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5 **IN THE COMPETITION**

Case No.: 1382/7/7/21

6 **APPEAL TRIBUNAL**

7 Salisbury Square House

8 8 Salisbury Square

9 London EC4Y 8AP

10
11 Wednesday 5th July 2023

12
13 Before:

14 The Honourable Mrs Justice Bacon

15 (Chair)

16 Professor Robin Mason

17 Justin Turner KC

18
19 (Sitting as a Tribunal in England and Wales)

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21
22 **BETWEEN:**

23
24 Consumers' Association

Class Representative

25
26 v

27
28 Qualcomm Incorporated

Defendant

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

33
34 Rob Williams KC, Michael Armitage, Ciar McAndrew and Antonia Fitzpatrick (instructed by
35 Hausfeld & Co. LLP on behalf of Consumers' Association)

36
37 Daniel Jowell KC, Nicholas Saunders KC and Jonathan Scott (instructed by Norton Rose
38 Fulbright LLP and Quinn Emanuel Urquhart & Sullivan LLP on behalf of Qualcomm
39 Incorporated)

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(10.30 am)

Case management conference

MRS JUSTICE BACON: Some of you are joining us live-stream so I'm just going start with the usual warning: an official recording is being made and an authorised transcript will be produced but, as you will know, 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 a contempt of court.

All right.

MR WILLIAMS: Good morning, Madam, and members of the Tribunal. I don't know if you wanted to say anything by way of introduction or whether we should just deal with housekeeping and any agenda.

MRS JUSTICE BACON: Yes, I think we should deal with housekeeping matters at the start. I do want to say a few words for everyone's benefit for the next hearing, in particular in relation to bundles, replacement bundles, and documents generally.

Everyone knows there is an issue which I think we will probably have to come back to when we get to the evidence and costs issues regarding the filing of witness statements for which permission has not been given. I think we need to have a clear roadmap for the next hearing as to what the parties can and cannot file. But I think I should say this now: it is very unhelpful to have a proliferation of documents at very short notice before the hearing, whether that's in the form of witness statements or repeated versions of the same document, such as repeated versions of trial bundles. It causes a great deal of work all round, especially for those who are working electronically and can't just substitute pages, and that is actually most of us these days.

So I think for the next CMC, we need to have very clear rules as to what can and cannot be filed. In particular, I don't want to see replacement bundles filed with documents for which the only corrections are a few cross-references. It is completely unnecessary, it's a waste of time and money and really for trivial amendments, I don't think we need

1 to have large amounts of documents refiled and put in replacement bundles or
2 supplemental bundles.

3 Also I think everyone needs to be aware that people are working electronically and therefore
4 need clear file names for things like multiple drafts of orders so we can see which
5 versions they are. Those are a few, I'm afraid, gripes at the outset and we need to
6 make sure that the order for the next CMC properly reflects what parties can and
7 cannot put in and any directions. And if the directions are not clear, everyone can ask
8 us for further directions.

9 If it is not clear to the parties whether further documents or witness statements or expert
10 reports or whatever can be filed, they can simply ask and enable the issue to be
11 clarified, rather than putting in documents and then having to deal with it
12 retrospectively.

13 All right, those are the points I wanted to just flag at the outset.

14 We have now received -- I think we now have four bundles: a core bundle, which at least some
15 of us have in a hard copy but not all of us; correspondence bundle I think which we're
16 all using the electronic version; the supplemental bundle; and the further supplemental
17 bundle. Again, we are all using the electronic versions of those.

18 **(Pause).**

19 **MR WILLIAMS:** Thank you, Madam. Also on housekeeping, obviously you have the parties'
20 skeleton arguments.

21 **MRS JUSTICE BACON:** Yes.

22 **MR WILLIAMS:** I should probably just check that you have the relevant draft orders.

23 **MRS JUSTICE BACON:** Yes. We have a very recent draft order that came in I think
24 overnight.

25 **MR WILLIAMS:** That is right. So in terms of the directions, we've put in a consolidated draft
26 order with our skeleton which dealt with matters other than disclosure; and separately
27 from that, as the discussion on disclosure started to settle down, we provided
28 Qualcomm with a draft order, I think it was on Monday, which captured the categories

1 we have been discussing in correspondence, and that was made available to
2 the Tribunal yesterday. We had hoped to do it on Monday, but then there was more
3 correspondence so we held off for a little bit.

4 There was then more correspondence in relation to the disclosure categories and disclosure
5 generally in the course of yesterday. We wrote to the Tribunal at the end of the day
6 setting out what we understood the position to be in terms of what was agreed, partially
7 agreed, disputed, and so on.

8 **MRS JUSTICE BACON:** Yes, we have that, and then we have the draft order that came with
9 that with highlighted categories.

10 **MR WILLIAMS:** That's right.

11 **MRS JUSTICE BACON:** So we have been working off the latest draft order with your letter
12 setting out what is agreed and what is not.

13 **MR WILLIAMS:** Yes. Then Qualcomm put in their mark-up of that order very late last night
14 so we have seen that this morning. I don't think their mark-up of the order completely
15 marries up with our description of what is agreed and what is not agreed.

16 **MRS JUSTICE BACON:** What I am going to do is take your draft and then we will just have
17 to go through the categories.

18 **MR WILLIAMS:** Yes.

19 **MRS JUSTICE BACON:** And especially if their mark-up is not agreed, we will just have to
20 deal with those as we come to it.

21 There is a question in our mind as to whether we're going to be able to get into the detail of all
22 of this because some of the issues on disclosure don't seem to be addressed in detail
23 in the skeleton arguments, and I note a suggestion that we deal with high level issues
24 now and leave some points over to be discussed further with the parties, when we get
25 to the disclosure issue, you will both need to just tell us how you would propose we
26 proceed with that for the purpose of this CMC.

27 **MR WILLIAMS:** For my part, I have a number of points, I think nearly all of which have been
28 foreshadowed in the skeleton. There are a few other points of relative detail which

1 have crystallised since then, but we were proposing to ask you to resolve points at that
2 level of principle, really, rather than matters of drafting.

3 In terms of the agenda, we had permission to amend first on the agenda, as far as we're
4 concerned, and that's where we would propose to go first.

5 **MRS JUSTICE BACON:** Yes. We would also propose to take things broadly in the order in
6 which it is set out on the Tribunal agenda.

7 **MR WILLIAMS:** Yes, exactly. Before I do that, should I just do introductions, Madam?

8 **MRS JUSTICE BACON:** I think we probably know everybody, but are there any other
9 housekeeping matters from Mr Jowell?

10 **MR JOWELL:** No. We are a little concerned with operating on the basis of their disclosure
11 order, but we can cross that bridge when we come to it because I don't think disclosure
12 is first on the agenda. But we sought to take their order and then to mark it up so one
13 can see the differences and may be more convenient to look at that version. But we
14 can see when we come to it.

15 **MRS JUSTICE BACON:** Yes, all right. I presume that we should be having a break in just
16 a bit more than an hour for the transcribers.

17 **MR WILLIAMS:** Yes.

18 **MRS JUSTICE BACON:** All right.

19 So the order in which I propose to deal with the agenda was to deal with the pleading
20 amendments, and then the requests for further information before we get to disclosure.

21 So we will not get to disclosure until the second half of the morning at the earliest
22 anyway.

23 **MR WILLIAMS:** I'm grateful.

24 So starting, then, with permission to amend, Madam, you will have seen that the amendments
25 divide up into amendments dealing with NLNC and refusal to licence.

26 There is consent to all of the refusal to licence amendments and some of the NLNC
27 amendments. There are two remaining sets of issues which we both dealt with under

1 the heading 3G CDMA amendments and 5G amendments, although within the 3G side
2 there are two slightly different related points.

3 **MRS JUSTICE BACON:** Yes. That is the natural division because in relation to the 3G
4 CDMA, there is the limitation point.

5 **MR WILLIAMS:** Yes, exactly.

6 **MRS JUSTICE BACON:** In relation to 5G, as I understand it, the question is simply whether
7 there should be answers to requests for information first.

8 So, dealing with the 3G CDMA amendments, provisionally it might help if I indicate our view,
9 subject to the submissions you are going to make. Provisionally, our view is that the
10 amendments do obviously allege a new cause of action, and provisionally our view is
11 that we do not consider that they turn on the same or substantially the same facts. So
12 provisionally we are with Qualcomm that the 3G CDMA case would need to be deemed
13 to be made on 26 June, which would then put a backstop on your claim for damages
14 from 26 June 2017. So that's our provisional view.

15 You can address us shortly on that and then we will decide if we need to hear from Qualcomm.

16 **MR WILLIAMS:** I'm grateful, Madam. So the 3G and the 5G amendments have the common
17 theme, which is that they both concern the leveraging of market power in relation to
18 chipsets, other than LTE, but which affect the LTE royalty. The NLNC policy as
19 pleaded isn't about a particular type of chip, it's a policy which has been applied by
20 Qualcomm over a long period both preceding the LTE era and, more recently, in
21 relation to 5G chipsets.

22 So the amendments deal with the same conduct and the question is: in what markets did
23 Qualcomm hold market power at different points in time and how has that market
24 power played into the particular licence agreements entered into over time? The
25 amendments have been made, which we now have disclosure of the agreements, and
26 we have been able to do that analysis. The amendments under both headings have
27 three aspects: market definition, dominance and abuse. As you have said, Madam,
28 the 3G CDMA amendments raise the limitation issue.

1 There is no disagreement between us on the law in relation to rule 32.2 and I think the debate
2 does turn on whether we bring ourselves within the rule as you've just described it,
3 Madam. I think that is the only issue because if we do bring ourselves within the rule,
4 my learned friend's skeleton doesn't say permission to amend should be refused as
5 a matter of discretion.

6 **MRS JUSTICE BACON:** No.

7 **MR WILLIAMS:** And we dealt with discretion in paragraph 22 of our skeleton.

8 So you obviously have the rule in mind. It asks whether the new claim arises out of the same
9 facts or substantially the same facts as a claim in respect of which the party applying
10 permission has already claimed a remedy in proceedings. And just to be clear, this is
11 not talking about whether the essential facts are the same. If the essential facts are
12 the same, then one has the same cause of action and you're not into the territory of
13 rule 32.2.

14 The question is whether we have already substantially pleaded the facts on which we need to
15 rely so that the new cause of action is not materially broadening the scope of the factual
16 enquiries at trial. In our skeleton paragraph 12, we have quoted the Mastercard case,
17 which in turn quotes other cases citing other cases. It's probably worth looking at
18 paragraph 40 of that, which is at authorities A/808.

19 I'd assumed that was going to come up on the display, Madam, because I don't have
20 an electronic authorities bundle with me, but it doesn't seem to be. I don't know
21 if -- I thought there was going to be an electronic display, but perhaps there isn't. Here
22 it is, I'm grateful.

23 So this is the Mastercard case citing Lord Justice Tomlinson in the Ballinger case, and in turn
24 he refers to Mr Justice Coleman in the BP case, BP Plc v Aon and I think if the Tribunal
25 just reads paragraph 40, I would be grateful.

26 **(Pause).**

27 **MRS JUSTICE BACON:** Yes.

1 **MR WILLIAMS:** One can see the question is whether the facts on which the amendments
2 turn are going to have to be investigated. I stress it's not the essential facts, so to put
3 that in concrete context, it might be said that the essential facts underlying a claim for
4 an abuse of dominance in the LTE markets concern facts relating to dominance in that
5 market. So the question of market power in the 3G market is not the central fact as far
6 as dominance in LTE is concerned. But the question in this context goes more broadly
7 than that; it's not whether the essential facts are the same, it's whether the factual
8 enquiries were going to be part of the trial in any event.

9 That's the way we put the case because when you come to look at the pleading, you can see
10 the facts on which we rely, which are essentially Qualcomm's market power in CDMA,
11 its dominance, its status as an unavoidable trading partner in CDMA on the one hand,
12 and then the negotiations relating to the 2009 amendments to Samsung's licence,
13 those facts were going to be investigated at trial in any event.

14 They may not have been the essential facts as far as the LTE abuse is concerned, but they
15 were facts which were going to be investigated in any event.

16 So the --

17 **MRS JUSTICE BACON:** I'm looking at your pleading and you have some very
18 general -- you've a very general pleaded position in paragraph 62D that Qualcomm is
19 an unavoidable trading partner for OEMs, and then D(ii) it's the only manufacturer with
20 experience in the legacy CDMA standards, OEMs being dependent on Qualcomm for
21 their supply of CDMA chipsets. Those are very broad and general allegations, but
22 what you then have in 63A are some very specific allegations which will need specific
23 enquiry as to Qualcomm's monopoly power, dominance for a specific time period,
24 percentage market shares of the market pleaded in 63A(a), competitors' ability to
25 increase output so as to exercise competitive constraints, first manoeuvre advantage,
26 barriers to entry, and constraints on market power.

27 Now, it's difficult to us as a matter of impression, that being the test, to really say that those
28 very specific allegations, and quite detailed allegations, would have been substantially,

1 that being the test, investigated in relation to the otherwise rather broad statements
2 about Qualcomm being the only manufacturer with experience, et cetera.

3 **MR WILLIAMS:** Yes. The response to that, Madam, is that those are really particulars of the
4 proposition that Qualcomm has market power in CDMA and had it over the relevant
5 time. I will go through the pleading in a moment, but we needn't have pleaded those
6 matters. What we have sought to do there is plead particulars on the one hand market
7 definition and, on the other hand -- because I think the references you go there towards
8 paragraph 63A --

9 **MRS JUSTICE BACON:** 63A, yes.

10 **MR WILLIAMS:** -- and they consented to that amendment, Madam.

11 **MRS JUSTICE BACON:** The entirety of that amendment.

12 **MR JOWELL:** No. It's consensual but only on the basis that it's subject to the relate-back.

13 **MRS JUSTICE BACON:** Yes, that's our understanding. The issue is not as to whether it's
14 arguable but the question is when -- as I outlined at the start, my understanding is that
15 the issue is when the amendment is deemed to be made -- is this right, Mr Jowell: your
16 position is that you consent to the amendment but because it is a new claim and
17 doesn't arise out of the same or substantially the same facts, you say the date on which
18 it is made must be deemed to be 26 June this year?

19 **MR JOWELL:** Yes. The traditional approach was always if you wanted to bring a new claim
20 out of time or partially out of time, you had to issue a whole new claim --

21 **MRS JUSTICE BACON:** Yes, and this is a substitute for it.

22 **MR JOWELL:** -- and this is a substitute for that, which you would sometimes call the
23 Mastercard order after the approach in paragraph 5 of Mastercard v Deutsche Bahn.

24 **MR WILLIAMS:** I hadn't understood Mr Jowell's position to be that, Madam. Could we look
25 at his skeleton --

26 **MRS JUSTICE BACON:** We understood it to be that. You can take to us the skeleton but
27 he's just confirmed what we understood to be the case.

28 **MR WILLIAMS:** I can --

1 **MRS JUSTICE BACON:** So it's paragraph 34 --

2 **MR WILLIAMS:** If one looks at paragraph 22 of his skeleton.

3 **MRS JUSTICE BACON:** I am looking at paragraph 34, which is the position as I summarised
4 our provisional view. So they say that.

5 **MR WILLIAMS:** Yes, but paragraph 34 deals with what they characterise as the 3G CDMA
6 chipset market amendments, which are the ones that are contested. If one goes back
7 to paragraph 22, they have defined those amendments in the first sentence of
8 subparagraph A, and then there is a footnote which refers to a number of paragraphs.
9 And this is consistent with the position they have taken in correspondence that these
10 are the amendments they challenge on the basis of the 3G -- on the limitation point.

11 **MRS JUSTICE BACON:** I see. That footnote doesn't have -- yes, that --

12 **MR WILLIAMS:** That is consistent with the position on correspondence, Madam, where they
13 have said in terms they consent to 63A. We can get you the reference for that.

14 **MRS JUSTICE BACON:** Can we just bottom out what the dispute is.

15 **MR JOWELL:** No, that's just an oversight. It's very clear from what we say subsequently in
16 the skeleton that one of the key points we make is that the investigation of dominance,
17 well, is a new enquiry and that's all premised on -- apologies for the oversight, but it's
18 quite clear that we are objecting to those amendments.

19 **MRS JUSTICE BACON:** Well, otherwise that 63A wasn't in there --

20 **MR JOWELL:** I think that is just a typographical error for which we apologise for any
21 confusion.

22 **MRS JUSTICE BACON:** The amendments which for the first time allege abuse of dominance
23 and an alleged 3G CDMA chipset market are prima facie time-barred; and 63A is for
24 the first time alleging --

25 **MR JOWELL:** Absolutely.

26 **MRS JUSTICE BACON:** -- abuse of dominance in relation to -- now, but the question is
27 whether -- this is a question about market power rather than the abuse. But we had

1 certainly read Qualcomm's position as being that 63A was part of the abuse of
2 dominance on that market.

3 **MR JOWELL:** I'm grateful that we were at least clear when read as a whole.

4 **MRS JUSTICE BACON:** Apparently that was a misunderstanding between the parties.

5 **MR WILLIAMS:** Well, could you read the letter at tab 164 of the correspondence bundle,
6 please.

7 **MRS JUSTICE BACON:** All right.

8 **MR WILLIAMS:** That's page CR628.

9 **MRS JUSTICE BACON:** Is that coming up on the EPE?

10 **MR WILLIAMS:** It's paragraph 8B in particular, but you will need to read the letter.

11 **(Pause).**

12 **MRS JUSTICE BACON:** We have 628. Where is the paragraph that refers to --

13 **MR WILLIAMS:** It's paragraph 8B at the bottom of 629. But the point is that the letter explains
14 the limitation objection applies to certain paragraphs and it identifies those paragraphs,
15 starting at paragraph 3 and then running through those paragraphs, 3, 4, 5, 6 and 7.
16 8 deals with the remaining amendment and 8B takes issue with paragraph 63A only to
17 the extent that Qualcomm objects to our reliance on evaluative findings of foreign
18 courts. There is a very clear distinction drawn in this letter between the objections to
19 which the limitation objection applies, which 63B is not included in that list.

20 **MRS JUSTICE BACON:** 63A.

21 **MR WILLIAMS:** I beg your pardon, 63A, is not included in that list and this point, where a
22 different objection is taken.

23 **MR JOWELL:** If I may, one needs to read it in light of paragraph 3 where we say:

24 "Your client now belatedly seeks to make a new claim in relation to an alleged abuse of
25 dominance in a purported market for 3G CDMA chipsets, the 3G CDMA amendments."

26 Now, what's happened is simply that there is a typographical error here which has been carried
27 over unfortunately into the skeleton. But I think again if one reads it as a whole, it's
28 clear we are objecting to the whole of the 3G CDMA allegation.

1 **MRS JUSTICE BACON:** Well, yes. Because 6.ba is a summary that Qualcomm has held
2 a dominant position on the markets for the sale of 3G CDMA and 5G chipsets. That's
3 a summary of the point that is then developed, as we see it, in 63A as to dominance
4 in 3G, 63B dominance in 5G, and then later on in relation to abuse.

5 I think that must be regarded as a typo. Obviously there was some ambiguity because that
6 paragraph wasn't specifically referred to. It's a bit unfortunate that paragraph 63A is
7 then specifically referred to in 8(b) of this letter, which may have contributed to the
8 misunderstanding. But we understood the position to be as Mr Jowell has just outlined,
9 so I think we will need to address that position. They are not consenting to 63A
10 unambiguously, nor even simply on terms regarding the evidence of foreign courts.
11 That does fall in with the other paragraphs, including the summary paragraph 6.ba as
12 a matter which they say should not be deemed to be pleaded until 26 June 2023.

13 **MR WILLIAMS:** I mean, I will go through the pleading in a moment, Madam. I think our
14 position is that the issue of Qualcomm's market power and its status as an unavoidable
15 trading partner in 3G CDMA, those are the core facts that underpin the allegation of
16 dominance in that market.

17 Those facts were already pleaded. I think there is a reference to monopoly power elsewhere
18 in the pleading which I will show you, and it seemed to us that Qualcomm was
19 realistically accepting that the facts -- there was no plea of a specific market in relation
20 to 3G CDMA chips and that's why they took issue with 63. But in terms of the facts as
21 opposed to the central facts underpinning dominance in that market, those facts are
22 pleaded. And it seemed to us the fact that they had omitted 63A from their list was a
23 realistic recognition that we had pleaded the core facts.

24 Now, the points you highlighted --

25 **MRS JUSTICE BACON:** What do you understand to mean "substantially the same facts"?
26 Because I think you both draw attention to the fact that the word is "substantially" the
27 same rather than "similar".

1 **MR WILLIAMS:** Yes. So I think for these purposes, we need to distinguish between the core
2 facts underlying the plea of dominance, which are the market power and the fact that
3 the trading partners who wanted to purchase the 3G CDMA chips were dependent on
4 Qualcomm. What one then has in the new pleading in 63A are really the particulars of
5 that, detailed particulars.

6 **MRS JUSTICE BACON:** No, but before you apply the test, can you tell me how you interpret
7 the test of "substantially the same facts"? What do you say that that means?

8 **MR WILLIAMS:** We say that it doesn't require a materially different factual enquiry at trial.
9 And it's not just the similarity of the facts, the authorities are clear about that, it doesn't
10 require materially different facts to be investigated. What we say is that the matters
11 that have been now pleaded as particulars of Qualcomm's market power in this market
12 fell underneath the broad umbrella of its market power in the 3G CDMA market.
13 They're not different facts, they're just particular matters that would have to be
14 investigated in that context.

15 **MRS JUSTICE BACON:** Where is there a pleading of market power or dominance such as
16 to raise the particulars set out in 63A?

17 **MR WILLIAMS:** I will show you it now, Madam, and I was going to go through the pleading
18 in a slightly more holistic basis.

19 **MRS JUSTICE BACON:** If you're going to come to it --

20 **MR WILLIAMS:** I will give you the reference now because I do want to answer your question.
21 It's 62 which deals with evidence of dominance in LTE chipset markets. So that's what
22 the subject matter is. And in 62A(ii), there is a reference to the FTC's finding of
23 monopoly power in the global market for CDMA modem chips between 2006 and 2016,
24 which is the same period. But that's a reference to the finding.

25 62D --

26 **MRS JUSTICE BACON:** The unavoidable trading partner.

27 **MR WILLIAMS:** -- pleads that it's an unavoidable trading partner.

28 **MRS JUSTICE BACON:** And D2.

1 **MR WILLIAMS:** And D2.

2 **MRS JUSTICE BACON:** Yes.

3 **MR WILLIAMS:** And F.

4 **MRS JUSTICE BACON:** Dependency --

5 **MR WILLIAMS:** " ... unlikely to have been able to constrain their market power. Neither of
6 the two largest ... was able to exercise countervailing power because of their
7 dependence on Qualcomm."

8 **MRS JUSTICE BACON:** Yes. But LTE chipset market is defined but not to include 3G CDMA.

9 **MR WILLIAMS:** Sorry, that is right. But what it's saying there is they were unlikely to be able
10 to constrain their market power in LTE because, in the last sentence, they were
11 dependent upon them for CDMA. So the market power arises from the dependence,
12 that's the essence of the relationship of market power.

13 **MRS JUSTICE BACON:** All right, but it's not pleaded that there was market power,
14 dominance, monopoly power in relation to CDMA. It's just a very vague point about
15 dependence for supply.

16 **MR WILLIAMS:** Well, it is pleaded in 62A(ii) with reference to the FTC judgment.

17 **MRS JUSTICE BACON:** But that's not pleaded as a point that will have to be investigated at
18 trial. If you look at A, the pleading is simply that there are evidence in relevant
19 decisions as to dominance. If one is responding to that, one just investigates to the
20 extent admissible at all what was said in those decisions. That's not a pleading of facts
21 that require investigation; that's simply a pleading of what is stated in other decisions.

22 **MR WILLIAMS:** Well, that's true as far as that paragraph is concerned, Madam. But if one
23 reads 62 as a whole, it is saying that in order to understand the extent of Qualcomm's
24 market power in relation to LTE, dominance in relation to LTE, one also has to
25 investigate and understand its market power in relation to CDMA.

26 **MRS JUSTICE BACON:** Well, the word "market power" is simply not used in relation to
27 CDMA. It's a vague allegation of dependence on Qualcomm, or that Qualcomm is
28 an unavoidable trading partner. There is nothing in this which requires any

1 investigation of the precise levels of market power, still less market shares, competitive
2 constraints, barriers to entry, and the like.

3 **MR WILLIAMS:** Really, the submission is this, Madam: that the underlying factual
4 position -- market power is in one sense an economic concept, it's layered on top of
5 the underlying facts. And the underlying facts, in our submission, concern the
6 dependence of OEMs on Qualcomm for -- as well as LTE chips, CDMA chips. What
7 one sees running through this paragraph 62 is the general theme that Qualcomm
8 is -- perhaps I do need to show you the pleading on a slightly more holistic basis. But
9 in order to understand Qualcomm's market power in the LTE market, in the LTE chipset
10 market, one needs to understand its status and its relationship and dealings with OEMs
11 in relation to CDMA. The essential relationship of dependence is what gives rise to
12 the market power and dominance in our submission, Madam.

13 So just by way of introduction to the pleading, I think you have the point: the amendments deal
14 with the leveraging of 3G market power into LTE sets in two ways. First of all, it's
15 dealing with the leveraging of that market power concurrently with LTE chips and
16 market power, and that's essentially new paragraph 68.da. It also deals with the
17 leveraging of 3G CDMA market power at a time when Qualcomm was dominant in 3G
18 but not in LTE, but which nevertheless may have affected LTE royalties on an enduring
19 basis. That's new paragraph 68.i.

20 If I could just then quickly take you through the pleading. The amendments start at
21 paragraph 6.ba. I wasn't going to take up time on that because that is a summary
22 paragraph. What you can see from that paragraph is we're still dealing with LTE
23 royalties. We're not changing the statement of claim or the class we're dealing with
24 the leveraging of market power in relation to different chipsets so as to affect those
25 royalties.

26 If you then turn on to paragraph 20, that's where we plead the legacy standards. We can see
27 from 20C that we plead CDMA and the 2G and 3G iterations of CDMA.

1 Then 29 specifically breaks that down into the 2G CDMA and the 3G CDMA standards; and
2 30 refers to CDMA chipsets which would follow in the same logic down into 2G and 3G
3 CDMA chipsets.

4 33 is where we start to plead the NLNC policy, and you can see from the first paragraph that
5 we plead any OEM wishing to purchase chipsets, including LTE chipsets, must also
6 agree to take a separate licence permitting it to use the Qualcomm associated SEPs.
7 The term associated SEPs isn't defined there, but you can see later on when you get
8 into paragraph 62 we are not saying that LTE chipset market power was only leveraged
9 into LTE SEP royalties, we're saying that there was -- cross-leveraging is the way
10 I have characterised it, if that's clear to the Tribunal -- leveraging for market power in
11 relation to one chipset into royalties charged on other chipsets.

12 53 is where you see the amendments on market definition. These are contested and what
13 this does is plead a further economic market for 3G CDMA chipsets on the basis of
14 facts that have already been pleaded. There is no pleading of new facts, in my
15 submission, and you can see that from 57A, which is the **mutatis mutandis** paragraph,
16 which essentially says that the economic framework we're applying to analyse these
17 distinct 3G CDMA and 5G chipset markets is the same as for LTE. So there are no
18 new facts as such, we have identified --

19 **MRS JUSTICE BACON:** Which is the **mutatis mutandis** paragraph?

20 **MR WILLIAMS:** I beg your pardon. 57A on C/104.

21 **MRS JUSTICE BACON:** " ... also support with necessary modifications the existence of ... ".

22 I mean, you're simply saying, well, we rely on the same types of facts but with
23 modifications relevant to those worldwide markets. It's not saying, "We rely on simply
24 the same facts".

25 **MR WILLIAMS:** Yes. But if you go back to 55A and B, for example, Madam, which I think
26 are the most important points, what you see in A is the fact that consumers at a given
27 time tend to prefer the prevailing standard; and at B, backwards compatibility with
28 legacy standards is an important matter. Obviously those paragraphs are then drafted

1 with reference to LTE, but the essential facts about how the market works are common,
2 in our submission, to standard chipsets relating to generation.

3 **MRS JUSTICE BACON:** But that's your submission. Your submission is that the same
4 applies to 3G CDMA and 5G. But that's something that if it's not agreed will have to
5 be investigated. That is saying this pleaded fact is also true of a different market, but
6 markets are different, inherently, and the same facts may or may not support
7 a conclusion as to market definition in those other markets.

8 **MR WILLIAMS:** I accept that point in strict terms, Madam, but the point that's made here is
9 a really very general point about the way these markets operate and the technologies
10 used in these markets.

11 Subparagraph A is really saying chipsets relating to the prevailing standard are of a higher
12 value, that's a general proposition. If you look at the first sentence, or the first part of
13 the sentence in B:

14 "Backwards-compatibility with Legacy Standards prevailing in a given location is also
15 important."

16 These are entirely general propositions about the way that chips work and the way this
17 technology is used in devices, Madam. These are not really points about LTE as
18 opposed to 3G CDMA or anything else; they're points about the way this technology
19 operates and is used.

20 **MRS JUSTICE BACON:** Which may or may not be true of the way the older markets worked.
21 At the moment, the Tribunal simply doesn't know but you can't simply say, well, we
22 have pleaded this in relation to the definition of newer markets. Precisely those facts
23 with nothing else will support the definition of older markets because there would have
24 to be an investigation as to whether those facts were true of the older markets, if not
25 admitted.

26 **MR WILLIAMS:** If one then reads on to 62 which we have already looked at, what we plead
27 there is that customers' dependence on Qualcomm for 3G CDMA technology gives it
28 additional and incremental market power, and obviously it is inherent in that plea that

1 consumers or OEMs who need those chips can't use other chips instead. And really,
2 this is all part of the same universe of facts, Madam, it's all dealing with the fact that
3 because OEMs using or continuing to use 3G CDMA chips need that particular
4 technology, including because it happens to be the prevailing technology from time to
5 time, and including because it needs to include reverse compatibility, that's why
6 Qualcomm holds market power in relation to those chipsets. That's why it's
7 an unavoidable trading partner.

8 So if one reads the pleas that do come later on in 62 together with 55, it's clear in my
9 submission that really all of these facts were going to have to be investigated on the
10 pleading as it stood. One was going to need to understand the extent to which
11 alternative technology would be a substitute for 3G CDMA technology. There are
12 disputes about that, but all of those facts were going to have to be investigated. And
13 I reiterate the point that what matters is whether those underlying facts would have to
14 be investigated, not whether they have been pleaded in a legal box of which there's on
15 the one hand market definition and on the other hand dominance. Those are
16 constituent elements of a legal cause of action, but that is distinct from the pleading of
17 the underlying facts themselves.

18 So in terms of the fact in 55, even if one accepts the point you put to me that facts pleaded
19 there in relation to LTE might merit different enquiries from an equivalent plea in
20 relation to 3G CDMA, if you then take into account the additional pleading of 62 which
21 squarely puts in issue customers' OEMs dependence on Qualcomm for those chips,
22 one would have to investigate the extent to which these things are substitutes for one
23 another. If they are substitutes for one another, then that whole relationship of
24 dependence as pleaded would break down.

25 So we have already looked at 62, and I won't repeat the submissions I have made in relation
26 to that, but we do say that on any fair reading of these paragraphs, on any sensible
27 reading, the question of the facts that underpin a plea of market power or dominance

1 are incorporated into the paragraph. And what you see further on in paragraph 63A
2 are then particulars of that.

3 Now, we had to take a decision about whether to provide those particulars. We provided them
4 because we thought that if the matter is going to go forward to trial, it's appropriate for
5 the particulars of our case to be pleaded. But if one accepts the proposition that we
6 have already put in issue the question of market power in a 3G CDMA market on the
7 pleading as it stood, then we needn't have provided those particulars. But we have
8 done it in the interests of transparency, Madam, so in my submission, we shouldn't be
9 criticised, or it shouldn't be held against us that we have chosen at this stage to provide
10 further particulars of a plea that was already on the face of our pleading.

11 **MRS JUSTICE BACON:** All right. So is that your submission on the 3G CDMA point?

12 **MR WILLIAMS:** Well, if one then goes -- so that's market definition and dominance. There is
13 then just abuse to deal with.

14 **MRS JUSTICE BACON:** All right.

15 **MR WILLIAMS:** C110, it starts at paragraph 67. That's where we have introduced these
16 additional markets into the plea of abuse. 68.da at the bottom of page C111 is a plea
17 which, in my submission, merely makes explicit what was already pleaded in
18 paragraph 62D and F: it's pleading that the relationship of dominance played into the
19 negotiations and constitutes an abuse. And that's clearly what we were saying in those
20 paragraphs: we were clearly alleging that the market power which exists in relation to
21 3G CDMA carried into the negotiations and affected the terms of the royalties. That
22 was the point of that pleading and all this paragraph does is explicitly plead that that
23 constitutes an abuse of dominance on the market that we have now pleaded in the
24 paragraph beforehand. So that is merely, in my submission, particularising what was
25 in paragraph 62.

26 There are really two aspects to this plea, Madam. The first is whether it should be admitted
27 as a new cause of action, which is the point we're considering now, but there is also
28 a debate between the parties about whether the pleading you have seen in

1 paragraph 62 should be read as nothing more than a plea of market power with no
2 allegation that that market power was exercised. I used the phrase market power
3 there, but in my submission, leaving to one side the question of whether this ought to
4 be admitted as a new cause of action, that there can be no objection, in my submission,
5 to admitting that pleading simply as a particular of the pleading you have already seen
6 in paragraph 62; that is to say that the relationship of dependence between Qualcomm
7 and OEMs in relation to CDMA chips carried into the negotiations between them.

8 **MRS JUSTICE BACON:** So there is nothing at all in paragraph 62 about leveraging, which is
9 a legal concept in the context of an abuse case. All that is said in 62 is that Qualcomm
10 is an unavoidable trading partner and that OEMs are dependent on Qualcomm for their
11 supply of CDMA chipsets. There's not even a mention of the word leveraging.

12 **MR WILLIAMS:** No, but 62F does go further than that because it says that Apple and
13 Samsung weren't able to exercise countervailing buyer power in their dealings with
14 Qualcomm because of their dependence on Qualcomm for CDMA chips. So that
15 doesn't use the word leveraging, but it does say in those commercial dealings,
16 Qualcomm's market power in relation to CDMA infected the negotiations; it impacted
17 upon the negotiations.

18 **MRS JUSTICE BACON:** That's a very different allegation to saying that Qualcomm leveraged
19 its market power in a specific defined market, which of course there wasn't in the old
20 pleadings any specific defined market, to obtain inflated royalties in another market.
21 That's a legal concept which requires factual underpinning.

22 **MR WILLIAMS:** Yes, sorry. The point I was making just a moment ago is that as far as 68.da
23 is concerned, I think there are two different issues. One is whether the natural
24 implication of the pleading in 62 is the point I was just making, that that relationship --

25 **MRS JUSTICE BACON:** Yes, I was addressing that.

26 **MR WILLIAMS:** I know you were, but I think I've made my submissions on that paragraph.
27 I was simply making clear that there is a separate issue in relation to 68.da, which is

1 whether it ought to be admitted simply as a particular of the allegations that were
2 previously pleaded in 62, if not as a separate cause of action.

3 **MRS JUSTICE BACON:** Yes.

4 **MR WILLIAMS:** Then the last limb of this plea is 68i, but one has to see that in the context of
5 the previous pleading at 68e(iii).

6 **MRS JUSTICE BACON:** Yes, we have looked at that.

7 **MR WILLIAMS:** You have that point, Madam, which is that the abuse pleaded in new
8 paragraph 68i is simply alleging that the conduct which was previously pleaded in
9 68e(iii) satisfies the requirements of an abuse.

10 What one sees in 68i is a specific allegation that in particular negotiations, Samsung sought a
11 reduction in the royalty rates, and it dropped its request as a result of conduct which
12 we say is a manifestation of the NLNC policy.

13 It is important to go back to the beginning of paragraph 68e because this is alleging that the
14 NLNC policy has applied from the late 90s, and certainly through the early 00s, and
15 these are points in time at which LTE didn't exist. So clearly in this context, the
16 leveraging of chipset market power as part of the NLNC policy is not leveraging market
17 power in LTE that didn't exist. So the market power being leveraged has to be market
18 power in relation to an earlier generation of chipsets, and in particular the example in
19 68E(iii), which dates from 2008, is during the period of 3G CDMA dominance.

20 So read in context, that can only be an allegation that Qualcomm is leveraging its market
21 power in relation to 3G CDMA chips because it didn't have market power otherwise,
22 LTE chipsets didn't exist. So leaving aside --

23 **MRS JUSTICE BACON:** Are you saying that we have to read 68e(iii) as an allegation of
24 leveraging from CDMA chips?

25 **MR WILLIAMS:** You do, Madam, yes. You do because --

26 **MRS JUSTICE BACON:** To impose higher royalties for LTE SEPs as you've pleaded in 68i?

27 **MR WILLIAMS:** Yes. Well, if one is considering the facts that would have to be investigated
28 in connection with that allegation, it is clearly pleaded as an instance of the NLNC

1 policy, so that raises the question of what market power is being relied on as part of
2 that negotiation. It can't be market power in relation to LTE chipsets because LTE
3 chipsets couldn't exist, they didn't exist. And the further back in time one goes in
4 paragraph 68e, it's increasingly clear that that can't be the plea.

5 So in order to understand whether that is in fact an instance of the NLNC policy being applied,
6 one has to ask the question: what market power did Qualcomm hold at the time and
7 what market power could it be leveraging? In our submission, just simply in terms of
8 the timing of events, it will be the 3G CDMA market. Now, none of that is explicitly
9 pleaded, but in order to investigate that allegation, which is contested by Qualcomm,
10 one would have to look into its market power at the time, identify the chipsets to which
11 that market power related, and consider whether that is a manifestation of the policy.

12 So, again, I make the point, the question is what facts would have to be investigated in order
13 to deal with these allegations? In my submission, one would have to look into those
14 matters in order to ascertain whether that is an instance of the NLNC market.

15 So it's against that background that paragraph 68i simply fits those factual issues into the legal
16 framework, that there is an allegation of abuse of dominance on a particular market.
17 But as I say, the factual material is all put in issue.

18 It is important to note that Qualcomm squarely joins issue with those in its defence. If you
19 could look at supplemental bundle tab 2, if we could just pick it up at paragraph 123
20 which is on S124.

21 **MRS JUSTICE BACON:** What's the PDF page?

22 **MR WILLIAMS:** Is it different from S124?

23 **MRS JUSTICE BACON:** Sorry, is it just 124? Yes, it isn't, it's 125.

24 Well, it says S124, but the PDF page is 125 because the PDF pages are out.

25 **MR WILLIAMS:** Yes. Yes, it's one page back from the page that's on the screen.

26 If you read through from 123 through to 127.

27 **(Pause).**

1 **MRS JUSTICE BACON:** All right, but this doesn't address specifically any dominant position
2 in the CDMA market because that's not pleaded.

3 **MR WILLIAMS:** No, it doesn't deal with that, but what it deals with is the factual question as
4 to whether the 2009 negotiation was affected by the leveraging issue.

5 **MRS JUSTICE BACON:** But there isn't any leveraging issue pleaded and there is no -- if one
6 was looking at this and taking as a way of testing it, whether disclosure has to be given
7 in relation to the issue of a specific CDMA market, dominance on that market, an abuse
8 on that market by leveraging into another market, nobody looking at these pleadings
9 would say that that's something which was an issue for disclosure.

10 **MR WILLIAMS:** With respect, Madam, if you look at the way that paragraph 68e is pleaded,
11 in fact it says the FTC judgment cites extensive evidence which indicates that the
12 NLNC policy enables Qualcomm to secure licences on the terms set out above, and
13 the NLNC policy as we rely on it is leveraging. So that is the plea, Madam, it doesn't
14 use the word "leveraging".

15 **MRS JUSTICE BACON:** Yes, but the plea is just about the FTC judgment. Any disclosure in
16 relation to this paragraph is simply a question about what the FTC judgment said.

17 **MR WILLIAMS:** I think that's not right, Madam, because it says it cites extensive evidence,
18 but we're relying on what we see in the FTC judgment to plead the facts. And you
19 have seen in -- so we've pleaded the facts in 68e(iii) that this is what happened. We
20 have given a cross-reference to the judgment, but we're pleading facts --

21 **MRS JUSTICE BACON:** Are you saying in the judgment that there is an allegation of
22 leveraging from a defined CDMA market into the LTE royalties?

23 **MR WILLIAMS:** No, Madam, that's -- this plea -- obviously the position Which? is in, it's
24 deriving its factual allegations from such evidence and other material as is available to
25 it. What this paragraph is doing is it's pleading the facts, it's making the allegation that
26 there was leveraging in 1997 and following, and specifically in 2008. It's pleading that
27 these specific instances are manifestations and applications of the NLNC policy. It's

1 doing it in reliance on the material available to it, which is to say the FTC judgment
2 which reveals facts about Qualcomm's conduct that Which? wouldn't otherwise know.
3 But the way in which they're pleaded here is not simply to recall findings, it's an allegation of
4 facts. If one reads the whole of the paragraph, the whole of paragraph 68 is alleging
5 the abuse, and this is cross-referring to and relying on facts as stated in the FTC
6 judgment. And if one stands back, Madam, of course that's the way in which these
7 facts are pleaded and relied upon because the way our case is put is that Qualcomm
8 has a long-standing policy, it's been in effect since, as we plead here the late 90s, and
9 that policy has been maintained and applied by Qualcomm in its dealings with OEMs
10 over a long period of time, continuing up to the period of the claim.

11 **MRS JUSTICE BACON:** Yes, all right. Well, I think we have your submission on that. Is
12 there anything else you want to say before we consider whether to hear from
13 Mr Jowell?

14 **MR WILLIAMS:** Just in terms of the point you have made about what disclosure needs to be
15 given, I don't believe it's in issue that we're going to get disclosure in relation to
16 licensing and supply agreements in relation to CDMA. So obviously at some level it's
17 accepted that those matters bleed into the pleaded facts and the allegations that are
18 going to have to be dealt with at trial.

19 **MRS JUSTICE BACON:** All right, thank you.

20 **MR TURNER:** Mr Jowell, just a question of clarity so we understand your relating back point
21 and paragraph 34. What actually comes out of the pleading, the proposed
22 amendments, what goes in and what doesn't go in? Sorry, I've got a bit confused,
23 that's all.

24 **MR JOWELL:** Yes, of course. So I think maybe it's easiest to pick it up from the way it's
25 referred to in Mastercard. It's volume 1, tab 21.

26 **MRS JUSTICE BACON:** Sorry, are we looking at the authorities?

27 **MR JOWELL:** The authorities bundle.

28 **MRS JUSTICE BACON:** I for myself just need a PDF page.

1 **MR JOWELL:** So A797.

2 **MR TURNER:** Which paragraph?

3 **MR JOWELL:** It's paragraph 4.

4 **PROFESSOR MASON:** 4?

5 **MR JOWELL:** Yes. What is done is that in the order, the order is made on terms that the
6 new pleaded claim pleads a new cause of action only from that date, or the stipulated
7 date. The practical effect is that insofar as they are seeking damages for any inflated
8 royalties passed on to consumers, those can only be claimed for the six years prior to
9 that date.

10 **MR TURNER:** I understand that. Just as a practical matter, subject to that caveat, everything
11 comes in.

12 **MR JOWELL:** Everything comes in. We will wish to ask further investigation the particulars
13 of the claim, but we're not taking the position that it should be at this stage refused in
14 relation to 3G.

15 **MR TURNER:** So including, for example, at paragraph 67 the allegation of abuse in relation
16 to the 3G CDMA market, that would stay in, would it?

17 **MRS JUSTICE BACON:** It stays in as a pleaded case, but your point is that in relation to any
18 damages, they can only be --

19 **MR TURNER:** They only go back six years. No, I understand.

20 **MR JOWELL:** That's exactly. We will be in due course -- the claim as currently pleaded is
21 highly ambiguous and it's a very unsatisfactory situation. But that's something we'll
22 come on to in due course.

23 **MRS JUSTICE BACON:** We will come on to particularisation. The limitation for damages
24 would mean that any disclosure would be limited to the disclosure relevant to damages
25 for that six-year period and not any earlier period.

26 **MR JOWELL:** Insofar as it is alleged to come from CDMA leveraging --

27 **MRS JUSTICE BACON:** CDMA, yes.

28 **MR SAUNDERS:** -- if you like, rather than LTE leveraging, which is the existing claim.

1 **MRS JUSTICE BACON:** All right.

2 All right. Well, I don't think we need to hear any more from Mr Jowell. In our view, the pleading
3 amendments in relation to 3G CDMA do raise a new cause of action and do not turn
4 on the same or substantially the same facts as already pleaded. We do not accept
5 Mr Williams' submissions on that point and therefore the position is that the pleading
6 amendments will be allowed but the 3G CDMA case is, as per what Mr Jowell referred
7 to as the Mastercard approach, deemed to have been made on 26 June 2023, which
8 means that there is a backstop for damages of 26 June 2017 and we do not accept,
9 just as a subsidiary matter, that any part of the CDMA pleading that is objected to is
10 simply particularisation of a claim made earlier.

11 If you require a more detailed judgment on that at some point, we will have to deliver that in
12 writing. But I'm not going to do that now, you will just need to indicate whether you
13 need that from the Tribunal.

14 **MR WILLIAMS:** We will do that, Madam.

15 **MRS JUSTICE BACON:** All right. I think we can perhaps move quickly on to the 5G
16 amendments and I can tell you our provisional view on that, which is to allow in the
17 amendments now but to require an answer to be provided to the requests for further
18 information within reasonably short order, and we had in mind the end of July.

19 Does anyone want to comment on that?

20 **MR JOWELL:** May I say Mr Saunders will be dealing with 5G, which seems appropriate
21 because he is technically more advanced than I am.

22 **MRS JUSTICE BACON:** Right.

23 Well, does anyone want to ask to us make a different order, whether on the principle or the
24 timing?

25 **MR SAUNDERS:** My Lady, what we say is that the ambiguities are so endemic in relation to
26 5G that actually the class representatives should have another go at this pleading and
27 to fix the things we have identified and deal with the points we have raised in a letter.
28 Once that's done, then we should have an opportunity to have a look at it. It may well

1 be that we can consent to it at that point, but it is extremely ambiguous the way that
2 this is alleged to have arisen, and it's very, very vaguely pleaded at the moment.

3 **MRS JUSTICE BACON:** Well, you haven't said in your skeleton argument, or in the
4 correspondence as far as I have seen, that if that had been pleaded in ab initio, it would
5 be liable to be struck out.

6 **MR SAUNDERS:** No, my Lady, we're not taking the point like that. We're saying that if they
7 address the points we've raised -- we made a number of points in a letter of -- in
8 correspondence, the letter in June, I think it was 27 June.

9 **MRS JUSTICE BACON:** Why don't you just take us first to the paragraph. What's your most
10 ambiguous paragraph?

11 **MR SAUNDERS:** Well, so if you take the pleadings in tab 7 of the core bundle, 57A we looked
12 at a moment ago. My Lady, can I just orientate you very briefly as to 5G because 5G
13 is a little bit different to LTE. It's a new standard that was coming in in 2018. You have
14 to know a little bit about the chipset supply practices.

15 The starting point is that Samsung self-supplied 4G (inaudible) chipsets and it had its Exynos
16 range of chips; Apple dual-sourced chips from Intel and Qualcomm --

17 **MRS JUSTICE BACON:** I wonder if that's a bit too much detail.

18 **MR SAUNDERS:** Well, my Lady, it's a little bit -- because in order to understand leveraging
19 or why we say that leveraging is very vague, the allegation of this, it's quite important
20 to understand where the chips were coming from and what the sources were. But
21 I can cut through it.

22 **MRS JUSTICE BACON:** I think you just need to take us to the worst paragraph.

23 **MR SAUNDERS:** Paragraph 57A we were looking at a second ago, "With necessary
24 modifications for 5G". They should set out what those modifications are at the very
25 least.

26 **MRS JUSTICE BACON:** Well, I understand what they're saying.

27 **MR SAUNDERS:** And then the allegations of leveraging, so the allegations of dominance we
28 have identified a number of, so you will see those in --

1 **MRS JUSTICE BACON:** 63B. There is nothing inherently unintelligible about this.

2 **MR SAUNDERS:** No, it's a question of dates because the dates are actually very critical in
3 2019.

4 **MRS JUSTICE BACON:** Well, okay, but you might dispute that in your defence.

5 **MR SAUNDERS:** We need to know exactly what is being alleged against us in terms of the
6 dates on which these different supplies were taken. I know they rely on the LDC date
7 and we have asked for that four times now but it's not been provided. But I agree this
8 is a point down the track.

9 68h on page 38, that's the abuse plea. It is said:

10 "Qualcomm leveraged its dominant position on the 5G market to impose inflated royalties for
11 the portfolio of LTE SEPs in relation to 4G."

12 And then they plead April 2019, the Apple agreement, and then there is another matter there
13 pleaded -- it's coloured in so I won't read it out.

14 **MRS JUSTICE BACON:** Yes.

15 **MR SAUNDERS:** "On those occasions, Qualcomm was able to and did leverage ..."

16 So it's a positive averment of fact that we have leveraged our dominance in the supply of 5G
17 chipsets, which at that stage Apple had just acquired Intel and were using Intel chips
18 for 4G, Samsung was self-supplying 5G chips and was launching them around that
19 time as well. So:

20 "Qualcomm's ability to withhold and disrupt supplies of chipsets, on which device
21 manufacturers depended, enabled it to secure inflated royalties."

22 So that's the allegation.

23 We raised a number of questions in relation to that because it's just simply we do not
24 understand how it is said in the circumstances where the market was a nascent market
25 and where both of these, Apple and Samsung, had their own self-supplying
26 mechanisms that it could be said they were dependent on Qualcomm.

27 **MRS JUSTICE BACON:** That's just a factual disagreement.

1 **MR SAUNDERS:** My Lady, it is, but we need to know some clarity around the case that's
2 actually alleged against us. Those are the points we picked up in correspondence.

3 **MRS JUSTICE BACON:** All right. But what is wrong with my proposal that we cut through
4 this, allow the amendment in and I make an order requiring a response to your
5 questions in relatively short order? What problem do you have with an answering of
6 your questions at the end of July?

7 **MR SAUNDERS:** My Lady, we don't have a problem with that if they answer the questions in
8 the letter. I think my learned friend's skeleton seems to cut through some of those --

9 **MRS JUSTICE BACON:** I was asking you both to address our proposal, which is that we
10 allow the amendments, get it done now, and then ask them to answer your questions
11 in short order.

12 **MR SAUNDERS:** I think we would be content with that.

13 **MRS JUSTICE BACON:** All right, thank you.

14 Mr Williams.

15 **MR WILLIAMS:** You have probably seen, Madam, that some of the questions in the letter are
16 the same questions that are asked in the RFI; that is the questions about whether the
17 nature of the cause of action, whether it's a refusal to supply, is it case 1, is it case 2?
18 Effectively they are asking those questions in relation to the 5G amendments as well.
19 So our proposal was that the responses to those questions should on any view be
20 joined up with the response to the other RFI.

21 **MRS JUSTICE BACON:** Yes, and we had in mind that for the end of July as well, but we will
22 come on to that. Assuming that we set a date by which all of the questions should be
23 answered -- and it's the same date so you don't have to do two lots of responses -- do
24 you object to the Tribunal's initial view that this should be allowed in but with responses
25 to be provided by a date to be set?

26 **MR WILLIAMS:** No, that's the position in principle that we support, Madam.

1 **MRS JUSTICE BACON:** All right. That's what will be ordered in relation to the amendments,
2 then. I don't think it's useful to have a prolonged process by which the answers are
3 then given and then we have another debate about whether these amendments go in.

4 **MR SAUNDERS:** My Lady, I entirely accept that. Can we just make it clear that that's without
5 prejudice to any application to strike out in the future if we should be so obliged to
6 make that?

7 **MRS JUSTICE BACON:** Yes.

8 **MR SAUNDERS:** And also just to be clear, these are the questions in the letter of
9 27 June 2023, so that sets out the various questions.

10 **MRS JUSTICE BACON:** Yes. Well, the order won't say without prejudice to you because
11 you haven't made an application to strike out. But your position is --

12 **MR SAUNDERS:** No, but I don't want it to be said against us that we're shut out from matters.

13 **MRS JUSTICE BACON:** Yes, all right. Well, that then deals with the pleading amendment.
14 Just let me make a note of that.

15 I think we will then take a short break for the transcribers and we will return in five minutes and
16 we will then turn to the issue of the two sets of RFIs.

17 **(11.43 am)**

18 **(A short break)**

19
20 **(11.50 am)**

21 **MR WILLIAMS:** Madam, I don't know in what order you want to deal with the RFIs.

22 **MRS JUSTICE BACON:** I propose to deal with the Which? RFI first. That's the class
23 representative's second RFI.

24 **MR WILLIAMS:** Yes.

25 **MRS JUSTICE BACON:** We have an initial question on that, and I think we agreed we are
26 just going to be scratching the surface of this question at this CMC and we're not asking
27 for definitive responses. But a concern we do have is the extent to which this is turning

1 into a FRAND trial, or a multiple FRAND trial, and how that is going to be case
2 managed.

3 Initially, the relevance of FRAND as far as we saw it was that FRAND was pleaded as a proxy
4 for the counterfactual competitive licence for the purposes of calculating loss and
5 damage.

6 It's come in again by way of defence, as we see it, in Qualcomm's pleading that its rates were
7 fair, using the word "fair" but I think not "FRAND". Now, the RFI seeks to investigate
8 the FRAND issues.

9 Just before we get into the RFI, can you give us a view on the extent to which you think this
10 trial is going to turn on FRAND issues, as in what proportion of the trial, and are there
11 going to have to be multiple investigations of FRAND or a single investigation? Can
12 you both give your view on that?

13 **MR WILLIAMS:** From our point of view, we don't think it's a FRAND trial, but we recognise
14 that questions of FRAND are going to be investigated in relation to quantum and
15 Mr Jowell's defence that their rate was FRAND, the royalties were FRAND.

16 In terms of this RFI, and this is really a point I was going to develop, this RFI is not directed at
17 FRAND issues, it's really directed at the factual question of how Qualcomm went about
18 setting its royalty rates. The submission I was going to develop is we don't seek that
19 information for the purposes of a FRAND question with a capital F; we seek it because
20 we say it's a factual issue that lies at the heart of the competition law case.

21 **MRS JUSTICE BACON:** Before we get on to that, you say it's not a FRAND trial but there
22 are issues of FRAND in relation to quantum. I'm not sure how I can reconcile those
23 two statements. It looks like there is going to have to be effectively a mini FRAND trial
24 at least in relation to quantum.

25 Is there going to have to be a separate FRAND trial in relation to the Qualcomm defences, or
26 does it come down to one and the same issue?

27 **MR WILLIAMS:** I think our view certainly at the moment is that it's one and the same issue
28 and it will be one trial.

1 **MR TURNER:** So if it's -- if the royalty rates charged by Qualcomm are not FRAND, I mean,
2 so what? How does that impact the abuse case?

3 **MR WILLIAMS:** Well --

4 **MR TURNER:** I appreciate Qualcomm's position. They say if they are FRAND, they can't be
5 abusive, and we will hear from Mr Jowell on that. But let's assume they're not FRAND,
6 why does that need to be investigated either as a matter of liability or quantum?

7 **MR WILLIAMS:** Well, we have proposed a methodology which is intended to identify the
8 counterfactual royalty rates. So on the way we put the case, we don't raise FRAND as
9 an issue in that sense.

10 **MRS JUSTICE BACON:** Well, you do because it's the best part of the counterfactual.

11 **MR WILLIAMS:** Yes, we have raised it as a benchmark for a counterfactual rate.

12 **MRS JUSTICE BACON:** That means there is going to have to be a trial of that benchmark
13 because you haven't put forward any other way of calculating the benchmark.

14 **MR WILLIAMS:** Yes. Sorry, I think -- sorry, Madam, we're at slightly cross-purposes. That
15 issue is clearly going to have to be investigated as a matter of expert analysis. The
16 point I was making was simply that we don't characterise the legal issue as one of
17 FRAND, but we have certainly envisaged that the question of whether the rate is
18 FRAND as it bears on quantum be dealt with as part of the single abuse and damages
19 trial.

20 Mr Turner's question is if the rate is not FRAND --

21 **MR TURNER:** Let's assume the rate is not FRAND. Where does that leave you?

22 **MR WILLIAMS:** Well, I think the question is what findings does the Tribunal make in
23 reaching -- I mean, do you mean it's higher than a FRAND rate--

24 **MR TURNER:** Yes, higher.

25 **MR WILLIAMS:** I think on that basis, Qualcomm's defence has been rejected.

26 **MR TURNER:** But is your positive case that if it's higher than FRAND, it's inappropriate
27 overcharging?

1 **MR WILLIAMS:** Certainly the way the expert methodology was envisaged at the CPO stage
2 was that if it's above FRAND, then it's above a competitive benchmark. So that's the
3 way that case was put forward.

4 **MRS JUSTICE BACON:** Does that mean -- but your abuse case is not put on that basis. On
5 one hypothesis, let's say the Tribunal investigated all of these issues, the Tribunal
6 could find that the royalty rates were above FRAND but that there was no abuse
7 because your abuse case, as you've just confirmed, is not put on a FRAND basis.
8 FRAND has nothing to do with whether there has been an abuse or not.

9 So the fact that an investigation of the FRAND rate might lead to the conclusion that the royalty
10 rates were above FRAND does not, on your case, tell us anything about whether there
11 is an abuse.

12 **MR WILLIAMS:** Well, it depends what you mean by the abuse, Madam, because obviously
13 in order to investigate the abuse, one would look at effects, and the impact of the
14 conduct on prices would be one aspect of analysing whether there were
15 anti-competitive effects.

16 **MRS JUSTICE BACON:** That's not pleaded as part of your abuse case.

17 **MR WILLIAMS:** Sorry, Madam -- obviously our case is that there was leveraging conduct
18 which had the effect of increasing royalty rates above the rates which would have
19 applied in the counterfactual. So in that sense, that is part of the effect of the conduct.

20 **MRS JUSTICE BACON:** So are you saying -- actually you said this is not a FRAND trial, but
21 there are issues of FRAND in relation to quantum. Are you now saying that actually
22 your abuse case does turn on an investigation of FRAND?

23 **MR WILLIAMS:** I think we had envisaged that there would be a single trial in which the
24 question of the conduct and its effects and quantum would all be investigated.
25 I'm afraid I don't have on the tip of my tongue an answer to the binary question,
26 Madam, whether if the answers noted that means there is no abuse. But certainly we
27 had envisaged that although the cause of action isn't defined with reference to FRAND

1 that the trial was going to be -- it was going to be a necessary element of the trial to
2 resolve the FRAND question, in particular because of the way our expert evidence --

3 **MR TURNER:** But the sort of -- I appreciate these questions are difficult to answer when put
4 so starkly, but whether FRAND is a relevant benchmark is quite an important question
5 precedent before you set off on a massive FRAND trial and have to decide whether it's
6 FRAND and you end up saying, well, it isn't, but then you shrug and go, "Maybe that
7 doesn't matter". These questions might arguably need grappling with at an earlier
8 stage.

9 **MRS JUSTICE BACON:** And I think the debate we have just had highlights that point because
10 you started off your answer to my question by saying that issues of FRAND only arose
11 in relation to quantum. But in the discussion we have just had, what you seem to be
12 suggesting is that actually it is a benchmark to determine whether there's been
13 an abuse.

14 **MR WILLIAMS:** Well, I didn't mean to put it on quite such a binary basis, Madam. I was
15 simply making the point that the question of effects is part of the abuse enquiry, and
16 part of the question of effects involves considering the impact on royalties. So I didn't
17 mean to say that in a sense there's a --

18 **MR TURNER:** We understand, but it's not straightforward to answer at this stage. I think
19 we've got that far.

20 **MR WILLIAMS:** I didn't mean to give a clean-cut answer. The practical answer to your
21 question, Madam, is that we accept FRAND issues come into the equation somewhere
22 and clearly you've raised them --

23 **MR TURNER:** And they come on into the, okay, why do they come into at all? Can you
24 answer that? You say they clearly come in somewhere, why?

25 **MR WILLIAMS:** At a minimum on our case, they come in as a benchmark for a competitive
26 price, at a minimum. On Mr Jowell's case, it comes in as a complete defence.

27 **MR TURNER:** Yes, we will get to Mr Jowell. But you're saying your case is if they charge
28 more than FRAND, that's evidence for abuse of itself?

1 **MR WILLIAMS:** Well, obviously one would need to establish the conduct as well, but it's part
2 of the answer to the question, I think, yes.

3 **MR TURNER:** Right. And why are you picking FRAND as the benchmark? I understand
4 other factors apply, but you're picking FRAND as a relevant benchmark. Why are you
5 picking FRAND and not some other benchmark?

6 **MR WILLIAMS:** I don't have an answer to that question on the tip of my tongue, Sir, I'm afraid.
7 That takes us back to the way the case was put at certification stage and --

8 **MR TURNER:** Yes, but I mean, things are going to move on and we're going to have to ...
9 yes, okay. Thank you.

10 **MRS JUSTICE BACON:** Can we hear -- I'm not sure which of you is going to address this.

11 **MR JOWELL:** I think I can deal with this at a high level anyway; and detailed FRAND issues,
12 Mr Saunders.

13 The position we have is that this is very much not and should not be a FRAND trial. However,
14 FRAND has come in, in two ways. One, as you've identified, is through the claimants
15 initially stating that it is a way of quantifying their loss, it's a benchmark for quantifying
16 their loss. And secondly, we did introduce it into our defence, but very much as
17 a backstop defence. It is not, we think, the central reason why this claim failed but it's,
18 if you like, an absolute backstop in the sense that we say if the rates were FRAND, as
19 we say they were, then obviously there was no abuse at all.

20 **MR TURNER:** Although the case that's put against you is a little -- is qualified in the sense
21 that it's not about whether -- I mean, it's saying you don't allow, and I appreciate this is
22 just an allegation which you deny, but you don't allow customers access to the
23 mechanisms which allow them to challenge FRAND. So I mean, that's an aspect of
24 abuse that's put against you, and again -- obviously you deny that, but I'm not quite
25 sure how an analysis of FRAND really helps in those circumstances.

26 **MR JOWELL:** No, except that I think the core of their allegation is that there is not what they
27 call the silencing allegations, which are really just settlement agreements with
28 customers, or provisions in settlement agreements with customers. But is this idea of

1 no licence, no chips, and the leveraging of it, and they say that led in some way to
2 higher royalties, we say -- well, we deny there is an abuse at all, we will come on to
3 that. And that's the central issue was this conduct of no licence, no chips, whatever
4 precisely that constitutes, an abuse of dominance? It's in that context that one then
5 needs to have some -- one needs to have a consideration of first and foremost of that
6 issue: is that an abuse of dominance? We simply say by way of a fallback, if you like,
7 defence, if it turns out that the rates are FRAND on an objective analysis, then clearly
8 there can be no abuse because there has been an effect.

9 Now, we thought that that might be common ground but somewhat bizarrely, given their case
10 on quantum, when we asked them about it, it isn't common ground. If I could just show
11 you that because this led to our confusion.

12 **MR TURNER:** I understand --

13 **MR JOWELL:** I think it is helpful to see it, it's in the response to our second RFI on S391. It
14 starts at -- the questions are at S390 and the answers are at S391.

15 **MRS JUSTICE BACON:** "1. Which? does not accept that if the licence terms were shown to
16 be FRAND, it would follow that the NLNC policy does not constitute an abuse of
17 dominance."

18 **MR JOWELL:** Yes. Which we found positively bizarre because if they're -- really, it's answer
19 to 6. They say:

20 "It is possible in principle for the royalty rates that Qualcomm imposed on Apple and Samsung
21 to involve overcharges without it also being that the case that the royalty rates paid by
22 Apple and Samsung were above the top of the range of possible FRAND rates."

23 And so we are now --

24 **MR TURNER:** It's not quite the question we are asking. These are complicated matters,
25 but -- I mean, as you rightly point out, you have introduced FRAND into your defence.

26 **MR JOWELL:** But very much as a fallback. It's not --

1 **MR TURNER:** Okay, that may be the case, but will you be saying that the Tribunal has to
2 have a single or maybe a multiple FRAND trial to know whether you have a defence
3 to this action?

4 **MR JOWELL:** Well, to some degree, that depends upon whether we can get sufficient clarity,
5 and therefore tractability of their abuse case such that it may be possible to resolve
6 that, if you like, without getting into FRAND, and that's what effectively our RFI is
7 seeking to do, which we will come on to. But at the moment, FRAND is in there as
8 a matter of quantum on their side as they're currently formulating their quantum case,
9 albeit apparently not decisive on abuse and it is a fallback for us. So that is the current
10 position on the pleadings. Whether it can be sensibly hived off --

11 **MR TURNER:** But you're saying FRAND is a benchmark for abuse.

12 **MR JOWELL:** Well, it's a --

13 **MR TURNER:** So if all the other allegations are proven but your royalties are FRAND, you'll
14 say that will give you a defence, no?

15 **MR JOWELL:** No. With respect, no. We say absolutely not. We say one has to -- that
16 FRAND is just a simply a fallback; that if it's not FRAND then a fortiori, if you like,
17 there's no abuse. But we say abuse has to be shown independently and at the moment
18 we are struggling to understand how this no licence, no chips allegation can be
19 adjudicated. How does one obtain a methodology to adjudicate whether that has
20 an anti-competitive effect or not?

21 That is why we're seeking to get some kind of clarity as to what actually is the nature of this
22 case. Because if it's simply policy alone, well, that simply -- it seems to us to be wrong
23 in law, that a refusal to supply a product on a perfectly reasonable basis; namely that
24 you haven't taken the licence that is necessary. We say that couldn't possibly be
25 an abuse, so the alternative way they seem to be formulating their claim is that you
26 use this, you effectively somehow try to use that, use the need for the chips as a way
27 to, if you like, make threats in relation to the licence. And then one needs to have a --

28 **MRS JUSTICE BACON:** Yes, that brings us -- we're not going to deal with that right now.

1 **MR JOWELL:** No, forgive me. But we need to find some methodology to try to measure, you
2 know, how the abuse as formulated like that then is or isn't an abuse. And that isn't,
3 that does not -- so to come back to the question I was asked -- that does not, certainly
4 does not come back to whether their rates were FRAND or not because the rates could
5 be above FRAND for all sorts of reasons --

6 **MRS JUSTICE BACON:** All right.

7 **MR JOWELL:** -- but that doesn't constitute an abuse.

8 **MRS JUSTICE BACON:** All right. It seems clear that there are on the one hand issues that
9 don't raise the issue of FRAND, including as you say the question of principle, whether
10 a rate that is FRAND can be nevertheless abusive, and other questions of principle.
11 Then there are some questions in the trial that will turn on FRAND issues.

12 I think at the very latest for the next CMC, we will need to have a clear indication of the
13 respective weights of those, the FRAND and the non-FRAND issues, for the proposed
14 trial, and indeed whether it's possible to separate off the question of quantum and elide
15 with that any FRAND issues to a second trial, leaving a first trial somewhat clean of
16 those issues, especially if there are major points of principle that will affect the question
17 of the extent to which FRAND is relevant at all.

18 So that's something we're not going to ask for answers on now, but we raise that as something
19 that will need to be addressed at the latest by the next CMC.

20 **MR JOWELL:** We are very grateful.

21 **MRS JUSTICE BACON:** All right. So we will then turn on to the question of the class
22 representative's second RFI, which is at S, PDF page 469.

23 **MR WILLIAMS:** I'm grateful, Madam. So you will have seen the way in which this has arisen.
24 Although this is formally a new request for further information, the second question
25 which was sent on 15 June, it's not new in substance. I think it's common ground that
26 it's a follow-up RFI which zones in on aspects of our first RFI, to which we say we
27 haven't had a proper response.

1 We have taken the opportunity to clarify and narrow some of the questions, so it's quite
2 different from Qualcomm's third RFI which we saw for the first time two weeks ago.

3 The RFI is, as you say, at 469. I don't know if you want to see it in the context of the previous
4 RFI.

5 **MRS JUSTICE BACON:** No, we will just look at this one.

6 **MR WILLIAMS:** I'm grateful.

7 **MRS JUSTICE BACON:** And I will say that our provisional view is that the questions in this
8 seem somewhat premature prior to disclosure and at least some of the requests look
9 like a matter for submissions, but the first part of request 4, insofar as it is simply cast
10 as a notice to admit, seems to be unobjectionable.

11 Qualcomm can say whether it admits the truth of facts recorded in the judgment and that's
12 a common type of RFI, and if it doesn't then you know what its position is, but I don't
13 think the matter of the question as to if it doesn't admit then why not, I think that's
14 a matter for submissions in due course. That's our provisional view.

15 **MR WILLIAMS:** That's the second half of request 4.

16 **MRS JUSTICE BACON:** Yes, exactly.

17 **MR WILLIAMS:** Yes. I'm grateful for that indication. The core of the RFI, as far as we're
18 concerned, is requests 1 to 3 and they go to the question of what steps if any
19 Qualcomm took to ensure that it was charging fair and reasonable royalties. And the
20 way this arises most directly on the pleadings is in the context of Qualcomm's
21 explanation of what it characterises as its own business practices and the pleading
22 that it sought to ensure that the rates gave it a fair return on the value of its SEPs.

23 So it does arise, in my submission, directly on the pleadings, but even if it hadn't been pleaded
24 in that way then it would still be a central factual issue in the case because it's
25 concerned with how Qualcomm went about setting the royalties which are at the heart
26 of the case.

27 **MRS JUSTICE BACON:** Why is this not just a matter for evidence or submissions in due
28 course? And I do not understand why you say that this is a necessary part of the

1 pleading. If Qualcomm says that its royalty demands are FRAND then that will be for
2 Qualcomm to establish.

3 **MR WILLIAMS:** Yes, so the way my learned friend put it in his skeleton, he said: well, we
4 have asserted that our rates are FRAND and that's an objective question for trial. But
5 those -- the paragraphs that he refers to, which are the pleas of FRAND are not the
6 paragraphs we're asking for further information of.

7 The paragraphs that we're asking for further information about, and it's probably worth just
8 looking at them in the defence briefly; it's supplemental bundle, tab 2. So that's the
9 RFI. So you can see them in the RFI.

10 **MRS JUSTICE BACON:** Yes, because they're extracted.

11 **MR WILLIAMS:** Yes, but what you can see -- and I will just make this submission -- what you
12 can see more clearly when you look at them in the context of the defence is that, in
13 particular, the requests at 49 and 59 are requests for particulars of what Qualcomm
14 characterises as its business practices, that is to say its chipset -- I just want to use
15 the right defined term -- chipset supply practice and the licensing practice, so --

16 **MR TURNER:** Where are you looking? I beg your pardon.

17 **MR WILLIAMS:** I will take you in the defence, if that's convenient. S64 in my bundle and the
18 reference is at 8 --

19 **MR TURNER:** You are looking in the defence, are you?

20 **MR WILLIAMS:** I am looking in the defence.

21 **MR TURNER:** That's fine, just give me the paragraph number in the defence again.

22 **MR WILLIAMS:** It's paragraph 48 in the defence.

23 **MR TURNER:** Thank you.

24 **MRS JUSTICE BACON:** Can that be brought up?

25 **MR WILLIAMS:** It's S83.

26 So you see the heading, "Qualcomm's chipset supply practice" and then 48 defines that
27 practice. 49 explains what the aims, objectives and outcomes of the practice are and

1 the questions -- the paragraphs that we have asked questions about include 49.1, in
2 particular the first line and 49.2, but --

3 **MR TURNER:** I think my difficulty is if you take FRAND away, so pretend we're not talking
4 about telecommunications; we're talking about screens for TVs or something and
5 somebody has patent rights or a suite of patent rights, they're entitled, and the whole
6 point of the system is they're charging a high price. And so although I appreciate
7 Qualcomm have said: we're not charging a high price, I don't understand why the price
8 has got anything to do with it, because the whole nature of a patent monopoly is you
9 charge a higher price than you would be able to do if you have fair competition.

10 Now, I appreciate once one gets into telecommunications you have the whole FRAND
11 landscape which impacts things, so if you look at it through FRAND eyes things get
12 more complicated for FRAND reasons, but I don't understand why from the purposes
13 of abuse one needs -- you're frowning at me, I can tell this is not very -- for the
14 purposes of abuse why you start off from the position someone's got a suite of patents,
15 they can charge large premium, what's wrong with that? To say otherwise seems to
16 be to say that competition law is trumping the patent system which, according to case
17 law, is not the case. So you have to look for other aspects of abuse rather than just
18 inflated price.

19 So that's why, when one gets to this sort of detail, it's very difficult at the moment for me to
20 understand why one is interested and looking at this from the price perspective as
21 opposed to from the conduct perspective.

22 **MR WILLIAMS:** I'm, with great respect, not going to answer your question, Sir, in this sense:
23 your question is about the level of the price and the RFI is not about the level of the
24 price; it's about the process by which Qualcomm set the price.

25 **MR TURNER:** The two are closely related.

26 **MR WILLIAMS:** Well --

27 **MR TURNER:** If the price isn't relevant, how they set the price isn't relevant.

1 **MR WILLIAMS:** We say that that, apart from anything else, understanding how they set the
2 price is an issue which is going to be relevant when we come to talk about expert
3 evidence in due course. And one of the questions that we say which the court ought
4 to have visibility of when it decides what expert evidence it ought to adduce is at the
5 outline level, not at the level of evidence but the outline level, what Qualcomm means
6 when it says in these paragraphs that it takes particular steps to ensure that its royalties
7 are set at a fair level, paraphrasing.

8 **MRS JUSTICE BACON:** That's not what it's saying in those paragraphs. If you read it,
9 paragraph 49 is saying Qualcomm's chipset supply practice is legitimate because it,
10 the "it" being Qualcomm's chipset supply practice; it's not saying: this is legitimate
11 because Qualcomm's policy is to recover a fair return on its investments, that fair
12 returned being FRAND. So I don't see that anything in paragraph 49 raises any of the
13 questions you've asked in your requests 1 to 3 and certainly not to the extent that one
14 needs to understand what's being said there by answering those questions.

15 **MR WILLIAMS:** If I can just show you the other reference. Yes, I was going to say, if I just
16 take to you the other reference. If you turn over to S88, because I think this is the
17 paragraph where the issue arises most directly. 57 deals with what is defined as the
18 licensing practice.

19 **MRS JUSTICE BACON:** But 57 isn't one of the paragraphs addressed in your RFI.

20 **MR WILLIAMS:** No, 59.4 is. I'm just showing you this for context.

21 **MRS JUSTICE BACON:** Right.

22 **MR WILLIAMS:** So this is where the licensing practice is defined. And if you turn over to
23 59.4, it's a particular of 59 which says as to Qualcomm's licensing practice, and 59.4
24 says that:

25 "Their business model is to seek to obtain a fair return on its R&D and to ensure that the
26 royalties it receives reflect the value of its SEPs at the end device level."

27 And then, continuing to read on in the last sentence:

1 "Qualcomm therefore contracts separately for (i) the value of the baseband chipsets it sells ...
2 and (ii) the value of its patent rights including its SEPs which it licences at the end
3 device level."

4 So that is saying that they contract for the value of the SEPs and so that's why we say that --

5 **MR TURNER:** I fully understand that Qualcomm have pleaded this. That wasn't really my
6 question. My question was asking you why it's going to be ultimately relevant to abuse.

7 **MR WILLIAMS:** Why it's going to be relevant to abuse?

8 **MR TURNER:** Yes. At the moment I am having difficulty understanding, and I don't mean
9 that you're wrong; I mean I'm having difficulty understanding.

10 **MR WILLIAMS:** I think it does intercept with the conversation we were having in relation to
11 the last issue, which is when the parties and their respective experts come to analyse
12 the royalties, they are going to be doing so within a framework which I think both
13 parties think, at the moment, is going to include aspects of a FRAND methodology
14 and --

15 **MR TURNER:** But why is charging a high price for patented technology abusive without
16 more? Why is it an indicator of abuse? It may be a consequence of abuse but why is
17 it an indicator of abuse? If I have a patent on an antibiotic that costs pennies to make
18 I'm probably going to charge tens of pounds to sell it. That of itself is not an indication
19 of abuse.

20 **MR WILLIAMS:** No. The essence of the abusive conduct is the leveraging, it's the leveraging
21 of the market power, and what we're dealing with here is what the price impact of that
22 may be. So, I mean, I'm not at the moment answering the question as to whether the
23 price in itself would ever be an indicator of abusive conduct. There are cases where
24 one simply looks at the outcome and says that that's part of the matrix, which is
25 informative of whether there's an infringement in the first place.

26 But at the moment, I'm assuming for the purposes of this submission, that the abuse is the
27 leveraging of market power and that we're now at the question at the end of the enquiry
28 which asks: are there effects -- what's the quantum of the claim. And it's in that context

1 that I think both sides accept the sorts of questions that have arisen in paragraph 59.4
2 are going to arise, and we say that it clearly arises on the basis of the pleading. It's
3 a central issue in the case because it's all about whether they took steps to ensure that
4 their rates were reasonable as opposed to leveraging the sort of higher royalty that
5 they can obtain because of their market power.

6 **MRS JUSTICE BACON:** Hang on, 59.4 is not pleaded in relation to quantum, and in relation
7 to the quantum issue I don't think any of the questions that you have asked would
8 arise, because FRAND is being taken into account in quantum in an objective way, as
9 far as I understand.

10 **MR WILLIAMS:** Well, Madam, no. We say that when the court or Tribunal comes to analyse
11 the question of whether this is an abuse, it is going to be a relevant consideration for
12 the Tribunal to look at how Qualcomm went about quantifying the royalties that it could
13 extract from OEMs in this situation and whether it simply charged the highest royalty
14 that it could or whether it did, as it says here, take steps to ensure the royalty reflected
15 the fair value of its SEPs.

16 **MRS JUSTICE BACON:** That's a completely different abuse. That is an excessive pricing
17 case, it's not a leveraging case or exploitative abuse, or whatever or -- sorry,
18 exclusionary abuse, or anything else that you have alleged.

19 **MR WILLIAMS:** Yes. On its own, it would be, but as part of the factual matrix, if on the one
20 hand the Tribunal is faced with evidence which says Qualcomm is pursuing a strategy
21 of leveraging; and on the other hand Qualcomm says no, in fact we didn't do anything
22 to leverage, what we did was charge reasonable royalties that established the value of
23 our SEPs, but in fact they can't provide any evidence that that's what they did and the
24 evidence --

25 **MRS JUSTICE BACON:** Well, that's a matter for evidence. If there is something they have
26 pleaded and they can't establish it, then they have not made out their defence. But
27 this seems to be -- the questions you're asking, it seems to me, go far beyond your

1 pleaded case: the central issues, as Mr Turner has raised, in relation to the abuse
2 case, or indeed Qualcomm's pleaded case.

3 **MR WILLIAMS:** Well, I think the most important practical reason why we say this arises at
4 this stage is that we're about to embark on a stage of seeking to make proposals for
5 expert evidence. And if in due course it's going to transpire that Qualcomm
6 substantiates the pleas it's put forward in these paragraphs by saying, "These are the
7 steps we took in order to set our royalties, we followed this particular method or we
8 used these techniques", then that's something the parties' experts would want and
9 need to address in their expert evidence.

10 **MRS JUSTICE BACON:** Yes, that will be flushed out in the expert methodologies, and if it
11 turns out there's an issue here which can't be addressed without further pleading, then
12 you can come back to the court and say: well, the experts have agreed that there is
13 this issue, Qualcomm's case is insufficiently pleaded, we need some more particulars
14 of this before we can make progress on the expert methodologies.

15 **MR WILLIAMS:** Madam, it won't necessarily be flushed out as part of the expert methodology
16 process, though, because what we're asking about here is what Qualcomm actually
17 did at the time. That is separate -- and that is really the point of this -- is that when we
18 come in due course to make proposals for expert evidence, we're going to want to deal
19 with both what the other side plan to do as part of their expert case, but also to be able
20 to deal with the case that's advanced on the facts.

21 **MRS JUSTICE BACON:** That's not a matter for expert evidence, then, that's a matter for
22 factual evidence and either Qualcomm substantiates what they say or they don't.

23 **MR WILLIAMS:** That's true on their case, Madam, but we will be dealing with those issues
24 through expert evidence, inevitably, in our position. So if it -- imagine this --

25 **MR TURNER:** Those issues being what, just remind me? What issues are you talking about
26 you will be dealing with?

27 **MR WILLIAMS:** The expert issues?

28 **MR TURNER:** Yes.

1 **MR WILLIAMS:** Essentially we're talking about the -- and I hesitate to use the word, but the
2 FRAND-type issues we were debating not very long ago.

3 **MR TURNER:** So you're going to say overcharging above FRAND insofar as one can ever
4 determine what the FRAND is, overcharging above FRAND, that's supportive -- are
5 we talking about quantum, are we talking about abuse, are we talking about ...?

6 **MR WILLIAMS:** Well, we're at least talking about quantum but the simple point is this: at the
7 moment, both parties envisage putting in evidence which will deal with the level of the
8 royalty rate to some degree with reference which is also an approach one would take
9 in a FRAND case -- whether you call it FRAND or not, it's the same sort of evaluation
10 techniques -- and we anticipate that Qualcomm is going to put forward an expert case
11 using a particular methodology.

12 **MR TURNER:** Maybe they are, but on a more fundamental level as to why they need to put
13 forward that case. Once you're outside a FRAND trial, where is the obligation on
14 a patentee to set royalties by reference to FRAND? Where does that obligation even
15 start to arise and why is that (a) relevant to abusive conduct or (b) an indicator of
16 quantum?

17 **MR WILLIAMS:** I'm dealing with this, if I may, on a slightly more prosaic level, which is that
18 at the moment we're planning to come back to the Tribunal in December and to deal
19 with questions at a reasonable level of granularity about what the expert evidence in
20 the case is going to look like. Leaving your deep question to one side for the moment,
21 both sides at the moment anticipate that what I have described as FRAND-type
22 evidence is going to form part of the expert evidence as part of the valuation case.
23 You have seen the pleas and Mr Jowell has made his brief submissions and he says
24 it's a backstop and nothing else.

25 **MR TURNER:** Given we might be discussing this in December, is there any reason why this
26 has to be answered now, this RFI?

27 **MR WILLIAMS:** We say it at least has to be answered before we put forward detailed
28 proposals for expert evidence because it really wouldn't be helpful to the Tribunal, or

1 efficient, either from our point of view or the Tribunal's point of view, for to us start to
2 formulate a crystallised position on expert evidence, not knowing how Qualcomm's
3 going to put this part of its case as a matter of fact. We understand the expert
4 methodology process we have proposed is intending to fill that gap in our
5 understanding as far as expert methodologies at trial are concerned.

6 But the issue arises in two ways. As I say, it's a pure question of expert evidence and
7 the Tribunal's management of that process and, on the other hand, in terms of factual
8 case, and one can posit a situation in which the parties move forwards with the expert
9 workstream without an answer to this question and put forward proposals, and then
10 we see a body of factual evidence in due course in Qualcomm's witness statements,
11 possibly into disclosure but possibly only in its witness statements, which put a different
12 complexion on all of that.

13 And that would be grossly inefficient, in my submission, really, really unsatisfactory. And I do
14 stress the point that we are not in the position of Qualcomm, who has factual witnesses
15 who can plug this gap. We're going to be dealing with it through our expert process,
16 and that is why we say that before that part of the case moves forward, we need
17 responses to these questions.

18 I hear what the Chair says about the second half of paragraph 4 and possibly paragraph 5 too,
19 but as far as questions 1 to 3 are concerned, that's the reason why we've made this
20 request now. We don't want to embark on that plank of work on experts and then to
21 find that effectively we have been missing an important part of the jigsaw.

22 **MRS JUSTICE BACON:** Right. Our provisional view is unchanged, I'm afraid. We are not
23 going to make an order that these requests be answered, with the exception of the first
24 part of request 4, which is simply whether Qualcomm admits the truth of certain facts
25 recorded in the FTC judgment. I don't think it's necessary to hear Mr Jowell or
26 Mr Saunders.

27 We don't think this is an appropriate time to explore this when it doesn't seem to us to arise
28 out of the pleaded case. It may or may not arise on the evidence in due course. If

1 Qualcomm puts forward evidence addressing the matters that are said here, that
2 evidence will be tested at trial, and some of the questions are, as we said at the start,
3 seem to us, an issue for submissions in any event.

4 So we do not make an order, save for the first part of request 4.

5 **MR SAUNDERS:** My Lady, could I just address you very briefly on something in preparation
6 for December or the next CMC when we do have it. These issues have been things
7 which certainly on this side of the court we have been grappling with to try and
8 understand what is this case on abuse that's being put against us -- and you will hear
9 Mr Jowell in relation to the RFI -- but more generally, quite how FRAND is said on the
10 claimant's case to fit in to the bigger picture is something we really do need clarity in
11 relation to.

12 **MRS JUSTICE BACON:** Yes, but the Tribunal also has concerns about this, as you will have
13 heard.

14 **MR TURNER:** It's not just the class representative.

15 **MR SAUNDERS:** No, no, I agree.

16 **MR TURNER:** They've put it in issue.

17 **MR SAUNDERS:** I take that, Sir, but they have disclaimed an excessive pricing case as well,
18 so the theory on which they say there's an abuse and, Sir, your points about the benefit
19 of a patent enabling charging at certain rates, we say are highly apposite to the point.

20 **MRS JUSTICE BACON:** These are questions the Tribunal is very much alive to, as you will
21 have understood from our questions.

22 All right, that deals with the class representative's RFI. Let's see if we can deal with the
23 Qualcomm RFI before lunch. With a fair wind, we may be able to get through the rest
24 of the issues in the CMC this afternoon, I am just indicating that. If we can, that would
25 be I think a jolly good thing for everybody.

26 All right, the Qualcomm RFI, Mr Jowell.

27 **MR JOWELL:** Yes. I think it is consented to in principle and the question is really in a sense
28 that they have agreed to answer it, save there is a dispute over timing. They have also

1 indicated that they think some of the questions are premature, or they have not
2 said -- which they have declined to identify which they say are premature.

3 **MRS JUSTICE BACON:** I think I should just indicate our provisional view: we consider the
4 questions should be answered at this stage and are not premature.

5 **MR JOWELL:** I'm grateful for that. If I may just add one or two things to what I was saying
6 previously because I think it will be swift.

7 **MRS JUSTICE BACON:** Are you going to address the question of proportionality or timing
8 because I have just given you our provisional view on proportionality and prematurity.

9 **MR JOWELL:** Well, I think it's very important on timing that we receive this really by the end
10 of July when we proposed and not the middle of September.

11 **MRS JUSTICE BACON:** Well, you don't need to make any more submissions on that. I have
12 already indicated that that's our provisional view. Why don't I hear from Mr Williams?

13 **MR JOWELL:** I'm grateful.

14 **MR WILLIAMS:** Madam, I will deal with timing first. We asked for mid-September because
15 we have availability issues at leading counsel level. I am away for the rest of July after
16 this week and Mr Turner is heavily engaged on another matter, and we simply thought
17 there was no particular urgency about this and that given the difficulties trying to pull it
18 together in August, a date in September would be much more practicable, absent any
19 particular urgency. So it's nothing more profound than that.

20 Obviously we can get on with it and if we were pushed to do it, we could probably provide
21 something in August. But normally that's not especially helpful and the question is
22 then is it worth the candle of pressing us to do it in August if nothing is really sitting
23 behind it. So it's purely a question of logistics at that level.

24 In terms of the response, we have made clear that we're going to respond. We're not
25 proposing to respond and put in a nil return. This is not a fig leaf. All we are saying is
26 this is a request we only received two weeks ago. We have been given no opportunity
27 to consider it and analyse the particular questions and it's very unusual, in my

1 submission, to make an application for an RFI before the counterparty has even had
2 a chance to respond to it.

3 There's no reason to apprehend that we're not going to respond in substance to the request
4 but at the same time, I'm not in a position to make submissions as to the precise extent
5 to which we will answer each and every question precisely as put. Just to take
6 an example, I mean, some of the requests ask for each and every particular of our
7 case at a point when we haven't received disclosure yet, so --

8 **MRS JUSTICE BACON:** Obviously you will be doing the best you can with the usual mantra
9 put in, you know, pending disclosure these are the best particulars we can give.

10 **MR WILLIAMS:** That's all we meant. We simply meant that by being ordered to -- if
11 the Tribunal is going to make an order that we should respond, we wanted to make it
12 absolutely clear that that doesn't mean we will be answering all of the questions in
13 exactly the way Qualcomm would like us to but. But perhaps that's --

14 **MRS JUSTICE BACON:** Well, it goes without saying that you can't prejudge what may
15 emerge in disclosure. So in terms of the availability issues, as I understand it, are you
16 saying you are completely unavailable between now and the end of July?

17 **MR WILLIAMS:** I am away after this week but I am working for parts of August and if it was
18 considered to be a priority, subject to our ability to consult with economic advisers, and
19 so on, we don't object to a day before September. It's simply that once one gets
20 past July, very often it's a matter of September is the next date, is this going to make
21 a difference to anybody?

22 **MRS JUSTICE BACON:** Well, yes, there is a difference between mid-August and
23 mid-September because not everybody is away for the entirety of August.

24 **MR WILLIAMS:** No, and I'm not suggesting we can't make any progress. It was simply
25 a timeframe which didn't, in my submission, put unnecessary pressure on us but
26 because July is going to be difficult. We apprehended a situation in which I look at it
27 in August, I have questions and the people I need to speak to aren't available for some
28 time. So that's why we proposed mid-September, it was purely practicable.

1 **MRS JUSTICE BACON:** How about the second week of September?

2 **MR WILLIAMS:** That will be fine.

3 **MRS JUSTICE BACON:** Let me just look at ...

4 All right, what about something like 11 September?

5 **MR WILLIAMS:** Yes, of course.

6 **MRS JUSTICE BACON:** All right, let's say 11 September.

7 **MR WILLIAMS:** Yes. Sorry, Mr Armitage reminds me there was the question of the 5G

8 amendments which you had in mind a sooner date in relation to those.

9 **MRS JUSTICE BACON:** Yes.

10 **MR WILLIAMS:** But as I said when we were looking at that issue, some of the questions are

11 the same.

12 **MRS JUSTICE BACON:** Well, yes. I don't have in mind that two different sets of answers

13 should be given. That seems to me inefficient.

14 **MR WILLIAMS:** Yes, we will deal with the 5G questions at the same time. I'm grateful.

15 **MRS JUSTICE BACON:** And in relation to the 5G questions, I presume you will be telling me

16 the same, that you and Mr Turner are both going to be unavailable.

17 **MR WILLIAMS:** We did. We propose the same date for the same reasons.

18 **MRS JUSTICE BACON:** Yes, all right. So we will order 11 September for that.

19 The question is now whether we turn on to disclosure. I think we should make a start on the

20 disclosure points at least to establish the parameters of what's currently in dispute.

21 How does each of you, or how do you all propose that we deal with the disclosure

22 issues in this CMC?

23 **MR WILLIAMS:** Madam, I have a list of points. I don't have the number in my head but it's

24 about ten points which are discrete points, which will, I think, more or less resolve the

25 outstanding points from our point of view, and they vary in the size and scale.

26 You will have seen there is a debate of principle about how far the disclosure ought to go more

27 broadly than Apple and Samsung and various categories. That's a cross-cutting issue

28 which it's not completely common across those categories, but it cuts across the

1 categories. That's probably the biggest issue, and then there are some other more
2 self-contained points.

3 I think on some of the issues -- you can take market definition and dominance, for
4 example -- I think the submissions on that will take on my side less than ten minutes.
5 So I would have thought that if the Tribunal wants to deal with this by hearing focused
6 submissions and giving an indication of what it makes of those submissions, from my
7 point of view, that could cut through very much most of the issues.

8 **MRS JUSTICE BACON:** All right. Mr Jowell?

9 **MR JOWELL:** We would certainly agree that the question of the disclosure in relation to third
10 party OEMs is an issue that runs across a number of different categories. It may not
11 completely resolve them because you might take the view that it's still appropriate to
12 consider them on a case by case basis on proportionality grounds, but it is an issue,
13 really, of relevance, we say, that cuts across and we think could usefully be
14 determined, or at least be highly informative and possibly determinative of
15 a number -- a suite of issues.

16 **MRS JUSTICE BACON:** Right. So what I would then suggest is that we deal -- I don't think
17 it's going to be helpful to have submissions on ten points from each of you and for us
18 to then try and address them all together.

19 **MR WILLIAMS:** No.

20 **MRS JUSTICE BACON:** Why don't we deal first with the issue about third party OEMs?

21 **MR WILLIAMS:** Before we do that -- sorry, I should have made clear, Madam, I have some
22 brief overarching points about where we are in the process because that then does
23 percolate into the specific categories. I think that will take five minutes or so for me to
24 address you on that.

25 **MRS JUSTICE BACON:** All right. So you give your very brief background submissions and
26 then we will deal with the third party OEM issue. We may not be able to deal with
27 this -- this will take more than lunchtime, and then perhaps over the lunch adjournment,
28 you and Mr Jowell could try and agree, after we have dealt with the third party OEM

1 issues, what other issues are we going to deal with so that the list of however many is
2 the same on both sides and that it's not ships passing in the night as to what you each
3 want to us address.

4 **MR WILLIAMS:** That sounds like a sensible suggestion, Madam.

5 **MR JOWELL:** We are likewise content with that approach, subject that I would like to make
6 some very brief overarching comments as well, if I may, extremely brief.

7 **MRS JUSTICE BACON:** About where we are?

8 **MR JOWELL:** Yes.

9 **MRS JUSTICE BACON:** Okay, so let's have the overview from both of you. It seems that it's
10 probably just going to be five minutes of prejudice from each of you. So we will have
11 that and then we will then get into the actual meat of the dispute.

12 All right, you have your five minutes.

13 **MR WILLIAMS:** Unusually it's not five minutes of prejudice actually, Madam.

14 **MRS JUSTICE BACON:** All right.

15 **MR WILLIAMS:** So really they are observations about how it's now envisaged the process is
16 going to work in practice and how that percolates into questions of practicality and
17 proportionality. So we have taken a realistic and pragmatic position in relation to
18 disclosure generally that one doesn't need to reinvent the wheel as far as disclosure
19 over the period of the FTC investigation is concerned, so one can start with that
20 document set for that period.

21 Usually when one is dealing with disclosure of documents going back ten years or even more,
22 there are significant difficulties identifying, retrieving, collating that material. All of that
23 has cost implications, all of that has proportionality implications. But for the FTC
24 period, in this case we don't have what would normally be that main burden of
25 disclosure; that is searching for relevant material, going back in time at the source, and
26 then filtering it to identify its relevance to the issues in the case. In this case, the
27 material that's going to be the subject of searches is much more recent, that's the
28 period from 2018 or so onwards.

1 Qualcomm's position has been that because one is dealing with a defined document set that
2 has been filtered in the way I have described, there doesn't need to be a relevance
3 review for FTC material because the documents are already relevant. There is
4 obviously force in that up to a point but in our submission, it does elide two separate
5 points. One is: is the material likely to be relevant to the case in a broad sense? And
6 the other question is: is it relevant to the specific categories that the parties have
7 agreed disclosure should focus on?

8 **MRS JUSTICE BACON:** Are you objecting to Qualcomm's proposal not to do a further filter
9 for relevance?

10 **MR WILLIAMS:** No.

11 **MRS JUSTICE BACON:** Then why do we need to address this issue, because it's not a point
12 in dispute?

13 **MR WILLIAMS:** Because it has implications for whether there are then proportionality
14 objections in relation to a number of the categories. Because what we have said in
15 our skeleton and in correspondence in the last few days is that we'll work with
16 Qualcomm to identify a process which would obviate the need for a relevance review
17 in relation to the FTC period. There is now a more or less agreed scheme, I think,
18 Mr Jowell can say if not, which has a number of elements. So we have a list of
19 custodians at the moment which relates to the scope of disclosure as it's been
20 conceived up until now. That could change according to what the Tribunal decides on
21 some of the disclosure categories. So we say the next step is for Qualcomm to, if
22 applicable, reconsider the scope of the custodians in the light of the Tribunal's
23 determinations at this CMC, and the same point probably applies to search terms.

24 It's common ground, then, that there should be engagement to agree as far as possible the
25 custodians and the search terms, and that will involve Qualcomm taking into account
26 suggestions we have made when it calibrates its search tools. We have said, really,
27 because there isn't going to be on this approach a relevance review, one needs to put
28 safeguards into the process to see that it's working in identifying the material we have

1 agreed should be looked for categories, and we have suggested a process of
2 verification once the searches start to return documents. We have also suggested, or
3 we've been explicit about saying, that one needs to have provision for further targeted
4 requests if it turns out the process hasn't worked as it was hoped to in some respects.
5 So all of that is going to involve close cooperation between the parties, but we have
6 found a way through that.

7 We have also agreed that at least in the first instance, there shouldn't be a privilege review.

8 We have accepted that in the first instance -- sorry, on the FTC document set. We
9 have accepted that in the first instance, redactions made in the US under US law can
10 be carried over. We may have queries and challenges to that in due course, but for
11 the moment, that's another task saved. What that really means is that most of the
12 disclosure we think now is going to be identified primarily by a process of electronic
13 searching through these pre-assembled materials. And that does obviously take a lot
14 of the time and cost out of the disclosure process. I'm not underestimating the scale
15 of the task that's left, but that is breaking the back of the process, and so the task is
16 much less burdensome than it would otherwise be.

17 So really the overarching point -- and it isn't just prejudice, Madam -- we say when Qualcomm
18 protests about the scale and burden of the task and it makes proportionality points,
19 you have to put them in the context of the process we have more or less agreed now.

20 Qualcomm says that the cost of the exercise is going to be up to £7 million. Given the points
21 we have just been making, it isn't really clear to us where £7 million is going to be
22 spent. Ms Thomas has said the cost of the relevance review was I think £2.5 million,
23 and that does seem like quite a small proportion of the costs, given that would
24 ordinarily be the most labour-intensive part of the process.

25 What we say is that there are differences between us on relevance and the Tribunal is going
26 to hear those debates. But in our submission, where the material is prima facie
27 relevant to the issues, the Tribunal should be slow to shut us out from access to
28 seemingly relevant material at this stage when the process of pinpointing that material

1 is going to be largely electronic for the material that goes back in time. So that's the
2 overarching point, Madam.

3 **MRS JUSTICE BACON:** All right. Thank you very much. Mr Jowell?

4 **MR JOWELL:** Yes. I'd like to make some points which are relevant to proportionality and
5 disclosure and to correct some of the misapprehensions my learned friend has just
6 given rise to.

7 **MRS JUSTICE BACON:** For the parity of time, you have five minutes as well.

8 **MR JOWELL:** All right, and I won't need all five.

9 First, disclosure to date. We have disclosed already over 2,500 documents, running to some
10 75,000 pages. Those are documents relating to the FTC proceedings, documents
11 related to the Korean proceedings, to the Taiwanese proceedings, the European
12 Commission proceedings, and so on. So they have already had a very large tranche
13 of disclosure.

14 The disclosure falls into two categories. The first is the production set in the FTC proceedings.
15 That is an enormous number of documents, 4.4 million. Now, the process of trying to
16 reduce that by search terms to a tractable number of documents is not a simple one
17 of: oh, well, you just run the searches and up they pop. It's going to be a difficult,
18 iterative process to try and ensure that the search terms are relevant and give rise to
19 a proportionate number of documents.

20 But that is only a small part of the difficulties we face because the post-2018 period, we have
21 to undertake new searches and those do require a relevance review.

22 So when they say: oh, well, we don't know where the costs of all of this is coming from, the
23 majority of the costs will inevitably be incurred, or likely to be incurred, in that post-2018
24 process. But that's not to underestimate that there will also be vast costs in
25 interrogating the 4.4 million documents in the FTC proceedings. Every time they very
26 cavalierly make another request for another slew and another category of document
27 which may be speculatively relevant, it is going to ramp up costs on my client further

1 and further. In the long run, we respectfully suggest, that is in no one's interests and
2 does need to be borne in mind.

3 **MRS JUSTICE BACON:** Thank you very much.

4 All right, we will take into account both sides' overarching submissions. Do you want to start
5 your submissions on the OEM issue now or do you want to come back in one hour and
6 start then?

7 **MR WILLIAMS:** I think it might be better to take stock with Mr Jowell because some of
8 the -- that's the first big point, but there were some smaller points before that, and
9 I think it's probably better to begin at paragraph 1 of the order and work through so that
10 the Tribunal can do that.

11 **MRS JUSTICE BACON:** Yes, all right. So we will pause slightly earlier. We will come back
12 at 1.55 and hopefully that will enable you both to agree on a running order.

13 Also if you do think we can finish this afternoon, I think that would be a good idea, to save
14 coming back tomorrow.

15 **MR WILLIAMS:** Can I ask in that regard, Madam: we have a residue of timetabling issues at
16 the end. Perhaps we just see how we get on with disclosure in the course of the
17 afternoon and see whether we're getting close to it or not.

18 **MRS JUSTICE BACON:** Yes, obviously I'm just flagging. If we can finish today, that will be
19 desirable. If not, of course we have tomorrow.

20 **MR WILLIAMS:** I don't know whether you would entertain sitting a bit later if we were close
21 to the end. But perhaps we can see if we can take stock of that later on.

22 **MRS JUSTICE BACON:** We could sit until 5.00. Of course those behind you may have
23 commitments after court which may make that difficult, but if you wanted to, and if it
24 would enable us to finish today, then we could sit until 5.00. What I don't want to do is
25 sit until 5.00 and then still have to come back tomorrow.

26 **MR WILLIAMS:** I think on that basis, we would need to be done by disclosure by about 4.30,
27 wouldn't we, to ensure we have time to deal with everything else? That's what's going
28 through my mind.

1 **MRS JUSTICE BACON:** Yes. There are some short points on the expert reports. I think
2 probably we'd finish a little bit earlier than 4.30 if we're going to get through all of the
3 rest, yes. So if it looks like we're not going to be there, then of course we will come
4 back tomorrow. All right, thank you very much.

5 **(12.55 pm)**

6 **(The luncheon adjournment)**

7 **(1.55 pm)**

8 **MRS JUSTICE BACON:** I'm aware it's rather cold so I have tried to rectify that. Wait a minute,
9 I need to now sign in to my realtime transcript again, which I will do.

10 **(Pause).**

11 Thank you. Sorry, Mr Williams.

12 **MR WILLIAMS:** Not at all, Madam.

13 Over the short adjournment, Mr Jowell and I and our teams went through the position on the
14 order. There are a number of points which have crystallised, I don't have a list of them
15 now. What I would like to do is start to work through them and see how we go, if that's
16 all right.

17 **MRS JUSTICE BACON:** Yes.

18 **MR WILLIAMS:** Can I tell you where we are on the draft orders, though, because the position
19 is a bit complicated. We were talking to Mr Jowell and his clients about the order whilst
20 simultaneously reading their order for the first time and it is a detailed mark-up. Some
21 of the amendments we see in their draft are the points of principle that we recognise.
22 Some of them are points where we just haven't had a chance really to digest the
23 implications of them.

24 So I'm going to make my submissions more at the level of principle for now. If Mr Jowell wants
25 to make particular points on the order, he can do that, and I may or may not be in
26 a position to deal with those points of detail now.

27 **MRS JUSTICE BACON:** Yes. I think the best we can probably do, subject to whether we're
28 going to go into tomorrow, is to deal with the important points of principle first --

1 **MR WILLIAMS:** Yes.

2 **MRS JUSTICE BACON:** -- see where we get to, and we may need to come back tomorrow
3 if there are further points of detail which can't be dealt with today.

4 **MR WILLIAMS:** Yes, and I don't want to mislead you, we talked about points of principle.
5 What we mean is there are discrete points which the Tribunal can determine, for
6 example, as to relevance. Some of them are more overarching, some of them are
7 quite specific. The first point we're going to deal with is quite specific.

8 **MRS JUSTICE BACON:** Yes, all right.

9 **MR WILLIAMS:** So in category 3, there is a disagreement between us about whether
10 documents relating to the KFTC process, the documents we're going to receive in
11 relation to the KFTC process, whether they should extend to what we have called the
12 enforcement stage of those proceedings. So that's things that happened after the
13 decision was reached in connection with the orders that the KFTC had made. You can
14 see the orders at A1839 --

15 **MR TURNER:** At?

16 **MRS JUSTICE BACON:** Sorry, which bundle and what PDF page?

17 **MR WILLIAMS:** Authorities, A1839.

18 **MRS JUSTICE BACON:** Yes.

19 **MR WILLIAMS:** Tab 37, thank you.
20 This is the decision and order. If you could turn on to the next page, paragraphs 3 and 4 are
21 the paragraphs which, broadly speaking, direct Qualcomm to make changes to the
22 practices which are the subject of these proceedings.

23 **MRS JUSTICE BACON:** What are we looking at?

24 **MR WILLIAMS:** I'm so sorry, this is the KFTC decision. I'm so sorry, Madam.

25 **MRS JUSTICE BACON:** All right.

26 **MR WILLIAMS:** These are the orders made by the KFTC.

27 **MRS JUSTICE BACON:** All right. Yes, so 3 and 4.

1 **MR WILLIAMS:** Then if you look on the next page, paragraph 9 deals with territorial scope,
2 just for completeness. These provisions say in broad terms, "Please bring an end to
3 these practices".

4 Now, in principle the steps taken pursuant to these provisions are highly relevant in
5 understanding what the relevant conduct was, what was involved in bringing it to
6 an end, and what the position was in the light of any steps taken. In broad terms, our
7 position is that the position didn't materially change after these orders, so it's very
8 important for us to see what happened pursuant to these orders. Qualcomm resists
9 providing this. We say it's obviously relevant material, and it's defined material which
10 should be easily capable of being identified.

11 So that's the discrete dispute under category 3. There is a different point about category 3,
12 which is that Qualcomm has told us that there are a small pool of documents in the
13 KFTC data sets that are not within the FTC production set and which would therefore
14 fall outside the scope of their proposed disclosure. We have asked them to do their
15 best to tell us why there is a difference between those document sets: was it
16 a difference in the scope of material requested? Was it a difference in the scope of
17 the issues being investigated? Was it a difference in time periods, and so on?

18 At the moment, we're just told that there is a difference and we ask them to really try a bit
19 harder to give us an explanation as to why that difference exists. Because depending
20 on the answer to that, it could affect whether we think that additional searches are
21 needed within that document set.

22 So that's really a request for information about the scope of the material, rather than a request
23 for disclosure in itself.

24 **MRS JUSTICE BACON:** All right.

25 **MR WILLIAMS:** Those are two points on category 3.

26 **MRS JUSTICE BACON:** All right. Mr Jowell.

27 **MR JOWELL:** Yes. In relation to the order of the Korean court and the correspondence in
28 relation to that, we simply don't see really what this -- we think this is just an outrageous

1 stretch, really. We don't see why this is likely to reveal documents that are of probative
2 value in these proceedings. And what's more, some of the -- in part this has been -- the
3 order was overturned.

4 So we're just struggling, really, to see why, as we were asked on yet another category of
5 documents, why we should go this far. And nothing Mr Williams has said has
6 convinced us, at least, that it is likely to produce helpful or probative documents to the
7 case that's advanced in these proceedings.

8 As regards the other issue, it seems to be a very minor one, and we think actually it can just
9 be dealt with by taking reasonable -- we're prepared to take reasonable steps to seek
10 to find out what this, you know, what the small number of documents that were
11 provided by the KFTC -- that were not provided to the FTC because the FTC was
12 apparently not interested in them. We're prepared to make reasonable enquiries to
13 ascertain what those are and to respond to them.

14 **MRS JUSTICE BACON:** All right.

15 **(Pause).**

16 We won't make an order for the disputed documents. As regards the second issue about why
17 there is a difference in the document pool, that seems to be capable of being dealt with
18 in correspondence. I'm not sure whether it's necessary for us to make any order
19 requiring an answer to be provided, given that Mr Jowell has indicated that his clients
20 will make reasonable attempts to find out what the problem was. But as regards the
21 disputed documents after the decision, we don't see that's likely to provide relevant
22 information and be a proportionate request in the circumstances of this case.

23 All right, so that's category 3. Next category, then.

24 **MR WILLIAMS:** Okay, so we now move on to the third party OEM issue. In relation to some
25 of these issues, Madam, if you decide at this stage that the material ought not to be
26 provided, am I right in thinking that if the circumstances change and it becomes
27 apparent the material might be relevant for a new reason --

1 **MRS JUSTICE BACON:** Yes, it doesn't preclude you from asking again on the basis of
2 changed circumstances, as with any provision of any order.

3 **MR WILLIAMS:** If Qualcomm takes a position where it appears that this material is relevant
4 after all, then ... I'm grateful.

5 So third party OEMs. This is a cross cutting issue which affects a number of categories. I'm
6 going to deal with it first in relation to categories 11, 12 and 24, which are all related.
7 As a starting point, it's common ground that Qualcomm should give disclosure of
8 chipsets supply and licensing agreements in relation to third party OEMs, but it doesn't
9 take the same approach to other categories and we say that it should.

10 The categories I have just mentioned, categories 11.1, 12 and 24, they're the main territory of
11 the NLNC, no licence no chips case. That is negotiations with OEMs -- 11.1 is
12 negotiations with OEMs in relation to chipset supply and SEP licences -- it might be
13 helpful to have our order to hand at this point.

14 **MRS JUSTICE BACON:** I have a version which I think accepts the changes made by
15 Qualcomm. Is that a version we can work off or do you want to work off a different
16 version?

17 **MR WILLIAMS:** I wanted to work off our version if you don't mind, Madam, because we
18 haven't had a chance to process their draft.

19 **MRS JUSTICE BACON:** All right. Where is the best reference for your version?

20 **MR WILLIAMS:** We've provided it, I think, in -- sorry, let me just see whether it's in the bundle.
21 Sorry, I assumed you would have it to hand, but I shouldn't assume.

22 **MRS JUSTICE BACON:** Well, I might.

23 **MR WILLIAMS:** Yes.

24 **MRS JUSTICE BACON:** Why don't I see if I've ...

25 **PROFESSOR MASON:** Are there copies available there?

26 **MRS JUSTICE BACON:** I just want to make sure that I am working off the right one because
27 there have been so many different versions floating around.

28 **PROFESSOR MASON:** Is it worth being handed up?

1 **MRS JUSTICE BACON:** Yes, I think so. Why don't you hand up the version you think we
2 need to have. **(Handed)**.

3 That's very helpful, thank you.

4 **MR WILLIAMS:** Apparently it's in F777 as well.

5 **MRS JUSTICE BACON:** All right. So we will look at category 11.

6 **MR WILLIAMS:** 11, yes. It's documents relating to the negotiations between the defendant.

7 And 11.1, any OEMs in relation to the grant of SEP licence and/or chipset supply
8 agreements, so that's chipset supply and licensing agreements. It's also category 12,
9 which is threats to cut off supply; and it's also category 24, which are communications
10 complaining about royalty rates.

11 We accept that these categories may be overlapping, but it seems to us that they all capture
12 core material relating to the NLNC case and that there's good reason to capture
13 category 12 and category 24 separately, just in case those materials are caught within
14 the searches for material relating to negotiations. Because if there are threats made
15 not in the context of a negotiation, that would be relevant; if there are complaints made,
16 that would also be relevant.

17 I'm going to make six points about the relevance of the material in these categories as it relates
18 to OEMs other than Apple and Samsung. The first point is that the NLNC policy is at
19 the heart of the abuse we rely on, and it's expressly pleaded as a market-wide policy
20 applicable to all OEMs. That is pleaded most clearly at paragraph 33 of the claim form
21 and you can look at it if you would like to.

22 **MRS JUSTICE BACON:** Yes. Any OEM.

23 **MR WILLIAMS:** Any OEM, yes. But the point also comes through the reply where there is
24 further pleading to this effect. If you would like to see it, I can show you that, but it's
25 basically making the same point where we expressly get into some of the dealings with
26 other OEMs.

1 So this isn't an individualised abuse, for example charging a specific discriminatory price to
2 a specific customer which one sometimes sees; it's a policy which is applied to all
3 OEMs for a particular purpose. That's the first point.

4 The second point is that to resolve the claim, the Tribunal is going to need to make findings
5 about the nature of the abuse as a whole, the way it operated, Qualcomm's motivations
6 for acting as it did, and the way it impacted on the market generally. And evidence
7 relating to Qualcomm's dealings with the range of OEMs will be relevant to all of those
8 issues.

9 Even if the claim ultimately turns on the causative impact on Apple and Samsung, the prior
10 question is to understand the abusive conduct. I can illustrate this point with
11 references to the way the US court and the KFTC looked at this issue just to briefly
12 show you the shape of their analysis, which we say is the way this Tribunal will be
13 asked to look at the same issues.

14 The FTC judgment is in the second supplemental bundle, tab 10 and it's pages F400 and 401.

15 **MRS JUSTICE BACON:** Can you give me the PDF page?

16 **MR WILLIAMS:** I'm sorry, I don't have a PDF reference. I don't know if anyone else does.
17 357.

18 **MRS JUSTICE BACON:** No, that's not right.

19 **MR WILLIAMS:** No.

20 **PROFESSOR MASON:** That's the start of it.

21 **MRS JUSTICE BACON:** I have the 48-page --

22 **MR WILLIAMS:** Yes. It should be F400, then, because the hard copy starts at 3.7.

23 **MRS JUSTICE BACON:** I have a 948-page PDF. If I type in -- the problem is that the
24 numbering does not reflect the PDF pages.

25 **MR WILLIAMS:** 560, thank you. If you see, there is a section B on internal page 44 which
26 then runs over on to internal page 45 and --

27 **MRS JUSTICE BACON:** Yes.

1 **MR WILLIAMS:** You can see it's a coherent business practice which is implemented and
2 enforced in different contexts against different OEMs. But it's explained in this general
3 way and then you can see that at the end the court says:

4 "To provide a coherent narrative, the court organises its discussions ..."

5 And then it sets out all of the different OEMs. Of course we know Qualcomm will make the
6 point that this judgment was overturned, but we say this is the natural way to analyse
7 the abuse on which we rely in this case. One sees the same thing, I'll give you one
8 more reference in the FTC. It is authorities 1942 --

9 **MR TURNER:** Say that again, what number?

10 **MR WILLIAMS:** 1942. You can see this is "Conduct 2" at the top of the page is:

11 "Conditioning the supply of modem chipsets on handset companies' acceptance of a licence".

12 If we turn on possibly two pages to paragraph 347, you can see it says:

13 "Despite the foregoing because the respondents provided licences for sale perhaps not at the
14 modem chipset level but at the finished handset product level, the respondents have
15 established or maintained a business policy which separated the supply of modem
16 chipsets and patent licensing for modem chipsets ..."

17 Then footnote 275 deals with the issue at the level of a business policy; then you can see 348
18 goes on to refer to business policies which force handset companies, plural, to act in
19 a certain way. And further on within that paragraph, you can see reference to the
20 framework created by the licensing agreement with the handset company. So it's
21 an overarching abuse, it's an overarching body of conduct.

22 So second point: the Tribunal is going to need to understand the conduct across the market
23 to analyse the abuse.

24 Third point: it is realistic to think that there is going to be uneven evidence across OEMs just
25 in the nature of things. So the picture which may be available to the Tribunal might
26 depend on which OEMs the disclosure relates to. That would be an unsatisfactory
27 position, in my submission: the Tribunal shouldn't be inhibited from making findings
28 about the conduct as a whole because documents relating to one OEM rather than

1 another tend to reveal unguarded comments or are more revealing of Qualcomm's
2 conduct. The Tribunal should have the benefit of the picture as a whole.

3 The fourth point is that Qualcomm is going to disclose licensing and chipset supply
4 agreements with other OEMs and we say that disclosure of its dealings with those
5 OEMs is going to be necessary to allow Which? and the Tribunal to understand and
6 interpret those arrangements in their context.

7 For example, critically how far will these agreements affected by similar conduct, how far are
8 they going to be clean comparators for other aspects of the analysis? How far will the
9 agreements affected by countervailing buyer power which will be relevant both to
10 understanding the abuse and the use of the agreements as comparators? So the
11 material, the negotiation material, is going to be really important to put the agreements
12 in their wider context.

13 The fifth point is that the causative impact of the conduct of Apple and Samsung may well
14 depend on or be influenced by the conduct as a whole and we give two examples of
15 this point at this stage.

16 First, the strength of the threat posed by the policy may be greater if there's evidence that the
17 conduct was market-wide and it may or may not be the case that OEMs knew exactly
18 about the way Qualcomm was dealing with its competitors. But as a general matter,
19 we say the more widespread the conduct, the more likely it is that an understanding of
20 its effect on the market would have percolated outwards, and that's going to affect the
21 credibility of the threat.

22 Secondly, this is an important point, the breadth of the conduct is potentially relevant to the
23 likely degree of pass-on of royalties by the OEMs themselves, which is an important
24 issue in the case. Indeed, Qualcomm itself contended at certification that the issues
25 relating to the pricing of other OEMs would be necessary to assess pass-on. If I can
26 show you that, it's at S992, volume 2, tab 35 of the supplemental bundle.

27 **MRS JUSTICE BACON:** Is that coming up?

1 **MR WILLIAMS:** You can see the point that's being responded to, Dr Padilla is responding to,
2 is at 5.34. It says:

3 "Mr Noble argues that UK handset retail markets are not duopolistic."

4 **MRS JUSTICE BACON:** I'm sorry, are you reading from the same page that's on our screen?

5 **MR WILLIAMS:** I am, yes. Paragraph 5.13.

6 Sorry, maybe it's better you just read 5.13 and 5.14. But the context is that in the preceding
7 paragraphs, Mr Noble has set out his position that because the market is competitive
8 rather than duopolistic, one would expect higher levels of pass through.

9 **MRS JUSTICE BACON:** All right, but that's making a somewhat different point about other
10 OEMs.

11 **MR WILLIAMS:** Well, it's making the point -- boiling it down, it's making the point that the
12 extent to which one sees pass through means that one has to understand the position
13 across the market and see whether the impact is common.

14 **MRS JUSTICE BACON:** Are you saying that because there is a mention of OEMs
15 constraining the pricing of Apple and Samsung, it is then necessary to go into quite
16 different issues regarding negotiations with those OEMs?

17 **MR WILLIAMS:** We're saying that the likelihood of pass-on depends on whether the impact
18 of the conduct is affected by -- whether the impact of the conduct was common among
19 the OEMs in question, because I think it's common ground that the extent of pass-on
20 will be affected by competitive conditions in the market more generally, and that would
21 include in principle competition posed to Apple and Samsung by OEMs other than
22 each other.

23 So in order to understand the likelihood of pass-on, one issue is to understand the pricing and
24 the pressures on other OEMs, which would include this conduct.

25 **MRS JUSTICE BACON:** Right.

26 **MR WILLIAMS:** The sixth point is we're not carrying out a roving enquiry here, we're seeing
27 disclosure in relation to Apple and Samsung and a number of OEMs who are referred

1 to in the FTC judgment. We're not looking far and wide; these are people who have
2 been identified already.

3 But having said that, we have considered in the interests of pragmatism whether we have
4 a fallback position rather than all of the OEMs. We have identified within the list of
5 OEMs other than Apple and Samsung, those for whom it is more rather than less
6 important that we have the relevant material, and in that list we would include six
7 OEMs. I raised this earlier with Mr Jowell at lunchtime, but I think it doesn't affect his
8 position. It would include Huawei, LGE, Lenovo, Motorola, ZTE and BlackBerry.

9 Broadly speaking, Huawei and LGE, they are in fact referred to as being the subject of threats
10 to terminate chipset supply, and our reply specifically referred to -- and the other OEMs
11 have been identified --

12 **MR TURNER:** Sorry, which paragraph are you referring to?

13 **MR WILLIAMS:** Paragraph 26. Supplemental bundle 1, tab 3. It's probably worth actually
14 picking it up now that we have opened it at paragraph 3A.

15 **MR TURNER:** 3A?

16 **MR WILLIAMS:** Yes, that's on page S150.

17 **MR TURNER:** I see, you've gone back to 3.

18 **MR WILLIAMS:** In tab 3 of this bundle.

19 **MR TURNER:** Yes.

20 **MR WILLIAMS:** "For the avoidance of doubt, Which? contends that Qualcomm applied the
21 NLNC Policy ... not only to Apple and Samsung but to a range of other OEMs: see
22 further paragraph 26 below."

23 And 26, you can probably read what you need to see, but you can see the references to LGE
24 in 26B1 and Huawei in 26B2. But before that at the end of paragraph B, it says:

25 "As to other OEMs (whose position is relevant for the reasons given at paragraph 3(b) above),
26 Which? refers to the evidence relied on by the US District Court to this effect."

27 And then gives two examples. So we're relying on the market-wide nature of the conduct and
28 we have just pleaded out two examples.

1 So LGE and Huawei are referred to there, but the others have been identified on the basis of
2 the FTC judgment which is referred to in that paragraph.

3 Qualcomm says that giving disclosure in relation to at least all OEMs would increase the
4 volume of disclosure four or five times and really, at least in relation to the FTC data
5 sets, which is where the prompt for this comes from originally, I rely on the points
6 I made before lunch about how this material can be identified in a focused way through
7 electronic searches.

8 So I think that's the issue as it relates to 11.1, 12 and 24, which as I say are all related.

9 **MRS JUSTICE BACON:** Thank you very much.

10 Mr Jowell.

11 **MR JOWELL:** If I could just go back to basics, the first point observed is that this is a case in
12 which the claimant sues, to state the obvious, as a class representative. It does not
13 sue as a regulator and that's a critical difference between its position and that of the
14 FTC and the KFTC.

15 As a class representative, it is suing in a representative capacity for the class that it purports
16 to represent. And the class it purports to represent here are persons that purchased
17 Apple phones and Samsung phones. They don't include people who bought from other
18 OEMs, they don't include people who bought from LGE or from Huawei or from the
19 numerous other OEMs. Where we struggle and still struggle is to see how there is any
20 causal relevance between the application of the conduct that's said to be the abuse to
21 other OEMs and the damages that are sought in these proceedings.

22 Now, the second point that needs to be borne in mind in that regard is that the no licence no
23 chip policy, or chip supply practice as we call it, as far as it's market-wide, it's common
24 ground. We state in paragraph 47 of our pleaded defence, we state in terms that
25 Qualcomm's practice is not to sell baseband chipsets to unlicensed customers of the
26 corresponding patents. So there is no issue here as to whether the policy exists.

27 Coming back in a sense to the subject matter of our RFI, there is a crucial ambiguity in the
28 claimant's case here because on one hand they seem to be saying that the chipset

1 supply policy in and of itself amounts to an abuse. If that is their case, the existence
2 of the conduct is common ground and we don't really need any enquiry into how it's
3 put into practice as regards anyone. The alternative way they seem to be putting their
4 case is that actually it's not so much the policy, it's not the chipset supply policy that
5 they object to, it's rather how that is put into practice in particular cases when it's
6 alleged that Qualcomm engages in threats to imminently cut off supply and puts people
7 in terror thereby and is therefore able to leverage up the licence royalties they extract.
8 That's their sort of alternative case.

9 Now on that alternative case, it's obviously very specific to the particular OEMs. It may be
10 that you can put LGE or Huawei in terror of being cut off from chipset supply in a way
11 that you can't with Apple or Samsung, but the only enquiry that's relevant for this
12 Tribunal is an enquiry into whether this conduct has caused damage through people
13 who bought Apple and Samsung phones.

14 So the fact it's pleaded as a market-wide policy is neither here nor there and is just simply not
15 relevant for the resolution of these proceedings.

16 Now, the other way my learned friend puts his case on these categories of other OEMs is he
17 says: well, you've provided the licence agreements for other OEMs and now we need
18 to contextualise those. Well, we provided lots and lots of documents that may or may
19 not be relevant to these proceedings, but the question is: why is it necessary to
20 contextualise those licence agreements with other OEMs? My learned friend doesn't
21 explain that.

22 It may be that what he is envisaging is that when the experts come to it, they will want to mount
23 a comparison and they will want to say: well, look at what Huawei is charged for its
24 royalty and look at what Apple and Samsung are charged for their royalty, and maybe
25 we will wish to draw some inferences from that.

26 Then it may be said: well, those agreements with those other OEMs are tainted because they
27 were infected by the same policy or that policy put into practice, and so on. That may
28 or may not be the case and what my learned friend asked at the outset was very, very

1 pertinent because he asked the Tribunal will we be shut out if disclosure orders are
2 not made at this stage, and the Tribunal rightly made it very clear this they will not be.
3 So if when it comes to it the experts say: well, actually we need this set of documents
4 in relation to other OEMs in order to mount a comparison, then at that stage we can
5 make the necessary disclosure. It's necessary for them to make an informed choice.

6 But at this stage, we don't even know whether the experts are going to approach it on that
7 basis or which comparators they're going to wish to use. So this disclosure is entirely
8 premature for that purpose.

9 And finally, from the point of view of -- I think my learned friend also mentioned pass-on, we
10 simply just don't see the relevance of that at all, again. But if we're wrong about that
11 and if the experts do say: ah, well, we need to see precisely how this policy was applied
12 to specific OEMs in order to determine pass-on, which we very much doubt they will,
13 then again, that be provided at that time. But we are very concerned that disclosure
14 in this matter can get completely out of hand, and certainly to do it for all OEMs would
15 multiply the volume of disclosure by four or five times, we say to no obvious end.

16 Our concerns are magnified when one considers the width of these categories. If one takes,
17 for example, the category 24 my learned friend mentioned on page 9, it's:

18 "All communications to the defendant from third parties that express concerns, whether
19 formally or informally, and whether in the context of licensing negotiations or otherwise
20 on the FRAND or royalty rate, for the defendant's SEPs or chipsets."

21 It's extraordinary. It is literally anybody whoever had any complaint or query, even, in relation
22 to FRAND or royalty rate on almost any chipsets.

23 We say this is just an extraordinary overreach and the Tribunal should have no hesitation
24 rejecting it. Those are our submissions.

25 **MR WILLIAMS:** Madam, can I just reply on one aspect of what Mr Jowell said, which is he
26 says -- and he makes this point in other contexts, he says the policy is admitted. This
27 is a slightly semantic point, in my submission, because Qualcomm does admit that it
28 didn't licence OEMs -- sorry, that it had a policy of not supplying OEMs with chipsets

1 unless they had taken a separate licence. But what they don't admit is that this was
2 part of a leveraging strategy and we don't accept the distinction he draws between the
3 policy on the one hand and the making of threats on the other hand as though these
4 were two different strands of conduct.

5 In our submission, it is all part of the same practice, it's all part of the same business strategy,
6 and one has to understand the two things together in order to understand the impact
7 of the policy, however one defines it. One isn't going to understand the impact of the
8 policy on the market by simply looking at the agreements that these other OEMs have
9 received; one has to see the material that goes back and forward between them and
10 Qualcomm.

11 That's the material principally covered by category 11.1, the negotiation material, but which is
12 also then covered by categories 12 and 24. One can tighten up the drafting of those
13 categories if needs be, but the basic point is category 12 covers threats which may or
14 may not be made in the context of a negotiation, and category 24 deals with complaints
15 about the very royalties that are the subject of our claims.

16 So all of that is related to the core proposition which is that Qualcomm operated this
17 market-wide policy, implemented it using particular forms of conduct in its dealings with
18 OEMs, and that led to higher SEPs royalty rates than would otherwise be payable by
19 the OEMs in question.

20 In my submission, Mr Jowell really doesn't have an answer to the point we make that
21 searching for this material at least within the FTC document set is not going to put his
22 client to any onerous burden.

23 **MRS JUSTICE BACON:** Thank you.

24 **(Pause).**

25 We are not minded to make an order for disclosure of documents relating to third party OEMs
26 for the reasons essentially given by Mr Jowell, obviously focusing on the disputed
27 categories.

1 So that deals with the third party OEM issue, and of course I would reiterate the point Mr Jowell
2 made at the end of his submissions that that does not prevent further targeted requests
3 being made at a future date in light of the discussions between the experts, for
4 example.

5 **MR WILLIAMS:** Moving on to a different issue which relates to categories 9 and 10. Without
6 going into the detail of Mr Jowell's order, we understand from the correspondence in
7 the last couple of days and his order that there is a disagreement about whether the
8 documents in categories 9 and 10 ought to include licensing and supply agreements
9 relating to 5G. Of course, this morning the Tribunal admitted our amendment in
10 relation to 5G, and there are two particular issues.

11 The first relates to licences, and we say the disclosure of licence agreements should cover 5G
12 licences if the licence also covers 4G SEPs because that's within the scope of our
13 claim. As far as supply agreements are concerned, we say the disclosure should
14 include 5G chipset supply agreements. As we have explained in the context of the
15 amendment for which permission was given, that market power in relation to chipsets
16 can be leveraged from one standard to another, and we need the 5G chipset supply
17 agreements to understand whether there may have been that sort of leveraging.

18 So it may be there is no issue about the first point and it's just a definition issue, but the second
19 point does seem to be in dispute on the supply agreement.

20 **MRS JUSTICE BACON:** So as it stands, is there no disagreement save for whether these
21 paragraphs extend to 5G? Is that it?

22 **MR WILLIAMS:** There is a different disagreement which relates to subparagraphs 2 and 3,
23 Wi-Fi and NFC, which I was going to deal with next.

24 **MRS JUSTICE BACON:** Yes, all right. So why don't you address all of the disagreements
25 on this category, so the first disagreement-- is as to whether 9 and 10 include 5G
26 licences --

27 **MR WILLIAMS:** And 5G chipsets.

28 **MRS JUSTICE BACON:** -- and 5G chipsets, right.

1 **MR WILLIAMS:** I'm not completely sure there is a disagreement about the first --

2 **MRS JUSTICE BACON:** Yes.

3 **MR WILLIAMS:** -- to the extent that 5G includes LTE, it would be within the scope, we say.

4 Okay, so the second sets of issues in relation to these categories relate to Wi-Fi and NFC.

5 These are non-cellular technologies where Qualcomm is not dominant and they
6 provide a counterpoint to its conduct in relation to the modem chipsets which are the
7 subject of the claim. As we understand it, in markets where Qualcomm is not dominant,
8 its practices are different, and we plead that point in our reply -- I will show you the
9 references again. It's supplemental bundle tab 3, page S/152, (g) in the middle of the
10 page. It says:

11 "... other wireless components in LTE-enabled handsets are licensed at the component level,
12 as opposed to the device level."

13 One sees that set out more fully in paragraph 27, which is on page S/169.

14 **MRS JUSTICE BACON:** That's simply a question about whether Qualcomm operates
15 a similar policy in relation to other markets, but that should be a question which can be
16 just determined by a factual enquiry of whether the policy is the same. Why does that
17 mean you need all relevant agreements? Is Qualcomm not simply able to say whether
18 it operates that policy in the same way that it said whether it operates the NLNC policy?

19 **MR WILLIAMS:** Well, I suppose it probably is able to say it, to give us a response at the level
20 of a pleading. But I think what we want to do is to analyse the agreement and to
21 understand whether one sees differences in the way the agreements operate
22 structurally in terms of their commercial terms where Qualcomm isn't able to access
23 market power. You have just decided on the last category that you weren't going to
24 permit third party OEM disclosure in relation to the last category, I'm not going to
25 reargue that point in this category, which is a less central category. But on this basis,
26 one would be looking for this material in relation to Apple and Samsung only.

27 Now, what Qualcomm say is that they're going to give us portfolio licences which will cover off
28 this technology in relation to Apple and Samsung -- sorry, which is going to cover off

1 this technology for all OEMs at the level of the licence. What we don't have are the
2 correspondence supply agreements so we can understand the two sides of the coin,
3 because obviously the point about the NLNC policy is that it relates to a relationship
4 between on the one hand, the licence; and on the other hand, the chipset supply
5 agreement.

6 What we're going to have on the basis of the position as it stands at the moment is an insight
7 into the way that these technologies are licensed, but we're not going to have an insight
8 in relation to the position of the chipset supply agreement.

9 **MRS JUSTICE BACON:** Can you not just deal with this by asking a relevant question in
10 relation to whether it's a request for information or otherwise? I don't understand why
11 you need all of the underlying documents. Is there even a dispute as to whether the
12 same policy is operated in relation to Wi-Fi and NFC?

13 Mr Jowell is shaking his head. Is there any factual dispute on this point?

14 **MR JOWELL:** No, there is no factual dispute. There may be dispute as to why we don't
15 operate it. It's not to do with market power at all, but we could explain that in due
16 course in evidence.

17 **MRS JUSTICE BACON:** Right. So there's not a dispute as to whether the policy is operated.
18 What's the pleaded point to which this disclosure goes?

19 **MR WILLIAMS:** The purpose of the disclosure is to understand those who are analysing the
20 royalty rates in the cellular SEP agreements; to understand whether there are
21 commercial differences between the agreements relating to cellular SEPs on the one
22 hand, and non-cellular SEPs on the other, which appear to be the result of the exercise
23 of market power. The starting point is to understand the differences in the commercial
24 arrangements.

25 **MRS JUSTICE BACON:** All right, okay. So those are the two disputes in categories 9 and
26 10. Shall I hear from Mr Jowell on those, then?

27 **MR JOWELL:** If I may, we're taking instructions on 5G, or Mr Saunders is.

1 On this latter point, we simply don't understand this, what relevance these various agreements
2 and side letters and amendments in relation to these other types of chipsets could
3 possibly have. I mean, bear in mind that what their case is, is they say you use your
4 market power on the chipsets market to try to get higher licensed royalties. So where
5 the alleged elevation occurs is in the licensing agreements, not in these chipset
6 agreements. The chipset agreements are just, if you like, part of the background which
7 they say: well, you threaten to cut people off to supply those chipsets. But the abuse
8 they say isn't being carried out on those chipset supply agreements. So now they go
9 through another -- well --

10 **MRS JUSTICE BACON:** I'm just a little bit confused. Are you saying that -- I understood that
11 there was a dispute as to in each of categories 9 and 10(ii) and (iii), are you saying
12 there is also a dispute in relation to (i)? Because I understood Mr Williams'
13 submissions to address (ii) and (iii) but not (i).

14 **MR JOWELL:** Yes. We also -- well, we -- no, we accept baseband chipsets that support
15 cellular SEPs --

16 **MRS JUSTICE BACON:** Can you just answer my question: does the dispute extend to (i), or
17 is it only (ii) and (iii)? Because Mr Williams referred to (ii) and (iii).

18 **MR JOWELL:** Forgive me. So (i) pertains to 5G, so that's -- and I am told and (ii) and (iii) so
19 (i) is the 5G issue which Mr Saunders will address you on.

20 (ii) and (iii) are something quite different entirely.

21 **MRS JUSTICE BACON:** Right, but you're addressing (ii) and (iii)?

22 **MR JOWELL:** I am addressing (ii) and (iii).

23 **MRS JUSTICE BACON:** Let's leave (i) out of the equation, then. So let's just focus on Wi-Fi
24 and NFC.

25 **MR JOWELL:** As I say, there are two aspects to it. There is the licence agreements and then
26 there is the chipset supply. Their theory is: you threatened to cut off the chipset supply
27 and you use that to elevate your licence agreements. Now as regards the licence
28 agreements for Wi-Fi and NFC, those are done by way of portfolio licences which have,

1 I believe, been supplied -- will be supplied in due course. So the licence agreements
2 are portfolio agreements and will be supplied if they're of any relevance.

3 But what they're asking for here are the supply of the actual -- the components and we simply
4 just don't understand why you would even want -- anybody would want to see the
5 component supply agreements, the terms of which are not alleged to be abusive,
6 effectively. What they say is abusive is the cutting off of supply, which is a different
7 matter entirely.

8 **MRS JUSTICE BACON:** I think if I understand Mr Williams rightly, he wants something like
9 a clean comparator --

10 **MR JOWELL:** Yes, but the comparator of any interest is on the licences, not on the
11 components, because it's not alleged that we -- there's no allegation we have put up
12 the price of our chips. What's alleged is we put up the price of our licence royalties.
13 So the terms of some comparator component, physical component supply, just seems
14 to us to be completely irrelevant.

15 But again, if in the very unlikely event that any expert did say we really absolutely want to
16 mount this comparison and we need to see the underlying agreements, then one could
17 cross that bridge at that point. But no coherent case, we suggest, has been advanced
18 as to why that would be, and certainly not why it's necessary or proportionate at this
19 stage.

20 **MRS JUSTICE BACON:** All right.

21 **MR WILLIAMS:** Is it helpful to finish this point off before you hear from Mr Saunders on 5G
22 or not?

23 **MRS JUSTICE BACON:** Yes. Why don't we finish this point off before we deal with 5G?

24 **MR WILLIAMS:** In relation to the submission Mr Jowell has made, he didn't really deal with
25 the simple point we made, which is that the NLNC policy is about the relationship
26 between the licences and the chipset supply agreements and it's about the interaction
27 between the two. That's the reason for seeking the chipset supply agreement as well

1 as the licences, so we can understand how that interaction works in relation to
2 technology where Qualcomm doesn't have market power.

3 I'm afraid I misspoke when I said this doesn't raise the third party OEM issue because it's
4 common ground that at the level of agreements generally, we should have supply
5 agreements in relation to other OEMs. It's only in relation to negotiation materials that
6 there was a dispute about that. So it seems that we're going to get the licensing
7 agreements for all OEMs, and it seems to me on that basis, on the basis of the
8 submission I have made, we ought to have the material at the chipset supply level too.

9 In relation to whether we can ask a simple question about this, can I just ask you to look at
10 our response for our request for further information and the response Qualcomm
11 provided to that, which is at supplemental bundle 1, tab 14, and in particular pages --

12 **MRS JUSTICE BACON:** Page of the PDF?

13 **MR WILLIAMS:** It's S/449 in my hard copy. I'm very sorry I don't have the references, Madam,
14 I hadn't tuned into this discrepancy.

15 **MRS JUSTICE BACON:** All right. It's 450 for us.

16 **MR WILLIAMS:** You can read the requests in 35 and the responses on the next page.

17 **MRS JUSTICE BACON:** I see. So Qualcomm declined to answer.

18 **MR WILLIAMS:** Yes. And in relation to Mr Jowell's point that we can come back and ask
19 about this if our experts want it, I mean, we have made these requests on the basis of
20 consultation and discussion with the experts about the sort of material they would want
21 to see. It's not a frolic and really we're now down to arguing about chipset supply
22 agreements in relation to these technologies with a certain number of OEMs.

23 **MRS JUSTICE BACON:** Let me just ask Mr Jowell.

24 Mr Jowell, would you respond to this request?

25 **MR JOWELL:** I'm taking instructions on that very point, Madam.

26 **PROFESSOR MASON:** Whilst doing so, might I just ask: elsewhere, there is reference to
27 how much additional material would be involved in disclosure. With respect to this

1 particular issue, Wi-Fi and NFC, do we have an estimate of how much additional
2 material would need to be accessed?

3 **MR JOWELL:** I will need to take instructions on that as well.

4 **(Pause).**

5 **PROFESSOR MASON:** While doing that, it's worth noting, I think, that there is also reference
6 to the extent that the technologies are licensed under the portfolio licence, they will be
7 disclosed anyway. So it's the increment that I am interested in.

8 **MR JOWELL:** Yes.

9 **(Pause).**

10 Forgive me for the delay. So the answer is yes, we're entirely content to answer those
11 questions of the RFI.

12 **MRS JUSTICE BACON:** Can we just clarify are these questions 35 to 39, or just 35?

13 **MR JOWELL:** 35 to 39.

14 **MRS JUSTICE BACON:** 35 to 39.

15 **MR JOWELL:** In relation to the last question, in relation to the volume of documents, I'm afraid
16 we don't have that information. But I think one can get a sense that it would be very
17 voluminous because what they're asking for are all agreements, relevant amendments
18 and side letters in respect of the supply of Wi-Fi components and NFC components
19 between the defendants and OEMs and their contract manufacturers, including
20 documents that detail the product specification, prices paid, and so on.

21 **MRS JUSTICE BACON:** Yes.

22 **MR JOWELL:** So it is clearly going to be a very large quantity of documents. But whether it's
23 thousands or tens of thousands, I'm afraid we just don't know.

24 **MRS JUSTICE BACON:** You can't put a figure on it. All right.

25 **(Pause).**

26 We will order that you answer their questions. We're not going to order that the documents in
27 (ii) and (iii) and categories 9 and 10 be provided at this stage. Again, having answered

1 the questions, if the experts say that it's really necessary, then we can see submissions
2 that are grounded in the evidence and the information from the experts.

3 That leaves 5G. What are your instructions on that, Mr Saunders?

4 **MR SAUNDERS:** I'm afraid this is going to be slightly anti-climactic. The only change there
5 is that Qualcomm doesn't agree to provide agreements which relate to 5G SEPs
6 exclusively. So where the agreements that relate to 5G and 4G -- the case that's now
7 come in, pursuant to my Lady's order this morning, was that the supply of the 5G chips
8 leverages the LTE price. Insofar as there are agreements that relate to 5G SEPs
9 exclusively and don't also relate to LTE, those shouldn't be within the scope of
10 disclosure because this is not a debate about 5G on its own, it's about 4G.

11 So that's the only clarification.

12 **MRS JUSTICE BACON:** Can I just see the relevant pleaded paragraphs?

13 **MR SAUNDERS:** The leverage paragraph is --

14 **MRS JUSTICE BACON:** Are we talking about 68h on page 38?

15 **MR SAUNDERS:** Exactly, page 38. So the allegation is that:

16 "The leveraging imposes inflated royalties for its portfolio of LTE SEPs under licences for SEPs
17 that relate to both LTE and to 5G. It is not an allegation in respect of 5G exclusively."

18 That's the point. The 5G licences, there is no claim in this litigation as to overcharge in respect
19 of 5G. This is just LTE.

20 **MRS JUSTICE BACON:** Is that agreed?

21 **MR WILLIAMS:** I hope I made clear we weren't seeking that, it was simply the crossover
22 licences. But there was the point on the chipset agreements as well.

23 **MRS JUSTICE BACON:** So we're talking about categories 9 and 10. I think, Mr Saunders,
24 your point just covered category 9 and Mr Williams' point is you haven't addressed
25 category 10.

26 **MR SAUNDERS:** My Lady, I think it's the same point. So it's just to clarify that Qualcomm
27 doesn't agree to provide agreements that relate to baseband chipsets that support 5G
28 exclusively, but it applies to their multimode ones then.

1 **MRS JUSTICE BACON:** Is that agreed?

2 **MR WILLIAMS:** I might need to take instructions about that, Madam, because in principle our
3 case on cross-leveraging wouldn't depend on whether the relevant purchaser was
4 necessarily purchasing 4G chipsets at the same time if Qualcomm is dominant in
5 a market for 5G and is able to leverage that on the licence rate. I mean, that's part of
6 the way we put the case in relation to Apple, as you probably see from the pleadings.

7 **MRS JUSTICE BACON:** All right. This seems to be going somewhat outside the scope of
8 what's been discussed. Can I suggest that as an initial tranche, you get the crossover
9 supply agreements, if that can be defined in the order, and that you discuss further
10 amongst yourselves and bring back to us later, if necessary. If it's necessary to do
11 that before the next CMC, you can ask for a determination on the papers.

12 All right.

13 **MR WILLIAMS:** Madam, related to those categories, there is category 10A, which is
14 a different sort of material and which we sought in conjunction with the material we
15 have just been addressing in category 10 in relation to Wi-Fi and NFC. I just think you
16 should have a chance to read that before I start to make submissions about it.

17 **MRS JUSTICE BACON:** All right.

18 **(Pause).**

19 Yes, all right.

20 **MR WILLIAMS:** So this wasn't seeking the agreements themselves.

21 **MRS JUSTICE BACON:** No, assessment of market power --

22 **MR WILLIAMS:** This was working on the premise that as we understand it, there is a different
23 practice in relation to these different technologies, and this was seeking to get to the
24 bottom of Qualcomm's internal thinking about that. It does seem to us that even as
25 things stand, that request is live, and even if we need to come back and ask for
26 agreements so we can analyse the agreements, documents relating to thinking at this
27 level of principle are relevant to the issues that have already crystallised before
28 the Tribunal.

1 I don't want to try the Tribunal's patience when you've just heard arguments about the last
2 category, but there is a difference in principle between this sort of material and the last
3 category. It may be that a sensible middle ground for the time being is for the Tribunal
4 to order this so we can start to understand the rationales for such different practices
5 as may exist across the different technologies because that material clearly would be
6 pertinent in the matter.

7 **MRS JUSTICE BACON:** Do you not think it would be more appropriate to await the answers
8 to questions 35 to 39 and then raise this again later?

9 **MR WILLIAMS:** If the answer to that is: no, we don't apply the same practice, then we will be
10 coming back and asking for this material, Madam.

11 **MRS JUSTICE BACON:** Yes. As I have said, it's understood that if matters change and if
12 you get further information which indicates that this is relevant, you can always come
13 back.

14 **MR WILLIAMS:** And is this a category which would necessarily need to wait for the next
15 CMC? Because obviously this point is crystallised already, Madam.

16 **MRS JUSTICE BACON:** I think none of these need to await the CMC if there is something
17 you need urgently, and we don't want to hold matters up by sending stuff off to the long
18 grass for another six months if it can be resolved. What I don't want to get is a dribble
19 of sequential requests that keep coming in and requiring determination.

20 If following the actions ordered at this CMC, a group of requests can be made and, for
21 example, you come back to us in September saying: please make a decision on this
22 now, well, September you're not going to probably get an answer from us, but at least
23 we could determine it in October. If you say it can't await the December CMC, then
24 group matters together and apply for a determination, explain why it's urgent. It may
25 be that we take the view that yes, it is urgent, and it can be dealt with then; or
26 alternatively it can await the next CMC.

27 All right, so that's 10A. What else?

1 **MR WILLIAMS:** So on category 12, which I think this is material relating to threats, this would
2 now relate specifically to Apple and Samsung only because you dealt with this earlier
3 on. Qualcomm insists this is a discrete category because they say this really will be
4 swept up in relation to the negotiations material. Our point is that the existence and
5 operation of threats of this nature, they're relevant in principle. Whether or not they
6 happen in the context of a specific negotiation highly pertinent to the case, particularly
7 given that we would now be talking about them only in terms of Apple and Samsung.

8 **MRS JUSTICE BACON:** Yes, all right. Why don't I hear Mr Jowell on this?

9 **MR JOWELL:** Very briefly. We don't seek to say that threats to suspend in order to leverage
10 are in any way outside the scope of reasonable disclosure, and now that this is
11 confined to Apple and Samsung, it is more confined.

12 However, we do also make the point that simply any threat to suspend chipset supply may not
13 be relevant because it's only -- if, for example, somebody didn't pay their invoice for
14 six months and we wrote to them to say: well, if you don't pay it quickly, then we're
15 going to cut off chipset supplies, that would have absolutely no relevance at all --

16 **MRS JUSTICE BACON:** How would you define this?

17 **MR JOWELL:** It just requires some qualification. So one could qualify it by saying -- we
18 sought to say in the context of the negotiations, but one could go broader than that,
19 I suppose, and say in order to -- whether in the context of the negotiations or in order
20 to -- or with a potential effect of changing licence terms, or effecting licence terms. On
21 that basis, we wouldn't object to it.

22 **MRS JUSTICE BACON:** Yes. Is that agreed, Mr Williams?

23 **MR WILLIAMS:** It's a very narrow category as it stands, Madam, and every time Qualcomm
24 makes a threat, particularly to these two suppliers, it's an expression of its market
25 power and the idea that it needs to be winnowed down even further from a category
26 which is already narrowly limited to threats being a particular form of conduct, in my
27 submission that's really not necessary or appropriate.

1 **MR JOWELL:** If I may come back: if one looks at it, for example, it's not just threats to suspend
2 cut-off, it's also to delay chipset supply. So suppose we said: I'm afraid we have
3 a problem in production and we may not be able to -- I mean, that could then be
4 caught. It has to be tethered in some way.

5 **MRS JUSTICE BACON:** Are you saying there is a material category of threats that are
6 innocuous, and is it going to take more time for you to winnow out the innocuous threats
7 than simply to provide anything? Because I am conscious that there may be a law of
8 diminishing returns and actually it may take more time for you to strip out this category,
9 and people will be put to more expense doing that than simply handing over anything
10 that is responsive to this request.

11 **MR JOWELL:** Well, yes, except that as I said, if it didn't have the word "delay" in it, I can see
12 that. But there must be all sorts of circumstances in which there will be delays to this
13 sort of -- bear in mind we're talking about a very long period of time and an awful lot of
14 chips. So any communication which says we might have to delay provision of the chips
15 could be caught by that, and that could be an awful lot of irrelevant documents.

16 **MRS JUSTICE BACON:** Given we're only dealing with Apple and Samsung, are there likely
17 to be any material number of documents which are in the innocuous category?
18 Because I'm very aware that if you qualify it, every time you qualify it, it requires
19 somebody to make a decision and that requires somebody to sit there reviewing the
20 document for responsiveness to the nuanced definition that you are proposing, at
21 which it is more time and more expense on your part which has to be paid for by
22 somebody.

23 So unless you are saying there is a material tranche of documents which are going to be
24 entirely innocuous and would be handed over on this basis, I'm not sure what the issue
25 is.

26 **MR JOWELL:** Well, I think it is that, we think it is going to be -- there is going to be
27 a material -- there is likely, and we don't know, but we think there is likely to be
28 a material amount, particularly because of the word "delay". Delays affect production

1 all the time -- and, yes, I am reminded that there are shortages of semiconductors. So
2 if any time Qualcomm says to Samsung or Apple: well, the chipset supply may be
3 delayed this month we have to provide -- that could be an awful lot of documents.

4 **MRS JUSTICE BACON:** That's not a threat, is it? A threat is more than saying: I'm very
5 sorry, we have had a shortage, there's going to be delay. That simply wouldn't be
6 a threat.

7 **MR JOWELL:** As long as that was understood, then it wouldn't be a problem. But a threat,
8 I mean is a somewhat --

9 **MRS JUSTICE BACON:** It is a threat to suspend, cut off or delay, it's an active step. It's not
10 a: I'm very sorry, due to circumstances outside our control, the ship carrying the
11 semiconductors has sunk and we're going to be delaying our delivery.

12 **MR JOWELL:** As long as it's understood that a threat connotes some -- is not simply
13 a forewarning, if you like, because it can be interpreted in that way.

14 **MRS JUSTICE BACON:** Well, Mr Williams, the proposal is that the information will be
15 provided, but with a threat interpreted as being a threat and not simply
16 an announcement -- an apologetic explanation of circumstances outside of their
17 control.

18 **PROFESSOR MASON:** And if it helps, I would interpret a threat as having a conditional
19 aspect to it.

20 **MR JOWELL:** I'm very grateful for those clarifications.

21 **MRS JUSTICE BACON:** If that's the case, is there any issue between you?

22 **MR WILLIAMS:** We didn't think the category was ambiguous, really, Madam, and --

23 **MRS JUSTICE BACON:** Sorry, would you mind if I just ...?

24 **MR WILLIAMS:** Of course.

25 **(Pause).**

26 **MRS JUSTICE BACON:** Yes, sorry.

27 **MR WILLIAMS:** We didn't think the category was ambiguous. Obviously if one takes at one
28 end of the spectrum: I'm sorry but there's been a delay with one of our inputs this week

1 and so the chips aren't ready so you're not going to get them, one wouldn't construe
2 that as a threat to withhold supply. To some extent, it's a question of interpretation.
3 We're a bit loath to give a dictionary definition of the word "threat", but we think it's
4 clear what we're asking for.

5 **MRS JUSTICE BACON:** Yes, all right. We're inclined to order this category and it will be
6 a matter of interpretation on the basis of the parties. If there are issues about that, you
7 will need to come back to us, and a threat will obviously include something like a veiled
8 threat, but it will not include an apology for delay for different circumstances. All right.

9 **MR WILLIAMS:** We're probably getting to the point where we might want to break for the
10 shorthand writer, Madam.

11 **MRS JUSTICE BACON:** Yes, all right.

12 **MR WILLIAMS:** Can I deal with one more category. I think in relation to category 13, one
13 has to abstract slightly from the drafting. My learned friend has made points in his
14 mark-up and over lunch about the drafting, but I think I just want to explain what this
15 category was directed at, and then maybe we can take the drafting away.

16 What this is seeking is internal material at Qualcomm which is dealing with the policies that
17 are the subject of the two allegations at an overall level, not in the context of specific
18 negotiations or agreements, but internal thinking, consideration, discussion of those
19 policies, what they're doing, what they're trying to achieve, what their objectives are,
20 what their likely effects are. Mr Jowell's clients at Norton Rose have made edits to this
21 category which tend to drag it back towards something more concrete specific;
22 whereas the purpose of the category, as you can see from references to internal
23 statements of principles, rules, guidance, strategy documents, and so on, it's dealing
24 with material of an overarching nature so we can understand the policies which are at
25 the heart of the proceedings. That's the point we're getting at.

26 I don't want to drag the Tribunal into minute drafting points, but it seems to us that at that level
27 of generality, the material is clearly relevant for all the reasons I have articulated in
28 relation to the other OEMs issue. You may say we're not going to get into negotiations

1 with OEMs, but understanding what Qualcomm is trying to achieve by implementing
2 this conduct, that's clearly relevant. And if the parties can sort that out in the drafting,
3 that's the material we're interested in.

4 **MRS JUSTICE BACON:** Yes.

5 Mr Jowell.

6 **MR JOWELL:** I'm afraid the devil is in the drafting and the problem is that, I mean, we have
7 provided -- if one looks at what is written there in paragraph category 13, it's just
8 extraordinarily broad. It's literally basically saying: give us anything about the first
9 number 1 is which relates to the defendant's cellular SEP licence agreements and
10 negotiation of the same. It's too --

11 **MR WILLIAMS:** I take the point, it's too broad. But I was trying, in my submission -- I'm sorry
12 to interrupt, but I just don't want Mr Jowell to aim at a false target. I accept that that
13 language is broader but the material language is the language which comes after "and
14 given the defendant's policy of not granting exhaustive licences". So that's what this
15 category is intended to get at.

16 **MRS JUSTICE BACON:** I'm looking at the redraft, Mr Jowell, which is internal board papers,
17 board minutes or strategy plans from January 2008 onwards, and so on. Are you
18 saying that if it's drafted in that way, you are content?

19 **MR JOWELL:** Yes, although even that is rather too broad in a way, on reflection.

20 **MRS JUSTICE BACON:** This is your draft, I believe.

21 **MR JOWELL:** Yes. It should really be limited to the two policies, effectively. Although, again,
22 one does slightly struggle with this because the two policies are essentially, as I said
23 earlier, common ground, so I think they really need to go back and think about what it
24 was specifically they want, given there isn't an issue that we have these two policies.

25 So what -- think more carefully about what it is this category is actually aiming at.

26 **MRS JUSTICE BACON:** Is there likely to be a large volume of documents if the category is
27 confined to 13 as per your redraft? Because it's a quite narrow category --

1 **MR JOWELL:** Yes, I think it will be relatively confined because it's confined by the type of
2 documents, internal board papers, board minutes or strategy plans. If it were those
3 and then also tied to the two policies, then it should be particularly limited.

4 **MRS JUSTICE BACON:** Well, I am looking at your draft. Are you saying it should be redrafted
5 in some way?

6 **MR JOWELL:** Well, I think it should be redrafted -- qualified to meet Mr Williams' point that
7 what he's really after are these documents insofar as they pertain to what they call the
8 NLNC policy and the RTL policy.

9 **MRS JUSTICE BACON:** Why don't we break and leave it to you and Mr Williams to see if
10 you can agree something between you? Because Mr Williams accepts that the request
11 must be more narrowly drawn, and it seems to me that if the request is narrowly drawn,
12 there may not be very much in it and we may be wasting more time arguing about this
13 than will be actually required to produce the materials.

14 **MR WILLIAMS:** Can I just make this point, Madam, just so you have it in mind: what I said in
15 my submissions was that Mr Jowell's redraft dragged this back too much towards the
16 agreements and away from the policies. If you read it, it does say:

17 "Internal board papers from such and such onwards that pertain to the defendants LTE licence
18 agreements and component ... agreements with the relevant OEMs."

19 So these are just documents that talk about Apple and Samsung. It's not documents at the
20 level of the policy, which is what the category was directed at. So I do think we're quite
21 a long way apart, this isn't a matter of drafting. Mr Jowell is dragging this category into
22 something much more specific than we were asking for. I do see that the language at
23 the start of our 13.1 has slightly taken an eye off the ball, but the meat of it, as you can
24 see in the policy, is referred to in both 1 and 2.

25 **MRS JUSTICE BACON:** Why don't we break and you can come back and read out to us
26 a suitably narrowed version of what you were asking, because it's very hard for us to
27 understand what the parties' arguments are if we don't have the competing drafts in
28 front of us. So why don't we do that: you can provide us with what you think you want,

1 and then we will hear your submissions on that; and Mr Jowell will then be able to
2 make his submissions by reference to a still target, rather than a target that is a bit
3 undefined at the moment.

4 All right. We will take five minutes.

5 **(3.24 pm)**

6 **(A short break)**

7 **(3.39 pm)**

8 **MRS JUSTICE BACON:** All right. Where are we on category 13, then?

9 **MR WILLIAMS:** So we have a hybrid proposal, some of which I think will be acceptable to
10 Mr Jowell, and some of which we have had to have a think about.

11 It's a hybrid of the start of Mr Jowell's order and then moving into ours. It starts, "Internal board
12 papers, board minutes", and then we would add " ... reports, plans and strategy
13 documents".

14 **MRS JUSTICE BACON:** "Reports, plans and" --

15 **MR WILLIAMS:** "... and strategy documents". Because our draft didn't define all these types
16 of documents, it was more general. We're now trying to think about what that ought to
17 look like, "reports, plans and strategy documents". We wouldn't then include
18 Mr Jowell's time limit from 1 January 2008 onwards because they're only going back
19 as far as the FTC production documents that go back anyway, so one doesn't need
20 a time limit on it " ... that relate to ...", and then you would go into the two policies as
21 defined in our order, although Mr Jowell has to take instructions about that. But that's
22 what we were talking about beforehand, the sort of -- an extended version of his front
23 part and then the back end of my order.

24 **MRS JUSTICE BACON:** So then you go, " ... that relate to ..." and then we carry on with 1
25 and 2 as in --

26 **MR WILLIAMS:** 1 and 2, but we would take out " ... relating to the cellular licence agreements
27 and the negotiation of the same", because we can see that that overlaps in other
28 categories, and so on. That's not really what this category was focused on.

1 **MRS JUSTICE BACON:** Oh, okay. So relate to -- oh, it simply we just go into number 2,
2 then.

3 **MR WILLIAMS:** No. Do you see in line 2 of 1, it says, "Including the policy, the defendant's
4 policy". We would start at the defendant's policy.

5 **MRS JUSTICE BACON:** Which relate to the defendant's policy of not granting exhaustive
6 licences and the defendant's policy of requiring OEM only.

7 All right, I have that.

8 **MR JOWELL:** So I think we don't have any difficulty with the initial part of internal board
9 papers, board minutes, reports, plans and strategy documents. We do think there
10 should be a temporal restriction because the more you extend it going back, even if it's
11 over the FTC set, given the volume of documents, it gets disproportionate. So we do
12 say from 1 January 2008.

13 Then we think that it should simply say " ... that pertain to the defendant's chipset supply policy
14 and Qualcomm licensing policy", because those are the -- I don't think there's any
15 substantive difference, really, but those are what we have admitted to, the policies in
16 those terms, and one can't sort of agree a category of documents in relation to a policy
17 that one doesn't have.

18 **MRS JUSTICE BACON:** Do you say that the wording in Mr Williams' draft --

19 **MR JOWELL:** It's just a little bit loose, it's just not quite the way we have put it. So I'm just
20 loath to, you know, at least agree a category that is not in the precise terms of the
21 policies as we formulate them. I don't think there's any --

22 **MRS JUSTICE BACON:** But we're all talking about the same thing, it's just a matter of
23 wording.

24 **MR JOWELL:** Yes.

25 **MRS JUSTICE BACON:** Okay. So we can leave you two to work out what the wording is.
26 Are we then just down to a date issue?

27 **MR WILLIAMS:** We are. I made submissions on this earlier on. There is a difference of
28 degree between the parties in terms of Qualcomm says our policy is simply that we

1 don't do this, and obviously we take the position that it relates to its conduct in the
2 market more generally. We are a little bit loath to have this tied back to their pleaded
3 position, which is very closely related to their particular take on the case.

4 Madam, you're right to say we all know what we're talking about, they know what we're talking
5 about. But I think tying it back to Qualcomm's own defined term, which is part of their
6 own position --

7 **MR JOWELL:** Can I make a proposal just to cut through this? What if we say, "Chipset supply
8 policy or Qualcomm licensing policy or any similar policies", and then that would be --

9 **MRS JUSTICE BACON:** But then that goes broader because when we're talking about things
10 which aren't the two policies. I think Mr Williams just wants to define it in a way that
11 reflects his pleaded case.

12 **MR JOWELL:** But in that case, it must say "any policy", rather than "the Defendant's policy",
13 because those aren't the terms in which we have admitted the policy. I am just doing
14 this out of an abundance of caution -- it's just that we can't refer to "the Defendant's
15 policy" which may or may not exist in those precise -- as characterised there.

16 It says of requiring -- well, it may be there really isn't any difference. Perhaps we could say
17 the chipset supply policy, or any policy, and then use his terms. But it's just simply that
18 I can't, if you like, acknowledge by agreement in an order that there exists the
19 defendant's policy in a particular term that my client has not admitted to, because it
20 may then be thrown back at us and these things, sometimes minor semantic
21 differences make a difference.

22 **MRS JUSTICE BACON:** Well, Mr Williams, can you live with that? As I have said, we all
23 know what we're talking about.

24 **MR WILLIAMS:** As I said before the break, the word "policy" was intended to be a limiting
25 word that was intended to stop this relating to --

26 **MR TURNER:** I think the concern is it's the defendant's policy, as I understand it. It just needs
27 to be policy without the defendant claiming it, if such a policy doesn't exist. As
28 I understand it, it's the only difference between you.

1 **MR WILLIAMS:** We will take the word "defendant" out. I don't think that would matter.

2 **MRS JUSTICE BACON:** Hang on, but you can't have it without the word "defendant" because
3 you're talking about its -- of not granting exhaustive licences to its SEPs, so we are
4 talking about --

5 **MR JOWELL:** Perhaps it could be any policy of the defendant. If it's not defined in our terms
6 then it can't be attributed to us, if you see what I mean. I'm sorry to be making a fuss.
7 This is probably --

8 **MRS JUSTICE BACON:** Relating to any policy of not granting exhaustive licences to the
9 defendant's SEPs to chipset manufacturers and then or and/or any policy. I think the
10 rest of it works.

11 **MR WILLIAMS:** I think maybe that would just leave the timeframe, Madam, yes.

12 **MRS JUSTICE BACON:** That would just leave the timeframe. All right, is there any reason
13 why you need documents before 1 January 2008?

14 **MR WILLIAMS:** It's the point I have already made that this is a long-standing policy. We're
15 just trying to understand the defendant's internal thinking about the policy. I don't think
16 2008 is a meaningful date. It's a date that's come into play in the context of other
17 issues for particular reasons and it's just been adopted and cross-applied here, but it's
18 not really got anything to do with this category which is a much more general
19 category about the policy.

20 **MRS JUSTICE BACON:** Yes, understood.

21 **(Pause)**

22 Where is it specified that this is from the FTC data set? That's not currently --

23 **MR WILLIAMS:** That's one of the points that's been picked up in Mr Jowell's mark-up and
24 which we don't take exception to.

25 **MRS JUSTICE BACON:** All right, I see. All right, if it's in the FTC data set then we will make
26 the order with the tweak that I have just discussed, but without a date.

27 **MR WILLIAMS:** I'm grateful, Madam.

1 So moving on, then, to category 14. This is a bit of a mixed bag and it does take on a different
2 complexion in the light of the argument about the amendment this morning.

3 14.1 relates to 3G, which is now going to be on the pleadings. Mr Jowell has said that he
4 wants to defer category 14.1 until they have pleaded to 3G CDMA market definition
5 and 3G dominance and we can see the force of that.

6 **MRS JUSTICE BACON:** Yes, so 14.1 is parked, then.

7 **MR WILLIAMS:** 14.1 is parked.

8 14.2 is a residual category of documents relating to LTE and which relate to particular issues
9 which arose in relation to the Apple exclusivity proceedings. Mr Jowell in his mark-up
10 I think offers that material and we're probably down to drafting points about that, so
11 I'm not going to deal with that in submissions, I think we can sort that out in the drafting,
12 14.2.

13 14.3 is 5G market power and it does seem to us very likely that this is going to be in issue and
14 we do pursue it. I didn't discuss with Mr Jowell whether he opposes this on the basis
15 of the same principle as 3G CDMA but their position in relation to this, as you can see
16 from their mark-up, was something very much more limited than we proposed.

17 They weren't proposing to deal with 5G market power generally at all; they were offering us
18 a very tiny slice of documents in relation to this and it seems to us that there is a point
19 of principle here which is whether now that 5G is on the pleadings, 5G market power
20 is on the pleadings, whether we should be entitled to that tiny slice or to disclosure
21 generally, and we say clearly the latter.

22 That's separate from the question of whether it ought to be parked pending Mr Jowell's
23 defence, but it does seem to us in the end we're going to need more than what
24 Mr Jowell is proposing on this.

25 **MRS JUSTICE BACON:** Yes, I can see that that well may be the case but, as with the CDMA
26 issue, should the disclosure on this not await their pleaded case, so everyone knows
27 the compass of what's being required and that's of course not pre-judging the position
28 that will be reached following the service of their pleading on that and with a strong

1 encouragement from the Tribunal to everyone to be sensible about what's requested
2 and to try and reach an agreement so that this doesn't need to come back before
3 the Tribunal at the next CMC.

4 **MR WILLIAMS:** Yes, I think the only point we make about both the 3G and the 5G issue is
5 that this is not like the other issues, which are once you've considered disclosure you
6 might need more information about Wi-Fi or NFC.

7 **MRS JUSTICE BACON:** No, it's standard disclosure.

8 **MR WILLIAMS:** This is a much more central foundational issue.

9 **MRS JUSTICE BACON:** Yes.

10 **MR WILLIAMS:** And so this is not the sort of issue that one might just say: well, come back
11 on an iterative basis in due course. Once we get to the end of the pleadings --

12 **MRS JUSTICE BACON:** No, of course, that disclosure is going to have to be provided. Yes,
13 understood, so we don't need to address this now.

14 **MR WILLIAMS:** No.

15 **MRS JUSTICE BACON:** Because there is agreement --

16 **MR WILLIAMS:** That indication is helpful because what we don't want to do is park everything
17 until December --

18 **MRS JUSTICE BACON:** No, there is no question that disclosure on these categories will
19 have to be provided. This isn't a question of a bit more being provided in relation to
20 something that is maybe not needed.

21 **MR WILLIAMS:** I'm grateful.

22 So category 16, there are various drafting amendments which I'm afraid I'm not quite in
23 a position to deal with, but there is a discrete point which is that our category -- this is
24 material, I should say, which is material taken into account by Qualcomm in
25 negotiations with OEMs generally, not just Apple and Samsung, in relation to the
26 setting of royalty rates.

27 We had sought clarification that this would include material that related to the backwards
28 compatible standards that were included, so obviously if one is valuing an LTE licence

1 and the LTE licence facilitates backwards compatibility, you have to understand not
2 just the value of the LTE technology but the 3G technology, the backwards compatible
3 technology too. And we say the 2G backwards compatible technology as well,
4 because in a LTE licence it goes back at least to 2G. For reasons we don't really
5 understand, Mr Jowell's clients have deleted 2G from this category.

6 We thought that was the only point of principle on this category. I think Mr Jowell's drafting
7 might introduce other issues which I'm not in a position to address.

8 **MRS JUSTICE BACON:** All right.

9 So, Mr Jowell, what are the issues of principle we can deal with today?

10 **MR JOWELL:** I think this is Mr Saunders.

11 **MR SAUNDERS:** So I'm not sure it was necessarily my (inaudible) but I will occupy it. So, as
12 I understand the position, we have offered to provide patent claim charts and studies
13 procured and/or commissioned by the defendants, but what we're proposing not to
14 provide is documents relating to number, quality, essentiality and value.

15 **MRS JUSTICE BACON:** I'm sorry, I can't hear you very well.

16 **MR SAUNDERS:** I'm sorry, number, quality, essentiality and value of the internal documents
17 within -- insofar as it relates to number, quality, essentiality and value of the declared
18 selling of SEPs.

19 And so these are closely related to the sorts of enquiries which were the subject of the RFI
20 which we were looking at earlier on which, in large part, is premature and relates to
21 subjective views about -- internal subjective views about strength or otherwise of
22 individual patents in the context where if, insofar as that is relevant to FRAND, it is not
23 of any probative value at all because FRAND is an objective measure that doesn't
24 normally take into account these kind of internal considerations. Either the agreement
25 is FRAND or it's not.

26 **MRS JUSTICE BACON:** All right, so just parking this there, is this the issue that Mr Williams
27 is not in a position to deal with?

28 **MR SAUNDERS:** So I think this --

1 **MRS JUSTICE BACON:** I'm sorry, I want to figure out what we can practically deal with today.

2 **MR WILLIAMS:** Can I just have a moment, Madam, because we do seem to have gone
3 backwards from a position in correspondence on this category and I just want to go
4 back to this for one moment, if I may. We're not going to have another break, but
5 I thought that we had a letter on I think it was Monday, I don't know if Ms McAndrew
6 has a reference there.

7 **MRS JUSTICE BACON:** Shall we just park this.

8 **MR WILLIAMS:** Maybe Ms McAndrew can find me the reference.

9 **MRS JUSTICE BACON:** Can we just move on to another category?

10 **MR WILLIAMS:** Yes. Yes, we can.

11 **MRS JUSTICE BACON:** What's left?

12 **MR WILLIAMS:** Category 17 is a category of documents that, broadly speaking, relate to the
13 sort of FRAND analysis that we were discussing this morning, and I've taken
14 instructions. It seemed to us that in the light of the discussion we had this morning that
15 the Tribunal would probably find it more useful to defer this issue because, in a world
16 where the Tribunal has raised some significant questions about the status of those
17 issues in the proceedings, we thought that you would probably want to defer
18 consideration of this category until you have more clarity about that.

19 **MRS JUSTICE BACON:** Yes, all right.

20 **MR WILLIAMS:** Category 18 is agreed. Category 19 is information in relation to the value
21 and volume of the defendant's OEM customers' smartphone sales.

22 Now, Qualcomm have agreed to provide information that was provided to them by the OEMs
23 themselves but there remains an issue about information which Qualcomm obtained
24 from chipset manufacturers in the context of the non-assert provisions.

25 You may remember from that part of the case that part of our case in relation to the non-assert
26 provisions is that Qualcomm sought to ensure that it was provided with information
27 about the volumes of sales that were made in connection with those non-assert
28 agreements and that information is, we say, part of Qualcomm exerting control over

1 the market, and so we say that that information, which is information relating to the
2 volume of sales which comes through that channel, should be provided because it's,
3 we say, one manifestation of the abusive conduct and I think that is resisted.

4 I think it's resisted in part on the basis of the nature of the information, the quality of the
5 information, but our point is more about the status of the information; the way it's
6 obtained and the context of the arrangements to which I have referred.

7 **MRS JUSTICE BACON:** All right.

8 **MR JOWELL:** I must confess that I don't recall reading anywhere in the pleaded case
9 an allegation that part of the abusive conduct is obtaining value and volume of sale
10 information from chipset manufacturers.

11 **MRS JUSTICE BACON:** Mr Williams' point is that the request is a general one turning on the
12 nature of the information and should not exclude particular channels by which you get
13 that information. Is there any reason why, if you have information in relation to this, no
14 matter from what source, it shouldn't be disclosed?

15 **MR JOWELL:** Well, if it's of any use for the purpose of quantum I think what we understood
16 is that we get reports from other OEMs and those can be useful for that purpose, but
17 we don't think that the reports from chipset manufacturers are likely to be useful for
18 that purpose. But what we find slightly alarming is that in fact this sounds as though
19 this is actually being obtained in order to make some point about an aspect of the
20 abuse that's not yet been pleaded, which is really a fishing expedition.

21 **MRS JUSTICE BACON:** Look, leave that to one side. The question is whether this category
22 is a category of information that you accept is relevant and should be provided, and if
23 so is there any reason why that shouldn't be broken down by reference to where you
24 get the information from?

25 **MR JOWELL:** My Lady, I can cut through this because I have received instructions that we
26 can provide it if it's requested.

27 **MRS JUSTICE BACON:** Okay, all right. That's category 19 and agreed.

28 Next category.

1 **MR WILLIAMS:** I'm sorry to do this, can I just go back and explain the position on 16 and 17
2 to you, Madam. It is important because we had an outstanding issue on 16 in relation
3 to 2G which I identified.

4 If you could look at the further supplemental bundle 2, which is in my bundle F692. It's tab 22
5 for anyone looking at the hard copy.

6 **MR TURNER:** Can you give me the number again?

7 **MR WILLIAMS:** F692.

8 **MRS JUSTICE BACON:** What's the PDF page?

9 **(Pause)**

10 Thank you.

11 **MR WILLIAMS:** If you just read 16 and 17, it's a bit confusing because we have dealt with
12 this as two categories whereas Qualcomm has treated them as a single category, as
13 you can see, because it says, "Further to our proposal," in paragraph 48. So they have
14 made one proposal.

15 But if you look at the text in relation to category 17, it seems to be saying they are prepared
16 to provide exactly the thing that Mr Saunders said they were prepared to provide just
17 a few moments ago, so that's why we were in difficulty.

18 **MRS JUSTICE BACON:** Am I looking at 16 or 17?

19 **MR WILLIAMS:** Both read together, because Qualcomm treat them as a single category.
20 They say they're prepared to provide material that played a role in negotiations and
21 they have originally set their position out in paragraph 48 of their letter.

22 We challenged the fact that that didn't include the information that is referred to in discussion
23 at category 17, that is documents relating to patent quality, essentiality or value and
24 they seem to agree to provide that, but Mr Saunders now says they don't do so, unless
25 I have misunderstood.

26 **MR SAUNDERS:** I think it's -- so you need to also look in the correspondence bundle,
27 page 514, which has the paragraph 48 that's referred to.

1 **MR WILLIAMS:** No, I understand. I thought that what this letter was saying is -- that they're
2 prepared to read these points into what they had offered previously whereas what
3 Mr Saunders seems to be saying is one now reads them out of that -- I think that's
4 what he seemed to be saying a minute ago. They won't give material relating to patent
5 quality, patent essentiality or patent value. I thought that's what you were saying
6 a moment ago.

7 **MRS JUSTICE BACON:** Mr Saunders, I have 514.

8 **MR SAUNDERS:** So 514 we said would give declarations to (inaudible), lists of LTE patents
9 declared as potential essentials, so declarations of the patents being potentially
10 standard essential; internal documents that may have been used by Qualcomm to
11 inform the royalty rates from the FTC, and so there is that proposal there, and to
12 conduct them across the following repositories. So obviously there are some
13 qualifications in there.

14 And then the letter of 692 says: we will do it in relation to UMTS or CDMA. Subject to this,
15 further types of internal document, we trust that this is now a resolved category. So
16 that's the position on the correspondence.

17 **MR WILLIAMS:** That is right and we thought it was a resolved category, but then we got the
18 order this morning.

19 **MRS JUSTICE BACON:** Which deletes 2G.

20 **MR WILLIAMS:** Deletes -- I don't know if they ever conceded 2G, but if you look on the
21 Qualcomm mark-up they have deleted "of the number, quality, essentiality and value"
22 which is the very point they seemed to agree to in this letter, and that material is
23 important and we just can't understand why they have gone backwards. We thrashed
24 this out and in fact Mr Saunders stood up to say that this is the issue of principle. But,
25 I mean, it was agreed on Monday.

26 **MR SAUNDERS:** I think, so it is added -- so it goes back into, if you look at the mark-up,
27 which relates to patent quality or patent portfolio quality or strength of patent

1 essentiality or patent value, so it's possibly just a drafting (inaudible), but the position
2 is as per the correspondence --

3 **PROFESSOR MASON:** Mr Saunders, can you speak up a little.

4 **MR SAUNDERS:** I'm sorry, Professor.

5 **MRS JUSTICE BACON:** I am slightly concerned that you seem to be addressing this on the
6 hoof and I am concerned that this has not properly been bottomed out as between you
7 two as between what is agreed and what isn't. I don't want Tribunal time to be wasted
8 if the parties are not absolutely clear what is agreed and what is not. I'm going to move
9 on from this.

10 **MR WILLIAMS:** It may be that in fact this is just in the drafting and there's been confusion
11 caused by --

12 **MRS JUSTICE BACON:** This is what I am going to say: in the order that is sent to us, either
13 it is agreed or it's kicked off, because this is not a satisfactory way, and I'm not pointing
14 the finger of blame at any particular party. We need to decide crystallised disputes.
15 I don't want people to be working out as they're going along what is and what is not
16 agreed.

17 16 and 17, either you agree them or you don't. If you don't agree them they will have to be
18 parked and you will have to come back if you can't agree them.

19 **MR WILLIAMS:** Category 20 is not in issue, I don't think, because I think it's accepted that
20 that should be provided in relation to Apple and Samsung. So that was essentially
21 about third party OEMs.

22 **MRS JUSTICE BACON:** Sorry, 20 is agreed? I'm sorry.

23 **MR WILLIAMS:** 20 was only alive in relation to third party OEMs.

24 **MRS JUSTICE BACON:** All right, so 20 goes. Is that right?

25 **MR WILLIAMS:** 20 -- 21, 22, which are two merged categories, this was in large part intended
26 to deal with the position of third party OEMs, but we say that this category ought to be
27 maintained in relation to at least Apple and Samsung. It is essentially documents
28 relating to what's been referred to as the silencing case and these documents would

1 otherwise be covered only by category 11, which is material relating to negotiations
2 relating to chipset agreements and licensing agreements, and so what we say is that
3 categories 21 and 22, the merged categories ought to be ordered at least in relation to
4 Apple and Samsung if not in relation to third party OEMs.

5 I think my learned friend's position is this is all covered elsewhere and if it's all covered
6 elsewhere then fine, but that doesn't affect the fact that in principle this material is
7 (inaudible).

8 **MRS JUSTICE BACON:** Yes, all right.

9 Mr Jowell or Mr Saunders.

10 **MR SAUNDERS:** We don't object to this. We have already proposed search terms which
11 capture settlement and release across the board, so that's fine insofar as it relates to
12 Apple and Samsung.

13 **MR WILLIAMS:** Category 23, I can articulate this very briefly. These are documents relating
14 to two projects under which Qualcomm considered whether to split its chipset supply
15 and licensing businesses.

16 One of them took place in 2007ish and ran on a bit after that. One of them took place in 2015.
17 We say that the documents relating to this issue are highly material because they relate
18 to Qualcomm's incentives in terms of the way it runs its business and the
19 inter-relationship between the licensing and the chipset supply, which is obviously at
20 the heart of the NLNC issue.

21 And really the point is Qualcomm recognising that if it split the businesses we say the
22 documents show that that shows that it will lose leverage; it would lose the leverage
23 that it asserts in these negotiations.

24 Qualcomm has accepted that it should provide the material relating to the 2015 project, which
25 is Phoenix, but it said Berlin is too long ago. The point we make is in the context of all
26 of the disclosure we're talking about, 2007 is not that long ago and of course the reason
27 we rely on the material is not because of its causative impact at a particular point in

1 time but it's because it illuminates Qualcomm's thinking about these matters and the
2 way in which its market power in relation to chipsets plays into licensing.

3 **MRS JUSTICE BACON:** Yes.

4 **MR JOWELL:** Well, two points on this. First, this Project Phoenix, although it's not directly
5 relevant to the claim that's advanced, we're not resisting, but we do try to draw the line
6 at Project Berlin simply because it pre-dates the claim period by some eight years.
7 Now, this is just seems to us to be, again, fishing around for prejudicial material.

8 The fact is that in relation to category 13 you have now ordered the disclosure of documents
9 and plans without time limit that pertain to the defendant's two policies, and so insofar
10 as these Project Berlin documents contain those, they will now be disclosed and
11 Qualcomm's views on its business structure beyond that are really too far removed
12 from anything relevant, both in subject matter and in time.

13 **MRS JUSTICE BACON:** Yes. Well, there seems to be some force in that, Mr Williams.
14 Insofar as this does relate to these policies, they're going to be disclosed anyway.

15 **MR WILLIAMS:** Well, we've got some disclosure in relation to this because of the disclosure
16 of material which is referred to in relation to the documents referred to in the decisions
17 and so on earlier in the year.

18 All we're asking is for Qualcomm to complete the job. It's a very small increment on top of
19 what we have got and what they're going to do in relation to Project Phoenix. It's not
20 about the causative impact of it; it's about this moment in time providing a really potent
21 insight into Qualcomm's analysis and understanding of its own incentives in terms of
22 the way it runs its business, so it's a very focused category.

23 **MRS JUSTICE BACON:** Why don't you see what you get under category 13 and, if it turns
24 out that there is some goldmine that's likely to produce a lot of really relevant further
25 information in relation to Project Berlin that's not been disclosed, you could come back.

26 **MR WILLIAMS:** Well, can I just look at the language in section 13, Madam.

27 I mean, this is a specific project and --

1 **MRS JUSTICE BACON:** Is it not going to be referred to in internal board papers,
2 board minutes, reports, plans and strategy documents that relate to, and then the two
3 policies which you're going to hammer out?

4 **MR WILLIAMS:** I probably haven't made this clear enough. This is something that is
5 specifically considered in the FTC judgment in the context of these very closely related
6 issues and, in the interests of time, I didn't take to you that reference because I thought
7 the point had crystallised. I can do that briefly if that would be helpful, because that
8 gives you a flavour of the sorts of material that one is looking at but it is, as I say, it's a
9 very focused pool of documents relating to an issue which we say sheds real light on
10 Qualcomm's own assessment and understanding of the relationship between the two
11 parts of its businesses.

12 **MRS JUSTICE BACON:** But very historic and the fact that it's been referred to somewhere
13 else doesn't mean that it's relevant for this Tribunal to look at.

14 **MR WILLIAMS:** If you're --

15 **MRS JUSTICE BACON:** I will look at -- take us to the document you want us to see.

16 **MR WILLIAMS:** Yes, it's further supplemental bundle volume 1, tab 10.

17 **MRS JUSTICE BACON:** And page?

18 **MR WILLIAMS:** It's page 158 in -- internal page 158. It's F514 in my bundle. I don't know if
19 the PDF will be the same.

20 **MRS JUSTICE BACON:** No.

21 **MR WILLIAMS:** 674.

22 In fact it might help to you just go back one page, to the bottom of that section on internal
23 page 157.

24 **MRS JUSTICE BACON:** I see, all right.

25 **MR WILLIAMS:** It's bang on point, Madam, is the point.

26 **MRS JUSTICE BACON:** Yes.

1 **MR WILLIAMS:** And given that it's a focused search for a residual category of documents,
2 some of which we already have, it's really hard to see that it shouldn't be swept up
3 now.

4 **(Pause)**

5 **MRS JUSTICE BACON:** All right, we are inclined to order this. These documents may be
6 provided anyway in relation to category 13. But insofar as they are not, it seems that
7 they are likely to contain at least some relevant material.

8 All right, category 24. Does this fall away because of the FRAND issue or at least --

9 **MR WILLIAMS:** 24 is really a residual category which is intended to ensure that the
10 negotiation material that we get -- which will now be in relation to Apple and Samsung,
11 if that material doesn't cover other instances where Apple and Samsung have
12 expressed concerns about the royalty rate, that we should get that material even if it
13 doesn't arise in the context of a particular negotiation, so it's a residual sweep-up
14 category.

15 **MRS JUSTICE BACON:** But I thought this was squarely under the third party OEM issue.

16 **MR WILLIAMS:** Well, sorry, it was pursued in relation to OEMs generally, third parties here
17 would include Apple and Samsung. You've ruled against us on third party OEMs, but
18 it would still remain in relation to Apple and Samsung only. This is effectively -- if I don't
19 pursue it for third party OEMs, which I wasn't proposing to do.

20 **MRS JUSTICE BACON:** Are you saying all communications to the defendant from Apple and
21 Samsung?

22 **MR WILLIAMS:** Yes, exactly.

23 **MRS JUSTICE BACON:** All right.

24 **MR WILLIAMS:** And, you know, the relevance of that we say is obvious when related to those
25 two particular OEMs.

26 **MRS JUSTICE BACON:** All right. If it's related to those two, is it resisted by the defendant?

27 **MR WILLIAMS:** Sorry, I beg your pardon, and the contract (inaudible), for the avoidance of
28 doubt.

1 **THE SHORTHAND WRITER:** I'm sorry, I couldn't hear that.

2 **MR WILLIAMS:** I'm sorry. And the contract manager, as well as -- sorry, the chipset
3 manufacturer, I beg your pardon. Sorry, too many acronyms. The chipset
4 manufacturers that acted on behalf of Apple.

5 **PROFESSOR MASON:** And I don't want to disturb any conversations, but it seems also
6 whether in the context of licensing negotiations or otherwise seems to be in question.

7 **MR WILLIAMS:** Well, that's the point of this: we're getting material in relation to the licensing
8 negotiations separately and the point of this category is to make clear that it's a residual
9 category, any material that is not swept up in the context of the negotiations. So it's
10 focusing on communications between Apple and Qualcomm, or their contract
11 manufacturers.

12 **PROFESSOR MASON:** And therefore you would resist the deletion of that phrase.

13 **MR WILLIAMS:** Yes, that's the point of it really. Those are the words intended to -- they're
14 for the avoidance of doubt words, really.

15 **MRS JUSTICE BACON:** Right, Mr Jowell or Mr Saunders?

16 **MR JOWELL:** I think we don't object to this insofar as it relates to the relevant OEMs, as we
17 call them, and I think also it would -- one would need to be for the relevant SEPs and
18 chipsets. I'm not going to be giving disclosure in relation to -- but subject to that I don't
19 think this would be opposed.

20 **PROFESSOR MASON:** Does that therefore mean you're content to leave in the "for the
21 avoidance of doubt" phrase that we just discussed, Mr Jowell?

22 **MR JOWELL:** Meaning the whether it's licensing negotiations --

23 **PROFESSOR MASON:** In the context, indeed.

24 **MR JOWELL:** -- or otherwise.

25 **PROFESSOR MASON:** Yes.

26 **MR JOWELL:** I don't think we have any particular concern with that provision. I mean, it
27 needs to be borne in mind that all of these sort of broad categories of documents at
28 the end of the day have to be reduced in some way to search terms that one can then --

1 **MRS JUSTICE BACON:** Yes, of course. Let's just get Mr Williams' response.
2 Mr Jowell says it would need to be for the relevant SEPs and chipsets.

3 **MR WILLIAMS:** I don't know what he means by the relevant SEPs. Does he mean cellular
4 SEPs? If he means cellular SEPs, that's fine.

5 **MR JOWELL:** LTE SEPs is what I mean.

6 **MR WILLIAMS:** We are then back to exertion of market power more generally, but it's true
7 that the claim relates to LTE SEPs; that's true.

8 **MRS JUSTICE BACON:** All right, so LTE SEPs. All right.

9 **MR WILLIAMS:** Yes. And I think category 25 is accepted in relation to Apple and Samsung
10 but not others and I've already addressed you on that. Is that right?

11 **MR SAUNDERS:** Sorry?

12 **MRS JUSTICE BACON:** Sorry, I couldn't hear that. So it's agreed in relation to Apple and
13 Samsung.

14 **MR WILLIAMS:** It's been very belatedly agreed in relation to Apple and Samsung.

15 **MRS JUSTICE BACON:** Is there an issue you want us to resolve?

16 **MR WILLIAMS:** Not on my side, no. I already addressed you on the wider position, but I just
17 want to check I wasn't misrepresenting.

18 **MR JOWELL:** On 25, I think we have said rather than costs, we have said royalty rates
19 because that is what is relevant here. Not their costs generally, their royalty rates.

20 **MRS JUSTICE BACON:** And it's royalty rates rather than costs --

21 **MR WILLIAMS:** Yes.

22 **MRS JUSTICE BACON:** -- agreed by both sides?

23 **MR WILLIAMS:** It's not obvious that the material they -- it's not obvious that Qualcomm would
24 discuss it in terms of whether the royalty rate in particular would be passed on, rather
25 than whether they would be in a position to pass on input costs more generally. That
26 really is a very refined definition.

27 **MR JOWELL:** I'm not sure because we're talking about the relevant OEMs passing on, and
28 the only thing we charge them are royalties.

1 **MRS JUSTICE BACON:** In that case, insofar as you have anything, you are saying it will
2 inevitably relate to royalty rates, but if it's not specifically expressed in terms of royalty
3 rates but if someone says costs more generally, I think Mr Williams would say he still
4 wants it. I'm not sure whether we should be drawing a distinction there.

5 **MR JOWELL:** I suppose so. What's relevant for the present claim is whether the royalty rates
6 are passed on by Apple and Samsung.

7 **MRS JUSTICE BACON:** Yes, and --

8 **MR JOWELL:** Not whether, you know, Apple and Samsung pass on some other -- you know,
9 the costs. So if Apple or Samsung come along to us and say: oh, we have had, you
10 know, plastic has gone up and we have had to pass on the cost of plastic to all our
11 customers, I'm not sure why that's -- terribly relevant.

12 **MRS JUSTICE BACON:** Well, I suspect that Mr Williams would want that insofar as you're
13 aware of that.

14 **MR WILLIAMS:** But the passing on of costs generally sheds light on the likelihood of the
15 pass-on.

16 **MRS JUSTICE BACON:** Yes, and that was the debate that was had at the CPO hearing.

17 **MR JOWELL:** Very well, then.

18 **MR TURNER:** We will say costs but Apple and Samsung.

19 Does that mean we've got through the disclosure points?

20 **MR WILLIAMS:** Yes, with one tiny point left, which is in the FTC document set, that did include
21 hard copy documents in relation to relevant custodians. We say that hard copy
22 documents and things like notebooks should be encompassed within the scope of the
23 more recent searches as well, and Qualcomm resist that on the grounds that it's too
24 much work, really. But we say this material was gathered for the FTC and by parity it
25 ought to be considered for the post-2018 period.

26 **MRS JUSTICE BACON:** Yes.

27 Mr Jowell, is there any reason why that shouldn't be --

1 **MR JOWELL:** Well, simply proportionality. We're talking about the period from 2018. Most
2 of this, the vast majority, is surely going to be electronic. Once one has to start going
3 through, you know, asking people for their notebooks and, I mean, really this is --

4 **MRS JUSTICE BACON:** The point I think Mr Williams was making is that insofar as it was
5 gathered for the FTC, can that not be searched --

6 **MR JOWELL:** Yes, but that's not in dispute.

7 **MR WILLIAMS:** No. My point was that this material was considered relevant for the FTC
8 period, it was gathered, it was part of the disclosure set, but one is obviously doing
9 a new batch of work for the post-FTC period --

10 **MRS JUSTICE BACON:** I see.

11 **MR WILLIAMS:** And we're saying one should take the same approach, really. We understand
12 it's more work but if the material was relevant for those purposes, then it's relevant for
13 the latter period.

14 **MRS JUSTICE BACON:** I understand, I'm sorry.

15 **MR WILLIAMS:** I'm sorry if I didn't make that --

16 **MRS JUSTICE BACON:** I'm sorry, I just didn't understand.

17 **MR JOWELL:** We say the vast majority of communications are going to be electronic. To go
18 and ask people to sort of hand over their notebooks and then try to decipher their
19 handwritten notes -- this is not a fraud case.

20 **MRS JUSTICE BACON:** But doesn't the point you make go both ways? If there is actually
21 not very much in terms of hard copy documents, there is not going to be very much for
22 you to search.

23 **MR JOWELL:** Well, it's particularly burdensome with hard copy because we have to
24 start -- the people with bad handwriting, we have to go and ask them: what does that
25 say, what does this mean, and so on.

26 **MRS JUSTICE BACON:** Do you have any evidence or any instructions as to how
27 burdensome this is, what the scale of the exercise that you are likely to have to carry
28 out?

1 **MR JOWELL:** At this stage, we don't know. We haven't scoped the exercise, I am told.

2 **MRS JUSTICE BACON:** Can we just leave this for further discussions between the parties,
3 you carry out an initial scoping exercise? If it turns out that actually because everyone
4 is doing everything on email, there are very few hard copy notebooks, there is less of
5 an issue here.

6 **MR JOWELL:** Yes, I'm grateful.

7 **MR WILLIAMS:** I think that is the end of disclosure for today's purposes.

8 **MRS JUSTICE BACON:** All right. So we might be able to deal with the rest of the issues now
9 if we go through them quickly.

10 Expert reports: the issue seems -- first of all there seems to be an issue about simultaneous
11 or sequential exchange. Our view is that simultaneous exchange should be sufficient,
12 given that Qualcomm has already detailed information about Which?'s methodology.
13 Mr Jowell are you going to vigorously resist that?

14 **MR JOWELL:** Well, I am somewhat because we have a problem with this case, which is that
15 at the moment we don't fully understand the court case on abuse. Of course some of
16 that will be flushed out we hope in responses to our RFI at the end of July.

17 But if it is indeed the case that they're going to rely on the same methodologies that they
18 proposed at certification stage, then we have had advance notice. But what would be
19 very unsatisfactory is if we are confronted with a case that we genuinely don't
20 understand, a case on abuse that we don't therefore know how properly to measure,
21 to suddenly be provided on exchange with some different methodology.

22 So it seems to us there are two possibilities. Either they are maintaining their existing
23 methodology, in which case they can tell us that, and then we will know in advance.
24 Alternatively, they're planning in fact to change their methodology or to substantially
25 supplement it, and in that case we should be told, again in advance.

26 **MRS JUSTICE BACON:** And the difference it makes is a difference of about a month?

27 **MR JOWELL:** Yes.

1 **MRS JUSTICE BACON:** So Which?'s proposal is that there should be simultaneous
2 exchange on 22 September and your proposal is the red one, is that right, that you
3 should then have Which? serving its statement on the 22nd and then you serving your
4 response on the 20 October.

5 **MR JOWELL:** Yes, I think may be that actually Which? is proposing October for both ... yes,
6 now that the RFI is only coming in --

7 **MRS JUSTICE BACON:** Yes, all right --

8 **MR JOWELL:** Forgive me, yes. Of course, I had forgotten. The RFIs are not in on the end
9 of July, they're in on 11 September. So that would only give us -- we get the RFI and
10 we will have ten days for our experts to decide their methodology. It's not even close
11 to being adequate for us.

12 **MRS JUSTICE BACON:** Yes. So how about we go with the red wording then, sequential
13 exchange? We are somewhat sympathetic to your points, given the issues that have
14 been flushed out in today's hearing regarding the nature of the class representative's
15 case, and obviously we have raised some further issues that the parties are going to
16 need to consider concerning the scope of the FRAND issues.

17 **MR JOWELL:** Yes.

18 **MRS JUSTICE BACON:** We would propose, then, to adopt the dates in red that Which?
19 should serve its statement, including the notice of the expert proposals on
20 22 September, and then you should respond as set out on 20 October.

21 **MR WILLIAMS:** Madam, can I just make one point at the moment because there is a staging
22 issue which I think has been slightly lost in this discussion. If you go back to
23 paragraph 6, what we proposed was simultaneous exchange of short statements of
24 methodology setting out the methods in the pleaded cases.

25 **MRS JUSTICE BACON:** Yes.

26 **MR WILLIAMS:** Then the next stage was going to be the provision of more granular
27 information about the number of expert witnesses, fields of expertise. So this is more
28 gearing up for a CMC in which the Tribunal is asked to deal with questions along the

1 lines of permission for expert evidence. What Qualcomm has done is roll those two
2 stages together.

3 **MRS JUSTICE BACON:** Yes.

4 **MR WILLIAMS:** What we're concerned about is that we shouldn't get into a fully developed
5 explanation of what our plans are for expert evidence in advance of this methodology
6 process. So our proposal was that the parties would exchange the methodology
7 statements first, then they could gear up for the CMC where they would make more
8 specific proposals for expert evidence, having had that visibility of each other's
9 methodology statements. It does seem to us likely to be not very efficient and not very
10 helpful for us to go the whole hog in the red words on page 3 before -- at the moment,
11 Qualcomm does have a lot of information about our current approach and this would
12 require us to take that a lot further and to gear up to the CMC without having any
13 visibility of their position at all.

14 That was the reason for this stage of the approach --

15 **MRS JUSTICE BACON:** I see. So you're proposing -- well, what do you then -- hang on,
16 Mr Jowell.

17 **MR JOWELL:** Sorry.

18 **MRS JUSTICE BACON:** What do you propose as regards the dates? If we go with the red
19 dates, 22 September and 20 October, when do you propose that the parties should
20 serve their -- and I think probably at that point simultaneously their proposals regarding
21 the number of experts, and so on?

22 **MR WILLIAMS:** Well, I mean, to some extent, it depends on the date of the CMC. Because
23 what I think we don't want is this to be too compressed before the CMC. But if the
24 CMC was later in December, then obviously this timetable could run a bit later, we
25 could have a simultaneous exchange of methodologies as we have proposed after the
26 RFI, once Mr Jowell has had a chance to consider our RFI, and then the second stage
27 of making more detailed proposals after that.

28 **MR TURNER:** After the CMC, you mean?

1 **MR WILLIAMS:** No, I'm so sorry. What we propose is a methodology stage and then
2 a detailed proposal stage, and so on.

3 **MR TURNER:** Yes.

4 **MR WILLIAMS:** We just don't think it's efficient or productive for to us work all of that up
5 before we have any visibility of what Qualcomm's doing.

6 **MRS JUSTICE BACON:** Yes. So let's assume that the dates are the red dates for the short
7 statements, and you get to, then, 20 October, Qualcomm has served its statement. If
8 that's the date, on what date would you be in a position, then, you say, to serve your
9 more detailed proposals regarding the number of experts you're calling, and so on?

10 **MR WILLIAMS:** If one is working on the basis we're going to respond to the RFI on
11 11 September, could we use 20 October as a date for, instead of 22 September, in our
12 paragraph 6? So simultaneous exchange of method --

13 **MRS JUSTICE BACON:** Why do you need until October? You will have done your RFI, you
14 have a lot of time before now.

15 **MR WILLIAMS:** We don't. It's Qualcomm that says it needs the time after the RFI.

16 **MRS JUSTICE BACON:** In which case, why can't you do yours in September? Is there any
17 reason why you need more than 22 September to put your proposals in? Because
18 that's the date on which you already say you think you could exchange statements.

19 **MR WILLIAMS:** Just the methodology, rather than --

20 **MRS JUSTICE BACON:** Yes. So just let's be clear: assuming we take the red dates, so in A
21 and A --

22 **MR WILLIAMS:** I understand.

23 **MRS JUSTICE BACON:** -- on what date will you be ready to serve your notice of the number
24 of experts, fields of expertise, and the expert issues?

25 **MR WILLIAMS:** I see. We have proposed that we would do that by 20 October, so I can't
26 see why we would still be in a position to do that. But it depends on when we get
27 Qualcomm's responsive methodology, that's the point. We want time to consider
28 whatever they give us.

1 **MRS JUSTICE BACON:** I have already set out the parameters.

2 **MR WILLIAMS:** I'm so sorry, Madam.

3 **MRS JUSTICE BACON:** Let's assume you serve your methodology on 22 September --

4 **MR WILLIAMS:** Yes.

5 **MRS JUSTICE BACON:** -- Qualcomm serves its on 20 October.

6 **MR WILLIAMS:** I understand.

7 **MRS JUSTICE BACON:** If that being the assumption, when will you be in a position, when
8 will you both be in a position, to exchange statements of your proposals regarding
9 experts?

10 **MR WILLIAMS:** I'm sorry, I have caught up now, Madam. I will take instructions.

11 **MRS JUSTICE BACON:** I would suggest that it should be some time in November.

12 **MR WILLIAMS:** I was just going to say the same thing. The point I was making a few
13 moments ago is it likely depends on when the CMC is. Because what you want is the
14 date to be far enough away to give the parties time to consider the position --

15 **MRS JUSTICE BACON:** November is going to be on any basis before the CMC.

16 **MR WILLIAMS:** Yes. So if mid-November were considered far enough in advance of the
17 CMC and the CMC were not on 1 December, which I think is what we have
18 countenanced at the moment, we could see all of that working.

19 **MRS JUSTICE BACON:** All right. What about 10 November?

20 **MR WILLIAMS:** That's three weeks.

21 **MRS JUSTICE BACON:** Can everyone do that?

22 **MR JOWELL:** For our part, we can make that, but may I make --

23 **MRS JUSTICE BACON:** Can we just deal with that first before dealing with anything else.

24 **MR JOWELL:** Well, it relates to that, if I may.

25 **MRS JUSTICE BACON:** All right.

26 **MR JOWELL:** It's just that we can understand I suppose that they might want to wait to
27 identify the number of experts they wish to call and the expert issues until after they

1 have seen our methodology statement, but it does seem to us that a methodology
2 statement does also presuppose a field of expertise in which that methodology sits.

3 **MRS JUSTICE BACON:** Well, it does, but they might want to see also what you say about
4 your methodology, that's the point being made.

5 **MR JOWELL:** I see that, but I think it would be -- I understand that. They might then wish to
6 see our methodology and say: well, we also need a forensic accountant.

7 **MRS JUSTICE BACON:** Exactly, which seems --

8 **MR JOWELL:** I take that point, but I think it would nevertheless be useful, in my respectful
9 submission, if when providing the methodology, it's not just completely untethered, it
10 is tethered to a discipline or disciplines. Of course they can supplement that, then,
11 but --

12 **MRS JUSTICE BACON:** Yes, I think that should be understood. Because it will have to say,
13 "Our economic expert will be doing this and our forensic accountant will be doing that".
14 As long as that's understood.

15 **MR WILLIAMS:** Not every area of expertise will deal with the methodology, Madam.

16 **MRS JUSTICE BACON:** No.

17 **MR WILLIAMS:** On the times you proposed, if we do need to do further work and further
18 thinking, the period between 20 October and 11 November is not very long, it's three
19 weeks. You could solve that either by bringing Qualcomm's date back a bit so they
20 don't have a full month, or by putting our date back a bit. But it does seem to me that
21 three weeks -- given that this is intended to allow to rethink the position once we have
22 had a chance to -- once we've seen what they say, three weeks is not very long in the
23 scheme of a case of this complexity.

24 **MRS JUSTICE BACON:** Well, what about the 17th? If it's the 17th, then you would have
25 two weeks before the CMC if it was on 1 December, which for the moment I can say
26 it's unlikely to be 1 December.

27 **MR WILLIAMS:** We hear what you say, Madam. Can we take dates away, we can't improve
28 on that at the moment.

1 **MRS JUSTICE BACON:** All right, let's say the 17th for the time being. That also deals with
2 the point about whether there should be the RFI first, so the remaining issue on
3 experts -- and this is just a point to flag, not a point on which we need your response
4 now -- is that we will want there to be some consideration prior to the next CMC as to
5 whether it will be useful to have any preliminary determination of expert issues, or
6 whether there are any issues regarding the identity or the nature of the experts that
7 need to be flushed out in advance.

8 What we do not want to see is a trial where criticism is made of experts, independence, or the
9 assumptions on which those experts have proceeded which could not have been
10 flushed out in advance, because there may be then serious issues with the entirety of
11 an expert's evidence, whether it's because of a criticism made of their experience or
12 independence, or because a dispute arises as to the premise on which the expert
13 methodology is conducted which fundamentally changes the evidence that's put
14 forward.

15 So insofar as there may be preliminary issues the Tribunal can usefully resolve, we would like
16 the parties to consider those. That will, of course, be part of the more general
17 consideration as to whether there should in any way be a split trial. This feeds into the
18 question as to whether some issues can be hived off, whether it's called a split trial or
19 preliminary issues trial, or whatever. That does not in any way prejudge the Tribunal's
20 thinking, but I'm asking the parties to consider it before the next CMC, because the
21 next CMC will need to set out the trial timetable in light of that.

22 All right. Are there, then, any other issues we need to deal with?

23 **MR JOWELL:** There is the additional question of applications for third party disclosure and
24 we understand the class representative has said that they intend to file third party
25 disclosure applications. We think it is very important that adequate notice is given to
26 us as defendant of what applications it proposes to make, because there's a real risk
27 with third party disclosure applications that applications are made only on an entirely
28 self-serving or partial basis.

1 **MRS JUSTICE BACON:** All right, so that's the issue in paragraphs 9 to 11 of the draft order.

2 **MR JOWELL:** Yes.

3 **MRS JUSTICE BACON:** Mr Williams.

4 **MR WILLIAMS:** Madam, we don't see that Qualcomm should have an opportunity to
5 pre-influence the applications we might want to make. If they want to challenge or
6 object to the applications we make, for example on the basis that we have cherry
7 picked the disclosure, they will be able to make that objection when the application is
8 heard. But it doesn't follow that they should be able to influence the nature or scope
9 of the application we're going to make in the first place. And it's not even a practical
10 suggestion, Madam, because to the extent we're in contact with third parties about
11 these matters, that's likely to be privileged and it's really very difficult to see how that's
12 going to work in the context of -- that that sort of engagement is going to work in the
13 context of Qualcomm also having the opportunity to influence what we might be
14 seeking from third parties.

15 The other point my learned friend makes in his skeleton argument is that once they have seen
16 what we are seeking, they may want to make their own requests. They can do that
17 but it doesn't follow that they ought to have the opportunity to try and shape or influence
18 our applications. So we say it's not necessary and it's not really practical either.

19 **MRS JUSTICE BACON:** Would you be anticipating that any applications you make should
20 be in any event copied to Qualcomm?

21 **MR WILLIAMS:** Certainly as regards applications in this Tribunal, we would make the
22 application. Sorry, I'm not being evasive, I just can't -- I haven't -- I'm not sufficiently
23 clear what the process would be for other sorts of applications.

24 **MRS JUSTICE BACON:** Is there any reason why you shouldn't copy Qualcomm with any
25 applications you make anywhere so they know what is being sought? Your point just
26 now was that if they see what you have sought and they want to make an application
27 for something wider, they then have the opportunity to do so. So on that basis, they
28 do have to see what you are asking for.

1 **MR WILLIAMS:** Sorry, I think I misunderstood. I thought your question is if the applications
2 were formally on notice. But no, can we tell them what application we have made, of
3 course we can tell them what application we have made.

4 **MRS JUSTICE BACON:** And copy them with the application?

5 **MR WILLIAMS:** Yes, there's no difficulty with that.

6 **MRS JUSTICE BACON:** Right. In that case, is there any real objection by Qualcomm if you
7 are going to be told when the application is made? The only difference is that you
8 don't get advance notice of it, but that's just a timing point.

9 **MR JOWELL:** Well, yes. It's a good second best, I think, from our point of view. We are
10 concerned about being ambushed effectively with applications that are made without
11 our knowledge in other jurisdictions and without the Tribunal's knowledge. It's not
12 really in the spirit of cards on the table with which we conduct this.

13 **MRS JUSTICE BACON:** Yes, you will be now. Mr Williams accepts that you won't be
14 ambushed and you will be informed of those.

15 **MR JOWELL:** Yes. On that note, I think the Tribunal wanted to come back to it, but again
16 we have found it is extremely difficult to cope with moving applications for documents
17 at the CMC made quite late in the day and there needs to be an ordered process as
18 well, in our submission, for the next CMC so we don't make the same mistake we made
19 last time of finding that we served responsive evidence and then found there wasn't
20 a specific provision for that.

21 **MRS JUSTICE BACON:** Yes.

22 **MR JOWELL:** So again, we would ask that applications for the next CMC are made well in
23 advance --

24 **MRS JUSTICE BACON:** Hang on --

25 **MR JOWELL:** -- and we then have a timetable to respond to it.

26 **MRS JUSTICE BACON:** -- that's a different point. So on third party disclosure, the order will
27 be that you will file -- well:

1 "The class representative shall, by 10 November 2023, file any third party disclosure
2 applications to be made in the Tribunal."

3 I'm not quite sure what that means. Are you just talking about applications in this jurisdiction?

4 **MR WILLIAMS:** That's just setting a timetable for matters that fall within this Tribunal's
5 jurisdiction, yes. We weren't setting -- the point wasn't to set a timetable for other
6 things, no.

7 **MRS JUSTICE BACON:** Any others, all right. Well, just make that clear in the wording:

8 " ... and that if any other applications are made in other jurisdictions, those shall be provided
9 to Qualcomm at the time they are made."

10 **MR JOWELL:** I think there also, though, has to be some longstop date by which they are
11 going to make any applications in other jurisdictions for third party disclosure. Because
12 for example, in the United States, a 1782 application, if that's what they have in mind,
13 can take an awfully long time to get resolved, and that will have implications for the
14 trial date, and so on.

15 So we do need to -- and what we are, again, very keen to avoid is a situation where suddenly
16 too close to the trial, we are served with a slew of documents obtained from third
17 parties pursuant to 1782, again, effectively an ambush.

18 **MRS JUSTICE BACON:** Yes. Mr Williams, what do you have to say about a longstop?

19 **MR WILLIAMS:** Well, I think what we say about it is that we have made clear that we have
20 reached a point in these proceedings where this issue is now crystallised, or more or
21 less crystallised, after a long process of trying to understand what it is that Qualcomm
22 controls. We thought it was helpful for this Tribunal to know what's happening in this
23 Tribunal. We're not hanging around in relation to any of this and we have another
24 CMC in December where we have said we will be telling the Tribunal what's
25 happening. But it's not helpful to impose a sort of arbitrary longstop. We have made
26 it clear that having reached the end of that correspondence with Qualcomm, we're now
27 focusing on this, and we now have a window before the next CMC where we have to
28 do so.

1 **MRS JUSTICE BACON:** Well, I think we will have to review it at the next CMC, but I think
2 now the Tribunal should put down a marker that we will be setting a timetable to trial
3 at the next CMC and will not be very sympathetic to suggestions that that timetable
4 should be delayed because of the class representative's failure to get on with its
5 applications in other jurisdictions.

6 **MR WILLIAMS:** No, no, we understand that.

7 **MRS JUSTICE BACON:** All right.

8 **MR WILLIAMS:** That's the basis on which we're proceeding.

9 **MRS JUSTICE BACON:** Okay. So that will be the order, and then turning to the next CMC.

10 **MR WILLIAMS:** Just before that, I don't know if we fixed dates for the outstanding RFI
11 responses, which are the bit of our RFI that you sustained. I can't remember if that
12 was dealt with, but there's also the questions which we asked previously on Wi-Fi and
13 NFC, and so on, on non-cellular technology, which Mr Jowell said they would respond.
14 I don't think a date was put on that.

15 **MR JOWELL:** For our part, we would be content with 11 September, same as their date.

16 **MRS JUSTICE BACON:** Is there any problem with those dates?

17 **MR WILLIAMS:** No.

18 **MRS JUSTICE BACON:** No, all right. So then directions for the next CMC. Now, we can't
19 give you a date. That's in part, I'm afraid, because of my own availability which turns
20 on a trial I am currently listed to hear in the Chancery Division and for which the PTR
21 is later this term.

22 However, I think it would be -- I understand that it would be appropriate to give clear directions
23 for applications and responsive evidence. Rather than trying to draft on the hoof now
24 late in the afternoon, can I suggest that you put in suggestions in the order which would
25 give a date before the CMC for any applications to be made and a date for responsive
26 evidence?

27 **MR WILLIAMS:** Yes.

28 **MR JOWELL:** Of course.

1 **MRS JUSTICE BACON:** All right. Does that, then, in principle deal with all the issues for this
2 CMC?

3 **MR WILLIAMS:** Could we request written reasons in relation to the amendment issue,
4 Madam?

5 **MRS JUSTICE BACON:** The first issue?

6 **MR WILLIAMS:** Yes, the 32.2 issue.

7 **MRS JUSTICE BACON:** Yes, we will endeavour to provide those by the end of term.

8 **MR WILLIAMS:** I mean, to the extent we wanted to take that further, Madam, would time not
9 be running until we have seen the Tribunal reasons, I presume?

10 **MRS JUSTICE BACON:** Yes, that would be the case, so I think you need to put that in the
11 order.

12 **MR WILLIAMS:** Right.

13 **MRS JUSTICE BACON:** I would like a draft order to be sent to us by the end of tomorrow.
14 Insofar as it is not agreed, I want the draft order sent to us by 4 o'clock with any points
15 that are not agreed included in square brackets as to each party's submissions as to
16 what should be included, and then brief -- with an emphasis on the word
17 "brief" -- submissions from each side as to their position on the matters that are not
18 agreed.

19 **MR WILLIAMS:** And that includes all the disclosure categories, Madam, I presume?

20 **MRS JUSTICE BACON:** That includes everything, yes, and then the Tribunal can finalise the
21 order as soon as possible.

22 One more point: I would just like to make it clear that the bundles in this case have been
23 shambolic. You both have large teams of solicitors. Every direction I have seen
24 regarding production of electronic bundles specifies that the pagination should
25 correspond to the numbers of the PDF, page numbers of the PDF. For the avoidance
26 of doubt, that means if there are 1000 pages in the PDF, the pagination should start at
27 number 1 and end at number 1000. No A, B or Cs; no points 1, 2 or 3, because those
28 are not picked up on the PDF readers which any High Court judge is using.

1 So for the remainder of this case, please ensure that your pagination of your bundles
2 corresponds to the number of pages in the PDF bundle and that references in skeleton
3 arguments and submissions are given to the PDF, because most of us this side of the
4 bench are using electronic versions for everything except the core bundle, and in at
5 least one member of the Tribunal's case, in this case for the core bundle as well, and
6 it's just hopeless if the bundles are not prepared properly. And tabs, if you want us to
7 refer to tabs, then the tab numbers have to be on the bookmarks. In this case, the
8 bookmarks contained long descriptions but without a single tab number, as far as
9 I could see.

10 So these are elementary requirements. It's the same as in the Chancery Guide, for example,
11 your solicitors are all familiar with them. Please ensure that the bundles conform to
12 the normal requirement for PDF bundles next time, in which we shall all be saved a lot
13 of time.

14 Is there anything else I need to deal with before the end of this CMC?

15 **MR JOWELL:** No, Madam. Thank you.

16 **MRS JUSTICE BACON:** All right.

17 **(4.55 pm)**

18 **(The hearing concluded)**

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