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IN THE COMPETITION

Case No. : 1382/7/7/21

APPEAL

TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 29th July 2025

Before:
The Honourable Mrs Justice Bacon
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Consumers' Association

Class Representative

v

Qualcomm Incorporated

Defendant

A P P E A R A N C E S

PHILIP MOSER KC, MICHAEL ARMITAGE,
(On behalf of Consumers' Association)

DANIEL JOWELL KC, NICHOLAS SAUNDERS KC, DAVID BAILEY
(On behalf of Qualcomm Incorporated)

1 Tuesday, 29 July 2025

2 (10.30 am)

3 Housekeeping

4 MRS JUSTICE BACON: Can you just bear with me, Mr Moser,
5 while I sort out my screen set-up?

6 MR MOSER: Of course.

7 (Pause).

8 MRS JUSTICE BACON: Thank you very much. I will just -- do
9 you want to call the case on?

10 I'm just going to start with the customary warning
11 for those who are joining us live stream on the website.
12 An official recording is being made and an authorised
13 transcript will be produced, but it is strictly
14 prohibited for anyone else to make an unauthorised
15 recording, whether audio or visual, of the proceedings
16 and breach of that provision is punishable as contempt
17 of court. Yes, Mr Moser, thank you.

18 MR MOSER: My Lady, thank you.

19 I'm appearing with Mr Armitage. My learned friends
20 Mr Jowell, Mr Saunders and Mr Bailey are here for
21 Qualcomm. The lady at the end is Mr Bailey's pupil, in
22 case you're wondering.

23 There is an agenda for today which is in the core bundle,
24 tab 1, page 3. Certainly my proposal is that we go
25 through the agenda in turn, although some points are

1 going to be more contentious than others. I see
2 there's, very helpfully, the screen. It may well be
3 that the thing has happened that shouldn't happen, that
4 the numbering of the bundles has been overtaken by
5 an index. We shouldn't be looking at the index, we
6 should be looking at the first substantive page of the
7 core bundle.

8 MRS JUSTICE BACON: Can you just tell me -- I have my bundle
9 saved separately. Can you just tell me which bundles
10 I should have? Because I can then start to open them.

11 MR MOSER: Yes.

12 MRS JUSTICE BACON: Can I just tell you what I have and you
13 can tell me if any of those are not likely to be needed
14 or if, in fact, I do not have anything that you do need.
15 So I have a core bundle.

16 MR MOSER: Yes.

17 MRS JUSTICE BACON: I have an application bundle, that's
18 separate to that.

19 MR MOSER: That's been overtaken.

20 MRS JUSTICE BACON: That's been overtaken. All right. Let
21 me just ...

22 Is -- okay, is that because it has been incorporated
23 into something else?

24 MR MOSER: Yes, in the core.

25 MRS JUSTICE BACON: All right.

1 Now, let me just check that the core bundle I have
2 is the same as the one that you have. I have 163 pages.
3 Is that right?

4 MR MOSER: That's sounds right.

5 MRS JUSTICE BACON: All right. Correspondence bundle, and
6 my correspondence bundle is 190 pages.

7 MR MOSER: Yes.

8 MRS JUSTICE BACON: Then I have a supplemental bundle,
9 which, while that is uploading, I also have a tab 65 to
10 the supplemental bundle, which seems to be an Excel
11 spreadsheet. And I have a second supplemental bundle.

12 MR MOSER: Yes.

13 MRS JUSTICE BACON: And then --

14 MR MOSER: All of those are relevant.

15 MRS JUSTICE BACON: All of those are relevant. Then I have
16 an authorities bundle which I have separately. And
17 I will be using electronic versions of all of these, by
18 the way, and my authorities bundle is 1,140 pages. Is
19 that all correct?

20 MR MOSER: That is correct. I rather hope that we won't be
21 going too intensely to authorities, but you never know.
22 That is certainly relevant. We may refer to them,
23 depending on how things go, because there's been
24 a certain outbreak of agreement on some points.

25 MRS JUSTICE BACON: That's good.

1 MR MOSER: So one can rehearse some of these points at
2 greater length or simply seek to cut through.

3 MRS JUSTICE BACON: All right. Well, as I indicated in the
4 letter sent to you yesterday, I think that it would be
5 appropriate to go through the items in the agenda more
6 or less in the order on the agenda. Not least so that
7 anyone who is only here for the exciting discussion of
8 the trial timetable and expert reports can then be
9 released.

10 MR MOSER: Yes.

11 Indeed, I'm grateful.

12 We've resisted the temptation of bringing someone
13 just for that purpose, so I'll do the best I can.

14 Discussion re witnesses

15 MR MOSER: I will just dive straight in. Point one on the
16 agenda is witnesses. We have a not very exciting
17 submission on that, which is we intend to cross-examine
18 all of Qualcomm's witnesses of fact and expert
19 witnesses. There is a question mark -- well, not
20 a question mark, there is a disagreement, to some
21 extent, between the parties as to the industry and
22 technical experts, mainly about how long they might
23 take, but that might be more a question for trial
24 timetable in a moment.

25 MRS JUSTICE BACON: Yes, I think that probably is. In

1 relation to the -- in relation to the witnesses, is
2 there still some disagreement about the days on which
3 the factual witnesses are cross-examined?

4 MR MOSER: I don't believe so. There was some
5 disagreement -- again, it will become clear once we look
6 at the trial timetable under point 2 -- as to whether we
7 can be more than one day with --

8 MRS JUSTICE BACON: I see.

9 MR MOSER: -- one of their witnesses. We've never said that
10 we would limit ourselves to a maximum of one day.

11 MRS JUSTICE BACON: All right, that's probably for the trial
12 timetable, so we'll get on to it.

13 So you're going to be cross examining all of the
14 factual witnesses.

15 Mr Jowell?

16 MR JOWELL: We're in the same position.

17 MRS JUSTICE BACON: All right. The order in which the
18 witnesses will be called, is that agreed?

19 MR JOWELL: Yes.

20 MR MOSER: Well, both of which, two witnesses of fact,
21 Mr Grubbs and Mr Blumberg, are due to be cross-examined
22 on a single day, and we're calling Mr Grubbs first.

23 MRS JUSTICE BACON: All right. So, is there any issue to be
24 resolved on that? Is there -- or is everyone agreed as
25 to what the running order is?

1 MR JOWELL: I think, subject to the issue of Mr Rogers's
2 evidence and the trial timetable, and that's really
3 a question of the Tribunal's -- whether the Tribunal can
4 grant us or Mr Rogers the indulgence of sitting on the
5 Friday.

6 MRS JUSTICE BACON: Yes, I'm very happy for that.

7 MR JOWELL: I'm very grateful, thank you.

8 MRS JUSTICE BACON: We can go straight to that point then.

9 MR JOWELL: Yes.

10 MRS JUSTICE BACON: I'm very happy to sit on the Friday of
11 that week rather than the Thursday, and we will then
12 treat the Thursday as the non-sitting day. I understand
13 that's because Mr Rogers's limited availability. All
14 right.

15 MR MOSER: That's all agreed.

16 MRS JUSTICE BACON: Yes.

17 Now, then the next question is the time that is
18 devoted to the cross-examination of Mr -- is it Gonell
19 or Gonell or something else?

20 MR JOWELL: Gonell.

21 MRS JUSTICE BACON: Neither of my pronunciations was right.

22 Okay, Mr Gonell and -- Mr Katouzian?

23 MR JOWELL: Katouzian, yes.

24 MRS JUSTICE BACON: Okay, all right. My provisional view is
25 that they are called in the order in which you have

1 specified. Is Mr Gonell going first?

2 MR JOWELL: Yes.

3 MRS JUSTICE BACON: All right. Well, it seems to me that,
4 if there are two days allocated for those witnesses, it
5 is very much for Mr Moser and Mr Williams as to how long
6 they take with those witnesses.

7 MR JOWELL: Understood, yes.

8 MRS JUSTICE BACON: All right. So I'm not going to mandate
9 that the cross-examination of each witness is going to
10 be completed within a day. It may be that Mr Gonell has
11 to make himself available too -- in case his
12 cross-examination goes -- goes on to Tuesday. Is he
13 being called first?

14 MR JOWELL: Yes, he is.

15 MRS JUSTICE BACON: All right. I think he'll just have
16 to -- he'll just have to be prepared for his
17 cross-examination to go over into the Tuesday.

18 MR JOWELL: And book his flight --

19 MRS JUSTICE BACON: And book his flight accordingly.

20 MR JOWELL: Yes.

21 MRS JUSTICE BACON: All right. So that deals with that.

22 The next question is the -- is there anything else
23 on the timetabling of the factual witnesses before we
24 get into the somewhat thornier issue of the experts?

25 MR JOWELL: I don't think so, no.

1 MR MOSER: I don't think so.

2 Discussion re experts

3 MRS JUSTICE BACON: So, on the experts, the first question
4 is whether the industry expert should be -- the
5 technical and the industry expert should be
6 cross-examined at all. Let's start with the technical
7 experts. The panel -- and I say this meaning the panel
8 and not just me -- we have looked, in overview, at all
9 of the expert evidence, I should say, and we've had
10 a discussion of this between ourselves. So I'm speaking
11 not merely for myself, but, obviously, I'm -- I am going
12 to have to make the decision today on my own.

13 We do have considerable reservations about the
14 volume of technical and industry expert put before us.
15 I understand that those reservations are also shared by
16 the Defendant team, from the comments that have been
17 made in the Defendant's skeleton argument.

18 Speaking for ourselves, there seems to be a very
19 considerable volume of very technical evidence which
20 does not appear to be relevant to the issues for
21 determination in this case. When we gave permission for
22 industry and technical evidence to be provided, we had
23 in mind that the vast majority of it was likely to be
24 uncontroversial. We needed that evidence by way of
25 background material only. It was not likely to be the

1 front and centre of the -- of the evidence that was
2 going to be necessary to decide the case. What we have
3 now is something along -- something approaching
4 180 pages of extremely technical industry and technical
5 evidence, that's a total of the three joint expert
6 statements, before one even starts to look at the
7 underlying expert report, which, for the avoidance of
8 doubt, I have no intention of pre-reading the underlying
9 industry and technical expert reports before the trial,
10 there simply is not time. We're going to get to the
11 pre-reading list, but just let it be said now there is
12 absolutely no way, in the week of pre-reading, I'm going
13 to have time to go back and read all of the original
14 industry and expert reports -- and technical expert
15 reports. At the very most, at the very, very most,
16 I will be reading the three joint expert statements on
17 that.

18 But, as I've just said, the evidence in those
19 178 pages is much too technical, much too detailed, and
20 goes way beyond the issues that we -- the evidence that
21 we need to decide the case. As evidence of which, the
22 economists make barely no mention of it. So this has to
23 be got under control because I am not having Tribunal
24 time wasted on a vast morass of evidence which is
25 completely irrelevant.

1 So let's just try and get this under control at this
2 PTR so that we don't have to spend a huge amount of time
3 dealing with this in our pre-reading, at the trial in
4 cross-examination, and following the trial.

5 So that's my little homily to start off with. Let's
6 start off with the industry experts.

7 Mr Moser, what is your -- sorry, technical
8 experts -- that is Ingers, Andrews, and Ingers,
9 Williams.

10 MR MOSER: Yes.

11 MRS JUSTICE BACON: What -- how much of that is relevant?

12 How much of it is actually disputed? Because we are
13 struggling to work out from the blue and green what is
14 actually disputed as opposed to here's something that
15 I am not going to address because I don't think it's
16 relevant. That's not helpful to us. And how much of it
17 needs to be the subject of cross-examination at the
18 trial?

19 MR MOSER: I will answer that question in half a minute.

20 The introduction to that is that we don't disagree
21 with the thrust of your homily, ma'am, and it seems to
22 us -- I can say straight out -- that the one and a half
23 days currently in the timetable turns out to be vastly
24 excessive, so a lot of time can, I think, be saved.

25 We do not, however, think that we can do entirely

1 without cross-examination. As far as the technical
2 evidence is concerned, I think there's a suggestion in
3 the other side's skeleton argument -- I make no
4 criticism of this -- it's suggested that it's all
5 somehow agreed, and I can see, if one looks at the
6 technical reports, it's not entirely transparent.

7 It is not all agreed, there are some material points
8 of disagreement. However, they do not relate to some
9 granular analysis of the licences and how they work.
10 It's principally, as far as our case is concerned, about
11 the justification that is advanced by the other side for
12 the way that they license at the end rather than at the
13 mid-point of the -- of the markets. So this question of
14 manufacturers, chipsets versus handsets, the main point
15 of interest, as far as our case is concerned, is the
16 refusal to license those manufacturers in the middle.
17 And it goes to a number of issues. But our case is that
18 that buttresses the no licence, no chips policy that's
19 at the heart of the case.

20 For this purpose, it's not just a question of where
21 the licence is granted, a chipset or handset, it's the
22 terms around that approach. So, for instance, Qualcomm
23 doesn't only grant licences at the handset level rather
24 than the chipset level, but it also prevents rival
25 manufacturers selling to unlicensed customers, and so

1 forth.

2 So that's about restrictiveness.

3 They say that RTL, as it's been abbreviated --
4 refusal to license -- is justified by various
5 considerations and one is the standard essential patents,
6 the SEPs, and that they're not implemented in the chip
7 but somehow elsewhere in the handset. They say it's
8 right to license in the handset and not the chip.
9 That's an issue that needs to be explored not for one
10 and a half days, but it needs to be explored in
11 cross-examination with the technical experts.

12 Another issue concerns how the ETSI framework
13 operates and whether it contemplates licensing at device
14 level or otherwise.

15 The technical evidence does go to that. So, it's
16 relevant to whether this is a legitimate business
17 practice, so that's relevant to the abuse, whether, as
18 we say, it serves to buttress NLNC in the claims of
19 justification for RTL, which --

20 MRS JUSTICE BACON: I'm not sure that the technical experts
21 should be giving any evidence on whether it's
22 a legitimate business practice; that's for the industry
23 experts.

24 MR MOSER: But we want to explore with them the technical
25 matters that underlie the question of whether it's

1 legitimate or otherwise.

2 MRS JUSTICE BACON: The technical matters should be largely
3 uncontroversial. And looking at the technical expert
4 reports, it is very, very difficult for us to see what
5 is actually disputed as a matter of technical fact.
6 There are vast swathes of blue and green and, when
7 I read them, I am asking myself, how can this be
8 a matter of dispute? Either it's factually correct or
9 it's not. It seems to be a lot of what is actually blue
10 and green is not because it's disputed as a matter of
11 fact, but is disputed as matter of relevance or nuance
12 or characterisation, and that's just not helpful for us
13 because there is a lot of material in that which we
14 cannot tell if it is disputed, actually disputed, as
15 a matter of technical fact and, if so, why. And
16 that's -- you know, that is, unfortunately, where we
17 have got to following, no doubt, a very lengthy and very
18 expensive process of producing these, but at the moment,
19 those reports are not helpful to us and we cannot see
20 what it is exactly that is going to be the subject of
21 cross-examination.

22 So, what do you propose to do to enable us to see
23 very clearly what is actually relevant and what, of the
24 material that is relevant, is actually disputed as
25 opposed to being a matter of argument in due course?

1 MR MOSER: But what may be useful -- I don't want to turn
2 this into a whole sort of separate exercise -- but what
3 may be useful is to present, either at the time of our
4 skeleton arguments or earlier, the issues that we say
5 are going to be usefully explored in cross-examination
6 with the industry and technical experts, explaining why.
7 Without giving -- we're not going to give
8 pre-advertising of all of our cross-examination, but in
9 broad terms explaining where we're going to go; for
10 instance, we're not going to go into all of the
11 licences, we're not planning an excessively technical
12 cross-examination.

13 MRS JUSTICE BACON: In which case, can't you just delete
14 all -- I mean, judicious use of the "delete" button is
15 always welcome in this Tribunal. Can you just not
16 delete all of the stuff from the joint expert statements
17 that isn't actually relevant and doesn't need to be
18 decided, or is essentially not disputed and you can just
19 say it in one sentence rather than a page?

20 MR MOSER: Perhaps, but I'm not going to do it on my feet,
21 with respect.

22 MRS JUSTICE BACON: No, of course you're not, but what
23 process are we going to follow to ensure that we don't
24 have to read swathes of completely irrelevant material?

25 MR MOSER: Suffice it to say, we're happy to, as I say,

1 pre-advertise the parts that we say are going to be
2 relevant and the parts that we consider ought to be
3 pre-read. I'm entirely with you, with respect, that it
4 will not be necessary to read all of the underlying
5 material.

6 MRS JUSTICE BACON: No, but even if we're talking about the
7 joint expert statements, if you are actually saying
8 a lot of that is irrelevant, it just needs to be
9 deleted.

10 MR MOSER: Well, I'm not necessarily conceding a lot of it
11 is irrelevant because it forms background to the case
12 and it's going to form background --

13 MRS JUSTICE BACON: No, that's no good. We can't just be
14 reading -- I mean, our time is limited. We are all
15 busy. And I'm not going to have put before the Tribunal
16 material that is irrelevant. If it's in the joint
17 expert statement, it should be there because it is
18 relevant and it should be setting out clearly what is
19 disputed and is not.

20 MR MOSER: Well, we hear you loudly and clearly, ma'am.
21 I think I can only repeat my offer that we produce, at
22 an appropriate time to be confirmed, an explanation of
23 what we say is material and what needs to be pre-read
24 and what can be excised.

25 MRS JUSTICE BACON: All right.

1 Can I hear Mr Saunders on this point?

2 MR SAUNDERS: My Lady, I think the -- my learned friend is
3 right that this came into the case in relation to the
4 issue of end device licensing, so are there
5 justifications which we have pleaded for device -- for
6 licensing at the end device level, rather than at the
7 chipset level? So that is, as it were, kind of the
8 broader pleaded issue.

9 Where this has ended up via the expert economist
10 evidence is that the high point is at paragraph 6.33 of
11 Mr Noble's eighth statement that says:

12 "I do not comment on whether the risks associated
13 with multi-level licensing set up by Qualcomm are
14 [materialising factors]."

15 So this is turning into a very substantial
16 sideshow --

17 MRS JUSTICE BACON: Yes, it sounds like --

18 MR SAUNDERS: -- which -- now, I should say that, actually,
19 what was -- it seems part of the reason for the dispute
20 is that the approach that Qualcomm's experts have taken
21 is to look at some of the Qualcomm patents that examine
22 whether they read onto an entire device or just the chip
23 and the approach that Dr Ingers has taken is to do
24 something different, which is to look at the standards
25 and say, "Oh, well, it seems to me these standards all

1 live -- these all relate to things that might be on
2 a chip". That is why there's a lot of coloured ink on
3 those documents, in part, because there is a certain
4 sense of it being ships passing in the night.

5 MRS JUSTICE BACON: Yes, I get that.

6 MR SAUNDERS: Now, for present purposes, does it actually
7 matter that we come to a landing on this point? Because
8 one of the things that Qualcomm says, and we pleaded, is
9 that, if you license at the chip level, everybody gets
10 into a terrible barney about what patents read onto what
11 and are they exhaustive and everything else. And you
12 can see this debate through the approaches of the
13 different experts, who, by taking different approaches,
14 have not agreed this -- these positions and resolving
15 this, resolving 25 patents or resolving hundreds of
16 pages of the standards, is just completely impractical
17 and a total sideshow.

18 But, for present purposes, the fact of the debate is
19 all we need, essentially.

20 And that is -- one can park it there.

21 MRS JUSTICE BACON: So, if you are essentially saying there
22 are various different approaches that can be taken to
23 this, one is the one taken by Mr Ingers, the other one
24 is the approach taken by Mr Andrews or Dr Andrews -- I'm
25 sorry, I'm probably misnaming them all -- that this does

1 not have to be resolved, then that is -- that is what
2 needs to be in the joint statement. That's two
3 sentences.

4 MR SAUNDERS: Well, my Lady, in a way, though, that's
5 a submission rather than -- and I'm not -- my Lady,
6 I should make it clear we're not -- we say that this is
7 one of the justifications for the device -- for the
8 practice that Qualcomm has adopted: namely, that there
9 are patents that read on to the device, and so OEMs will
10 need a licence to those patents regardless of whether
11 they're licensed. So it isn't a question of, do you
12 license at the chip or do you license at the device,
13 you've got to license at both, the chip and the device,
14 in the counterfactual.

15 So this is where -- this is how the whole debate has
16 developed.

17 Now, how can one -- I mean, the Tribunal can't come,
18 realistically, to a landing, running 25 mini patent
19 trials, which would just be, you know, a very
20 disproportionate and, frankly, impossible use of the
21 Tribunal's time.

22 Nor can it -- particularly where the positive case
23 developed by the Class Representative through its expert
economist seems
24 to place no reliance on the detail of this at all, as
25 far as the technical evidence is concerned.

1 But we do -- Qualcomm doesn't shy away from its
2 pleaded justifications for why end-level device
3 licensing is the norm and why it is appropriate to do
4 that.

5 MRS JUSTICE BACON: So how do we cut through this to get to
6 a volume of material that is (a) realistically readable
7 by the Tribunal; and (b) actually relevant, so that then
8 we can then also work out what the parameters of
9 cross-examination should be?

10 MR SAUNDERS: Well, my Lady, my learned friend suggested
11 that he might have a go cutting down what -- or
12 identifying sections that they say they want to
13 challenge. I was a little alarmed by the submission
14 a moment ago that he wants to put some of these points,
15 essentially technical points, through a sort of mini
16 cross-examination on this, because I don't understand
17 how the Tribunal could reach a view on the bigger issues
18 where the experts are quite a long way apart on this
19 question of whether there are patents that read onto the
20 device as a whole as opposed to just the chip, but, in
21 my submission, the way forward is probably for the
22 claimant to consider its position in the light of where
23 the experts -- the joint expert statement from the
24 economists has come out, and where its case is in the
25 light of its confirmation that RTL is buttressing only

1 and not an independent form of abuse, and then decide
2 the extent to which, and how, it says that this material
3 is actually necessary to challenge this material at
4 trial.

5 MRS JUSTICE BACON: Well, it's a matter for both parties
6 because, if something is in the joint expert statement,
7 it should be there because you want us to read it and
8 get to grips with it. And, at the moment, there is --
9 I do not want material to be in the joint expert
10 statement for us to have to read, if, actually, it's not
11 going to be relevant and if it's -- your point is a lot
12 of this is not going to be possible for us to resolve,
13 we just have to know that there's a debate there.

14 MR SAUNDERS: Yes.

15 MRS JUSTICE BACON: Then there's too much detail currently
16 because, at the moment, the level of detail in the
17 expert statement is assuming that we are going to have
18 to resolve some of this.

19 MR SAUNDERS: Yes. And the one thing that has not really
20 happened in the joint statement is Ingers doesn't deal
21 with whether he agrees with -- whether those patents are
22 actually practised for a device as a whole or not, save
23 for one particular patent, the call-out. So it may be
24 there is more common ground there that Dr Ingers could
25 identify.

1 But it is -- as I say, the difficulty with this,
2 really, we would say, is a question for the Class
3 Representative because it seems to us the way that the
4 case has developed through the expert economic evidence
5 is that it's not -- this is not really being relied
6 upon --

7 MRS JUSTICE BACON: The difficulty is for both of you,
8 because there are equal amounts of text in blue and
9 green.

10 MR SAUNDERS: Yes.

11 MRS JUSTICE BACON: So, somehow, that has to be corralled so
12 that we are not presented with a document that has
13 material that, realistically, we're not going to be able
14 to determine and, actually, which you are not asking us
15 to determine on the facts. As you say, if it's ships
16 crossing in the night, what on earth are we going to be
17 able to do with that?

18 So I think there is more than a process of simply
19 identifying areas that may be the subject of
20 cross-examination. How are you going to reduce the
21 expert reports on these points to points that we
22 actually need to pre-read and understand and reflect in
23 our decision, at the end of the day, and to remove
24 anything which we don't need to pre-read and we don't
25 need to decide? What -- can you just have a discussion

1 and give me an indication as to what you propose to do?

2 (Pause).

3 MR SAUNDERS: Well, I mean, one way to do this is to get the

4 experts back together, of course.

5 MRS JUSTICE BACON: I'm happy for you to take instructions.

6 MR SAUNDERS: I think, my Lady -- I mean, we can do this by

7 reference to pleaded issues, and so on, but my concern

8 is the ships passing -- I mean, what you see through the

9 evidence is you identify two different shipping lanes,

10 essentially.

11 MRS JUSTICE BACON: Yes, and that's not going to be the

12 subject of productive cross-examination, I don't think.

13 MR SAUNDERS: I think it's difficult to see, as we've

14 already foreshadowed in our skeleton argument, how, you

15 know, the fact that I may have a killer blow against

16 that particular approach doesn't mean that my learned

17 friend doesn't have one against another approach.

18 That's the difficulty.

19 MRS JUSTICE BACON: Yes.

20 MR SAUNDERS: So --

21 MRS JUSTICE BACON: Look, I am happy to direct that the

22 experts should be required to get back together again

23 and re-do their joint expert, because, at the moment --

24 I'm just going to say this again: the joint expert

25 statements, at least in relation to the technical

1 industry experts, are not useful to us, and I am not
2 willing for them to be put before the Tribunal in the
3 form that they currently are.

4 MR SAUNDERS: My Lady, is your concern particularly in
5 relation to the technical evidence? Because there are
6 obviously two joint statements in relation to that.

7 MRS JUSTICE BACON: We'll come on to the industry experts.
8 The industry experts have problems of a different order.

9 MR SAUNDERS: So that's -- maybe we'll deal with that in
10 a moment.

11 MRS JUSTICE BACON: We'll deal with that separately. Let's
12 start off with the technical experts.

13 Do you want me to rise for a few minutes while you
14 have a discussion between yourselves?

15 Let me just flag the problem with the industry
16 experts: the industry experts contain a lot of material
17 that is pure advocacy. I'm not going to -- I'm not
18 going to single out specific passages. You will be able
19 to recognise it when you see it. I've drawn your
20 attention to the provisions of the 2014 Guidelines. And
21 Practice Direction 35. As matters stand, there is
22 material there -- I would say the same is true, to some
23 extent, of the technical experts, but particularly
24 industry experts -- I look at it and I see two experts
25 who are arguing their clients' cases. I am very

1 concerned about where we go with this at trial.

2 If material goes in which is pure advocacy, one or
3 both of two things may happen: one, at the end of the
4 day, the Tribunal may decide that the evidence of
5 a particular expert is completely unreliable and will be
6 disregarded, and you will end up having spent a lot of
7 money and time on evidence which, ultimately, the
8 Tribunal rejects out of hand because it is pure
9 advocacy; secondly, the costs of producing the expert
10 evidence may be completely excluded. I've done that in
11 a recent case. The Tribunal is willing to do that
12 again. If we get to the conclusion that the evidence of
13 one or more experts is completely unreliable because it
14 is advocacy and this is not independent, those are
15 remedies which the Tribunal may resort to.

16 It's not -- that's not useful to the Tribunal or the
17 parties, for us to draw those conclusions. It's not
18 useful for us to have expert evidence before us which is
19 in flagrant breach of the provisions of the CPR on
20 experts' objectivity and independence and of the 2014
21 Guidelines. And there is material which, at first
22 blush -- I'm saying this provisionally, obviously
23 I haven't been able to read it in detail -- but it jumps
24 out of the page to me and the other members of the panel
25 as being of that category.

1 So I'm very concerned about that evidence and what
2 we're going to do with it. I do not want to get to
3 a trial and find ourselves feeling that we cannot rely
4 on the evidence of, in particular, the industry experts
5 because this is not objective enough.

6 So that's another concern that we have about that
7 joint statement and the evidence of those experts. As
8 I say, that's a different problem. They also have the
9 problem of ships passing in the night, to some extent.

10 So I'm going to rise for, say, five minutes, I'll
11 leave you to discuss what you propose to do, but it is
12 quite clear to me that if we are going to rely on any of
13 this, and especially if there's going to be
14 cross-examination, those joint expert statements are
15 going to have to be refiled. They are going to have to
16 be refiled on a timetable that works, bearing in mind
17 we're only a few months away from trial right now.

18 All right. So I'll rise --

19 MR MOSER: Before you rise, ma'am, so I can say this in
20 open -- so it establishes where we start our
21 discussions, it's very well for my learned friend to say
22 "ships in the night" and "total sideshow", but those are
23 phrases. The most important technical dispute is the
24 one about RTL that I mentioned. There is a real issue
25 here, but it's raised by them. It's the location issue,

1 it's whether the components of a mobile device are
2 outside the baseband chipset, and that is disputed by
3 our expert. So we don't intend to cross-examine on
4 everything, and that's what we're going to discuss. But
5 that, for instance, is an important point that they
6 raised. They brought all of the expert evidence on it.
7 It seems now that it hasn't gone as well as they thought
8 as a knockout point, or whatever, and they now say,
9 well, it's all a sideshow. They could withdraw that
10 technical evidence, if so. That's one way of
11 proceeding. And it means their pleadings are deleted.
12 This isn't something we've raised.

13 MRS JUSTICE BACON: I was not saying all the deletion, if
14 there is to be deletion, should be only on one side.
15 I was specifically making the point that it is both
16 sides that need to work together on this and actually
17 present, realistically, evidence to the court that we
18 need to decide and not evidence which it is acknowledged
19 goes to points that we are not going to be able to
20 decide. So I'm absolutely not pointing the finger --
21 I know Mr Saunders tried to say this is all your
22 problem. I'm not going to go there. Where I want to go
23 is to get to a point where we have the evidence that is
24 actually necessary for the case.

25 Do you want me to just rise for five or ten minutes

1 so you can have a discussion?

2 MR MOSER: That would be very helpful.

3 MRS JUSTICE BACON: Thank you.

4 (11.10 am)

5 (A short break)

6 (11.20 am)

7 MRS JUSTICE BACON: Yes, Mr Moser.

8 MR MOSER: Yes, well, I'm glad to say that we're agreed on

9 the course of action.

10 MRS JUSTICE BACON: Good, thank you.

11 MR MOSER: That we would do this.

12 It seems to us that the best procedure for it is

13 going to be lawyer-led, so that the legal advisers make

14 clear the points, however many there may be, and that

15 there may be relatively few high-level points on which

16 the Tribunal is going to be assisted by

17 cross-examination. Then take that in quite a focused

18 way to the experts so that they can look again at what

19 they've said, knowing this time exactly what we're

20 actually interested in.

21 So, in a sense, a two-stage procedure.

22 MRS JUSTICE BACON: So your proposal is that between you

23 you'll get together, indicate what is actually required.

24 That will enable the experts to reduce what is currently

25 said --

1 MR MOSER: Yes.

2 MRS JUSTICE BACON: -- to what is actually needed -- to what
3 you agree is needed for the trial?

4 MR MOSER: Yes. There may, of course, be an element of
5 disagreement. It may be we think something is required
6 and they don't, and it would be useful for it not to
7 matter, so all the points that either party wants to put
8 to the experts may be put.

9 MRS JUSTICE BACON: Yes, obviously because you won't, at
10 this point, necessarily agree on relevance.

11 MR MOSER: Yes.

12 MRS JUSTICE BACON: But can I ask this: are you both agreed
13 with my suggestion that there is irrelevant material in
14 the joint expert statements or do you actually both --
15 does one or both of you disagree with that statement?

16 MR MOSER: I don't think there's disagreement on that, in
17 the sense of, shall we say, no longer relevant or not
18 going to be in focus.

19 MRS JUSTICE BACON: Yes.

20 MR MOSER: I don't know -- we haven't discussed that.

21 MR SAUNDERS: It's a little bit -- on the pleaded issues, it
22 is relevant. On the way the case has developed in the
23 economic evidence, it is no longer of concern. I think
24 that is where we are.

25 MRS JUSTICE BACON: Yes, all right.

1 MR SAUNDERS: But --

2 MRS JUSTICE BACON: No, I understand your position.

3 MR SAUNDERS: Essentially, their case -- because we see the
4 case through the lens, in a part of Mr Noble's reports
5 and --

6 MRS JUSTICE BACON: Yes, of course. So it's contracted once
7 one looks at the economic evidence.

8 MR SAUNDERS: Yes.

9 MRS JUSTICE BACON: All right. So your proposal is that,
10 having seen what is actually now required in terms of
11 the technical background to set up the submissions based
12 on the economic evidence, you are both going to,
13 I think, say, collaboratively, the lawyers will get
14 together and indicate to the experts what is and what is
15 not required in terms of their evidence, and they're
16 then going to reduce -- I'm not envisaging that they
17 will go away and do any more work, but they will simply
18 reduce what is there.

19 MR SAUNDERS: Hopefully, hit the "delete" key on quite
20 a chunk of it that we can agree on, insofar as neither
21 of us say it's of any particular relevance now, that
22 some points can come out.

23 MRS JUSTICE BACON: So what we'll then have is a set of
24 revised joint expert statements, which can hopefully
25 supersede the original ones, so we then don't need to

1 look at the original ones anymore.

2 We'll focus on the revised ones for trial. Those
3 will, hopefully, be a good deal shorter than the
4 original ones. What would be useful in that is, in the
5 sections that are currently in blue and green, can
6 a very hard look be taken at each and every sentence in
7 those sections to determine what is actually disputed?

8 Now, if there is something that is not disputed as
9 a matter of fact, but is simply disputed as a matter of
10 relevance, it can be turned black, it's not a disputed
11 point, but then somewhere you can have
12 a footnote saying, "It is not disputed as a matter of
13 fact but not believed to be relevant", if you -- if one
14 person insists on this remaining in the joint expert
15 statement. If it's not -- if you both agree that it's
16 not relevant, it can come out.

17 MR SAUNDERS: Yes.

18 MRS JUSTICE BACON: But, at the moment, as I've said, what
19 I see there is text which I don't actually think is
20 disputed as a matter of fact, and then it makes it very
21 difficult for us to see what we want to get out of the
22 cross-examination if we don't actually know what is
23 definitively disputed as a matter of fact or not.

24 MR MOSER: Yes.

25 MRS JUSTICE BACON: All right. Can I -- so there's

1 a lawyer-led process. Revised joint expert statements
2 will be produced. Then we're talking about the three
3 industry and technical statements.

4 MR SAUNDERS: My Lady, the position in relation to the
5 technical evidence is possibly slightly different to the
6 industry -- the concern that my Lady expressed a moment
7 ago in relation to the industry experts.

8 MRS JUSTICE BACON: So were you just talking about the
9 technical --

10 MR SAUNDERS: My learned friend was just addressing the
11 position on the technical evidence.

12 MRS JUSTICE BACON: Before moving off of that, when do you
13 propose producing the revised technical statements?
14 What timetable works?

15 MR SAUNDERS: Hopefully, the end of August.

16 (Pause).

17 MRS JUSTICE BACON: It's plainly going to have to be
18 in August and not into September. The question is how
19 much of August do you need?

20 MR SAUNDERS: Yes. I mean, part of the difficulty is we
21 don't know what the experts' availability is over August
22 and that can sometimes be a problem.

23 MR MOSER: We had envisaged the procedure would be the same
24 for the industry and technical experts. So I wasn't
25 just talking about the technical. But I think there was

1 a different point my learned friend has on guidance in
2 relation to --

3 MR SAUNDERS: I think the guidance, my Lady, I think --
4 well, there's the question of dates on the technical
5 evidence first --

6 MRS JUSTICE BACON: Let's deal with dates and technical
7 evidence first, then we'll come to the industry
8 evidence.

9 MR MOSER: We have a proposal of completing the whole
10 process by 10 September, which is two weeks before
11 skeletons.

12 MRS JUSTICE BACON: That's too late, I think.

13 MR SAUNDERS: Well, we would suggest end of August, subject
14 to expert availability. If we have a major problem that
15 someone is completely unavailable or something, then
16 we'll have to come back. But I'm concerned --

17 MRS JUSTICE BACON: Yes, I think end of August, at the very
18 latest. I mean, at the very latest, 29 August, if you
19 think that will give you enough time. I should flag
20 that we think that we probably need to get the skeletons
21 by 19 September, not the 23rd, as proposed. So just
22 bear that in mind. But the end of August would give you
23 three weeks and you would, of course, already have had
24 considerable input into that process in terms of
25 identifying what needs to be done.

1 MR MOSER: We can do that, I think, in relation to the
2 technical -- our industry expert --
3 MRS JUSTICE BACON: Let's stick with the technical experts.
4 MR MOSER: Right.
5 MRS JUSTICE BACON: So revised technical joint expert
6 statements will be produced by 29 August. All right.
7 Now, Mr Moser or Mr Saunders, what is your proposal
8 regarding --
9 MR SAUNDERS: So, as far as the industry experts are
10 concerned, as I understood, the Tribunal's concern is
11 that the -- that there is advocacy on the part of both
12 experts --
13 MRS JUSTICE BACON: Well, there is --
14 MR SAUNDERS: -- in the joint statement.
15 MRS JUSTICE BACON: Yes. It seems to me there is advocacy
16 in the joint expert statement and, as I say, I'm not
17 going to single out particular passages. There is --
18 though that -- the industry expert joint statement is
19 also, it seems to me, too long and containing material
20 which, again, is not going to be required, so there has
21 to be something of the process of in the light of the
22 economic evidence and the way that the case has come
23 out, having a hard look and seeing what is actually
24 needed. So that process should happen as well. But
25 what about revising this with a view very firmly in mind

1 as to the requirements which all of the experts have
2 signed up to in terms of the CPR requirements?

3 MR SAUNDERS: Well, my Lady, I think the way forward on that
4 is, obviously, we have my Lady's indications this
5 morning from the Tribunal. We can draw the attention to
6 the experts again in relation to the guidance and what's
7 required of them, and have a discussion -- with your
8 leave, have a discussion with them about what is
9 required, and then have liberty to refile, if they
10 consider it appropriate to do so. I mean, ultimately,
11 that's a question -- we can't cajole them into doing
12 that, but we can indicate, my Lady, the Tribunal's
13 concerns --

14 MRS JUSTICE BACON: Yes.

15 MR SAUNDERS: -- and what needs to be -- the sort of things
16 that are being identified.

17 MRS JUSTICE BACON: Yes.

18 MR SAUNDERS: Hopefully, that will help move that process
19 forward. So, in a way, it is possibly a two-step
20 process on much the same lines as my learned friend was
21 indicating, although a sidestep of which is drawing the
22 experts' attention to the requirements in the Tribunal
23 guidance and the CPR.

24 MRS JUSTICE BACON: Yes. Mr Moser, did you have anything to
25 say about that?

1 MR MOSER: All I have to say is that -- an availability
2 issue with Mr Schneider, who is back on 3 September,
3 hence it will either have to happen very quickly or
4 there would have to be, say, time until around about
5 10 September.

6 MRS JUSTICE BACON: When is Mr Schneider going to be away
7 from?

8 MR MOSER: He's away from 21 August.

9 MRS JUSTICE BACON: Well, all right, then. It's going to
10 have to happen before then. So -- just to be clear, the
11 industry experts will have to go through the same
12 process in terms of relevance --

13 MR MOSER: Yes.

14 MRS JUSTICE BACON: -- and disputed material, but, in
15 addition, I think it would be helpful if, on both of
16 your sides, you looked at the evidence carefully through
17 an independent and objective lens and look very
18 carefully at all of the guidance and draw relevant
19 paragraphs of that to the attention of your respective
20 experts.

21 MR MOSER: Just to be clear, ma'am, of course relevance is
22 not entirely about cross-examination; there will be
23 agreed things that are highly relevant.

24 MRS JUSTICE BACON: Obviously, yes. I mean, if there are
25 agreed relevant things, that's --

1 MR MOSER: Even better.

2 MRS JUSTICE BACON: We originally envisaged that most of
3 these reports would be (a) agreed and (b) relevant. The
4 problem is getting reports a large amount of which is
5 not agreed and query how much of it is relevant.

6 MR MOSER: Exactly.

7 MRS JUSTICE BACON: So we obviously do want the agreed and
8 relevant material. All right. So if we say the
9 industry experts, they are going to have to go through
10 the same process, and if it happens that Mr Schneider is
11 away from 20 August, we can work to the deadline of the
12 29th, but it may be that that expert joint expert
13 statement needs to be filed before Mr Schneider goes
14 away.

15 MR MOSER: Yes.

16 MR SAUNDERS: My Lady, I should make clear we don't -- I'm
17 afraid I don't presently have instructions about
18 Mr Melin's availability, but hopefully we can work
19 to the same date.

20 MRS JUSTICE BACON: Yes. All right.

21 MR MOSER: My Lady, I'm grateful.

22 On the common ground point as to what we do about
23 the trial timetable in the meantime, may I suggest
24 leaving in one day for now pro tem?

25 MRS JUSTICE BACON: A total of a day?

1 MR MOSER: A total of a day.

2 MRS JUSTICE BACON: For all of those experts?

3 MR MOSER: Yes.

4 MRS JUSTICE BACON: Yes, that's what also, provisionally,
5 I had in mind. At the moment, there's one and a half
6 days. Let's leave in a day in total. I would expect
7 that, insofar as you needed that day, you were -- as
8 I currently see it, and obviously I will wait to see
9 what you produce with the joint experts -- but I would
10 envisage that you are going to want to spend more of
11 that with the industry experts than with the technical
12 experts. And I envisage that's certainly what the
13 Defendant's position is. I understand your position
14 that you don't want to dispense entirely with
15 cross-examination, but -- so I'm not going to hold you
16 to a time allocation, but, at the moment, it seems to me
17 that it's going to likely focus more on the industry
18 than the technical experts.

19 So that then concludes, I think, agenda item 2(c).

20 MR MOSER: It does.

21 MRS JUSTICE BACON: All right.

22 MR MOSER: Unless -- were there other points on ...?

23 No, the next point on the agenda, I think, is
24 hearsay. I was wondering whether there was more on the
25 timetable?

1 MRS JUSTICE BACON: Do you want to get into the timetable
2 for the hot tub now? Because I do have a proposal from
3 the panel on this.

4 MR MOSER: Oh, yes.

5 Discussion re timetable for hot tub

6 MRS JUSTICE BACON: So we have discussed the hot tub and our
7 provisional view at this point, which, subject to
8 discussion now, will need to be reflected in the trial
9 timetable.

10 The provisional view is that we will need two and
11 a half days in the hot tub. We won't specify what of
12 that is directed to specific issues that will come out.
13 We then propose a total of a day for cross-examination,
14 so that's half a day for each side.

15 MR JOWELL: Well, we -- for our part, my Lady, we don't --
16 we think there is time for -- if one's only spending
17 a half a day on the industry expert -- sorry, a day on
18 the industry and technical experts, that does leave one,
19 then, two-and-a-half days for the hot tub. But, for our
20 part, we will struggle to be able to adequately
21 cross-examine the economists on all of the different
22 topics, and bear in mind there are -- there's not just
23 abuse, there's also dominance, there's also the
24 leveraging aspects of royalties and so on. Within
25 a day, I think that is going to be -- within half a day,

1 that is going to be too constrained, in our respectful
2 submission.

3 We do think that -- the hot tub, of course, is
4 a relatively useful way of elucidating their evidence in
5 discussions with the Tribunal members, but it doesn't,
6 in our submission, detract from the utility of
7 an adversarial process with cross-examination, which is
8 essential, really, in our submission, to a fair trial.

9 MR MOSER: I respectfully agree with and adopt the
10 submissions of Mr Jowell.

11 MRS JUSTICE BACON: All right. How much have you got in the
12 timetable at the moment? At the moment, it's two and
13 a half days and then --

14 MR JOWELL: Then we have a one and, I think, a one and
15 a quarter day each in the present. And if we are
16 doing -- as I said, if we are doing only the one day on
17 the industry --

18 MRS JUSTICE BACON: Well, I don't think you should
19 necessarily assume that time reduced should be added
20 on -- for one expert should be added on to another
21 expert, because it may be that there is simply more time
22 elsewhere in the trial for, for example, preparation of
23 the closing submissions or that we bring the trial to an
24 end a day forward.

25 MR JOWELL: No, but I think the one part that isn't -- we

1 wouldn't suggest is a good economy is to cut down
2 further on the cross-examination of the economists,
3 I mean, that is -- in a sense, that's very important.

4 MRS JUSTICE BACON: Right, your proposal was that there
5 should be two and a half days between you on
6 cross-examination and two days in the hot tub. If we're
7 going to increase that to two-and-a-half days in the hot
8 tub, then it seems that that should reflect a reduction
9 in the time for individual cross-examination.

10 I think, provisionally, at this stage, then, I will
11 say a maximum of one day on each side cross-examination.
12 And we will keep that under review. Because it seems to
13 me that that cross-examination should not simply be
14 a rehearsing of the matters that have gone over in the
15 hot tub, because the purpose of the hot tub is to get
16 the economists' evidence on the points we're asking
17 about. So it's not useful if you simply rehash the same
18 ground to try and get a better answer to that.

19 MR JOWELL: Well, I think the purpose is to have
20 an opportunity to try and put the case, and to -- it is,
21 in a sense, to elicit their full evidence, which may not
22 be possible -- which won't necessarily be elicited
23 through the type of questioning that comes from the
24 Tribunal. I mean, it may be that the Tribunal will
25 cross-examine the experts, but it may be that the

1 Tribunal won't. And, therefore, it may be necessary to
2 go back through the same ground.

3 MRS JUSTICE BACON: All right. For the time being, I will
4 say a maximum of a day each side, but I think that will
5 need to be kept under review and we may have another
6 discussion about that at the start of the trial, when we
7 have seen the skeleton arguments, and when we've had
8 a proper opportunity to look at the joint expert
9 statements.

10 MR JOWELL: Of course.

11 MRS JUSTICE BACON: All right.

12 MR MOSER: Of course, ma'am.

13 On the day, who knows? It may be possible to sit
14 a little bit early, or whatever, and do it that way
15 without having a whole extra day.

16 MRS JUSTICE BACON: Yes. I think that, on both sides, those
17 who are involved in that aspect of the cross-examination
18 will need to keep carefully under review what is
19 necessary for you to actually put to the experts. If the
20 expert's full position has been given already in the hot
21 tub, then I don't think the Tribunal is simply going to
22 allow you to have another go, as I said, to get a better
23 answer that might be more favourable to your case.

24 MR MOSER: That's heard loud and clear.

25 MRS JUSTICE BACON: All right.

1 Is there anything else that needs to be said before
2 we move on to 2(d)? And especially, is there anything
3 else that Mr Saunders needs to be here for?

4 MR SAUNDERS: Well, my Lady, I was planning to be here all
5 day. I'm on brief at trial, so I'm not -- I can leave
6 the hearing room, if necessary, but --

7 MRS JUSTICE BACON: I'm not going to dismiss you, but,
8 equally, there may be things that are more useful for
9 you to do if you're not needed for the remainder of the
10 hearing. Of course you can stay here if you really have
11 nothing else better to do.

12 MR SAUNDERS: I mean, I don't want to get into the division
13 of labour within the case more generally, but it's not
14 perhaps as siloed as my learned friend sees it.

15 MRS JUSTICE BACON: Okay. All right. Are we --

16 MR MOSER: The only thing -- sorry. I was going to say the
17 only thing worth mentioning, perhaps, before we move on
18 to the applications, is this question of four days of
19 closing and the spillover day. That's mentioned in the
20 timetable. At the moment, if we look at page 142 of the
21 core bundle, we have week 5. And our comment there for
22 Monday to Thursday is that the Class Representative's
23 position is that the parties should have four days for
24 closing submissions and reply. So it's not just the
25 submissions, it's also the replies. And they say three

1 plus one, basically. So there's -- it's a distinction
2 without a difference, perhaps, but it's -- we think it's
3 nicer to know how long you have rather than letting it
4 just spill over into a Thursday.

5 MRS JUSTICE BACON: Yes. Our provisional view -- and,
6 again, we've discussed this within the panel -- is that
7 three days' closing submissions should be sufficient.
8 By then, we'll have had presumably quite detailed
9 written closing submissions.

10 MR MOSER: Yes.

11 MRS JUSTICE BACON: And your oral closing submissions can be
12 very focused. So I think that we should not assume that
13 in one -- well, one is simply going to flow over ad lib
14 into Day 4. So I think that you should prepare your
15 closing submissions on the basis that it will be three
16 days.

17 MR MOSER: Thank you.

18 MRS JUSTICE BACON: We can have, at this point, 6 November,
19 in reserve. But, also, it may be that the timetable
20 shifts because of earlier stages, and in particular, if
21 it turns out that the -- we don't need, say, a full day
22 with the experts on the industry and technical points.

23 MR MOSER: Yes, exactly, although I imagine it's still
24 welcome to have two reading days --

25 MRS JUSTICE BACON: Yes.

1 MR MOSER: -- for the Tribunal.

2 MRS JUSTICE BACON: Well, also, I was going to suggest that
3 that -- well, okay, given that we're on the timetable,
4 I can suggest that I think it would be more useful to
5 us -- or without getting on to now, which we'll come to
6 later, as to page lengths.

7 Provisionally, I was going to suggest that we have
8 delivery of closing submissions either by first thing on
9 the 29th or last thing on the 28th, whichever you regard
10 is better for your sleep patterns.

11 MR MOSER: Well, I think, certainly, the sleep patterns of, in
12 particular, Mr Armitage will benefit from the close of
13 business on the 29th.

14 MRS JUSTICE BACON: I was offering close of business on
15 the 28th or first thing on the 29th, so that we do have
16 three days to read the closing submissions and actually
17 make good use of the -- of that period, so that we have
18 appropriate time for discussion, and -- and we can then
19 come prepared for the oral closing submissions with any
20 questions. If we're going to get somewhat lengthy
21 written closings, I think that's going to be very
22 difficult for us to digest, particularly as a panel of
23 three, in two days.

24 MR JOWELL: May I make a suggestion --

25 MRS JUSTICE BACON: Yes, Mr Jowell?

1 MR JOWELL: -- Madam President? If we -- if it's decided
2 that we will only have three days in closing, we
3 could -- we could push those three days forward a day,
4 so that it's -- or back a day, to Tuesday, Wednesday,
5 and the Thursday. And then that would allow the
6 Tribunal to have the Monday also to read without putting
7 us under undue stress to prepare the written closing
8 submissions in just two working days, which I think
9 would be a bit challenging.

10 MRS JUSTICE BACON: It's not two working days because you
11 have, Friday, 24 October.

12 MR JOWELL: Three, that's true, but it's still, I think,
13 quite challenging, because it's hot on the heels of the
14 expert competition economists' evidence. So -- and that
15 will -- so to get over all of that, I think -- well,
16 just -- that's a suggestion, in any event --

17 MRS JUSTICE BACON: That means that we definitely --

18 MR JOWELL: -- to keep everybody happy.

19 MRS JUSTICE BACON: We will then absolutely not have an
20 extra day in reserve.

21 MR JOWELL: That's correct. But we -- we'll just have to be
22 disciplined with our oral submissions.

23 MRS JUSTICE BACON: All right.

24 I think that that is -- I think that it's preferable
25 to us having only two days to read the closing

1 submissions. I am happy to pencil that in for the time
2 being, but on the basis that, if time is saved earlier
3 in the timetable, then that will move back accordingly.

4 MR JOWELL: Of course.

5 MRS JUSTICE BACON: And we're not simply going to allow that
6 to create extra time for writing the closing
7 submissions. Because I think it would be better if we
8 could finish on 5 November.

9 MR JOWELL: Certainly. Understood.

10 MR MOSER: Thank you.

11 MRS JUSTICE BACON: So, when you prepare the adjusted
12 timetable, I think you should just note for the
13 technical and industry experts, it's up to one day, and,
14 if that is not required, then everyone else needs to be
15 prepared to start earlier. So don't get to the
16 situation where we discover that one or other expert is
17 not available to start earlier.

18 MR MOSER: Yes, that's important.

19 MRS JUSTICE BACON: And similarly, with any of the other
20 witnesses, if it goes short, we'll just motor on,
21 obviously subject to flight schedules and so on, but
22 I would rather -- I'd rather use the time effectively,
23 if we can. I don't know if that's going to be possible
24 with the factual witnesses.

25 MR MOSER: Well, the factual witnesses are earlier, so

1 I think that's not going to be a problem.

2 MRS JUSTICE BACON: Well, no, but I can see that might not
3 be possible, for example -- yes, the comment that I just
4 made may not be able to be the case because I think you
5 have a problem, anyway, because Mr Rogers can't get
6 there earlier. All right. So probably you can scrap my
7 last comment because --

8 MR MOSER: He's a fixture, so we start -- we start the
9 mobile agenda, as it were, on about the 15th.

10 MRS JUSTICE BACON: Yes. All right. Yes, that's right.
11 That's going to have to be confined to that. All right.

12 MR MOSER: Right. So that does bring us to the agenda item
13 2(d) --

14 MRS JUSTICE BACON: Yes.

15 MR MOSER: -- about hearsay notices. It is Qualcomm's
16 application of course.

17 MRS JUSTICE BACON: Let's start.

18 Hearsay application

19 MR JOWELL: May I start by briefly taking you to certain
20 principles derived from authorities, albeit I'm sure
21 that your Ladyship will be very familiar with them. The
22 first is the Nichia Corporation v Argos Ltd, which is in the
23 authorities bundle at page 109. I would just like to
24 take you, if I may, to a statement in
25 Lord Justice Jacobs's well-known comments in this case

1 on the nature of standard disclosure. If we could go to
2 page 120, please.

3 This is -- he's just mentioned the old
4 Peruvian Guano chain of enquiry test for disclosure, and
5 he says the following. He says:

6 "It is manifest that this is a much wider test than
7 that for standard disclosure. I have a feeling that the
8 legal profession has been slow to appreciate this. What
9 is now required is that following only a reasonable
10 search, the disclosing party should, before making
11 disclosure, consider each document to see whether it
12 adversely affects his own or another party's case or
13 supports another party's case. It is wrong just to
14 disclose a mass of background documents which do not
15 really take the case one way or another, and there is
16 a real vice in doing so. It compels the mass reading by
17 the lawyers on the other side, and is followed, usually,
18 by the importation of the documents into the whole case
19 thereafter, hence trial bundles, most of which are never
20 looked at. Now, it might be suggested it is cheaper to
21 make this sort of mass disclosure than to consider the
22 documents with some care to decide whether they should
23 be disclosed and, at that stage, it might be cheaper
24 just to run it all through the photocopier or the CD
25 maker, especially since doing so is an allowable cost,

1 but that is not the point, for it is the downstream
2 costs caused by overdisclosure which so often are so
3 substantial and so pointless. It can even be said, in
4 cases of massive overdisclosure, that there is a real
5 risk that the really important documents will be
6 overlooked. Where does a wise man hide a leaf?"

7 Now, pausing there, the answer there to "where the
8 wise man hides a leaf" is in the forest.

9 The point that Lord Justice Jacobs is making in that
10 last sentence is that there is a risk that the
11 litigation tactic of overdisclosure becomes a way of
12 effectively hiding documents, either a way of hoping
13 that adverse documents to the disclosing party are
14 overlooked or a way of concealing helpful documents to
15 the disclosing party so that those documents are then
16 sprung on the other side at the trial and catch the
17 other side unawares.

18 All of this is -- this is consistent with the modern
19 principle of procedure that's been familiar for at least
20 20 years now, that parties are not supposed to engage in
21 these sorts of last-minute ambush tactics. Modern
22 litigation, as we're often told, is to be conducted with
23 cards face up on the table.

24 So that's the first authority.

25 The second I'd like to show you concerns hearsay

1 more specifically, and that's in the bundle in the
2 authorities bundle at page 142. If we could go to that,
3 please.

4 This is Miller v Associated Newspapers Ltd. So if we
5 could go to page 152. We see a paragraph there,
6 paragraph 24, the hearsay problem:

7 "In this context, I should refer to the hearsay
8 evidence on which the defendant relied. It is not
9 suggested the defendant was not entitled to rely on such
10 evidence. However, looking at the matter realistically
11 the defendant sought to prove its version of events
12 without recourse to the oral evidence of the key
13 participants ... It relied, for example, on highly
14 selective extracts of statements ..." and so on.

15 Then, if we could go forwards to page 156. Forgive
16 me, page 156 -- yes, that's fine. You see paragraph 36,
17 and I think we can ignore the first sentence which
18 concerns the facts of the case. Then:

19 "In my view, however, it is unfair to the
20 individuals concerned to advance such a case in their
21 absence; and Mr Warby's submission simply underscores
22 the difficulties caused when hearsay evidence on
23 important matters is deployed in this way. As the
24 authors of Phipson on Evidence, 17th edition, say:

25 '... the Civil Evidence Act is not intended to

1 provide a substitute for oral evidence. The basic
2 principle under which the courts operate is that
3 evidence is given orally ...'"

4 MRS JUSTICE BACON: I have read to the end of that
5 paragraph.

6 MR JOWELL: I'm grateful.

7 So we say the claimants in the present case, which
8 could reach that guidance, as it were, wholesale,
9 because they rely, for a core part of their case, on
10 hearsay evidence, and they're adducing no witness
11 evidence either from Apple or Samsung, the only two OEMs
12 whose negotiations in the relevant period are relevant.

13 Now, of course, this is not the occasion on which to
14 discuss the inherent difficulties of that approach.
15 That will be a matter for trial. But what is relevant
16 for today is simply that the Tribunal should ensure, in
17 our respectful submission, that there is not unfair
18 surprise at trial by reason of a forest of hearsay.

19 Now, pursuant to the Tribunal's orders for exchange
20 of hearsay notices the claimant has served
21 an extraordinary 4,989 pages of transcripts and
22 depositions which it then says it has refined -- I put
23 that in quotes -- to a hearsay extracts table of a mere
24 1,339 pages, albeit that it states it's very keen to
25 tell us that that extracts table is non-exhaustive.

1 Now, that is equivalent to about five full --

2 MRS JUSTICE BACON: 1,339?

3 MR JOWELL: Nine, yes, pages, which it says is

4 non-exhaustive. Now that's the equivalent of about five

5 full days of testimony, and we say that must surely be

6 cut down to a sensible amount.

7 There's nothing unfair in requiring the Class

8 Representative to do that.

9 On the contrary, we say it would be profoundly

10 unfair not to cut it down. I mean, suppose that they

11 had served witness statements running 1,339 pages?

12 I mean, that would be an obvious abuse of process. And

13 the same applies here, even more so, when, effectively,

14 hearsay notices are being used as a substitute.

15 MRS JUSTICE BACON: Well, I have your submissions, you say

16 that the Class Representative should serve a table of

17 no more than 40 pages.

18 MR JOWELL: Yes.

19 MRS JUSTICE BACON: Then you serve your table of no more

20 than 40 further pages.

21 MR JOWELL: Yes.

22 MRS JUSTICE BACON: Presumably.

23 MR JOWELL: Yes.

24 MRS JUSTICE BACON: Because there's no need for you to say

25 the same ones.

1 MR JOWELL: Indeed.

2 MRS JUSTICE BACON: So, insofar as it's necessary for there
3 to be context on other points, you include those in your
4 table.

5 MR JOWELL: Yes.

6 MRS JUSTICE BACON: Then the sum totality of that is what is
7 included in the trial bundle.

8 MR JOWELL: That's our proposal.

9 MRS JUSTICE BACON: I understand. Thank you, Mr Jowell.

10 Mr Moser?

11 MR MOSER: Madam, you, of course, went straight to the heart
12 of the matter, because it's all very well to recite this
13 and for Mr Jowell to throw Peruvian Guano at me and then
14 talk about Miller, this is a completely different case
15 to the one Mrs Justice Sharp faced in Miller. They
16 chose, in Miller, only to adduce hearsay evidence when
17 they could have adduced live evidence. We're not doing
18 this by choice. This, of course -- if we're talking of
19 modern litigation, this is an emerging jurisdiction
20 where a consumer's association like Which? will not have
21 access to the witnesses.

22 MRS JUSTICE BACON: Yes.

23 MR MOSER: And it has to be dealt with by way of hearsay --

24 MRS JUSTICE BACON: I'm sorry there's lots of whispering
25 going on on the front bench. Do you mind just being

1 quiet so I can hear what Mr Moser is saying? Thank you.

2 Mr Moser? Sorry.

3 MR MOSER: What happened in this case is we have produced
4 hearsay evidence. That's all been chewed over and
5 ordered at previous CMCs. It is, in part, lengthy.
6 It's explained in our submissions why some of it is
7 lengthy because of the way it is done in the US. This
8 is not, somehow, evidence that has come out of nowhere,
9 or is untested.

10 MRS JUSTICE BACON: No, no, there's no objection to where
11 it's come from nor to its existence; the question is as
12 to its quantity. And it seems to me Mr Jowell is
13 absolutely right to say that you could never put in
14 a thousand pages of witness evidence.

15 MR MOSER: He's absolutely right. Now, they've put in about
16 75 pages of witness statements. What we propose to put
17 in is -- it's been called a "table", but what we're
18 effectively going to put in and what we're going to
19 suggest is that that table is going to contain
20 everything that you need to read.

21 MRS JUSTICE BACON: How long is it going to be?

22 MR MOSER: It's going to be no more than 100 pages. And
23 that is because we are distilling a greater amount of
24 information, including from other parties, so we're
25 having to deal -- again, this was settled in a CMC.

1 We're entitled at least to refer to other participants
2 in the market, so we're dealing with the market.
3 Obviously, principally, with Apple and Samsung. But if
4 we are not able to put in at least that amount, we say
5 we're going to be compromised. It may well --
6 MRS JUSTICE BACON: That's more than the other side's
7 factual evidence --
8 MR MOSER: That is true.
9 MRS JUSTICE BACON: -- the totality of their factual
10 evidence, and you have some factual evidence as well.
11 Why would I need 100 pages of what is hearsay? It's
12 likely to be less relevant to the issues and -- less
13 relevant and less probative. It seems to me rather
14 a lot.
15 MR MOSER: I'm going to slightly push back. I don't like
16 to, but I slightly push back on "less relevant", because
17 some of it, of course, is going to be highly relevant
18 because it's about Apple and Samsung, and the way that
19 we're proposing to do it is going to obviate the need
20 for instance to have multiple witnesses as one might
21 have in other circumstances. So they've got their
22 witnesses from Qualcomm from one party, we are
23 effectively covering multiple parties in slightly more
24 than the page number that they have. And they say they
25 want to reply in 40 pages. I mean, I have no particular

1 objection to that, but that's roughly half of what I'm
2 proposing and that seems about right.

3 MRS JUSTICE BACON: What, you are saying that you should
4 have 80 to their 40?

5 MR MOSER: Well --

6 MRS JUSTICE BACON: It's going to have to be the same on
7 either side, because you are going to select bits that
8 you rely on and they may want the same amount of other
9 bits that they rely on to put what you are relying on in
10 context.

11 MR MOSER: That's a matter entirely for you, ma'am, but I'm
12 just suggesting that, because they say that 40 is
13 adequate for them, I'm trying to find an explanation as
14 to why it's adequate for them and I say we need a bit
15 more, or maybe twice as much.

16 MRS JUSTICE BACON: What you have in mind is a document that
17 extracts the passages that you rely on?

18 MR MOSER: Yes.

19 MRS JUSTICE BACON: It doesn't need to be in tabular format.
20 In fact, landscape is thoroughly unhelpful, I would say,
21 it's going to have to be in portrait form. I think it's
22 just going to be the extracts that you rely on.

23 MR MOSER: Yes.

24 MRS JUSTICE BACON: Ultimately, what we can do is, if they
25 then supply their however many pages, it would be useful

1 for those -- for a single composite document to be
2 produced which splices together the two in chronological
3 order or in some kind of order which reflects the way in
4 which they were originally presented.

5 MR MOSER: Understood.

6 MRS JUSTICE BACON: Yes. So the question is length and
7 timetable.

8 MR MOSER: Yes.

9 MRS JUSTICE BACON: So you want 100 pages. What do you have
10 to say about the timetable?

11 MR MOSER: Well, our starting bid was at the same time as
12 the skeletons.

13 MRS JUSTICE BACON: It's not going to be then. It's going
14 to have to be in August, because -- and not the end
15 of August either, because they're going to have to go
16 through and decide on some responsive selection, and
17 that's going to have to be in good time before the
18 skeletons are produced.

19 Now, let's say, for the sake of argument, we work
20 backwards from the 19th as the skeleton date,
21 19 September, can I make a suggestion that your extracts
22 are produced by 22 September?

23 MR MOSER: Of August?

24 MRS JUSTICE BACON: 22 August, I'm sorry. Theirs are
25 produced by 5 September. That gives two weeks before

1 the skeletons.

2 MR MOSER: I'm just taking instructions.

3 (Pause).

4 Yes.

5 MRS JUSTICE BACON: Can I just hear Mr Jowell on those

6 dates?

7 MR JOWELL: Yes, we're content with those dates.

8 MRS JUSTICE BACON: So it just leaves to decide how many

9 pages. Just let me make a note of the dates.

10 Yes, Mr Jowell, can you respond on the number of

11 pages that you think?

12 MR JOWELL: Well, we think that 100 really is excessive. We

13 are in your -- if they want to get 50, that should

14 really -- really should suffice. But we do insist on

15 parity because we have to counter.

16 MRS JUSTICE BACON: Yes.

17 MR JOWELL: The other aspect of all of this is that -- is

18 that we do say that we have to -- we would confine our

19 confidentiality review to these pages, not to the whole

20 lot. That will save some considerable expense.

21 MRS JUSTICE BACON: All right.

22 What I'm going to say is 70 pages each. Those pages

23 will need to be pages formatted in the same way as the

24 skeleton arguments. So it's not a question of 70 pages of

25 10-point single space.

1 We'll come, later on, to page length of the skeleton
2 arguments in closing submissions, so I'll set the ground
3 rules for that, but those have to be -- the extracts
4 need to be formatted in the same way.

5 MR MOSER: Any chance I can bid you up to 80, ma'am?

6 MRS JUSTICE BACON: No. I'm sorry, I don't think -- so
7 I think that -- I think 70 pages of hearsay will mean
8 that the Tribunal will be presented with 140 pages in
9 total. Given the extent of the factual evidence,
10 I don't think that more than that is required. I will,
11 as an indulgence to Mr Moser, allow 75 and split the
12 difference. That gives 150 pages.

13 I really do not think that any more than that is
14 needed, if you confine what is produced to what is
15 really relevant. Given the extent of factual evidence
16 already going to be in play, and the fact that this
17 doesn't completely remove the need for factual evidence
18 on both sides, I think that ought to be more than
19 adequate.

20 If there is -- if you get to the point of your
21 selections and there is an exceptional reason why you
22 need more than that, there will, of course, be the usual
23 provision on liberty to apply in the order. So -- I am
24 not absolutely not encouraging you to do so. You would
25 need to come back with a very good reason as to why you

1 need more than that, but I think that it is really
2 necessary to focus on what is relevant and necessary for
3 the decision of the case, which, ultimately, a lot of
4 which is not going to turn, I suspect, on any
5 requirement for more than 150 pages, total, of hearsay
6 evidence.

7 MR MOSER: I'm grateful. I'm grateful for the indulgence.

8 That deals with that aspect of the hearsay
9 application.

10 I don't know whether my learned friend wants to make
11 further points on that? There was a separate
12 application and point on a limited number of references
13 arising out of three transcripts which were omitted from
14 our hearsay notice, but that has been -- it's certainly
15 not opposed to allow those in. I don't know whether --

16 MRS JUSTICE BACON: Yes, you want to amend the notice by
17 adding in the additional references. So this just
18 increases the total original pool, as far as I see. Is
19 that definitely not opposed?

20 MR JOWELL: They are very small and we -- so, therefore, we
21 don't -- they're referred to in Noble's evidence,
22 I think, so we don't. They will be -- effectively,
23 I suppose they will be supplanted by the new table and
24 it will either be in that new table or not.

25 MRS JUSTICE BACON: The point is they have to be allowed

1 days, which is what was ordered in PSA.

2 MR JOWELL: That's correct. I think --

3 MRS JUSTICE BACON: Is this opposed?

4 MR JOWELL: Yes.

5 MR MOSER: It's really, I think, very lightly opposed, but

6 it's boiled down to a question of how many days. So

7 three business days or 48 hours, which is, I think, the

8 Patents Court tradition.

9 The use of three business days can potentially be

10 awkward because if, for instance, you're cross-examining

11 on a Tuesday, three business days' notice would be --

12 well, if you are examining on a Monday, three business

13 days' notice would be the Tuesday before. So it can get

14 suddenly much more expansive than three days sounds. So

15 48 hours, we say, is more usual. If the Tribunal is

16 so-minded, that would be consistent, as I say, with the

17 approach in the Patents Court.

18 MRS JUSTICE BACON: Yes.

19 MR JOWELL: The issue for us is that we have witnesses who

20 are coming over from San Diego, which is a very long

21 journey and a very large time difference, so 48 hours is

22 not really very helpful in that context.

23 MRS JUSTICE BACON: Yes, all right. I am going to say three

24 clear business days, which was the same period as in the

25 PSA case. That seems to be a sensible provision,

1 especially when we have witnesses who, during that
2 period, will be travelling on long-haul flights.

3 MR JOWELL: We're very grateful.

4 MRS JUSTICE BACON: All right.

5 Good, so that's then 2(e)(i).

6 Discussion re deadline for bundle additions

7 MRS JUSTICE BACON: What about, then, 2(e)(ii), which is the
8 deadline for bundle additions. Is there anything to say
9 on that? Is there agreement?

10 MR MOSER: I'm not sure we've specifically touched on that.
11 I'll take instructions from Mr Armitage.

12 (Pause).

13 There's a suggestion that Mr Armitage and Mr Bailey
14 might discuss that maybe over lunch.

15 MRS JUSTICE BACON: All right. If there is any disagreement
16 on that, then just raise it with the Tribunal after
17 lunch.

18 MR MOSER: Yes.

19 MRS JUSTICE BACON: All right.

20 Directions to trial

21 MRS JUSTICE BACON: Does that then bring us on to directions
22 to trial and in particular skeleton argument lengths?

23 MR MOSER: Well, it would do. I'm not sure whether my
24 learned friend is pursuing his other suggestion which
25 was, effectively, we can never refer to anything that

1 isn't in the hearsay notice, which -- I mean, it ought
2 to be largely overtaken by the table and the way things
3 are going to develop, but that was part of his
4 application so it's a matter for him.

5 MR JOWELL: I'd understood the -- indeed, it was overtaken
6 because I'd understood that the new hearsay notice would
7 be exhaustive, effectively. Because, otherwise, it's
8 pointless if it's not. If they are going to -- if they
9 are going to say: well, we are -- we are going to --
10 I know there's this notice, but we're just going to
11 pitch up anyway and rely on other documents, then
12 there's not much point in having the order.

13 Now, I appreciate, of course, that the Civil
14 Evidence Act says that a failure to comply with a notice
15 doesn't render the documents strictly inadmissible, but
16 it also says that the Tribunal can effectively decide
17 what weight it -- (a) what weight it gives to such
18 documents in respect of which a notice is not served,
19 and also that it can regulate it through its procedure
20 and costs, and I mean, typically -- I mean, say you had
21 an order that said, well, disclosure will be by
22 a certain date, and someone then rocked up at trial with
23 a whole bunch of new relevant documents that they said
24 supported their case, the response of the court or
25 Tribunal would be to say, well, either, "You can't rely

1 on those documents" or to say, well, "There now must be
2 an adjournment and you must pay the costs of that
3 adjournment".

4 MRS JUSTICE BACON: Do I have to deal with this now, or is
5 it that if any -- if there is any attempt to rely on
6 anything else that that needs to be the subject of
7 an application in due course?

8 MR MOSER: It's probably useful just to at least air the
9 point now. And I am glad my learned friend has
10 clarified what his thinking is on this. Because the
11 point of the table is not that it's going to replace
12 entirely, as it were, all of the documents in this
13 sense. It may well be that the Tribunal itself will
14 want to see the context for some of the extracts in the
15 table. So we'd want to look at, for instance, the
16 question, a few pages earlier, or the next answer, or
17 whatever it is in the underlying transcript.

18 So the Tribunal itself may wish to refer to that so
19 that it's not only faced with what we've described as
20 "snippets", which is the undesirable thing identified in
21 Miller.

22 Also, it's a question of the contents of the hearing
23 bundles, so that's a practical issue. It's not proposed
24 to that, somehow, the hearing bundles are going to be
25 simply emptied of evidence. The point about the table

1 is not --

2 MRS JUSTICE BACON: I think the Defendants don't want the
3 hearing bundle to be cluttered with thousands of pages
4 of material that is ultimately not required. That, no
5 doubt, comes at an expense, in terms of loading up onto
6 the Opus system, but it also makes -- the inclusion of
7 irrelevant material is not costless, in terms of the
8 efficiency of navigating through the bundles. Even if
9 you have electronic bundles, inclusion of irrelevant
10 material makes it more difficult to find what is
11 actually relevant.

12 I am inclined to think that if there is an agreement
13 that the way we deal with hearsay evidence is to put in
14 the extracts from each side in some appropriate format,
15 then I don't -- at the moment, I'm struggling to see why
16 we would need anything else, particularly if Qualcomm is
17 going to be able to put it -- put surrounding extracts
18 in, if it relies on anything for context. So, you know,
19 it's possible, not inconceivable, that the Tribunal
20 might take it upon itself to go off on a frolic of its
21 own and ask for something else, but I would expect that,
22 given the many difficult issues in the case, we're
23 unlikely to want to go on such frolics if we've already
24 been told that the relevant material is there.

25 MR MOSER: Yes. But it's difficult to predict whether the

1 Tribunal, or indeed one of the parties, in the course of
2 the trial, would want to go to the source material.
3 It's not irrelevant in the sense that the hearsay table
4 is going to have been drawn from that. It doesn't
5 become a new hearsay notice that then restricts all of
6 the hearsay evidence only to that.

7 The evidence is, per se, admissible.

8 If it is necessary, for instance, for context, to
9 look back at the source material for the quote of which
10 we place principal reliance in our hearsay table, what
11 are we to do if the source material is not there? Of
12 course we're not going to put in source material that's
13 not referred to at all. That is, in that sense,
14 irrelevant. But I -- I mean, this is a very useful
15 discussion to have now because it's important, of
16 course, for the preparation of bundles. I do strongly
17 submit that the source material which is still
18 admissible has to be there so that one can go to it if
19 required.

20 MRS JUSTICE BACON: Mr Jowell, can I have your submission on
21 that?

22 MR JOWELL: Well, we respectfully disagree. I mean this --
23 the whole point of having this confined is so that it is
24 confined. If it's simply a sort of tip of an iceberg
25 where you can always go and find more material, then

1 that's hopeless. Effectively, how are we going to deal
2 with that, how -- I mean, even just the practicalities
3 of that. What of the confidentiality issues where we
4 haven't reviewed all of that for confidentiality,
5 including third party confidentiality?

6 MRS JUSTICE BACON: Yes.

7 MR JOWELL: Again, we're just in a position where we are --
8 there's a real risk, serious risk, of us being sprung
9 with -- with new evidence at trial which we haven't had
10 a chance to consider, find the relevant documents in
11 respect of, and so on.

12 MRS JUSTICE BACON: Yes.

13 MR JOWELL: Of course, it's different if the Tribunal says,
14 well, I'd like to see the answers, you know --

15 MRS JUSTICE BACON: Would it be a solution if the -- if
16 there is somewhere, buried away at the back of the
17 office structure, a set of entirely confidential bundles
18 on the understanding that you do not have to review
19 those for confidentiality, they are going to be marked
20 confidential from the start, so nobody's time is taken
21 up with dealing with this. And if -- if the Tribunal,
22 for some reason, considers it necessary to see some
23 other part of a transcript of a deposition, for example,
24 what's relied on is a sentence and what we don't have in
25 the extracts that you've provided is a few sentences

1 earlier, which will explain the context of the question
2 leading up to the bit that's then answered, then the
3 Tribunal can look at it, but we don't have to -- nobody
4 has to waste time in dealing with confidentiality at
5 this point. And the -- and the presumption absent
6 an extremely good reason to the contrary is that the
7 witnesses do not have to look at anything beyond the
8 table that -- or -- I'm going to stop saying "table"; it
9 doesn't have to be a tabular format. The 150-page
10 extract which will be produced in total. Would that go
11 some way to alleviating your concerns?

12 MR JOWELL: Yes, it would. And, if I may respectfully say
13 so, I think that's a sensible suggestion, provided,
14 also, it's understood that this isn't supposed to be
15 a sort of resource that can then be put to our witnesses
16 in the witness box, because, otherwise, we have -- you
17 know, they have to have an opportunity to review all of
18 that.

19 So there is -- and it won't be a resource for the
20 claimants to sort of put material from that into their
21 closing submissions or their opening submissions, at
22 least absent some specific and justified application on
23 that part.

24 MR MOSER: If I may say so, ma'am, we entirely agree. That
25 would meet our concern. It won't be a great extra cost

1 simply to have all of this material in a completely
2 separate bundle. It can be confidential. A lot of the
3 material would not, in fact, be confidential because
4 it's in public documents. It doesn't matter. The point
5 is that it can be there. Nobody is going to put it in
6 their closing submissions if it hasn't been mentioned at
7 all in the trial. And it's partly, I suppose,
8 a question for the Tribunal as to what extent is the
9 Tribunal happy not to see something it might want to
10 see.

11 MRS JUSTICE BACON: Yes, it is there in extremis, no one has
12 to review it for confidentiality. If somebody does want
13 to refer to it for some reason, you'll have to apply to
14 the Tribunal and we'll have to deal with any
15 confidentiality concerns then. I'm not encouraging
16 anyone to do so, but it is there in extremis if somebody
17 needs to refer to it.

18 MR MOSER: Indeed.

19 MRS JUSTICE BACON: All right, let's do it like that.

20 So that I think -- does that then deal with
21 everything in section 2 of the trial -- of the PTR
22 agenda?

23 MR MOSER: Well, I think so, to the extent that -- this was
24 my learned friend's application. But I think --

25 MRS JUSTICE BACON: Anything else, Mr Jowell?

1 MR JOWELL: No, I think that is -- that's all -- I think
2 that's all dealt with. I think -- I hope, crystal
3 clear.

4 MRS JUSTICE BACON: All right, thank you very much.

5 So let's go to skeleton arguments and closing
6 submissions.

7 Discussion re skeleton arguments and closing submissions

8 MRS JUSTICE BACON: I'm happy with 80 pages each side, which
9 is the joint proposal, subject to the following: my
10 usual formatting requirements, which I have modified in
11 one respect, so minimum font size, Times 12 or Ariel 11
12 or an equivalent font size for the main text, your
13 citations and footnotes can be one point smaller;
14 1.5 line spacing, save for citation and footnotes which
15 can be single spaced; at least 1.5 line space between
16 paragraphs, that's to reflect the 1.5 line spacing of
17 the whole document; minimum margins 2.5 centimetres top,
18 bottom and sides; bundle authorities references in bold
19 in the main text and not in footnotes; and generally --
20 some of you may know I don't like footnotes. Footnotes
21 are usually there because you don't actually want
22 someone to read them. If you want me to read it, put it
23 in the main text. And particularly, do not put your
24 bundle and authorities references in the footnotes
25 I don't want to have to spend my time skipping around on

1 the page.

2 There was a question about transcript references.

3 I think the answer to that is, if you think that it is
4 something that I -- that you want me to put in the
5 judgment as a section of the transcript that is
6 particularly notable, then extract it, don't just
7 extract it for the fun of it, but extract it if you
8 think this is such a stark bit of the transcript that
9 makes your point that you would expect and hope for it
10 to make it into the judgment. That kind of level of
11 thing. If it is simply that you can paraphrase the
12 point and say "Mr X said this", you can just give the
13 bundle reference, you don't need to give an extract to
14 show me that Mr X did say that. I can go and see the
15 thrust of what he said.

16 So I'm not expecting lengthy extracts. But really
17 important extracts if you think you need them.

18 Table of contents at the start, absolutely,
19 cross-referenced to either paragraphs or page numbers.
20 I sometimes get tables that don't have any paragraph or
21 page number cross-references, and then it's not useful
22 as a table of contents. It does need to be
23 cross-referenced.

24 Those -- those are the formatting requirements for
25 both the skeleton arguments and the closing submissions.

1 For closing submissions, we might as well have
2 a discussion about that now.

3 There's two options really. One is that you have
4 a separate document and I read the two side-by-side and
5 that means that the closing submissions then are shorter
6 and can't duplicate anything that's in the skeleton
7 argument. The other option is that you produce
8 an entirely new document which supersedes the skeleton
9 argument and the skeleton argument goes through the
10 shredder. If you opt for option 2, which, in my recent
11 experience, most counsel prefer, because they want me to
12 have a single, self-contained document, then depending
13 on the extent of your additions to the skeleton
14 argument, it may be helpful for you to put them in
15 a different colour so that I can see what's new. If, on
16 the other hand, there is very little that you retain
17 from the skeleton argument and you're effectively
18 rewriting it, then I obviously don't want a document
19 that's blue or something like that because it makes it
20 difficult to read.

21 Most counsel do choose to simply add to their
22 skeleton argument and delete as necessary and put
23 in additional text in a different colour, usually blue.
24 Which would you prefer? It's going to have to be the
25 same for both of you, obviously. Mr Moser?

1 MR MOSER: We prefer a new document.

2 MRS JUSTICE BACON: A new document which will supersede the
3 skeleton argument?

4 MR MOSER: Yes.

5 MRS JUSTICE BACON: All right. Mr Jowell and Mr Saunders,
6 what's your preference?

7 MR JOWELL: I think a new document is probably preferable.

8 MRS JUSTICE BACON: All right. So that will then -- the
9 closing submissions will need to be a single,
10 self-contained document, it's no good referring back to
11 the skeleton argument because, if you do that, then the
12 skeleton argument is going to go -- it's going to be
13 binned and I won't look at it again.

14 All right.

15 On that basis, how many pages are you bidding for?

16 MR JOWELL: Perhaps, 100 or 120. I'm in your hands.

17 MRS JUSTICE BACON: All right. Mr Moser?

18 MR MOSER: 120 sounds good. Because it's going to include
19 the skeleton argument.

20 MRS JUSTICE BACON: Yes. I'm content with 120.

21 MR JOWELL: Yes.

22 MRS JUSTICE BACON: That is absolutely everything. If you
23 choose to include appendices, that's within the 120-page
24 limit that's not 120 plus a load of annexes.

25 MR JOWELL: Foiled again!

1 MRS JUSTICE BACON: All right.

2 MR MOSER: All right.

3 MRS JUSTICE BACON: And that -- sorry, by the way, that

4 doesn't mean you aren't allowed to divide that up and

5 you may want to have some documents at the end or some

6 part of your submissions at the end in the form of

7 a table or an appendix or something, but it's going to

8 be 120 including all of that.

9 MR MOSER: Yes, understood, thank you.

10 MRS JUSTICE BACON: All right.

11 Discussion re the Mewes evidence

12 MRS JUSTICE BACON: What -- 3(b), have we --

13 MR JOWELL: This is simply a -- refers to the Mewes

14 evidence.

15 MRS JUSTICE BACON: Oh, the Mewes evidence.

16 MR JOWELL: It's rather a mouthful. What we have asked for

17 is permission, I think agreed in principle, to respond

18 to that hearsay, that specific hearsay evidence, that

19 was permitted by the Tribunal.

20 MRS JUSTICE BACON: Oh, I see, and this is just the debate

21 as to how long your response is --

22 MR JOWELL: Yes. We really are keeping it very succinct.

23 MRS JUSTICE BACON: You say you want ten pages plus

24 two pages for Dr Padilla.

25 MR JOWELL: Yes, up to ten pages -- well, five pages for

1 each of the two -- of substantive witness evidence for
2 each of the two of the two witnesses --

3 MRS JUSTICE BACON: Which of your witnesses are going to be
4 dealing with this?

5 MR JOWELL: I think it is Mr -- it's Mr Gonell and
6 Mr Katouzian. One is talking about a negotiation that
7 went over -- about two years, and they -- they're not
8 going to go into excruciating detail about it, but it
9 does take a little time to explain things and
10 contextualise them.

11 MRS JUSTICE BACON: What is envisaged that the Class
12 Representative will be putting in in response? Is it
13 just Mr Noble?

14 MR JOWELL: Yes. Yes.

15 MR MOSER: Yes, just the expert.

16 MRS JUSTICE BACON: Just the expert. All right.

17 MR JOWELL: So we would -- we want -- our expert has not yet
18 commented on -- Mr Padilla has not commented on it at
19 all. We just want, I think, up to two pages for him
20 and -- am I correct? Then two pages --

21 MR MOSER: Two pages for us, yes.

22 MRS JUSTICE BACON: Mr Moser, what's your submission as to
23 why you think that there should be a total of -- I think
24 you are saying in total, or even each, of three pages of
25 factual witness evidence?

1 MR MOSER: I mean, they've already had the chance to give
2 their evidence. They're not unaware of what happened in
3 these negotiations with Apple. Insofar as they haven't
4 dwelt on it, to a particular extent, that's a matter for
5 them. So we think giving them the chance to sort of
6 retrofit evidence on it is not necessary, that they can
7 explain the existing evidence in the light of the Mewes
8 evidence, that would be of assistance, but that
9 shouldn't take more than three or maybe four pages.

10 There shouldn't be a need for extensive new
11 evidence.

12 MRS JUSTICE BACON: Are you saying three or four pages in
13 total?

14 MR MOSER: Yes. Say two each.

15 MRS JUSTICE BACON: All right. Well, what I'm going to say
16 is I think each of the witnesses should have up to four
17 pages, that will give eight pages total, we have two
18 pages for Dr Padilla and Mr Noble, which I think is
19 agreed.

20 MR MOSER: Yes.

21 MRS JUSTICE BACON: All right. So up to four pages for
22 each.

23 MR JOWELL: Yes.

24 MRS JUSTICE BACON: That's not -- eight in total spread
25 across the two.

1 MR JOWELL: Just to be clear, that's four pages of
2 substantive evidence that doesn't include the
3 boilerplate bit at the start.

4 MRS JUSTICE BACON: No.

5 Do we have a date for that? Or is it agreed?

6 I think it's -- the suggestion is the further evidence
7 goes in by 5 August, and the supplemental expert
8 evidence by 19 August. Is that expert evidence on both
9 sides simultaneously?

10 MR MOSER: 28th August for Mr Noble.

11 MRS JUSTICE BACON: The 28th. So we have 5 August, the 19th
12 and then the 28th?

13 MR MOSER: Yes.

14 MRS JUSTICE BACON: Is that agreed?

15 MR MOSER: I think so.

16 MR JOWELL: Yes.

17 MRS JUSTICE BACON: Already. Good, all right, so that deals
18 with the Mewes evidence.

19 Are we now on 4?

20 MR MOSER: Yes, 4.

21 Application re confidentiality by MR MOSER

22 MR MOSER: So, confidentiality is our application here.

23 This is about the designation, de- or re-designation, of
24 documents for which confidentiality is claimed. And our
25 application for a ruling or guidance, really, as to

1 whether confidential treatment should be afforded to
2 certain documents.

3 Now, you'll recall the nature of this application.
4 We made it because we were concerned that the position
5 taken by Qualcomm on confidentiality was not going to be
6 sustainable at trial. Various of the documents raised
7 third party interests, so those are being considered in
8 parallel. But our objective in this application is to
9 try and come up with a workable approach, at least
10 between the main parties, which is also acceptable to
11 the Tribunal and which can then be put to the third
12 parties to see if they take a different view.

13 To a large extent, again, I might be able to
14 abbreviate the history because there's a long history
15 of --

16 MRS JUSTICE BACON: I'm not sure I need any of the history,
17 I think I just need a proposal as to the way forward and
18 the guidance that you want me to give.

19 MR MOSER: Yes, exactly. The application has, to a large
20 extent, in my submission, achieved its purpose because
21 Qualcomm has substantially revised its position which
22 has largely narrowed the issues between us, and it's
23 really narrowed it to just a couple of questions of
24 principle.

25 The best place to look at this, I submit, is

1 Qualcomm's letter of 27 July 2025. I'm sorry, it's got
2 a number now.

3 MR BAILEY: If it assists, it's in the second supplemental
4 bundle at tab 35.

5 MRS JUSTICE BACON: Could I have a page number, possibly, in
6 the second supplemental bundle, because I am working
7 completely electronically?

8 MR BAILEY: It's page 354, madam.

9 MR MOSER: I'm most grateful.

10 So, if we look at that letter and perhaps skip over
11 some of the submission, then, at paragraphs 7 and
12 following, there's some suggestions around specific
13 pricing terms in agreements.

14 And, at 9, there is this paragraph starting:
15 "Having regard to ..."

16 Do you have that, ma'am?

17 MRS JUSTICE BACON: Yes.

18 MR MOSER: "Having regard to the guidance in ... [the]
19 Practice Direction ... the principle of open justice ...
20 Qualcomm proposes that pricing terms in agreements are
21 designated as not confidential where the agreement
22 expired over five years ago and was not renewed or
23 renegotiated, subject to (i) any relevant third party
24 establishing that the terms are confidential ... and
25 (ii) Qualcomm providing evidence to explain why a

1 particular term ...

2 [Is, or] should, remain confidential".

3 Now, that goes a long way, in our submission,

4 towards meeting the difficulties. There is this rule of

5 thumb I think we're all aware of --

6 MRS JUSTICE BACON: The five-year rule.

7 MR MOSER: -- of the five years. On agreement, as a rule of

8 thumb, we can agree a five-year period. I think

9 sensibly that it should run from the date of expiry of

10 the agreement, not the entry into the agreement.

11 But as for Qualcomm's caveats "and has not been

12 renewed or renegotiated", I do submit that there is

13 an important distinction between renewal and

14 renegotiation.

15 MRS JUSTICE BACON: Yes, your point is if it's renewed and

16 the term is then a current term, then the term is still

17 confidential.

18 MR MOSER: Exactly.

19 MRS JUSTICE BACON: But if it's renegotiated and a different

20 term is negotiated as to price, then the fact that this

21 is -- that the new -- the new agreement is

22 a renegotiation of a previous agreement doesn't render

23 all of the previous agreement confidential.

24 MR MOSER: Indeed.

25 MRS JUSTICE BACON: I would be inclined to agree. But if

1 Mr Jowell or somebody -- and Mr Bailey wants to seek to
2 persuade me otherwise.

3 Mr Moser, is that your basic point?

4 MR MOSER: Well, that's my basic point.

5 On that distinction then, we accept that the
6 pricing/non-pricing distinction falls away, but we can
7 live with that, because it just means that negotiated as
8 opposed to boilerplate terms in agreements that expired
9 in the last five years are confidential on the rule of
10 thumb. We say the same basic approach can then be
11 applied to documents evidencing negotiation, say, and so
12 on.

13 MRS JUSTICE BACON: Yes. Your point is if there's
14 a document which is relevant for a negotiation and for
15 an agreement that has been subsequently renegotiated,
16 and the relevant document in question, therefore, has
17 been effectively superseded because the terms in
18 question have been superseded, that document should not
19 be confidential simply because the current agreement is
20 a renegotiation of something that was in existence some
21 time ago.

22 MR MOSER: Exactly so. In fact, on strategy documents,
23 helpfully they've already agreed that approach.

24 MRS JUSTICE BACON: Yes, all right.

25 Mr Bailey?

1 Submissions by MR BAILEY

2 MR BAILEY: Madam, on that point, we do say that where
3 a term or an agreement is renegotiated there is
4 a particular aspect of confidentiality. It's addressed
5 by Mr Greenfield. If I could just show you that, madam,
6 his first witness statement is in the core bundle,
7 tab 7, at page 89. It's addressed in paragraph 20, but
8 if I could just perhaps ask you to re-read that
9 paragraph to yourself.

10 (Pause).

11 MRS JUSTICE BACON: Yes, I think I read this the first time
12 round.

13 MR BAILEY: Yes. So madam, the point is that if a term is
14 renegotiated, and then on the Class Representative's
15 approach it's more than five years old and therefore
16 should be regarded as not confidential, that the concern
17 for Qualcomm and its counterparties is that will reveal
18 that there has been a renegotiation, and moreover that
19 both Qualcomm and its counterparty have adjusted their
20 negotiating position. In a sense it's the change in
21 terms that itself is telling other, in particular the
22 counterparties' competitors, about the negotiating
23 strategy being adopted. Put simply, it reduces
24 uncertainty for other industry participants as to the
25 terms applied, and they can then use that information to

1 seek better terms when they negotiate their own
2 arrangements. So it's sort of for that reason that the
3 change in terms will have included this particular
4 caveat.

5 MRS JUSTICE BACON: So what you are seeking to protect,
6 essentially, is the information that there has been
7 a change in terms, and a renegotiation rather than the
8 substantive content of the original negotiation?

9 MR BAILEY: Yes, ma'am. If, for example, there were, say,
10 a royalty rate for licensing LTE at, say, 5 percent,
11 originally, and that is then renegotiated to a different
12 figure, if one then, on the Class Representative's
13 approach, says, well, the 5 percent now has to be
14 published, what other industry participants can infer
15 from that is, number 1, there's been a negotiation,
16 number 2, that both Qualcomm and the counterparty have
17 moved away from 5 percent to a different figure, and
18 therefore perhaps now is opportune for other licensees
19 seeking to renegotiate in relation to the same
20 technology. I think that's quite an important point,
21 that we're not saying, in relation to a licence where
22 the technology is now obsolete, for many of these
23 licences they concern the same patented technology and
24 so it has a continuing relevance to other parties.

25 That's the concern being identified by

1 Mr Greenfield.

2 MRS JUSTICE BACON: So all that you would know, though, on
3 your hypothesis -- and I think it's helpful to think of
4 an example like this -- on that hypothesis, all that you
5 know is that the figure is no longer 5.

6 MR BAILEY: That is right, madam. You know that they used
7 to have 5 percent, you know that they are on a different
8 figure now, you don't know more than that, but you do
9 know that the parties' sort of approaches to the
10 negotiation has meant that they've moved away from that
11 particular rate. So it's not the same as revealing the
12 rate itself, but it is disclosing how both Qualcomm and
13 a counterparty are approaching negotiations.

14 The point Mr Greenfield makes earlier in his
15 statement at paragraph 17 is that these agreements are
16 long running. They last for many, many years. And so
17 the sensitivity and the relevance of that information
18 may be heightened in this particular industry.

19 MRS JUSTICE BACON: Yes. All right.

20 MR BAILEY: Therefore, that would be both damaging to
21 Qualcomm and of course also potentially for other
22 counterparties. So that's the rationale behind that
23 particular aspect or proposal.

24 MRS JUSTICE BACON: Thank you.

25 Mr Moser, do you have anything to say in reply?

1 MR MOSER: Yes, I do.

2 Submissions in reply by MR MOSER

3 MR MOSER: Where Mr Greenfield explains his concern is at
4 paragraph 12 of his statement at page 86 of the core
5 bundle. He gives three proper points or examples, or
6 rather three reasons for his concern. The first is if
7 a third party discovers that there might be more
8 favourable licensing terms, there's an MFN concern I'll
9 come back to that. The second is I think the one
10 addressed by my learned friend now, which is if a third
11 party were to discover what concessions or changes have
12 been made. Likewise, (c), if a third party were able to
13 discover what concessions or changes its competitors
14 sought.

15 Well, unless the party knew the outcome of the
16 concessions or changes, it's not going to cause any
17 commercial harm. And under the difference between
18 renewal and renegotiation that we're proposing, the
19 outcome will not be known.

20 And, in any event, the example that Mr Greenfield
21 gives of, for instance, the MFN provision, is
22 an interesting one, because if we look at the FTC
23 proceedings, that's in supplemental bundle, tab 39,
24 page 1829 -- I'm sorry, we should ... so sorry, no,
25 that's the actual agreement. This is an agreement. We

1 needn't go to that.

2 But what happened is that this was an agreement that
3 was made publicly available in the course of the FTC
4 proceedings. There are some royalty provisions in it,
5 there's an MFN provision, but there's no evidence that
6 counterparties have sought to rely on this publicly
7 available document to secure leverage in their own
8 negotiations with Qualcomm and that's no doubt because
9 the document is now historic.

10 So we say that there's no actual evidence in
11 Mr Greenfield's statement of such harm.

12 As I say, the overarching point is if you don't know
13 the outcome of the renegotiation, it can't possibly be
14 the harm my learned friend suggests.

15 MR BAILEY: Madam, if I may, could I just briefly respond on
16 the example given by my learned friend, given he refers
17 to it for the first time in his reply? On the Sony
18 licence agreement.

19 MRS JUSTICE BACON: This is the document at 1829?

20 MR BAILEY: That's correct, madam.

21 Further submissions by MR BAILEY

22 MR BAILEY: This, actually, is a very good example of how
23 the devil is in the detail and that one does need to
24 look quite carefully at particular agreements.

25 So it's said by the Class Representative that this

1 illustrates that there's no evidence we worry about the
2 provisions in this licence. Madam, you can see on the
3 first page, at the top, the agreement was entered into
4 on 16 February 2012. It's a matter of public record,
5 that's around the time of the Sony/Ericsson merger.

6 Can I just briefly show you the clause setting out
7 the term of the agreement. That's on page 1840. Of
8 course, many licences last for a long time. In this
9 case, however, madam, you'll see that actually this
10 agreement only had a term of six months. I do say that
11 that is a material and relevant difference
12 distinguishing it from other licences for which Qualcomm
13 has maintained confidentiality. Indeed, the short
14 duration of this licence meant that it wasn't
15 an agreement currently in force at the time of the US
16 proceedings, which of course is why we didn't maintain
17 that it was confidential. Indeed, it wouldn't be
18 confidential according to the proposals that we have
19 made.

20 So for our part this does not demonstrate or still
21 undermine that where there have been re-negotiations,
22 particularly where other parties will be aware of the
23 circumstances as between Qualcomm and a counterparty,
24 they can make inferences as to the direction in which
25 a particular rate has moved. That is a particular

1 concern for Qualcomm.

2 So we say that really this is not a benchmark
3 against which one can say that we don't care about
4 confidentiality, it actually demonstrates that you
5 really do need to look at it quite carefully document by
6 document.

7 Ruling

8 (12.48 pm)

9 Ruling re confidentiality

10 MRS JUSTICE BACON: Yes. Well, I have considered the
11 submissions of both parties on this point. There is
12 a large measure of agreement. The residual disagreement
13 seems to be over renegotiated documents where the
14 original agreement has expired but has in some way been
15 renegotiated and substituted with new terms.

16 Mr Moser's position, as far as I understand it, is
17 that if there are new terms and such that the original
18 agreement is no longer current, then such terms as have
19 been superseded in the new agreement should no longer be
20 confidential.

21 Mr Bailey's position, I understand, is that
22 revealing the original agreement will give competitors
23 information about the negotiating strategy being
24 adopted, in the sense that they will be aware that there
25 has been a negotiation and that the original terms are

1 in some way no longer current, which reduces the
2 uncertainty for other industry participants.

3 I am afraid I regard that as too tenuous to justify
4 maintaining confidentiality in what, it is common
5 ground, would be historic agreements, for which at least
6 five years had passed since the date of the expiry of
7 the agreement.

8 It seems to me that the mere fact that there has
9 been a new agreement adopted with different terms does
10 not tell competitors very much at all. And, in
11 principle, therefore, that sort of agreement and the
12 documents relating to the negotiating strategy for that
13 sort of agreement ought to be unredacted.

14 If, however, in exceptional cases, there is
15 a particular concern, then application can be made for
16 a particular document to remain confidential, but it
17 does not seem to me that the mere fact that a document
18 evidences a change or an undetermined change of
19 approach, or the fact that a particular agreement has
20 been renegotiated, is, in itself, sufficient to justify
21 maintaining its confidentiality.

22 (12.51 pm)

23 Discussion re outstanding disputes on confidentiality

24 MRS JUSTICE BACON: Can I make a proposal about outstanding
25 disputes on confidentiality? Because there is obviously

1 the potential for there to be some residual dispute, and
2 it's not clear to me whether there is agreement as to
3 how those are to be resolved. I'm not keen for this to
4 wait until the trial.

5 Have you, between the two of you, explored how you
6 would propose to deal with that?

7 MR BAILEY: So, madam, before court, I spoke to my learned
8 friend about whether we could discuss the outstanding
9 works streams and work out a process by which the trial
10 bundle contents are to be finalised, the confidentiality
11 review could be undertaken, both by us but also of
12 course notifying third parties, putting in dates for
13 that to happen. Madam, you've helpfully identified
14 a sort of protocol dealing with the hearsay material
15 which helpfully kind of removes that work stream. There
16 is then a separate point about how to handle the 1782
17 materials as well, which of course requires third party
18 notification.

19 The suggestion I was going to make was whether, over
20 the short adjournment, myself and Mr Moser and
21 Mr Armitage could discuss what the steps are, noting of
22 course that there is a hard stop date for the trial
23 bundle to be filed electronically and in hard copy of
24 16 September, so everything has to be sort of agreed and
25 resolved by that stage.

1 MRS JUSTICE BACON: Yes.

2 MR BAILEY: So if that would be amenable, madam, we could
3 try and see if we could broker more consensus on this.

4 MRS JUSTICE BACON: All right. I think it would be helpful.
5 What you would do is then revise what I have at page 135
6 of the core bundle, which is the timetable to trial,
7 there will be a number of additional steps now included
8 as a result of the discussion earlier in this PTR.

9 What I was going to propose was that, if there are
10 any residual disputes, particularly about
11 confidentiality, the Tribunal could set aside, for
12 example, a half day in the first week of September.
13 Now, it won't be me, but Mr Turner is available then,
14 who is also, as you know, a Tribunal chair. He would be
15 willing to make himself available. I'm not going to say he is
16 ecstatic about making himself available, because
17 I understand he has another case, a Tribunal case, the
18 next week, but he would be willing to make himself
19 available for a focused half day hearing in the first
20 week of September. I understand that there would be
21 Tribunal time in terms of having a courtroom available
22 during that week.

23 If that helps with your discussions, and if you
24 think that it would be a good idea to pencil that in,
25 essentially for confidentiality but other -- anything

1 else of that sort of level of disagreement which needs
2 to be really resolved before the bundles are finalised,
3 if you think that that would be useful then please
4 indicate that after the short adjournment. If actually
5 you think that there's not going to be any need then we
6 don't need to set aside the Tribunal calendar.

7 MR BAILEY: Madam, you may have seen a flurry of
8 correspondence from the two minnows or two rather large
9 third parties that have --

10 MRS JUSTICE BACON: Yes --

11 MR BAILEY: -- a vested interest in maintaining their own
12 confidentiality.

13 MRS JUSTICE BACON: The names of those are not confidential,
14 I don't think.

15 MR BAILEY: No, it's not, madam. It's Apple and Samsung.
16 They have come to life because they discovered the
17 application had been brought by the Class
18 Representative, albeit in relation to Qualcomm's
19 information, but of course, actually, many of the
20 agreements and the negotiations concern us and --

21 MRS JUSTICE BACON: That would be a mechanism for dealing
22 with that.

23 MR BAILEY: Indeed, madam.

24 The only practical concern -- but again I can
25 discuss it with the Class Representative -- is about

1 whether half a day in dealing with the third party's
2 information -- they have taken quite strident positions,
3 obviously they can hear the indications of the Tribunal
4 today, and obviously you have Qualcomm and the Class
5 Representative's position on how confidentiality should
6 be approached, but they have put down very strong
7 markers about them having an opportunity.

8 Again, we can obviously discuss how best to handle
9 that. My only concern whether half a day for dealing
10 with both Qualcomm confidentiality and Apple and Samsung
11 confidentiality.

12 MRS JUSTICE BACON: Well, I think that there's a danger of
13 these things being given disproportionate time in the
14 Tribunal. In view of the -- you know, the trial length,
15 and the importance of getting these things dealt with
16 expeditiously, I think that it would be appropriate at
17 this point if we did reserve time, to reserve a half
18 a day, and then if anyone thinks that more is needed,
19 then they will have to notify the Tribunal very quickly.

20 There would also need to be provision for dates
21 leading up to that by which any application, whether by
22 the parties or by third parties, should be made, which
23 would be binding on Apple and Samsung as well.

24 We have in mind skeleton arguments of no more than
25 20 pages, given that this will need to be a focused

1 application, if there is one, to be dealt with
2 efficiently by the Tribunal.

3 MR MOSER: Indeed, ma'am. Both Samsung and Apple have put
4 down markers in correspondence. It's quite right to
5 raise it. I was going to raise it independently.

6 MRS JUSTICE BACON: All right. Well then that will enable
7 any dispute emerging from their positions to be dealt
8 with at that hearing.

9 MR MOSER: We hope very strongly it won't be necessary. We
10 certainly -- our principal concern about this is that
11 there shouldn't be some massive satellite issue about
12 confidentiality.

13 MRS JUSTICE BACON: Yes.

14 MR MOSER: In the end, it's about how we're dealing with it
15 at trial.

16 MRS JUSTICE BACON: Absolutely. Yes, all right.

17 So provisionally, unless I am told otherwise after
18 the short adjournment, I will make an order for
19 a half-day hearing. And then you can then liaise with
20 the registry to find a suitable date to reserve in the
21 Tribunal's calendar that week. I should say, as ever,
22 the Tribunal will be very happy to hear junior counsel,
23 and there will be no expectation that any such hearing
24 would need to be attended by leading counsel. It is of
25 course for the parties as to who they wish to instruct.

1 I'm aware that everyone is going to be very busy around
2 that time. If it's helpful for you to instruct junior
3 counsel, then we would be very happy to see junior
4 counsel.

5 All right. Is that a convenient point to rise for
6 the short adjournment or is there anything else that you
7 would like me to deal with in the last five minutes?

8 MR BAILEY: Madam, if I may, just because I hope it will cut
9 through things for the afternoon.

10 The ruling you made in relation to renegotiation, do
11 I take it that, actually, one can read that to apply to
12 all of the other categories? It's the same caveat for
13 non-pricing terms, the same category for negotiations.
14 So, actually, it cuts through across all of them.

15 MRS JUSTICE BACON: It's the same principle, yes.

16 MR MOSER: That's how we'd understood it, thank you.

17 Just to comment on the programme for this afternoon,
18 as it were. As far as I can see it's relatively light
19 now. You've made the 4(b) confidentiality ring order.
20 How to manage confidential material at trial. The only
21 matter of substance, certainly on our side, that remains
22 is how we will deal with Mr Blumberg and Mr Grubbs, the
23 material relating to them. Perhaps we can discuss that
24 over lunch as well.

25 MRS JUSTICE BACON: Yes. On my list, I also have discussion

1 of appropriate protocol for the hot tub and sending of
2 questions, and also the materials that should be
3 permitted in the hot tub. So that you know in advance.

4 MR MOSER: Yes.

5 MRS JUSTICE BACON: And bundles, physical copies,
6 instructions and so on --

7 MR MOSER: That shouldn't take long.

8 MRS JUSTICE BACON: -- which won't take very long. I don't
9 think either of those should take very long. Then
10 there's an issue -- sorry, regarding -- can you just
11 explain to me what the outstanding issue is on the
12 evidence?

13 MR MOSER: Yes, there is some correspondence about it which
14 I will take you to after lunch, if I may. But this is
15 the evidence of Mr Blumberg and Mr Grubbs, who are not
16 members of any confidentiality ring, and so they haven't
17 been able to review documents which have been designated
18 as confidential in these proceedings. In fact, there's
19 the Kafkaesque situation in relation to Mr Grubbs. He's
20 been unable to review transcripts of his own depositions
21 taken during the proceedings FTC.

22 MRS JUSTICE BACON: I see. So it's how to deal with
23 confidentiality given that they're not in the
24 confidentiality ring.

25 MR MOSER: Yes. We've come very close to a solution

1 already. Again, I will cut through, there was a letter
2 yesterday --

3 MRS JUSTICE BACON: That's all right. I've noted that. Why
4 don't we take that first after the short adjournment?

5 MR MOSER: Yes.

6 MRS JUSTICE BACON: Then we'll deal -- well, actually, what
7 we should deal with first is the outcome of your
8 discussions as regards any residual dispute, so just
9 picking up the point that we discussed a minute ago.
10 Then we'll deal with the evidence of Mr Grubbs and
11 Blumberg. Then we'll deal with the hot tub and bundles.
12 Then, if there's anything else that you think I need to
13 deal with, then you can raise it.

14 MR MOSER: Thank you.

15 MRS JUSTICE BACON: All right. 2.00.

16 (1.00 pm)

17 (The short adjournment)

18 (2.00 pm)

19 MR BAILEY: Madam, could I perhaps begin, if I may, with
20 a progress update as to where we have got to on
21 confidentiality, unless my learned friend had any --

22 MR MOSER: I thought we were doing Blumberg and Grubbs
23 first.

24 MR BAILEY: I thought -- well.

25 MRS JUSTICE BACON: No, I think we were going to just deal

1 with the residuals on confidentiality first.

2 MR MOSER: I stand corrected and sit down.

3 MR BAILEY: I'm very grateful. I'm very pleased to say that
4 the parties have made excellent progress and have
5 reached an outline for your approval, madam. What we
6 would suggest happens is that Qualcomm will review the
7 confidentiality designations in the 321 documents that
8 are already in the trial bundle in light of the general
9 rule of thumb we discussed this morning, by 8 August.

10 Then we would say that the parties, Class
11 Representative and Qualcomm, will, if so advised, add
12 any further documents to the trial bundle by no later
13 than 13 August.

14 We would say on the same date, applying the existing
15 allocation of responsibility, Qualcomm and the Class
16 Representative would notify any relevant third parties
17 of confidential information contained in those
18 additional documents.

19 Both parties would be very grateful if there would
20 be an opportunity by, say, 20 August, for a small number
21 of additional responsive documents to be added to the
22 trial bundle, the idea being, once we've seen what the
23 Class Representative is wishing to add, we may wish to
24 put in a small number of responsive documents and vice
25 versa, and we have tried to make this very even-handed.

1 So we would say 20 August would be the date for any
2 further responsive additions to the trial bundle.

3 MRS JUSTICE BACON: Is that just Qualcomm?

4 MR BAILEY: No, madam, it's for both, so the Class
5 Representative as well, to be even-handed.

6 MRS JUSTICE BACON: That's to respond to any further
7 documents that are being added by the 13th?

8 MR BAILEY: That's correct, madam.

9 MRS JUSTICE BACON: So this is the final round, you're not
10 then suggesting we have a sort of iterative --

11 MR BAILEY: It is a somewhat iterative process, but it has
12 to come to an end at some point for good order.

13 MRS JUSTICE BACON: It comes to an end on the 20th.

14 MR BAILEY: There is then the point about the need to notify
15 third parties of any confidential information that is
16 claimed in those documents, and we would suggest that
17 that process is, again, kick-started on 20 August --

18 MR ARMITAGE: I'm sorry to stand up. It's just because
19 I have been dealing with this matter.

20 Just on the timing for the notifications to the
21 third parties, so we would respectfully ask for a little
22 bit of time between the date on which we notify Qualcomm
23 of which documents we'd like to add to the trial bundle
24 and the time by which we notify the third parties,
25 because there's a degree of work to be done in collating

1 the documents and sending the notifications.

2 MRS JUSTICE BACON: Oh, I see. So you are saying you don't

3 want it to be on the same date as 13 August?

4 MR ARMITAGE: Yes, we had discussed it happening

5 simultaneously and there's just a degree of practical

6 work, on solicitors' side, in relation to that. So if

7 we could have --

8 MRS JUSTICE BACON: What about the 15th?

9 MR BAILEY: That's acceptable, from Qualcomm's perspective.

10 MR ARMITAGE: Yes, I think the 15th to actually send out the

11 notifications.

12 MRS JUSTICE BACON: So, by 15 August, both of you to notify

13 relevant third parties. All right.

14 So then we got to responsive documents to be added

15 by 20 August and, by parity of reasoning, that would be

16 the 22nd --

17 MR BAILEY: Exactly right, madam.

18 MRS JUSTICE BACON: -- to notify third parties.

19 MR BAILEY: Yes.

20 MRS JUSTICE BACON: Thank you very much.

21 MR BAILEY: Then we've kept a clear eye on the suggesting

22 hearing date for resolving any disputes about

23 confidentiality. And so, what we were proposing, in

24 light of that, is that, on 29 August, if so advised that

25 Class Representative would apply, to challenge any

1 request for confidential treatment that would otherwise
2 satisfy the general rule of thumb that we discussed this
3 morning. Alternatively, if either Qualcomm or
4 a relevant third party wish to maintain confidentiality
5 in relation to information that doesn't satisfy that
6 general rule of thumb, it will be for it to apply with
7 submissions in evidence and that would all happen by
8 29 August. Madam, you very helpfully indicated that
9 those submissions should be subject to a 20-page limit,
10 and that's what we say should apply to that document, or
11 those documents.

12 MRS JUSTICE BACON: So, by 29 August, the party and any
13 third parties to file submissions, limited to
14 20 pages --

15 MR BAILEY: Yes, madam.

16 MRS JUSTICE BACON: -- and any evidence --

17 MR BAILEY: Yes, madam.

18 MRS JUSTICE BACON: -- supporting challenges to
19 confidentiality designations.

20 MR BAILEY: Madam, it may be challenges to confidentiality
21 designations, if it were the Class Representative, but,
22 of course, it may be for the third party or Qualcomm to
23 have to produce evidence to establish confidentiality.

24 MRS JUSTICE BACON: Or seeking to establish confidentiality.

25 MR BAILEY: That's correct, madam.

1 Madam, I should just mention that the revised
2 confidentiality ring order at the moment imposes
3 a minimum period for consulting third parties, and
4 that's not a problem for the first date in August that
5 we mentioned, but it is a problem for the responsive
6 additions to the trial bundle because what the
7 confidentiality ring order does is it says you have to
8 be 14 clear working days of consultation to third
9 parties. That clearly won't work with the compressed
10 timetable that we had, so we had a suggestion that we
11 discussed about this, whether we could invite you to
12 give an indication that that period should be reduced,
13 in the case of the responsive trial bundle documents,
14 to five working days, and subject to any third party --
15 Apple, Samsung -- applying to the Tribunal with specific
16 reasons by the end of the week.

17 So, either way, we need to amend the confidentiality
18 ring order and obviously you can't do that without the
19 third parties at least having an opportunity to address
20 you and, in their absence, we would suggest
21 an indication.

22 MRS JUSTICE BACON: Yes. I think that it would be
23 appropriate to give that indication. And that the order
24 will be amended subject to any points raised by third
25 parties.

1 How do we deal with that as a matter of
2 practicality? Is it that we wait for any submissions
3 from Apple and Samsung, and then, on a particular date
4 next week, make the order? How do you think that this
5 needs to be dealt with procedurally?

6 MR BAILEY: So, you have given the indication today, one --
7 I would invite the Tribunal to set a date. I was going
8 to suggest potentially the end of this week, say, by
9 which a third party needs to come in to the Tribunal, if
10 it so wishes, to persuade you that they need more time
11 than what is provisionally being allocated, and then the
12 Tribunal would have to decide earlier the following
13 week, which is still in advance of when we would be
14 making notifications on 15 August.

15 MRS JUSTICE BACON: Yes.

16 MR BAILEY: Then we could draw up an order for your
17 approval, madam, early next week.

18 MRS JUSTICE BACON: Yes, that seems sensible. Could you
19 just show me the provision that will need to be amended?

20 MR BAILEY: Yes, madam. If you just bear with me a second.

21 (Pause)

22 Madam, the confidentiality ring order is to be found
23 in the supplemental bundle, and it is at tab 10 which
24 begins at page 814. Madam, the process that will need
25 to be revised is to be found on page 825. And this is

1 paragraph 8 of the order. Madam, you'll see that the
2 process starts by talking about the notification in
3 8.1.1. Then you'll see, madam, in 8.1.2, that
4 a response should be produced within 14 clear working
5 days. It's that particular minimum period which indeed,
6 actually, according to this, a third party can ask for
7 even more time, as indeed many of them have since we've
8 been reviewing the current set of documents, but that's
9 at the relevant time period that would need to be
10 amended.

11 MRS JUSTICE BACON: And your point is that the 14 working
12 days would, in principle, work for the first date, but
13 not for the second, but --

14 MR BAILEY: Yes, madam.

15 MRS JUSTICE BACON: -- bearing in mind the need to get on
16 with this, we should amend that date, for all purposes,
17 to five clear working days.

18 MR ARMITAGE: Just to say, madam, one would naturally expect
19 the batch of documents on the second date to be very
20 significantly smaller, if that assists. And, obviously,
21 as my learned friend says, the existing 14-day provision
22 would be workable with the first deadline, so it's
23 a relatively limited variation in that sense.

24 MRS JUSTICE BACON: Yes.

25 Does the five working days timetable in 8.1.4 also

1 work? Because, if you were going to notify third
2 parties by 22 August, they have five working days to
3 respond -- I suppose that does just about dovetail with
4 the 29th deadline.

5 MR BAILEY: It does, madam, but it is ever so slightly
6 tight. And, of course, if there were to be any such
7 applications for more time, that would have a very
8 important knock-on effect, particularly in the run-up to
9 the hearing on the -- in early September. Yes.

10 MRS JUSTICE BACON: Are you content that what you're
11 proposing will then work, provided that we have
12 29 August as the date by which the applications are made
13 by the third -- well, parties and third parties with the
14 Tribunal?

15 MR BAILEY: Yes, madam, subject to -- just to finish off the
16 proposed procedure, in fairness to any other party that
17 wished to respond to those applications on 29 August, we
18 were going to suggest that if, on 2 September, capped at
19 ten pages, any response be put in, because, of course,
20 potentially, the Class Representative might have
21 submissions it wishes to make in response to
22 a confidentiality claim by Qualcomm; equally, it
23 might -- there may be points that Qualcomm wish to make
24 in relation to third party claims.

25 So that would just be an interim step.

1 Then the hearing -- madam, I think you said before
2 lunch, potentially the chair would be available to sit
3 on the third. I understand from the registry that the
4 chair is potentially able to sit any day that week but
5 not the week after.

6 MRS JUSTICE BACON: Yes. No, I indicated that it would have
7 to be in the first week of September. I didn't have
8 a particular date in mind in that week.

9 MR BAILEY: Madam, on Qualcomm's behalf, we'd be very
10 grateful if the chair could sit on 4 September, because
11 the instructing client would be able to attend the
12 hearing on that date.

13 MRS JUSTICE BACON: Yes. Well, I'm somewhat concerned at
14 there being a possibility of a total of potentially over
15 100 pages of submissions on confidentiality. If there
16 were four parties before the Tribunal and every one puts
17 in 20 pages of submissions and a 30-page response --
18 sorry, and a ten-page response, is there any way of
19 dealing with this by saying that an application should
20 be made in very short format with brief evidence in
21 support, and then you can just all file a single --
22 a skeleton argument each? I am just trying to avoid
23 having a proliferation of documents.

24 MR BAILEY: The slight difficulty, madam, is that dealing
25 with it in the abstract, it's quite hard because one

1 doesn't know the number of documents and requests for
2 confidential treatment. Of course, what one might say
3 is any particular request shouldn't be any longer than
4 half a page, you know, it can be set out quite shortly.

5 MRS JUSTICE BACON: Yes. I think I want to have an overall
6 compass on the submissions from any one party that are
7 before the Tribunal and we had -- again, this is
8 following discussion with Mr Turner -- we had in mind
9 that it would be 20 pages of submissions in total from
10 each side.

11 MR BAILEY: From Qualcomm's perspective, we are happy with
12 that.

13 MR ARMITAGE: We're certainly not going to demur from that.
14 Just so that the Tribunal has it, it is not necessarily
15 just Apple and Samsung, it's another consideration.
16 There are other relevant third parties who have been
17 less vocal in most respects, shall we say, but I think
18 that's really a factor in favour of the approach you're
19 suggesting, respectfully, so I just raise that for
20 information.

21 MRS JUSTICE BACON: Yes. So, rather than having long-form
22 submissions filed on 29 August, I think a very short
23 application, rather like an application in the High
24 Court, just identifying, in extremely compressed format,
25 what your challenge is. Then everyone knows what is

1 challenged. Then you can put your -- and very brief
2 evidence because we are all dealing with this in
3 a compressed timescale. I don't want this to turn into
4 an enormous sideshow with reams of evidence, supporting
5 evidence, put in. The evidence should be extremely
6 compressed. I don't want any exegesis of the history,
7 I don't want any archaeology, I just want very short
8 submissions as to evidence, insofar as is necessary at
9 all, to be honest. You may not need any evidence. It
10 may simply be a matter of argument. But, then,
11 whatever -- whatever you put in in brief to just
12 identify the dispute, I would suggest very brief
13 skeleton arguments limited to an absolute maximum of
14 20 pages to cover all of the issues. And it's a one
15 shot on -- if the hearing is on the fourth and I think
16 the skeleton argument will have to be in by 10.00 am on
17 the 2nd. That's tighter than I would normally say, but
18 I'm aware that if the applications are in on the 29th,
19 you're not going to have very much time if I were to say
20 skeleton arguments on the 1st.

21 Does that work? Or do we need to bring everything
22 forward a bit to have you -- to give you a chance to
23 make your submissions?

24 MR BAILEY: It might be advisable to bring the 29 August
25 date forward a bit, so that it allows a bit more time

1 for all parties to digest the material, so that they can
2 then produce the 20-page skeletons by 2 September for
3 a hearing on the 4th. Because if -- I think 29 August
4 is towards the end of the last week of August. And, if
5 one were to bring it forward to the middle of that week,
6 even, that would just create a couple of additional
7 clear working days, I haven't had an opportunity to
8 discuss that with my learned friend, so I can't speak --

9 MRS JUSTICE BACON: Mr Armitage, what do you think?

10 MR ARMITAGE: I don't think we have a particular problem
11 with that. Just to clarify, the proposed process is
12 that a party seeking to establish a position that is
13 different from the rule of thumb discussed earlier is
14 the party making -- so it may be that Which? in fact and
15 you'll have seen we've emphasised on a number of
16 occasions we have no particular axe to grind in terms of
17 the confidentiality claim, so it may be we have very
18 little to say about this, actually, although I can't
19 exclude that. So, from our perspective, it's a matter
20 for the Tribunal, obviously, but we don't push back on
21 my learned friend's proposal.

22 MRS JUSTICE BACON: I think the 27th is going to be more
23 realistic if you are aiming for a hearing on the 4th.
24 I'm very sorry, I know this is going to cause
25 significant disruption to the holidays of all of you to

1 prepare for this trial. The Tribunal has no wish to
2 inflict upon you all an additional hearing if it's not
3 absolutely necessary. So all I wanted to do is to put
4 a date in the diary and establish a process leading up
5 to it, but I'm hoping very much that this won't be
6 necessary.

7 MR BAILEY: Madam, it does occur to me that, insofar as one
8 is making orders that will affect the third parties,
9 perhaps including this date, it would also potentially
10 be prudent to allow any third party to make submissions
11 to the Tribunal if they can't make that date. They'd
12 have to have incredibly good reasons for doing so, but
13 because they're not here, I'm just conscious that they
14 may wish to make representations to the Tribunal about
15 it.

16 MRS JUSTICE BACON: Yes. All right. I think, if there are
17 any -- what process is going to be undergone to notify
18 the third parties of these proposals?

19 MR BAILEY: Another point about the notification process is,
20 obviously, some third parties have already been notified
21 by both Qualcomm and the Class Representative for
22 various documents. It has been a very time consuming
23 and, in some respects, sclerotic process, as third
24 parties have asked for more time. As matters currently
25 stand, we should actually hear from a number of third

1 parties tomorrow as to the claims that they wish to
2 make. One proposal that we'd make to try and simplify
3 and hopefully make it much more workable was that the
4 Class Representative and Qualcomm agree a standard form
5 notification that would go out that would set out very
6 clearly what the relevant information is and what the
7 relevant process is, and what a third party so advised
8 needs to do, and by when, and we could actually do that
9 later this week, and see if we can agree that as
10 a template which hopefully makes everyone's lives
11 easier.

12 MRS JUSTICE BACON: Yes. But that still leaves the question
13 open as to what happens if any representatives of --
14 whether it's Apple and Samsung or anyone else, disagree
15 with the process that we've just discussed between the
16 parties, given that they're not here.

17 MR ARMITAGE: Yes, I'd just turned around and briefly
18 discussed with those instructing me, perhaps the way to
19 deal with that is for my side, and Qualcomm's side, to
20 agree a joint letter to relevant third parties informing
21 them of the process so that it be laid down today,
22 subject, of course, to their right to comment, and
23 inform them that they need to provide any
24 representations by date X.

25 But very promptly after we leave today, that

1 notification ought to go out. Just on the process.

2 MR BAILEY: But then it presumably follows, to answer,
3 madam, your question, that if they disagree with the
4 process, what happens then? Presumably, early next
5 week, each of Class Representatives and Qualcomm will
6 need to make their own responsive submissions to the
7 Tribunal and the Tribunal will need to decide what the
8 process should be on the papers.

9 MRS JUSTICE BACON: I'm somewhat reluctant to hold off
10 finalising the order from today's hearing, given all of
11 the pieces that have to be slotted in until next week,
12 or even later if there are some further submissions.
13 What I would have in mind is that the order gets
14 finalised in the next couple of days. But then there
15 should be liberty to apply in particular for third
16 parties affected by these paragraphs of the order. And
17 that, if they want to propose a variation of the order,
18 they should -- they can do so within -- in fairly short
19 order.

20 Otherwise, we may face the spectre of this just
21 being held over, and I know people are going to be
22 probably disappearing on holiday next week to the extent
23 you're getting holidays. Would that work?

24 MR BAILEY: That would be acceptable to Qualcomm, madam.

25 MRS JUSTICE BACON: I would rather not that we get to the

1 first week of August and we're still trying to sort out
2 even the order from this hearing.

3 Does anyone have any better idea?

4 MR BAILEY: No, madam.

5 MRS JUSTICE BACON: No.

6 MR ARMITAGE: No better ideas, no. Respectfully, that
7 sounds like a good approach.

8 MRS JUSTICE BACON: Yes.

9 So pencilling in a hearing on 4 September. The
10 Tribunal will confirm that. I'll get someone to respond
11 to you. I think, just checking with Mr Turner's clerk,
12 that that date is definitely available. All right.
13 Thank you.

14 Discussion re Mr Grubbs and Mr Blumberg

15 MRS JUSTICE BACON: Mr Moser, are we on to Mr Grubbs and
16 Mr Blumberg?

17 MR MOSER: We are, Blumberg and Grubbs.

18 I have good news which is that the parties have
19 an agreed proposal as to how to deal with the evidence.
20 So this was about the question of what can be shown to
21 Blumberg and Grubbs, in particular because it contains
22 evidence that may be confidential, including to Lenovo
23 and BlackBerry, their former employers.

24 The proposal is that we, each of us, the parties to
25 the case, show each other the list of documents that we

1 think ought to be shown to Mr Blumberg and Mr Grubbs,
2 and those documents have two qualities: one is that they
3 are documents on which my learned friend Mr Jowell wants
4 to cross-examine; and the other is they are documents we
5 want to show them to allow them to prepare. So, for
6 instance, their own previous transcript.

7 There's then a second round of both parties having
8 looked at this and any, as it were, responsive
9 re-examination or "Oh, you showed them this. Well,
10 then, we want to show them that document", be added to
11 that list a few days later. Those lists are then
12 amalgamated and shown to Lenovo and Blackberry
13 respectfully with the request that they agree.

14 The dates proposed for this is the 12th is proposed
15 for the exchange of list with the additional proposed
16 documents by Which? and Qualcomm; on the 15th, which is
17 the Friday, any supplementary documents, which ought to
18 be limited, but we'll see; and then, on the 18th, the
19 Monday, we jointly write to BlackBerry and Lenovo and
20 ask them to respond by the end of August.

21 Of course, they're not here, BlackBerry and Lenovo,
22 so I don't think an order can be made as to when they
23 have to respond, but the indication, perhaps, would be
24 helpful. But that's when we envisage that happening.
25 Again, by about 29 August, all being well.

1 Quite what happens if they don't respond is
2 a different matter. And without wishing to overburden
3 whatever hearing Mr Turner is going to enjoy having at
4 the beginning of September, it may be that that is the
5 fallback for this also to be brought back and say this
6 has happened or not happened. With any luck, it's all
7 going to be fine.

8 MRS JUSTICE BACON: In that case, I would suggest that you
9 ask any response to be provided by 22 August. That
10 gives them a week. Or the 25th, if you want to be very
11 generous. And any difficulties following that to be
12 submitted for determination on the 4th.

13 MR MOSER: Madam, yes. I think experience shows the 25th
14 would be wiser.

15 MRS JUSTICE BACON: Right.

16 MR MOSER: So if we can settle on that.

17 MRS JUSTICE BACON: They need to know that 4 September will
18 be set aside and available for that. So I don't think
19 it will be satisfactory for any -- for either of those
20 to then say, "Well, we can't submit anything for the
21 hearing, then. We haven't had enough time to deal with
22 it", as Apple and Samsung has done now. That's the date
23 on which confidentiality issues, all round, need to be
24 resolved.

25 MR MOSER: Yes. I'm grateful. That will be heard.

1 MRS JUSTICE BACON: Thank you. I mean, that was a comment
2 not directed at you, Mr Moser, but for --

3 MR MOSER: I'm aware. It was a comment through us at them
4 and that's very helpful.

5 MRS JUSTICE BACON: Yes. Good. So that deals with that
6 issue. I'm very happy with that proposal.

7 MR MOSER: I'm grateful. Well, that finishes 4.
8 That only leaves 5. Bundles.

9 MRS JUSTICE BACON: Shall we -- before we do 5, shall we
10 interpose hot tub --

11 MR MOSER: Yes.

12 MRS JUSTICE BACON: -- because that has been raised?
13 Discussion re hot tubbing

14 MRS JUSTICE BACON: So I've suggested already that we will
15 have two-and-a-half days for the hot tub. As you might
16 imagine, it will be led by Mr Ridyard, the economist
17 member on the panel, I should say in substitution for
18 Mr Mason, who was going to be doing the case but can't
19 anymore.

20 The proposal is that we will send a list of the
21 areas for questioning, at the latest, during the first
22 week of the trial. If possible, we will send it earlier
23 during the reading week. We are aiming, I should say,
24 to meet before the reading week, which means, of course,
25 what is currently down as the pre-reading week is -- we

1 will have to start the reading earlier and some of us
2 will be doing so. So the -- ideally, we will send you
3 the list of questions before the trial, but, at the very
4 latest, it will be during the first week of the trial.

5 We are content for the parties then to suggest
6 additions, if they -- to those questions, if so advised.
7 We can't guarantee that we will cover all of the
8 additions, but if you want to make suggestions and you
9 think we're missing out some vital points, then please
10 do make suggestions. That should give sufficient time
11 for everyone to be aware of the general areas for the
12 hot tub, before the hot tub starts on -- it will either
13 be the 15th or the 16th depending on the time required
14 for the other experts.

15 What I propose, also, is, in line with what some of
16 you may have seen floating around with the CAT user
17 group in terms of potential protocol for the hot tubs
18 going forward, our proposal is that the experts should,
19 in the hot tub, be permitted to have hard copy,
20 annotated reports and hard copy notes, but in the
21 cross-examination section they should only be permitted
22 the trial bundles, so their original reports without
23 annotations and no notes.

24 Just to explain our thinking behind that, and this
25 is something that has been discussed quite widely, but

1 if you disagree -- if anyone disagrees with that, I'll
2 invite submissions on this in a moment.

3 The Tribunal's thinking on that is that because the
4 hot tub is, by its nature, somewhat more discursive and
5 wide ranging, we recognise that it is likely to be
6 helpful for the experts to have notes in addition to
7 their reports.

8 We say hard copy notes because we don't want to run
9 into problems of policing. If we allowed the experts to
10 have computers, then there might be issues regarding
11 whether there was any outside interference, for example,
12 and I don't want there to be any suggestion of
13 difficulty policing, so that's why we suggest hard copy
14 notes.

15 However, during the cross-examination, we think it's
16 not going to be useful for the experts to be trying to
17 refer to their notes. We really want the experts to be
18 just focusing on the questions asked and the documents
19 that they are being taken to in the cross-examination,
20 which is why, at that point, we think that the normal
21 rule of just having the trial bundles available to them
22 should apply.

23 Does anyone disagree with that and want to
24 persuade -- seek to persuade me of something else?

25 MR JOWELL: For our part, no.

1 MRS JUSTICE BACON: Mr Moser?

2 MR MOSER: No.

3 MRS JUSTICE BACON: No. All right.

4 I'm also aware that there has been some variance in
5 practice regarding transcripts. Again, consistent with
6 the provision that's been debated as -- going forward,
7 generally, my proposal is that the experts of all
8 colours, shades, and specialisations, should be able to
9 see the transcripts of their evidence, should be sent
10 them, and, indeed, the same will apply to any witnesses
11 who are in purdah overnight, they should be able to
12 receive the transcripts of the day before, but there
13 should obviously be no other communication with the
14 relevant witness.

15 Does anyone disagree with that?

16 MR JOWELL: Again, no. Provided it's not -- you know, used
17 by the experts or the witnesses as a kind of means of
18 coming back after the session and saying, "I've read
19 that I said this and actually what I meant ..."

20 I mean, maybe occasionally they do that, but
21 I think, as a rule, that shouldn't be encouraged.

22 MRS JUSTICE BACON: I agree that the Tribunal does not
23 encourage the relevant witness or expert to come back
24 the following day with a recantation of everything they
25 said the previous day. Nor will we encourage, or indeed

1 allow, someone to turn up with a pre-prepared speech:

2 "I said this, now can I just read out the
3 alternative version of my evidence?"

4 That's not going to be permitted.

5 And indeed, the reference to allowing notes in the
6 hot tub should also not be interpreted as allowing
7 anyone to give a pre-prepared speech on anything.

8 The purpose of transcripts is to assist those who
9 don't have the power of perfect recall as to what they
10 said and then want to check what they were asked. Of
11 course, as you say, Mr Jowell, on some occasions, it may
12 be appropriate, or indeed useful, for the expert or the
13 witness to say, "I think what I said yesterday wasn't
14 entirely clear. Can I just clarify?" If done
15 judiciously, I doubt that there will be objections, but
16 that should absolutely not be taken to encourage
17 an attempt to revise in substantial part what was said
18 the day before.

19 MR JOWELL: I'm grateful for that indication.

20 MRS JUSTICE BACON: On that basis, is everyone content with
21 the general rule of permitting transcripts?

22 MR JOWELL: Yes.

23 MRS JUSTICE BACON: Mr Moser, you're looking troubled.

24 MR MOSER: I'm just interested because I'm wondering what
25 the policy reason is -- of course, I hear you, ma'am,

1 about -- perhaps -- perhaps it's similar in spirit to
2 typographical corrections in judgments, say, where, if
3 there's a factual error, it can be corrected, but it's
4 not to be seen as an invitation to revisit the
5 arguments.

6 MRS JUSTICE BACON: Something along those lines, but,
7 certainly, when an expert is asked a question, they may
8 seek to do the best they can first time around and,
9 having thought about it overnight, they may want to
10 slightly clarify what they have to say, but, as I say,
11 this is not an opportunity to seek to row back or
12 completely revise what they said the day before, just
13 because they realise it's maybe not favourable to their
14 general case.

15 MR JOWELL: Yes, quite.

16 MRS JUSTICE BACON: All right.

17 Yes, is there anything else that can usefully be
18 said about the expert evidence in cross-examination or
19 the hot tub at this point?

20 MR JOWELL: Yes, I suppose there's the issue of purdah.

21 MRS JUSTICE BACON: Ah, yes, so I think the -- what we will
22 do, subject to any violent disagreement, is that, when
23 the hot tub is over, the experts will both be released
24 from purdah. So, on each side, they can then re-join
25 their legal teams and discuss with them before each of

1 them then goes back into the witness box.

2 MR MOSER: I think that is the sensible solution that we had

3 proposed already.

4 MR JOWELL: Yes.

5 MR MOSER: It seems we all agree.

6 MRS JUSTICE BACON: All right.

7 MR JOWELL: The other issue is the question of -- I suspect,

8 strongly suspect, that there will be occasions when it

9 will be necessary to either sit -- well, probably, for

10 some sections, sit in private if one's discussing rates

11 which are still confidential.

12 MRS JUSTICE BACON: Yes.

13 MR JOWELL: And it may be -- on other occasions, it may be

14 possible to ask questions with, you know -- on the basis

15 that one doesn't read the figure out, or the clause out,

16 aloud, yes.

17 MRS JUSTICE BACON: I would suggest, as far as possible,

18 and I think you both of you had in mind that you would

19 do this anyway, simply do it without reading out the

20 relevant clause or figure, and everyone will just do

21 their best. I'm aware, sometimes, there are slip-ups.

22 We can deal with that by correcting the transcript, if

23 necessary. But I think, as far as possible, we'll deal

24 with it that way. If there are sections where we need

25 to go into private session, perhaps -- especially in the

1 cross-examination, if you can group your confidential
2 questions together so that we don't have to keep going
3 in and out of private session repeatedly.

4 MR MOSER: Yes.

5 MRS JUSTICE BACON: I think even if that means taking things
6 not exactly in a logical order.

7 MR MOSER: In the usual way, exactly.

8 MRS JUSTICE BACON: All right.

9 MR JOWELL: The same may apply to the hot tub.

10 MRS JUSTICE BACON: Yes. And we will obviously have that in
11 mind. Is there anything else before we turn to the
12 exciting subject of bundles? Mr Bailey?

13 Discussion re the UK 1782 Confidentiality Ring Order

14 MR BAILEY: Madam, on the agenda I believe we skipped over
15 item 4(b). Earlier this week, you did make the 1782
16 confidentiality ring order.

17 MRS JUSTICE BACON: Yes, I thought that was dealt with.

18 MR BAILEY: It has been, but madam I just wanted to raise
19 with you just a question of practicality in terms of how
20 that material is handled. It's not really subject to
21 the process of confidentiality that we just mapped out
22 in August, and one of the reasons for that, as you know,
23 madam, is that the 1782 materials have a particular
24 process by which any challenges have to be --
25 essentially, abide by the terms of the Protective Order

1 of the US court.

2 So echoing the proposal, madam, you made this
3 morning in relation to the hearsay materials, where you
4 said it may be possible for them to be put into
5 a confidential bundle on Opus, such that, as and when it
6 is necessary to refer to them, one can do so, and if
7 there is any dispute, it can sort of be raised then,
8 that would at least take care of those materials.
9 Because, otherwise, we're concerned that actually (a) it
10 will be an additional work stream, but (b) also it may
11 not be one that can even be completed because it's
12 actually subject to the supervision of the US court.

13 I just wanted to put that on your radar.

14 MRS JUSTICE BACON: Given the work that everyone is going to
15 have to do over the next couple of months, I'm very keen
16 to avoid extra work, if that's possible. I know that,
17 through my own comments, you've been required to do
18 additional work over the summer, for which I apologise,
19 in relation to the expert reports. I am aware that you
20 are all going to be very busy. So if that's
21 an appropriate way forward and that's agreed --

22 MR BAILEY: Madam, I haven't had a chance to speak to my
23 learned friends about that issue.

24 MR MOSER: That seems fine, we have no objection.

25 MRS JUSTICE BACON: All right.

1 MR BAILEY: I'm grateful.

2 Discussion re bundles

3 MR MOSER: I'm grateful to Mr Bailey for that.

4 That brings us, indeed, to the exciting subject of
5 bundles, and this is largely really a question for the
6 Tribunal and not for us to tell you whether the Tribunal
7 requires a physical copy.

8 MRS JUSTICE BACON: All right. So, as you know, I work
9 mostly electronically, and the same I think will be true
10 for at least some of the other --well, actually, I'm
11 not going to speak for the other members of the
12 Tribunal, I will leave that to them to let me know.

13 But, for my part I think it will be useful to have
14 a core bundle, or bundles, in hard copy. I will make
15 enquiries as to whether you need to provide more than
16 one hard copy. But bank on doing, at least for me,
17 a hard copy set of the core bundles, which would be the
18 essential pre-reading. So I have in mind: the
19 pleadings; the witness statements, without annexes or
20 exhibits; and the final joint expert statements for the
21 industry and technical experts; the joint economic
22 statement. And then we have to probably have a debate
23 about the underlying economic statements. Because I've
24 had a quick look at the joint economic statement and
25 I think that differs from the industry and technical

1 experts. Because I think, looking at the industry and
2 technical expert statements, those are pretty much
3 stand-alone documents and were intended to be such and,
4 probably, especially with the revisions that are
5 discussed, probably no further reference is needed to
6 the underlying reports. I'm not sure that's true of the
7 economic statement because I found it actually very
8 difficult to follow that.

9 I think, although that's going to be a useful
10 document to crystallise what the areas of dispute are,
11 I fear that we're probably going to have to pre-read the
12 underlying economic reports. So I think the trial
13 economic reports -- and you prepared a helpful list of
14 what is going to be necessary for pre-reading for the
15 trial -- I think it's -- oh, no, actually, you haven't
16 included the underlying economic reports on that, but
17 I think it's two reports each? Is that right?

18 MR JOWELL: I think it's three, on our part, because we had
19 the separate leveraging report.

20 MRS JUSTICE BACON: Right. So three and two.

21 MR JOWELL: Mm.

22 MRS JUSTICE BACON: All right. So, much as it pains me,
23 I think that those are going to have to be added.

24 Does that sound reasonable for core bundle and
25 pre-reading? Will that fit into no more than two lever

1 arch files, if copied double-sided?

2 MR MOSER: We would ask, please, that certainly our hearsay

3 non-table would be added to the core bundle.

4 MRS JUSTICE BACON: That's going to be the amalgamated,

5 which would be 150 pages eventually?

6 MR MOSER: Yes.

7 MRS JUSTICE BACON: All right, yes. That may be sensible

8 because that's effectively serving the place of what

9 might otherwise be factual evidence.

10 MR MOSER: The witness statements, yes.

11 MRS JUSTICE BACON: So that's going to be 150 pages in

12 total. As I suggested, it would be -- I mean, if you

13 think this is a crazy idea to have two separate tables,

14 but I thought if you amalgamated it into one then that

15 would help with seeing what comes before and after

16 extracts.

17 MR MOSER: Yes. I mean, it will be in the detail, if

18 somehow some of it proves difficult, it might have to be

19 moved to the back or something. But yes.

20 MRS JUSTICE BACON: All right. And please portrait rather

21 than landscape, otherwise we're going to be sitting here

22 turning around our bundles in a courtroom.

23 MR MOSER: Quite.

24 MRS JUSTICE BACON: So if you can prepare a core bundle of

25 that kind. And I suggest that that's replicated on Opus

1 so that anyone who is not having that in electronic form
2 will have the same references, and at the trial then the
3 references can be given to that in the Opus bundles
4 rather than having to give two sets of references at the
5 trial. Does that sound sensible?

6 MR SAUNDERS: My Lady, I think yes. The way to do it on
7 Opus is if you have a second reference for the documents
8 on Opus that is also for the core bundle. So then you
9 have effectively a mirror bundle on Opus rather than --
10 otherwise you get into a bit of a pickle because you
11 have subsets of different documents on Opus and some
12 people mark up one and not others, which is
13 an experience I had in another trial.

14 MRS JUSTICE BACON: Right.

15 MR SAUNDERS: I mean, there are ways of doing this so that
16 the whole thing just cross-refers and everything
17 hyperlinks and it works automatically.

18 MRS JUSTICE BACON: All right. I'm not sure I entirely
19 follow what you're saying but --

20 MR SAUNDERS: We can find a practical way of doing this.

21 MRS JUSTICE BACON: As long as you do something which
22 involves the least work for everybody, and only
23 hopefully one set of references to be given at the
24 trial, so that you're not scrabbling around trying to
25 give the Tribunal one set reference to the hard copy or

1 core bundle and then the Opus operator another
2 reference.

3 MR SAUNDERS: Yes. The other thing just to mention on
4 different versions of documents is the way that Opus is
5 set up is that there is a non-confidential bundle and
6 then there are sub-bundles for each tier of the
7 confidentiality club. So I suppose sort of the pinnacle
8 of which being the 1782 material perhaps. The most
9 convenient thing, certainly for counsel, at least, is to
10 have the highest tier version available of each document
11 because then you can see the mark-up on it and then
12 you're just working on one document. Because the other
13 versions are all redacted, or sub-redacted, and some
14 witnesses are not able to see all the material that's --

15 MRS JUSTICE BACON: Yes, but what does that mean for the
16 EPE? Because there will be -- I'm presuming you're not
17 envisaging that there would be public display of
18 confidentiality?

19 MR SAUNDERS: Yes. So that is a kind of practical
20 difficulty, because the version that you're working
21 from, presumably as the Tribunal, is not the same
22 reference as the redacted version. So we will have to
23 have a think as to how we deal with that, I think.

24 MRS JUSTICE BACON: I think that's probably a technicality
25 too far for the PTR, but some thought will need to be

1 given to that.

2 MR SAUNDERS: Yes.

3 MR MOSER: There are ways of dealing with it and we've had

4 it in the past. One way of dealing with it is having

5 some sort of masking screen, or not showing it -- not

6 being on the certain row of people who are no longer in

7 the ring. Things like that.

8 MRS JUSTICE BACON: Yes, all right. Well, perhaps at the

9 start of the trial we can just have a discussion about

10 how you are going to deal with that.

11 MR MOSER: I'm grateful for the explanation. I'm afraid

12 I also didn't completely follow but I'm sure that it's

13 extremely clever and it's going to work very well!

14 MRS JUSTICE BACON: Let's all just hope!

15 All right. I think there may be a deal of

16 adjustment as we go through and we'll all do the best

17 that we can. I am sure that you'll be able to speak to

18 each other and come up with some suitable process.

19 But just going back to my question. If the bundles,

20 the core bundles, are structured in the way that I've

21 suggested, what's the volume of material that is in

22 that? I did a quick count up but I confess I hadn't

23 included exactly the parameters of what I've just said,

24 and I was hoping that if you copy double-sided the core

25 bundle should run to no more than two lever arch files.

1 MR SAUNDERS: You might struggle -- so that is the pleadings
2 and the technical expert evidence and the joint
3 statements (Indicates).
4 MRS JUSTICE BACON: Right.
5 MR SAUNDERS: The economic evidence is about the same,
6 although I suspect you might slightly run over two
7 bundles.
8 MRS JUSTICE BACON: Of course you're not going to --
9 MR SAUNDERS: That's going to slim.
10 MRS JUSTICE BACON: It's going to slim because you're not
11 going to include the original technical experts, it's
12 just going to be the slimmed down hopefully joint
13 statements.
14 MR SAUNDERS: So we might be --
15 MRS JUSTICE BACON: You might be able to.
16 MR SAUNDERS: Yes.
17 MRS JUSTICE BACON: All right.
18 In terms of pre-reading, although I've indicated
19 that of necessity we're probably going to have to start
20 the pre-reading a little bit earlier than the week
21 before, please take pity upon the Tribunal. I would
22 be -- I think we would all be struggling if we were
23 asked to read any more than the contents of the core
24 bundle as indicated. It actually would be helpful, if
25 you think that there are parts of the original economic

1 expert reports that we don't need to read, in the light
2 of where the experts have come out, it would be useful
3 if you can indicate that. Could we have a jointly
4 agreed pre-reading list submitted at the same time as
5 the skeleton arguments?

6 MR MOSER: Yes.

7 MRS JUSTICE BACON: So there's only one list. And as far as
8 possible, please cut down the pre-reading in light of
9 where you've both come out. As I've said, we are
10 obviously going to have to get into the weeds of the
11 original expert reports to some extent -- the economist
12 expert reports to some extent, but if we don't have to
13 read all of those then that would be preferable.

14 MR MOSER: I mean, I don't want to over-promise, but I would
15 think it's not going to be necessary to read all of
16 them. I'm sure we can manage that, and that will cut
17 down.

18 MRS JUSTICE BACON: Yes. All right. I think that that was
19 everything probably on bundles.

20 MR MOSER: I think so. Dates and so on are broadly agreed.
21 It is not impossible, one cannot exclude the possibility
22 of some limited further additions afterwards. Obviously
23 it would be restricted to whatever would be absolutely
24 necessary. But it's just sometimes of course, as
25 matters progress, there might be the odd document. But

1 then that would be subject to the usual application.

2 Skeletons & Authorities

3 MRS JUSTICE BACON: Yes.

4 Oh, there is actually one point. So skeleton
5 arguments, I'd suggested 19 September. Is that doable
6 for everyone?

7 MR JOWELL: Yes.

8 MR SAUNDERS: Yes.

9 MRS JUSTICE BACON: All right. So can I say 4 o'clock on 19
10 September?

11 MR MOSER: Yes.

12 MRS JUSTICE BACON: Then authorities. So this is a slight
13 complication because I use PDF authorities bundles.
14 I don't use the Opus ones. Because I have them on my
15 iPad and I mark them up on my iPad. So, again, I don't
16 want to put everyone to a lot of additional work. Are
17 you saying that you will have to provide authorities to
18 Opus and have them all on the Opus bundle? Or is
19 there -- does that mean that you are going to have to
20 create a duplicate PDF bundle for me?

21 MR SAUNDERS: It's very easy to turn a folder of documents
22 on Opus into a PDF, so you can do that, you can just
23 export it. So I would have thought, subject to timing,
24 the easiest way to do this is to put them all on Opus.
25 They can then be hyperlinked if that is desirable, and

1 you can -- then that can be dumped into a PDF which you
2 can then use to mark up on your iPad or something.

3 MRS JUSTICE BACON: All right. Then you can do that and
4 then export it into one or a few.

5 MR SAUNDERS: Yes, you can have either individual PDF files
6 or ones --

7 MRS JUSTICE BACON: I would think normally somewhere between
8 one and three authorities bundle and you might find it
9 convenient to separate it if they get very big. But
10 that does mean that, if additional authorities are
11 added, there will at some point need to be a grouping of
12 the additional authorities into a supplemental
13 authorities bundle?

14 MR SAUNDERS: Also, I presume that you want further
15 authorities in a further bundle rather than meaning that
16 you replace your previous one.

17 MRS JUSTICE BACON: Absolutely. So once I've been sent the
18 PDF, I will start marking that up, so you can't just add
19 anything to that. So, yes, I would say in general as
20 small a number of original bundles as is generally
21 feasible. I'm not sure how many authorities you are
22 going to be relying on, but yes, definitely no more than
23 three.

24 MR SAUNDERS: Yes.

25 MRS JUSTICE BACON: And then any further authorities during

1 the course of the trial, I would suggest at some point
2 around closing submissions, just gathered together into
3 a single supplemental bundle.

4 MR SAUNDERS: Of course.

5 MR MOSER: Yes.

6 MRS JUSTICE BACON: Thank you.

7 And date for that, if we're doing -- if we're
8 starting our pre-reading on -- well, nominally on -- in
9 the week before, I think we will need the authorities
10 bundles maybe a little bit before the 26th. Could
11 you -- would you be able to send the authorities bundles
12 by the 25th? That will be almost -- that will be four
13 days after the skeleton arguments.

14 MR MOSER: Yes.

15 MR SAUNDERS: Of course.

16 MRS JUSTICE BACON: All right, thank you.

17 Discussion re role of junior counsel

18 MRS JUSTICE BACON: The only thing else that I had on my
19 list to canvas at this PTR is the role of junior counsel
20 at the trial. Mr Moser?

21 MR MOSER: Yes, I certainly plan to have the involvement of
22 junior counsel. I'm not sure I can say at this stage
23 exactly what they are going to do. There will be at
24 least some sharing of cross-examination responsibilities
25 and possibly also in closing.

1 MRS JUSTICE BACON: Okay, thank you. All right, and we'd be
2 very happy for both. We're always keen to see junior
3 counsel involved as far as they can be.

4 Mr Jowell?

5 MR JOWELL: Yes, well certainly Mr Bailey will be involved
6 in some parts of submissions and cross-examination. And
7 I'm hoping a significant role. And I don't know
8 whether -- I assume there's no difficulty if we have --
9 for example, if we're doing the economic evidence,
10 there's no problem with us splitting up the
11 cross-examination between counsel.

12 MRS JUSTICE BACON: No, there isn't, subject to the usual
13 caveat that it should be properly structured so that
14 it's not that one's having another go.

15 MR JOWELL: No, indeed, on entirely different topics.

16 MRS JUSTICE BACON: On entirely different topics. Also,
17 I would prefer that there wasn't a sort of up and down
18 too much. So I would prefer it if -- for example, if
19 you are going first, you put all your questions first,
20 then followed by Mr Bailey, rather than there being back
21 and fourth between you.

22 MR JOWELL: Understood, understood.

23 I don't know whether you're anticipating that the
24 more junior counsel would also have a speaking role.

25 I hadn't envisaged that at the present time. Although

1 if there is an opening, also.

2 MRS JUSTICE BACON: All right, understood. Yes.

3 MR MOSER: I certainly hope that and intend that Ms McAndrew

4 should have a speaking role.

5 I should also probably mention that at the trial

6 there will also be dedicated IP counsel, although their

7 role is going to be strictly to the parts where they are

8 relevant. We have -- I think in the past there's been

9 Daniel Alexander KC and David Ivison, who can speak to

10 matters of IP to the extent that it becomes relevant.

11 It may be only very peripherally relevant now.

12 MRS JUSTICE BACON: Does that mean you have a six-counsel

13 team?

14 MR MOSER: Yes, but we very much hope there won't be six

15 people attending on the same day.

16 MRS JUSTICE BACON: Yes, I hope so too. I think it would

17 normally be quite disproportionate for there to be six

18 counsel in attendance.

19 MR MOSER: Yes.

20 MRS JUSTICE BACON: All right. Well, you need to divide the

21 work between specialist counsel as appropriate. It may

22 be, following the process that we discussed this

23 morning, regarding the technical and industry evidence,

24 that there isn't quite so much for them to do.

25 MR MOSER: Exactly. I only envisage them attending only

1 a few days, maybe at the beginning and end.

2 MRS JUSTICE BACON: All right. Because this is not an IP

3 trial, it's a competition trial.

4 MR MOSER: No, exactly.

5 MRS JUSTICE BACON: Yes. All right. Yes, well, that will

6 be a matter for you, and no doubt there may -- there

7 will be cost submissions in due course.

8 MR MOSER: Well, that, indeed.

9 MRS JUSTICE BACON: All right. Thank you. Is there

10 anything else?

11 MR JOWELL: Not from our side, I think. No.

12 MRS JUSTICE BACON: No. All right. So could I ask for the

13 draft order to be sent to the Tribunal -- I am looking

14 at -- given the head start that you'll have this

15 afternoon, by 4 o'clock tomorrow. Is that feasible?

16 MR MOSER: Very.

17 MRS JUSTICE BACON: All right. That was confidently said by

18 Mr Moser, and Mr Armitage who is going to have to

19 implement that confidence. Four o'clock. The usual

20 suggestion, if there is anything that you are unable to

21 agree for some reason -- despite the provision of

22 a transcript of today -- in the draft Order, just send

23 along brief submissions, either in comment boxes or by

24 way of a separate document. Brief does mean brief. So

25 that that those can be resolved before we finalise the

1 Order.

2 All right, thank for attending today.

3 (3.00 pm)

4 (The hearing concluded)

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