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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. : 1382/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 10th January 2024

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Consumers' Association

Class Representative

v

Qualcomm Incorporated

Defendant

APPEARANCES

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

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

Wednesday, 10 January 2024

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(10.30 am)

Application re Korean proceedings (Continued)

MRS JUSTICE BACON: Yes, Mr Williams. You were going to conclude your submissions on the Korean point.

MR WILLIAMS: Yes.

MRS JUSTICE BACON: I sense that Mr Saunders is already jumping up because he wanted to say something.

Mr Saunders, I will give you an opportunity to say something.

MR SAUNDERS: I will be very very brief, my Lady.

MR WILLIAMS: I wasn't going to make more submissions, Madam, I just wanted to round off two points we were dealing with at the end of yesterday.

First of all you said to me towards the end of the argument --

MRS JUSTICE BACON: Wait a minute, I am sorry, I am just having problems logging in.

MR WILLIAMS: No problem.

(Pause).

MRS JUSTICE BACON: I am sorry, I am going to have to rise and sort out my computer. Otherwise I can't take notes.

(10.31 am)

(A short break)

(10.33 am)

1 MRS JUSTICE BACON: Apologies. I am in now, Mr Williams.

2 Your last point.

3 MR WILLIAMS: You said to me towards the end of the argument
4 looking at the list in the draft order: what is the most
5 important?

6 MRS JUSTICE BACON: Yes.

7 MR WILLIAMS: I perhaps literally construed that as: which
8 is the single most important category? When I made the
9 application I put it on the basis the core of the
10 application was A and B, that is to say the exhibits and
11 the submissions around those exhibits which would
12 contextualise the exhibits and explain the position of
13 the party making the submission, which in some instances
14 would be a third party such as MediaTek or Intel.

15 So that is the way we put it. That was the core of
16 the application. Exhibits on the one hand, submissions
17 and briefs on the other.

18 The response to your question was really a response
19 on what is the single most important category, but we
20 did put the application on that wider basis.

21 The final --

22 MRS JUSTICE BACON: I think your answer yesterday was A but
23 you also wanted F.

24 MR WILLIAMS: Yes. F is reversing out the effects of
25 caveats on previous orders for which we say there is no

1 longer any basis. And we don't -- I mean, the substance
2 of the documents they were seeking are meant to be
3 caught by the other categories and by the order that was
4 made last January. We included F as a sweep up because
5 we just don't know what material may have been withheld
6 on the basis of that caveat and whether it is
7 exclusively documents that would otherwise be ordered by
8 other parts of the order.

9 So that was simply saying anything you withheld on
10 the basis of a caveat for which we say there was no
11 proper basis should be reversed.

12 The final point really relates to that very issue.
13 The sweep up provision as I put it yesterday is intended
14 specifically to reverse the carve out that was ordered
15 in July for third party produced material but I made the
16 submission yesterday that it now appears that the
17 disclosure that was given in response to the order
18 last January for documents that are referred to in the
19 relevant decisions on the basis that the material wasn't
20 within Qualcomm's control, that material was improperly
21 withheld because they no longer maintain the control
22 point.

23 So we have that order. I didn't ask for another
24 order for that material again because we have the order
25 but if you are with me on the argument, we say that

1 a part of dealing with this would also involve covering
2 off material which wasn't disclosed pursuant to the
3 order last January but which ought to have been
4 disclosed once Qualcomm accepts it does in fact have
5 control of that material.

6 So we haven't sought another order for that because
7 we have the order already but at a practical level that
8 would need to be resolved. If it was thought desirable
9 to make another order regularising the position on that
10 we could sort that out as part of drafting the order.

11 MRS JUSTICE BACON: Are we talking about F here?

12 MR WILLIAMS: No, I am sorry. F I think -- I probably need
13 to take it out -- F I think says anything that was
14 withheld under the July caveat.

15 MRS JUSTICE BACON: Yes.

16 MR WILLIAMS: That is because in the July order there was
17 an express caveat and in order to obtain material that
18 has been withheld on that basis we need a further order
19 reversing the effect of that caveat.

20 MRS JUSTICE BACON: Yes.

21 MR WILLIAMS: The position is different for the January
22 material because we already have an order in the January
23 order that Qualcomm should disclose material that is
24 referred to in the decision, subject only to the
25 reservation of position in relation to control.

1 They said at that time some of the material that
2 would fall within the scope of the material we are
3 arguing about now wasn't within their control so they
4 withheld that material at that point. But they no
5 longer maintain that material is within their control.

6 The point I am making in a slightly laboured way is
7 we haven't sought another order for that material but at
8 a practical level we say one would need to go back over
9 that ground and make sure material that was wrongly
10 withheld on the basis of the control argument is now
11 disclosed.

12 MRS JUSTICE BACON: All right. I think the way to deal with
13 that is let's see where we come out.

14 MR WILLIAMS: Yes.

15 MRS JUSTICE BACON: Then the parties will either manage to
16 sort this out in the order or you will have to come back
17 to me with further comments on what is not agreed in the
18 draft order.

19 MR WILLIAMS: Once we have principles from you I don't think
20 there will be a problem with the order I just wanted to
21 explain why we have a specific sweep up for July but not
22 a specific sweep up for January.

23 MRS JUSTICE BACON: I understand.

24 MR SAUNDERS: My Lady, can I just take you to the July order
25 because actually this is -- I think the way that my

1 learned friend just developed that point does need to
2 be -- it is important you see the order. That is the
3 supplemental bundle, tab 33, volume 2, tab 33, page 952.

4 Then it starts at page 954, so this is the
5 disclosure paragraph. Paragraph 1.

6 MRS JUSTICE BACON: At the moment that is not coming up on
7 the EPE screen but it may pop up shortly.

8 MR SAUNDERS: The main supplemental bundle, page 954.

9 Paragraph 1 in the bottom half of the page. Thank you.

10 Sorry it is 953, I think, on your numbering. I am
11 sorry. That is it.

12 So the operative part of the order is paragraph 1:

13 "Qualcomm shall conduct reasonable and proportionate
14 searches ..."

15 So this order deals with the FTC material as well as
16 aspects of the Korean material but not relating to the
17 third parties.

18 We then have the carve out on page 959 on your
19 numbering, 960 for the others that. Is paragraph 5 if
20 we can just look at that.

21 MRS JUSTICE BACON: Yes.

22 MR SAUNDERS: So it carves out:

23 "Shall not be obliged for search for or provide
24 Third Party produced Confidential Information".

25 MRS JUSTICE BACON: Yes.

1 MR SAUNDERS: That applies to the FTC. It cuts across
2 everything. Here we are dealing with Korea, this isn't
3 an application in respect of the FTC. So F as currently
4 drafted in the order sought by my learned friend just
5 cuts out 5 in its entirety. So there is some -- I am
6 not sure that is what he actually wanted to achieve but
7 I think we have been debating whether this material
8 should be produced from the Korean proceedings not
9 cutting across the FTC.

10 MR WILLIAMS: We are only seeking to reverse that carve out
11 for the Korean materials and I am sorry if we need to
12 tidy the drafting up on that. But there's no
13 disagreement on the principle.

14 MR SAUNDERS: The other point about F is it is correct we
15 are not taking a point on control in respect of the
16 Korean material and that -- but there is -- the effect
17 of F is effectively to give them everything. So it
18 shouldn't be ordered -- I mean the sweep up aspect of it
19 is in fact a provision of totality and it renders all
20 the previous paragraphs somewhat pointless because it
21 just means everything is to be provided.

22 What should be done in a more principled way is to
23 order disclosure of whatever categories if my Lady and
24 the Tribunal are against us to identify the specific
25 categories and then order those specific things. Then

1 we can sort out the drafting.

2 MRS JUSTICE BACON: No, I didn't understand that last point
3 at all. I think what is being said in relation to F,
4 and the wording of it can be the subject of debate
5 between you two, is simply that insofar as there were
6 documents that were previously withheld or redacted from
7 the Korean set on the basis they contained information
8 confidential to a third party, those should now be
9 disclosed, is that right?

10 MR WILLIAMS: Yes, Madam, it is.

11 MR SAUNDERS: So that is the entire set of all documents
12 containing third party material. It isn't just limited
13 to the exhibits filed by the KFTC and then -- do you see
14 the categories A and B?

15 MRS JUSTICE BACON: Yes, the point is insofar as you were
16 previously were searching for and obtained but did not
17 disclose or disclosed but redacted documents from the
18 Korean proceedings on the basis of third party
19 confidentiality, those should simply now be given.

20 MR WILLIAMS: Yes, as specifically ordered. I mean there
21 were orders for the production of some Korean material
22 and then there was a carve out. So what we are saying
23 is that anything that fell within the primary order but
24 that was withheld on the grounds that it fell within the
25 carve out, if the carve out is reversed for all the

1 reasons I have developed then one is simply back to the
2 primary order.

3 MRS JUSTICE BACON: That is how I understood it and if
4 necessary it seems to me that that could be amended to
5 make the position clearer.

6 MR SAUNDERS: Yes it may be necessary to finesse drafting.

7 In response to my Lady's question in relation to the
8 categories, my learned friend has explained that
9 yesterday he was particularly keen to obtain A and today
10 was saying that B was also important by way of context.
11 It seems to us at least that the inclusion of F has the
12 effect of just providing the totality because unless --
13 because if the Tribunal orders a sub category A and also
14 orders F then sub category A is just if you imagine the
15 Venn diagram it is consumed by F as well. There is no
16 distinction.

17 MR WILLIAMS: I see Mr Saunders' point. Really what he is
18 saying is the Tribunal will need to decide what should
19 be disclosed and then the scope of the sweep up should
20 be tailored to whatever is being ordered for disclosure.
21 I accept that point and we can sort that out as a matter
22 of drafting.

23 I think what he is saying is that the sweep up
24 shouldn't be drafted so broadly that it gives us
25 disclosure of any material the Tribunal doesn't order

1 but we just need to see where the Tribunal comes out on
2 the primary order. If you grant our application the
3 sweep up would be general and if the disclosure --

4 MR JUSTIN TURNER: Sorry, I am confused now. If, for
5 example, the intention was to give 1A, let's say, why
6 would you need F? It just gets caught by two orders
7 doesn't it? You have already -- it has been ordered
8 that you produce --

9 MRS JUSTICE BACON: No, I think that F would be necessary
10 because 1A deals with exhibits filed by the KFTC and
11 third parties but, as I understand it, the July order
12 includes --

13 MR JUSTIN TURNER: Includes exhibits and documents provided,
14 yes.

15 MRS JUSTICE BACON: But more than that. I think the July
16 order would have included exhibits filed by Apple and
17 Samsung as well as by -- well, as well as by other
18 parties.

19 MR WILLIAMS: The reason we call it a sweep up is because
20 there is an overlap between them and --

21 MR JUSTIN TURNER: Okay, sorry, I understand now. I am
22 being slow. I understand.

23 MR SAUNDERS: I think to cut through it, if perhaps the way
24 to approach it is decide as my learned friend said which
25 categories -- if you are against me on the principle

1 decide which categories are to be included and in
2 respect of which counterparties and then we can come up
3 with some wording which doesn't violate what was ordered
4 previously. The tail of the not violating sweep up
5 should not overcome the dog of the category. That is
6 the point. A rather involved way of saying: decide the
7 categories and we can sort out the drafting, I think.

8 The other point I wanted to make, if I may, is
9 Mr Williams in his submissions said that the Class
10 Representative needs this application as against
11 Qualcomm because they are not getting particular
12 cooperation from Apple and Samsung. There is no actual
13 evidence in relation to the position there and the Class
14 Representative is refusing to update us as to the
15 position on that and we say it is very unsatisfactory
16 for counsel to make a point in that way on their feet.

17 The skeleton arguments didn't suggest that there was
18 any particular problem obtaining it, it is now being
19 said it is highly unlikely it can be obtained. Again
20 there is no evidence of that position. Actually it is
21 quite contrary to the approach taken in the skeleton.

22 So what we say is that even if that were right it
23 doesn't justify making an order for provision of
24 material relating to LG and a slew of other mobile phone
25 manufacturers. You have already ruled at the last CMC

1 that negotiation histories with third party OEMs other
2 than Apple and Samsung should be excluded. We say that
3 is quite right because they are at best peripheral to
4 the Class Representative's claim. We say this is really
5 another example to obtain some of that material via
6 the Korean proceedings back door when actually it is of very
7 best peripheral importance.

8 It is important to bear in mind we have heard a lot
9 about LG. We heard about that in Mr Williams'
10 submissions a little bit in reply, not so much,
11 tellingly. LG don't make chips. There's no basis for
12 them -- they are a mobile phone manufacturer and there
13 are several other people in that list. When you think
14 about the counterparties, there are those that make
15 chips, there are those that are OEMs that make phones.

16 Sometimes you order the counterparty might be in
17 both categories but again we would invite the Tribunal
18 to approach this as a question of principle rather than
19 just saying, well, there is a bucket of documents, we
20 might as well have the whole lot. It has to be
21 a principled basis on which to order and we invite to
22 you do that in a way that is consistent with the way you
23 approach disclosure in the case more generally.

24 I will leave the Tribunal with that. Those are our
25 reply submissions.

1 (Pause)

2 MRS JUSTICE BACON: I will give a short ruling on this.

3 Ruling

4 MRS JUSTICE BACON: It is common ground that this Tribunal

5 has jurisdiction to order the production of documents

6 notwithstanding that to do so might breach criminal law

7 in a foreign jurisdiction, Bank Mellat paragraph 63.

8 A fortiori this Tribunal may also do so where the breach

9 is of a civil procedural obligation. Whether the

10 Tribunal will do so is a matter of discretion taking

11 into account the risk of proceedings in the foreign

12 state on the one hand and on the other hand the

13 importance of the documents sought for the fair disposal

14 of the domestic proceedings.

15 In the present case Qualcomm's primary objection to

16 production of documents submitted by third parties in

17 the Korean courts turns on the risk of civil actions

18 arising from a breach of an implied obligation of

19 confidentiality under Korean law, preventing the

20 recipients of that material from using the documents for

21 any purpose other than carrying out the litigation in

22 which the material was originally disclosed.

23 The existence of that implied obligation of

24 confidentiality is not disputed. It is also not

25 disputed that breach of that implied obligation might in

1 principle give rise to claims made by the relevant third
2 parties against Qualcomm under article 750 of the South
3 Korean civil code, which states that any person who
4 causes losses to or inflicts injuries on another person
5 by an unlawful act intentionally or negligently shall be
6 liable to pay compensation for damages arising
7 therefrom.

8 It is apparent, however, that the risk of such
9 a claim against Qualcomm if it were ordered by this
10 Tribunal to provide the documents sought, is minimal.
11 In the first place, it is questionable whether the
12 provision of documents pursuant to an order of a court
13 or Tribunal in this jurisdiction would be regarded as
14 an intentional or negligent unlawful act.

15 More importantly, however, it is difficult to see
16 how any third party could suffer loss or damage if the
17 relevant documents are, as proposed, provided into
18 a strictly circumscribed confidentiality ring. Qualcomm
19 has not identified any serious basis on which use of the
20 documents for the purposes of these proceedings and
21 subject to the same sort of strict confidentiality
22 requirements as are routinely imposed by the Tribunal in
23 cases of commercially confidential documents could give
24 rise to any material risk of loss or damage to the third
25 parties in question. Nor any precedent in the South

1 Korean jurisdiction for a claim on that basis.

2 In those circumstances, the risk of a civil action
3 against Qualcomm under the Korean civil procedural
4 provisions for breach of its obligation of
5 confidentiality seems to us to be more theoretical than
6 real.

7 Set against that, Qualcomm does not dispute that at
8 least some of the documents provided by third parties
9 for the purposes of the Korean proceedings are or may be
10 relevant to these proceedings. It does however dispute
11 the relevance of documents that are provided by third
12 parties other than Apple or Samsung.

13 The Class Representative's response to Qualcomm's
14 third request for information filed on 11 September 2023
15 makes clear however that the Class Representative relies
16 on examples of Qualcomm threatening to cut off the
17 supply of chipsets to OEMs other than Apple and Samsung
18 and sets out the basis on which the Class Representative
19 contends that this is relevant to its claim regarding
20 the ability of Apple and Samsung to obtain reasonable
21 royalty rates from Qualcomm.

22 In addition, the Class Representative's case in
23 respect of alleged exclusionary effects arising from the
24 RTL policy which is also explained further in the same
25 RFI response necessarily concerns third parties other

1 than Apple and Samsung.

2 On the pleaded case as it currently stands
3 therefore, documents provided for the Korean proceedings
4 by third parties other than Apple and Samsung cannot be
5 said to fall entirely outside the scope of these
6 proceedings.

7 Qualcomm also says that the relevant documents can
8 be obtained through other means such as by section 1782
9 requests made in the US proceedings or a rule 63
10 application in this Tribunal. It says that it would not
11 oppose applications made on either of these bases. It
12 seems to us however both inefficient and
13 disproportionate to put the Class Representative to the
14 time and expense and likely delay of making third party
15 applications either here or in a foreign jurisdiction
16 when it can instead simply ask Qualcomm to provide the
17 documents which it already has.

18 Qualcomm's remaining objection is that the exercise
19 is likely to be burdensome. We consider that Qualcomm's
20 claims in this regard are likely to be somewhat
21 overstated. In any event, however, the force of any
22 such objection is considerably diminished if the
23 documents ordered are confined to a narrower set of
24 documents than is currently sought by the Class
25 Representative.

1 Mr Williams said that the most important categories
2 of documents are those in paragraphs 1A and B of his
3 draft order, namely copies of the exhibits filed by the
4 KFTC and third parties during the KFTC and SHC
5 proceedings. And copies of briefs filed and other
6 submissions made by the KFTC and third parties in the
7 SHC proceedings and/or the SCK proceedings. As well as
8 category F which is a sweep up provision.

9 It appears that the documents in category A may
10 contain no more than a few hundred documents. We
11 consider that these are the documents that are most
12 likely to be relevant for the purposes of these
13 proceedings. The probative value of the remainder of
14 the documents sought such as submissions made in the
15 Korean proceedings, lists of exhibits and transcripts of
16 hearings is likely to be far less significant and we are
17 not at present persuaded that there is any compelling
18 case for ordering those documents to be disclosed by
19 Qualcomm.

20 We therefore consider that it is appropriate to
21 order the production of the documents listed in
22 paragraph 1A of the draft order. Documents in
23 paragraph 1F should also be provided insofar as those
24 reflect category A. The documents are to be provided
25 into the confidentiality ring and subject to the further

1 provisions in that regard set out in the draft order.

2 We do not at present order the production of the
3 remaining documents listed in paragraphs 9B to D of the
4 draft order. It is however open to the Class
5 Representative to make a more targeted application for
6 specific documents in those categories at a later stage
7 should it consider this to be necessary once it has
8 reviewed the documents provided under category 1A.

9 MR WILLIAMS: I am grateful, Madam. I assume you haven't
10 acceded to the submission about the cross undertaking in
11 damages.

12 MRS JUSTICE BACON: No.

13 MR WILLIAMS: That falls away. I am very grateful.

14 MRS JUSTICE BACON: So that deals with the Korean issue.

15 Now --

16 MR SAUNDERS: My Lady, sorry, can I just -- to mention
17 again, we will double check to make sure there is -- the
18 extent of the overlap there may be no overlap with
19 category 1A but insofar as the documents are covered by
20 US protective order and then by consent ended up in
21 the -- if there is a third party document which was
22 covered by US protective order.

23 MRS JUSTICE BACON: Yes.

24 MR SAUNDERS: But was then also to be found in the Korean
25 material.

1 MRS JUSTICE BACON: Yes.

2 MR SAUNDERS: We need to double check the position in
3 relation to the US protective order.

4 MRS JUSTICE BACON: Yes.

5 MR SAUNDERS: Because we don't want to get into a situation
6 where we are in breach of the US protective order by
7 providing it pursuant to the order.

8 MRS JUSTICE BACON: Yes.

9 MR SAUNDERS: So I will ask, if I may, for a carve out for
10 that. It may not be a problem with 1A, we will have to
11 check.

12 MRS JUSTICE BACON: Yes.

13 MR SAUNDERS: But just to mention that.

14 MRS JUSTICE BACON: Yes. Are you content, Mr Williams?

15 MR WILLIAMS: Well, I understand the point but as I said
16 yesterday it's a point raised for the first time by my
17 learned friend in his submissions. Whilst I understand
18 the point I can't agree at the moment to there being
19 a carve out. I think what we would like to hear from
20 Qualcomm as a matter of urgency is an explanation of
21 what the position is because this does have an impact
22 potentially on the order. At the moment we are punching
23 in the dark, really. It is a new point as far as we are
24 concerned.

25 I think if they could explain to us the point of

1 principle in correspondence and identify any documents
2 that are affected by it we can take a view on that.

3 MRS JUSTICE BACON: Well, the thing is that the order has to
4 be drawn up and I haven't had any submissions on the
5 desirability of overriding any US protective order. So
6 I think pro tem the order will have to include a carve
7 out but with liberty to apply for that to be removed if
8 you consider it appropriate and there are reasons for
9 doing so.

10 But I don't think that absent any submissions on
11 that point -- I have obviously had submissions on the
12 Korean point, I don't think it would be -- if there is
13 a concern, I don't think it would be appropriate to just
14 override that without submissions.

15 MR WILLIAMS: No. To be clear, I am not suggesting at all
16 that you would do that, it is simply that Mr Saunders
17 has made the point that there is this overlap and the
18 consequence of the overlap is that they can't give the
19 disclosure and at the moment we need to understand that
20 better.

21 MR SAUNDERS: Just to be clear I am not saying we can't give
22 the disclosure, I am saying there may be documents that
23 have this problem.

24 MRS JUSTICE BACON: I think you were saying you couldn't
25 agree to there being a carve out. I think pro tem there

1 will have to be just as a matter of logistics because
2 I don't want to delay sealing the order until maybe some
3 weeks down the line this is sorted out.

4 MR WILLIAMS: I understand.

5 MR SAUNDERS: The only other issue is timing.

6 I am not sure whether there is much of a dispute
7 between us about that or whether we can sort it out in
8 the order but -- we asked for three months but I think
9 two months if it is category A.

10 MRS JUSTICE BACON: If it is category A it is a tiny
11 fraction of the overall subset.

12 MR SAUNDERS: It is the time for third party objections
13 because they can apply to the -- we would have to notify
14 them, they may make applications to either this Tribunal
15 or to the Korean court.

16 MRS JUSTICE BACON: Are you content with two months,
17 Mr Williams?

18 MR WILLIAMS: Two months, I think. If that is time to do
19 the disclosure, to do the review, time to get objections
20 in and time to give the disclosure I can see how that
21 adds up to two months but I can't see it adds up to
22 a lot more than two months.

23 MRS JUSTICE BACON: Yes.

24 MR SAUNDERS: My Lady, I am grateful. If there are
25 applications we may have to make an application

1 separately but that is not something we have to deal
2 with at the moment.

3 MRS JUSTICE BACON: All right.

4 Next on my list I have Wi-Fi and NFC market power,
5 is that right?

6 MS MCANDREW: Yes, I am going to be dealing with those.

7 I will rearrange myself to be closer to the microphone.

8 MRS JUSTICE BACON: I should say the Tribunal is always
9 pleased to hear from junior counsel.

10 Application re outstanding disclosure

11 MS MCANDREW: I am proposing to take all of Which?'s
12 outstanding disclosure applications together. I will
13 deal with them all in one set if that is convenient to
14 the Tribunal. Which? has made a small number of
15 targeted applications for Qualcomm material and they are
16 set out in paragraph 2 of Which?'s draft order, which is
17 in the core bundle at tab B4, page 135.

18 The current position is that one of these
19 applications was agreed at the time the skeletons were
20 filed, in respect of the others there has been some
21 movement since then, one has fallen away subject to one
22 point which I will raise with the Tribunal and points of
23 dispute remain in relation to the other three.

24 So I will take them in turn, starting with Wi-Fi.

25 That is at paragraph 2A of the draft order. There

1 Which? sought documents concerning Qualcomm's assessment
2 of its own market power in relation to the supply of
3 Wi-Fi and NFC components and the impact of that market
4 power on its dealings with its customers.

5 To briefly explain the context for this application,
6 the Tribunal will recall that at the last CMC this
7 category was also in issue but it was held over pending
8 Qualcomm's response to Which?'s RFI on whether Qualcomm
9 did in fact apply the NLNC policy to Wi-Fi chipsets.
10 Qualcomm has since confirmed it does not and so
11 a question therefore arises as to why not.

12 This category of disclosure was aimed at getting
13 documents which go to Qualcomm's internal thinking on
14 that subject. Which?'s position is that this will
15 provide a useful counterpoint to Qualcomm's approach to
16 baseband chipsets and be informative of the real reasons
17 why Qualcomm applies NLNC in that context where, unlike
18 with Wi-Fi, NFC it enjoys very strong market power.

19 For its part, Qualcomm has offered to respond to
20 this disclosure application by way of responding to
21 a request for information. Which? is still of the view
22 that the contemporaneous documents which reflect
23 Qualcomm's thinking on this issue are likely to be
24 highly relevant but we can see the sense in Qualcomm
25 setting out its position formally on the issue, so we

1 won't pursue this category at this CMC. We will serve
2 an RFI on it and see what Qualcomm has to say in its
3 response.

4 MRS JUSTICE BACON: All right. So that has then fallen
5 away.

6 MS MCANDREW: There is just one point I need to raise in
7 respect of this, Madam. Having itself proposed that
8 this issue be dealt with by an RFI, Qualcomm now
9 purports to generally reserve its rights pending sight
10 of that RFI. The reason that I raise this is because
11 Which? is not pursuing this disclosure category on the
12 basis that Qualcomm will respond to an RFI setting out
13 the reasons why the NLNC policy is not applied in that
14 context. Which? will obviously try to ensure the RFI is
15 appropriately tailored and proportionate et cetera but
16 what we really don't want is to get back a response
17 which says we don't consider this is relevant or some
18 other sort of unhelpful response.

19 MRS JUSTICE BACON: All right. Can I just check then what
20 Qualcomm's position is? Are you going to respond to
21 that RFI and not say it is not relevant?

22 MR JOWELL: In principle really this should be a matter for
23 witness evidence but if the RFI is properly targeted
24 our intention is to respond to it, yes.

25 MRS JUSTICE BACON: All right.

1 MS MCANDREW: I am grateful for that.

2 So subject to that then, that category falls away.

3 The next category of disclosure is set out in
4 paragraphs 2B and 2C of the order. These cover material
5 which relates to the market definition and dominance
6 exercises in the 3G and 5G. These are the key
7 categories that were leftover from the last CMC at which
8 Which? was granted permission to amend the claim form to
9 plead the existence of relevant 3G and 5G markets,
10 Qualcomm's dominant position on those markets and
11 corresponding allegations of abuse of that dominant
12 position.

13 Madam, you very helpfully indicated that Which?
14 would be entitled to disclosure of material going to
15 those issues in due course. However, there was
16 a general consensus that the scope of that disclosure
17 was best parked until the amended defence had been
18 served, which of course has now been done.

19 So the question is not whether this disclosure
20 should be given but rather the scope of that disclosure.
21 I raise that just because until very recently Qualcomm's
22 position was essentially that it would give no further
23 disclosure in respect of any of these issues and despite
24 the fact that there has been some movement Qualcomm is
25 still taking a fairly narrow and restrictive approach to

1 its disclosure in this regard.

2 So if I start with the 3G material, that is
3 paragraph 2B. You will see there that Which? seeks
4 documents which relate to the Commission's assessment of
5 market definition and dominance in the predation
6 decision. In particular, requests for information,
7 responses to those requests for information and
8 submissions made by Qualcomm to the commission. Plus in
9 each case any underlying documents provided alongside
10 those responses or submissions.

11 On its face that request could be read as extending
12 to all the documents on the Commission's file but Which?
13 would be content to accept disclosure of any documents
14 which are referred to in the market definition or
15 dominance sections of the decision. That is sections 10
16 and 12.

17 The vast majority of those documents are RFI
18 responses, there are also some references to Qualcomm's
19 responses to the statement of objections, supplemental
20 statement of objections and Qualcomm's response to an
21 information decision made by the Commission as well.

22 MRS JUSTICE BACON: You are now confining this to documents
23 referred to in the market definition and dominance
24 sections of the decision that fall into these categories
25 1 to 4?

1 MS MCANDREW: So we say that giving disclosure of the
2 documents referred to in sections 10 and 11 of the
3 decision is effectively a short cut to getting to those,
4 yes, to those categories.

5 MRS JUSTICE BACON: All right. You are not asking for
6 anything beyond the documents referred to in the
7 relevant sections, so sections 10 and 11.

8 MS MCANDREW: We are in two minor respects which I will
9 develop. Any submissions made by Qualcomm to the
10 Commission in respect of market definition and dominance
11 which are not referred to. It may well be there aren't
12 any, we don't know the position. As I say, this bit of
13 the decision does refer to the SO response and the SSO
14 response. And we would like any documents that were
15 provided alongside any RFIs et cetera that are referred
16 to in these bits of the Commission decision.

17 MRS JUSTICE BACON: Insofar as they form part of Qualcomm's
18 submissions?

19 MS MCANDREW: Or RFI responses.

20 MRS JUSTICE BACON: Yes.

21 MS MCANDREW: If they happen to have been so provided
22 alongside the RFI responses.

23 MRS JUSTICE BACON: And RFI responses by Qualcomm.

24 MS MCANDREW: By Qualcomm and by third parties as well.

25 MRS JUSTICE BACON: Oh.

1 MS MCANDREW: Not just Qualcomm.

2 MRS JUSTICE BACON: Okay, so just let me get this straight.

3 You want all of the documents referred to in sections 10
4 and 11 of the decision. In addition, you want --
5 insofar as not included in sections 10 and 11 -- you
6 want submissions by Qualcomm and third parties and
7 responses to RFI responses -- can you just say exactly
8 what you want in addition?

9 MS MCANDREW: Yes. So the additional categories are any
10 submissions made by Qualcomm on market definition and
11 dominance which are not covered by the footnotes in the
12 decision.

13 MRS JUSTICE BACON: Yes.

14 MS MCANDREW: And then in respect of everything that is
15 referred to in the decision and any additional Qualcomm
16 submissions we would like the underlying documents that
17 may be referred to.

18 MRS JUSTICE BACON: The last of those is I think a bit
19 unclear. In respect of everything that is referred to
20 in --

21 MS MCANDREW: So what we have in the decision is a number of
22 references to RFIs et cetera and it is conceivable that
23 documents were provided alongside those RFI responses.
24 So to the extent that they were, we would like to see
25 those documents.

1 That is sort of set out underneath (iv) in
2 paragraph 2B of our draft order:
3 "such disclosure to include any documents provided
4 alongside the relevant RFI, answer, response or
5 submission".
6 MRS JUSTICE BACON: Is your additional category simply
7 defined in (iv)?
8 MS MCANDREW: Yes, is the short answer. If by (iv), Madam,
9 you mean (iv) and the rider that goes underneath it.
10 MRS JUSTICE BACON: Yes. So three things then. You want
11 disclosure of documents in sections 10 and 11 of the
12 decision. Number 1. Secondly, insofar as not covered
13 by number 1 you want submissions from Qualcomm to the
14 Commission regarding market definition and dominance.
15 And thirdly you want the documents referred to in (iv),
16 including the rider.
17 MS MCANDREW: Yes.
18 MRS JUSTICE BACON: All right. What is Qualcomm's position
19 on that?
20 MS MCANDREW: Well, if I --
21 MRS JUSTICE BACON: Were you about to summarise where you
22 had got to and make submissions in relation to it?
23 MS MCANDREW: I was.
24 MRS JUSTICE BACON: Okay.
25 MS MCANDREW: So if I could just sort of explain how the

1 application has evolved.

2 MRS JUSTICE BACON: I don't think we need the history.

3 Where are we now?

4 MS MCANDREW: Well, Qualcomm has agreed to give excerpts
5 from the documents referred to in certain recitals of
6 the decision. The particular recitals to which that
7 agreement relates are example recitals which were
8 provided by Which? as a reason why the predation
9 decision was in general terms relevant. Qualcomm has
10 taken a pretty literalistic view to that and said, okay,
11 insofar as you have identified recitals in
12 correspondence we will give you the documents referred
13 to in those recitals.

14 Now, Which? doesn't agree that the disclosure should
15 be so limited. Which? considers this decision to be of
16 general relevance to the 3G market definition and
17 dominance assessment which it will undertake in this
18 case and Qualcomm's proposal would effectively salami
19 slice the documents referred to in these sections of the
20 decision in a way that is just not helpful for Which?'s
21 economists in trying to understand the Commission's
22 analysis as a whole. That is the first point.

23 There are also particular sections of the decision
24 which are not covered by Qualcomm's proposal, which
25 would be directly relevant to the market definition and

1 dominance analysis. So, for example, section 10.2.8 of
2 the decision. I don't think we need it turn it up but
3 essentially it covers the substitutability of slim and
4 integrated baseband 3G UMTS chipsets. That is a factor
5 which Which?'s economists propose to consider in this
6 case in relation to their market dominance assessment.
7 And the analysis of the Commission in that regard will
8 be directly applicable to what Which? is going to do
9 here.

10 Qualcomm made a number of relevance objections to the
11 decision generally on the basis it concerns slightly
12 different chipset types, a different communication
13 standard, different time period et cetera. I don't know
14 if those relevance objections are being maintained in
15 relation to the remaining sections of the decision which
16 are not covered by Qualcomm's agreement.

17 Insofar as they are, I can respond to them but
18 insofar as Qualcomm simply says that these are the most
19 relevant bits of the decision and it is proportionate to
20 provide only those, Which? would make a number of points
21 in relation to that proportionality.

22 MRS JUSTICE BACON: Let me see what Mr Jowell has to say on
23 that. Is there anything else you want to say?

24 MS MCANDREW: I would only make the headline point, Madam,
25 this is in general terms a very focused and narrow

1 category of disclosure. We have specifically made it by
2 reference to the 3G predation decision because that is
3 off the shelf material which is easy for Qualcomm to
4 disclose. It sort of goes to proportionality but it is
5 the headline reason for why we are pursuing disclosure
6 via this route.

7 MRS JUSTICE BACON: Thank you very much, Ms McAndrew.

8 Mr Jowell.

9 MR JOWELL: The starting point it is important to appreciate
10 that the decision in question, the predation decision,
11 concerned a different market, different chipsets, UMTS
12 chipsets not 3G CDMA chipsets. It also concerned
13 a different time period. The time period investigated
14 is 2009 to 2011 which significantly pre-dates the claim
15 period. It concerns different OEMs, not just standard
16 Apple and Samsung and most importantly of all perhaps it
17 concerned a different market segment. We are talking
18 about baseband chipsets used in USB dongles for laptops
19 not in mobile broadband devices. So it is some way
20 distant from the subject matter of these proceedings.

21 So our initial stance was, well, we don't see what
22 relevance these documents are going to have. Why should
23 we have to provide you with a slew of documents which
24 are confidential to ourselves and third parties about
25 matters that aren't germane? The response that came

1 back was they pointed to certain recitals of the
2 decision which they said might contain matters that
3 indirectly are relevant because they say, for example,
4 they concern the substitutability of UMTS and chipsets
5 that support CDMA so there is a connection there. And
6 they gave another set of recitals that also concern
7 something that was potentially connected.

8 So we responded by saying, well, fine, we will give
9 you the documents that are referred to in those recitals
10 where there may be some relevance.

11 They then came back and said, well, actually there
12 are more recitals where there are potentially -- there
13 is a potential overlap. So our response was, well,
14 fine, we will give you the documents that are referred
15 to in those recitals as well. But what we don't see is
16 why what we are expected to do is to give everything up
17 that is in the market definition of dominance section
18 and indeed some more when most of those documents are
19 simply not going to have any relevance to this dispute.

20 We simply say, well, we are prepared to give
21 disclosure of the documents in all of those recitals
22 that you identify as being something that is potentially
23 relevant and we also say we should be entitled to --
24 because there is a slew of documents that are referred
25 to in those recitals and most of the material in those

1 documents is going to be completely irrelevant and a lot
2 of it highly confidential, we should be entitled to make
3 some kind of redactions for irrelevant material in those
4 documents.

5 So what we -- having made an initial proposal that
6 they weren't happy with, we came back with our most
7 recent proposal is that we should be entitled to take
8 out those parts from the documents that are not relevant
9 to 3G CDMA chipsets. Or as we put it: we wish to
10 provide the extracts in the documents referred to in the
11 recitals that are potentially relevant to market
12 definition and dominance as regards 3G CDMA chipsets.

13 So we say we have taken a reasonable stance. We are
14 simply saying these are the recitals you have identified
15 and we will provide you with all parts of the documents
16 that are potentially relevant that are referred to in
17 those recitals. We don't understand why this matter
18 hasn't therefore simply gone away.

19 We are concerned that there is this constant
20 request -- insatiable requests, really -- for documents
21 in these proceedings which are really speculative and
22 seem to us to be fishing expeditions. We have taken
23 what we say is a perfectly reasonable stance and we
24 simply don't understand why they seem to want more and
25 more.

1 MS MCANDREW: If I could just briefly to respond to some of
2 the points made by Mr Jowell. Which? doesn't accept
3 that these documents are sort of generally irrelevant as
4 a starting premise, subject to only specific recitals
5 that are relevant. If I could take the objections that
6 were made by Mr Jowell in turn.

7 Mr Jowell first said that this decision is concerned
8 with UMTS chipsets not CDMA. That is true as far as it
9 goes but there are many similarities between chipsets
10 which implement those different types of standards and
11 the analysis of market definition and dominance in the
12 Commission decision will be of material help in
13 conducting the equivalent exercise in this case.

14 Mr Jowell said the decision concerns a time period
15 which pre-dates the claim period. The infringement
16 identified in the decision lasted between July 2009
17 to June 2011 but for the purposes of Which?'s claim we
18 are interested in the exercise of market power at the
19 time when patent licence agreements were struck that
20 might have affected the claim period and in light of the
21 recent amendments to Which?'s pleading, that obviously
22 includes agreements which preceded the claim period and
23 there is in that regard a pleaded allegation that there
24 was a licence agreement struck between Qualcomm and
25 Samsung in January 2009 which might have been one such

1 agreement.

2 I note in passing my understanding is that
3 Mr Padilla's analysis does not begin on the first day of
4 the relevant period but in fact may include agreements
5 which themselves go back as far potentially as 2004. So
6 we say the timing point just falls away.

7 Qualcomm also says that the abusive conduct in the
8 predation case was directed at Huawei and ZTE which are
9 not relevant to the present proceedings. Which? is not
10 interested in sort of that abusive conduct, our request
11 is specifically limited and tailored to the market
12 definition and dominance sections of the decision and
13 Which? says these are questions which are self-evidently
14 not OEM-specific but need to be addressed on
15 a market-wide basis.

16 Finally, Mr Jowell said that the predation decision
17 is not relevant because it concerned a different
18 putative market segment. That is chipsets for use in
19 mobile broadband devices and not phones. But again that
20 is not correct in circumstances where those chips are
21 closely related such that there is a general degree of
22 commonality in the factors which are relevant to market
23 definition and dominance in both contexts.

24 We say the starting premise is that these sections
25 of the decision and documents which go to them are

1 generally relevant. It is not a slew of documents at
2 all. It is a focused and targeted request. The number
3 of documents is in the low hundreds. It is quite hard
4 to tell by looking at the footnotes because the titles
5 of some of the documents are redacted so you can't sort
6 of see where you are possibly double-counting but we are
7 not talking about a large number of documents here.

8 As to redactions and whether Qualcomm should be
9 entitled to give only the excerpts of the documents
10 which, in Mr Jowell's words, are relevant to the 3G CDMA
11 market definition and dominance exercise, Which? does
12 not accept that that would be appropriate for two
13 reasons.

14 First, in order for Which? to understand the importance
15 of the relevant sections in the Commission decision and
16 the information which was relied upon by the Commission
17 in conducting that analysis, it is likely to be
18 necessary for our client to review the documents as
19 a whole. That is particularly the case in relation to
20 RFI responses, where it can't safely be assumed that the
21 relevant information will be neatly packaged into
22 a section, you know, headed "market definition" or
23 "dominance". It may be strewn through the response of
24 the third party. And, on Qualcomm's proposal, what we
25 are likely to end up with is a sort of patchwork of

1 documents that may be genuinely difficult to make sense
2 of.

3 The second point is that Which? is also concerned in
4 light of the sort of numerous relevance disputes which
5 have arisen in these proceedings that it is not
6 appropriate for Qualcomm to be in sole charge of
7 deciding what is relevant to the 3G CDMA market
8 definition and dominance exercise.

9 The Tribunal will recall that when it ordered
10 equivalent disclosure in respect of the exclusivity
11 payments decision, Qualcomm adopted a very restrictive
12 approach to its redactions. Which? ended up having to
13 come back to the Tribunal and applying for those
14 redactions to be lifted. That application was granted
15 and the whole thing was very inefficient.

16 So we say, stepping back, this is a targeted,
17 proportionate application and the documents should be
18 granted in unredacted form, save for the usual
19 considerations which apply to redactions.

20 MRS JUSTICE BACON: All right. We will rise for five
21 minutes and we will come back and give our ruling on
22 this.

23 (11.25 am)

24 (A short break)

25 (11.31 am)

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Ruling

MRS JUSTICE BACON: The Tribunal will order the documents as now sought by Which?. As explained by Ms McAndrew in her opening submissions on this point, it may be that some of those documents are not relevant but in general the Tribunal accepts, in principle, the submissions made by Ms McAndrew as to the general degree of commonality between the issues debated in the Commission's decision and the issues that arise in the present case and we consider that there are likely to be documents within those categories that are relevant to these proceedings.

We do not consider that it is appropriate for Qualcomm to embark on the likely time-consuming exercise of redacting parts of those documents that Qualcomm considers not to be relevant. So those documents should be disclosed but obviously with the usual confidentiality requirements.

Application continued

MRS JUSTICE BACON: That I think leads us to -- well, the relevant part of the order will obviously need to be redrafted on the basis that you have explained. Are we now into then 5G, which is a different issue?

MS MCANDREW: Yes, thank you, Madam. If we turn to 5G that is set out at paragraph 2C of Which?'s draft order, which is I believe up on the screen. For anybody in

1 hard copy it is core 4, page 136.

2 There has been some movement in relation to this
3 category also. I can now say that (ii) and (iii) are no
4 longer in dispute.

5 MR JUSTIN TURNER: Because they have been given?

6 MS MCANDREW: Because Qualcomm has agreed to -- yes, to
7 confirm Qualcomm has agreed to search the remaining
8 documents which relate to the LTE exclusivity payments
9 decision for any documents that refer to Qualcomm's
10 market power in the supply of 5G chipsets. That is sort
11 of a safety check. We don't expect there to be reams of
12 relevant 5G material which will result from that check
13 because that decision had a different focus; LTE
14 chipsets.

15 So in addition to that and because there is no
16 equivalent 5G decision, Qualcomm will now have to do
17 some searches for the remaining 5G material. Of that
18 material, only (i) is now in dispute. Qualcomm has also
19 agreed that any searches should cover (ii).

20 This (i) is trying to get at material in which
21 Qualcomm refers to actual or anticipated commercial need
22 of OEMs for its 5G baseband chipsets in the context of
23 licensing negotiations. Qualcomm initially sort of
24 resisted this category in its entirety but yesterday
25 made an alternative more limited proposal. That is in

1 Norton Rose Fulbright's second letter of 9 January,
2 paragraph 4. I don't know if the Tribunal has that
3 letter or if we should hand up hard copies?

4 MR JUSTIN TURNER: The one you handed up yesterday, I have
5 it here.

6 MRS JUSTICE BACON: Is that the one handed up yesterday?

7 MS MCANDREW: I don't know. I am not sure on that.

8 Mr Jowell may be able to confirm.

9 MR JOWELL: If not, we have copies.

10 MS MCANDREW: My solicitors have copies if needed.

11 MRS JUSTICE BACON: I don't think it is.

12 MS MCANDREW: It is separate to the list of issues. It is
13 the second letter of 9 January and the title the
14 relevant sort of title is: 5G documents.

15 (Document handed).

16 Qualcomm's proposal is set out in paragraph 4 of
17 that letter, which is over the page. Essentially,
18 Qualcomm has marked up (i). So you see it has
19 introduced the word "LTE" before SEP licensing terms.
20 It has removed the generic reference to OEMs and their
21 contract manufacturers and replaced that with
22 a reference to Apple and Samsung, in particular.

23 Which? does not agree that this mark-up is
24 appropriate, so taking the points in turn.

25 Insofar as relates to Qualcomm's proposal to limit

1 the disclosure by reference to Apple and Samsung, that
2 limitation would reflect Qualcomm's case on market
3 definition, which is that you need to define market
4 specifically by reference to which OEM Qualcomm is
5 selling to at any given time. So the Apple market or
6 the Samsung market. That is not Which?'s position.

7 Which? says that issues of market definition and
8 dominance need to be considered on a market-wide basis
9 and that there is therefore no reason to exclude
10 material which sheds light on Qualcomm's market power in
11 5G simply because it relates to an OEM which is not
12 Apple or Samsung.

13 On any view, we don't understand the excision of the
14 reference to contract manufacturers. We think there may
15 be negotiations with Apple's contract manufacturers as
16 well as with Apple. But our primary position is that no
17 such limitation at all is necessary or appropriate.

18 A similar point arises in respect of Qualcomm's
19 suggestion that it should only disclose documents
20 referring to the importance of the supply of 5G chipsets
21 when negotiating LTE SEP licensing terms because what we
22 are trying to get at here is: what does Qualcomm think
23 about its own position, its own commercial strength in
24 the supply of 5G chipsets? It doesn't matter whether
25 the contemporaneous documents which reflect that

1 internal thinking originated in the context of LTE or 5G
2 licensing negotiations, they are equally relevant.

3 In any event, we know that LTE and 5G licences are
4 typically subject to a single agreement. So you are
5 sort of, again, engaging in an artificial separation of
6 the relevant material which risks excluding some
7 material which we say is relevant. So Which? commends
8 its original formulation to the Tribunal.

9 Qualcomm has objected to this request on grounds of
10 proportionality. On the contrary, we say that these
11 disclosure requests are again narrowly tailored. As
12 mentioned previously, there is no 5G decision -- no
13 relevant 5G decision -- so some searches are necessary.
14 The shortcut option is not available and we have
15 proposed some limited searches for that purpose.

16 There is an issue about whether Qualcomm should
17 conduct any searches only in respect of the post-FTC
18 period or whether it should also conduct searches over
19 the back end of the FTC production set. The Tribunal
20 will recall the FTC production set ends in March 2018.
21 I don't know if the Tribunal wants me to address this
22 issue now or to hear Mr Jowell on the substance of the
23 request.

24 MRS JUSTICE BACON: I think we had better hear you on that.
25 That is paragraph 5 of the letter?

1 MS MCANDREW: Yes, exactly. So Which?'s position is that it
2 is necessary and proportionate to run searches over the
3 back end of the FTC production set because that --

4 MRS JUSTICE BACON: From what date then?

5 MS MCANDREW: We propose 2015, Madam, because we understand
6 that --

7 MRS JUSTICE BACON: Is there a date in 2015?

8 MS MCANDREW: 1 January. Because we understand that the
9 first 5G chipset was discussed in the public domain as
10 far back as 2016 and so, you know, allowing for
11 a reasonable lead-in time, we think that 1 January 2015
12 is an appropriate date.

13 If it is necessary, I can show the Tribunal some
14 references in the FTC decision which make crystal clear
15 that there are 5G documents in that production set. It
16 might be useful just to look at some of those.

17 The FTC decision is in the fourth volume of the
18 authorities bundle at tab 37. If we could turn up
19 page 3378.

20 MR JUSTIN TURNER: Sorry, which bundle again?

21 MS MCANDREW: I am sorry.

22 MR JUSTIN TURNER: Which bundle did you say?

23 MS MCANDREW: Authorities bundle, fourth hard copy bundle,
24 tab 37, page 3378.

25 If we pick it up at line 20, this is the US district

1 court finding that:

2 "In its internal documents and public statements
3 Qualcomm has consistently stated that it is ahead of
4 rival modem chipset suppliers in developing 5G chips."

5 Then it refers to a January 2018 letter sent by the
6 Qualcomm CEO to Qualcomm shareholders in which he says
7 that Qualcomm is at that point 12 to 24 months ahead of
8 its competitors in the transition to 5G.

9 So if it is 12 to 24 months ahead, we think that
10 planning must have been going on -- planning and
11 preparation in relation to 5G must have been going on
12 significantly in advance of that date, including
13 potentially negotiations with OEMs on where they are
14 going to get their 5G chipsets from.

15 If I could also just show the Tribunal another brief
16 reference at page 3357 in the same tab. Heading 4 is
17 discussing some internal analysis which Qualcomm did in
18 2015 to decide whether it should split its licensing
19 businesses from its chipset business. And the
20 conclusion that Qualcomm reached at that point was that
21 it should not because -- it is recorded in the
22 judgment -- the chipset muscle which it enjoyed was
23 a critical means of ensuring it could achieve higher
24 royalty rates in the corresponding SEPs.

25 MRS JUSTICE BACON: What are you wanting us to read?

1 MS MCANDREW: If we pick it up from line 23 on that page.
2 These are senior Qualcomm personnel exchanging emails
3 about how, you know, the advisability of the potential
4 split between those two businesses could be impacted by
5 the transition to 5G. And you see there one of the
6 arguments for not splitting is we need to be positioned
7 for 5G. The response comes back that without Qualcomm's
8 chipset monopoly power, Qualcomm may become isolated and
9 ineffective at embedding its technology into standards.
10 And then you see there below the quote from the email.
11 This exchange took place in 2015, so we say it is
12 perfectly reasonable to assume that planning and
13 preparation for 5G deployment was happening then. That
14 being the case, it is necessary to conduct searches over
15 the back end of the FTC production set. We would limit
16 those searches by reference to a start date of
17 1 January 2015. We obviously accept it is not necessary
18 to do searches over the entire production set, which is
19 significantly larger in temporal scope. But we do say
20 that some searches of that set are required.
21 MRS JUSTICE BACON: Just to be clear, you are not asking for
22 documents just within the FTC documents?
23 MS MCANDREW: No. We think there should be searches post
24 the FTC period, i.e. after March 2018. Those searches
25 are ongoing and I understand Qualcomm's position to be

1 that insofar as it is ordered to do searches today it
2 will do those searches over the post FTC period. The
3 point in dispute is whether it should also do searches
4 over the back end of the FTC period and we say yes.

5 MRS JUSTICE BACON: In that respect, for the period -- the
6 FTC period, you are only asking them to do searches from
7 within the FTC document set?

8 MS MCANDREW: Yes. The FTC production set. That universe
9 of documents that was produced in the FTC proceedings.

10 MRS JUSTICE BACON: All right, because that is not currently
11 clear but would need to be made clear in the --

12 MS MCANDREW: Yes. That is the sort of premise that all of
13 the disclosure for that period has proceeded on.

14 MRS JUSTICE BACON: All right. Thank you. I will hear from
15 Mr Jowell.

16 MR JOWELL: Yes. The starting point I should make clear is
17 when one looks at the order it is framed in terms of
18 disclosure of documents but it is caveated at the outset
19 by the fact that we have to conduct reasonable and
20 proportionate searches for documents in the following
21 categories.

22 We would emphasise that insofar as we have agreed to
23 these, we are agreeing to reasonable and proportionate
24 searches for the documents. We obviously cannot do more
25 than that. We can't be promising to provide all

1 documents that may be in our possession.

2 MRS JUSTICE BACON: No.

3 MR JOWELL: We are extremely concerned with the mounting
4 costs of these proceedings from our side.

5 MRS JUSTICE BACON: Well, you say that with five counsel in
6 the courtroom.

7 MR JOWELL: That may be, but the fact is that the vast
8 majority of the costs in these proceedings are going to
9 be disclosure costs. What we have is insatiable demands
10 for documents which when they are then produced we see
11 in their skeleton argument they then complain that we
12 have produced too many documents or that the documents
13 are produced in a manner that are unreadable and
14 difficult for them to search.

15 There needs to be some limit on the volume of
16 documents and the process of even agreeing search terms
17 itself can be an onerous and expensive exercise. Then
18 conducting the searches, reviewing the documents,
19 particularly when there are new documents for privilege
20 and so on, is extremely time-consuming and extremely
21 expensive. We put down a marker that the costs are
22 racking up and racking up in these proceedings.

23 So it shouldn't -- if in due course we need to come
24 back and say, well, we need for them to make provision
25 for security for costs, then they should hear that now.

1 MRS JUSTICE BACON: Yes.

2 MR JOWELL: Because if they keep asking for more and more
3 searches, they are extremely expensive to do.

4 So that is the background.

5 We have agreed to go back and check the exclusivity
6 payments decision. We have agreed also that our
7 searches for strategy documents will not exclude 3G. We
8 have agreed to their general category of internal
9 documents referring to the Defendant's market power in
10 the supply of 5G chipsets and we simply make two
11 proposed limitations on category 1. The second
12 limitation also applies to category 2.

13 The first limitation is that we do say that when
14 looking for internal documents referring to the
15 importance of the supply of 5G chipsets when negotiating
16 SEP licence terms with OEMs, that should be restricted
17 to the OEMs that are relevant to these proceedings;
18 Apple and Samsung. We accept, incidentally, that it
19 would also extend to Apple's contract manufacturers.
20 I do accept that.

21 But we do say that it is disproportionate for us to
22 go back and search all of the different streams of
23 negotiations that we have had with multiple OEMs to see
24 whether something might pop up in those negotiations
25 where we refer to the importance -- someone refers to

1 the importance of the supply of 5G chipsets. That is
2 truly disproportionate in circumstances where we are
3 agreeing to category C2, which is internal documents
4 referring to the Defendant's market power in the supply
5 of 5G chipsets.

6 MRS JUSTICE BACON: What I am a bit concerned about is the
7 document that you do find on whatever basis, whether it
8 is because you have searched your negotiation stream
9 with Apple and Samsung or just because you have searched
10 internal correspondence generally. And it is entirely
11 general. It refers to the importance of the supply of
12 chipsets when negotiating set licensing terms but
13 doesn't refer to Apple or Samsung.

14 If you had that kind of document, if it didn't in
15 any way directly or indirectly refer to Apple or
16 Samsung, wherever it was found, you wouldn't be handing
17 it over.

18 MR JOWELL: That type of document would fall within C2
19 because it would be an internal document referring to
20 the Defendant's market power in the supply of 5G
21 chipsets. So it would be.

22 But what we object to is having to go off and --
23 there are different documents which will be with
24 different custodians relating specifically to
25 negotiations. I mean, we can see that if once one has

1 C2 we do say why do you -- I mean, arguably you don't
2 even need C1 at all, but insofar as you have C1, if you
3 want us to go and look at the negotiations, then that
4 should be limited to the OEMs that are in issue here.
5 Otherwise, one is going to do a dozen searches.

6 MRS JUSTICE BACON: So are we to understand by C1 that what
7 is asked is that you go and look at the documents
8 arising from the negotiation streams and within those
9 you were asked to produce documents referring to the --
10 internal documents referring to the importance of supply
11 of 5G chipsets?

12 MR JOWELL: Yes. But as currently drafted if we don't put
13 in the limitations then it is all -- negotiations with
14 every single different OEM.

15 MRS JUSTICE BACON: Yes, but this is not just any document
16 that says when we are negotiating SEP licensing terms we
17 should bear in mind our position in 5G. What this means
18 is internal documents arising from negotiating SEP
19 licensing terms -- you have your limitations on that --
20 which refer to the importance. Is that how we should
21 read it?

22 MR JOWELL: Yes. But insofar as there is -- that is how
23 I understand it at least. But that means that it does
24 have to have the limitations both on the type of SEP
25 licence and the identity of the OEM that we have

1 suggested.

2 MRS JUSTICE BACON: So your point is that this restricts
3 where you are searching for the documents.

4 MR JOWELL: Yes, correct. But one has C2 to the internal --
5 so it is not correct to say, as my learned friend says,
6 that restricting it in this way is somehow accepting our
7 market definition because that would be true if we were
8 not accepting C2 perhaps but we are accepting category
9 C2, which is internal documents referring to the market
10 power in the supply of 5G chipsets, and that is entirely
11 general. We are not suggesting that that category
12 should be restricted.

13 MRS JUSTICE BACON: Yes, all right.

14 MR JOWELL: So we say that that restriction is necessary to
15 make this proportionate search.

16 The second point we take is the time period. This
17 applies --

18 MR JUSTIN TURNER: You have not mentioned LTE.

19 MR JOWELL: Forgive me. And also it should be restricted to
20 LTE SEP licensing terms again. We are only concerned
21 with LTE licensing terms in these proceedings. No
22 other.

23 Really category C1 in a sense is more -- is not
24 really focused on dominance and market power. It really
25 C1 in a sense is more looking at the leveraging

1 allegation. In any event, it should be restricted to
2 LTE, SEP licensing terms with the two OEMs and not all
3 OEMs. Otherwise, this is getting completely out of
4 hand.

5 The second point is perhaps even more important and
6 that relates to the time period. That applies -- our
7 time limitation, and I should make this clear, we
8 propose it should apply to both categories (i) and (ii).
9 That is we say that it should relate to the period after
10 we started to sell 5G chipsets, which is Q2/2019.
11 Because how can dominance of market power arise in
12 relation to 5G until you start to sell the product? It
13 doesn't make any sense.

14 MRS JUSTICE BACON: Well, I am not sure I follow that
15 because you could be discussing your likely market
16 position before you have started to sell. For example,
17 by saying that you are ahead of your competitors.

18 MR JOWELL: Well, I think it is really a stretch to say that
19 the potential market power -- you can have an abuse of
20 potential market power.

21 MRS JUSTICE BACON: That is not what is said. But the
22 documents that you have which discuss the market
23 position that you will have might be relevant to the
24 assessment of the market power that you ultimately do
25 have, because they will reveal how you thought about and

1 your awareness of the potential competition. And
2 potential competition is of course relevant to market
3 power.

4 MR JOWELL: Well, the allegation that is made in relation to
5 dominance as pointed out to me is that we are dominant,
6 they say, from at least 2019. So in support of that
7 they say we sold chipsets from Q2/2019. So there is no
8 allegation of dominance prior to 2019, nor could there
9 be.

10 MRS JUSTICE BACON: No, but your assessment of potential
11 competition might be made in say 2017 or 2018 and
12 potential competition is -- and barriers to entry, for
13 example -- are relevant to the question of dominance.

14 MR JOWELL: Well, very peripherally relevant because you are
15 saying -- at most you could say you anticipated in 2017
16 that you might have a dominant position in 2021. But
17 really what is the evidential value of what you
18 anticipated years ago? In this case, on their
19 suggestion four years before you even started selling
20 the chip? I mean, it is very emotive, very loose
21 evidential value.

22 Bear in mind, at the end of the day, market power is
23 going to be based on largely, at least, on objective
24 characteristics; supply of the market and so on. Share
25 of the market.

1 What someone perceived power they might or might not
2 have years before they even started selling the product
3 is of very limited relevance. And then against that
4 limited relevance you then have to balance the enormous
5 burden of carrying out these searches.

6 My learned friend talks about the FTC set of
7 documents and she points to a couple of things in the
8 decision where at most you could say, oh, well, it was
9 anticipated that there may be some form of important
10 position in the 5G market. Bear in mind, 5G standards
11 didn't even exist until 2017. Forgive me, I am told
12 quarter 2/2018 is when these standards were produced.

13 So what is going to happen here, if you allow this,
14 is we have to go back to this huge FTC set of documents,
15 search through for defined search terms, what are we
16 going to say? 5G? Find every single document that
17 refers to 5G, potentially thousands of them, search to
18 see whether any of them are relevant to market power.
19 To what end, I ask?

20 Maybe they might have some tangential relevance
21 potentially to dominance that couldn't possibly -- isn't
22 alleged to have manifested in 2019 and couldn't possibly
23 have manifested until at least 2019 because there were
24 no sales until that point.

25 MRS JUSTICE BACON: Okay, I have your submissions.

1 MR JOWELL: We are simply trying to put a reasonable
2 limitation and to try and limit the costs of these
3 proceedings which are ramping up day by day.

4 MRS JUSTICE BACON: Thank you. Ms McAndrew very briefly in
5 reply.

6 MS MCANDREW: Yes, I will just make a few short points in
7 response. I will focus on the specific disclosure
8 category at issue. Mr Jowell made a number of wider
9 ranging points about disclosure and the approach that
10 Which? is taking to it. On that I would only say that
11 Which? is seeking disclosure which it thinks it
12 genuinely needs. It has made efforts to ensure the
13 disclosure requested is proportionate and that is the
14 approach that Which? is taking.

15 On the OEM specific issue, we do say that to limit
16 this to just Apple and Samsung would be reflective of
17 sort of a one-sided concept of market definition. We
18 understand based on previous disclosure disputes that
19 Qualcomm will be providing us with negotiating material
20 in relation to Apple and Samsung in any event. So
21 Mr Jowell's offer is sort of not particularly effective
22 to get us the additional material that we say we need in
23 this regard.

24 Essentially, I think what it boils down to is that
25 there is a sort of dispute about the repositories of

1 documents which should be searched. For the reasons
2 I have given, we say it is proportionate for Qualcomm to
3 search both negotiating material and other repositories
4 which might contain strategy documents or other internal
5 documents which don't arise specifically in the context
6 of a negotiation.

7 On the LTE limitation, Mr Jowell said that this is
8 really a disclosure category which is going to abuse.
9 We don't accept that at all. This disclosure category
10 is aimed at market definition and dominance generally in
11 relation to 5G chipsets. Those questions are broader
12 than just LTE SEP licensing.

13 Fourth, in relation to the question of whether
14 searches should be conducted over the FTC production
15 set, Madam, we echo your comment. This is about
16 potential competition and Qualcomm's anticipated
17 position in the 5G market. I have taken you to sections
18 of the FTC decision which make crystal clear those
19 documents are there to be found.

20 In relation to Mr Jowell's point this will now be
21 a very burdensome exercise to go back and relook at the
22 FTC production set, I just remind the Tribunal we did
23 seek this disclosure at the last CMC. Qualcomm could
24 have included these searches in the searches it has
25 conducted over the FTC production set between now and

1 then. It chose not to and now Which? is seeking this
2 disclosure to which we say it is reasonably and
3 proportionately entitled.

4 Unless I can assist the Tribunal further on that.

5 PROFESSOR MASON: Could I just ask -- forgive me if you have
6 mentioned it already but I have been searching back
7 through the transcript as we have been discussing this
8 and I can't spot it. Does anybody have an estimate of
9 the size of this task? The number of documents that we
10 are talking about? If we are talking about it being
11 a proportionate task, what evidence do we have on that?

12 MR JOWELL: What I have been told, I say this on
13 instructions, is that -- from the whole -- we have the
14 FTC documents and the post FTC documents that we have
15 currently collated, with the word "5G" in it there are
16 close to 600,000 documents.

17 PROFESSOR MASON: But would a slightly more intelligent
18 search bring that number down?

19 MR JOWELL: Presumably so but, you know, it is not obvious
20 what additional words you combine with it.

21 MRS JUSTICE BACON: Ms McAndrew said that she had proposed
22 some limited searches. I understood that to mean they
23 had proposed search terms.

24 MR JOWELL: No. We are supposed to come up with the search
25 terms, then they critique them. So it has not been

1 an easy process agreeing search terms and nor would it
2 be in this case.

3 MS MCANDREW: Just on that point, Madam, obviously the
4 search terms do need to be agreed between the parties.
5 Which? will engage constructively in that proposal. It
6 is not proposing to adopt a free-ranging approach to
7 this disclosure request. The other search terms have
8 been agreed between the parties and we say that is
9 an appropriate approach here as well.

10 If the Tribunal is particularly concerned about the
11 proportionality of the request under (i), Which? would
12 be prepared to limit the other OEMs to the sort of core
13 OEMs that it has referred to in its pleading to which
14 you, Madam, referred in your ruling on the Korean
15 disclosure. That may be a proportionate and sensible
16 way forward but we do say that limiting it to Apple and
17 Samsung exclusively is unduly restrictive.

18 MRS JUSTICE BACON: Thank you.

19 We will just rise and come back in a few minutes.

20 (12.04 pm)

21 (A short break)

22 (12.08 pm)

23 Ruling

24 MRS JUSTICE BACON: We will order disclosure on the basis of
25 the amendments to the order proposed by Qualcomm. We

1 consider insofar as there are additional documents going
2 over and above the documents in categories (ii) and
3 (iii) which Qualcomm has already agreed to provide, they
4 are likely to be of somewhat limited relevance and we do
5 have a concern about the proportionality of the
6 disclosure obligation and the costs of providing that.

7 Regarding the time period we consider that it would
8 be appropriate to order documents from somewhat before
9 the commercial supply of 5G chipsets but we do not
10 consider that it would be appropriate to ask for
11 searches to go back to 2015 as proposed by the Class
12 Representative. An appropriate time period we consider
13 would be to commence in quarter 2 of 2018, which is when
14 the 5G standards came into existence and is a year
15 before commercial supply of 5G chipsets by Qualcomm.

16 MS MCANDREW: Madam, can I just check one point in relation
17 to that ruling? Is the Tribunal's intention to exclude
18 then from any searches the FTC production set which ends
19 in March 2018?

20 MRS JUSTICE BACON: Yes. Necessarily.

21 MS MCANDREW: I am grateful.

22 Application continued

23 MRS JUSTICE BACON: So the next issue is then, we believe,
24 Samsung self-supply.

25 MS MCANDREW: Yes that is because subparagraph D is agreed.

1 So subparagraph E. (i) is agreed and so the only issue
2 arises in relation to (ii).

3 There is of course a pleaded dispute about whether
4 self-supplied chipsets form part of the relevant
5 markets. Which?'s position is that they don't because
6 they are not a viable outside option for the majority of
7 OEMs. Qualcomm's position is that they do.

8 This issue, as you have said, Madam, plays out with
9 particular relevance to Samsung and by this category
10 Which? seeks documents which reflect Qualcomm's view of
11 the extent to which OEMs genuinely do have this outside
12 option and Samsung in particular.

13 If we turn up the relevant part of the pleading on
14 which this disclosure request is based. Paragraph 102B
15 of Qualcomm's defence, which is in supplemental
16 bundle 1, tab 2. Page 136.

17 So it is subparagraph (c) at the top of the page.
18 It is denied that Apple and Samsung are

19 "Likely to be constrained to obtaining some of their
20 5G chipsets from Qualcomm. Other suppliers ... exist.
21 [And] Qualcomm is aware that Samsung has chosen to
22 incorporate [its own] 5G chipsets into its devices ..."

23 This pleading relates specifically to 5G chipsets
24 and the reason we pursue this disclosure request
25 specifically in relation to 5G is because we already

1 have quite a bit of material which goes to Samsung self-
2 supply in 4G and 3G. The 3G material is covered off by
3 some of the disclosure that the Tribunal ordered
4 earlier. The 4G disclosure was covered off by the
5 Tribunal's order in relation to the exclusivity payments
6 decision but there is no 5G decision, as I have said.
7 So we say that some limited searches are relevant in
8 relation to this category.

9 Qualcomm says that this disclosure is likely to be
10 caught by searches which it has already been directed to
11 do by this Tribunal in July. That is negotiation --
12 searches for negotiation material in which views on
13 Samsung's ability to self-supply may have been expressed
14 internally by Qualcomm and strategy documents which
15 consider the same issue.

16 We say that may be the case but there may well be
17 other documents which are not caught by those searches
18 which were not specifically directed at self-supply in
19 5G chipsets. And because this issue arises most
20 directly in relation to 5G, we say it is appropriate for
21 Qualcomm to do some limited searches over the post FTC
22 period only. In respect of which you have heard from my
23 learned friend those searches are ongoing.

24 MRS JUSTICE BACON: Do you want to respond to Qualcomm's
25 point that the public documents are sufficient?

1 MS MCANDREW: The public documents are an important part of
2 the analysis but insofar as Qualcomm has contemporaneous
3 documents in which it expressed its own unvarnished view
4 on the truth of the proposition which is in its
5 pleading, we say that would be highly relevant.

6 MRS JUSTICE BACON: The point is whether the public
7 documents are sufficient.

8 MS MCANDREW: Well, to do the complete analysis we say, no,
9 we would like the extra documents in order to be able to
10 do the complete analysis regardless of what can be
11 obtained from public sources.

12 MRS JUSTICE BACON: All right. I will hear from Qualcomm.

13 MR JOWELL: As you see from the pleading that is on the
14 screen in front of you, we pleaded this -- Samsung's
15 ability to self-supply -- based upon the objective
16 quantitative data which is that they do in fact self-
17 supply about half of their 5G chipsets. You will see
18 also that we have agreed to provide the data on which
19 that is based.

20 We have also agreed, as my learned friend
21 acknowledged, to -- insofar as we have any internal
22 assessments of the extent to which Samsung can self-
23 supply, we will provide those documents insofar as they
24 come up in the searches we are already carrying out in
25 relation to strategy documents or negotiating documents.

1 What they are saying now is well, we want you to
2 carry out yet further searches for Qualcomm's assessment
3 of the extent to which Samsung can self-supply. We say
4 that those are documents which are of very limited
5 relevance to this issue because the direct evidence is
6 first of all, the public evidence as to how much they do
7 self-supply and secondly, insofar as there were
8 impediments to them totally self-supplying in some way
9 that created a dependence on Qualcomm, those are
10 documents that will be in Samsung's possession not
11 Qualcomm's possession.

12 So if they want documents -- if what they are trying
13 to do is to seek to establish, as I think they are, that
14 Samsung was dependent on Qualcomm for some proportion of
15 their 5G chips then they need to get those documents
16 from Samsung, and they have made a 1782 application
17 against Samsung.

18 For reasons we don't understand, they don't seem to
19 be asking for documents within this category from
20 Samsung but clearly that is who they should be asking
21 for them from because who knows better than Samsung the
22 extent to which Samsung can self-supply?

23 At best, Qualcomm's documents are looking through
24 a glass darkly at whether Samsung can or can't to the
25 extent to which they can self-supply. So it is very --

1 at best, very indirect evidence. It is already going to
2 be likely to be covered by searches. This is just
3 entirely unnecessary and disproportionate and as I say,
4 it is going to further and further rack up costs.

5 MRS JUSTICE BACON: Thank you. Any reply?

6 MS MCANDREW: Just two brief points. One to reiterate the
7 point I made.

8 MRS JUSTICE BACON: I don't think you need to repeat points.
9 Do you want to make any different points?

10 MS MCANDREW: I would like to say in response to Mr Jowell's
11 submission that the only things we need to look at are
12 the publicly available data, that there is a world of
13 difference between that data and Qualcomm's unvarnished
14 internal view.

15 And I believe I should just correct the record,
16 I think we are applying for material from Samsung as
17 part of the 1782 application which goes to Samsung's
18 internal view about its dependence on Qualcomm for
19 chipsets. This application is asking for the Qualcomm
20 side of that story.

21 MRS JUSTICE BACON: Thank you.

22 (Pause).

23 Ruling

24 MRS JUSTICE BACON: We will not order this to be provided
25 insofar as there are further documents not already

1 thrown up by the existing searches and in addition to
2 the publicly available information, we consider that
3 they are likely to be of very peripheral relevance.

4 MS MCANDREW: Thank you. That is all from me.

5 Applications by Qualcomm

6 MRS JUSTICE BACON: Am I right in thinking that we then move
7 on to Qualcomm's applications for correspondence with
8 Apple and Samsung or is there anything else from
9 Which?'s side?

10 MR JON TURNER: No. Just to say that, as far as we see it,
11 they are not points that will take a great deal of time.
12 I have Qualcomm's application for disclosure from us of
13 any documents voluntarily given to us by third parties.
14 I think that the rule 63 disclosure application has
15 probably fallen away in view of what you ruled
16 yesterday.

17 Secondly --

18 MRS JUSTICE BACON: I thought the rule 63 application is
19 going to be parked until the summer?

20 MR JON TURNER: Yes. That is parked.

21 MRS JUSTICE BACON: Not that it has fallen away?

22 MR JON TURNER: Well, the application today has fallen away.

23 MRS JUSTICE BACON: I am not dealing with the application
24 today.

25 MR JON TURNER: Yes. So this is just to list how we see the

1 other remaining items for today.

2 MRS JUSTICE BACON: Yes, I am not sure I understand the
3 point that you had on your list because I understand
4 that Qualcomm is applying for copies of your
5 correspondence with Apple and Samsung. I understood
6 that the disclosure given by Apple and Samsung was in
7 any event agreed to be provided.

8 MR SAUNDERS: Yes. My Lady, can I just clarify exactly what
9 it was that we are after?

10 MR JON TURNER: The draft order.

11 MR SAUNDERS: We want to be kept in the loop on the
12 correspondence relating that. It is coming up at the
13 next CMC. I can address you on the finer aspects but
14 that is it. We are not suggesting we deal with that
15 application in the absence of Apple and Samsung today.

16 MRS JUSTICE BACON: No. So correspondence with Apple and
17 Samsung is number 1 of what is left. Number 2, I had
18 Qualcomm's approach to rate setting; 3, amendment of the
19 class definition; 4, any progress on the list of issues
20 for trial; 5, trial timetable.

21 MR JON TURNER: Yes.

22 MRS JUSTICE BACON: And then 6, AOB, which we had a couple
23 of points we will raise at that stage. Is that your --
24 does that correspond to your list.

25 MR JON TURNER: It does, almost precisely. Just to say on

1 the first issue so that there is no confusion if we can
2 turn up what I believe --

3 MRS JUSTICE BACON: No, if we are into the first issue then
4 Mr Saunders will make his case on that and you can
5 respond.

6 MR JON TURNER: All right.

7 MR SAUNDERS: My Lady, I think I can deal with this quite
8 briefly. You will have seen that Which? rely in their
9 skeleton on the extent of cooperation they have received
10 from Apple and Samsung to their various requests, they
11 in effect rely on the substance of that correspondence
12 with them and they say you have heard submissions about
13 the extent to which they have actively engaged with
14 these consumer claims.

15 We, for our part, have been asking for a very long
16 time in these proceedings for Which? to get on with
17 these third party disclosure requests. We see them as
18 a really very significant case management issue in these
19 proceedings, particularly the proper timing of the 1782s
20 in the US and the rule 63 applications here. They do
21 need to get on with these and for proper case management
22 we do need to have visibility as to what the issues are
23 as they develop.

24 MRS JUSTICE BACON: Well, the visibility you get by the
25 provision of the disclosure as and when received. That

1 is your real time disclosure.

2 MR SAUNDERS: Well, but the question is that the risk that
3 we are concerned with, and this is the case management
4 issue, is that there is a risk that if you are talking
5 to an interested third party in these circumstances,
6 there is a risk, we say, that the disclosure that is
7 going to be produced or that is consented to in the
8 context of these applications is curated in such a way
9 that the documents produced may not give a complete
10 picture or may miss material out.

11 So we say it is necessary and fair to provide us
12 with a full set of communications so that we can see if
13 the subset of that material is going to be produced
14 because it may be us that is saying actually it isn't
15 just that material over there, you also need to have
16 this material to set that material into context.

17 MRS JUSTICE BACON: Then all you need is a description of
18 what is being produced in the disclosure. I think your
19 point is there is a difference between having a pack of
20 documents that is disclosed and knowing what that pack
21 of documents is supposed to be.

22 MR SAUNDERS: Yes. So the key thing from a case management
23 perspective is we need to know if -- they have asked for
24 a wide range of disclosure in both 1782s and in the rule
25 63 applications. It is common in some of these

1 applications for the parties to reach -- the applicant
2 and the party producing to reach a compromise.

3 Now, if that is being done, we want sight of that
4 compromise because it may be that the compromise is
5 a partial compromise and we want some documents around
6 the edges.

7 MRS JUSTICE BACON: All right, I think that indicates that
8 all you need to know is the title of the subset of
9 documents that is being provided. You need to
10 understand what they are.

11 MR SAUNDERS: Well, insofar -- but we need to have that in
12 real time. Because if we -- we may make an application
13 ourselves.

14 MRS JUSTICE BACON: That doesn't mean you need the
15 correspondence. You just need to know as and when the
16 documents are being -- you get this pack of documents
17 what is the description of that pack of documents.

18 MR SAUNDERS: Well, my Lady, I think we are not suggesting
19 we have to have it at exactly the same time but we do
20 want to make sure that if it is us who need to bring as
21 it were a corrective application or an application for
22 wider material we don't then jeopardise the trial date
23 by having to do that so late in the day.

24 MRS JUSTICE BACON: It seems to me entirely reasonable that
25 if you get 1,000 pages of documents you understand what

1 the description of those 1,000 pages is, but that is
2 a different matter from having the correspondence.
3 Would you be content with that?

4 MR SAUNDERS: Let me take instructions, but that, as you can
5 see, is our main -- if that is a subset, we are
6 (inaudible).

7 MRS JUSTICE BACON: Mr Turner, would you be able to provide
8 the description of the documents?

9 MR JON TURNER: Yes, we can. I was going by their draft
10 order.

11 MRS JUSTICE BACON: Let's leave the draft order aside.

12 MR JON TURNER: Setting that aside, listening to what he
13 says, if he wants the description of documents which are
14 disclosed then that is fine.

15 MR SAUNDERS: The other thing to be absolutely clear about
16 is at the moment there is no provision in the order for
17 any documents that are provided on a voluntary basis by
18 Apple and Samsung to the Class Representative. Insofar
19 as those come across, we should also have those at the
20 same time that they are produced because again if we see
21 that that material is a subset and it only includes, as
22 it were, Apple's greatest hits against Qualcomm, it may
23 well be that there need to be further applications made
24 and that gives rise to a case management issue that we
25 want to catch sooner rather than later because it has

1 the potential if it happens very late to cause very
2 significant time problems.

3 MRS JUSTICE BACON: Yes. Mr Turner, are you content to
4 provide documents that are provided on a voluntary
5 basis?

6 MR JON TURNER: No, we are not. This is his application.
7 What they are saying -- if you turn up their draft order
8 which is in core bundle, tab 9, paragraph 285, this is
9 what I apprehended.

10 PROFESSOR MASON: Forgive me, could we have the page number
11 as well, please?

12 MR JON TURNER: Page 285. Bottom of the page, this is what
13 I thought he was going to be saying. He's finally said
14 it. They want all documents obtained from third parties
15 in relation to these proceedings, including ones
16 provided voluntarily or obtained by other means.

17 Over the page, they want it in the period now that
18 they are talking about is ten days. It has been
19 changed. So almost contemporaneously they want anything
20 that is shared with us within that period of time.

21 Three points, because this is us dealing with third
22 parties who may provide material for our case in these
23 proceedings.

24 First, obviously as a practical matter, disclosure
25 could be provided voluntarily. We look at it, it turns

1 out not to be relevant, it is part of discussions with
2 third parties. Second, obviously, and I don't think
3 this will be contested on the other side, such
4 discussions are very likely to be covered by litigation
5 privilege generally. Discussions between the Consumers'
6 Association and third parties for the purposes of
7 developing the case in court.

8 MRS JUSTICE BACON: He is not referring in this to your
9 discussions, it is referring to documents obtained from
10 the third parties.

11 MR JON TURNER: No, exactly. So in the course of those
12 discussions, if documents are shared they say, well, we
13 must have those in real time. That is a highly
14 intrusive and extremely unusual --

15 MRS JUSTICE BACON: Why is it? Because you have an ongoing
16 duty of disclosure of anything relevant.

17 MR JON TURNER: We have and we will comply with that.

18 MRS JUSTICE BACON: Why does that prevent you from providing
19 those documents in real time if they are relevant?

20 MR JON TURNER: If they are relevant. If documents are
21 simply the subject of discussion with third parties, you
22 are inserting, quite rightly, the adjective "relevant".
23 But in terms of discussion with third parties we need
24 time to digest what has been given and decide whether
25 they are in fact relevant at all.

1 Also, I come back to the important point which has
2 been foreshadowed yesterday and is an extremely
3 important point for the Consumers' Association, that
4 there is apprehended to be a chilling effect of
5 discussions with third parties hovered over by Qualcomm,
6 the Defendant, with whom they are -- for whom they are
7 an extremely important trading partner and where they
8 could fear commercial reprisals. Obtaining cooperation
9 from third parties for the Consumers' Association's case in
10 these proceedings is a very delicate matter.

11 Therefore, rather than saying that we should provide
12 documents, any documents shared with us voluntarily,
13 within ten days, the position should be that if
14 documents come to us those documents are relevant,
15 certainly if they are adverse documents to our case and
16 we understand that the same should be true on the other
17 side, if they have any known adverse documents such
18 documents will be provided. We don't shrink from that.

19 What we do shrink from is the suggestion that within
20 a very short period of time as discussions are taking
21 place with third parties --

22 MRS JUSTICE BACON: What timescale will they be provided
23 then? Because I don't think it would be reasonable for
24 you to get documents, sit on them for two months and
25 then have a look at them. So how many days do you need

1 to look at something and decide whether it is relevant?

2 MR JON TURNER: That may depend on the task at hand. It
3 depends on the individual documents which are provided.
4 There is no one size fits all rule.

5 MRS JUSTICE BACON: In principle, if documents are being
6 provided to you by a third party in the context of these
7 proceedings, they are likely to be relevant. Otherwise
8 it is difficult to see why the third party is going to
9 be providing them to you. Not an industry player. So
10 in light of that, how many days is needed to assess the
11 relevance?

12 MR JON TURNER: My Lady, if I have to put a single figure on
13 it, then we would say a three week period would be
14 required.

15 MRS JUSTICE BACON: All right, so your position is that if
16 relevant documents are provided they will be disclosed
17 within a three week period.

18 MR JON TURNER: Yes. We will need to assess -- yes, if
19 relevant documents are provided, then we will do so.

20 Similarly, I say on the other side, although there
21 is no specific wording in any order providing that
22 Qualcomm should provide known adverse documents to us,
23 because so far disclosure has been addressed by
24 category, we take it that because of the principle, my
25 Lady, that we have been debating that they will obey the

1 same stricture.

2 MR SAUNDERS: My Lady, I don't know the position on that but
3 there is no application in respect of it.

4 MR JON TURNER: Well, it arises out of the application.

5 MRS JUSTICE BACON: This particular order relates to
6 a specific category of documents. There isn't a general
7 application for an order against anyone regarding known
8 adverse documents. Let's focus on the point at issue in
9 paragraph 8. Your position is that if documents are
10 provided that are relevant, they will be disclosed
11 within a three week period. Can I hear Mr Saunders in
12 reply on that, please?

13 MR JON TURNER: My Lady, just to say, I have just received
14 instructions that four weeks is the period which is
15 sought.

16 MRS JUSTICE BACON: All right.

17 MR JON TURNER: With liberty to apply.

18 MRS JUSTICE BACON: Mr Saunders?

19 MR SAUNDERS: My Lady, we say three weeks but in the final
20 three months before trial, one week. The reason being
21 that --

22 MRS JUSTICE BACON: Three weeks for now.

23 MR SAUNDERS: But once we're three months before trial, one
24 week. Because as I say the concern here is a case
25 management one.

1 MRS JUSTICE BACON: Yes I understand. We will discuss.

2 (Pause).

3 All right. Three plus one. Three weeks for now,
4 one week in the three months before trial. We think
5 that is proportionate and the documents to be provided
6 to you will be the documents which are relevant,
7 obviously, as with any other documents in the case.

8 MR SAUNDERS: Yes.

9 MRS JUSTICE BACON: Next point I have is the application for
10 further clarification, I believe, of Qualcomm's approach
11 to rate setting.

12 MR JON TURNER: I am obliged.

13 So the starting point here is our skeleton argument,
14 paragraphs 7 and 8 on page 3. That is where the point
15 was introduced which led to your Ladyship putting it on
16 the slate.

17 The point is this. The Tribunal will necessarily be
18 required to assess the business strategy pursued by
19 Qualcomm in this abuse case and it is legitimate for the
20 Consumers' Association to place reliance on the motives
21 underlying Qualcomm's business strategy.

22 The precise matter requiring clarification is simply
23 whether Qualcomm takes into account its market strength
24 in chipsets when requiring OEM customers to enter into
25 patent licences and to agree to royalty rates at the

1 level demanded. We consider that this will be
2 potentially very important for the outcome of your
3 assessment at the trial on abuse. The point is
4 currently being addressed via disclosure only.

5 Qualcomm has disclosed, as you have seen from the
6 witness evidence, 450,000 documents, which it tells us
7 is over 7 million pages. We have responded, and I don't
8 need to take you to the correspondence, that our E-
9 disclosure providers are having certain technical
10 difficulties searching it. Mr Jowell referred to that
11 a moment ago.

12 The point here is that it is proving very difficult
13 to search efficiently for documents which show the basis
14 on which Qualcomm sets its royalty rates, that is
15 whether it really is based on an assessment of the value
16 of the patents alone, which is what they plead, or not.

17 Qualcomm says it is the Consumers' Association's job
18 to expend the cost and the resources to hunt for these
19 documents without it giving any guidance within this
20 amorphous mass that has been provided.

21 MRS JUSTICE BACON: I presume that Qualcomm has complied
22 with your requests for disclosure. You can hardly then
23 say that Qualcomm is then required to go through that
24 and make your case for you.

25 MR JON TURNER: We are not asking for that but may I say

1 that where a difficulty such as this arises, it is not
2 appropriate for the party giving disclosure simply to
3 sit back and say now costs must be expended on your
4 side, if there is an efficient cooperative approach that
5 can be taken in modern litigation. Our position is that
6 it is far more efficient for Qualcomm to clarify what
7 they took into account in setting their rates, it is
8 an issue in the case, and how and where and who actually
9 did this.

10 MRS JUSTICE BACON: That is a matter for witness evidence,
11 isn't it?

12 MR JON TURNER: It is a matter for clarification now because
13 it will enable us to find the documents in the
14 disclosure. You have heard a moment ago two things,
15 Mr Jowell grumbling about the costs of these proceedings
16 and also talking about the difficulty of using search
17 terms to try to locate documents. If we are going to
18 search this disclosure, it is going to be extremely
19 helpful and constructive and in the interests of justice
20 for Qualcomm to explain these matters.

21 It is a request, in a sense, it is going to be by
22 information how this is done within their organisation,
23 where these decisions are made, it will enable us
24 efficiently to locate what we are looking for in the
25 disclosure material. To take further steps if we find

1 that items are missing.

2 MRS JUSTICE BACON: Where is your draft order?

3 MR JON TURNER: What I have said, my Lady, is that this is
4 a matter that we weren't proposing to raise now because
5 discussions are ongoing but as it has been raised this
6 is what we are going to be seeking by way of a request.

7 MRS JUSTICE BACON: I see. You are not asking the Tribunal
8 to make any order on this.

9 MR JON TURNER: No, no. It is paragraphs 7 and 8 of our
10 skeleton and we have said that this is something that we
11 are going to be pursuing, we are currently still in
12 discussions. Our expectation is that they should and
13 will behave cooperatively because it is such
14 an important point, because in modern litigation this is
15 how parties should behave.

16 MRS JUSTICE BACON: Well, there is no order sought from us.
17 Mr Saunders, do you want to spend two minutes telling us
18 what your position is on this? And then the Tribunal at
19 least knows.

20 MR SAUNDERS: My Lady, I am not going to waste time on this,
21 particularly, but it is paragraph 75 of their skeleton
22 argument that deals with this. The earlier paragraphs
23 my learned friend took you to are just looking at some
24 of the earlier authorities and making a few omnibus
25 submissions which are not really on this point.

1 Paragraph 75 deals with -- they identify a couple of
2 paragraphs of the defence; fair return on investment and
3 a fair remuneration for the value of the SEPs. As the
4 Tribunal will know there is a magic to that word "fair"
5 because it is to be found in FRAND. In any event, at
6 the last CMC there was a RFI that identified
7 paragraph 10.3 of the defence, the same paragraphs that
8 we are getting here. Mr Williams addressed you on that.
9 He said that they were seeking not only FRAND, they
10 weren't just FRAND paragraphs, they made the same point
11 last time and then the Tribunal ruled and just to invite
12 to you look at the ruling, which is in the supplemental
13 bundle 871, if we could look at that. Page 871 of the
14 supplemental bundle.

15 Sorry, is it possible to go to page 871 of the
16 supplemental bundle? Thank you.

17 Actually, sorry, it will be 870, sorry. Yes, it is
18 just at the bottom. You heard submissions on all of
19 this in the context of the previous RFI and then --

20 PROFESSOR MASON: Which line number?

21 MR SAUNDERS: Sorry, line 22, just the bottom of the page
22 and then you will see Mrs Justice Bacon's ruling there.

23 (Pause).

24 MRS JUSTICE BACON: So that was in the context of the RFI.

25 MR SAUNDERS: The previous RFI.

1 MRS JUSTICE BACON: Is this now then being resurrected?

2 MR SAUNDERS: It is. We say -- we will have to wait and see
3 what RFI we get but this has already been dealt with by
4 the Tribunal and the answer which my Lady and the
5 Tribunal came to on that occasion was it is a matter for
6 witness evidence. The answer is yes, it is. That is
7 the short point.

8 MRS JUSTICE BACON: Thank you. We are now apprised of what
9 the position is, I don't need to hear anything more.
10 There is not an application before us. Let's move on to
11 the amendment of the class definition.

12 MR JON TURNER: My Lady, I shan't -- just to say the
13 relevant requests that we were making.

14 MRS JUSTICE BACON: We don't need to pursue this.

15 MR JON TURNER: Paragraph 79 and following.

16 MRS JUSTICE BACON: There is apparently no request that we
17 make an order, there is no application, so I don't think
18 we need to hear further from either party on this.
19 Amendment of the class definition.

20 MR WILLIAMS: This started life as an application by
21 Qualcomm but it has sort of morphed into an application
22 by us. So I think I need to go first, on that basis.
23 This is really just to explain where we have gotten
24 to. The Sony ruling was handed down on 21 November and
25 Qualcomm wrote to us on 1 December raising the point

1 that the class definition needed to be varied in light
2 of that judgment and we agreed with that straight away.

3 We had hoped at that point that we would be able to
4 sort the matter out between us but Qualcomm instead made
5 an application which they called an application to amend
6 our claim, which was a bit of a curious thing. It was
7 a strike out application.

8 We said that was premature and that a strike out
9 wasn't the correct solution so we responded to that
10 application with our own. It wasn't a formal
11 application but our position was that the way to deal
12 with the issue was for us to amend the claim to bring
13 the class up-to-date as at the date of this hearing. We
14 said that was obviously better than kicking people out
15 of the class only to bring them back in at a later date.

16 The night before the hearing Qualcomm agreed with
17 that approach in principle. So they are not pursuing
18 their application to strike out members of the class
19 going back to the date of the claim form.

20 MRS JUSTICE BACON: So is there now agreement that the class
21 should include purchasers up to 9 January 2024?

22 MR WILLIAMS: I think there is agreement on that in
23 principle. We have put forward amendments for the body
24 of the claim form to reflect that, which Qualcomm have
25 seen. I don't think there is any difficulty with those

1 amendments. We do need -- we have realised that we need
2 to update one other aspect of the claim form which is at
3 the back of the claim form there is a list of phone
4 models and we realised --

5 MRS JUSTICE BACON: To bring that up-to-date.

6 MR WILLIAMS: We need to bring that up to date. We know
7 what we need to do, we can do it very quickly. Qualcomm
8 haven't seen that yet so they can't agree to that in
9 detail, but that is the principle.

10 MRS JUSTICE BACON: All right. Is that agreed, Mr Jowell?

11 MR JOWELL: Subject to that point on the detailed list of
12 models, yes, that is agreed in principle.

13 The one point I should mention is that it has been
14 suggested that there may be a further amendment just
15 prior to trial to bring in yet further class members.
16 We don't think that that -- we put down a marker simply
17 that we don't think that would be appropriate, not least
18 because we understand that the relevant type of products
19 that fall within the category of affected products are
20 no longer being sold and in de minimis quantity by
21 Samsung, so it is simply disproportionate.

22 MRS JUSTICE BACON: Let's have that debate. I am not going
23 to foreshadow that debate when it arises.

24 MR WILLIAMS: I won't take up time. There is a simple draft
25 order, Madam, which would vary the class.

1 There's only one practical point arising from the
2 point Mr Jowell just made which relates to what we do
3 about notice to the class because notification to the
4 class has been given on the basis of the former class
5 definition. If I could just explain briefly what we are
6 proposing to do.

7 We are proposing to -- obviously we accept that we
8 have to put something out there to explain the correct
9 position and to correct the position as previously
10 communicated to the class. What we are proposing to do
11 is to publish a short form notice which we provided to
12 the Tribunal last week, which would explain essentially
13 the amendment that is now agreed to between the parties.

14 But that would be to explain that the definition of
15 the class has changed. That is separate from the
16 question of giving class members another opportunity to
17 opt out. What we are proposing to do is to park that
18 process because of the possibility that the claim will
19 be further expanded to bring it up-to-date as at the
20 date of trial.

21 It seems to us nothing is to be gained by going back
22 to consumers again and again with repeated notification
23 exercises for that purpose. As long as it is done in
24 due course then we say that the rule will be discharged.

25 Mr Jowell hasn't said that there is any difficulty

1 with that. He has reserved his position on the further
2 amendment but it does seem to us for as long as there is
3 the possibility of at least a further amendment it is
4 efficient and in the interests of consumers that we deal
5 with that all in one go in due course.

6 MRS JUSTICE BACON: Yes.

7 MR JOWELL: Well, I think we will encourage them simply to
8 make their research. Our understanding is that the
9 affected products are simply no longer being sold in any
10 material quantities and so it is better to get on with
11 this process of notification now rather than later. But
12 that is something we will have to wait and see.

13 MRS JUSTICE BACON: Do you want the Tribunal to set
14 a deadline for any further amendment?

15 MR JOWELL: Yes.

16 MRS JUSTICE BACON: What do you propose that should be, by
17 reference to the date of the trial?

18 MR JOWELL: Well, as I said, we would encourage there to be
19 no further amendment but if there is to be one then we
20 would say it should be at least six months prior to the
21 date of trial.

22 MRS JUSTICE BACON: Could, for example -- all right, thank
23 you, Mr Jowell. Mr Williams, could any further
24 amendment come back before the Tribunal at the next CMC?

25 MR WILLIAMS: I don't think it can, Madam. The point is

1 this. We accept that the numbers of consumers buying
2 LTE only mobile phones are tailing off. Which? is
3 representing the class. It has to take a view based on
4 the real numbers at any point in time as to how to
5 discharge its obligations to the class and it has to do
6 that looking at the number of consumers that would be
7 left out by not amending the claim further.

8 So the way this was dealt with in Le Patourel
9 recently, admittedly that was hard on the heels of the
10 Sony decision, but in that case it was dealt with at the
11 PTR and there was a final round of amendments at that
12 point and a notification exercise, so we understand.

13 Sorry, I don't mean to give evidence.

14 MRS JUSTICE BACON: All right. Certainly it needs to come
15 back no later than the PTR.

16 MR WILLIAMS: No, of course. It may be that we reach
17 a point where we can see the numbers have just dropped
18 off and we can tie matters up. But Which? does have to
19 take a view based on the real numbers, Madam.

20 MRS JUSTICE BACON: Let me say this. It needs to come back
21 no later than the PTR and can you simply at the next CMC
22 update the Tribunal as to the position? So that we and
23 Qualcomm know where you have got to.

24 MR WILLIAMS: Yes.

25 MRS JUSTICE BACON: So we don't leave it until a cliff edge

1 of the PTR for then everyone to find out what your
2 position is.

3 MR WILLIAMS: No. We don't want to leave it later than we
4 need to.

5 MRS JUSTICE BACON: All right. So if you update the
6 Tribunal at the next CMC and then any application no
7 later than the PTR.

8 All right, thank you very much for everyone's
9 cooperation.

10 Now the remaining issues are the list of issues for
11 the trial, the trial timetable and a few other matters.
12 We are not likely to get through all of those before
13 lunch. What would you like me to do? How long do you
14 think you need on the remaining issues in the case?

15 MR JON TURNER: So we have on the slate only the list of
16 issues and the timetable. We have reached substantial
17 agreement on the list of issues, at least. Getting that
18 done before the short adjournment.

19 Although I haven't discussed in detail the timetable
20 that results from this with my learned friend we had
21 a brief discussion yesterday about the trial start date
22 and length and so forth, so I can set out our position
23 on that before the short adjournment at the very least.

24 MRS JUSTICE BACON: I think what we will do then is deal
25 with the list of issues before the short adjournment,

1 then you can have a more detailed discussion about the
2 trial timetable, rather than just having your position
3 and then everyone goes away. It seems to me it is more
4 efficient for you to have a proper discussion over the
5 lunch adjournment and then we can deal, hopefully quite
6 shortly, this afternoon with the trial timetable.

7 MR JOWELL: Just in relation to the trial timetable, I think
8 it would assist us all if we could understand from the
9 Tribunal whether the reason for the Easter date is
10 essentially just a desire to deal with matters quickly
11 or whether there are availability problems for the
12 Tribunal so that we can -- because it would be futile
13 for to us speculate that the trial date might be later
14 if that is simply going to be impossible.

15 MRS JUSTICE BACON: No. In fact, I was not suggesting that
16 the trial would be listed at Easter. What I was asking
17 for was whether it could come on as early as that, and
18 we would then obviously have to look at availability of
19 both the panel and counsel. So I wanted to understand
20 the earliest, from the parties' perspective, that you
21 think that it could be listed.

22 It may well be that, from the panel's perspective,
23 we are not able to list it until later in the year in
24 any event, but we would like to know what the margins
25 are on both sides.

1 MR JOWELL: That is very helpful. Thank you.

2 Discussion re list of issues

3 MR JON TURNER: My Lady, on the list of issues, we proposed
4 an updated draft last night and we have received this
5 morning substantial agreement with some minor changes
6 from Qualcomm.

7 MRS JUSTICE BACON: Do you have that to hand up?

8 MR JON TURNER: We have copies which we will give to you
9 now.

10 (Document handed).

11 Essentially, we are very close.

12 This reflects the draft that we sent last night. It
13 is fully agreed apart from the blue tracked line, which
14 is Qualcomm.

15 "Market definition and dominance" hasn't changed.

16 If you go to "alleged abuse", there is a new paragraph 7
17 which we have included which reflects the point that
18 they had previously wanted.

19 MRS JUSTICE BACON: Yes. I understand.

20 MR JON TURNER: "Is this capable of constituting an abuse in
21 law?" So that is there.

22 8 then is breaking it down and looking at
23 components. (a) is NLNC departure from competition on
24 the merits; (b) capable of having an anti-competitive
25 effect --

1 MRS JUSTICE BACON: I can't see the proper meaning of the
2 insertion of the word "alleged" there. It doesn't make
3 any sense. The question is whether it is capable of
4 having an anti-competitive effect.

5 MR JON TURNER: I agree with that.

6 MRS JUSTICE BACON: "Alleged" goes. That is just
7 incoherent.

8 PROFESSOR MASON: The second "alleged" goes.

9 MRS JUSTICE BACON: The second "alleged" goes.

10 MR JOWELL: If I may just explain where we are coming from
11 on that. Our case would be that the mere fact that
12 royalties were elevated by reason of a no licence no
13 chip policy, if that were the case, does not therefore
14 mean that that would be anti-competitive.

15 MRS JUSTICE BACON: Well, then the answer to that --

16 MR JOWELL: As long as that is understood, then we don't
17 need the "alleged", but we just --

18 MRS JUSTICE BACON: Of course your case is that the answer
19 to that is no. I don't think we need the "alleged"
20 there in order for to us understand that your position
21 is that the answer to that question is no.

22 MR JOWELL: That's fine.

23 It is not just that -- yes, very well. And it would
24 be no even if the royalties were elevated as a result --

25 MRS JUSTICE BACON: All right. There is a certain extent of

1 (inaudible) about this.

2 All right (c).

3 MR JON TURNER: So the next addition that they propose 8(c),
4 we said:

5 "Is the RTL policy capable of having exclusionary or
6 foreclosure effects?"

7 They want to insert "independently non abusive", but
8 we had seen that as being absorbed in (d) which is, in
9 the light of the (inaudible) above, which is asking
10 whether it has exclusionary or foreclosure effects, does
11 it buttress --

12 MRS JUSTICE BACON: No, but that is not the point they are
13 making. The point that they are making is the point
14 that you made yesterday, which is that you are not
15 saying that -- or we understand that you are not saying,
16 and indeed if you look at your answer to the third RFI,
17 you are explicitly not saying that the RTL policy is in
18 itself abusive. So I don't think we necessarily need
19 the words "independently" but that simply, I think,
20 clarifies what they understood you to be saying
21 yesterday.

22 But I think the point is that they want to get in
23 there that you are not saying that it was independently
24 abusive.

25 MR JON TURNER: My Lady, we are content with that.

1 MRS JUSTICE BACON: All right. So that stays in. That is
2 a helpful clarification.

3 All right (d) is agreed.

4 MR JON TURNER: (e) is I think the only remaining
5 substantive point. This is the further allegation of
6 silencing, inserting pressure on other industry parties,
7 including Apple and Samsung, not to seek third party
8 FRAND determinations or not to assist in proceedings
9 like this. We put in other industry parties because,
10 first, that is precisely the pleaded case. I will take
11 you to the pleading --

12 MRS JUSTICE BACON: We have read your response to the RFI,
13 the section that Mr Williams helpfully referred to at
14 the end of yesterday, which makes the point about other
15 industry parties.

16 MR JON TURNER: And indeed your ruling earlier confirmed
17 that. The other industry parties is part of our
18 pleading as well. So we say that should stay, because
19 that is one of the issues in the case. It can't be
20 excised in the list of issues.

21 MR JOWELL: If I may respond on that?

22 MRS JUSTICE BACON: Yes.

23 MR JOWELL: We simply don't understand, if there was
24 pressure on other industry parties, other OEMs, how that
25 would be causally connected in any respect to their

1 claim in respect of Apple and Samsung phones.

2 MRS JUSTICE BACON: Yes. The way in which it is said to be
3 causally connected is set out in the response to the
4 RFI. You may say it at trial, "this makes no sense
5 whatsoever and there is no evidence", but unless you are
6 asking to us strike out that bit of the RFI, they are
7 saying that there is some causal connection.

8 MR JOWELL: Well, I don't quite understand -- having read
9 their RFI, we simply don't understand how there is
10 a causal connection. The difficulty is here, normally
11 one would just say, well, they have pleaded it, have it
12 in. But the problem is that, once it is established, if
13 you like, as an issue in the case, then potentially we
14 will have to adduce evidence on whether we exerted
15 pressure on half a dozen to a dozen --

16 MRS JUSTICE BACON: Well you will anyway, because it is
17 pleaded.

18 MR JOWELL: It may be pleaded but the fact that somebody
19 pleads something doesn't make it an issue in the case,
20 necessarily. It is not connected to the actual claim
21 that is made.

22 MRS JUSTICE BACON: The issues need to reflect the pleaded
23 case. Their pleaded case says in terms we rely on at
24 least the following examples.

25 MR JOWELL: Yes. To which we say, how does that get you

1 anywhere if this wasn't known by Apple and Samsung, and
2 isn't alleged to have been known by Apple and Samsung?
3 How does that in any way elevate the price of the
4 royalties --

5 MRS JUSTICE BACON: Then you would have to apply to strike
6 out the relevant bits of their pleaded case so that it
7 is not before us. At the moment, it is before us in the
8 form of their response to the RFI. I don't see how, at
9 this stage, without applying to excise the relevant bits
10 of the pleadings, you can excise that as an issue in the
11 case.

12 Of course, you can submit it doesn't add up to a row
13 of beans at trial but, at the moment, we still have to
14 look at it. Otherwise, if it is not on the list of
15 issues, the danger is that there is then a satellite
16 dispute at trial as to whether the matter is before us.

17 MR JOWELL: As long as it is understood that one would only
18 be examining this insofar as it is relevant to the claim
19 which is brought.

20 MRS JUSTICE BACON: You are examining it insofar as it is
21 relevant to the pleaded case. You may say there is no
22 evidence whatsoever of causation and/or causation for
23 other reasons inherently doesn't make sense. But, at
24 the moment, it is there so you have a choice: either
25 excise it from the pleaded case, apply to do so, or put

1 up with the issue which reflects the pleaded case.

2 MR JOWELL: We will have to give serious consideration to
3 whether we apply to excise it from the pleaded case,
4 insofar as it is not alleged to be known by Apple and
5 Samsung, because we simply don't understand how any
6 pressure exerted on other parties could logically have
7 any effect on the rates charged for Apple and Samsung.

8 MRS JUSTICE BACON: I can see you have an argument on that.
9 Indeed, we noted that the response to the RFI explicitly
10 says that at present it is not an alleged. They are not
11 ruling out that they may seek to add the point in,
12 following further disclosure. That is what is
13 explicitly said.

14 MR JOWELL: Then one gets into difficulty because, of course,
15 we may not get the disclosure that they rely on until
16 after this 1782.

17 MRS JUSTICE BACON: All right.

18 MR JOWELL: Perhaps we can -- you have heard what I have to
19 say about this and we do have -- because we do have
20 reservations about putting in witness statements dealing
21 with our relations with other industry parties that are
22 of no relevance to the claim actually advanced.

23 MRS JUSTICE BACON: Yes. We have the point, Mr Jowell. If
24 you want to make an application, make it at the next
25 CMC.

1 MR JOWELL: Very well.

2 MRS JUSTICE BACON: Is that it?

3 MR JON TURNER: My Lady, almost. Just for the record on
4 that, two short points. It is relevant because, if
5 there is no FRAND determination by anybody in the market
6 their royalty rates stand. That is the point. That is
7 why it maintains --

8 And second, if there is silencing in relation to
9 litigation, we cannot find witnesses to help us for this
10 case. Very simple.

11 MRS JUSTICE BACON: You have heard the debate which I have
12 had with Mr Jowell. You are on notice that Qualcomm
13 thinks that this point is hopeless. It may or may not
14 decide to deal with that before the trial by applying to
15 strike out the relevant parts of your pleaded case.

16 MR JON TURNER: Yes, my Lady. And I have just explained our
17 rationale.

18 Paragraph 10 and one other. There is just a typo.

19 So at paragraph 10 on the document you have, it
20 says, "questions 9 to 9 above", it should say "8 to 9".

21 MRS JUSTICE BACON: Yes.

22 MR JON TURNER: Equally, at paragraph 16 over the page, this
23 is just the word processing package. It should say:

24 "Having regard to the answers to questions 14 and 15
25 above."

1 MRS JUSTICE BACON: Yes. All right.

2 MR JON TURNER: My Lady, that is it.

3 MRS JUSTICE BACON: Thank you very much, and thank you for
4 the cooperation between the parties to agree the list of
5 issues.

6 We will let you know if we have any other questions
7 after we have had a proper look at it, but likely not.
8 Then we can deal with the trial timetable.

9 The other substantive point I just wanted to address
10 is the question about the litigation funding agreement
11 and the letter that came to us asking for our blessing.
12 We will just explain what we propose to do or not to do
13 about that. If there are any other points, then those
14 will be raised by counsel this afternoon.

15 Thank you.

16 (1.02 pm)

17 (The short adjournment)

18 (2.00 pm)

19 Discussion re timetable

20 MRS JUSTICE BACON: Yes, Mr Turner.

21 MR JON TURNER: May it please the Tribunal. We have managed
22 to have a discussion over the lunch adjournment and we
23 are substantially ad idem. I will convey where I think
24 we have got to and why we have got to it and Mr Jowell
25 will supplement me if he takes a different view or my

1 and his point of view don't accurately reflect the
2 agreement.

3 The parties both consider that this is not a four
4 week trial, that it will be at the minimum a six week
5 trial and more likely a seven week trial. We can talk
6 you through that.

7 Secondly, in terms of the procedural steps needed to
8 get to trial, we consider that, with the best will in
9 the world, this can't be brought on before spring 2026.
10 We had said in our skeleton arguments on both sides
11 prior to the hearing we were agreed on a date in May.
12 There are two particular factors which I will take you
13 to.

14 The first is the ordinary trial requirements. There
15 was a draft trial timetable attached to our skeleton
16 argument which set things out there and I will show you
17 why we think that those particular time periods are
18 needed for the pre-trial steps.

19 The second is a more general point not reflected in
20 that timetable, that we need to have a fair chance
21 procedurally to obtain, via the US process from Apple
22 and Samsung, documents that on the claimants' side will
23 be necessary for a just trial. You have heard from both
24 sides that that process is likely to take -- it is
25 uncertain but we are targeting, let's say, one year for

1 that to take place. So we are trying to build that into
2 the discussion as well.

3 With the Tribunal's permission, I will just take
4 those points in turn.

5 First is the length of the trial. Both parties
6 agree that this is minimum of six weeks and more likely
7 seven. What we see here is that Qualcomm has indicated
8 that it may have up to eight witnesses of fact. On the
9 claimants' side, we are not sure whether we will have
10 live witnesses, we may or may not, but let's say
11 conservatively that we will not, we are relying on
12 hearsay evidence.

13 In that case, we consider that the first at least
14 two weeks, four day week trial, should be considered to
15 be devoted to the openings and the cross-examination of
16 their eight or so factual witnesses. After that, you
17 have the experts.

18 MRS JUSTICE BACON: That is a day for each witness.

19 MR JON TURNER: If there are -- well, it depends on the
20 length of time one is assuming for the openings. If you
21 assume a day a piece, then --

22 MRS JUSTICE BACON: Not quite a day if you have four day
23 weeks.

24 MR JON TURNER: Well, if it is four day weeks, if you assume
25 for the moment a day each for opening, you are then

1 talking about six remaining days for cross-examination.
2 But say it is a bit longer than that. For eight
3 witnesses at the moment -- we don't have a proper vision
4 of this, but at least eight -- it seems to us that two
5 weeks for the openings and fact side of the case is
6 appropriate.

7 If you turn then to the experts. You will have the
8 economists, the industry experts and the technical
9 experts. The economists are going to be dealing with
10 market definition dominance and abuse and the Padilla
11 correlation analysis. Let's say you have for all of
12 that one more week of four days.

13 MRS JUSTICE BACON: Two days each per side.

14 MR JON TURNER: Two days each side, yes. Assume then that
15 for all of the other witnesses, that is the technical
16 and industry witnesses we have identified, you deal with
17 all of that within one week. Maybe that sounds tight
18 but if it is only one week, considering it to be tight
19 --

20 MR JUSTIN TURNER: We were hearing earlier the technical
21 issues -- there's unlikely to be a great deal of dispute
22 about that. I understood anyway. So could you just
23 elaborate on how you get to a week for those? And the
24 industry experts? It does seem a lot to me.

25 MR JON TURNER: Well, the industry experts, certainly on our

1 side, if we don't have factual witnesses, is going to be
2 talking about the licensing practices in the industry,
3 what constitutes essentially normal practice both in
4 terms of the direct licensing and licensing of
5 components to rival chip makers and matters of that
6 kind. And also the negotiation -- process of
7 negotiation of patent licences for the portfolios and
8 how that is generally done.

9 MRS JUSTICE BACON: How much of this is really going to be
10 controversial to require a week of cross-examination?
11 There is a difference between them giving evidence on
12 points which is useful background, and we kept reading
13 in the descriptions of the evidence this will be useful
14 background for the Tribunal. I am sure a lot of it will
15 be useful but how much of it is going to be seriously
16 disputed?

17 MR JON TURNER: We think that on those matters, if you look
18 at the way that the issues are defined in the pleadings,
19 with them saying that the industry works in a different
20 way from the way that the Class Representative asserts,
21 that will turn out to be controversial. There will also
22 be the analysis which is less controversial, we
23 discussed yesterday, of the standards and the standard
24 setting organisations and so forth.

25 In relation to that part, I am not suggesting that

1 that would occupy a great deal of court time --

2 MR JUSTIN TURNER: Sorry, the way the industry works, is

3 there likely to be a dispute about that?

4 MR JON TURNER: Yes. Absolutely.

5 MRS JUSTICE BACON: A week's worth of dispute about that?

6 Maybe half a day's worth of dispute about that.

7 MR JON TURNER: That is part of the expert evidence. I am

8 not saying that in itself will occupy an entire week but

9 in answer, Sir, to your question, you will have seen,

10 for example, that part of their case is that there is no

11 practice of licensing component makers and that under

12 the regime that applies, the FRAND regime in this area,

13 end device licensing is the way that everybody

14 approaches the matter. So that is one area of dispute.

15 Equally, no -- well, what we call "no licence no

16 chips", you have heard from Mr Jowell is said to be

17 a practice that is on our side we say novel and

18 problematic, on their side they will say it is normal

19 and fits in with the way that the industry approaches

20 the licensing of patents in this context.

21 MR JUSTIN TURNER: Are you going to produce patent licences

22 to show that?

23 MR JON TURNER: Patent licences in order to show what, sir?

24 MR JUSTIN TURNER: How other competitors in the field are

25 licensing -- what licensing arrangements -- the

1 licensing arrangements they use will be apparent on the
2 face of the licences, one assumes. Either they will be
3 licences to chip manufacturers or they will be licences
4 to OEMs?

5 MR JON TURNER: Well, we are -- yes.

6 MR JUSTIN TURNER: People saying -- speculating on what
7 licences might be out there without producing the
8 licences would seem to be, I don't know, of marginal
9 interest.

10 MR JON TURNER: We are hoping that such licences which have
11 been called for in disclosure, I am not able to speak
12 for what has yet been provided, will include those sorts
13 of things but the industry experts will also be talking
14 about the practices that occur in the industry, how
15 licensing takes place. One of -- I am not going to
16 develop.

17 MR JUSTIN TURNER: It seems to be this is quite an important
18 area but it seems to be sort of evidence of fact dressed
19 up as expert evidence.

20 MR JON TURNER: Well, it is industry expertise, in the sense
21 that we, on our side, through Dr Schneider will be
22 producing information to talk about how people
23 licence -- he used to be, I think, at Nokia or one such
24 organisation -- how licensing takes place, the sorts of
25 considerations that come in, the interplay between the

1 different standards under which licensing occurs and so
2 forth.

3 The reason why that is important is that on
4 Qualcomm's side they take a different view from us about
5 the nature of this, what the outside options are
6 available to the licensees and so forth. So without
7 being able to drill into the entirety of the case now,
8 in answer to the question: is that going to be at all
9 a significant issue? I think both sides would say it
10 is.

11 In terms of the other issues, technical as well as
12 other industry expert material, on the technical side
13 one of the issues which I think we mentioned yesterday
14 was the location of the technology. Is it all
15 implemented in the chipset or is it elsewhere in the
16 handset device?

17 MR JUSTIN TURNER: What is your position on that?

18 MR JON TURNER: Our position is that it is all in the
19 chipset, theirs is that it is not. As a result of it
20 not being, they say, it is an efficiency that you
21 licence everything at the end device level because then
22 you cover it all in one go. It is part of their
23 economic efficiency justification for the practice.
24 Whereas we, on the other hand, are saying it is all
25 implemented in the baseband chipset.

1 So that is part of it as well. At this distance
2 out, all I am saying is --

3 MR JUSTIN TURNER: Are we going to have to look at patents
4 claim by claim, and have to look at patents which say:
5 I claim a chip which has the following function, and
6 then go to claim 3 which says: I claim a chip with the
7 following function when it is in a telephone or mobile
8 phone? Are we going to have to go through and work out
9 which claims relate to the OEMs and which claims read on
10 to the chips in isolation?

11 MR JON TURNER: Sir I can't say now exactly how that is
12 going to be approached. This is Qualcomm's case about
13 how this arises and it is our response to it that
14 Dr Ingers will be addressing.

15 All I can say now at this point though is leaving
16 aside the expert economists to allow, if we are setting
17 down a trial, a single week for the other experts is by
18 no means generous. If anything we see it as tight.

19 MRS JUSTICE BACON: All right. So you say a week is tight.
20 What else?

21 MR JON TURNER: There is after the experts going to need to
22 be a break for writing the closing submissions and you
23 reading them and for counsel to prepare the oral closing
24 submissions.

25 MRS JUSTICE BACON: Okay, so a few days.

1 MR JON TURNER: Again, we have looked at a week for that,
2 provisionally.

3 MRS JUSTICE BACON: You might not get a week in the context
4 of having had evidence for four weeks at most.

5 Then oral closings.

6 MR JON TURNER: Then we have oral closings in the following
7 week. Now if you tot that up it comes to a minimum of
8 six weeks and we between us feel that it is realistic to
9 allow for seven. But at the very least, the joint view
10 is that we are looking at a six week trial, given the
11 complexity of the issues in the case.

12 MRS JUSTICE BACON: Yes.

13 All right, so that --

14 MR JON TURNER: That is the first part of it.

15 MRS JUSTICE BACON: That is the first part of why you think
16 you need six weeks, maybe seven weeks. You simply might
17 not get that.

18 MR JON TURNER: We understand, but we are communicating to
19 you what we feel that the case requires from both sides.

20 MRS JUSTICE BACON: All right.

21 MR JON TURNER: We then turn to the timetable and if you
22 open up our skeleton --

23 MRS JUSTICE BACON: I will look at the annex.

24 MR JON TURNER: The annex at the end. I will just
25 spotlight a number of points. There is a further

1 dimension I have said that I will mention to you which
2 is the 1782 procedure, but we are considering that the
3 Defendant's disclosure it's agreed would be complete
4 in October of this year.

5 MRS JUSTICE BACON: What is the date of disclosure on the
6 basis of the current orders made by the Tribunal? What
7 is the latest?

8 MR JON TURNER: We believe the next round of disclosure that
9 we are due to receive is March.

10 MRS JUSTICE BACON: Right. So why is the end date October?

11 MR JON TURNER: The reason for that is the notion that both
12 parties have shared that we will look at the disclosure,
13 we will look for parts of it that we feel are inadequate
14 or things that are missing and we may make further
15 applications.

16 MRS JUSTICE BACON: All right. But at the moment the dates
17 are March. So is that March on the basis of the current
18 orders of the Tribunal?

19 MR JON TURNER: That's right.

20 MRS JUSTICE BACON: What are the dates set in the current
21 draft orders? Are there any dates set?

22 MR JON TURNER: Yes, it is the end of March.

23 MRS JUSTICE BACON: End of March, right. Well, you just
24 might not get a period of six months or in fact nine
25 months from now to just trawl over what you have got.

1 Let's just leave that out of the consideration because
2 you can just do that as we are going along.

3 So disclosure is actually going to be completed
4 in March. You might be -- we might have some further
5 disclosure that you ask for but I am not going to
6 schedule time for everyone to sit around and look at it
7 for an extensive period of time.

8 So, we are at March 2024. Why can't you set out now
9 the matters of fact that you want to rely on at trial?
10 Why can't that be done by the end of February?

11 MR JON TURNER: My Lady, that is dependent on us getting, to
12 a very real extent, the material which we have applied
13 for, had to apply for in the US.

14 MRS JUSTICE BACON: No, it doesn't. You have the decisions
15 already. Why can't you do it by the end of February?
16 You have been looking at this for a long time. We are
17 now some time into this procedure, we are at CMC4. Why
18 on earth can't you do it by the end of this month,
19 frankly?

20 MR JON TURNER: My Lady, so that we are not at
21 cross-purposes, why can't we do what by the end of this
22 month?

23 MRS JUSTICE BACON: Matters of fact you want to rely on at
24 trial? Your case has been pleaded, you have set out
25 extensive responses to RFIs, you must know what you want

1 to rely on from the decisions or opinions in foreign
2 proceedings. The decisions and opinions are there, they
3 are included in part in the trial bundle. I don't
4 understand why you have to have anything beyond.

5 MR JON TURNER: I see. Yes. So we are not only concerned
6 with those foreign judgments and decisions, we are
7 concerned with the material that we are seeking to
8 obtain via disclosure in the US. May I just show you an
9 example of why?

10 MRS JUSTICE BACON: Well, no. Can we just look at what is
11 set out on the trial timetable which is the matters of
12 fact from decisions or opinions that you want to rely on
13 at trial? Insofar as that is helpful to your case, you
14 must be able to identify it already.

15 MR JON TURNER: Oh, I am sorry. Yes, we are at slight
16 cross-purposes. In terms of the decisions or opinions
17 of the foreign decisions we intend to rely on at trial,
18 certainly we can look at those and we can seek to say
19 these are points on which we seek to rely.

20 MRS JUSTICE BACON: By when?

21 MR JON TURNER: But it does need to be taken together with
22 the next box down.

23 MRS JUSTICE BACON: It doesn't. Let's just look at the
24 third row. Why does the third row need to wait any
25 longer than this month or next month?

1 MR JON TURNER: Well, my Lady, in one sense if you are
2 asking whether we can go through those decisions and
3 list out all of the findings of fact which are relevant
4 to our case, yes, we can get on and do that.

5 Our proposal was that it makes sense to do it when
6 the Defendant's disclosure is completed and when we can
7 see in the light of the disclosure we have received what
8 it will be necessary to rely on from the foreign
9 decisions as well. But the primary material which we
10 are hoping to rely on will be material that is disclosed
11 and made available in these proceedings.

12 If you are asking for an anticipatory action on our
13 part, then, yes, we are willing to do that now. It is
14 merely that first, some of that could be superseded
15 because we are actually going to be finding documents
16 and we are going to be relying on those directly from
17 the disclosure, from the FTC set.

18 And secondly, some of that material, which I will
19 turn to now, includes witness testimony or records of
20 what witnesses said and so forth in those decisions,
21 recorded by those courts, the US district court, and we
22 are going to say that is very important and we are going
23 to be relying on this. That will intersect with what we
24 are seeking for from the US in the procedure there.

25 MRS JUSTICE BACON: I still don't understand why, if we're

1 looking at the third row of this table, why you need
2 beyond February to do just that. I want to go through
3 it row by row.

4 MR JON TURNER: Well, my Lady, I have made my points on
5 that. We are able to go through the Korean and the US
6 decisions and set out the matters of fact on which we
7 would rely there. It may well be, as I say, that at
8 trial some of that material will not be necessary and we
9 will not --

10 MRS JUSTICE BACON: Well, then, of course --

11 MR JON TURNER: So we would be striking it out.

12 MRS JUSTICE BACON: You can strike it out but at least there
13 is a preliminary statement. Let's assume that is done
14 by February. Next row down, when will you have received
15 the documents necessary for this? Obviously leaving
16 aside any section 1782 material.

17 MR JON TURNER: Well, that is exactly what this is dealing
18 with, my Lady. The deposition transcripts and the
19 witness statements or equivalent given in the foreign
20 proceedings.

21 MRS JUSTICE BACON: You have had some of that already and
22 you will get more pursuant to today's order.

23 I understand that the disclosure, the long stop date, is
24 somewhere around March.

25 MR JON TURNER: Well, materially, quite a lot of what we are

1 seeking is something that we are only going to be
2 getting in the 1782 procedure. May I just illustrate
3 this? Will you allow me to show you this?

4 MRS JUSTICE BACON: Let's supposing we focus on the material
5 that you get now and pursuant to the orders the Tribunal
6 has already made. Leave aside any 1782 material. So
7 when will you have got all the documents that you need
8 that you will be relying on in this fourth row? Is
9 it March?

10 MR JON TURNER: The end of March is when we will get the
11 disclosure but apart from the 1782 process is going to
12 contain certain of these materials but it will not --
13 the point is it will obviously not be comprehensive.

14 MRS JUSTICE BACON: You might get more, all right. So let's
15 focus on that. So focusing on what you have got and
16 will be getting, you will get that by the end of March.
17 For that material, how long do you need?

18 MR JON TURNER: That is very difficult, my Lady, to say.
19 I would need to take instructions on that but we would
20 say that it will take possibly two months or more for us
21 to --

22 MRS JUSTICE BACON: Two months. Okay, let's pencil in the
23 end of June.

24 MR JON TURNER: At least.

25 (Pause).

1 It has just been pointed out to me you have already
2 heard that we are being given an enormous amount of
3 disclosure which is extremely difficult to search
4 within. We are performing multiple tasks in parallel.

5 MRS JUSTICE BACON: Yes.

6 MR JON TURNER: So I would urge the Tribunal, please, to be
7 sensitive to the burden placed on the claimant.

8 MRS JUSTICE BACON: Yes. But the issues in trial 1 are
9 confined and we anticipate that much of it is going to
10 turn on legal argument. Many of the factual points may
11 be entirely peripheral and there is a question of
12 proportionality. It seems to us extraordinary that from
13 the fourth CMC you are saying that it will take more
14 than two years to get this to trial, in fact nearly two
15 and a half years, for what is in our view less than
16 a six week trial. This is already the fourth CMC in
17 proceedings that are of some longevity already.

18 That is where the Tribunal are coming from.

19 Let's move down to the witnesses of fact.

20 MR JON TURNER: My Lady, just before we do, will you allow
21 me just to show you the sorts of material that we hope
22 to get which completes that package from the 1782
23 processes and why it is relevant, and why it will come
24 into the witness statement process at the end of
25 2024/beginning of 2025?

1 MRS JUSTICE BACON: Well, you might be able to serve
2 supplementary witness statements at that point.

3 MR JON TURNER: Well, our view is that the efficient
4 approach -- again, this is a matter of agreement with
5 both sides -- is that we provide notice at a certain
6 point before they serve their witness statements of the
7 material on which we intend to rely, which will include
8 material from the US depositions, let's say, and that we
9 do so before they serve their statements so they can
10 take those into account in their witness statements.

11 The alternative would be to wait until they have
12 served their statements without that material and to
13 envisage a second wave of reply statements. On both
14 sides, we consider that the approach which is commended
15 is preferable.

16 MRS JUSTICE BACON: All right.

17 (Pause).

18 All right, what we are going to do -- you presented
19 the agreed position and I am afraid it is not acceptable
20 to the Tribunal. We are not going to delay this until
21 spring 2026. However, there seems to be limited merit
22 in the Tribunal trying to go laboriously through the
23 different pre-trial steps when this is the agreed
24 position and you will no doubt need to take instructions
25 and agree alternative arrangements on the basis of

1 a more accelerated timetable.

2 So what we would propose is to order that the trial
3 is going to be set down for an absolute maximum of five
4 weeks. You will just simply have to cut your cloth to
5 fit that coat and that will have an impact on the extent
6 of evidence that is provided, the extent of
7 cross-examination and what you build in in terms of
8 preparation for that.

9 As for when this can come on. You haven't indicated
10 availability next summer. Do you want to make any
11 submissions on availability of counsel next summer or is
12 it the fact that the counsel team or sufficient numbers
13 of the counsel team can be available during the course
14 of the summer term in 2025?

15 MR JON TURNER: My Lady, two points on that if we are
16 talking about summer 2025, so June/July. The first is
17 that you may know this, we have received a judgment
18 yesterday, a ruling from the president of the Tribunal
19 in the Trucks case where there is going to be
20 an intensive three month trial, which he is targeting
21 for November, December and January next
22 year. January 2026. So many of the counsel before you
23 now, including all on this side and many on the other
24 are involved in that case. That is a consideration for
25 the Tribunal in terms of listing.

1 The other is the point that, if I may, I will
2 develop very briefly, which is that for there to be
3 a just trial in this case we will need to be able to
4 obtain or have a fair chance of obtaining the US
5 material.

6 MRS JUSTICE BACON: Yes. You have said that could take up
7 to a year, which takes us to January next year. The
8 question is how much longer after that do you really
9 need? It seems to us that the US material may not be of
10 central relevance and it ought to be possible to deal
11 with that by supplemental statements. Certainly for the
12 bulk of the evidence, including all of the technical
13 experts, none of that, it seems to us, turns on any of
14 the US material.

15 As for the economists, it seems to us that that is
16 not likely to turn on the US material either, save to
17 a peripheral extent. The main issues are going to be
18 the theory of harm and how you say that the anti
19 competitive leveraging has occurred. It is very unclear
20 to us how the US material is going to have a huge
21 bearing on that. We appreciate of course that it may be
22 relevant but the question is whether it is so relevant
23 that you need a very long period of time after obtaining
24 that before the trial.

25 The question again, if you are telling us that

1 Trucks is starting in November, that seems to be
2 a reason for bringing the timetable before November,
3 because we are not going to wait until spring 2026
4 because of Trucks.

5 MR JON TURNER: No, my Lady. I understand that.

6 If you will allow me just two minutes.

7 MRS JUSTICE BACON: Yes.

8 MR JON TURNER: To try to persuade you on the point that you
9 have just articulated a view on, which is that the
10 material from the US proceedings is of limited
11 relevance, because we see it quite differently. We see
12 it as potentially being very important to the decision
13 that you will make at the trial. If I can just give you
14 an indication, I would like just a moment to try to show
15 you why.

16 MRS JUSTICE BACON: All right.

17 MR JON TURNER: If you open up the supplemental bundle, the
18 third supplemental bundle, I think it is, volume 3 of
19 the supplemental bundle.

20 MRS JUSTICE BACON: The third supplemental bundle.

21 MR JON TURNER: Yes it is the first supplemental bundle, it
22 is the third volume, if you have it in hard copy. Go in
23 it to tab 59 and look at page 4080. This is in the
24 Apple 1782 request. What you will see, go back a page
25 from the one that is up on the screen, request number

1 1 -- I am going to look at requests numbers 1 and 3.

2 Request number 1 is unredacted versions of the
3 following documents that were provided, that was by
4 Apple. That was documents selected to be used as the
5 exhibits by the FTC or Qualcomm or jointly at trial. B,
6 other depositions, forget the submissions if you like,
7 but the briefs and the witness statements and the expert
8 reports that were provided.

9 If you turn the page, go to request number 3, these
10 are documents which are needed because there is
11 currently a complete -- almost complete gap in the sense
12 that none of this was covered by the previous
13 proceedings. We are also looking at the period of the
14 abuse relating to the time after these foreign
15 decisions. So this is from here you see April 2019
16 forwards, so we are talking about the latter period
17 there.

18 Such documents from Apple are going to be needed for
19 a trial when one of the main issues is going to be the
20 continuing effects of the practice about which we
21 complain in this period.

22 If you would please go forward --

23 MR JUSTIN TURNER: Sorry, so why does the provision of that
24 document need to hold up the preparation of evidence,
25 generally? Expert evidence, technical evidence,

1 economic evidence?

2 MRS JUSTICE BACON: The Padilla analysis?

3 MR JON TURNER: Well, the Padilla analysis, absolutely not.

4 I think again all sides agree there is simple

5 correlation analysis, that can go ahead.

6 MRS JUSTICE BACON: All the general theory of the bargaining

7 theory in relation to which Professor Shapiro has

8 already written an extensive paper.

9 MR JON TURNER: Yes, all of that is fine. What I am

10 addressing now is the point we were on a moment ago

11 which is the date for the trial and I am showing you why

12 these bear on when a just and fair trial can be set

13 down. So, I am not talking about --

14 MR JUSTIN TURNER: So we are proposing the trial takes place

15 after you receive these documents.

16 MR JON TURNER: That's right.

17 MR JUSTIN TURNER: So what point are you addressing us on?

18 MR JON TURNER: I am saying this is going to -- the

19 suggestion made by my Lady was that this is going to be

20 of perhaps limited relevance and shouldn't be

21 an important point in determining the date for trial.

22 What I wish to show you with this --

23 MRS JUSTICE BACON: Sorry, just so there is no confusion,

24 there is no suggestion on the Tribunal's part that the

25 trial should take place before a year hence. There is

1 no suggestion that we go into the trial at this point
2 deliberately on a date which is before you expect to get
3 the US material. The point is that we are suggesting
4 a summer date next year which would be six months after
5 your anticipated long stop for getting the US material.

6 MR JON TURNER: Well, and there I will turn in a moment to
7 the period after -- let's target a year for when this
8 might be received, so say the end of January 2025. You
9 then have to have all the remaining steps, some of which
10 depend on assimilating and digesting this material
11 before the trial is set down.

12 May I just make one further set of observations on
13 this. If you go forwards to page 4099. You have the
14 parallel documentary requests in relation to Samsung.
15 If I may just illustrate why this sort of material is
16 going to be something that will need to be digested by
17 everybody and will affect the further pre-trial steps,
18 let's just take one of the points there, the deposition
19 of one of the important Samsung witnesses, material we
20 do not now have, Injung Lee.

21 If you would open up the US district court judgment
22 I will just show you a few references to what sort of
23 thing we may well expect to receive will comprise. That
24 is authorities tab 37. If you go in it, please, to
25 page 3216.

1 The first point, you will be aware that one of the
2 issues in the case, one of the prime issues, is a point
3 that I canvassed with Mr Turner yesterday, which is
4 whether threats were made explicitly or implicitly and how
5 that fits in. If you look at lines 4 to 9. You have
6 an extract of the material from that man's deposition
7 for Samsung, he testifies that in 2008 when the
8 negotiations -- that's with Qualcomm -- got prolonged.
9 There's then these statements and he testifies this
10 exerts the pressure on them in relation to agreeing to
11 the patent licensing terms.

12 You see, again, if we are running a case which
13 depends on the exertion of pressure, this sort of
14 material in this case from one of the principal parties,
15 Samsung, is likely to be important.

16 MRS JUSTICE BACON: You have that.

17 MR JUSTIN TURNER: You have this already.

18 MR JON TURNER: Well, Sir, if you can guarantee that in your
19 decision you will be satisfied with that and the wider
20 context in which it sits will not affect the weight that
21 you give to it.

22 MR JUSTIN TURNER: I don't think that's an appropriate
23 submission. Again, the point arises, you are going to
24 get this material six months before. So let's assume
25 you see that the context throws light on it, you bang in

1 the Civil Evidence Act notice, presumably it doesn't
2 take long to read -- you put in the Civil Evidence Act
3 notice two weeks later. Still five and a half months
4 from trial, what is the issue exactly? And that is
5 assuming you don't get the documents early.

6 MR JON TURNER: I am going to address that point. Let me
7 just give you a couple more references on this then
8 I will directly address what you say.

9 Go to page 3217, just turn over the page, look at
10 lines 10 to 14. This is one of the points that I was
11 sketching a moment ago about the technology all being
12 essentially concentrated in the chipset. Again, that
13 sort of material was part of the discussion there and it
14 will feed into part of the evidence that will need to be
15 adduced for our trial 2.

16 Two more. If you go to page 3275 and look at lines
17 3 to 7, again Injung Lee and his deposition, here you
18 have one of the key points in the case about refusal to
19 licence rival chip makers which they say is not the
20 industry practice. We say it is. You have the witness
21 talking about a refusal to licence essentially a joint
22 venture including Samsung for chip making and again
23 therefore it is something which we think will be
24 important at the trial on abuse.

25 The final one, the final reference and then I will

1 talk about how this fits in, if you go to page 3333, and
2 you look on that page from lines 9 to 16, again this is
3 from the Lee deposition and the point there is the
4 comparison by that witness of the disparity in rates.

5 I am not now thinking about assessing the magnitude
6 in any quantitative sense but in terms of showing that
7 there is an adverse effect from the practice, that there
8 is a disparity between what Qualcomm is paid and what
9 other people are paid for a subject matter of comparable
10 value.

11 MR JUSTIN TURNER: You made this application when for these
12 documents?

13 MR JON TURNER: I am sorry?

14 MR JUSTIN TURNER: You made the 1782 application when? Just
15 remind of the date.

16 MR JON TURNER: We made it last month.

17 MR JUSTIN TURNER: Why was it not made a year ago?

18 MR JON TURNER: It was made, without waiving privilege,
19 after attempts at discussion in order to see if material
20 could be provided voluntarily.

21 MR JUSTIN TURNER: Right.

22 MRS JUSTICE BACON: How long had you spent on those
23 attempts?

24 MR JON TURNER: Well, my Lady, it has been several months
25 over which these privileged discussions have taken

1 place.

2 MRS JUSTICE BACON: How many months?

3 MR JON TURNER: I am afraid -- well, I can take
4 instructions.

5 (Pause).

6 So, my Lady, I can take instructions on the precise
7 date but in relation to when discussions were opened
8 with or sought to be opened with those parties, we
9 probably need to go back and dig in to find the precise
10 dates. I doubt that I will be in a position to give you
11 an exact statement now of when we first opened those
12 privileged discussions.

13 What Mr Williams has reminded me is that we were
14 also in parallel seeking to obtain this material from
15 Qualcomm, you will recall. The Defendant in these
16 proceedings. And it was at the July CMC last year that
17 this ran into the sand and you will recall that at that
18 CMC, we had to turn to the question of this in a more --

19 MR JUSTIN TURNER: 20 plus months before you made
20 an application under 1782 and you are now saying that
21 getting the documents six months before the trial is
22 prejudicial to you, and you should be given a further
23 indulgence. It just seems an unattractive submission.

24 MR JON TURNER: Well, I don't know if Mr Jowell is going to
25 say something, in which case I will allow him to do so,

1 but in answer to your point we, for our part, consider
2 that we have made efforts to try to get these materials
3 which are needed both from Qualcomm and over time from
4 these third parties and we have been driven to make this
5 application and we put it together essentially as soon
6 as it became clear that it was necessary to do this.

7 MRS JUSTICE BACON: If these were central, given that the
8 CPO order was made in what, July 2022?

9 MR JON TURNER: Around that time.

10 MRS JUSTICE BACON: We find it extraordinary that these
11 so-called central documents were not sought until the
12 end of last year. And it is now being said that we have
13 to hold up the entire trial timetable to wait for these
14 central documents for which your side waited for over
15 a year after CPO certification to seek formally.

16 MR JON TURNER: Well, my Lady, it is true that the formal
17 applications were made in November. It is not true that
18 we have not been seeking to obtain these materials
19 through other routes.

20 MRS JUSTICE BACON: No is suggesting -- it is the time that
21 you spent trying to get those.

22 To what extent is it possible to accelerate the US
23 process?

24 MR JON TURNER: That is dependent on one factor within
25 control of the parties in this courtroom, Mr Jowell may

1 then wish to come in, which is that Qualcomm has
2 signalled it may take an adverse or even what we see as
3 a possibly obstructive approach in US proceedings. If
4 they were to do that, for example, they say that our
5 applications are one sided and they want to make their
6 own, that that would lengthen the period of time
7 required before the US courts were able to provide the
8 documents.

9 MRS JUSTICE BACON: But if this were somehow to be
10 accelerated and Qualcomm were to remove its objections
11 how quickly could this be provided?

12 MR JON TURNER: Well, my Lady, that is within the gift of
13 the US courts.

14 MRS JUSTICE BACON: All right, but you must have lawyers who
15 have given you an estimate of how long that might take.

16 MR JON TURNER: The estimate that we have received is that
17 it may be within and it is no more clear than this,
18 a period of months to --

19 (Pause).

20 Yes, so the position is that according to the advice
21 we have received, you are looking at a minimum period of
22 six months for the order and then the provision of the
23 material to us after that. And that it is a realistic
24 scenario to be looking -- that is why we have taken
25 a period of around a year for the purpose of this

1 discussion about the timetable.

2 MRS JUSTICE BACON: Is there any other way of speeding this
3 up? For example, by making applications in this
4 Tribunal?

5 MR JON TURNER: Under the Hague convention?

6 MRS JUSTICE BACON: Well, whatever. Are you telling me that
7 there is no other way of getting these than through the
8 section 1782?

9 MR JON TURNER: My Lady, it is a very fair question. Yes,
10 we did consider that as well. The alternative is for
11 this Tribunal to make letters of request under that
12 procedure. We have sought to see whether that would be
13 faster and the advice we have received is that it
14 wouldn't. Essentially, it would be slower because it
15 would require a process here and then unravelling
16 a process which is essentially the same as the 1782
17 procedure.

18 We have therefore taken the course which seems to be
19 the fastest way in which we can get material that is
20 important for the claim.

21 MRS JUSTICE BACON: And there is no way to get those
22 documents from Qualcomm by a similar process to that
23 which you have deployed in relation to the Korean
24 documents?

25 MR JON TURNER: Qualcomm are saying that these documents are

1 covered by protective orders. They are saying the
2 burden is on us to try to deal with this, that they
3 don't have any obligation to assist actively to get
4 these documents.

5 So, yes, my Lady, again, we have been thinking about
6 this very anxiously and for a long period of time. I am
7 therefore only able quite gently to push back at the
8 suggestion that we have essentially sat on our hands
9 because there have been a great number of efforts.

10 MRS JUSTICE BACON: Well, all right. But it still remains
11 to be explained why those efforts took more than a year
12 with the size of the legal teams that you have.

13 Can I hear from Mr Jowell?

14 MR JON TURNER: Yes.

15 MRS JUSTICE BACON: One thing that I would like everyone to
16 consider in this courtroom: if you were given a choice
17 between June next year and October next year, which
18 would you go for? I would like an answer for that when
19 Mr Jowell has finished his submissions now.

20 MR JOWELL: I am grateful. If I could just make first a few
21 points.

22 The first is that we very much share the Tribunal's
23 regrets about the delay in making this application. For
24 the record, we informed the claimants, I think a year
25 ago, that they should be making a 1782 application if

1 they wanted these documents. It is simply not in our
2 power to provide these documents, they are with external
3 lawyers who are subject to a protective order who cannot
4 for fear of criminal sanction in the United States
5 provide these documents. Either to us, I understand, or
6 to the other side. We have made that clear for a very
7 long time and this is the process. For reasons we
8 simply don't understand they have delayed and delayed.

9 That is all very regrettable but we are where we are
10 and from our point of view, as a Defendant, what we do
11 wish to avoid is a situation where we are bounced into
12 a trial where we are provided with a huge slew of
13 potentially relevant documents which we won't have seen
14 before in terms of this legal team or our witnesses and
15 our experts just before trial. That would be the
16 epitome of an unfair --

17 MR JUSTIN TURNER: Is five and a half months just before
18 trial?

19 MR JOWELL: Well, it is very close to trial because one has
20 to consider, first of all, that these documents are
21 going to be very voluminous potentially, potentially
22 thousands of documents. Somebody then has to review
23 them, you then have to have witnesses who are mainly
24 located in San Diego who have day jobs and we have to
25 find slots to discuss these documents with them if they

1 are relevant to their witness evidence. They have to be
2 shown to the experts, the economists.

3 We have spoken to the economists and they say, well,
4 we understand that our role is not purely to look at
5 things wholly in the abstract. We are also as other
6 cases have recently said in this Tribunal they have to
7 show curiosity to how the parties themselves looked at
8 the commercial logic of their own arrangements.
9 Therefore, they feel that they are obliged to look at
10 the detail of how counterparties to these negotiations
11 looked at their respective positions and give their
12 opinions in light of that.

13 So we are understandably reluctant to go through
14 a process where we have initial witness statements,
15 initial expert reports, which are then supplemented --

16 MR JUSTIN TURNER: These are negotiations Qualcomm is
17 a party to. You are going to adduce fact evidence from
18 eight witnesses.

19 MR JOWELL: Eight or ten.

20 MR JUSTIN TURNER: About these negotiations and you are
21 saying a document may have come to light which hasn't
22 been fully digested by those witnesses and their
23 evidence is going to be so off-beam that even in five
24 and a half months, they can't --

25 MR JOWELL: Well, one has to bear in mind, the documents

1 have to be identified, that could take -- if there are
2 thousands of documents that can take a process of weeks
3 or even longer. Then you have to find time to discuss
4 it with the witnesses, then the witnesses' evidence has
5 to be provided to the experts, then the experts have to
6 provide their reports, then you might have to have reply
7 reports and you are bang up against the trial.

8 I think we looked -- we thought about this
9 previously and the view we came to was that eight months
10 is the reasonable minimum for that process to be gone
11 through. You are effectively going from disclosure all
12 the way through to trial.

13 MRS JUSTICE BACON: But you are already saying that your
14 witnesses of fact, their statements are going to be
15 provided in January 2025 in circumstances where you
16 anticipate that the American documents might not be
17 available until January 2025.

18 MR JOWELL: I think we were rather hoping they would be
19 available. We were thinking the year would last until
20 the end of December. Actually that brings me to another
21 point, if I may, which is this.

22 From our point of view, there is another issue here,
23 which is: what if the American documents don't appear
24 within the year? What happens then? We consider does
25 the trial go off? This is -- there is no margin for

1 error here and if the trial doesn't go off and they come
2 in, say, March, then we are well and truly ambushed and
3 we are all going to be ambushed by the slew of new
4 documents and the need to give new evidence.

5 So if you are going to go down this route then we do
6 say there needs to be a sort of drop dead date by which
7 if the documents from 1782 don't arrive then they are
8 excluded from the trial or it is agreed that the trial
9 will go off. Because what one can't really fairly have
10 is a situation where we'd go through them -- we suddenly
11 have to digest thousands of documents on the eve of the
12 trial. That would be manifestly unfair.

13 MRS JUSTICE BACON: Is there anything the Tribunal can do to
14 hurry along the process in the States?

15 MR JOWELL: That is -- again, if I can come on to that.

16 First of all, we are not objecting to their
17 applications. Their applications are not against us,
18 they are against Apple and Samsung. All we are doing or
19 plan to do, may do, is to bring a parallel application
20 that, if you like, in our view mirrors their application
21 and somewhat completes the picture in relation to these
22 documents so that we don't get a one-sided slew of
23 documents.

24 We do not anticipate that that should delay
25 proceedings and it is standard process. Insofar as our

1 application comes after theirs, then one can deal with
2 that at the time.

3 MRS JUSTICE BACON: When are you going to make that
4 application?

5 MR JOWELL: We are hoping to do it within the next month.

6 MRS JUSTICE BACON: Month?

7 MR JOWELL: Yes, it requires -- these are -- bringing
8 an application against -- oh, two weeks.

9 MRS JUSTICE BACON: That sounds more reasonable.

10 MR JOWELL: One has to bear in mind these are very large
11 counterparties. They are enormous dominant companies,
12 they are our main trading partners and it is no small
13 thing to bring any form of application against these
14 very powerful companies.

15 MRS JUSTICE BACON: That will be done by the end of January.

16 MR JOWELL: Yes but what could be done, you ask, in order to
17 expedite proceedings in the United States? What we
18 would suggest is that as a general matter applications
19 for specific and limited classes of documents are
20 normally accorded quicker and more favourable treatment
21 through the 1782 applications, as one would expect.

22 Therefore, if the claimants were to cut down their
23 application so that it applied to narrower classes of
24 documents and ones in particular that did not require
25 new searches to be carried out by Apple and Samsung,

1 then there would be a higher chance of this being done
2 and dusted quickly.

3 MRS JUSTICE BACON: We have seen that some of the documents
4 sought were simply depositions, et cetera. Those ought
5 to be able to be provided very quickly.

6 MR JOWELL: Yes.

7 In terms of whether we would prefer mid June
8 or October, I think inherently we would prefer the later
9 date but there are availability issues wherever it is
10 placed.

11 MRS JUSTICE BACON: Well, I am afraid we cannot list this
12 for the convenience of counsel in Trucks.

13 MR JOWELL: That is fully understood.

14 MRS JUSTICE BACON: And we are not going to do so. If that
15 means that counsel will have to be replaced, then that
16 is just the way it is going to fall. The Trucks trial
17 may fall away. Many of these do.

18 MR JOWELL: Indeed.

19 MRS JUSTICE BACON: Is that Trucks 3?

20 MR JOWELL: Trucks second wave, I think it is called.

21 MRS JUSTICE BACON: Right. Well, whatever.

22 It would be wholly inappropriate for to us list this
23 for after Trucks on the basis of counsel conflict given
24 the high rate of settlement of cases and on that basis
25 we would make progress with no competition cases because

1 the competition Bar is so overloaded at the moment.

2 So you would prefer October. What is Mr Turner's
3 answer?

4 MR JON TURNER: If it is a choice between those dates, we
5 would prefer October with the same constraints.

6 MRS JUSTICE BACON: All right.

7 (Pause).

8 All right. Thank you for your submissions on both
9 sides. What I would like would be a revised timetable
10 to trial, targeting a start date in October 2025.

11 I think for your purposes you should assume the start
12 of October as in the start of the legal year. We will
13 have to look at panel availability to see when precisely
14 that works from the Tribunal's perspective.

15 MR JON TURNER: Yes.

16 MRS JUSTICE BACON: A trial of absolute maximum, at this
17 point, five weeks. I am not saying that we are going to
18 give you five weeks. At this point, this is an outside
19 generous figure and it may be that at the next CMC that
20 is cut down. But we will say for the moment pencilling
21 in a window of five weeks. Not including pre reading.
22 So five weeks from the first day of the trial.

23 MR JON TURNER: May I make, to close this off, two
24 observations arising from the debate we have just had?

25 You were interested in what might accelerate the US

1 procedure. There are two things that have been
2 mentioned or two things that I will now mention, one of
3 which was discussed, which in our view would.

4 The first is if Qualcomm does make its parallel
5 application saying that ours is one sided, then that
6 will increase the time taken for this to be resolved in
7 the US. You have not heard any reason why -- well, you
8 have seen it -- ours is said to be one sided. It isn't.
9 And therefore we would suggest that unless you are given
10 some solid reason why there is a legitimate need to do
11 this it would be a matter that you might seek to
12 discourage.

13 The second point is that we consider again that,
14 although we wouldn't be adopting the letter of request or
15 Hague convention approach but using this instead, were
16 the Tribunal able to give some written indication,
17 a letter or a ruling that could be produced in the US to
18 the US courts, that might affect the speed with which
19 the judicial officials there dealing with this process
20 the application.

21 MR JUSTIN TURNER: Is there a reasonable prospect this will
22 be refused? Do the parties have a view on that?

23 MR JON TURNER: We don't see that there is. We don't know
24 what objections are going to be taken, what is going to
25 be said by Apple. Samsung have indicated so far that

1 they are objecting to the matter on certain grounds that
2 seem to us to be incorrect. That has just come in. So
3 I am not in a position to say whether that is
4 a realistic prospect or not. What we can say is
5 a realistic prospect is that both Apple and Samsung may
6 say, well, we are not going to cooperate with this.
7 Mr Jowell is correct to have made that submission.

8 Therefore, to come back to what I was saying, of
9 those two points if the Tribunal felt able A, to
10 discourage Qualcomm unless it can give you a legitimate
11 reason why it says this is one sided, that could be of
12 assistance; and secondly, some written letter or ruling
13 from the Tribunal may be of assistance in persuading the
14 judicial officials in the United States.

15 MRS JUSTICE BACON: Well, firstly, I don't think it is
16 appropriate for us to say anything about an anticipated
17 application on the part of Qualcomm which we haven't
18 seen. Nor could we give a ruling. I don't know what
19 the lis would be for us to give a ruling on.

20 I did have in mind that if the parties requested it
21 we might be able to consider, for example, sending some
22 kind of letter, but to whom? I think that might be
23 something for the parties to discuss after the hearing
24 and if thought appropriate the parties could jointly
25 write to us with a request as to what we should do and

1 a draft of what they think the Tribunal might, if so
2 advised, send. We can then consider that.

3 I will leave that with the parties.

4 What I am going to say is that the parties will need
5 to provide, along with the order from today's hearing,
6 a draft trial timetable which leads to a trial starting
7 at the start of October, whenever the start of the legal
8 term is in October 2025. Obviously, that can be amended
9 as we go along, in particular at the next CMC.

10 There are, however, several steps which will need to
11 take place before that CMC. So, for example, the third
12 row of your draft timetable: the Class Representative to
13 set out matters of fact from the decisions and opinions
14 in foreign proceedings that it intends to rely on at
15 trial, that should be February 2024.

16 There is probably not much further progress save for
17 the next row. In relation to the hearsay evidence,
18 relating to the documents that have already been
19 provided or will be provided in the next lot of
20 disclosure from this hearing, I don't see why there
21 shouldn't be an interim statement on the basis of those
22 documents provided by, say, the start of July 2024. And
23 of course that can be added to once the American
24 documents come in, but I don't see why a statement of
25 the matters relied on from the documents that everyone

1 already has needs to wait for another year or up to
2 another year.

3 Those are the two steps which I think would need to
4 happen before the July CMC, in any event. Is there
5 anything else that anyone suggests we ought to put in as
6 a fixed date before the July CMC?

7 MR JON TURNER: Well, there are two points that cropped up
8 yesterday which I just mention in case the Tribunal is
9 interested in dealing with those as well. The first is,
10 and we discussed it a moment ago too, the Padilla
11 analysis. It was said, well, why can't they get on with
12 that? This simple correlation analysis doesn't depend,
13 as we understand it, on anything further being needed.
14 That is something which could be progressed and we would
15 want the information on which that is to be provided to
16 be given to us beforehand and then Dr Padilla's analysis
17 when it can be done.

18 MRS JUSTICE BACON: All right. So when could Qualcomm
19 provide the information on the basis of which the
20 Padilla analysis will be carried out?

21 MR JOWELL: I think that information has essentially been
22 provided already. It is essentially the licence
23 agreements.

24 MRS JUSTICE BACON: All right.

25 MR JOWELL: If there is anything else, we could aim to

1 provide that by July. But the analysis itself is going
2 to take a little time and I do know that Dr Padilla has
3 some availability issues in the first half of this year.
4 So we would prefer that to be in the autumn of this
5 year. But we have no objection to giving that, as it
6 were, in advance and in advance of the American
7 documents.

8 MRS JUSTICE BACON: So we could possibly return to the date
9 of the Padilla analysis at the next CMC but I think,
10 provisionally, I think we should be looking at a date of
11 no later than 1 October 2024.

12 MR JOWELL: Can we say with liberty to apply, as it were?
13 Because we need to check with him.

14 MRS JUSTICE BACON: Yes, well, we could come back to that in
15 the next days after you have checked in with him.

16 MR JOWELL: We are grateful.

17 MRS JUSTICE BACON: Before the order is finalised but if it
18 is going to slip beyond that, given the quite
19 circumscribed scope of that and he will no doubt have
20 assistance from people in his team, I would be surprised
21 if it needed to wait longer than that, that is already
22 nine months from now for an analysis which in principle
23 ought to be capable of being done now.

24 MR JOWELL: Yes. That is taken on board. Absolutely.

25 MRS JUSTICE BACON: Is there anything else?

1 MR JOWELL: I was just not clear two points. One is I think
2 we do need a date by which if the other side is to
3 change horses from Mr Noble to Professor Shapiro we need
4 to know and then for any provision of alternative
5 methodologies to be provided.

6 MRS JUSTICE BACON: Well, should I say then by the end
7 of February if either Which? wants to change from
8 Mr Noble to somebody else or if Qualcomm wants to change
9 from Padilla to somebody else, you should notify the
10 other side?

11 MR JOWELL: Together with, I think, any replacement
12 methodology.

13 MRS JUSTICE BACON: Yes.

14 MR JON TURNER: That is acceptable.

15 MR JOWELL: Thank you. Also do you intend us to -- for the
16 timetable beyond July, do you want us to provide that to
17 you now, as it were, or does the Tribunal want to wait
18 until the next CMC?

19 MRS JUSTICE BACON: Well, I think for the timetable
20 beyond July I think it would be provisional to be
21 reviewed at the next CMC but I think what we need to do
22 now is for everybody to have in mind the dates going
23 forward because I don't want to come to a point in July
24 at which we discuss doing something and everyone says,
25 oh no, that is much too quick, we hadn't got in mind

1 that we would have to do it by then.

2 That is why I think now we already need to have
3 a provisional timetable leading up to a start date
4 of 1 October, which can be then tweaked as required
5 going forward.

6 MR JOWELL: We are grateful. Does the Tribunal have a firm
7 view of a preference for witness statements followed by
8 supplemental witness statements after the US
9 proceedings? Or are we free to, as it were, put in as
10 a witness statement should in the ordinary way go after
11 the disclosure from the US proceedings?

12 MRS JUSTICE BACON: Well I think the parties can discuss
13 that.

14 MR JOWELL: I am grateful.

15 MRS JUSTICE BACON: What I do question is why the expert
16 reports need to await or at least some of them need to
17 wait for the witness evidence because in particular all
18 of the technical experts that ought to be capable of
19 being dealt with already.

20 MR JOWELL: Understood.

21 MRS JUSTICE BACON: It is very unclear why that needs to
22 await even the American materials.

23 MR JOWELL: Understood. If appropriate we can make
24 proposals for that presumably in the autumn.

25 MRS JUSTICE BACON: In the autumn of this year, yes.

1 MR JOWELL: On the sequential basis you indicated.

2 MRS JUSTICE BACON: On the sequential basis indicated
3 yesterday for some of those experts, not all of them.

4 MR JON TURNER: My Lady, two final points. The other thing
5 that was discussed yesterday, which we provisionally
6 said we thought would be very helpful, and I don't think
7 there was push back, was the idea of an agreed statement
8 of facts being produced.

9 MRS JUSTICE BACON: I think where we came out was that
10 rather than doing that we would have the sequential
11 exchange of the expert reports on the issues which were
12 likely to be less controversial. Because we saw that as
13 likely to be more efficient and requiring less back and
14 forth between the lawyers than trying to do an agreed
15 statement.

16 MR JOWELL: That is what we understood from your ruling
17 yesterday.

18 MR JON TURNER: The way that we see this efficiently working
19 I think Mr Saunders referred to provision on their side
20 first, he called it a position paper, on which we could
21 comment.

22 MRS JUSTICE BACON: Well, no that was a proposal which was
23 ventilated as one of the options. In the end our
24 decision was to have sequential exchange of some of the
25 expert reports on the basis that that would eventually

1 amount to much the same thing. Andrews, for example,
2 and I think Williams will go first.

3 MR SAUNDERS: Yes I think that was the proposal. If it
4 avoids lawyers worrying about other lawyers, which is
5 always the concern. Experience shows these things are
6 never quite as easy to sort out, as you might imagine.

7 MRS JUSTICE BACON: Your proposal had been in any event that
8 the draft agreed statement would be drafted by those
9 experts so it seems sensible, rather than trying to
10 involve the lawyers in agreeing something which may be
11 very difficult to agree, simply having those experts set
12 out the position in their own words and insofar as that
13 is not agreed then the corresponding expert on Which?'s
14 side can comment on it.

15 MR JON TURNER: Yes, my Lady, finally then on the issue of
16 sequencing, just to be very clear about this, what we
17 did discuss was that the Padilla analysis should go
18 first on the economic side. For the remainder, our
19 position and I can just develop it a little bit further
20 now is that there should be simultaneous exchange so --

21 MRS JUSTICE BACON: No, that was not what was ordered. The
22 Padilla analysis -- we have dealt with this already,
23 Mr Turner, yesterday. The Padilla analysis will go
24 first and then the response to that. In relation to the
25 remainder of the competition analysis, the competition

1 economic analysis, the order was that the Which? expert
2 should go first, followed by the Qualcomm expert.

3 That is water under the bridge. That was the
4 discussion yesterday and I don't really want to return
5 to matters we have already discussed.

6 MR JON TURNER: My Lady, I fully accept that. May I just
7 make a point that I was unable to make yesterday which
8 is an important one, which is that part of the abuse
9 case involves the positive allegations on Qualcomm's
10 side that it is not abusive because of objective
11 justification and efficiencies. In such a case where
12 the positive case is being made by that party, for them
13 to go second is going to cause problems.

14 It is not something I had the opportunity really to
15 draw to your attention yesterday but it is something
16 which I think is very important and otherwise is going
17 to lead to a suboptimal outcome in terms of the --

18 MR JOWELL: If I may, we don't agree because there is
19 provision -- at least there was provision -- in the
20 draft timetable for reply reports and then after that
21 for agreed statements of agreement and disagreement, so
22 we don't see that is a problem.

23 MRS JUSTICE BACON: What is the current pleaded case on
24 efficiencies and objective justification?

25 MR JOWELL: We do plead objective justification but it is

1 very much a secondary case. Our primary case is that
2 there is no abuse to begin with. Well, there is no
3 abuse, nothing that requires objective justification or
4 if you like the objective justification is itself part
5 of the assessment of whether there is any prima facie
6 anti-competitive effect.

7 MRS JUSTICE BACON: Mr Turner, if there is something you do
8 not understand as to their pleaded case you could
9 presumably ask for further information on that. In the
10 normal way you will have the opportunity to do a reply
11 report. It seems to me that that ought to deal with the
12 issue.

13 MR JON TURNER: Well, my Lady, we will deal with that if
14 necessary. In terms of asking for further information,
15 there is a difference between asking for the pleading to
16 be clarified and receiving their report which we respond
17 to.

18 MRS JUSTICE BACON: Yes.

19 MR JON TURNER: Mr Jowell said it can wait until the joint
20 statements. I have been in that situation on a number
21 of occasions, the joint statements should not be the
22 occasion for a further expert report, effectively.

23 MRS JUSTICE BACON: Well, this is not going to happen at any
24 rate before July, so as I have said the timetable
25 beyond July will be provisional only. I don't think it

1 is sensible without having even seen what you propose in
2 terms of a draft timetable for the Tribunal to be taking
3 a view on exactly when everything is going to occur, so
4 we can come back to this, but provisionally the order is
5 as stands from yesterday.

6 MR JON TURNER: I understand.

7 MRS JUSTICE BACON: All right.

8 MR JON TURNER: The final point on this is just to note that
9 on the technical side Mr Saunders said before the lunch
10 adjournment when we finished the debate on this that
11 there were these various pairings. You provisionally
12 have questioned certain aspects of that. So far as
13 relevant here, for example, our expert Dr Schneider is
14 going to be dealing with industry expert material and
15 some of that will be the contextual material which will
16 feed into the work that we discussed.

17 Other parts of what he is dealing with, including
18 the interchangeability of chipsets between different
19 generations and across regions and so forth, does not
20 fall into that category. So I am simply putting a marker
21 down that it is not as though the expert evidence of at
22 least Dr Schneider will be contained fully within that
23 first report. It may be that there are two reports that
24 need to be produced.

25 MRS JUSTICE BACON: I see. Well, again, I haven't seen

1 a detailed statement of when everything after July is
2 anticipated to be provided. If following further
3 discussions you think that it is more efficient for
4 there to be a different sequencing, then you can no
5 doubt either provide that in the draft timetable or come
6 back to this in July. But I think it is sufficient for
7 us to say at this point we anticipate that the technical
8 evidence ought to be dealt with in the autumn if there
9 is no reason why it should be held up behind the US
10 application.

11 MR JON TURNER: My Lady, I am obliged.

12 As far as we are concerned, the only remaining
13 matters are the funding point that you indicated before
14 the short adjournment today, which Mr Williams will deal
15 with, and then I have a specific observation on case
16 management between now and the next CMC that is
17 scheduled in July.

18 MRS JUSTICE BACON: All right. Before we deal with funding
19 is there anything that Qualcomm wants to say about the
20 trial timetable?

21 MR JOWELL: Nothing further, thank you.

22 MRS JUSTICE BACON: All right.

23 Discussion re funding

24 MRS JUSTICE BACON: So, funding. The only point to really
25 make is that we don't consider that it is for the

1 Tribunal to endorse the litigation funding agreement.
2 We consider that the terms of the agreement are a matter
3 for the Class Representative and its litigation funders.
4 Qualcomm has not objected to those terms, we have not
5 raised any objection to those terms of our own
6 initiative on the Tribunal's side, so the position is,
7 as we see it, that there is simply nothing for the
8 Tribunal to determine on that at this point.

9 MR WILLIAMS: Thank you, Madam. I think we agree. The only
10 reason for raising the matter is that when the matter
11 was certified, the Tribunal authorised Which? on the
12 basis of a package of material, one strand of which was
13 the litigation funding arrangement. That has now been
14 changed and we simply wanted to make sure that the
15 Tribunal was fully sighted of that point.

16 MRS JUSTICE BACON: Of course. Quite properly.

17 MR WILLIAMS: Before we executed those revised agreements.

18 MRS JUSTICE BACON: Yes.

19 MR WILLIAMS: If the Tribunal -- we have addressed the issue
20 with Qualcomm, we have put it before the Tribunal, if
21 the Tribunal is content, we are content to proceed on
22 that basis.

23 MRS JUSTICE BACON: Well, therein lies the rub. I don't
24 think it would be appropriate for us to say the Tribunal
25 is "content with" when nobody has raised any objection

1 to the litigation funding agreement. Our position is we
2 don't see a need at this point to make any ruling
3 because there is no objection either from Qualcomm or
4 raised by the Tribunal.

5 MR WILLIAMS: I am sorry to tell the Tribunal there was no
6 issue and then to reintroduce the issue. I didn't mean
7 to suggest you were approving anything, I simply meant
8 we have put the position before you and told you what we
9 are going to do and absent anything else we will carry
10 on in that way.

11 MRS JUSTICE BACON: Yes. Mr Jowell.

12 MR JOWELL: We, for our part, recognise the wisdom in the
13 Tribunal's non-intervention, particularly because we do
14 observe that solely our judgment in this matter has
15 been -- permission to appeal has been granted in
16 relation to it, so of course we must reserve our rights
17 to come back to this in light of any judgment of the
18 Court of Appeal.

19 MRS JUSTICE BACON: Yes.

20 MR JOWELL: Not waive, of course, our rights. So we don't
21 object to the current (inaudible).

22 MRS JUSTICE BACON: Thank you. Yes, and Mr Turner, then,
23 you wanted to make a point about case management.

24

25

1 Discussion re case management

2 MR JON TURNER: Yes. This is a general observation and it
3 follows on from the decisions that have just been made
4 about the way forward at the trial. We currently have
5 in the diary -- or we are proposing to have -- a CMC six
6 months away in July. In view of the debate that you
7 have heard over the last two days, including over the
8 question of the approach to rate setting in this field,
9 it is very likely that there may be requests for
10 decisions by the Tribunal in the period before the next
11 CMC, rather than it all stacking up.

12 So this is really to say that we expect that there
13 may well be requests for decisions, some of which you
14 will feel able to deal with on paper, in other cases
15 there may need to be hearings.

16 MRS JUSTICE BACON: Right. I take it you are not asking for
17 Friday breakfast CMCs with juniors going forward?

18 MR JON TURNER: Well ... Unless croissants are provided,
19 no. We don't expect it will be anything like the
20 regular clinics at 8 am in the morning.

21 MRS JUSTICE BACON: All right. But it may be that if
22 further hearings are needed those go into the diary ad
23 hoc as and when. And it may be appropriate to send
24 junior counsel along to those hearings.

25 MR JON TURNER: Yes.

1 MRS JUSTICE BACON: If markers are put down, that is one.
2 I should also put down a marker we have been very
3 pleased to hear from junior counsel at this hearing. We
4 would like to hear from junior counsel at future
5 hearings and we would be even happier if we heard from
6 junior counsel on both sides. I am sure that everyone
7 will take that comment to heart.

8 Another point on counsel. There is a very large
9 number of counsel before the Tribunal for this CMC. It
10 does seem to us that the CMC could be dealt with by
11 a smaller number of counsel on each side. Of course
12 there may be points which one or other member of the
13 counsel team has been beavering away on and that person
14 could be on a WhatsApp or telephone if issues arise
15 which cannot be dealt with. But if we continue to see
16 very large teams of counsel at the CMCs we may consider
17 recording formally in the order for the benefit of
18 a costs assessment that we don't consider it was
19 necessary for the hearing to be attended by more than
20 a specified number of counsel on each side.

21 So you will obviously consider that.

22 We understand that there may be a division of work
23 between the counsel teams, so if it is the case that we
24 are hearing from three counsel, there is more of
25 a justification from that than if the majority of

1 counsel are not saying anything.

2 So that is an exhortation for proportionality going
3 forward in the number of lawyers appearing in front of
4 us.

5 Is there anything else that needs to be said, apart
6 from determining when we are going to get a draft of the
7 order?

8 MR JOWELL: Not from our point, other than to say that your
9 exhortation is heard loud and clear. Of course, things
10 may be more efficient than they appear on the surface.

11 MRS JUSTICE BACON: Yes, of course.

12 In terms of the order, would it be possible for us
13 to be sent a draft of the order, a minute of the order
14 from today and yesterday, agreed insofar as is capable
15 of agreement, by close of business on Friday?
16 Indicating, if there is disagreement on any aspect, what
17 the parties respective positions are. I have in mind
18 that either that could be put in the comment boxes or in
19 a very brief cover email. That should also include,
20 again agreed as far as possible, the draft timetable
21 leading up to October next year. Then we will obviously
22 consider any areas of disagreement on the order and send
23 you a finalised draft order, hopefully next week.

24 MR JOWELL: Yes, of course. It is always difficult in these
25 situations because sometimes one doesn't get the draft

1 order from the other side until one hour before close of
2 business, and then one is scrabbling. I don't know if
3 it is possible to give carriage to one side or the
4 other?

5 MRS JUSTICE BACON: Who is volunteering to do the first
6 draft?

7 MR JOWELL: I think we are content to do the first draft.

8 MRS JUSTICE BACON: Why don't you send that to the other
9 side by close of business tomorrow.

10 MR WILLIAMS: On the applications that we have made and
11 succeeded on, I am not standing on ceremony but it would
12 be conventional for us to draft the orders that we have
13 obtained through our applications.

14 MRS JUSTICE BACON: All right, I won't make an order.

15 MR WILLIAMS: Maybe we can talk about it.

16 MRS JUSTICE BACON: You can talk about it. Perhaps first
17 drafts on each side could be sent by no later than close
18 of business tomorrow, so there is not a risk of this
19 being run up to the wire on Friday.

20 I am just conscious that, in previous cases in this
21 Tribunal, sometimes it has taken a while for the order
22 to be sent, and I think it is appropriate just to
23 crystallise what is agreed and what is not, and then the
24 Tribunal can decide on the points of disagreement rather
25 than the parties racking up costs trying to agree it

