation, I think, that applied -- well, it applied in the course of the litigation in National Grid to which I referred. I don't understand that it's ever been ...

So I did just want to put that on the record, if you like. But I think you have my position on the point.

MRS JUSTICE BACON: Yes.

MR ARMITAGE: I'm grateful.

MRS JUSTICE BACON: We're going to rise, and we need a break anyway for the transcriber. So we'll rise for 10 minutes or so.

(3.35 am)

(A short break)

(3.50 pm)

Ruling

(For Ruling, see [2023] CAT 4)

MR ARMITAGE: I'm very grateful.

On the final point, obviously at the moment the draft order doesn't provide for that mechanism, but we can liaise with the other side about a suitable mechanism, and perhaps taking some inspiration from the order I referred to in the other litigation, and return to you if there's any issue over timings, I suppose, if that's agreeable.

MRS JUSTICE BACON: Yes.

Now, we need to rattle quite quickly through the remaining points.

MR ARMITAGE: Indeed. I hope we can do so.

Submissions by MR ARMITAGE

MR ARMITAGE: Paragraph 9, as I say, the number 8 in blue is an error. The only debate is the words in red.

We say -- and I'll make this submission in 10 seconds -- the words are unnecessary. It's unclear what they are intended to achieve in circumstances where all of the disclosure referred to above, the preliminary disclosure, is limited to documents within the defendant's control. So we don't see any need for those words, we don't see what they achieve.

MRS JUSTICE BACON: All right.

MR ARMITAGE: And paragraph 10, it's the same in relation to that.

MRS JUSTICE BACON: All right. So I'll hear Mr Jowell on that.

Submissions by MR JOWELL

MR JOWELL: I'm not sure that we also understand the objection to paragraph 9 because what we are saying in paragraph 9 is that they should be in the English language versions, where those versions are already readily available and are able to be disclosed. So if it's suggested that we should create English language versions or go out of our way to find them, then we don't think that's reasonable.

MRS JUSTICE BACON: The unobjected wording says, "where such versions are available". I don't think it's suggested that you should create them. The only question was to the "readily available".

MR JOWELL: Yes. Well, provided it's understood that that wouldn't include draft translations, which might be subject to privilege.

MR ARMITAGE: If they're privileged, fine. But I don't see -- if there's a draft translation that's the best available version, we'd obviously want that. But obviously privilege is a different matter.

MRS JUSTICE BACON: There's no comment on that which limits this to final versions as opposed to draft versions. The only question is whether it means "readily available". I think I'd be somewhat reluctant to insert wording that generates satellite disputes about the ease with which the translations can be retrieved from your systems.

MR JOWELL: Well, the only difficulty with that is that there might be some -- I think the concern is that there might be a document that is translated into English but is difficult to locate.

MRS JUSTICE BACON: All right. But you have until 24 February. Exactly how long does it take you to find a document?

MR JOWELL: Well, these are multiple documents.

MRS JUSTICE BACON: But the date has been agreed for the disclosure of the relevant documents. All that is said here is: well, for the avoidance of doubt, where available, when you're providing disclosure on that agreed timescale, it should be the English language versions.

MR JOWELL: Yes, and we say that's fine as long as we have the English language versions available. We don't want to be in breach of the order just because there's some English language version that has been overlooked somewhere, that's the problem.

MRS JUSTICE BACON: Well, I think everyone has to be sensible about this.

MR JOWELL: Yes. I think as long as it's understood that it's not intended that we should do separate extensive searches to see whether --

MRS JUSTICE BACON: Somewhere in the world there's an English language version. I don't think anyone is going to be asking that. So we can delete the red words in paragraph 9.

What about in paragraph 10? It's a reasonable endeavours point. It seems to me that you don't need the "readily available and identifiable". If you can't do it by then, you can't do it, and you'll say why you can't.

MR JOWELL: May I just take instructions? **(Pause)**

Yes, again, the point is made that this is intended to be preliminary disclosure, provided rapidly, relatively rapidly, and again, we don't want to be expected to do inordinate extensive searches.

MRS JUSTICE BACON: That's incumbent upon reasonable endeavours already.

MR JOWELL: As long as that's understood.

MRS JUSTICE BACON: Yes. All right, we'll remove the red wording in paragraph 10.

That brings us then on to paragraph 11. That's Mr Jowell's request, I think. All right. 13. Sorry, is there anything before then? No, the date is agreed in paragraph 12. Paragraph 13 then.

MR JOWELL: This is an important matter because the class representative is likely, and has stated that it's likely, to seek third party disclosure, and the scope of that third party disclosure could be important for the resolution of the issues in this case.

We are concerned by two things. First, that we are being, to put it neutrally, repeatedly surprised by matters that are brought up at the last minute and that important things are provided without us having an opportunity to review them. And there is also a tendency on the part of the class representative to proceed in a unilateral fashion.

We think it's very important that the scope of this third party disclosure is provided with cards open on the table, as is meant to be the case in litigation in this jurisdiction, and that we have an opportunity to consider it, to comment on it, and for the Tribunal to consider it. What we don't want is for there to be the class representative effectively going off unilaterally making a request, or suddenly springing us with a request very shortly before the next CMC.

MRS JUSTICE BACON: What are you talking about when you say "third party disclosure"?

MR JOWELL: Well, we understand that they have indicated that they will be seeking disclosure from third parties, particularly Apple and Samsung, we anticipate, and maybe others, relevant to the issues in the proceedings, and particularly in relation to the potential pass-on by Apple or Samsung of the allegedly higher patent rates.

MRS JUSTICE BACON: Yes, but isn't that for them to just -- at some point, if they want to seek that disclosure, then they'll have to make an application for that.

MR JOWELL: Yes, and we say that they should make that -- we say that just as we have to provide our proposed disclosure in advance of the next CMC --

MRS JUSTICE BACON: It's not your proposal for third party disclosure, it's the disclosure proposal for the disclosure you're going to give to them.

MR JOWELL: Yes.

MRS JUSTICE BACON: It seems to me that third party disclosure is something fundamentally different, isn't it?

MR JOWELL: In our respectful submission, it's not. It's going to be -- from a practical point of view, first of all, it's going to be very important to know when and what is being sought and how it's being sought, because that can then affect the progress of the proceedings.

So, for example, if they make an application very late and a trial date has been set, it can jeopardise the trial date. It could also mean that we obtain this information very late, or our experts obtain --

MRS JUSTICE BACON: If they make a late application which is like to jeopardise the trial date, then the Tribunal might simply refuse that application. This is a long way away from trial, isn't it?

MR JOWELL: We believe it is. But we nevertheless think that they should start to think now about what is -- and I'm sure they have already started to think about what is the scope of the third party disclosure they are going to be seeking. And if they are going to make proposals, they should make proposals openly and not -- as I said, what we're

concerned about is them doing it unilaterally, without consultation and without sufficient time for us to consider it.

MRS JUSTICE BACON: Well, they can't do it unilaterally because they're going to have to ask the Tribunal to make the order and then you'll have the chance to comment on that.

MR JOWELL: Not necessarily, Madam, because they can, for example, bring a 1782 application in the United States.

MRS JUSTICE BACON: Well, then they have to make an application there. I don't understand what you say about unilaterally.

MR JOWELL: Yes. Well, the proper -- well, what I mean by "unilaterally" is they will make an application in the United States for specific categories for disclosure that may be selective, for example. And we will then say: well, actually if we're going to get those categories of disclosure, one should also get these categories.

MRS JUSTICE BACON: Then you can say that at the time the application is made.

MR JOWELL: Yes, but in our respectful submission it's not good case management for this sort of thing to go on without the Tribunal being au fait with it and indeed with us being given an opportunity to comment on it. Otherwise what you have is they will shoot off an application, we will shoot off an application; things can get extremely unnecessarily complicated.

Therefore, we think that they should openly provide what proposals they are making for third party disclosure, and they should do so in advance of the next CMC. If they're not prepared to do it for the next CMC, but they still say that there should be third party disclosure, then what is going to mean is that the matter can't be set down for trial at the next CMC.

MRS JUSTICE BACON: Why not?

MR JOWELL: Well, because a 1782 application can delay things considerably, for example.

MRS JUSTICE BACON: Well, if they make it late, then they do that at risk that the matters obtained won't be taken into account at trial and will be inadmissible.

MR JOWELL: Madam, can I put it this way then: that if they are to make proposals for third party disclosure at the next CMC, they do so at least ten days in advance.

MRS JUSTICE BACON: That's a different question. You've made a point in your skeleton argument about things coming in at the last moment which we can consider. There's not a provision for that in the directions. But I can see that --

MR JOWELL: As a fallback, we would say: if they are going to make proposals at the next CMC for third party disclosure, then -- and if they don't, then we put down a marker that making it later or making it without consultation could be very disruptive to the progress.

MRS JUSTICE BACON: Yes. I think you are going further and saying that any application should be made at least ten days before.

MR JOWELL: We do indeed.

Direction

MRS JUSTICE BACON: All right.

I don't need to hear from Mr Armitage. I think we can deal with the question about springing applications at the last minute by making a direction that any application for the CMC should be made a certain number of days before the CMC. Mr Armitage, do you have any objection to ten days, as suggested by Mr Jowell?

MR ARMITAGE: Just so I understand, so it's a one-off order, if you like, rather than a general order? So it's for the next CMC, ten days?

MRS JUSTICE BACON: Yes.

MR ARMITAGE: May I just take a moment? **(Pause)**. Just for the record, we don't accept the premise for the application in terms of -- I'm not going to address you on that -- but we don't accept it's a punitive provision or anything like that. We of course accept the principle that application should be made in good time ahead of any CMC. We respectfully suggest seven days for the next CMC. The applications for this CMC were made last Friday by us, there has obviously been lots of movement since then, it's always a balance, but we say seven days is more appropriate than ten.

MRS JUSTICE BACON: Seven calendar days or seven working days? Just for the avoidance of any doubt.

MR ARMITAGE: I think we would say seven calendar days, if that's agreeable.

MRS JUSTICE BACON: Mr Jowell, is there any problem with that?

MR JOWELL: When one considers that there needs to be responsive evidence potentially and then opportunity -- we think ten days is actually acceptable and appropriate.

MRS JUSTICE BACON: All right. Well, we'll say ten calendar days. With the weekend intervening we do think that seven days, given the necessity for any response, is cutting it a bit short, especially if we want the parties to have narrowed any disagreements between them by the time of the CMC. We won't make an order now that the class representative should file a disclosure report setting out its proposals for disclosure from relevant third parties. Apart from anything else we think that it's premature at this stage, and it will be for the class representative in due course to consider whether it seeks any order from the Court in respect of third party disclosure.

Housekeeping

MRS JUSTICE BACON: I think that deals with everything on the agenda save for the costs of this hearing. Before we get to costs, is there any other issue we need to deal with?

MR ARMITAGE: Madam, obviously in the skeleton argument and in the letter to the Tribunal we had suggested the Tribunal might consider today some points of principle relating to relevance. I see the time.

MRS JUSTICE BACON: Well, I can tell you that the Tribunal wasn't minded to do so in any event.

MR ARMITAGE: Yes. You'll have seen our position, it's set out clearly.

MRS JUSTICE BACON: Yes. We don't think it's appropriate for us to give opinion evidence on abstract points when we don't have the documents before us. If there is a dispute about relevance then we can decide that at the time.

There is the outstanding question, I forgot before we come to costs, regarding the date of the next CMC. You were all going to take instructions as to whether that was doable or not.

MR ARMITAGE: As to whether the May date was doable?

MRS JUSTICE BACON: Yes.

MR ARMITAGE: So with some regrets on my side we think that may be a case of -- it may be a case of less haste more speed and actually the July option is preferable. There are lots of issues to be dealt with. We think May is a bit too tight given the agreed timing for Qualcomm's disclosure report. So it's really the first available date after --

MRS JUSTICE BACON: 13 June.

MR ARMITAGE: -- 13 June, on the understanding it may be July.

MRS JUSTICE BACON: Yes.

MR ARMITAGE: I think that's agreed?

MR JOWELL: We do.

MR ARMITAGE: The only point, Madam, is Mr Jowell and I both think it's sensible for it to be listed for two days, or one day with one in reserve. Obviously we can notify the Tribunal nearer the time if the second day isn't required, but there may be quite a lot of issues on disclosure.

MRS JUSTICE BACON: We will do that, but then we would encourage the parties to narrow the issues between them.

MR JOWELL: Absolutely.

MRS JUSTICE BACON: I think the problem with this CMC was that it was listed for one and then it was suggested that two might be required, and obviously doing it that way round is not going to be feasible.

MR ARMITAGE: It is simply to avoid that situation.

MRS JUSTICE BACON: I will do that, but I'm reluctant for a CMC to spill over into two days. So I would encourage the parties to be able to confine this to one day, and if they are able to do so in sufficient time to indicate in their skeleton arguments, or even before

that, that only one day will be required so that the second day can be released from the diaries of all involved. Then that would be preferable.

MR ARMITAGE: Of course, we entirely agree with that.

MRS JUSTICE BACON: All right. So provisionally two days. Then anything else other than costs?

Costs

MR ARMITAGE: Only costs, but I think that is now agreed. Does your draft order just say square brackets?

MRS JUSTICE BACON: Yes, it says square brackets.

MR ARMITAGE: I think there is a more up to date one.

MRS JUSTICE BACON: What is agreed?

MR ARMITAGE: So in relation to the amendments, the consented to amendments at paragraphs 1 and 2, that's the usual order, costs of and occasioned by the amendments going each way. Other than that, costs of all these matters, costs in the case.

MRS JUSTICE BACON: Yes, but there's one more point to raise, but just before we do that, are you saying costs in the case irrespective of where we come out on the strike out?

MR ARMITAGE: Yes.

MR JOWELL: We have to accept that.

MRS JUSTICE BACON: All right, okay. Mr Turner has one more point.

Question from MR TURNER

MR TURNER: I just want to raise a point that actually I raised at the last hearing. If I could just ask you to go to tab 4, which I think is Qualcomm's defence, just to pick it up, it appears in many places, but if we pick it up at 10.3(b), so that's page 62. In subparagraph (b), about two-thirds of the way down, there's a sentence that says:

"From the beginning of the cellular industry, all major SEP holders exhaustively licensed..."

PROFESSOR MASON: Is this the core bundle?

MR TURNER: Yes, tab 4. So:

"From the beginning of the cellular industry, all major SEP holders exhaustively licensed their SEPs only at the end device level. When Qualcomm entered the industry, it followed this established industry practice. Qualcomm has no duty to license its SEPs exhaustively to competing baseband chipset suppliers."

I think, as I understand Qualcomm's position, broadly it has some non-assert agreements with these competing chipset suppliers.

Qualcomm's position is that this does not give rise to exhaustion, and so you have no duty to licence sets exhaustively to competing baseband chipset manufacturers. Now, exhaustion is normally a legal concept, not something that arises under a duty, so I think what we'd like to be addressed on, at least in writing by the time of the next CMC, are the following points. First of all, why as a matter of UK law does the non-assert agreement of this species not of itself give rise to exhaustion? (Is a non-assert not a licence by another name?) On what basis, therefore, is a royalty then sought from the customers of these rival manufacturers? Of course, we are focusing particularly on Apple and Samsung. I think it would be helpful to understand that from the point of view of UK law and European law.

A further question then arises, what is the relevant law for this analysis? Of course, one appreciates it may not be UK law at all if these licences are operating in other countries and manufacturers is in other countries.

So I think I invited you to address us on this at the last hearing, and I notice nobody said anything yet. So perhaps -- I'm not asking you to answer those questions today.

MR JOWELL: No, and forgive us for overlooking that, of course I wasn't personally at the last hearing.

MR TURNER: I appreciate that, of course.

MR JOWELL: Mr Saunders I am sure, co-counsel, will no doubt have a more informed response than myself. But I notice that the United States Court of Appeal referred to it as the non-assert as being no licence/no problem, is the way they summarised the point. So, yes, we have the points and we will certainly of course address them.

MR TURNER: I think that applies to both parties.

MRS JUSTICE BACON: Perhaps there could be just recorded in the order that we would like written submissions on those points at the latest at the next CMC.

MR JOWELL: Yes.

MRS JUSTICE BACON: Regarding the drafting of the order, obviously you won't be able to make any provision as regards the strike-out argument, the outcome, though, in relation to the order, but I think that it's important that we sort out the order promptly after the hearing. So can I ask that by close of business on Monday a draft order is sent to the Tribunal so far as is agreed? If there are any points that are not agreed then you should indicate the points of disagreement and accompany the order with brief submissions on whatever is not agreed.

I think what you'll have to do is make provision that a ruling on the strike-out application is reserved, but nevertheless to make clear that the provision for costs includes the costs for a strike-out application. In due course, when judgment is handed down on the strike-out application, then there will be an order on that.

Application for permission to appeal by MR JOWELL

MR JOWELL: I'm grateful.

One further matter. We would seek permission to appeal in relation to the ruling on disclosure on the grounds being twofold: (1) that the terms of the embargo are that the information must be used solely for the purposes of proceeding for the application of Article 101 and 102 and these proceedings are not solely. Secondly, that we rely on Birss J's ruling that Pergan does apply to at least statements of objections. We say that they do raise a point of law that has got reasonable prospects of success. So we do seek permission at least to appeal.

Decision

(For Ruling, see [2023] CAT 4)

MR JOWELL: Thank you.

MRS JUSTICE BACON: Is there anything else that we need to address now?

MR ARMITAGE: I'll double check just in case. **(Pause)**.

MR JOWELL: I'm reminded that we do have the additional authorities on the strike-out, the Employment Tribunal case.

MRS JUSTICE BACON: Yes, I understand they have been sent to the Tribunal.

MR JOWELL: They have been sent to the Tribunal.

On behalf of us all, thank you very much.

MR ARMITAGE: There is one question, it's whether we are permitted to make any further submissions in writing on the further authorities.

MRS JUSTICE BACON: I'm not inviting any submissions on the authorities to be provided by either side, but --

MR ARMITAGE: Obviously, if so advised and strictly limited, I'm not suggesting we will do it, it's just we haven't read them, that's the only thing.

MRS JUSTICE BACON: The authorities have just been sent to us. If you have any more submissions to make on that you can put them in no more than two pages of A4 with no playing around with the margins, please! Unlike some submissions I have received recently! Any response on one side of A4. Your submission to be made by close of business on Monday; Mr Jowell's submissions in response by close of business on Tuesday. Two pages and one page each and then we'll deal with the matter.

All right, thank you.

(4.20 pm)

(The hearing concluded)