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IN THE COMPETITION

Case No. : 1382/7/7/21

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 6th October 2025 – Wednesday 5th November 2025

Before:

Mrs Justice Bacon

Derek Ridyard

Justin Turner KC

(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, ROB WILLIAMS KC, MICHAEL ARMITAGE, CIAR MCANDREW, DANIEL ALEXANDER KC, DAVID IVISON AND CHARLOTTE MCLEAN (Instructed by Hausfeld & Co LLP) on behalf of Consumers' Association

DANIEL JOWELL KC, NICHOLAS SAUNDERS KC, DAVID BAILEY, SOPHIE BIRD, CHARLES WALL, ALEXANDRA BRECKENRIDGE (Instructed by Norton Rose Fulbright LLP and Quinn Emanuel Urquhart & Sullivan LLP) on behalf of Qualcomm Incorporated

Monday, 6 October 2025

1
2 (10.30 am)
3 (Proceedings delayed)
4 (10.44 am)
5 Housekeeping
6 THE CHAIR: Good morning, everyone. I am sorry for the
7 delayed start. I understand that the problem is that
8 the Opus audio is not working but I think it is better
9 that we just start. I think the livestream is working.
10 I am going to start with the warning at the start.
11 So some of you are joining us livestream on our website
12 so I am starting with the customary warning. An
13 official recording is being made and authorised
14 transcript will be produced, but it is strictly
15 prohibited for anyone else to make an unauthorised
16 recording, whether audio or visual, of the proceedings
17 and breach of that provision is punishable as a contempt
18 of court.
19 Thank you.
20 Just as one more timing housekeeping matter.
21 Mr Moser, just to let you know that I have a meeting at
22 4.30 so we will have to finish by at the latest about
23 4.20 today. If you foresee problems with that, then
24 I think you should let me know now, especially given
25 that we have had a slightly delayed start. If you are

1

1 not able for your side to accommodate your submissions
2 in the time you have today, and have, say, 10 minutes
3 overspill, we could do that at the start of the hearing
4 tomorrow and we could maybe just start a little bit
5 earlier to make up time, if you are going to run into
6 problems.
7 MR MOSER: That is a very kind indication. It is difficult
8 to indicate right now and I would hope to be able to
9 finish this morning, if necessary, at some stage, when I
10 am effectively just pointing you at documents, giving
11 you something in note form. Then my learned friend
12 Mr Williams is in the afternoon and as a coda on IP law,
13 my learned friend Mr Alexander at the end. So he is
14 likeliest to be squeezed, if he needs ten minutes in the
15 morning, I somehow doubt it, but --
16 THE CHAIR: No, just given that we have started late and
17 given that we might need to rise maybe a few minutes
18 earlier than you would have expected, I just wanted to
19 warn you of that now. Obviously we have a few
20 housekeeping points to start off with so, yes, all
21 right, we will see where we get to.
22 The other timing point is, I think, the
23 confidentiality section and perhaps we should think
24 about confidentiality generally. I understand that at
25 the end of the morning you want a closed session. How

2

1 long?
2 MR MOSER: I was going to raise that. I have decided,
3 I think, I can do without.
4 THE CHAIR: All right.
5 MR MOSER: I will just point you to things.
6 THE CHAIR: Yes.
7 MR MOSER: That will save time and also is more in the
8 interest of open justice.
9 THE CHAIR: Okay. I am concerned about the extent of
10 confidentiality. At some point we will just need to
11 have a discussion about how we are going to manage
12 things going forward, because it seemed that some of the
13 witnesses look okay, but there seems to be an alarming
14 amount of highlighting in the evidence of some of the
15 other witnesses and I just wonder if you have any
16 thoughts on how we are going to deal with that.
17 MR MOSER: There is an alarming amount, I agree. As Class
18 Representative, we have tried to manage as best we can
19 with the requests for confidentiality, of course it is
20 not our confidentiality, we fear a certain amount of
21 witness evidence is going to have to be given in private
22 because of the amount of redaction. That is of course
23 unsatisfactory. It may be that at some moment this
24 week, when there is some time, perhaps before we start
25 witness evidence, that can be revisited.

3

1 THE CHAIR: Yes.
2 MR MOSER: With, Madam, your indication well in mind.
3 THE CHAIR: Yes. I think maybe we ought to do that. Let us
4 just get to the end of the opening submissions and then
5 schedule in some time to revisit the question of
6 confidentiality because I am concerned. From our point
7 of view, it is going to be very difficult if everything
8 that is highlighted cannot be discussed in open court.
9 MR MOSER: Yes.
10 THE CHAIR: So let us not deal with that now in detail but
11 just flag it that we will have to create some time in
12 the timetable for us to review that.
13 Before we go further, is it me or is it arctic in
14 this courtroom?
15 MR MOSER: It is arctic.
16 THE CHAIR: Can we turn the temperature up by a number of
17 degrees. Thank you.
18 All right. What --
19 MR MOSER: We can do our best to generate as much hot air as
20 we can.
21 THE CHAIR: I'm sure that will not be a problem for your
22 side, Mr Moser! For your side of the bench. Sorry,
23 I am not talking about you in fact specifically.
24 MR MOSER: Fair comment.
25 THE CHAIR: Yes, all right. We will try and get the

4

1 temperature turned up. It always seems to be either
 2 tropical or arctic in these court rooms.
 3 All right. Other housekeeping issues? Mr Moser,
 4 why do you not go through your housekeeping points and
 5 then I will then indicate a few further points from the
 6 Tribunal if you have not covered them.
 7 MR MOSER: My only housekeeping point is one that has been
 8 explored in correspondence, which is we are very sorry
 9 about the spacing in our skeleton argument. I do not
 10 know whether the Tribunal has seen a letter about it.
 11 THE CHAIR: I did. It is not clear to me why it was
 12 misunderstood. The other side seems to have understood
 13 what was said. Obviously there was a lack of clarity so
 14 I do not want to take up a lot of time on this. I think
 15 I should just say, then, for the avoidance of doubt,
 16 rather than I'm saying 1.5 line space, which clearly was
 17 not sufficiently clear, there should be at least a 12
 18 point space over each main text paragraph otherwise the
 19 spacing is too dense and it is really difficult to
 20 follow. Please do not try and gain space in any other
 21 way, such as removing the hanging indents or numbered
 22 paragraphs. Just format the rest of the document as you
 23 have done, but ensure that there are 12 point spaces
 24 after each main text paragraph, because for one reason
 25 or another you ended up having a lot more words than the

1 other side who did space their skeleton in the way that
 2 I had thought was clear, but plainly was not clear
 3 enough.
 4 Closing submissions length and format. I know that
 5 it is the customary practice for people to start
 6 drafting their closing submissions at the start of the
 7 trial or even before the start of the trial, so should
 8 we just have a word about how long those are going to be
 9 and what they should cover?
 10 MR MOSER: I think there was an order at the PTR --
 11 THE CHAIR: Have we --
 12 MR MOSER: -- as to the length of the closing submissions.
 13 THE CHAIR: Do we already have that?
 14 MR MOSER: Yes.
 15 THE CHAIR: Can you remind me then?
 16 MR JOWELL: From recollection, it was 120 pages.
 17 THE CHAIR: 120, all right.
 18 MR JOWELL: To be a replacement.
 19 THE CHAIR: Sorry, I had not remembered that we had dealt
 20 with that. Fine. That is all fine.
 21 I think that was mostly it. Two points that we
 22 thought would be helpful for us. First of all, can we
 23 have a very short document from either, just a page or
 24 two, which sets out your essential case on what the
 25 market definition is and the market shares that you get

1 out of that.
 2 MR MOSER: Yes.
 3 THE CHAIR: Because, strangely, in a case which involves
 4 quite detailed submissions on market definition, we do
 5 not seem to have that in a handy format on either side.
 6 So just set out the market definition that you are
 7 contending for and the market shares which follow from
 8 your market definition.
 9 Secondly, just for us to consider how the
 10 cross-examination of the industry and technical expert
 11 is going to work, can we have from each side, by the end
 12 of the week, again, in very short format, a list of the
 13 areas on which you wish to cross-examination the
 14 industry and technical experts, if at all. This is not
 15 an encouragement for you to find points to cross-examine
 16 them on; we have a day set aside for cross-examining all
 17 of the industry and technical experts so it is not going
 18 to be long in any event, but if that day can be reduced
 19 even further, it seems to us it would be helpful.
 20 Those areas for cross-examination have to be only on
 21 disputed points that are absolutely essential to the
 22 determination of the case. We do not want them to be
 23 cross-examined of issues that are really background and
 24 we think it would be good for the Tribunal to be
 25 educated on them. The Tribunal has been educated

1 I think sufficiently by reading the joint statements of
 2 the industry and technical experts. So
 3 cross-examination points should focus on essential
 4 disputed issues and your note on points for
 5 cross-examination of those should cross-reference the
 6 paragraphs of your skeleton argument which address those
 7 issues, again, to ensure that any cross-examination is
 8 on absolutely critical points that you have addressed
 9 and you will be addressing and not on superfluous points
 10 that are on no basis are going to find their way into
 11 our judgment.
 12 So can we have that on both sides and let us see if
 13 we can get the cross-examination of those down to the
 14 bare minimum, insofar as it is required at all. Just to
 15 say, in case it is not obvious to you from my comments
 16 just now, we are not convinced that very much, if any,
 17 cross-examination of the industry and technical experts
 18 is required so it is for you to persuade us that any of
 19 this is going to be useful.
 20 MR MOSER: That is very helpful. I can say that the parties
 21 have been in very constructive discussions about this
 22 very point and it is, I think, common ground that not
 23 very much, if any, cross-examination is going to be
 24 necessary. We have not completely reached a landing yet
 25 on technical experts, in particular, but we will of

1 course do that and that will be done before the end of
 2 the week.
 3 THE CHAIR: All right. Thank you very much.
 4 The idea of that is that we can then take stock well
 5 ahead of the day that is set for the cross-examination
 6 of those experts next week. Is it Wednesday?
 7 MR MOSER: Yes.
 8 THE CHAIR: All right. Thank you.
 9 That was the -- that was all of our housekeeping
 10 points that we need to raise right now.
 11 MR MOSER: I am grateful.
 12 Opening submissions by MR MOSER
 13 MR MOSER: In that case, I'll dive straight in, if I may.
 14 It seems an obvious place to start with the list of
 15 issues. I do not know whether anybody is using the hard
 16 copy core bundle? The list of issues in the hard copy
 17 is at 40 in the second core bundle. In electronic, it
 18 is at {H/74/1}.
 19 THE CHAIR: All right. So for your information, Mr Ridyard
 20 is entirely electronic. Mr Turner and I are hybrid
 21 electronic and hard copy. We are both using the core
 22 bundles, but not very much else, in hard copy. I also
 23 have all the authorities in electronic copy.
 24 MR MOSER: I am grateful.
 25 THE CHAIR: Yes, all right.

1 MR MOSER: The list of issues obviously will be for me.
 2 I use them merely as a kind of aide-mémoire to point out
 3 the running order today and the issues that I will open
 4 on this morning. My learned friend, Mr Williams, is
 5 going to be opening on market definition and dominance
 6 and market power this afternoon so we are doing it in
 7 the order of my learned friends for Qualcomm skeleton
 8 argument.
 9 I will be opening therefore on issues 7 and
 10 following on abuse --
 11 THE CHAIR: So you are starting your submissions at the
 12 abuse end?
 13 MR MOSER: Yes.
 14 THE CHAIR: All right. Then following that with market
 15 definition and dominance?
 16 MR MOSER: Yes.
 17 THE CHAIR: All right.
 18 MR MOSER: To some extent there is some abuse in what my
 19 learned friend is going to talk about because
 20 Mr Williams will also deal more -- in more detail than
 21 me with 8(c) which is the alleged RTL Policy.
 22 I will open on issue 7, 8 and -- apart from (c),
 23 and, in particular, the question of is it capable of
 24 constituting an abuse? Is there departure from
 25 competition on the merits? Is it capable or likely to

1 have an anticompetitive effect? Has Qualcomm taken
 2 additional steps, such as not permitting the seeking of
 3 third party determinations of whether its royalties are
 4 FRAND? Objective justification is really the obverse of
 5 some of those points.
 6 I will not open in any detail on issue 10 on FRAND
 7 or on issues going to effect on trade and territoriality
 8 which are dealt with in the skeleton and, at least for
 9 opening purposes, I do not plan to add very much to what
 10 we say in the skeleton.
 11 So that is what I will do.
 12 THE CHAIR: Well, I think we do need to understand what your
 13 position is on whether you are saying that the royalties
 14 were -- ended up being at an above FRAND level or
 15 whether you are saying, as your primary case, they were
 16 within FRAND, but higher than they otherwise would have
 17 been?
 18 MR MOSER: No, our primary case is going to be that they
 19 ended up above FRAND, in fact considerably above FRAND,
 20 and therefore issue 10 is always going to be academic.
 21 That is the primary position. We say that is perfectly
 22 clear when looking at the evidence.
 23 We do also say, and partly this is of course only
 24 going to become clear in Trial 2 so that is partly for
 25 another day. We do also say that merely because we have

1 ended up within a FRAND bracket does not mean there was
 2 no abuse. As I will explain in a moment, the way that
 3 the abuse manifests is at the time of negotiation. The
 4 negotiations are tainted by the leveraging and by the
 5 closing off of an outside option and so the rate that
 6 you end up with is reasonably likely. I am tempted
 7 always to say "almost certainly" but I don't have to put
 8 it that high. I am showing that there is a reasonable
 9 likelihood to have ended up higher than it would have
 10 been if the negotiations had been undertaken. So if
 11 sitting down and negotiating on a figure between 6 and
 12 8, then if you end up with 8 because of the way that the
 13 negotiations have been tainted, that is an
 14 anticompetitive effect that has led to a higher rate
 15 than otherwise, whether it is FRAND or not.
 16 THE CHAIR: But if your primary case is that the royalties
 17 were significantly above FRAND, when you were asked
 18 about whether you were advancing an anticompetitive
 19 pricing case, why did you say that you were not?
 20 MR MOSER: Because that is not how we are characterising the
 21 abuse. We say that the nature of our theory of harm is
 22 about the way that the negotiations have been tainted.
 23 We are not saying that you have to find a particular
 24 price and then say that this prices above it. That, in
 25 a sense, is how the other side are trying to

1 characterise it : look at where you end up and if it is
 2 FRAND, then it is fine. We say, no, the whole ecosystem
 3 within which the rate was negotiated was tainted by
 4 anticompetitive actions that were a departure from
 5 competition on the merits and where you end up on
 6 damages, is a matter for Trial 2.
 7 THE CHAIR: Yes. I mean, I'm still struggling with why
 8 you -- it is not part of your case to characterise this
 9 as excessive pricing, because it strikes me if your
 10 primary case is that the royalties were significantly
 11 above FRAND, then surely you are saying that it is an
 12 excessive price, because you are saying it is above the
 13 fair, reasonable and non-discriminatory price range?
 14 MR MOSER: Well, it is simply necessary, in my respectful
 15 submission, for us to use the excessive pricing lens,
 16 because we are looking at a form of abuse which
 17 I am sure it is not contentious is not a matter of fixed
 18 categories. There is no pigeonholing particular abuse.
 19 The particular abuse we are talking about is what has
 20 been short-handed as "NLNC", no licence, no chips, and
 21 that takes hold at the point of negotiation.
 22 The matter for Trial 2 is going to be what is the
 23 difference, but in relation to testing whether it is
 24 capable of constituting an abuse of a dominant position
 25 in law, I do not have to nail my colours to the mast of

1 excessive pricing because of the way that we have put
 2 the case and I will expand on that in a moment.
 3 THE CHAIR: All right.
 4 MR MOSER: I recognise that these points have been put,
 5 particularly in my learned friend's skeleton argument.
 6 That is why I want to formulate our abuse at the
 7 beginning. I have four points that I'd like to discuss
 8 and I have flagged them already.
 9 The first point is the nature of the departure from
 10 competition on the merits and its likely effect. If
 11 I can just very briefly identify where the core case is
 12 pleaded.
 13 THE CHAIR: Well, do you want to summarise your four points
 14 to just give us a road map for your submissions. The
 15 first is the nature of the departure from competition on
 16 the merits. What are the other three?
 17 MR MOSER: So the second is the nature of how we define
 18 "NLNC".
 19 THE CHAIR: Yes.
 20 MR MOSER: The third is the counterfactual. The fourth is
 21 objective justification.
 22 THE CHAIR: All right. So you are starting we the departure
 23 from competition on the merits?
 24 MR MOSER: Yes.
 25 If we look at the claim form, at core bundle, tab 1,

1 {IRA/1/41}, we have paragraph 72, which talks of the
 2 NLNC policy as buttressed by RTL and further measures
 3 "are likely to have the effect of suppressing the
 4 competitive process in both the LTE chipset and LTE SEP
 5 markets, thereby causing OEMs such as Apple and Samsung,
 6 to pay higher all-in prices for LTE chipsets whether
 7 purchased from Qualcomm" or from its rivals than they
 8 would pay in the absence of Qualcomm's policies.
 9 Then it concludes and says:
 10 "This harm is ultimately suffered by final
 11 consumers."
 12 THE CHAIR: When you say "all-in pricing" you mean the
 13 chipsets, plus the SEPs?
 14 MR MOSER: Yes.
 15 Of course importantly for the nature of the NLNC,
 16 they are said by Qualcomm to have separate prices and
 17 the licence is negotiated first.
 18 Then at 73, we say that it is "a departure from
 19 competition on the merits" and they "are not methods of
 20 competing to offer customers advantages in terms of
 21 price, choice or quality" and "restrict competitive
 22 forces that would otherwise ... inure to the benefit of
 23 consumers". I have started there because of course we
 24 have the Consumers' Association Which? bringing this
 25 collective action on behalf of millions of consumers who

1 purchased Apple and Samsung devices in the claim period
 2 and therefore have suffered loss. Even though, as
 3 I say, that issue of loss would be a matter for Trial 2,
 4 for this trial we will need to answer the question of
 5 liability and in relation to abuse therefore is it
 6 capable of constituting an abuse and also was NLNC
 7 capable or reasonably likely to have had an
 8 anticompetitive effect by increasing royalties?
 9 That is all I wanted to say about the basics of our
 10 pleading, but the nature of NLNC is defined at
 11 paragraph 33 of this claim form which is at page 14 of
 12 the electronic bundle. {IRA/1/14}.
 13 THE CHAIR: All right. When are you in your submissions
 14 going to deal with exactly how the suppressing
 15 competitive process worked in your view? I mean, you
 16 just pointed us at the way it is summarised extremely
 17 briefly in paragraph 72 of the claim form, but when do
 18 we see how that fed into the specific licensing
 19 negotiations for the relevant SEP licences that were
 20 conducted by Apple and Samsung?
 21 MR MOSER: I can deal with that directly. I will also say
 22 that I am going to take the Tribunal to a certain number
 23 of documents and some parts of the hearsay which
 24 illustrate what we say so that the nature of the abuse,
 25 where the abuse manifests itself, as I say, is in the

1 area of course of the negotiation of the royalty and
 2 Qualcomm, instead of competitive negotiation, uses the
 3 inherent risk, or sometimes explicitly stated threat, of
 4 chipset supply disruption, or software delay, to
 5 foreclose a normal discussion of royalties and
 6 conditions for the licences. Instead, it is unless you
 7 take our package of licences at Qualcomm's rate and on
 8 our terms, unless you do that, there are no chips.

9 Qualcomm's terms include royalty at a rate which we
 10 say is likely to be inflated and that is payable on
 11 every phone, whether it uses Qualcomm's chips or not,
 12 and there are a host of other, we say, egregious terms
 13 that Qualcomm has imposed from time to time by the
 14 historic practice of requiring OEMs to take the whole
 15 package of patents, whether they needed them or not,
 16 insisting on using the handset as the royalty base in
 17 order to capture elements of value, such as premium
 18 casings, nothing to do with Qualcomm's technology.

19 THE CHAIR: Are you saying that the end device licensing is
 20 in itself objectionable? I do not -- I am not sure that
 21 that is articulated in your skeleton argument or the
 22 claim form and nor does it seem to come out of the
 23 evidence.

24 MR MOSER: Well, the end device licensing is one of the
 25 aspects that buttresses the behaviour.

1 THE CHAIR: So you are saying that that is something that
 2 Qualcomm should not have done?
 3 MR MOSER: Not in this context, no. It would have been --
 4 it would have been appropriate for a dominant firm in
 5 this context to allow the licensing at OEM-level,
 6 because that would have been one way of avoiding the
 7 anticompetitive effect. It is the whole ecosystem of
 8 measures that we criticise.

9 THE CHAIR: So you are saying that the end device licensing
 10 system which Qualcomm pursued was in itself
 11 objectionable as being part of the abuse?

12 MR MOSER: Yes. But whether there was RTL or not refusal to
 13 license, the NLNC policy was in any event abusive. RTL
 14 is, as it were, an extra. It is an extra element of the
 15 abuse that is present and what it does is it closes off
 16 the ability to escape from the consequences of NLNC,
 17 because you cannot get the same licence elsewhere.

18 THE CHAIR: But you are not saying it is a stand-alone
 19 abuse?

20 MR MOSER: No.

21 THE CHAIR: So you are saying it was abusive in the sense
 22 that it was part of the NLNC abuse?

23 MR MOSER: Essentially, yes.

24 MR RIDYARD: Just going back to the threat to refuse to
 25 supply chipsets, what exactly is it that triggers that

1 refusal in your case? I mean, if I am an OEM and I say,
 2 "I do not like these royalty rates, I would rather pay
 3 less" and the way for me to do that is to instigate some
 4 kind of litigation or arbitration under the FRAND
 5 principles, are you saying that as soon as I say that
 6 I am told, "Well, if you commit to a FRAND arbitration,
 7 I will withdraw the chips"?

8 MR MOSER: The way this works is that Qualcomm insists on
 9 the sale of its SEPs separately and in advance of the
 10 sale of its chipsets and on the terms demanded. So that
 11 is what is pleaded at paragraph 33 of the claim form on
 12 Qualcomm's preferred terms. The NLNC policy that we
 13 object to is not simply a policy of saying: we need you
 14 to take out a licence before we supply you with chips.

15 No, it is that Qualcomm uses disruption of supply or the
 16 threat of disruption of supply as a tool for leveraging
 17 more advantageous, we say supracompetitive, licence
 18 terms. In short, when we say about demanded, it does
 19 not mean take it or leave it; it means that Qualcomm
 20 ultimately got to impose terms that the OEM would not
 21 have accepted in undistorted negotiation and absolutely
 22 part of that is that the safety valve, the route to
 23 a FRAND negotiation, is then not open to the OEM.

24 MR RIDYARD: So that is the purpose of my question. So I am
 25 an OEM, I do not like the royalty rates, I am sure we'd

1 all like to pay less royalties, but my way to do that is
 2 to instigate a FRAND arbitration, say. So I say to
 3 Qualcomm, "Well, I am going -- I want to go to a FRAND
 4 litigation arbitration and I am happy to commit to
 5 whatever happens to come out of that arbitration" and
 6 you are saying at that point Qualcomm then turns off the
 7 tap on the chipsets?

8 MR MOSER: Yes. It turns off the tap, or everybody knows in
 9 the industry that that is what is very likely to happen
 10 to you if you have the temerity to go to FRAND.

11 MR RIDYARD: So I do not even take the step of saying "I am
 12 prepared to commit to FRAND terms" because I know that
 13 before I even say that, my chipsets will be turned off?

14 MR MOSER: Yes, not all negotiations are the same. So
 15 sometimes some OEMs say "We want to go to FRAND" and are
 16 told "no". Sometimes they just do not even go there
 17 because, as you say, they know what the answer is going
 18 to be. That is why it is not always an express threat.
 19 Sometimes it is.

20 MR RIDYARD: It is a bit tricky to evaluate that, because it
 21 is unobservable, is it not? If you say "Before I even
 22 open my mouth you are going to cut off my chipsets",
 23 then I do not even ever open my mouth.

24 MR MOSER: We will observe it in the evidence. Sometimes
 25 people do open their mouth and are shut up. Sometimes

1 we see evidence, internal evidence, that says, "Well, we
 2 did not even open our mouth because we were burnt last
 3 time. Not going to do it this time, for instance, in
 4 a renegotiation of terms." Sometimes they have been
 5 trained already not to open their mouth.
 6 THE CHAIR: Mr Moser, are you going to talk us through this
 7 morning what you say happened for each of the relevant
 8 licensing negotiations for Apple and Samsung to show us
 9 that that was the case?
 10 MR MOSER: I will try to.
 11 THE CHAIR: I am not saying that you have to, if it was not
 12 your plan, but if you were not going to do it, when were
 13 you going to do that?
 14 MR MOSER: It is my plan.
 15 THE CHAIR: All right.
 16 MR MOSER: It is my plan to take you to the documents.
 17 It may be that I can take care of the introductory
 18 story more quickly because I think we have really got to
 19 the nub of it through the questions. I was going to say
 20 I am going to talk about the nature of NLNC. I think
 21 I've broadly covered that, without giving you all of the
 22 references. We have covered it in, for instance, our
 23 reply to further information of 11 September 2023. It
 24 may suffice to go to that.
 25 THE CHAIR: All right.

1 MR MOSER: That is at {B/10/10}, core bundle 9. Then maybe
 2 I'll be done with the pleadings and get on with showing
 3 you some other things.
 4 You will see what we said there at paragraphs 3 and
 5 4:
 6 "Through the NLNC policy, the Defendant requires
 7 OEMs to enter into a separate patent licence on the
 8 terms demanded ... as a conditional or pre-condition of
 9 supply ... failing which the supply ... is (or is at
 10 risk of being) disrupted."
 11 THE CHAIR: Core bundle, tab 9.
 12 MR MOSER: Tab 9.
 13 THE CHAIR: {B/10/10}.
 14 MR MOSER: {B/10/10}. It is also internal page 10
 15 {B/10/11}.
 16 THE CHAIR: Paragraph?
 17 MR MOSER: Paragraph 3 starting:
 18 "Through the NLNC policy ..."
 19 I will not read it all out to you, but if you cast
 20 your mind over it down to:
 21 "The Defendant's practice is intended to, and by its
 22 nature does, pressurise OEMs into accepting the licence
 23 terms demanded by the Defendant."
 24 THE CHAIR: So are you saying in terms that this pressures
 25 OEMs into abandoning or not pursuing FRAND negotiations?

1 MR MOSER: Yes. So our criticism is not that they seek the
 2 licence, nor that they seek it in advance of supply, but
 3 that they seek it on non-competitive terms and in ways
 4 that therefore prevent the seeking of FRAND
 5 determination and leveraging their unique
 6 double-dominant position in the SEP and chipset markets
 7 and creating this atmosphere of risk of disruption of
 8 chip supply in order to do so. The counterfactual is at
 9 4 in the next paragraph:
 10 "... the NLNC policy prevents OEMs from obtaining
 11 the supply of chipsets straight away on the basis that
 12 they do not agree to the Defendant's terms demanded for
 13 the separate patent licence because those terms are not
 14 regarded as FRAND, but would commit to a FRAND licence,
 15 including a FRAND royalty rate, the terms of which are
 16 set by an independent third-party determination (such as
 17 by a patents court...) in default of a mutual agreement.
 18 That is a legitimate position on the basis of which an
 19 OEM is reasonably entitled to receive the continued
 20 supply of chipsets even in the absence of having already
 21 entered into a SEP licence on terms set by
 22 the Defendant, yet such position is precluded by the
 23 Defendant's policy."
 24 That is exactly, Madam, your question, the answer to
 25 your question.

1 THE CHAIR: So you are saying that the counterfactual is
 2 that there would be a FRAND determination?
 3 MR MOSER: There would be the possibility of a FRAND
 4 determination, yes. Our counterfactual is a world
 5 without NLNC, which includes all of this behaviour that
 6 I have outlined.
 7 THE CHAIR: So in your counterfactual, how would the
 8 licensing work for somebody who's a supplier of both
 9 chipsets and has a portfolio of SEPs? Are you saying
 10 that the correct counterfactual, what Qualcomm should
 11 have done, should have been to license at the chipset
 12 level?
 13 MR MOSER: They should have licensed and said, "Here is our
 14 licence. These are our terms. If you do not like these
 15 terms, we can go to FRAND arbitration or negotiation --
 16 sorry, FRAND arbitration or court determination in due
 17 course and here are the chipsets while we do that."
 18 THE CHAIR: So that answer does not suggest that you are
 19 saying they should have licensed at the chipset level,
 20 because of course at that level there would not have
 21 been the FRAND system?
 22 MR MOSER: Well, that is not our particular counterfactual.
 23 The counterfactual is that they should have allowed the
 24 FRAND determination at whatever level they are licensing
 25 with their counterparty. So when they are talking to

1 Apple, it is Apple who's seeking the chipsets and the
 2 FRAND determination would be on that basis. So this is
 3 not --
 4 THE CHAIR: All right. So you are not saying -- so you are
 5 not saying that the counterfactual is one in which there
 6 was not end device licensing? It is your counterfactual
 7 one in which you assume end device licensing but that
 8 licensing goes to a FRAND determination?
 9 MR MOSER: What the end device licensing does, in our
 10 ecosystem argument, is that it precludes the escape
 11 route. You cannot get them any other way. If they
 12 follow the proper counterfactual with the FRAND
 13 determination open to the customer, then, yes, I agree,
 14 Madam. The question of RTL falls away because it is no
 15 longer a problem because the negotiations are carried
 16 out properly.
 17 THE CHAIR: Okay. But at what point do you say that the --
 18 what does the licence attach to in your counterfactual?
 19 MR MOSER: To the chipsets.
 20 THE CHAIR: Okay. So you are saying that then the licence
 21 is then bundled in with the chipsets in your
 22 counterfactual? I am just trying to understand what
 23 your counterfactual is exactly, because Qualcomm says
 24 they do not understand it.
 25 MR MOSER: It attaches -- forgive me, I misspoke. It

1 attaches to the handset that contains the chipset.
 2 THE CHAIR: So you are saying that there should have been
 3 end device licensing in your counterfactual?
 4 MR MOSER: Yes.
 5 THE CHAIR: All right. So your counterfactual is one in
 6 which there is an end device license. You are not --
 7 the chipset does not come with an exhausted licence so
 8 you do not incorporate the royalty into the price of the
 9 chipset, but you then -- you do negotiate that
 10 separately with the OEM, but in a FRAND -- on a FRAND
 11 negotiation? Is that your counterfactual?
 12 MR MOSER: Yes. I'll take you in a moment to where Mr Noble
 13 explains his view of this in his report, but it does tie
 14 in exactly, Madam, with what you are saying, because our
 15 counterfactual, as I say, is a world without all of this
 16 NLNC. They say, well, we are entitled to do what we do
 17 for two reasons. One is they say they want a reasonable
 18 return on their patents and the other reason they give
 19 is they say that they want to avoid exhaustion. Now,
 20 those are both perfectly proper aims to which they are
 21 entitled, but it does not engage with our abuse for the
 22 reasons, Madam, you have outlined because neither
 23 reasonable payment nor reasonable steps to avoid
 24 exhaustion require NLNC. They do not need to leverage
 25 the threat of supply disruption in licence negotiations

1 or shut off the route to FRAND, because they can achieve
 2 their purpose in another way. I promised to show you
 3 how Mr Noble puts that. That is in core bundle, tab 35,
 4 in Mr Noble's eighth report.
 5 THE CHAIR: Just one moment. (Pause).
 6 Yes.
 7 MR MOSER: So Mr Noble's eighth report, electronic reference
 8 {POE/21/103}.
 9 MR TURNER: Sorry, Mr Moser, where in the bundle?
 10 MR MOSER: Tab 35. It will be in the second bundle.
 11 MR TURNER: Thank you.
 12 EPE OPERATOR: I do not seem to have that.
 13 MR MOSER: I do not know why. It is also in core --
 14 THE CHAIR: Core bundle, tab, 35. Which paragraph?
 15 MR MOSER: Paragraph 6.65. I'll start from the second
 16 sentence:
 17 "... from an economics perspective [that sentence],
 18 it would seem that there are a variety of alternatives
 19 to NLNC that could address this issue: one alternative
 20 could be for Qualcomm and the OEMs to sign a licence
 21 specifying that absent an agreement over royalties, the
 22 appropriate rate would be subject to a third-party
 23 determination of the appropriate royalty rate, as part
 24 of a broader agreement to supply Qualcomm chipsets."
 25 So when they criticise our case and our

1 counterfactual, they make it too easy for themselves in
 2 my respectful submission. We are not saying you have to
 3 sell your chips without a licence. It is not that
 4 a patent owner should give away its chipsets without
 5 a licence, opening itself up to the risk of exhaustion.
 6 It is not that a patent owner should supply chipsets
 7 without payment for those chipsets or he is not entitled
 8 to cease supply under a contract for a physical good if
 9 payment is not being made. That applies, for the
 10 avoidance of doubt, whether you are dominant or
 11 non-dominant, but what we say, very simply, is that at
 12 that stage of negotiation you have to allow the -- you
 13 have to allow the possibility of FRAND licence
 14 arbitration that Mr Noble explains.
 15 THE CHAIR: Well, so if all you are saying is the effect of
 16 the abusive conduct was there was not the possibility of
 17 FRAND arbitration, the counterfactual is simply that
 18 they had to allow the possibility of FRAND arbitration.
 19 If that is what you are saying, I understand that, but
 20 I am not sure that that is what Qualcomm understood you
 21 to be saying.
 22 MR MOSER: It has certainly always been part of our case.
 23 This is what I have identified as being the nub of the
 24 abuse.
 25 THE CHAIR: The nub of the abuse is that it was not possible

1 to go to FRAND and the counterfactual is they licensed
 2 at the OEM level, but that the OEMs should have been
 3 able to go to FRAND, if they did not agree with the
 4 price set by Qualcomm?
 5 MR MOSER: Yes. So that is the safety valve aspect.
 6 I've described what we say are all of the aspects of the
 7 abuse and they are all there, but, as it happens, there
 8 is a key for a dominant company to allow licensing
 9 before sale of chipsets and the key is the general law
 10 on this matter, which is the FRAND possibility.
 11 A word, if I may, on patents and competition law
 12 because although some may think this is a case somehow
 13 at the intersection of competition law and IP law,
 14 I respectfully say it is not really. IP law just forms
 15 the background to this, but it is essentially common
 16 ground that the refusal to grant a licence under an IP
 17 right more generally does not constitute an abuse of
 18 a dominant position. There have to be some other
 19 elements to the factual situation to make it abusive.
 20 It is common ground that there is no mention of
 21 patents in Article 102 or Chapter 2 and that even
 22 a dominant company must be in a position to take
 23 reasonable steps to protect its royalties, to get paid
 24 for your patents and avoid accidental exhaustion. All
 25 of that is common ground, but what you cannot have is

1 a company in Qualcomm's position, with the products it
 2 has, and the SEPs it holds, using its market power to
 3 foreclose any FRAND discussion. In other words, that is
 4 an abuse of your patent right and that is not
 5 competition law somehow trumping intellectual property
 6 law, because I say it chimes exactly with what IP law
 7 says about SEPs. There is case law on FRAND licensing,
 8 recently, that has emphasised two important ways in
 9 which SEPs differ from ordinary patents and SEPs, it
 10 will be remembered, are the patents we are dealing with,
 11 the special -- essential -- standard essential patents
 12 that are required in order to practise the rights
 13 concerned.
 14 They affect an owner's ability to exercise market
 15 power in a competition law sense, but if we look at an
 16 authority. It is *Panasonic Holdings Corporation*
 17 *v Xiaomi Technology*. That is authorities bundle 2,
 18 tab 42, page 1. If we look at {AB2/42/1}, just a brief
 19 glance at the headnote. It is an appeal against the
 20 refusal of an application by the Defendants in
 21 litigation "relating to standard essential patents,
 22 ('SEPs') for a declaration that a willing licensor in
 23 the position of the claimant (*Panasonic*) would agree
 24 to enter into, and would enter into, an interim licence
 25 of the portfolio of patents which it had declared to be

1 essential to [ETSI]. [This is for] 3G and 4G standards
 2 pending the determination by the Patents Court of what
 3 terms for a final licence of its portfolio were fair,
 4 reasonable and discriminatory ('FRAND')."
 5 If we turn on to page 23 {AB2/42/23} and look, in
 6 particular, at paragraphs 79 and 80, we essentially see
 7 how this system works. So, first, we are told that SEPs
 8 differ from other patents. That is at 79. "Normal
 9 patents are monopoly rights, and the primary remedy for
 10 infringement is an exclusionary injunction ... to
 11 preserve the monopoly". SEPs "are subject to the SEP
 12 holder's obligation to grant licences to any implementer
 13 who desires a licence on FRAND terms". That is the key.
 14 The obligation to grant licences to any implementer who
 15 desires a licence on FRAND terms. An implementer is
 16 entitled, in turn, to such a licence as of right. "SEPs
 17 are not property rights of the same status as other
 18 patents ... the SEP regime is a liability regime" and
 19 "the SEP holder's remedy is a financial one". The only
 20 role for an injunction is to enforce the entitlement to
 21 the money.
 22 "The second point is the implementer is entitled to
 23 a licence from the first day it implements the standard
 24 provided that it is willing to take a licence on FRAND
 25 terms". So an "implementer is entitled to a licence

1 [and one] which is continuous and not subject to
 2 interruptions by injunctions".
 3 So my point is simply that the duty of the dominant
 4 undertaking in such situation is exactly the same as the
 5 general law already requires. It is an obligation to
 6 grant licences on FRAND terms to any willing licensee
 7 and that includes, of course, the possibility to assess
 8 what is FRAND in the event that the parties cannot
 9 agree.
 10 So what a dominant firm is not allowed to do is to
 11 say, "If you do not like the terms, tough". You have to
 12 say, "If you do not like the terms, we can negotiate,
 13 arbitrate or go to court"; in other words, the FRAND
 14 route, "And we will supply you with chips while that
 15 route takes its course on the understanding that you
 16 will pay royalties at whatever rate is found by the
 17 court or tribunal to be FRAND".
 18 I noted --
 19 THE CHAIR: So if Qualcomm did continue to supply chips
 20 while a FRAND process was proceeding, then you would say
 21 that would not have been abusive?
 22 MR MOSER: Exactly. Moreover, I say, it is completely
 23 normal. That is what the relevant IP regime dictates.
 24 THE CHAIR: So your case will require you to show that
 25 Qualcomm -- that when FRAND litigation was initiated,

1 Qualcomm withdrew its supply of chips or it threatened
 2 that it would do so if the counterparty, the OEM, had
 3 initiated FRAND litigation?
 4 MR MOSER: Yes.
 5 THE CHAIR: All right.
 6 MR MOSER: So we want to establish on the balance of
 7 probabilities that Qualcomm used its dominance in chips
 8 in a manner which was likely to result in a distortion
 9 of the negotiation process with OEMs. If we manage
 10 that, we have established a prima facie infringement.
 11 At that point, the burden shifts to the other side to
 12 show objective justification so that the effect of NLNC
 13 went no further than was necessary to protect the right
 14 to recover FRAND royalty. So a legitimate commercial
 15 self-defence to avoid, for instance, exhaustion.
 16 I said my fourth point was going to be objective
 17 justification. I can do it very shortly because it is
 18 the reverse side of the same coin. For the reasons
 19 I have explained, it was not necessary because there was
 20 a legitimate SEP holder's right including FRAND that we
 21 see in *Panasonic*, that we see in Mr Noble's eighth
 22 report, and why the counterfactual --
 23 THE CHAIR: So exactly what was not necessary.
 24 MR MOSER: It was not necessary to foreclose FRAND. It was
 25 not necessary to either threaten or imply a threat of

1 non-supply.
 2 MR TURNER: Mr Moser, I am still struggling with the refusal
 3 to license aspect, just how that plays in. I appreciate
 4 it is part of the ecosystem and you use the word
 5 "buttress" a number of times in a number of places. So
 6 how would it work? Let us assume that Qualcomm demand
 7 a very high royalty. They cannot demand that of the OEM
 8 or manufacturer or they can demand that of the chip
 9 supplier. So let us assume they demand an excessive
 10 royalty from the chip -- rival chip manufacturer and
 11 they are at some form of impasse, maybe they are
 12 proceeding slowly towards some resolution or not, they
 13 are still supplying chips to Apple and Samsung, the
 14 OEMs, and then one -- does not one just shift the
 15 problem? They then say, "Well, I am afraid, mate, you
 16 are not licensed. Go and speak to your chip
 17 manufacturer". How does that all fit in?
 18 MR MOSER: In particular --
 19 MR TURNER: If Apple are supplying the chips anyway --
 20 sorry, if Qualcomm after supplying the chips, I do not
 21 see how it all really helps. It seems to be another
 22 very confusing scenario. Mr Williams does not trust you
 23 to answer this question apparently.
 24 MR MOSER: No, he is very worried about what I am going to
 25 say.

1 I am going to press on. I know that he is going to
 2 deal with RTL.
 3 MR TURNER: All right. You can leave it until later. That
 4 is fine.
 5 MR MOSER: The sotto voce was "I am going to deal with RTL."
 6 I am going to deal with your question as best I can, if
 7 I may. White knuckles all round. The point is
 8 particularly in focus in relation to the contract
 9 manufacturers at Apple and that is a wrinkle I have not
 10 come to yet, but that is simply the same behaviour just
 11 a step away from Apple. So Apple is then -- until 2019
 12 Apple was getting its chips via contract manufacturers
 13 and there was direct supply.
 14 MR TURNER: Yes.
 15 MR MOSER: That was simply the same behaviour between, as we
 16 will see in the evidence, Qualcomm and the CMs, NLNC, no
 17 FRAND, we say therefore too expensive, at the CM level
 18 and then Apple has to pay that to the CMs. So it only
 19 becomes -- if your question is --
 20 MR TURNER: I was referring to the chip manufacturers, not
 21 the CMs.
 22 MR MOSER: The chip manufacturers, yes. But, as I say, in
 23 that case, Mr Williams will deal more with that because
 24 that is his department, but I wanted to get in the point
 25 about the contract manufacturers because I had not

1 mentioned them yet and to complete the thought what then
 2 happens is that the price is passed on and of course
 3 ultimately to the consumers and that is why we are here.
 4 So it does continue.
 5 So just to complete on objective justification.
 6 While a counterfactual policy, which only secures the
 7 right to a fair payment against risk of exhaustion, may
 8 be objectively justified, you make sure that you are
 9 properly licensed before supply and so on, there are
 10 other less restrictive solutions as just explored and as
 11 Mr Noble's alternative shows. So I need not repeat it
 12 all again, but it is the same thing in relation to -- in
 13 relation to objective justification. Just a word on
 14 that because in my learned friend's skeleton argument he
 15 says, "We have raised exhaustion and we have raised the
 16 fact you want to be paid for your royalties so now
 17 somehow the burden is now on us [he says] to show that
 18 there is no objective justification". We resist that,
 19 because we say all they have done is they have rather
 20 vaguely raised these concepts. In the end it may not
 21 matter very much where the burden sits, but I want to
 22 say that also.
 23 It is not simply a question of, well, you know, you
 24 are entitled to drive a hard bargain. I do not, to
 25 belabour the point, because I think I have made it

1 several times now, but I noticed that my learned friend
 2 had put a last minute authority -- a couple of last
 3 minute authorities --
 4 THE CHAIR: Before you move on to that. You say there are
 5 less restrictive means. Are you then referring to the
 6 suggestion in Nobel paragraph 6.65 of the --
 7 MR MOSER: Yes.
 8 THE CHAIR: -- licence specifying that absent agreement the
 9 rate would be subject to third-party determination?
 10 MR MOSER: Yes.
 11 THE CHAIR: Is that basically an arbitration agreement? Is
 12 that what you are saying or what do you mean by this?
 13 MR MOSER: What I mean is -- what I submit is the common or
 14 garden route by which several licences are generally
 15 negotiated as illustrated in *Panasonic*, which is that at
 16 the time of negotiation, we say: here is your licence,
 17 effectively. If you do not like it, of course we can go
 18 to arbitration, but in the meantime we supply. The
 19 dominant company is perfectly protected by this as far
 20 as exhaustion is concerned.
 21 THE CHAIR: Oh, so are you simply saying that there would be
 22 a FRAND determination?
 23 MR MOSER: Yes.
 24 THE CHAIR: I see.
 25 MR MOSER: But there would also be a licence. So what they

1 say to us is, "You cannot say we have to just give away
 2 our chips and we are not allowed to ask for a licence".
 3 What we specifically object to is, again, as per
 4 the claim form, the licence on Qualcomm's specific
 5 terms. So we are not saying that you are not allowed to
 6 say, well, I have to protect myself against exhaustion
 7 by way of licence. What we are saying is you cannot do
 8 all the specific things that I have outlined they do and
 9 the answer is Noble 6.65. That is one way of achieving
 10 both a fair return for your --
 11 THE CHAIR: So what you mean is that they get a licence,
 12 they do not pay at that point, but they defer payment to
 13 when it is agreed?
 14 MR MOSER: Either they defer payment or they agree to
 15 a payment and there will be an accounting at the end of
 16 the arbitration or court determination.
 17 THE CHAIR: But what do they actually pay?
 18 MR MOSER: Well, in that case, they will be paying the
 19 inflated rates until it is determined that they are
 20 anticompetitive, but that is not necessarily so.
 21 THE CHAIR: Sorry, I did not quite catch that. What are you
 22 saying that they would pay?
 23 MR MOSER: They would -- well, either they will not be
 24 paying, pending determination of the arbitration, or
 25 I suppose they might be paying the inflated rates, we

1 say "inflated", on the basis that at the end the parties
 2 will agree. What is more normal, I believe, and I --
 3 and I probably defer to my learned friend Mr Alexander
 4 when he comes in at the end of the day, what is more
 5 normal, I understand, is that you agree to the lower
 6 rate at the outset, pending determination, and then
 7 supplement the rate, if necessary, at the end of a FRAND
 8 determination.
 9 THE CHAIR: So you are saying that either you would not pay
 10 at all, or you would pay the inflated rate, or you would
 11 pay the lower rate?
 12 MR MOSER: What is clear is that the appropriate rate will
 13 always be paid by the end of the process. There is no
 14 question of the company -- the company in the position
 15 of Qualcomm going unpaid for any of this.
 16 THE CHAIR: So your counterfactual is that there would be
 17 a payment of a royalty by the OEM, but as long as there
 18 is an agreement that this can be subject to a FRAND
 19 determination, that would be non-abusive. What is
 20 abusive is an explicit or implicit insistence by
 21 Qualcomm that it cannot be subject to FRAND? Have
 22 I summarised that correctly?
 23 MR MOSER: Exactly. Exactly.
 24 MR TURNER: So it comes down to a very simple point then
 25 whether Qualcomm has been preventing Apple and Samsung

1 obtaining a FRAND determination either at arbitration or
 2 in the courts. I mean that is the sole point you rely
 3 on. If you do not succeed on that, everything else
 4 falls away.
 5 MR MOSER: That is right. It is -- you have the whole
 6 issue, but you can screw in that safety valve and if you
 7 manage that, you can diffuse the problem.
 8 MR TURNER: You are going to come to the evidence on --
 9 MR MOSER: Yes, so I am going to come to the evidence
 10 directly. I was going to go to this on last minute
 11 authority that my learned friend put in, just because
 12 it, I submit, illustrates the point. I do that as
 13 briefly as I can and then I will go straight into the
 14 evidence.
 15 So the authority that was put in is in authorities
 16 bundle 2 {AB2/12.1}. If anyone has the hard copy, it is
 17 tab 20. So it is {AB2/12.1}.
 18 THE CHAIR: What is the page in the bundle, the pdf page?
 19 MR MOSER: 1.
 20 THE CHAIR: No, I need the big pdf page. It could be in
 21 thousands.
 22 MR MOSER: Oh --
 23 THE CHAIR: Because that's what I am working off. I have
 24 pdf bundles. I have one pdf for each of the authorities
 25 bundles and the outline tab on my reader does not have

1 the tab numbers so I just need the page -- pdf page
 2 number.
 3 MR MOSER: Okay. This is where I have to say that is one
 4 number I do not have. I have the electronic. I have
 5 the hard copy.
 6 THE CHAIR: All right. Let me just see if I can get there
 7 by hyperlinking. It is 909, I think.
 8 MR MOSER: I am grateful. We will get hold of --
 9 THE CHAIR: Just before you -- I mean, I do not know how
 10 long you want to spend on this point, but perhaps if it
 11 is going to be a long time, we could have a break before
 12 it. If it is going to be a short time, you could go to
 13 this authority and then have a break.
 14 MR MOSER: I will be quite short.
 15 THE CHAIR: All right. Let us do that and then we will have
 16 a break for the transcriber.
 17 MR MOSER: Thank you. We will see if we can find a pdf so
 18 then Ms McLean, who I should add is not on the long list
 19 of people in the skeleton, but Charlotte McLean is
 20 appearing here with me and she will be able to whisper
 21 to me whatever the pdf pages are.
 22 So the authority that my learned friend has put in
 23 is *Humber Oil v Associated British Ports*. It is
 24 a rather strange case about negotiations for a rental of
 25 a lease agreement, extending a lease agreement at

1 a port. We see that at paragraph 3 of the judgment.
 2 Negotiation for the lease of an oil terminal. The
 3 complaint was that one of the parties had sought payment
 4 of excessive rent. So it is a case that includes the
 5 terms of the Landlord and Tenant Act 1954. If we look
 6 at paragraph 10 of the judgment, we will see there set
 7 out section 34 of the Landlord and Tenant Act 1954
 8 {AB/2/12.1/4}, which provides that where you have
 9 negotiation like that, then in default of agreement the
 10 rent "may be determined by the court to be that at
 11 which, having regard to the terms of the tenancy ... the
 12 holding might reasonably be expected to be let." In
 13 other words, a sort of FRAND rental.
 14 In the claimant's submission, if we look at
 15 paragraph 19 {AB2/12.1/8}, counsel for the claimant, who
 16 was my learned friend Mr Lasok ran a creative argument
 17 that said that he:
 18 "... maintained that a proposal by a monopoly
 19 supplier in the course of negotiations to charge
 20 excessive, unfair or discriminatory prices is, without
 21 more, abusive conduct for the purposes of ...
 22 Article 102."
 23 This was rejected by the court., perhaps
 24 unsurprisingly, on a number of bases. At 20, the judge
 25 rejects the contention that to propose in the course of

1 negotiations prices which are excessive is of itself and
 2 without more abusive conduct:
 3 "Put simply, such conduct cannot constitute any form
 4 of 'imposition'.
 5 So, in other words, just driving a hard bargain is
 6 not in itself abusive. That is unsurprising.
 7 Putting forward a figure in the course of
 8 negotiation, not an excessive price under Article 102,
 9 fine. The conclusions are 31 and 32 and 33. What is
 10 interesting about this otherwise entirely unsurprising
 11 finding is what is said at paragraph 33 {AB2/12.1/13}.
 12 At paragraph 33 what the judge says is:
 13 "As I have already held ... the decision of the
 14 Court of Appeal in *Attheraces* ... does not establish
 15 [such] a proposal."
 16 Five lines down:
 17 "Further, in a case such as this, any element of
 18 compulsion which might arise from the dominant position
 19 of the proposer is negated by the jurisdiction of the
 20 Court, in the absence of agreement, to assess the rent
 21 or price on the basis of a statutory formula which
 22 necessarily excludes any ransom element."
 23 So we have, in that interesting little case, exactly
 24 the same sort of safety valve. Not abusive in and of
 25 itself to say "I want you to pay X", but insofar as

1 there is abusive behaviour, it is negated by the
 2 safety valve of the court assessment.
 3 THE CHAIR: So you say as long as that safety valve existed
 4 here and was not cut off by Qualcomm saying, "If you try
 5 to, if you try to trigger that safety valve, we will
 6 stop supplying you chipsets", then that was not an abuse
 7 and that is your counterfactual case?
 8 MR MOSER: That is the counterfactual. If the port had cut
 9 off the route to the 1954 Act, that would have been
 10 a different story in our submission.
 11 THE CHAIR: Yes. All right. That is very helpful. Thank
 12 you very much, Mr Moser.
 13 So we will rise for a five-minute break.
 14 MR MOSER: Yes.
 15 (11.52 am)
 16 (Short Break)
 17 (12.01 pm)
 18 MR MOSER: Before I dive into the evidential points, my
 19 learned friend Mr Alexander has given me a helpful note
 20 on this question of what is the level while one is
 21 holding the ring in a FRAND situation. Apparently the
 22 recent English court's approach, and he will come on to
 23 this in the case of *Lenovo*, is that the rate that you
 24 pay while you wait for the negotiation is not the top
 25 rate or the bottom rate, but a rate somewhere in between

1 determined at the outset. That is just a footnote to
 2 the discussion earlier in relation to what happens in
 3 the counterfactual.
 4 The nature of the evidence in this case, as far as
 5 the Class Representative is concerned, it is well-known
 6 that we rely heavily on documentary evidence and also
 7 the admissible hearsay evidence.
 8 The general approach in competition law cases is
 9 that it is necessary, very largely, to act by way of
 10 inference, whether that is 101 or 102. I won't go now
 11 to the authority. It is in the skeleton argument, but
 12 in *Phones 4U*, which is electronically at {AB2/39/30}, it
 13 is tab 47 of the hard copy bundle, at paragraphs 83 to
 14 86, we have referenced the court's usual approach to
 15 competition law cases and, in particular,
 16 Advocate General Kokott's advice at the end of
 17 paragraph 85 of that judgment.
 18 We say that the necessity of drawing an inference is
 19 a fortiori in private enforcement by
 20 a consumers' association against a multinational, but of
 21 course we do not have any of the direct witnesses.
 22 THE CHAIR: So this is which authority? Authorities 2,
 23 tab 39?
 24 MR MOSER: Tab 39.
 25 THE CHAIR: Paragraph?

1 MR MOSER: It starts at page 30. It is paragraphs 83 to 86.
 2 I am just aware of the difficulty with my Ladyship's
 3 bundle.
 4 THE CHAIR: It is all right. I will make do.
 5 MR MOSER: It is, in particular, where Mr Justice Roth cites
 6 Advocate General Kokott at AG saying:
 7 "... it would be incompatible with the EU principle
 8 of effectiveness for national courts to impose on
 9 competition authorities or private litigants criteria
 10 for proof of an infringement of art 101 or 102 'that are
 11 so onerous as to render such proof impossible in
 12 practice or excessively difficult'."
 13 That is in the context of saying that the
 14 commonsense proposition is that one has to realise that
 15 very often in competition cases evidence is done in
 16 a clandestine way and one has to rely to some extent on
 17 inference.
 18 There is also, as far as hearsay is concerned, no
 19 hierarchy of evidence. That is the last authority
 20 I will attempt to go to in this section, but in the case
 21 of *Welsh v Stokes*, {AB2/9/1}, which is tab 16 of the
 22 hard bundle, that was a case about hearsay evidence. We
 23 had it at the PTR that there was no rule of law which
 24 prohibited a court giving weight to hearsay evidence.
 25 At paragraph 23, Lord Justice Dyson said {AB2/9/10}:

1 "The decision what weight (if any) to give to
 2 hearsay evidence involves an exercise of judgment. The
 3 court has to reach a conclusion as to its reliability as
 4 best it can on all the available material. Where a case
 5 depends entirely on hearsay evidence, the court will be
 6 particularly careful before concluding that it can be
 7 given any weight. But there is no rule of law which
 8 prohibits a court from giving weight to hearsay evidence
 9 merely because it is uncorroborated and cannot be tested
 10 or contradicted by the opposing party."
 11 Again, we say, that is to some extent a fortiori in
 12 this case because it has been corroborated, we say, by
 13 documents that we will look at and we have, of course,
 14 the hearsay table where it was tested in
 15 cross-examination and given under oath in the
 16 United States, making it appropriate, we say, to give it
 17 considerable weight.
 18 We have, of course, avoided the temptation to resort
 19 to inadmissible evidence in other cases after the
 20 *Hollington v Hewthorn* decision, although in a slight
 21 side-swipe, if I may be permitted, it is surprising that
 22 in my learned friend's skeleton there seems to be
 23 liberal reliance on inadmissible US and Korean material
 24 and I would ask you to ignore that as indeed you are
 25 ignoring it in our case.

1 A few --
 2 THE CHAIR: In relation to the hearsay that you rely on, it
 3 would be helpful for your closing submissions to sort of
 4 give a ready-reckoner of the context for the various
 5 categories of hearsay that you rely on. For example,
 6 one of the categories is depositions given in the US
 7 proceedings, but it would be helpful to know what the
 8 outcome of those proceedings was, because Qualcomm says,
 9 well, no weight is to be placed on those because the
 10 initial first-instance judgment was overturned.
 11 MR MOSER: Yes. We do that. I will not spend time now.
 12 THE CHAIR: No.
 13 MR MOSER: But the short answer is that we say it was
 14 overturned on procedural grounds. There is an issue
 15 between us.
 16 THE CHAIR: Yes, but I think it would be good to know what
 17 you say about each category of hearsay evidence that you
 18 rely on and why you say it is -- that it is appropriate
 19 for us to take that into account.
 20 MR MOSER: Yes, that is understood and it will be done.
 21 MR TURNER: When we look at either hearsay evidence or
 22 direct evidence in this case, is it right we have to
 23 keep in mind two things: first of all, whether Qualcomm
 24 is refusing to supply, but we also need to keep in mind
 25 whether the purchaser has agreed to take a licence on

1 FRAND terms, do we not? So there may be circumstances
 2 where it is legitimate to refuse to supply and
 3 circumstances where it is not? But if a prospective
 4 purchaser has not -- let us leave the details -- but has
 5 not indicated or said they will take a licence on FRAND
 6 terms, presumably, in those circumstances, it would be
 7 perfectly at liberty for Qualcomm to say, well, if that
 8 is your case, we are not going to -- if that is your
 9 position, we are not going to supply you?
 10 MR MOSER: Well, perhaps. To be clear, the way that we
 11 present the case it is not our case that I have to show
 12 in each negotiation there was an express exchange along
 13 the lines of "Can we please have it on FRAND terms
 14 subject to arbitration?" and Qualcomm says "No,
 15 certainly no, no deal, otherwise we will stop". So we
 16 see that expressly in some cases, but in other cases it
 17 is implied. In other cases, we say it is no longer
 18 necessary to see it three times because we have it the
 19 first time.
 20 MR TURNER: But the point I was putting to you is that one
 21 also needs to understand the context. So whether it is
 22 express or implied or whatever, one still needs to ask
 23 the question: has the purchaser of chips agreed to take
 24 a licence on FRAND terms?
 25 MR MOSER: Yes, what we tend to see is that the purchasers

1 of the chips do not think that the terms are FRAND and
 2 that is, I think I am right in saying without exception,
 3 as far as we have evidence of what they think about the
 4 terms, save that they felt they had no option. So it is
 5 perhaps not a question I need to engage with, because
 6 I do not think we find that situation in the evidence
 7 where somebody says, "Oh, well" --
 8 MR TURNER: Sorry, we may be at cross-purposes. I think
 9 this is not an insignificant point to get straight
 10 before we look at the evidence.
 11 Do you accept there could be any circumstances under
 12 which Qualcomm can legitimately refuse to supply chips
 13 and the circumstance in particular I was putting to you
 14 is where the purchaser of those chips has not agreed to
 15 take a licence on FRAND terms?
 16 MR MOSER: Forgive me, I misunderstood the question. No,
 17 that is whatever the appropriate answer is, "yes" or
 18 "no", so it has to be a willing licensee.
 19 MR TURNER: Yes, that is point I was putting. So when we
 20 look at the specific instances, one of the things we
 21 have to ask ourselves is: if there was a refusal, is it
 22 in the context of a willing licensee?
 23 MR MOSER: Absolutely.
 24 MR TURNER: Yes.
 25 MR MOSER: My point was simply, I might be corrected,

1 I cannot think of evidence of people saying, "Well, I am
 2 not a willing licensee" and still insisting .
 3 The whole system only works, of course, if you enter
 4 into a negotiation with a willing licensee who is in
 5 principle prepared to take on FRAND terms.
 6 They are particularly willing in a sense when they
 7 already have a licence and they are renegotiating.
 8 Now, we will come to that.
 9 So the admissions first because I just want to set
 10 the scene very briefly, again, by setting out what is
 11 not in dispute about the evidence. It is admitted that
 12 Qualcomm's policy was worldwide. So they call it CSP,
 13 we call it NLNC. Whatever it is, the policy is
 14 worldwide. That is paragraph 54 of their defence.
 15 It is also common ground that these policies were
 16 applied at all relevant times, even if there is
 17 a dispute about the effects. It is also admitted that
 18 Qualcomm's dual position in the market was unique. That
 19 is paragraph 52.1 of their defence.
 20 Fourth, it is admitted by Qualcomm that what it
 21 calls a CSP was not applied to other chip products,
 22 where it was not dominant, like WiFi. That is
 23 Qualcomm's RFI response at {B/12/3-5}, paragraphs 3 and
 24 7.
 25 We see that difference in treatment, if we look at

1 a presentation which was given by Qualcomm to Apple
 2 in 2008. It is an outer ring item so I am not going to
 3 read it out, but it is at {POF/135/3-6}. There it is.
 4 So if we start at 3, it is -- it should be a series of
 5 slides. That is the wrong page, I am afraid.
 6 {POF/135/3}. There. We see on the first page the
 7 definition of "Purchasers". The first two bullet
 8 points. That code name is "Apple". There is -- I hope
 9 everyone has discovered the glossary and the chronology
 10 in the bundles which gives us the various terms,
 11 including the codenames that they each use for each
 12 other?
 13 MR TURNER: Just remind me, where is the glossary?
 14 MR MOSER: The glossary is at --
 15 MR TURNER: I have seen reference to it but I have not
 16 actually looked at it.
 17 MR MOSER: It is at {S/6/1}. It is not in the core bundle,
 18 I am afraid. {S/6/1}. It should probably go in the
 19 core bundle. We will see if we can put in the
 20 chronology, the glossary and the dramatis personae.
 21 THE CHAIR: Which codename are you talking about?
 22 MR MOSER: I do not know whether I am allowed to say it out
 23 loud.
 24 THE CHAIR: You have something up on the screen.
 25 MR MOSER: Yes.

1 THE CHAIR: I see. Okay, I see.
 2 MR MOSER: There is a codename in the second one and we see
 3 at page {S/6/3}, that is the codename for "Apple" used
 4 by Qualcomm.
 5 MR TURNER: I am struggling to find that.
 6 THE CHAIR: Yes, of course.
 7 MR MOSER: So the one product that is being talked about
 8 there, that is the relevant chipsets, and non-WAN are
 9 things like WiFi.
 10 If we go to the next page {POF/135/4}, we see the
 11 two boxes on the left-hand side under the Apple
 12 codename, and the difference in treatment to WAN and
 13 non-WAN. Finally, at page 6 {POF/135/6} --
 14 THE CHAIR: I do not understand what you are saying about
 15 this.
 16 MR MOSER: It is difficult, but I have already said what is
 17 admitted by Qualcomm is that it treats other kinds of --
 18 its other licensed products, like WiFi, differently to
 19 the way it treats chipsets. So cellular, non-cellular,
 20 WAN and non-WAN, are treated differently. We say that
 21 this is an important point. It is critical and we say
 22 exceptionally telling. If NLNC was required to ensure
 23 a fair return to avoid exhaustion, and so on, on
 24 chipsets, then it would have been required also for
 25 these other technologies and, yet, it was not. These

1 other technologies where they were not dominant.
 2 MR TURNER: So are you saying there is a reference to no
 3 licence, no chips implicitly or explicitly in this
 4 document?
 5 MR MOSER: I am not going that far. That is not quite what
 6 this document is showing us. This document is showing
 7 us for cellular they required licences. For non-WAN
 8 they were sold on an exhaustive basis all in one.
 9 THE CHAIR: Well, it does not say -- I mean --
 10 MR MOSER: Separate licences, not separate licences.
 11 THE CHAIR: There is an "or" in the box and we have not
 12 looked at the "or".
 13 MR TURNER: But you have not addressed us on separate
 14 licences and not separate licences. Why does that
 15 matter?
 16 MR MOSER: Why it matters is because that is, again, part of
 17 how NLNC works. Apple has -- sorry, Qualcomm has two
 18 divisions within its group of companies, one of which is
 19 in charge of licensing and one of which is in charge of
 20 selling the chipsets. It discusses from time to time --
 21 and we can look at that -- whether or not one should
 22 split these and they come to the conclusion that we
 23 should not split these because they give us particular
 24 market power.
 25 They could be selling the licence and the chipsets

1 on one. They do not. They sell them separately and
 2 they sell the licence first on particular conditions and
 3 until you have a licence, no chips and they sell the
 4 chipsets second.
 5 MR TURNER: So you can wrap the price of the licence in with
 6 the product or you can tease it out? Does it matter?
 7 MR MOSER: Well, that is -- it may or may not matter, but
 8 that is what they do for these other products where they
 9 are not dominant.
 10 THE CHAIR: But that is not your counterfactual. You have
 11 explained very clearly -- and thank you -- what your
 12 counterfactual is and that is not a counterfactual in
 13 which they are bundled.
 14 MR MOSER: No, it is not.
 15 THE CHAIR: So I am not sure why we are looking at this and
 16 why any point is being made about the bundling of the
 17 licence with the chipsets.
 18 MR MOSER: It is essentially a defensive point, because one
 19 of the points that is going to be taken against me is
 20 that they say, well, we had to do a number of things and
 21 one of the things we had to do was to sell these
 22 separately. We say, no, you did not. You are
 23 absolutely right, my Lady, it is not determinative.
 24 THE CHAIR: It is not only not determinative, it is not any
 25 part of your case to say that they should have sold the

1 licence together with the chipset, because that is not
 2 your counterfactual. Your counterfactual, which
 3 articulates what they should have done in order not to
 4 abuse, starts from the premise that they -- the licence
 5 was sold separately from the chipset. Your point is
 6 simply, as I have understood it, and you have said it
 7 several times, is that there should have been
 8 a possibility -- the safety valve of FRAND negotiation,
 9 which there was not.
 10 MR MOSER: Well, Madam, yes, the reason that I am leading up
 11 to this is because one of the things that is said
 12 against me is, well, this separation of licence and
 13 chipsets was necessary. One of the things that reveals
 14 the approach by Qualcomm and reveals the motivation of
 15 Qualcomm, the anticompetitive motivation of Qualcomm, is
 16 that they kept these things separate. If we look at
 17 internal documents from Qualcomm, we can see that they
 18 are well aware that their chipset market power gives
 19 them a significant advantage in SEP licensing
 20 negotiations and that business model is based on
 21 leveraging the power in order to extract inflated
 22 royalties from OEMs.
 23 THE CHAIR: I am trying to understand what you say. You
 24 just said that the anticompetitive motivation is
 25 revealed by the fact that they kept these things

1 separate.
 2 MR MOSER: Yes.
 3 THE CHAIR: But the premise of your counterfactual is that
 4 they were separate. That is your non-abusive
 5 counterfactual so keeping them separate cannot reveal an
 6 anticompetitive motivation, because that is precisely
 7 what you say would have been the case in the
 8 counterfactual, the non-abusive scenario.
 9 MR MOSER: Well, it is certainly what Qualcomm thought. If
 10 we look at Qualcomm document from 2007 --
 11 THE CHAIR: No, I am not asking what Qualcomm thought; I am
 12 asking how the fact that the licence was separate from
 13 the chipset could reveal an anticompetitive motivation,
 14 which is the point that you have just made?
 15 MR MOSER: If you keep the licence separate from the
 16 chipset, it assists your NLNC strategy because you are
 17 always negotiating only about the licence before you
 18 ever come to the chipset and you have two different
 19 parts of Qualcomm working, as it were, hand in glove.
 20 One of which says, you have to take this licence and the
 21 other one says here are the chipsets and there is
 22 sometimes some disagreement over whether the customer is
 23 actually paying for the royalty for the licence or
 24 paying a premium on the chipsets and the customers even
 25 disagree on exactly what it is they are being charged

1 for.
 2 I can illustrate this point by showing you an
 3 internal document from Qualcomm because Qualcomm
 4 launched its -- an internal review in 2007 where it
 5 considered spinning off the licence business. If we
 6 look at {POF/122/8}. This is something called, "Project
 7 Berlin" and at {POF/122/8} we see the bullet point in
 8 the middle of the page that if they spin off QTL, that
 9 would hurt QTL's leverage -- that is the licensing
 10 company -- to negotiate 3G renewal and 4G OFDMA
 11 licensing deals.
 12 If we look at {POF/128/19}, another presentation
 13 from Project Berlin, we see at the top, second line,
 14 left-hand box, a significant con of spinning off the
 15 company would be increase the attacks on QTL, on
 16 licensing.
 17 If we look at --
 18 THE CHAIR: Where are you looking at?
 19 MR MOSER: I am looking at the second box -- the second full
 20 box of third box down on the left hand side, top,
 21 "Increased attacks on QTL". It is significant cons to
 22 the spin-off.
 23 It is explained in an internal 2008 email, which is
 24 at {POF/134/1}. That is an email from Mr Altman of
 25 Qualcomm to various people at Qualcomm. If we look at

1 the main paragraph toward the bottom of the page,
 2 four lines down:
 3 "The Chinese manufacturers, the Korean
 4 manufacturers, even Nokia will want and need to supply
 5 CDMA ... handsets ... or risk losing market share.
 6 Today, [Qualcomm] is by far the leading CDMA supplier.
 7 Given the fact that so many companies have viewed CDMA
 8 as a rapid growth market, very few chip companies have
 9 put resources into ... development. [Qualcomm] is and
 10 we expect will remain the pre-eminent leader ..."
 11 And so on.
 12 Then:
 13 "As the CDMA2000 grows and OEMs decide to
 14 participate ... "
 15 Sorry, skip that:
 16 "If you consider the fact that the only companies
 17 that have attacked us today are companies that
 18 essentially purchase little or no [chips] from us, you
 19 can understand how the combination of QCT with QTL
 20 greatly enhances QTL's success. As CDMA2000 grows and
 21 OEMs desire to participate in it to grow their market
 22 share, OEMs will remain reliant on us for continued
 23 supply and will need to maintain positive relationships
 24 with us ... this will help us grow our businesses as one
 25 company. If we were two companies, they would rely

1 entirely on QCT, but would have no incentive not to
 2 attack QTL."
 3 So there was an inherent business logic, as far as
 4 Qualcomm was concerned, to what I was describing.
 5 A similar thing was considered again in something called
 6 "Project Phoenix" in 2015. There Mr Wise of Qualcomm --
 7 that is at {POF/616/1}, at the bottom of the page,
 8 Mr Wise explained:
 9 "There is a high correlation between our modem
 10 (chip) share and licensing compliance and royalty rates
 11 sustainability. Where we have low chip share we are
 12 seeing challenges with compliance and maintaining the
 13 royalty rate ... If its [QCT's] share falls, however, we
 14 lose that important element to sustaining our royalties.
 15 SO IT IS CRITICAL [in capitals] THAT WE MAINTAIN HIGH
 16 MODEM SHARE TO SUSTAIN LICENSING."
 17 In another place, at {POF/629/11}, we have
 18 a presentation as to why strategy -- a strategy makes
 19 sense. We see the first line that:
 20 "Addresses QTL compliance challenges and
 21 sustainability of long-term royalty rate; without risky
 22 litigation."
 23 So, in that way, the policy of having this
 24 separation, whatever the legal logic, Madam, was that it
 25 enabled -- it was one of the enablers of NLNC and it

1 certainly was what Qualcomm internally appears to have
 2 thought and reveals its motivation. It is also,
 3 incidentally we say, evidence that they knew what they
 4 were doing in relation to NLNC. It was not somehow
 5 something that happened to them accidentally.
 6 Now --
 7 THE CHAIR: But the document, this last document, says:
 8 "Drives compliance and royalty rate."
 9 So "risky litigation" could simply mean without
 10 Qualcomm having to sue to ensure that the OEM was
 11 licensed. It does not -- this does not necessarily mean
 12 that it avoided the prospect of the OEM seeking
 13 a licence level in a FRAND determination.
 14 MR MOSER: Well, you might think that, Madam, if you had not
 15 read the emails or the slides that go before. I say, in
 16 the context of the other evidence, it is, on balance,
 17 more likely that it reads the way we say.
 18 THE CHAIR: Do you want to show us the most telling point
 19 for you from the perspective of the context?
 20 MR MOSER: Forgive me?
 21 THE CHAIR: Well, you said, "I interpret it that way because
 22 I have not seen the context" so do you want to take me
 23 to the best document for you which provides --
 24 MR MOSER: I meant the context of the slides we just looked
 25 at before. This is the last of this run of slides

1 I wanted to look at, but what we see in both the Project
 2 Berlin and the Project Phoenix slides is that they
 3 wanted to keep these companies deliberately separate
 4 because they saw that the licensing company on its own
 5 was going to be exposed and, therefore, by necessary
 6 implication, I submit, exposed to litigation -- risky
 7 litigation coming from others.
 8 THE CHAIR: So what do you understand by "risky litigation"?
 9 Is it your understanding that the reference to "without
 10 risky litigation" means without the possibility of the
 11 licensee resorting to FRAND?
 12 MR MOSER: Yes.
 13 THE CHAIR: I should have said without the licensee
 14 resorting to FRAND litigation.
 15 MR MOSER: Yes. I should say, generally, I am also guilty
 16 of sometimes using shorthand without rehearsing, again,
 17 all of the rather fussy points around whether it is
 18 FRAND litigation or otherwise, but, yes.
 19 At the heart, of course, of the NLNC conduct is that
 20 it made it significantly more costly for OEMs to engage
 21 in that sort of litigation because they were dependent
 22 on chipsets supply from Qualcomm. To Qualcomm's royalty
 23 rates via a FRAND determination was going to be -- was
 24 going to be risky or potentially business-ending for the
 25 OEMs because, without licence, you do not have any

1 chips, without chips you do not have a business. That
 2 was well understood and, for example, the hearsay
 3 evidence from *Motorola*, if we look at this, outside
 4 option, I just want to come to the nub of what
 5 I have been discussing about FRAND litigation, if we
 6 look at the hearsay evidence from *Motorola*, that
 7 explains in dramatic terms what the consequences of
 8 seeking a FRAND determination might be. I will invite
 9 the Tribunal, please, I cannot read it out, but to read
 10 the extract at {POD/7/58}. It is in the middle of the
 11 page, highlighted in pink.
 12 THE CHAIR: Is that going to come up?
 13 MR MOSER: There it is.
 14 THE CHAIR: Is this part of the hearsay extract?
 15 MR MOSER: Yes, it is.
 16 THE CHAIR: All right. It is going to be difficult for you
 17 to tell us which bit of the extract you want us to read
 18 without revealing it. Maybe you can just tell -- you
 19 could count down from the Qs. So which question
 20 number do you want us to look at?
 21 MR MOSER: So if you see a question in the middle of the
 22 page that starts "Resisting Qualcomm's".
 23 THE CHAIR: Yes.
 24 MR MOSER: From there.
 25 THE CHAIR: All right. I just do not understand why this is

1 confidential. This is what we are talking about.
 2 I mean, this is ridiculous if we are not going to be
 3 able to discuss things like this in open court because
 4 you have been making these submissions all morning.
 5 MR MOSER: Madam, yes. We will have to revisit this.
 6 THE CHAIR: As discussed, we are going to have to revisit
 7 this and I say that for the benefit of everyone in the
 8 courtroom. We cannot continue if something like this is
 9 said to be confidential, but it is precisely what the
 10 parties -- both parties are going to need to discuss and
 11 the witnesses are going to need to discuss in the
 12 witness box.
 13 MR TURNER: Sorry, I do apologise, Mr Moser, just remind me,
 14 what is this document we are looking at?
 15 MR MOSER: Oh, this is hearsay evidence from *Motorola*.
 16 MR TURNER: Yes, but what is the document?
 17 MR MOSER: If we go back to page 57, we see
 18 Mr Todd Madderom, *Motorola*, from US proceedings in 2016
 19 {POD/7/57}.
 20 MR TURNER: Right. So these are court proceedings?
 21 MR MOSER: These are court proceedings. Generally the
 22 hearsay document is court proceedings of examination or
 23 cross-examination of the witnesses in US proceedings.
 24 MR TURNER: That is fine. Thank you.
 25 MR MOSER: Sorry. (Pause)

1 Conversely, *Motorola* explains if it had not been
2 dependent on Qualcomm for chips, it could have launched
3 a royalties challenge and if we look at {POD/7/63} --
4 MR TURNER: The date of this is what?
5 MR MOSER: 2016.
6 MR TURNER: Remind me, they are discussing what period?
7 MR MOSER: Well, they are essentially discussing what we are
8 discussing, but they are talking about -- well, I mean,
9 they are talking about why *Motorola* was not -- did not
10 feel able to seek a FRAND determination.
11 Still I believe with Mr Madderom at 63, this is not
12 redacted. The question at 223:24 is:
13 "How, if at all, would moving away from Qualcomm
14 chipsets, better position *Motorola* to have a fight with
15 Qualcomm about Qualcomm's royalties?
16 "Answer: Qualcomm would not be able to cut off our
17 supply in that fight. It's as simple as that. We could
18 create a fight, and we feel like our supply would not be
19 threatened. Perhaps there may be some import/export
20 issues that happen along the way in certain countries,
21 but specifically that would be an aggressive approach to
22 maybe perhaps renegotiate with Qualcomm."
23 There is an instance with LG where Qualcomm flexed
24 its chipset muscle to dissuade LG from continuing with
25 an arbitration in which LG wished to raise antitrust

1 complaints about Qualcomm's proposed licensing terms.
2 If we can look at {POD/7/51}, that is Hwi-Jae Cho from
3 LG in proceedings in 2019. If we look down the
4 question:
5 "How did ..."
6 Well, start at the beginning:
7 "How did LG interpret Mr Altman's statements
8 [Mr Altman of Qualcomm] A: Although I feel most
9 confident about my personal interpretation, my
10 recollection was that we internally thought it was a
11 threat by Qualcomm. We thought Qualcomm would use
12 whatever leverage it had because Qualcomm often
13 mentioned termination of the supply agreement. As
14 threatened in the letter, we thought Qualcomm would do
15 something about LGE's baseband around chipset supply."
16 THE CHAIR: This was not Apple or Samsung, was it?
17 MR MOSER: No, it was not. This is LG. I am starting with
18 the market more generally where we have evidence of
19 Qualcomm's policy which is admitted to be the same
20 worldwide at all material times.
21 MR TURNER: But the difficulty is we do not have context.
22 THE CHAIR: I think that is not admitted. I think that is
23 absolutely not admitted, which is why I did ask you at
24 some point we need to look at each of the points of
25 which licence negotiation occurred with Apple and

1 Samsung and for you to explain what was going on at that
2 particular time and what the leverage was that you say
3 Qualcomm had at each particular point in time. Sorry.
4 MR TURNER: Sorry, no.
5 MR MOSER: Madam, yes, but, as we say in our skeleton
6 argument, we start with other examples of OEMs, which is
7 one of the things that it was agreed we could do at one
8 of the CMCs, to show that this is the ecosystem. It is
9 not just specific to Apple, but I am happy to move to
10 Apple and Samsung, because Apple and Samsung, despite
11 their size, were not immune to this effect of NLNC.
12 Samsung, in fact, if we look at the evidence, set out
13 very clearly why it could not litigate against Qualcomm.
14 If we look at an internal strategy document from
15 October --
16 MR RIDYARD: Sorry to interrupt, just to go back to those
17 ones, the LG and the *Motorola*, is it clear that those
18 OEMs were content to commit to FRAND and that that was
19 the context in which the chipsets were being -- they
20 fear that they would be refused?
21 MR MOSER: I submit generally, and I can make this good by
22 references, though not now, I submit generally that we
23 are dealing with companies that were willing licensees
24 on FRAND terms. There is --
25 MR TURNER: But it has to be at a specific moment of this

1 conversation, whatever it was, interaction between --
2 were they at that stage behaving like willing licensees
3 or were they not? If they were not, then that provides
4 a very different context.
5 MR MOSER: Indeed. I mean, I glance at the time because
6 there is only so much I have been able to do, it turns
7 out, this morning.
8 MR TURNER: Yes, of course.
9 MR MOSER: If one looks at the evidence, there are clear
10 passages where we see that the OEMs concerned say, well,
11 I was -- you know, we are willing to deal with you on
12 FRAND rates. We see this, for instance, in the passage
13 with Sony which is not redacted. We are willing to deal
14 with you on FRAND rates. Please can you do something.
15 The answer quite evidently is "no".
16 MR RIDYARD: You think that also applies to *Motorola* and LG
17 because I do not think -- is there something that shows
18 us that trigger point there, where they said, "I want to
19 commit to a FRAND determination"?
20 MR MOSER: Well, we will look at this in the evidence with
21 the witnesses and we will see the context of this. My
22 submission is that, yes, whether expressly from the
23 evidence or by necessary inference, in each case that
24 I am showing you, I say we are dealing with willing
25 licensees.

1 I want to finish, if I may, this section of evidence
 2 about, in particular, Apple and Samsung resisting and
 3 I want to start with an internal Samsung strategy
 4 document from October 2013. 2013 is around the time of
 5 an important episode in which Samsung sought,
 6 unsuccessfully, to renegotiate its royalties with
 7 Qualcomm. Can I invite the Tribunal to read the extract
 8 at {POF/415/17-18} and that is a 1782 external-eyes-only
 9 document, but there it is, and in particular, starting
 10 at the red and grey box at the bottom of page 17 reading
 11 through to 18 and, in particular, the last bullet point.
 12 (Pause)
 13 THE CHAIR: What, in this, says that there was any threat to
 14 cease supply in the event that Samsung were to say,
 15 "I will go to FRAND negotiation, I will go to FRAND
 16 litigation, if necessary. In the meantime, I will --
 17 I will simply pay the medium price or whatever it is the
 18 standard holding price to be paid pending a FRAND
 19 determination"?
 20 MR MOSER: We see that if we look at another 1782 document,
 21 which is the evidence from Mr Injung Lee --
 22 MR TURNER: Just before you move on, do we know what this
 23 document is? I have read the words but what is the
 24 document?
 25 MR MOSER: Sorry, the earlier document?

1 MR TURNER: No, the document we are looking at now -- before
 2 the one you are going to, so the one at {POF/415} --
 3 MR MOSER: Forgive me, I should have started at page 11.
 4 I am taking this as quickly as I can. If we look at
 5 page 11, we see the top end of that document
 6 {POF/415/11}, it was a Qualcomm response document of
 7 8 October 2013. So this is essentially a plan of what
 8 they hope to do.
 9 MR TURNER: 2013, right.
 10 MR MOSER: 2013 is an important time because that is when we
 11 say they ought to have been able to renegotiate in time
 12 for -- just before the claim period in time for the
 13 claim period in relation to LTE, but I was going to take
 14 you to the evidence of Injung Lee in 2016 in US
 15 proceedings of Samsung at {POD/7/38}. That puts into
 16 context what we have just seen. I cannot read it out,
 17 but it is the question in the middle which starts:
 18 "I think you testified ..."
 19 Do you see that there? If you can read the three
 20 questions and answers in the middle, please. (Pause)
 21 Go to:
 22 "... as favour of Samsung."
 23 Eight lines down.
 24 I think I can say this in open: our case is whatever
 25 they tried to do in 2013, again, it did not work. The

1 reason is explained.
 2 MR TURNER: Are they saying here that they do not want to go
 3 to arbitration because it takes a long time? I mean,
 4 they are not talking specifically about not having
 5 chipsets, are they? They may be talking about other
 6 things?
 7 MR MOSER: Well, it is not how I read it. If we look at
 8 those eight lines from "I think you testified earlier"
 9 down to "in which direction", answer, I submit it is
 10 very clear that that is of course our case.
 11 THE CHAIR: But where does that say that there was any
 12 implicit or explicit threat? I mean, the OEM might
 13 simply have just taken a view that it was not going
 14 to -- actually this is ridiculous.
 15 How am I going to discuss this if it is all
 16 confidential? I cannot ask the question I need to.
 17 Right.
 18 MR MOSER: Well, we will clearly have to look at this. In
 19 the time available --
 20 THE CHAIR: Make your submissions and then I think we are
 21 going to very, very soon, maybe even before the
 22 submissions tomorrow, discuss what we are going to do.
 23 Maybe you can have a word with Mr Jowell and Mr Saunders
 24 over lunchtime because this is absurd. I mean, this is
 25 the heart of the case. We cannot proceed with the rest

1 of the trial with all of this stuff in confidential.
 2 MR MOSER: Yes.
 3 THE CHAIR: Make your submissions, Mr Moser.
 4 MR MOSER: Well, if I could just turn to Apple because
 5 hearsay evidence in the case of Apple shows the company
 6 was also unable to seek a FRAND determination because of
 7 the risk of supply disruption. I will cite the example
 8 of Mr Blevins, who explained the risks of bringing IP
 9 litigation. I am afraid it is another 1782 document at
 10 {POD/7/17-18}. So start at the bottom of 17 and about
 11 halfway down to 18. If I could invite you to read those
 12 passages, please. (Pause)
 13 THE CHAIR: Why do you want us to -- you want us to start at
 14 the words "And I am wondering ..."?
 15 MR MOSER: Yes.
 16 THE CHAIR: A somewhat leading question, but anyway.
 17 (Pause)
 18 But what about the question three lines up from the
 19 bottom on page 17?
 20 MR MOSER: Well, this is part of our case that it was not
 21 always necessary for them to say it expressly because
 22 everybody knew what the situation was.
 23 MR TURNER: "Imply" is the word used.
 24 MR MOSER: Exactly, it is express or implied.
 25 THE CHAIR: So there was -- so there was no suggestion or

1 implication of a threat?
 2 MR MOSER: There did not need to be. When I say that
 3 everyone in the industry knew, I have not taken you to
 4 all of the wider OEM evidence. I do not know -- have
 5 you finished reading the passage?
 6 MR TURNER: Again, sorry, the context for this document?
 7 MR MOSER: The context for this document is this is, again,
 8 examination in US proceedings and in this case it is
 9 Tony Blevins of Apple on 28 January 2016.
 10 MR TURNER: This is a deposition and this is Apple and
 11 Qualcomm are the parties?
 12 MR MOSER: It is the FTC proceedings.
 13 MR TURNER: Right.
 14 MR MOSER: The fact that Apple felt constrained by
 15 Qualcomm's market power is, we say, illustrated by
 16 something that they actually hold against us because
 17 they say, "Ah, well, Apple had buyer power. In fact
 18 Apple even sued us" says Qualcomm. We say that the
 19 company, Apple, was only in a position -- it only felt
 20 able to challenge Qualcomm in 2016 and following when it
 21 thought that it was no longer going to be dependent on
 22 Qualcomm for chips.
 23 MR TURNER: So what date are they talking about here?
 24 MR MOSER: So here we are talking about that period in
 25 about 2016 to 2018 when Apple believed that it was going

1 to be able to escape from the Qualcomm straitjacket on
 2 supply of chips and that is the period when -- we have
 3 not reached that stage yet of the chronology, but that
 4 is the period when Apple was able to -- felt able to sue
 5 Qualcomm and in fact launched an all out worldwide
 6 assault on Qualcomm's selling system and NLNC, including
 7 attempts at FRAND, and assessing the royalty because
 8 what happens in the case of Apple is that, prior to
 9 2019, Apple had no patent licence with Qualcomm.
 10 Instead, they were broadly dealing with contract
 11 manufacturers. I have said that these contract
 12 manufacturers, like the whole market, were suffering
 13 from the licensing leverage rates. So Apple was forced
 14 to pay these, even with limited rebates.
 15 Despite its size, we say that Apple could not muster
 16 sufficient bargaining power to reduce the rate further
 17 due to its dependence on Qualcomm for chips. That is
 18 the context for these answers that we are looking at in
 19 the LTE proceedings. Exceptionally, there is a period
 20 between about 2016 and 2018 when Apple gradually
 21 develops bargaining power because it thinks it has
 22 secured another chip option and so, as soon as we say it
 23 manages to escape from under the heel of the monopolist,
 24 it initiates this all-out challenge to Qualcomm's
 25 licensing practices, including NLNC and including

1 royalties.
 2 In that period, we see these giants fighting it out.
 3 The obvious inference is because they thought Intel was
 4 going to provide them in the next stage with 5G and
 5 Samsung were already there with Galaxy.
 6 We also know, to cut a long story short, the outcome
 7 of Apple's version of events is the chips did not arrive
 8 and, once again, Qualcomm had them over a barrel and it
 9 capitulates on all fronts. Qualcomm says, "No, Apple
 10 just bowed to the inevitable that its rates were FRAND
 11 anyway" and that will be a conflict on the evidence for
 12 the Tribunal.
 13 You see in the chronology that is there is
 14 a settlement agreement, but at all points prior to 2016
 15 we say it is clear that Apple did feel constrained. It
 16 is only at that one moment when Apple feels, "Oh, no, we
 17 are going to be able to get some chips from somebody
 18 else" that they suddenly are able to take Qualcomm to
 19 court and then they do so with a vengeance.
 20 That is important context for this when you say to
 21 me, well, how do I know that Apple even wanted to do
 22 this? Well, we know because we can test it against what
 23 happened when they thought that they had leeway.
 24 So, I mean, that is the position with Apple. The
 25 Defendant tries to hold that against us and says --

1 THE CHAIR: You say at all points prior to 2016 it is clear
 2 that Apple felt constrained, but after that?
 3 MR MOSER: Yes.
 4 THE CHAIR: After that?
 5 MR MOSER: After that, between 2016 and the settlement
 6 in 2019, they litigated hard, it will be recalled,
 7 against Qualcomm.
 8 THE CHAIR: But that takes up quite a lot of the period of
 9 the claim.
 10 MR MOSER: It --
 11 THE CHAIR: The claim starts in 2015 so you are then
 12 immediately into a period, or almost immediately into
 13 a period in which you are saying they litigated hard and
 14 were not constrained.
 15 MR MOSER: Yes. We know what happens with the Mewes
 16 evidence, which is that in 2019 we end up back at
 17 square one and, in short, there is unmitigated loss
 18 which is paid for the entire claim period.
 19 THE CHAIR: Well, what do you mean by "unmitigated loss"
 20 because during that entire period they were litigating?
 21 Then they settled.
 22 MR MOSER: They were litigating, but when there is
 23 a settlement there is a back payment of all the royalty
 24 for the time of litigation.
 25 THE CHAIR: But your counterfactual case is the ability to

1 litigate and they did have that ability during the --
 2 during the period 2016 to, on your case, 2019.
 3 MR MOSER: They briefly felt they had the ability to
 4 litigate .
 5 THE CHAIR: It is not briefly. It is three years.
 6 MR MOSER: It is, but there was then the collapse at the
 7 doors of the court in the way that is explained by
 8 Ms Mewes. In one way or another, I am going to have to
 9 go to that evidence. I know that it is 1.00 pm and we
 10 are constrained on time, but I simply have not managed
 11 to get there. Perhaps if we can rescue some time back
 12 at the beginning of tomorrow morning, I can muster my
 13 outstanding references and take you there after lunch
 14 because what I still need to do, I feel, is to tell the
 15 end of the Apple story, explain the Samsung case and
 16 give you some references for the documents which at some
 17 stage I would be grateful if you could cast an eye over.
 18 THE CHAIR: Well, when we come back at 2.00 you can tell us
 19 how much time you want tomorrow morning. It will not be
 20 long. We will have to start early and I will have to
 21 just discuss with my fellow panelists and everyone
 22 whether we can start early.
 23 We are also going to have to have a discussion about
 24 confidentiality so just build that in. It looks like we
 25 are going to need to be here early tomorrow to do both

1 those things.
 2 All right. So we can be here early tomorrow and
 3 just let me check my own diary. All right. So we could
 4 start theoretically at, say, 10.00 or earlier than 10.00
 5 to deal with confidentiality and a delineated amount of
 6 time for you to have to finish your submissions.
 7 MR MOSER: Would 9.45 be too early?
 8 THE CHAIR: No, I think we can do that, unless I say
 9 otherwise after a discussion over lunch.
 10 So you will let us know how much more time you want
 11 tomorrow morning and how much time you think we need for
 12 the confidentiality discussion.
 13 MR BAILEY: Madam, if I may, just in relation to
 14 confidentiality. Obviously the Tribunal will be aware,
 15 it is not simply that Qualcomm is making requests for
 16 confidential treatment. There is also the position of
 17 the third parties, as the Tribunal will recall from the
 18 hearing earlier this month. I just wondered, if the
 19 Tribunal is intending to have a discussion about, for
 20 example, the 1782 material, does the Tribunal wish to
 21 hear from the third parties? They expressed extremely
 22 strong views about this at the last hearing.
 23 There is a further complication which I should also
 24 raise, just so the Tribunal is aware of it, which is
 25 that, in relation to the 1782 material, that is not just

1 simply within the parties' control; there is a process
 2 which also requires the US District Court to be involved
 3 because it is its Protective Order that applies to that
 4 information.
 5 I just wanted to raise those two matters now in case
 6 you had any views about how we should proceed before
 7 tomorrow morning.
 8 THE CHAIR: Well, is it possible for them to be here
 9 tomorrow?
 10 MR BAILEY: Well, Madam, we can obviously make enquiries
 11 over the short adjournment to see if that would be of
 12 assistance. It just seemed to me that if the Tribunal
 13 wishes to discuss confidentiality and try and arrive at
 14 a regime that works for the court and the parties --
 15 MR TURNER: We would also need to know what documents. We
 16 dealt with a handful, but there may be other documents
 17 that the parties are going to refer to.
 18 The trouble is at the last hearing it was not clear
 19 which documents were going to be referred to actually in
 20 the course of proceedings, if you recall. So, yes, it
 21 is not just the documents referred to this morning, it
 22 is others you intend to refer to.
 23 THE CHAIR: I think there is no way that we are going to be
 24 able to deal with this on a document-by-document basis.
 25 We would have to deal with it on a category-by-category

1 basis and then just give a ruling on the broad
 2 categories of documents we do not think are
 3 confidential.
 4 I mean, I think you need to come up with something
 5 which is a way of dealing with this going forward which
 6 is not going to involve us spending a lot of time on
 7 a satellite issue which really should not be the focus
 8 of this trial, but we need to find a way forward because
 9 this kind of document that we are being shown, it is
 10 going to be impossible -- it was impossible for me to
 11 ask Mr Moser the question that I wanted to ask him about
 12 something that was blindingly obvious and is the main
 13 focus of the submissions of the Class Representative in
 14 this hearing.
 15 I cannot see how that kind of thing can possibly be
 16 regarded as confidential because it is the Class
 17 Representative's essential case.
 18 So --
 19 MR BAILEY: I do appreciate the concern. It is just that it
 20 will not be Qualcomm that is saying to you that that
 21 material (inaudible) third party is confidential, it
 22 will be the third party. I am only raising, really
 23 vicariously on their behalf --
 24 THE CHAIR: Yes, I understand. Can you just -- put your
 25 heads together and propose a process whereby we can make

1 a determination on broad categories of documents in
 2 short order, without spending hours and hours on this,
 3 because we do not have the time in this trial , but it is
 4 evident that it needs to be sorted out.
 5 So I will let you come back to me after lunch with
 6 how you, between you, propose how we proceed so we can
 7 actually ask the questions, without having to ping-pong
 8 in and out of closed session , on completely obvious
 9 points that are central to the submissions on both
 10 sides .
 11 All right. Thank you very much. We will come back
 12 at just after 2.00 pm.
 13 (1.07 pm)
 14 (The luncheon adjournment)
 15 (2.00 pm)
 16 THE CHAIR: Just give me a moment, Mr Moser.
 17 Yes.
 18 MR MOSER: In I hope no more than 15 or 20 Minutes, I hope
 19 to achieve a limited number of things. I want to
 20 respond to a particular point in their skeleton argument
 21 which I feel I must do and that ties in with what I was
 22 talking about immediately before lunch. That will take
 23 me to the Mewes evidence and then I will go to our
 24 skeleton argument and, with one exception, essentially
 25 point you to the Apple and Samsung-specific evidence.

1 THE CHAIR: All right. How long are you going to need
 2 tomorrow morning --
 3 MR MOSER: I of course will need --
 4 THE CHAIR: -- to catch up?
 5 MR MOSER: We might need about half an hour in the morning
 6 tomorrow to catch up.
 7 THE CHAIR: Well, I think I can give you about 20 minutes,
 8 because we are then going to have to spend the rest of
 9 that time first thing in the morning dealing with
 10 confidentiality .
 11 MR MOSER: Yes.
 12 THE CHAIR: Unless you have an agreed proposal now?
 13 MR MOSER: I know that Mr Armitage and Mr Bailey have been
 14 talking. There is no agreed proposal now, but they are,
 15 as it were, the keepers of the redactions and they will
 16 continue to talk and it is probably going to be they who
 17 will be addressing you on it tomorrow morning, rather
 18 than me.
 19 THE CHAIR: All right. Are they going to send anything for
 20 us to peruse before tomorrow morning?
 21 MR BAILEY: Madam, Qualcomm can certainly put forward
 22 a proposal as to how Qualcomm will request that its
 23 confidential information it to be treated during the
 24 trial . So we can put forward that as a proposal for
 25 that.

1 We are also notifying Samsung and Apple, in
 2 particular , in light of the indication given by the
 3 Tribunal this morning, so that they are aware of the
 4 hearing and also the Tribunal's concerns. We do not
 5 think we are in a position, however, to take matters
 6 further than that, because obviously they will need to
 7 address the Tribunal as to the position in relation to
 8 their documents.
 9 The other thing that Qualcomm were suggesting to the
 10 Class Representative is that we can identify broad
 11 categories of information because you said you were
 12 considering categories and we can put those categories
 13 to the third parties so that they are aware that those
 14 are the ones that are the subject of tomorrow's
 15 discussion .
 16 THE CHAIR: Yes. Your proposal needs to be a mechanism for
 17 us to deal with it , which would need to include, so far
 18 as appropriate, any representations to be made by Apple
 19 and Samsung. So it is not just what you suggest should
 20 happen, but how we then address that question in terms
 21 of getting necessary submissions from Apple and Samsung.
 22 You are the contact with them.
 23 MR BAILEY: Madam, that is not entirely correct. We are not
 24 just the contact with third parties . The parties
 25 themselves agreed and divided up how they would liaise

1 with third parties . It depended upon whether or not
 2 a particular party was relying on third party
 3 information so we are not the guardian, Madam, of third
 4 parties and so in that sense, if I may, I would suggest
 5 that the parties should co-operate and liaise after
 6 court to try and agree the process.
 7 THE CHAIR: Yes, all right.
 8 MR BAILEY: I am grateful.
 9 MR MOSER: I am grateful to everyone.
 10 On my first point, this issue around their skeleton.
 11 If I can start with their skeleton at {EAOS/2/24}, and
 12 paragraph 37, starts on the previous page, but I want to
 13 look at the bit that is on internal page 21 of their
 14 skeleton, just before paragraph 38. They say something
 15 which they think is a complete answer to this question
 16 of whether Apple was even willing, on this question
 17 I had about a willing licensee , and my point about that
 18 was generally everyone was always a willing licensee and
 19 we get what references we can on that in due course.
 20 I pointed out that there was a period when Qualcomm
 21 and Apple were at loggerheads. They have chosen
 22 a quotation from Apple's legal counsel at that time and
 23 they say --
 24 THE CHAIR: What paragraph are we looking at?
 25 MR MOSER: This is at the end of paragraph 37, just above

1 38, internal page 21, and it is therefore {EAOS/2/24}.
 2 They say Apple was not truly interested, look at what
 3 their counsel said:
 4 "If Qualcomm makes a motion for a worldwide FRAND
 5 determination, we are going to oppose it in any
 6 jurisdiction ."
 7 Said Isaacson.
 8 That is not probative of anything for a number of
 9 reasons. The first is that, fundamentally, what Apple
 10 was saying in that submission was they did not believe
 11 the royalty rate could be set without scrutiny of
 12 Qualcomm's portfolio. It is worth looking at where this
 13 quotation comes from. It is at {POD/8/24} at 31:4. On
 14 that page, we have Bill Isaacson for Apple and he
 15 says -- if we are there, he says:
 16 "At the outset, Your Honour, what I would like to
 17 say ... Apple, as master of its complaint ... is that
 18 Apple is not seeking a worldwide FRAND determination in
 19 this court or any other court. In fact, when you look
 20 at our pleadings, we are seeking FRAND determinations on
 21 18 specific patents, as well as other determinations
 22 about those patents. In fact, it is Apple's position
 23 that if someone -- [and here comes the quote] -- if
 24 Qualcomm makes a motion for worldwide FRAND
 25 determination, we are going to oppose it in any

1 jurisdiction .
 2 "THE COURT: Why? A: Couple of reasons. First of
 3 all ... no authority."
 4 I skip then down --
 5 MR JOWELL: I think if you read on --
 6 MR MOSER: That is the first reason. If it matters, you can
 7 read it to yourself . They say there is a negotiation
 8 that is unsuccessful referenced in pleadings, but there
 9 is no obligation to enter into a licence with Qualcomm.
 10 However, the fact that those negotiations broke down was
 11 not because the court has the authority to step in and
 12 say we will determine what is fair . It is
 13 a jurisdictional point.
 14 The other problem starts four lines up from the
 15 bottom. The other problem is:
 16 "The patents, which would be the subject of the
 17 worldwide FRAND determination, are not before this
 18 court. They are not in any of the pleadings. They are
 19 not -- there's no one asking you to review those. In
 20 fact, it is the opposite. Qualcomm very much want you
 21 to set a FRAND rate without actually looking at the
 22 patents; in other words, to have this Court set
 23 a royalty for licensing of a patent without knowing what
 24 the patents are. They are not in the pleadings."
 25 So fundamentally this is part of an ongoing argument

1 between Apple and Qualcomm at this time when, for
 2 reasons I've explained, Apple felt able to bring
 3 proceedings, where Apple objected to arbitration on
 4 Qualcomm's terms, as they saw it, without a valuation of
 5 the actual SEPs.
 6 It is also, as we will see in evidence from
 7 Mr Watrous and other places, it is an objection to
 8 arbitration in the NLNC world where FRAND arbitration or
 9 court determination will use comparators that Apple said
 10 were equally tainted. Mr Williams will address this .
 11 This is the poisoned well argument.
 12 So Apple had to raise the antitrust points, as well
 13 as doing FRAND arbitration, to expose the inflation of
 14 the underlying rate found across all of Qualcomm's
 15 portfolio of licences .
 16 Again, this is at the time when they are fighting
 17 each other around the world. No one is agreeing to
 18 anything. So that is the exception that proves the
 19 rule, as it were, when Apple was not willing. In that
 20 context, I submit Apple's actions actually tell
 21 a different story because, far from not seeking a FRAND
 22 determination, Apple issued proceedings, including in
 23 the USA and the UK, which sought a range of reliefs,
 24 including FRAND determinations. I will just give you
 25 the references but there are pleadings for the US

1 proceedings in the file at {ORI/116/65}, at
 2 paragraphs 243 and following. In the US proceedings we
 3 see that they sought declarations that certain patents
 4 were non-essential, declarations of FRAND royalties on
 5 the basis the royalty base should be the smallest
 6 saleable unit and all of that.
 7 The claim also raised exhaustion. That is
 8 {ORI/116/84}, paragraphs 113 and following.
 9 Apple also issued proceedings in the UK {POF/765},
 10 including a competition claim, paragraph 90,
 11 {POF/765/29}, and following, a claim that a breach of
 12 ETSI obligations and the claim of the patents were
 13 invalid -- so across the board.
 14 THE CHAIR: So {POF/765}.
 15 MR MOSER: Page 29 and following and at paragraphs 90 and
 16 following of the pleadings we see all of the different
 17 claims that were brought. If we look at -- we perhaps
 18 should glance at this more than just for your note
 19 {POF/765/10}, at paragraph 32 and following of the UK
 20 pleadings, we see a description of Qualcomm's licensing
 21 practices that Apple complained about which are fairly
 22 similar to what we say in this claim. That is at
 23 paragraph 32 to 40.
 24 At paragraph 61, at page 20 {POF/765/20}, they say:
 25 "Apple is currently challenging Qualcomm's fees and

1 practices in connection with sale of chipsets and
 2 licensing of associated SEPs through competition law
 3 challenges in multiple jurisdictions . Ultimately, the
 4 terms of the licence between the parties will have to be
 5 determined, whether through litigation or negotiation."
 6 So it is certainly not an indication that they were
 7 not willing to have FRAND negotiation or litigation.
 8 They were actively seeking FRAND litigation. It is just
 9 that in that time of perceived bargaining power they had
 10 brought a general litigation trying to break the NLNC
 11 business model. We say actually that is strong evidence
 12 that dependence on Qualcomm had been what was holding
 13 Apple back from litigating up to that point. That being
 14 said, the fact Apple did not want to arbitrate on
 15 Qualcomm's terms is not a good point when it comes to
 16 willingness and when one looks at what Apple did
 17 ultimately litigate on in its own terms in the US and
 18 the UK.
 19 THE CHAIR: What do you mean by arbitrating on Qualcomm's
 20 terms?
 21 MR MOSER: Well, what counsel for Apple was saying in his
 22 submissions was, "We are going to oppose worldwide FRAND
 23 arbitration at any cost". That is because they
 24 perceived that what Qualcomm was after in the US court
 25 was, without looking at the individual SEPs, determining

1 some sort of worldwide FRAND rate and they objected to
 2 that, not least because, they said, these patents are
 3 not before you, you do not have the jurisdiction and
 4 that is what I mean by "Qualcomm's terms".
 5 How it ended is in the evidence of Ms Mewes, which
 6 we see at {POD/7/72}. The parties have competing
 7 narratives about this, but Ms Mewes, we see, is very
 8 clear in what she says. This is in her -- this is in
 9 her third witness statement, given in the *Optis v Apple*
 10 proceedings here in 2022 in the United Kingdom. We see
 11 paragraph 10:
 12 "Qualcomm's a key component supplier for Apple
 13 products, including the iPhone. At the time the
 14 Qualcomm deal was negotiated, (and to this day),
 15 Qualcomm had a 'no licence, no chip' policy, that as far
 16 as I know is a practice unique to it and through which
 17 it required any customer purchasing Qualcomm chips to
 18 also take a royalty bearing licence. During the
 19 negotiation period prior to April 2019, Apple had no
 20 other supplier from which it could purchase suitable 5G
 21 chips for its iPhone products to be released starting
 22 in 2020, and Apple was therefore 'over a barrel' in its
 23 negotiations with Qualcomm -- I understand that Apple
 24 was two days away from the date at which it expected it
 25 would miss the 2020 launch date of its 5G-enabled WiFi

1 when the deal with Qualcomm was finalised. For this
 2 reason, I also do not consider the Qualcomm licence to
 3 be a comparable licence."
 4 We have seen in other places that what happened to
 5 that period of perceived bargaining power was it all
 6 ended with the settlement in 2019. I have described it
 7 as "back to square one". Slightly constrained again by
 8 confidentiality as to what I can say in relation to the
 9 details of the settlement, but, as far as, Madam, your
 10 question, you know, what is the money consequence, it
 11 was a settlement back. So there was no -- no saving
 12 achieved at any time by all of that effort and Apple was
 13 back, in the colourful language, under the heel of the
 14 monopolist in 2019 and at all times since.
 15 MR RIDYARD: Are you saying there that it just ran out of
 16 time to get what was due to them or -- because there is
 17 two ways of looking at that, is there not? One is they
 18 would have got a much better settlement but then they
 19 ran out of time and they thought they were also going to
 20 be non-dependent on Qualcomm for 5G chips, in which case
 21 they could have carried on the litigation, but they had
 22 to stop because they suddenly found they did not have
 23 any 5G chips, or maybe they went to the litigation
 24 process and they did not get a better price because the
 25 price they were already getting was the right price? So

1 how do we distinguish between those two hypotheses?
 2 MR MOSER: Well, the second is their hypothesis, Qualcomm's
 3 hypothesis, which we say it is inherently unlikely that
 4 suddenly they have lost faith in this thing that they
 5 have been litigating with all guns blazing for
 6 two years. In fact, what we say is on the balance of
 7 probabilities the case is what Ms Mewes actually says,
 8 which is --
 9 MR RIDYARD: But why should we favour your view over their
 10 view on it?
 11 MR MOSER: Because we say by obvious implication, it is the
 12 more natural interpretation of what went on. They
 13 wanted to have the 5G chips. We know that the
 14 expectation was dashed. We know the 5G chips did not
 15 arrive in time and it is, for instance, in Mr Noble's
 16 report, his ninth report, at paragraph 233, and they had
 17 to do something. Samsung's Galaxy was already on the
 18 market with its 5G and they were driven back to the arms
 19 of Qualcomm.
 20 MR RIDYARD: So it is miscalculation by Apple? They thought
 21 they had five years or whatever to do the litigation and
 22 they ended up with only three and, therefore, there was
 23 not enough time.
 24 MR MOSER: It is a disappointed expectation. From
 25 about 2015, they thought this thing was going to be

1 developed by another company.
 2 MR RIDYARD: Yes, so that is what you are saying?
 3 MR MOSER: It was.
 4 MR RIDYARD: Yes.
 5 MR MOSER: So we will see what they say about that, but
 6 that, we say, really fits entirely with the explanation,
 7 with respect, given by Ms Mewes under oath in *Optis*.
 8 So, as briefly as I can then --
 9 THE CHAIR: Yes --
 10 MR MOSER: -- the evidence. It is going to be most
 11 convenient to take it from our skeleton argument.
 12 THE CHAIR: Well, you will have to be extremely brief
 13 because we are already 20 minutes into the afternoon.
 14 MR MOSER: Yes. Madam, I am going to go almost entirely now
 15 to Apple and Samsung evidence. I do want to touch on
 16 one bit of other OEM evidence. That is the only one
 17 that I am going to go which is at paragraph 189 of our
 18 skeleton argument, because it puts into context what
 19 I say about what is to be expected from the evidence and
 20 what is not to be expected.
 21 So, as I said right at the beginning in my opening,
 22 sometimes we see direct threats to cut off chip supply.
 23 One of those occasions is in the negotiations with
 24 *Motorola* in 2015. There -- I will not go to it -- but
 25 the reference is there and it is hyperlinked in the

1 electronic version. We see a handwritten note from
 2 Mr Amon of Qualcomm about his own Qualcomm colleague,
 3 Mr Reifschneider, and he says, in that negotiation,
 4 licensing -- Mr Reifschneider "constantly threatening to
 5 cut off supply". So there we have a handwritten note,
 6 specifically example of withdrawal of supply.
 7 I would say immediately the evidence is that not
 8 good for every negotiation. If you are looking for
 9 an email or a note of every negotiation that says, "And
 10 we will cut off your supply", you will not find it. As
 11 I have also said, in competition cases, it is not always
 12 necessary. You have to draw an inference and you have
 13 to draw, on my submission, if you are with me, that
 14 there was an ecosystem and an atmosphere of risk that
 15 everyone appreciated. That included the contract
 16 manufacturers in the case of Apple and I think
 17 I have taken you to the example of Pegatron.
 18 I will just go to one further actual document and
 19 that is going to be Mr Sewell in the hearsay document at
 20 {POD/7/28}.
 21 THE CHAIR: Is this in the skeleton again, because I thought
 22 you were giving us skeleton references now?
 23 MR MOSER: Yes, I was giving you skeleton references.
 24 I just want to supplement this one point in relation to
 25 the contract manufacturers. Then I do not have to come

1 back to it when we get to it in the skeleton. As the
 2 last one, if we look at -- it is a 1782 argument --
 3 document, but if we look at Mr Sewell's evidence in a
 4 2018 deposition, starting at 82.24, this describes the
 5 NLNC situation in relation to the contract manufacturers
 6 and what Apple had to say about that. If one just reads
 7 to the end of that page to where it says 97.9. (Pause)
 8 THE CHAIR: All right.
 9 MR MOSER: That is because a point is made against me that
 10 says, well, contract manufacturers protected Apple from
 11 this problem. No, they did not, for that reason.
 12 Skeleton argument, in particular, in relation to
 13 Apple at paragraphs 218 and following, I will not read
 14 it all out, not because it is redacted, but because
 15 there simply is no time, but each of these documents, at
 16 paragraphs 218 through to 241, is highlighted. I would
 17 ask, please, that the Tribunal at some point in these
 18 weeks have a look at the documents that are connected
 19 electronically to those paragraphs, please {EAOS/1/63}.
 20 That, again, deals also with the case of whether Apple
 21 just sort of gave up on its litigation or not.
 22 Similarly, in relation to Samsung, if we look at
 23 paragraphs 243 to 249 {EAOS/1/70-72}. That deals with
 24 the Samsung case. It is a bit different because
 25 Samsung's rates had been set back in 1993 and, in

1 Samsung's case, we are dealing with the variation that
 2 we are always talking about renegotiation and an extreme
 3 reluctance, we say, to exercise the outside option,
 4 including in 2013 when they could have done just before
 5 the claim period. We say it is easily understandable if
 6 you look the previous experience of negotiations that
 7 are highlighted here in the documents, in which Qualcomm
 8 repeatedly threatened to cut off Samsung's chipset
 9 supply. In the Samsung case, it is more overt than in
 10 the Apple case where they said they did not have to
 11 because we knew. In Samsung's case, you will see the
 12 evidence. They repeatedly threatened to cut off their
 13 supply and Samsung was given to understand the potential
 14 costs of disputing royalty terms with Qualcomm.
 15 Our case is that the sting of those lessons and
 16 Samsung's resulting fear, reasonable fear, of chipset
 17 supply persisted throughout those later negotiations.
 18 So you have a licence entered into in 1993 when none of
 19 the 3G, 4G, 5G were even a twinkling in anyone's eye and
 20 somehow it is said: that is all fine and that is all
 21 fair for the rates that were being paid in 2015 to 2018,
 22 the claim period. We say, no, it was all tendered into
 23 at a time of total CDMA Qualcomm dominance and total
 24 Samsung dependence and never effectively changed.
 25 There was a change in 2018, you will see that in the

1 chronology, when Samsung was permitted a sort of
 2 renegotiation as a result of the Korean Fair Trade
 3 Commission decision, but it did not benefit them much
 4 because they simply got the prevailing market rate again
 5 and they were, it seems, more interested in being pegged
 6 to the Apple or Huawei rates. That does not change our
 7 case, but it is consistent with Which?'s case that these
 8 hiked rates were passed on to consumers and there were
 9 no effective renegotiations of the leveraged rate at any
 10 time. That is the Samsung case that carries on through
 11 to paragraph 270 with the documents hyperlinked.

12 I am sorry that is all a bit rushed, but that brings
 13 me to the end of what I wanted to show you.

14 THE CHAIR: Thank you very much.

15 Opening submissions by MR WILLIAMS

16 MR WILLIAMS: Madam, members of the Tribunal, I did not have
 17 any voice last week. I have a bit of a voice this week.

18 I will try and keep my voice up, but if you could just
 19 bear with me and if I am not clear at any point, please
 20 do tell me.

21 THE CHAIR: Have you tried Vocalzone?

22 MR WILLIAMS: I do not even know what Vocalzone is.

23 THE CHAIR: I will bring you some in tomorrow.

24 MR WILLIAMS: I am very grateful.

25 I am going to address three aspects of the economics

1 in the case and along the way I will deal with a few
 2 matters of law and some of the factual issues as they
 3 feed into the economics. The three topics are market
 4 definition, dominance and abuse.

5 The third of those topics has three elements. One
 6 of them is Mr Noble's bargaining model and how that fits
 7 into the case. Then I also want to say a bit about RTL,
 8 as promised, and then, finally, leveraging, although
 9 I do not propose to say very much about that.

10 We are obviously a bit squeezed on time? I am going
 11 to keep making points. I will take you to documents
 12 here and there, but if you need me to slow down at any
 13 point, Madam, then please say. Otherwise, I will try
 14 and keep the submissions coming.

15 The legal framework for market definition and
 16 dominance is set out in the *Cabo* judgment, Madam, which
 17 obviously you are very familiar with. I was not going
 18 to spend time on that. I think it is mostly common
 19 ground. I will pick up one or two legal points relating
 20 to this bit of the case along the way.

21 You will have seen our position on the definition of
 22 development markets from our skeleton and from
 23 Mr Noble's evidence. I will show it in just a minute.
 24 The basic idea is that OEMs need chips to make devices
 25 of different types and models and one of the fundamental

1 criteria for producing a device is compatibility with
 2 a given standard and if an OEM wants to make a device
 3 that complies with that standard, they need the right
 4 sort of chip and there is no substitute for that. You
 5 cannot make a 4G phone with a 3G chip. So if I can show
 6 you how that shakes down in Mr Noble's evidence. It is
 7 core bundle, tab 35, page 12 or it is {POE/21/12},
 8 paragraph 2.5.

9 So what you see on that page and the next page are
 10 five relevant chipset markets defined with reference to
 11 standards and the complication is that some of the
 12 markets involve backwards compatibility with other
 13 standards because in jurisdictions where one standard is
 14 used rather than another, there are variants and so what
 15 one sees there is both an LTE CDMA standard and an LTE
 16 UMTS standard. The basic concept is compatibility with
 17 relevant standards.

18 The way that plays through into dominance is that on
 19 Mr Noble's analysis, Qualcomm is dominant in all of
 20 those markets, except the first one. You get that from
 21 paragraph 3.3 of Mr Noble's report a bit later on.

22 There are two real world scenarios that kind of
 23 bring this to life. One is that as a new standard
 24 emerges, OEMs want to make devices that conform to the
 25 latest standards to offer the functionality that the new

1 standard offers and, for example, 4G was roughly four
 2 for five times as fast as 3G. One gets that from
 3 footnote 38 in Mr Noble's eighth report, just for
 4 a reference.

5 If I could bring up {POE/21/108}. This is in part
 6 confidential evidence from chipset -- from OEMs provided
 7 in the context the European Commission investigation,
 8 essentially to the effect that chips complying with one
 9 standard or specifically chips complying with an older
 10 standard, 3G, are not a substitute for chips that comply
 11 with the more recent standard, for commonsensical and
 12 obvious reasons. One sees that in Apple and Samsung and
 13 there is also evidence from *Lenovo* to like effect.

14 If I can make the same point using a different sort
 15 of evidence, if we could bring up, please, {ORI/153/5}.
 16 Sorry, page 1 {ORI/153/1}. So this is a Bloomberg
 17 commentary from April 2019. So it is very close in time
 18 to the Apple settlement and it is, we say, relevant
 19 market context for the Mewes evidence which Mr Moser was
 20 just addressing. It gives colour to the market's
 21 perception of the pressure that was on Apple at that
 22 time. You can see the heading, "Apple's rival see 5G as
 23 a golden opportunity to beat iPhone". And you get the
 24 flavour of it from the first page down to "5G future" on
 25 page 2 {ORI/153/2}. (Pause)

1 So it is market commentary. There is pressure on
 2 Apple to get a 5G phone to market, a 4G chip is not
 3 going to cut the mustard. So we note, if you move down
 4 and look at the bottom of that page, there is
 5 speculation, we say, accurate speculation, that Apple's
 6 feud with Qualcomm was going to end up putting pressure
 7 on it to do a deal. So this is the perception of the
 8 market. It is obviously not internal evidence but it is
 9 market perception.

10 If we could just turn on to page 3 {ORI/153/3},
 11 there is -- it says at the top of page 4:

12 "The need for 5G chips may give Apple reason to
 13 quickly settle the case ... currently works with
 14 chipmaker Intel Corp., which doesn't expect to be able
 15 to sell 5G components at scale until 2020."

16 So the sort of speculation about difficulties
 17 procuring chips for Intel.

18 A bit further down there is a quote from Cristiano
 19 Amon from Qualcomm saying: we are a leader and we are
 20 very keen --

21 THE CHAIR: Yes.

22 MR WILLIAMS: You get the flavour.

23 Just to complete the picture over on page 4
 24 {ORI/153/4}, you can see at the bottom of the page:
 25 "Apple's iPhone rivals aren't wasting any time."

1 Top of the page:
 2 "This is a golden opportunity for us."
 3 Says LG and so on.
 4 So that is the imperative for an OEM to get hold of
 5 the newest chips, chips complying with a particular
 6 standard, to bring them to market and it brings to life,
 7 in my submission, why older chips are not a substitute.

8 So that is one real-world scenario.

9 The second real-world scenario you have probably
 10 picked up from the skeletons, which is that OEMs may
 11 want to make devices for use on certain networks and the
 12 Tribunal has seen, I think, that in the US, in
 13 particular, and in other jurisdictions, there were
 14 competing 3G standards, UMTS and CDMA, and if an OEM
 15 wanted to make a CDMA-compatible device for use on
 16 a CDMA network, they needed a CDMA chip and UMTS was not
 17 a substitute for that. That was true at the time of 3G
 18 and it was true at the time of 4G, because of the
 19 backwards compatibility issue.

20 There is a lot of evidence of Apple's particular
 21 need for CDMA in that context. We have set out some of
 22 it in paragraph 215 of our skeleton. You will see a bit
 23 more, I hope, in the course of my submissions.

24 So that the basic logic underpinning Mr Noble's
 25 market definition.

1 His approach is in line with the *Predation* decision.
 2 I will give you a reference. That is {POF/919/44},
 3 recitals 178 and 179. I won't go to it, given the time.
 4 As I have shown you, his evidence is also in line with
 5 what OEMs were telling the Commission in the context of
 6 that investigation and in the context of the
 7 Commission's investigation into exclusivity --
 8 Qualcomm's exclusivity provisions.

9 So defined in that way, the markets do not include
 10 self-supply, which means particularly the supply of
 11 chips internally by Samsung and Huawei, and that is
 12 because at least until 5G -- I am sorry, there is an
 13 exception for 5G, but at least until 5G the proportion
 14 of sales made by those companies externally was
 15 minuscule. It was very small indeed. Mr Noble -- if
 16 you would like to see the reference, it is {POE/21/24},
 17 paragraph 2.35, page 24, footnote 58. You can see the
 18 very small percentages.

19 MR RIDYARD: So you are excluding self-supply from the
 20 market, but when it comes to looking at Qualcomm's
 21 market power over Samsung, you do --

22 MR WILLIAMS: Anything that does not come in at these stages
 23 comes in at some stage, yes, I accept that.

24 So that is Mr Noble's approach. There are three
 25 main differences on Dr Padilla's approach. First,

1 Dr Padilla identifies what we describe as Apple and
 2 Samsung-specific markets. Secondly, on that basis he
 3 finds that self-supply is in the same market,
 4 particularly for Samsung and, thirdly, he finds that
 5 chips complying with different standards are in the same
 6 market.

7 So this is very, very different in precedence and it
 8 is a reinvention of the wheel, if I can put it that way.

9 This idea of Apple and Samsung-specific markets, it
 10 is front and centre in Dr Padilla's analysis because his
 11 analysis of self-supply depends on that. His analysis
 12 of substitutability across standards is all based on
 13 Apple and Samsung's own devices and his analysis of
 14 dominance is all based on these markets. So a lot turns
 15 on this point in terms of the shape of the case.

16 In my submission, the clearest way to see the
 17 problem with what Dr Padilla -- with his conclusions is
 18 to jump straight to the end and to look at what is
 19 covered by his market definition in the final analysis.
 20 We have set this out in our skeleton, but I hope you do
 21 not mind me repeating it. Although Dr Padilla
 22 conceptualises these markets as Apple and
 23 Samsung-specific, they are not actually Apple and
 24 Samsung-specific in any way we can understand, because
 25 the markets Dr Padilla defines include all chips that

1 complied with any standards for which Apple or Samsung
 2 were buying chips at any point in time, not just the
 3 chips that Apple and Samsung were buying, but all chips
 4 that complied with the standards for which Apple and
 5 Samsung were buying chips from time to time.
 6 So his LTE markets include all LTE chips that are
 7 bought by any OEM at the time Apple and Samsung are
 8 buying LTE chips.
 9 THE CHAIR: So on the one hand, he narrows it to be
 10 OEM-specific and, on the other hand, he broadens it to
 11 include all of the chips, including multiple
 12 generations?
 13 MR WILLIAMS: Well, he calls it Apple and Samsung-specific
 14 but it is very, very similar to what Mr Noble does.
 15 THE CHAIR: Well, you say because the chips overlap, they
 16 were the same chips.
 17 MR WILLIAMS: Yes. I mean, I will unpack it a little bit,
 18 but, yes, that is right.
 19 In fact, the Apple market includes chips that were
 20 bought by Samsung and vice versa. So it is curious,
 21 but, in my submission, it becomes harder -- even harder
 22 to understand when one looks at why Dr Padilla says that
 23 the market should be Apple and Samsung-specific. He
 24 makes two points.
 25 One is that Apple and Samsung had their own specific

1 requirements and, secondly, he says there is pricing
 2 dispersion.
 3 Now, these are obviously features of many markets.
 4 In our skeleton we refer to the *Churchill Gowns* case
 5 where a similar issue arose and the Tribunal
 6 unhesitatingly found that the market for the supply of
 7 university dress covered all universities, even though
 8 every university had its own particular requirements.
 9 So it is quite clear that differentiation is not enough
 10 to establish an OEM-specific market.
 11 Can I bring up, please, Noble 9, Mr Noble's ninth
 12 report, paragraph 216 {POE/23/9}. If the Tribunal could
 13 read at the bottom of the page:
 14 "There is considerable overlap in the chipsets ..."
 15 Then read that and then over the page {POE/23/10}.
 16 (Pause)
 17 It is quite a stark piece of evidence and we say
 18 a very unpromising basis on which to say that Samsung
 19 has such bespoke requirements that its chips are in
 20 a different market.
 21 Now, the Tribunal may have seen there is one respect
 22 in which Apple did buy different sorts of chips, because
 23 it buys what are called "slim modems" which do not
 24 include the application processor, but it is common
 25 ground that those chips are in the same market as the

1 system honour chips so that is not a point of
 2 distinction.
 3 We really do struggle to understand how Dr Padilla
 4 starts with this idea of bespoke requirements and
 5 differentiated pricing and then ends up with a market
 6 which includes all chips supplied to everyone at what
 7 are presumably a whole range of prices. If the market
 8 includes chips that are supplied to everyone, in what
 9 sense does Apple have such bespoke requirements that its
 10 chips are in different markets? When it comes down to
 11 it, for as long as Apple is buying, say, LTE UMTS chips,
 12 all LTE UMTS chips are in that market and we say that is
 13 simply not a bespoke requirement. That is just a chip
 14 that complies with the standard.
 15 So if one stands back and looks at the chips that
 16 are actually in Dr Padilla's market, you can see there
 17 are various suppliers, predominantly Qualcomm, but some
 18 others, using their resources to supply OEMs with
 19 a range of chips that comply with a given standard and
 20 from there it is a small step to see that if the
 21 hypothetical monopolist supplier to Apple or Samsung
 22 were to put up their prices, there is capacity in the
 23 market that would be diverted to supply chips at a more
 24 competitive price and in fact the Tribunal may have seen
 25 from Mr Noble's evidence that actually this is a market

1 where there are not capacity constraints because the
 2 chipset manufacturers tend to use foundries so they do
 3 not tend to have internal capacity difficulties.
 4 Mr Noble makes that the point at 2.42 and 2.43 of his
 5 eighth report.
 6 So, having made those points, I just want to come
 7 back to the beginning of Dr Padilla's analysis and the
 8 issue of the focal product which is a point of
 9 difference between the experts. Dr Padilla says he has
 10 picked the narrowest possible focal product in
 11 line with, you know, first principles and he has used
 12 that to test the boundaries of the market, but the
 13 reality is that his focal market is not really very
 14 different to Mr Noble's market and in fact the key
 15 difference is that he includes self-supply so, in that
 16 respect, it is wider. So we say this idea that
 17 Dr Padilla has picked the narrowest possible focal
 18 market is really an illusion. For the most part, he has
 19 picked a different description of a product that is
 20 supplied to the whole market, as Mr Noble has.
 21 THE CHAIR: Yes. Well, that is part of what we are hoping
 22 to tease out by the request for the market definitions
 23 and market shares. We wondered whether they were
 24 ultimately very different.
 25 MR WILLIAMS: Well, we say that analysis ends up in similar

1 places, but obviously then Dr Padilla launches off his
 2 analysis in other respects, in other directions from
 3 this Apple and Samsung-specific framework so it is
 4 an important point even if the markets look the same in
 5 terms of the shares and data.
 6 THE CHAIR: Yes, understood.
 7 MR WILLIAMS: So that was my next point really, which is
 8 that the Tribunal is aware that it is Qualcomm's case
 9 that there has to be this exclusive focus on Apple and
 10 Samsung and Mr Moser has made submissions about why we
 11 do not accept that is the case, but here we are at the
 12 stage of defining the market and dominance and we say
 13 you cannot squeeze the whole of the analysis into this
 14 nominally Apple and Samsung-specific framework when what
 15 you are actually looking at is the supply of these
 16 products to the whole market. So it is a big point of
 17 departure in terms of the economic framework.
 18 If I may, at this point I want to divert from market
 19 definition to dominance before coming back to market
 20 definition and deal with countervailing buyer power
 21 because it bears some relation to the topic I have just
 22 been addressing.
 23 Countervailing buyer power is a dominance topic so
 24 let me explain why I am dealing with it here. It is
 25 often said that market definition is a means to an end,

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1 it is not an end in itself, and in the *Cabo* judgment you
 2 I think quoted the Commission saying it is an
 3 intermediate step. Obviously it is well established
 4 that dominance can be counteracted in principle by
 5 countervailing buyer power and there is an issue in the
 6 issues for this Trial, issue 6, which is: were Apple and
 7 Samsung able to exert countervailing buyer power?
 8 So, looking ahead, Dr Padilla says we are interested
 9 in Apple and Samsung here so does it not make sense to
 10 define the markets in these ways? Well, I have already
 11 made the point that in fact his markets are not focused
 12 on Apple and Samsung so that point does not go anywhere.
 13 But on countervailing power buyer, the question of
 14 whether an undertaking's potential dominance is
 15 counteracted by CBP, it is not a customer-by-customer
 16 assessment. The existence of some large customers on
 17 a market with a number of other customers does not mean
 18 that the MT is not dominant and I want to show you two
 19 authorities going to that point.
 20 The first is *Irish Sugar*, which is authorities
 21 bundle 3 {AB3/5/1}. It is 5226. I think we want to go
 22 to, Madam, in the pdf. This was a case in which the
 23 monopoly provider of sugarbeet in Ireland and
 24 Northern Ireland was held to have abused the dominant
 25 position because of rebates and pricing practices. Can

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1 we please look at paragraph 93 and paragraph 94 on
 2 pages 30 and 31 --
 3 THE CHAIR: Authorities bundle 3.
 4 MR WILLIAMS: Have I got that wrong? {AB3/5/1}.
 5 THE CHAIR: You gave me the reference of 5226, but there are
 6 not that many pages in it. I have around 3,000 pages.
 7 MR WILLIAMS: I am sorry. I checked it on a pdf I had.
 8 THE CHAIR: Let me just look. In AB3 --
 9 MR WILLIAMS: Tab 5.
 10 THE CHAIR: -- tab 5. All right. Yes, pdf page 254. Thank
 11 you.
 12 MR WILLIAMS: So I wanted to just pick it up at 93 and 94
 13 {AB3/5/30-31}. The Tribunal can see the argument there
 14 being made by *Irish Sugar* that it was not dominant
 15 because, in particular, there were two very large
 16 customers in the market.
 17 The court deals with that at 97 and 98.
 18 THE CHAIR: I am just trying to figure out what page of
 19 this --
 20 MR WILLIAMS: It is page -- well, in the report, it is 139.
 21 93 and 94 set out the issue.
 22 MR RIDYARD: Where does all this sort of take you in
 23 substance, because suppose we found that Qualcomm had
 24 market power over *Lenovo* and so forth but did not have
 25 market power over Apple and Samsung because Apple and

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1 Samsung had -- did have leverage, it would still be
 2 dominant in some sort of legal sense, but ultimately we
 3 are interested in whether bad things happened to Apple
 4 and Samsung, are we not?
 5 MR WILLIAMS: Can I answer that question in a few minutes,
 6 sir?
 7 MR RIDYARD: Yes.
 8 MR WILLIAMS: I understand the question completely and I am
 9 going to deal with it. I just want to take us through
 10 the analysis and then I will get to that point.
 11 So 93 and 94 set out the issue. It is dealt with at
 12 97 and 98 and the point that I rely on in particular is
 13 in the middle of 98. This is then picked up in
 14 subsequent cases. In 98 one sees:
 15 "The applicant can therefore hardly maintain that
 16 the Commission committed an error of assessment by
 17 stating that 'despite the presence of two large
 18 customers, the demand side is composed of a number of
 19 buyers which are not equally strong and which cannot be
 20 aggregated to conclude they may constrain the market
 21 power of the supplier ... "
 22 So not equally strong, cannot be aggregated,
 23 a number of other buyers.
 24 So that is the principle. We see that principle
 25 carried through.

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1 The second case is the Commission Decision in
 2 *Motorola (AB3/18)*. This case is actually much closer to
 3 home. It was a case involving a finding of an abuse of
 4 dominance by *Motorola* in seeking and enforcing an
 5 injunction on a SEP against Apple. So much closer to
 6 home. If we could turn to page 52 in the report
 7 {AB3/18/52} -- in the decision, I am sorry, here we see
 8 the *Irish Sugar* principle being applied in this context.
 9 You see from 237 and 238, *Motorola* contends that Apple
 10 constrains its market power, in essence because it is
 11 Apple, and one sees echoes of the arguments being made
 12 in this case.
 13 Then just moving through reasonably quickly. 240
 14 sets out the principle we saw in *Irish Sugar*. I am
 15 sorry, Madam, have I lost you?
 16 THE CHAIR: Yes.
 17 MR WILLIAMS: In the report we are now on page 46, in the
 18 decision, I am sorry. It is internal page 46,
 19 bundle-page 53. It starts at 52. 237 is *Motorola's*
 20 argument about Apple. 240 sets out the principle we saw
 21 in *Irish Sugar*. Then if I could ask you to read 241.
 22 (Pause)
 23 So we say that is the correct approach.
 24 Importantly, if the Tribunal looks at 243, you will see
 25 a principle that we drew out in our skeleton which is

1 the distinction between bargaining power and buyer
 2 power, "buyer power" being a factor that counteracts
 3 dominance and "bargaining power" simply being a factor
 4 in the mix of the assessment of the competitive effects
 5 THE CHAIR: But at 244 it says:
 6 "... even if one or more potential licensees ...
 7 were to enjoy bargaining power with regard to their own
 8 SEPs or non-SEPs, this would ensure that only
 9 a particular or limited segment of customers is shielded
 10 from the market power of *Motorola*."
 11 That implies that there is an acceptance that on
 12 this premise a particular segment of customers is
 13 shielded from the market power of *Motorola*. So is it
 14 not that the point that Mr Ridyard was making, we are
 15 looking at Apple and Samsung and whether Qualcomm
 16 exercises market power vis-à-vis those customers?
 17 MR WILLIAMS: Well, it certainly is a question of --
 18 I really I am going to come to it in just a moment,
 19 which is that the bargaining position of Apple and
 20 Samsung undoubtedly comes into the assessment and, in my
 21 submission, it comes in at the stage of assessing likely
 22 effect, and that is point I am going to come to in
 23 a minute. Maybe I should make the submission now.
 24 It is that -- I mean, what we say is Mr Noble's
 25 framework sets out the right way to analyse the case,

1 which is one is analysing the likely effect of the NLNC
 2 policy first of all as a general matter, because it is
 3 a market-wide policy. It is not a policy which is
 4 targeted at Apple and Samsung. Dr Padilla says you have
 5 a theory of harm that is about Apple and Samsung. We do
 6 not have a theory of harm that is about Apple and
 7 Samsung; we have a damages claim that is about Apple and
 8 Samsung, but we have a theory of harm that is about the
 9 likely effects of the policy. So we say that the
 10 damages claim does not dictate the definition of the
 11 market.
 12 The policy applied to Apple and Samsung, along with
 13 the rest of the market, and the Tribunal has started to
 14 see that their concerns were echoed by the rest of the
 15 matter. There are concerns about the policy.
 16 THE CHAIR: But what point is there in us going down
 17 a rabbit hole of looking at what the market power might
 18 be in relation to a different customer when the claim is
 19 only concerned with the -- with what may be claimed in
 20 relation to Apple and Samsung by way of damages? That
 21 will be pointless, a waste of time for us.
 22 MR WILLIAMS: Well, I am not inviting you to waste time,
 23 Madam; I am simply saying one has to step through the
 24 stages and ask the question: well, is Qualcomm dominant
 25 on the market as defined? The question of -- one sees

1 quite clearly from the authorities that the question of
 2 dominance is not to be answered on a customer --
 3 countervailing buyer power is not to be answered on
 4 a customer-by-customer basis. So the Tribunal has to
 5 decide if Qualcomm is dominant on a relevant market and,
 6 given that legal framework, the answer, in my submission
 7 is that it is dominant and I will show you the evidence
 8 shortly.
 9 THE CHAIR: But is there any statement in here saying that
 10 one can never look at CBP on a customer-by-customer
 11 basis, because were these cases where -- where what was
 12 in issue was damages due in respect of one customer and
 13 not others?
 14 MR WILLIAMS: Well, if we go back to where we were, I was
 15 about to show you 245, which says:
 16 "... *Motorola's* interpretation of countervailing
 17 buyer power would lead to the existence of a dominant
 18 position being dependent on the bargaining position of
 19 each potential licensee relating to any patent *Motorola*
 20 may need access to ... "
 21 That is dealing with -- saying dominance is not a
 22 customer-by-customer assessment, dominance is
 23 a market-wide assessment, and the point I was going to
 24 make in answer to Mr Ridyard's question is if this was
 25 an individualised course of conduct, one could

1 understand, possibly, looking straight through
 2 everything, and looking at the position of the two
 3 particular OEMs, but this is a market-wide policy. We
 4 say that the likely effect of the policy is in some ways
 5 intrinsic to the policy in the way in which it operated
 6 generally and for the Tribunal to understand that the
 7 Tribunal needs to look at the policy in its market
 8 context, which is the whole of the market.

9 Now, having done that, the Tribunal will have
 10 a picture of the likely effect of the policy as
 11 a general matter and of course that will include the
 12 evidence relating to Apple and Samsung, but, of course,
 13 we accept the Tribunal is ultimately going to focus on
 14 the question of the likely effects on those two OEMs,
 15 but, in our submission, one has to step through and say
 16 what are the likely effects of the policy for which the
 17 whole picture is relevant? With that picture, one can
 18 then say, well, is there some distinction about Apple
 19 and Samsung, either because of who they are or what we
 20 see in their dealings with Qualcomm?

21 In my submission, that is the right way to look at
 22 it and that is consistent with the legal framework,
 23 which is that you start with the market, you start with
 24 the dominant position in that market, you look at the
 25 conduct as a market-wide policy and then ultimately get

1 to Apple and Samsung. That, in my submission, is the
 2 right way to analyse it, but it is consistent with the
 3 law.

4 So that is --
 5 THE CHAIR: So you accept, if we were to conclude there was
 6 something distinct about the relationship between
 7 Qualcomm and Apple and Samsung, we might be able to
 8 carry out a dominance assessment on a customer-specific
 9 basis, but in this case you say that there was not
 10 anything specific about them and therefore we should
 11 look at it on a market basis?

12 MR WILLIAMS: No, I do not say you could look at dominance
 13 on a customer-specific basis, because I say the market
 14 is the market, as I've defined it. Qualcomm is dominant
 15 on that market, for reasons I have not got to yet, and
 16 the question of countervailing buyer power should be
 17 examined in the context of the market, not certain
 18 customers on the market. I do not accept you could find
 19 against me on dominance on that basis.

20 I do accept that when you get to the issue in the
 21 list of issues for trial which is about the likely
 22 effects of the policy on Apple and Samsung of course you
 23 have narrowed your focus down there, but in my
 24 submission one answers that question having looked at
 25 the policy as whole, having looked at the policy as

1 practised in the market generally, because the policy
 2 was not different when applied to Apple and Samsung as
 3 when it was applied anywhere else. It was the same
 4 conduct. It had the same objectives. It had the same
 5 potential effects and the question you are ultimately
 6 going to have to ask is : was there something different
 7 about Apple and Samsung which meant that they were
 8 immune from those effects? That is the way we put the
 9 case, Madam.

10 So that is what we say about CBP. I do not have
 11 time to go to them all, but 256 at 257 reinforce the
 12 points I have just been making about CBP.

13 So while we are in *Motorola*, can we just jump ahead
 14 to recitals 324, 326 and 327 and I am really sorry, I do
 15 not have a page reference for this. I thought I had the
 16 correct pdf reference, but I do not. Can we scroll
 17 through it, please {AB3/18/75}. Back further, sorry
 18 {AB3/18/65}. Can I just ask you to note 324 and perhaps
 19 read to yourself 324, 326 and 327. This is page 58 in
 20 the decision or 65 in the bundle. (Pause).

21 THE CHAIR: Yes.

22 MR WILLIAMS: So this abuse involved seeking an injunction
 23 on standard essential patents. The point I wanted to
 24 make is it is said against us our theory of harm and our
 25 case is novel and unprecedented, but here one can see

1 that the core of our case in some ways is expressed
 2 through these paragraphs, which is that it is abusive
 3 for a SEP holder to use its market power to prevent an
 4 implementer, even in this context Apple, from taking its
 5 products to market. We do say, well, what one sees in
 6 this case is Qualcomm achieving the same ends through
 7 a different means, but the mischief and the theory of
 8 harm is very similar.

9 So I made my overall submission about the approach
 10 to the case in response to Mr Ridyard's question. That
 11 was my overall take-away from this part of the case, but
 12 there is a narrow point which is, in my submission,
 13 because he has wrongly zoomed in on Apple and Samsung
 14 from the get-go, Dr Padilla's legal framework -- his
 15 economic framework is in no man's land for this part of
 16 the case, because there is no analysis of dominance,
 17 other than on the basis of the markets as he defines
 18 them, and there is not an assessment of countervailing
 19 buyer power on that basis either. So, in my submission,
 20 there is no alternative. There is no proper alternative
 21 to the framework Mr Noble has provided the Tribunal
 22 with.

23 So I hope you can see now why I wanted to take that
 24 the issue together with Apple and Samsung-specific
 25 markets precisely because of Mr Ridyard's question to

1 me.
 2 I am now just going to go back to market definition
 3 and finish that off. If the Tribunal rejects the idea
 4 of Apple and Samsung-specific markets, then, as I have
 5 said, the question of self-supply being in the market
 6 falls away. That is common ground. It also blows a big
 7 hole, in my submission, in Dr Padilla's analysis on the
 8 third issue, which is whether chips compatible with
 9 different standards are in the same market because
 10 Dr Padilla presents that analysis solely with reference
 11 to Apple and Samsung devices.
 12 This is another bit of the case where Dr Padilla
 13 does something unconventional. It is common ground that
 14 the framework for analysing market definition is the
 15 SSNIP test as applied to the supply of chipsets and the
 16 Tribunal has evidence of the pricing of chips in
 17 Mr Noble's eighth report. If I can just bring that up,
 18 it is {POE/21/19}, figure 2.3. If we just read 2.22 and
 19 then look at the figure over the page, please
 20 {POE/21/20}. (Pause)
 21 If we can look at 2.3 if the Tribunal is ready,
 22 please, over the page. So obviously one sees average
 23 prices plotted on the left and different chips plotted
 24 and, in my submission, that makes the good point that
 25 Mr Noble makes in 2.2 about differentiation in chip

1 prices for different standards.
 2 Now, Dr Padilla does not do a SSNIP test on the
 3 chipsets. He moves downstream to the devices and he
 4 says there is substitutability between devices
 5 compatible with different standards at a particular
 6 price point. His logic is basically this,
 7 I think: customers with £500 to spend on a phone in 2020
 8 might have bought a 5G phone or they might have bought
 9 a 4G phone and OEMs make phones according to consumer
 10 demand and so it follows that because the customer may
 11 switch from a 5G phone to a 4G phone, there must be
 12 substitutability between the chips that go in the
 13 phones, such that the chips are in the same market.
 14 I think that is the logic.
 15 THE CHAIR: Yes, and it would drive demand.
 16 MR WILLIAMS: Yes. One can start to see what -- well, in my
 17 submission, one can start to see what is wrong with the
 18 example, if I adapt it. Assume I drive a Mini with
 19 a petrol engine and I have been intending to replace it
 20 with another petrol version and I go to the showroom and
 21 the petrol version starts at £25,000 and the electric --
 22 and the salesman says, "Well, in fact we have now got an
 23 electric version. It is only £26,000" and I am
 24 persuaded to get the electric can so I switch my demand
 25 and my price point from petrol to electric.

1 If one follows Dr Padilla's logic, then a petrol
 2 engine is in the same product market as a car battery,
 3 because a consumer may switch from a petrol car to
 4 an electric car and that will affect what components
 5 Mini needs to build the car. In my submission the
 6 correct way to analyse the example is Mini makes petrol
 7 cars and it makes electric cars. It needs petrol
 8 engines and it needs car batteries and of course when
 9 Mini decides whether to continue to make petrol cars, it
 10 has regard to consumer demand for petrol cars, but once
 11 it has decided to make a petrol car, it needs a petrol
 12 engine and the same is true for mobile phones and
 13 chipsets.
 14 When Apple started to sell phones on Verizon, it
 15 needed CDMA chips. The fact that a consumer might
 16 switch from Verizon to AT&T does not mean that Apple
 17 could also switch because it wanted to make phones for
 18 Verizon so one thing just does not follow from the
 19 other.
 20 MR RIDYARD: I think -- I am sure Dr Padilla will speak for
 21 himself at some stage, but, as I understand it, what he
 22 says is that if you look at the phones out there, there
 23 is lots of 3G phones and lots of 4G phones out in the
 24 market at any point in time and so the phone maker
 25 could -- if something happened to make it more

1 attractive to sell 3G phones than 4G phones, then the
 2 phone makers could adapt and adapt to that incentive by
 3 switching between the two phone types. He is not saying
 4 you can make a 4G phone from a 3G chip, but he is saying
 5 that they just want to sell phones and if it means
 6 selling a 3G phone with a fancy screen, that is just as
 7 good to them as selling a 4G phone with a standard
 8 screen and it is still a phone sale so they are prepared
 9 to trade off those two types of phones.
 10 MR WILLIAMS: The consumer is, that is right.
 11 MR RIDYARD: No, they are saying the phone maker is prepared
 12 to do that, because Apple or Samsung, they just want to
 13 sell phones ultimately. It has to be phones that
 14 someone wants to buy, of course, but I think he is
 15 saying that they are prepared to trade-off the
 16 proportion of 3G to 4G phones that they sell at any
 17 point in time according to the costs of doing so.
 18 MR WILLIAMS: Yes, of course we accept there is an
 19 interaction. Of course there is an interaction between
 20 downstream demand and what the chips that the
 21 manufacturers have to do, but that cannot answer the
 22 question. One still has to ask the question of what is
 23 the definition of the market upstream and of course
 24 Dr Padilla does not do anything like a SSNIP test.
 25 I have shown you the pricing data. He does not do

1 anything like the SSNIP test. As Mr Noble points out,
 2 if one actually thinks about the way a SSNIP test would
 3 work in this context, if you have a SSNIP at the chipset
 4 level and then it moves downstream, it is a tiny price
 5 increment. So of course there is a price interaction,
 6 but that does not get you home on effectively the
 7 substitutability being effectively the same at both
 8 levels or there being an inevitable switch from one to
 9 the other -- it transposes in that way.

10 So we do say that it is, as I say curious that
 11 Dr Padilla relies on this very indirect framework for
 12 looking at it, rather than looking at, as I have said,
 13 the actual price information or what OEMs say about
 14 their ability to switch from one chip to another. I
 15 showed the Tribunal some of that evidence. We say that
 16 is far more relevant evidence and no doubt all of these
 17 issues will be explored in the hot-tub in due course.

18 I am about to move on to dominance. I do not know
 19 if you want me to pause there?

20 THE CHAIR: That is a good idea. Let us have five minutes
 21 and let us come back and then you will be going through
 22 until about an hour.

23 MR WILLIAMS: I will be going through until 4.20. I will
 24 try to get through as much as we can --

25 THE CHAIR: Does that mean we have Mr Alexander's bit

1 tomorrow?

2 MR WILLIAMS: I think that is where we have ended up, yes.

3 THE CHAIR: Thank you.
 4 (3.10 pm)

(Short Break)

6 (3.21 pm)

7 MR WILLIAMS: So, Madam, as we were discussing before the
 8 break, the parties take different approaches to market
 9 definition and that leads to different approaches to
 10 dominance and different -- the evidence of dealings
 11 between Qualcomm and the OEMs being considered in
 12 different boxes, if I can put it that way. So I am
 13 going to deal with two issues in parallel now. I am
 14 going to say what we say about dominance based on
 15 Mr Noble's market definition, but as we go through I am
 16 also going to deal with points that Qualcomm makes about
 17 interactions between Apple and Samsung and Qualcomm
 18 based on Dr Padilla's market definition and the balance
 19 of bargaining power in that framework.

20 The starting point is market shares. The
 21 authorities establish that markets shares are central to
 22 the assessment of dominance and there is a presumption
 23 of dominance if markets shares are above 50%. There are
 24 authorities cited in the skeletons for that. We say
 25 that threshold is met so we are in the territory of

1 a legal presumption of dominance. Dr Padilla does play
 2 down the market share evidence, but in my submission,
 3 they cannot be played down because there is a legal
 4 presumption.

5 There is a question about whether market shares
 6 should be primarily considered by value or volume.
 7 Mr Noble prefers to calculate market shares by value
 8 because it is a differentiated market. Can I just show
 9 you one authority on this approach, which is the
 10 decision in *Warner-Lambert/Gillette* {AB3/3/7}. It is
 11 paragraph 22 which deals with value versus volume.

12 (Pause)

13 THE CHAIR: Yes.

14 MR WILLIAMS: So we say that has echoes of this case and of
 15 course value-based shares are particularly informative
 16 where one of the reasons we say Qualcomm is in
 17 particularly strong position is because it is in
 18 a unique position at the premium end of the market and
 19 obviously that is captured in the value-based shares,
 20 rather than volume-based shares.

21 Obviously the market shares are different according
 22 to the parties to market definitions, but they are not
 23 actually as different as you might expect. Mr Noble
 24 picks this up in his ninth report. I will just give you
 25 the reference. It is footnote 39, where he says: if

1 I calculate market shares for Dr Padilla's markets, he
 2 comments on how the figures correlate to thresholds.
 3 You will see that. So the results are not as different
 4 as you might expect.

5 The clearest way, in my submission, to see
 6 Qualcomm's market power against other players is to look
 7 at some of the graphs which Mr Noble --

8 THE CHAIR: Yes, when you are doing your short note on the
 9 market definition and market shares, if you think it is
 10 relevant for us to consider different bases, then just
 11 set those out.

12 MR WILLIAMS: I will.

13 THE CHAIR: Because I think it will be helpful for us to see
 14 the spectrum of market shares that are produced on
 15 different assumptions, which you consider we ought to be
 16 looking at.

17 MR WILLIAMS: Okay. We will think about that, yes. Thank
 18 you.

19 So if we -- I am going to show you some of the
 20 graphs showing market shares. Because these involve
 21 share data, they are treated as confidential. I can
 22 make the points I want to make by saying: look at how
 23 high the line is, broadly speaking, and look at how low
 24 all the other lines are. That is basically the
 25 submission I will be making many times over. So if we

1 could start with 3G-CDMA, which is Mr Noble's eighth
 2 report {POE/21/36}.

3 THE CHAIR: Is that figure 3.1?

4 MR WILLIAMS: I cannot see it yet, I am afraid. Yes, okay,
 5 we can see it now and one can see that Qualcomm's share
 6 is somewhere between extremely high and extremely high
 7 and one can see that there is one competitor in this
 8 market, VIA, and you can see where it is in the
 9 early years which are the years that matter for 3G-CDMA
 10 and indeed even at its peak you can see where it ends
 11 up.

12 THE CHAIR: Yes.

13 MR WILLIAMS: It never sold to Apple. It never sold more
 14 than a small percentage to Samsung in line with the
 15 shares that you see there. So we say the position for
 16 Apple and Samsung was no different from the market
 17 generally and in 2009, which is the only year for which
 18 this matters, Samsung bought 100% of its CDMA needs from
 19 Qualcomm, Apple was buying CDMA for 100% from Qualcomm
 20 as well.

21 THE CHAIR: Yes.

22 MR WILLIAMS: What we see in Qualcomm's case is one example
 23 of Samsung making reference to VIA in negotiations which
 24 we say is a really a drop in the ocean compared --
 25 THE CHAIR: Why do the graphs stop at 2015?

1 MR WILLIAMS: Well, the technology stops being used. So
 2 3G-CDMA --

3 THE CHAIR: So you say it is not even relevant to look at
 4 anything after that?

5 MR WILLIAMS: No, there is no issue in the case where you
 6 need to know what 3G-CDMA is after that year.

7 THE CHAIR: I see.

8 MR WILLIAMS: Now, Qualcomm -- I am going to digress
 9 a little bit here. Qualcomm's strength in CDMA, it is
 10 an important point, because Qualcomm used Apple's
 11 dependence on it for 3G-CDMA and its desire to reduce
 12 the royalty burden as a means of tying Apple into
 13 exclusivity which then has further impacts on the market
 14 which is a dominance issue. I think the Tribunal has
 15 the point. Apple started on AT&T. Once it decided to
 16 expand to Verizon, it needed CDMA and that was when it
 17 started to need Qualcomm chips and I am now going to
 18 show you three pieces of evidence in the hearsay
 19 extracts. If we could start at -- this evidence from
 20 Jeff Williams of Apple starting in 2016 -- the first two
 21 references I think 2016 and then the last one is 2019
 22 from the trial.

23 MR TURNER: This is to establish what?

24 MR WILLIAMS: This is to establish how Qualcomm got to a
 25 position of exclusivity with Apple and what was going on

1 in that negotiation which I know is something the
 2 Tribunal is interested in.

3 So if we start at {POD/7/3}. There is an extract
 4 starting 49:1. You can see about halfway down -- this
 5 is all commentary on the MIA, one of the agreements, and
 6 then it picks up:
 7 "Do you nevertheless consider ..."
 8 Could you read from there on, please. (Pause)
 9 I should say this is all 1782 material. I am not
 10 reading it out because it is all subject to those
 11 restrictions.

12 Then I think you need to just go over the page
 13 {POD/7/4}. (Pause)

14 The point is in 2007 Apple has come to a deal with
 15 Qualcomm, but this is how it feels about the deal that
 16 it has done. So if we can then move on to page 9
 17 {POD/7/9}, another confidential extract starting with
 18 the number 238. Then if you could just read down to the
 19 end of that extract, please. This is Apple's need for
 20 CDMA chips, broadly speaking. (Pause)

21 The point there, Madam, is this is how Apple
 22 perceived the interaction between the need for chips and
 23 the discussions around the royalty which is obviously
 24 central to the case. Then over the page, we are now in
 25 open testimony and I can be a bit more explicit

1 {POD/7/10}. There is an entry that starts 874. You can
 2 see at the very beginning of that you have Apple
 3 commenting on what it thought about VIA, which we saw in
 4 the graph. They say VIA were not technically ready or
 5 capable so the only option was Qualcomm. That is what
 6 Mr Williams, the chief operating officer of Apple says.
 7 If you can just read the evidence there and I will --
 8 down to 890 on the next page and I will explain what we
 9 say in context with that.

10 THE CHAIR: Where do you want us to start reading from?

11 MR WILLIAMS: From:
 12 "Can you tell us about the origin ..."
 13 Down to --

14 THE CHAIR: Sorry, on page 10?

15 MR WILLIAMS: On page 10, down to the middle of page 11
 16 where there is a new number.

17 THE CHAIR: Yes, got it. {POD/7/11}. (Pause). Yes.

18 MR WILLIAMS: So the basic story is Apple has rebates
 19 against the level of the royalty, but now it needs CDMA
 20 chips and it wants -- this open evidence, I can say
 21 this, Mr Williams said: we want to get the rebates on
 22 CDMA as well, because we need those phones in order to
 23 sell them and essentially the price of that was
 24 exclusivity. So the effect then was this attempt to --
 25 this dependence on Qualcomm for chips and the imperative

1 to reduce the level of the royalty burden, that is what
 2 leads to Apple agreeing exclusivity terms to secure
 3 those rebates and that is obviously an important point
 4 then in terms of dominance. It is an important part of
 5 the factual story, but it is also important in terms of
 6 dominance in terms of explaining how Qualcomm has shored
 7 its position up, shutting other suppliers out from
 8 supplying Apple.
 9 One does not need to be pejorative about it. The
 10 fact is there was an exclusive agreement and that had
 11 an impact on other suppliers in the market.
 12 So that is an important part of the factual story I
 13 wanted to show the Tribunal.
 14 In that passage Mr Williams talked about LTE. Now,
 15 that takes us back to the next graph in Mr Noble's
 16 report, which is {POE/21/38}. Now, this is a different
 17 picture from 3G-CDMA. In fact, these figures include
 18 both LTE-CDMA and LTE-UMTS, the two different variant
 19 standards, and I will come back to that in a minute.
 20 One of the key years in the case, as Mr Moser says, is
 21 2013 for a couple of reasons. It is the year when Apple
 22 negotiated the BCPA, one of the agreements the Tribunal
 23 is interested in. It is also the year when Samsung
 24 sought to renegotiate the LTE royalty rate. We can see
 25 where Qualcomm's market share is in 2013.

1 MR TURNER: Figure 3.3, is it?
 2 MR WILLIAMS: 3.3, exactly, yes.
 3 At the time Samsung's share was in line with the
 4 market and we know Apple's was 100% because of the
 5 exclusivity provisions.
 6 What Mr Noble then does is he tries to break that
 7 down into LTE, UMTS and CDMA, which is not very easy
 8 because of data constraints, but if you turn over to the
 9 table under paragraph 3.16 {POE/21/40}, Mr Noble then
 10 sets out his attempt to calculate LTE-UMTS shares
 11 excluding CDMA on that table and you can see where they
 12 are. I do not know if you are looking at a hard copy or
 13 waiting for the EPE?
 14 THE CHAIR: So this is table 3.1?
 15 MR WILLIAMS: That is right, yes. That is breaking out
 16 CDMA. That is breaking out UMTS.
 17 MR RIDYARD: And this because we know that CDMA is much
 18 smaller than UMTS so it cannot have the limit to how
 19 much --
 20 MR WILLIAMS: I have jumped through, but that is the logic,
 21 sir, yes.
 22 So it is part of Qualcomm's case that the market
 23 shares are not representative of market power because
 24 there are low barriers to expansion but, in my
 25 submission, that is really just not what the data shows

1 for any of these markets and if we go back to page 38
 2 {POE/21/38}, we can see what happens to MediaTek over
 3 time and we can see what happens to Qualcomm. It is not
 4 just a story of low barriers to expansion, not until one
 5 gets past the point where 5G certainly is of primary
 6 significance.
 7 So that is the quantities of aspect of MediaTek, in
 8 particular.
 9 Now, there is also a qualitative aspect of MediaTek
 10 versus Qualcomm and you will hear about this from
 11 Mr Grubbs and Mr Blumberg so I will not spend time on
 12 that now, but can I give you some references so you have
 13 them. Mr Moynihan of MediaTek gives some very candid
 14 evidence about -- sorry, did you have a question?
 15 THE CHAIR: Sorry to interrupt, Mr Williams, just because
 16 you were talking about the figure 3.3 and you made
 17 a point about Qualcomm's market share at least until 5G
 18 came on.
 19 MR WILLIAMS: Sorry, I made a point about MediaTek.
 20 THE CHAIR: Yes. But so you were talking about Qualcomm's
 21 market share --
 22 MR WILLIAMS: Yes.
 23 THE CHAIR: -- sorry, in LTE until the point at which 5G in
 24 impacted.
 25 MR WILLIAMS: Yes.

1 THE CHAIR: What is your theory as to what then happened to
 2 Qualcomm's market share after 5G? Why did it behave in
 3 the way that is shown on this diagram?
 4 MR WILLIAMS: Well, I can just comment on what the graph
 5 shows. You can see there is a crossing over of two
 6 lines.
 7 THE CHAIR: Yes.
 8 MR WILLIAMS: So the premium end of the market is shifting
 9 to 5G at that point.
 10 THE CHAIR: Yes.
 11 MR WILLIAMS: Someone else is taking up the LTE and I think
 12 there is evidence -- Mr Noble gives evidence about how
 13 MediaTek focused on servicing the less premium end, as
 14 in LTE, because 5G is premium at that point.
 15 THE CHAIR: I see. So Qualcomm kind of loses interest at
 16 that point.
 17 MR WILLIAMS: We are going to see 5G in a minute.
 18 THE CHAIR: Yes, all right. Thank you.
 19 MR WILLIAMS: Yes.
 20 So that is quantitative evidence. MediaTek, there
 21 is candid evidence from Mr Moynihan of MediaTek, and
 22 I will just give the references {POD/7/69-70}. He
 23 basically says we could not serve the premium end of the
 24 market. We just could not.
 25 Now, in that graph on 36 -- I am sorry, can we go

1 back to that graph. In the graph we can also see -- 38,
 2 please {POD/21/38}, we can also see Intel. The position
 3 of Intel is a key focus in the case. I will just
 4 summarise what we say about Intel. We say that fairly
 5 early in the life of LTE, Intel had emerged as
 6 a potential technical alternative to Qualcomm, but did
 7 not enter until it did a deal with Apple in 2015 coming
 8 into 2016. The reasons are summarised in 233 of our
 9 skeleton and I am afraid they are all in the
 10 confidentiality bucket for the moment. I tried to work
 11 out how to make this submission without breaching any
 12 embargo and I could not do it so I am just going to have
 13 to ask you to read 233 again.
 14 Have I given you the wrong reference? I am sorry,
 15 I think I have given you the wrong reference. It should
 16 be 223, I am sorry {EAOS/1/64}. (Pause)
 17 This is why I wanted to get into the exclusivity to
 18 some degree because there is a plan to try and get Intel
 19 on-stream, but it is just not economically viable, the
 20 terms of the exclusivity arrangement. That is why we
 21 see in that graph that Intel's share does not take off
 22 until 2015 and that is, as Mr Moser was saying, the
 23 start of the period when we recognised that Apple
 24 started to gain bargaining power because it had broken
 25 free from its dependence on Qualcomm. Mr Moser has made

1 the point about how telling it is that once liberated,
 2 Apple chooses to litigate, but, more generally, we say
 3 the idea that Intel's eventual emergence in 2015/2016,
 4 after many years of trying to penetrate, the idea that
 5 this somehow shows that there were not barriers to entry
 6 or expansion, we say does not get off the ground. It
 7 was an absolute battle for Intel to get to where it got
 8 to.
 9 So moving finally to 5G. Now, the Tribunal has
 10 already heard the key significance of 5G is its impact
 11 on the Apple settlement and our case is as Mr Moser has
 12 explained this morning. If we could look at page 42,
 13 please, in Mr Noble's report {POE/21/42}. So it is --
 14 we are looking at the top line again. One can see where
 15 it is. At the start of this period, one can see that
 16 there is also Samsung in the market and at this point
 17 Samsung is mostly supplying itself we understand and one
 18 can see then one supplier slopes down and another
 19 supplier slopes up, but the top line stays pretty much
 20 where it is, which, in our submission, is an extremely
 21 high level.
 22 Now, in relation to this part of the case, 5G, we
 23 have gone down a bit of something of a rabbit hole as to
 24 whether Qualcomm held "prospective market power", to use
 25 that the phrase, which is used in the reports, and this

1 comes from something Mr Noble said in his eighth report.
 2 I am sure that will be explored in the hot-tub. I am
 3 not going to say too much about it. The submission we
 4 have made in the skeleton is that this is more
 5 terminology than it is substance. One can see the
 6 market position in 2019. The point we make is Apple was
 7 negotiating with Qualcomm at that point in time,
 8 April 2019, and it was looking for supplies in
 9 18 months' time. So the question is: where was Qualcomm
 10 then? Where did Apple think Qualcomm was going to be
 11 down the road? Was it still going to be the premium
 12 supplier in the market? What were Apple's other
 13 options? In our submission the graph tells us.
 14 Qualcomm was in an overwhelmingly strong position as
 15 at April 2019 and overall and generally.
 16 So what are said to be Apple's alternatives, which
 17 mean that it was not dependent on Qualcomm for 5G chips,
 18 there are three candidates. One is Intel, which never
 19 made it to market with a 5G chip. There is also
 20 MediaTek and Samsung, who are in the graph, as you can
 21 see, to suppliers from whom Apple never bought a chip.
 22 If we could look at {POF/886} just to get a snapshot of
 23 Qualcomm's perception of MediaTek. This is not
 24 confidential, I do not think. If we look at page 16,
 25 {POF/886/16}, this is an internal messaging brief

1 prepared by Qualcomm on the current status of 5G. You
 2 can see, I think, page 16 says "Competitive messaging."
 3 So this is the third section of an internal document
 4 dealing with how they are positioning themselves
 5 relative to the competition.
 6 If we turn on to page 19, please {POF/886/19}.
 7 Sorry, this January 2019 so it is really quite proximate
 8 to the negotiations with Apple. One can see sort of
 9 a third of the way down "MediaTek 5G" and it is a bit
 10 technical, but one can see on the right-hand side there
 11 is a bullet which says:
 12 "MediaTek highlighting [first half of 2020
 13 commercial supplies] for an integrated 5G mobile
 14 chipset. This is expected to be their first commercial
 15 5G solution versus Qualcomm 5G significantly ahead on 5G
 16 generations."
 17 So their own internal assessment is they are well
 18 ahead of MediaTek in the months approaching the
 19 negotiation with Qualcomm.
 20 MR RIDYARD: I am a bit unclear of what you are saying, not
 21 just here but generally, about this quality
 22 differentiation. I can see that some people's chips may
 23 be better than others and Qualcomm's may be better than
 24 some of its rivals in some categories, but on the market
 25 definition you are not seeking to say there is

1 a separate market for high quality 5G chips as opposed
 2 to low quality ones.
 3 MR WILLIAMS: No.
 4 MR RIDYARD: Therefore, the consequence of that is you are
 5 saying that they are effective -- they compete
 6 effectively with one another. So, in that sense, what
 7 conclusions are you drawing here? Let us say we all
 8 agree that Qualcomm's 5G chips are better than the
 9 rivals, but there are alternatives. You said or implied
 10 that there at the effective substitutes even if they are
 11 not perfect substitutes, so why is it not good enough to
 12 Samsung to buy a few more of the lower quality ones in
 13 order to, you know, keep Qualcomm on their toes?
 14 MR WILLIAMS: So there are a few aspects to that question,
 15 I think. One is that Mr Noble says there is not a clear
 16 delineation between premium and non-premium, but there
 17 is differentiation and that differentiation is relevant
 18 to how people compete. For example, Apple is a premium
 19 device and Apple buys premium chips. Apple does not buy
 20 the same chips that you might find in a cheap phone,
 21 perhaps another Chinese model. So the fact that they
 22 compete on a spectrum in one market does not mean that
 23 all chips are equal or all equally substitutable for all
 24 purposes. That's one point.
 25 Another point relates to leadership in the market.

1 I have not taken you to one of the documents I was going
 2 to take you to. I will give you a reference, if I may,
 3 {POF/851}. This is one of many documents you will see,
 4 we will probably see some in cross-examination, with
 5 Qualcomm trumpeting its leadership in 5G. I think it
 6 trumpets its leadership in many standards. There is
 7 a kind of confidence in it. So one sees certain
 8 suppliers tending towards certain ends of the market and
 9 other suppliers tending towards other ends of the
 10 market. We saw it a bit with that MediaTek shifting
 11 into LTE. So there is substitutability but not
 12 effective substitution for all purposes is partly what
 13 we say.
 14 Yes, this is very early days. This is Apple making
 15 the decision right at the very beginning of 5G. In
 16 a sense, Qualcomm has proven technology, and other
 17 suppliers -- we have just seen MediaTek -- are not
 18 proven. So there is a sort of interaction between
 19 quality and leadership and reliability.
 20 MR RIDYARD: Yes, but if your economic expert is saying that
 21 Qualcomm -- within 5G, I mean, obviously there is
 22 a differentiation, we understand that, but it is saying
 23 that a high end 5G supplier is not able to act
 24 independently of the lower quality 5G suppliers, so why
 25 is it then that they are not -- I know they are not

1 doing exactly the same thing and there are compromises
 2 involved, but why is there not effective substitution
 3 between them if you said they are in the same market?
 4 MR WILLIAMS: Sorry, so, first of all, we define the market
 5 as 5G chips. I have shown you the market shares. We
 6 are now talking about slightly, on our case anyway,
 7 a nuance within that, which is what is the bargaining
 8 position of, for example, Apple and Samsung when dealing
 9 with Qualcomm in particular and so we say in that
 10 context it is important to have regard to what their
 11 particular needs were because we are talking about
 12 balance of bargaining power and, as I said, Apple uses
 13 premium chips. It only ever uses Qualcomm and Intel
 14 chips after a certain point in time. It never uses
 15 a MediaTek chip. Samsung is more a mixed picture,
 16 because it has its self-supply business, but very
 17 heavily dependent, we will see from the evidence, on
 18 Qualcomm for flagship devices across the globe.
 19 So one sees that within the question of is there
 20 dependence, is there -- is Qualcomm an unavoidable
 21 trading partner to some extent for those customers? We
 22 say that it is for a constituency of its supply, because
 23 it absolutely does want those chips for Apple's purposes
 24 across its portfolio and for Samsung in at least some of
 25 its flagship phones.

1 MR RIDYARD: Thank you.
 2 MR WILLIAMS: So that is MediaTek. I mean, I have slightly
 3 foreshadowed what I wanted to say about Samsung which is
 4 Samsung was supplying itself but Samsung was itself
 5 heavily dependent on Qualcomm for chips in premium
 6 devices. You will see the evidence in due course. It
 7 is common ground that Samsung had the incentive to
 8 supply itself as much as it could so it could not even
 9 meet its own supplies. The idea that it was in
 10 a position to supply Apple's needs as well, we say, that
 11 is not realistic, not in April 2019.
 12 So Qualcomm has this argument, well, this is a case
 13 of competition for the market, not competition within
 14 the market, but that depends on there being effective
 15 competition for the market and we say this degree of
 16 dependence in the relationship at all times for at least
 17 a proportion of the supply, that means that is not
 18 effective competition for the market because there is
 19 this element of ongoing dependence.
 20 I'll just sweep up a couple of points on dominance.
 21 It is common ground that there are material barriers to
 22 entry. The debate is about barriers to expansion and
 23 I have made my submissions largely about that when we
 24 saw the story told by the market share data, but we say
 25 obviously entry and expansion are related. Mr Noble

1 developed that in his evidence. There is a good
 2 illustration in the Intel story, which is Intel having
 3 finally penetrated LTE, never made it in 5G, which shows
 4 that it is just not that easy to transition. The
 5 markets remain difficult to penetrate.
 6 As well as expert evidence analysing the market, the
 7 Tribunal has contemporaneous evidence of how market
 8 participants felt at the time. I am just going to give
 9 you a couple of examples. One document I need to open
 10 for another purpose. I will show you that. This is an
 11 external-eyes-only document so we need to be careful
 12 with this one. It is {POF/415}. Mr Moser went to this.
 13 It is a Samsung internal document from 2013 and I do not
 14 have a page reference {POF/415}. Well, I will give you
 15 the reference I do have and then perhaps I will give you
 16 the other reference in the morning when I come back.
 17 The reference I have, if you look at page 18, this is
 18 Samsung's reliance rate on Qualcomm in 2013
 19 {POF/415/18}. At the top of the page, it says:
 20 "LTE reliance rate."
 21 You can see that is the LTE that Samsung was buying
 22 from Qualcomm at that time. Mr Moser says he showed you
 23 that. I am sorry if I am taking up time.
 24 So maybe we will just move on to another document,
 25 sorry.

1 {POF/425}. This is an Apple internal email
 2 in 2013, December 2013, looking ahead to 2016 {POF/425}.
 3 I will not read it out. There is a codename. If you
 4 look at the paragraph starting:
 5 "In talking with Aaron ..."
 6 It says "ops", operations I think, and then you can
 7 read to yourself. You know who Eureka is, I think.
 8 THE CHAIR: Yes.
 9 MR WILLIAMS: It is Qualcomm anyway and that is -- but
 10 I will not read the rest of it out.
 11 Then you can see they are basically talking about
 12 their options to avoid that situation and you can see
 13 who the suppliers are. One of them exited the market
 14 and the other one we know what happened in terms of one
 15 of them is Intel.
 16 That is the concern. At that point in time, 2013,
 17 correctly, consistently with the evidence I showed you,
 18 that is Apple's assessment of Qualcomm's -- their
 19 internal assessment at the time of Qualcomm's market
 20 power.
 21 So, finally, on dominance, chip dominance, anyway,
 22 we refer in our skeleton to *Genzyme* for the proposition
 23 that behaving in a way that is contrary to the wishes of
 24 customers is the hallmark of dominance. That is
 25 paragraph 73 of our skeleton, which brings me, finally,

1 to the two policies. I am going to deal with RTL when
 2 I deal with abuse which might be now or in the morning,
 3 but just dealing with the --
 4 THE CHAIR: I thought Mr Alexander needed the morning.
 5 MR WILLIAMS: I might be a few minutes. We understand what
 6 our time limit is.
 7 So NLNC policy. Now, perhaps the most striking
 8 thing about Qualcomm's skeleton is that between all of
 9 the discussion of its contributions to research and
 10 development in the industry and its hypercompetitive
 11 behaviour is that there is not any reference to the
 12 absolute tidal wave of objection to the NLNC policy that
 13 one sees in the evidence. Can I show you one document
 14 which is a 1782 document {POF/493}. Now, the context of
 15 this is an acquisition by Qualcomm of another company.
 16 If you just read the first -- the context does not
 17 matter but just read the paragraph. (Pause)
 18 It is internal Apple commentary on the policy.
 19 This is pretty strong stuff and, as the Tribunal has
 20 seen, that is really the tip of an iceberg. There is
 21 a wealth of evidence from across the industry from OEMs
 22 expressing their objection to the policy, but Qualcomm
 23 has managed to maintain it for 20 years.
 24 Now, that does not tell us whether it is an abuse of
 25 a dominant position, but it does tell us a lot about

1 Qualcomm's dominant position on the market, its ability
 2 to maintain this policy in the face of industry
 3 opposition.
 4 So that is what I wanted to say about chipset
 5 dominance.
 6 SEP dominance, very briefly. There are only two
 7 points to make. Obviously any SEP holder is 100% market
 8 shareholder, whether the market is the market for
 9 a single SEP or a portfolio of SEPs. There are
 10 monopolists. There are two questions: is that somehow
 11 negated by cross-licensing and is it negated by the
 12 FRAND obligation? Now, in terms of cross-licensing, not
 13 every OEM can offer a cross-licence as a bargaining
 14 chip, but, even if they can, they need Qualcomm's
 15 licence more than Qualcomm needs them because Qualcomm
 16 does not make phones. So we say that does not go
 17 anywhere in terms of equalising up the bargaining power.
 18 The more conceptual point is about the significance
 19 of the FRAND commitment and I am not going to make
 20 detailed submissions about it. Qualcomm refers to the
 21 *Apple v Optis* decision where Mr Justice Marcus Smith
 22 found that the FRAND commitment did negate dominance in,
 23 I think, three short paragraphs in that decision. We
 24 would recommend to the Tribunal the somewhat more
 25 detailed and developed analysis of Mr Justice Birss, as

1 he then was, in *Unwired Planet* which is -- I will not
 2 going to it -- {AB2/22}, paragraph 630 to 670. It is
 3 a 40-paragraph discussion. The punchline --
 4 THE CHAIR: Where does it start?
 5 MR WILLIAMS: Paragraph 630 to 670. The punchline is that
 6 in the context of 100% market shares, the FRAND
 7 commitment just is not enough to counteract dominance.
 8 So we say that is the position, but there is another
 9 point to make in this context, which is back to the NLNC
 10 policy. We say the NLNC policy has an impact on the
 11 bargaining position of the licensee. I am not here
 12 asking you to accept our case on abuse to decide
 13 dominance, but it is a fact that Qualcomm has a chipset
 14 supply practice which means that licensees cannot get
 15 chips until they have signed a licence and it is common
 16 ground that that means that, at a minimum, they need to
 17 commit to the terms on offer and comply with them in
 18 order to obtain the supply of chips at all. We say that
 19 arrangement, by its nature, reduces the degree of
 20 protection afforded to a willing licensee who under the
 21 FRAND framework could not be prevented from obtaining
 22 chips. So we say that, on any view, rebalances power in
 23 favour of the SEP owner.
 24 So in the time I have left, I will say a few words
 25 to introduce the bargaining model of Mr Noble's

1 economics as they relate to abuse. The point I want to
 2 make really --
 3 THE CHAIR: Are you going to cover the RTL and non-assert
 4 agreements?
 5 MR WILLIAMS: Yes, I am going to cover that. It is whether
 6 I steal some time from Mr Alexander in the morning to
 7 finish that off, but I want to get to the end of this
 8 section.
 9 So the point I want to make really is the theory of
 10 harm -- the economic theory of harm in this case is very
 11 simple: I think it is recognised that the FRAND
 12 framework should in principle mean that a willing
 13 licensee does not face business interruption because
 14 they do not agree to the SEP owner's terms and Mr Moser
 15 has covered this in submissions this morning. Our case
 16 is that the effect of NLNC is that a willing licensee,
 17 who is not prepared to agree Qualcomm's terms and who
 18 would otherwise want to avail themselves of the
 19 regulatory regime, may face a business interruption cost
 20 or at least a potential business interruption cost and
 21 Qualcomm only has that leverage because it is dominant
 22 in the supply of chips as well as the licence, and
 23 therefore it can take steps that it cannot take using
 24 only its market power in the SEP licences given the
 25 FRAND framework. So we simply say the NLNC policy

1 creates additional and illegitimate downside risk for
 2 an OEM that cannot agree a licence with Qualcomm. It
 3 puts them at risk of a business-critical interruption
 4 and so increases the cost of failing to agree a licence.
 5 The crux of it is that an OEM faced with that
 6 downside risk, that risk of business interruption, will
 7 rationally be willing to pay a higher royalty to avoid
 8 that risk rather than suffer it and that is a simple and
 9 logical theory of harm. It is intrinsic to NLNC, as we
 10 put it, that it creates this risk of business
 11 interruption for an OEM. That is what it is there to
 12 do. It is there to create that implicit threat. We say
 13 it is logical that it increases the OEM's willingness to
 14 pay to avoid it.
 15 In fact, what the Tribunal sees is that although
 16 Qualcomm disputes the theory of harm, most of the
 17 disputes in the case are around questions of fact,
 18 rather than questions of economics. Qualcomm makes nine
 19 points in its skeleton argument about why the theory of
 20 harm does not hold and they are basically all factual
 21 points more or less.
 22 But Mr Noble has not rested his case -- his position
 23 on that intuition. He has developed the bargaining
 24 model and really that serves two useful purposes. One
 25 is to stress-test intuition in the same way that writing

1 reasons for a judgment makes you -- causes the court to
 2 give confidence in its intuitive judgment and the
 3 bargaining model does that too. Importantly, it allows
 4 one to identify the assumptions that need to be met for
 5 the model to hold. So there are two valid purposes in
 6 the model.
 7 THE CHAIR: You say he is stress-testing it, but the model
 8 is no good if it is not grounded in facts.
 9 MR WILLIAMS: No, sorry, that is true, but that is the
 10 second point, which is that it gives visibility to the
 11 factual assumptions that mean that the model needs to
 12 hold and a large part of the battleground will be those
 13 assumptions.
 14 Just one other framing part in this part of the
 15 case. One of the criticisms that is made of the
 16 bargaining model by Dr Padilla is that it does not
 17 establish causation of the inflated royalties, but it is
 18 not the purpose of the bargaining model to demonstrate
 19 causation of inflated royalties. Economic models do not
 20 demonstrate causation anyway, because causation is
 21 a question for the Tribunal. Even a regression model
 22 shows correlation, rather than causation, but the point
 23 of the bargaining model is to provide insights into the
 24 expected outcome of a negotiation carried out under
 25 different conditions and to assess what the likely

1 outcome is. We are not deciding causation in quantum;
 2 we are assessing if that is what a theory of harm is,
 3 identifying the likely effect of a course of conduct.
 4 Now, I just want to make two more general points
 5 before I deal with a couple of the assumptions. It is,
 6 of course, part of our case that NLNC give Qualcomm the
 7 ability to impose more disadvantageous terms on an OEM
 8 than it would otherwise, but is it not our case that
 9 these are take it or leave it terms. Mr Noble is very
 10 clear that his theory of harm is about the distortion of
 11 a process of competitive negotiation and the distortive
 12 effect that an NLNC has on that negotiation and
 13 specifically what it does is it takes what should be
 14 a negotiation about the value of the technology and
 15 skews it by adding in, as I have said, this additional
 16 business interruption cost. That is an element which
 17 would not come into play in an ordinary competitive
 18 negotiation. An important point flows from it --
 19 a couple of important points flow from this.
 20 One is that it is not an objection to the theory of
 21 harm that the impact of the policy varies from OEM to
 22 OEM or that Apple and Samsung may not have paid the same
 23 as other OEMs. It is not part of our case that NLNC
 24 means every OEM ends up paying the same rate or that
 25 there is a straight-line relationship between dependence

1 and royalty level. What we say is that there is this
 2 factor in the mix which distorts the negotiation which
 3 increases the level of the royalties which an OEM is
 4 willing to pay and there is a directional effect, but it
 5 does not mean that everyone ends up paying the same.
 6 The second point is that Mr Noble's theory of harm
 7 applies where there is a credible threat to chip supply.
 8 It requires a threat which puts the OEM in genuine fear
 9 of business disruption, but it does not depend, for all
 10 the reasons that have been canvassed, on Qualcomm saying
 11 in terms if you challenge our rate, we will cut off chip
 12 supply. If the OEM reasonably fears disruption, then it
 13 will rationally be prepared to pay more and that is
 14 an important point because of the way the policy
 15 operated in practice. The Tribunal has heard sometimes
 16 Qualcomm's behaviour was more overt than on other
 17 occasions, but if the implicit threat is there, then it
 18 will tend to inflate the level of the royalty that the
 19 OEMs are prepared to pay.
 20 So I just wanted to deal before I come to RTL with
 21 a few of the assumptions which one sees set out in
 22 Qualcomm's skeleton, paragraph 120, page 68. I will
 23 just outline our position in relation to these or at
 24 least some of these so the Tribunal has a picture of the
 25 battleground.

1 121, there is -- it makes an assumption there is
 2 a credible threat of disruption to chip supply. I have
 3 just dealt with that point. It does not make that
 4 assumption and that is a point which -- a point of fact
 5 which will be established in the course of the trial.
 6 THE CHAIR: Which paragraph?
 7 MR MOSER: Paragraph 120. I am sorry, perhaps I took it too
 8 quickly.
 9 THE CHAIR: 120. You mean 120, subparagraph 1?
 10 MR WILLIAMS: I am sorry, so 120, bargaining model will be
 11 explored. It makes a number of assumptions. Then there
 12 are nine subparagraphs. I am just going to pick some of
 13 these up. So 120.1 assumes there is a credible threat
 14 of disruption. Well, as I have said, the model does
 15 make that assumption. That is right and it is
 16 a question of fact really whether that credible threat
 17 existed.
 18 (2) is a point more in the nature of economics and
 19 the point is that if Qualcomm withheld chip supply, it
 20 would recover at least some of the profits it would lose
 21 by selling more chips to other OEMs or, to put the point
 22 in my own language, the OEM needs Qualcomm more than
 23 Qualcomm needs any one OEM.
 24 One can illustrate the point by considering one of
 25 the scenarios which arises on the current facts. One of

1 the things Qualcomm says about the 2019 negotiation with
 2 Apple is that Apple could have chosen not to buy 5G
 3 chips and just chosen not to sell 5G phones for longer.
 4 We say that is not plausible but let us follow that
 5 logic. If Apple had made that decision in 2019, then
 6 consumers who wanted 5G phones would have needed to go
 7 elsewhere. They would have needed to buy a Samsung
 8 phone or a *Motorola* phone or whatever else. In that
 9 scenario, the likelihood is that those other OEMs would
 10 have taken market share off Apple, because Apple cannot
 11 offer a 5G phone to some degree and so there would have
 12 been scope for Qualcomm to capture 5G's chip business
 13 for the OEMs who switch their demand from Apple to
 14 another OEM. So that is a good illustration --
 15 practical illustration of why it is that Mr Noble
 16 assumes that if Qualcomm cuts off supply to one OEM, it
 17 will be able to recapture some of those lost profits.
 18 What Qualcomm says in 120.2 is we are ignoring the
 19 facts for a couple of reasons. One is the bespoke
 20 requirements. I have already dealt with that point
 21 {S/2/69}. The second reason is said to be that Qualcomm
 22 simply could not replace its largest customers. We say
 23 the problem with that point is we have seen what
 24 happened between Apple and Qualcomm in that extended
 25 period. Qualcomm was perfectly happy to see Apple walk

1 away for two years as part of this dispute and it played
2 the long game and it held out and in the end Apple came
3 back and the Tribunal knows how that ends. So we say it
4 is an abstract point that Qualcomm could not afford to
5 lose Apple. It is really not consistent with what we
6 see in the factual narrative.

7 I will skip over 120.3 and 120.4 and I will go to
8 120.5. Now, this relates to a secondary way in which
9 NLNC undermines an OEM's outside option, which is that
10 it creates a pool of licences across the market at
11 inflated rates. Those licences would obviously be part
12 of the evidence base in any litigation or arbitration
13 and obviously in any one case licences with the same
14 licensor relating to the same technology are a very
15 relevant source of evidence in principle. The point
16 that is made here is, well, the risk here is you end up
17 with a vicious circle where inflated rates across the
18 market are excused to justify other inflated rates and
19 the Tribunal will hear about this in the course of the
20 trial. I will show you one evidence reference, if
21 I may. It is {POD/7/24}. Then there is a reference
22 that starts at 296, if you just read from there down to
23 the bottom of the page. (Pause)

24 In particular, it is the bottom of the page.

25 THE CHAIR: Where it says:

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1 "And the second reason ..."?
2 MR WILLIAMS: Yes, exactly. So a very real concern for
3 Apple.

4 Now, Dr Padilla says attaching weight to this point
5 involves making the irrational assumption that the court
6 is going to get it wrong. In my submission, that is
7 a simplistic perspective from an expert as experienced
8 as Dr Padilla. We all understand litigation risk. We
9 all understand the difficulties establishing cases in
10 the face of countervailing evidence. The existence of
11 a large number of licences with the same licensor at
12 inflated risk will necessarily increase the risk for
13 an OEM seeking to litigate FRAND and indeed one has
14 already seen in relation to Apple that they took on the
15 challenge of not only challenging the rate, but
16 establishing the anticompetitive practice that they say
17 was inflating the rate and that obviously complicates
18 the litigation and increases the challenge for a party
19 seeking to get to the bottom of this. So we say this is
20 a very real point and it is a factor which is relevant
21 in understanding the theory of harm and the obstacles
22 that the OEM exercised in their outside option.

23 I will -- I think I will leave those assumptions.
24 There is more I could say, but we have another
25 five weeks so I am sure we will get through the points.

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1 I will start dealing with RTL now because I know the
2 Tribunal wants to hear about it, not to keep you in
3 suspense any longer.

4 So when we deal with RTL, we are assuming, as
5 a starting point, that Qualcomm licences at the device
6 level and the question is whether it should be offering
7 licenses at the chipset level as well. I think some of
8 your questions to Mr Moser were, "Your theory of harm,
9 Mr Moser, does it assume licenses at the chipset level
10 or at the device level?" We accept the distortion is at
11 the device level, but the question is: what is the
12 impact of whether there is licensing also at the chipset
13 level? I hope that helps to frame the discussion.

14 So when we criticise RTL, we are not shifting all of
15 the focus to licensing at the chipset level; our theory
16 of harm remains distortions in the process of licensing
17 OEMs at the handset level.

18 The principal significance of RTL, as Mr Moser said
19 in that context, is it means there is no alternative to
20 taking -- I think this was your point, sir, which you
21 put to Mr Moser. There is no alternative, if there is
22 not a licence at the chipset level. There is no
23 alternative for the OEM than to go to Qualcomm and get
24 a device-level licence.

25 The point we make is if there were a regime of

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1 licensing at the chipset level as well, then that might
2 put competitive pressure on the royalties because you
3 might end up with a competing product of licensed
4 chipsets, but there is not because there is not any
5 licensing at the chipset level.

6 So that is why Mr Noble says one consequence of RTL
7 is that there is no bypass. There is no plan B. You
8 have to go to Qualcomm for the licence. You have to pay
9 the prevailing royalty rates. That is the first point.

10 The second point is that RTL is a barrier to entry
11 for chipset manufacturers and therefore it is a factor
12 which tends to reinforce Qualcomm's dominance in the
13 chipset markets and that is because, absent RTL -- the
14 same point really -- chipset manufacturers would find it
15 easier to compete with Qualcomm which has the advantage
16 of being able to offer a licence to its SEPs alongside
17 the sale of its chipsets. So rivals to Qualcomm cannot
18 offer the same benefit and the customer needs to go and
19 deal with Qualcomm as well. So that is a factor which,
20 as a barrier to entry, reinforces dominance.

21 THE CHAIR: They would be able to have -- they would find it
22 easier to compete with Qualcomm because they would then
23 be able to license Qualcomm's SEPs and then -- and that
24 would then be exhaustive?

25 MR WILLIAMS: It is an all-in product, yes, exactly. It

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1 would be interactive.
 2 The principal response from Qualcomm to those
 3 points -- I should be clear, this is not a freestanding
 4 abuse case. I am making all of these points in the
 5 context of the NLNC abuse. They are all factors which
 6 come back to the NLNC case.
 7 The principal response from the other side to those
 8 two points is to say, well, end device licensing is the
 9 norm, it is the norm in the industry. We have two
 10 responses to that. The first is that an otherwise
 11 conventional practice may be anticompetitive if
 12 practised by a dominant entity. That is clear as
 13 a matter of law, see 108 of our skeleton. We do not
 14 say, as I said, RTL is an abuse in itself, but we do say
 15 it is part of the abuse when conjoined with dominance in
 16 the supply of chipsets and the NLNC policy. So that is
 17 point 1.
 18 Point 2 is that a practice can reinforce dominance
 19 or it can reinforce the restrictive effects of another
 20 practice, whether or not it is objectionable in itself.
 21 We say it is self-evident that RTL creates the no bypass
 22 mechanism and it creates a barrier to entry. Whether or
 23 not it is inherently objectionable, it does have those
 24 reinforcing tendencies.
 25 MR TURNER: I still do not quite understand how it can make

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1 a difference if it was licensed to the chip level. Let
 2 us assume that Qualcomm asked a non-FRAND rate from the
 3 manufacturers and let us assume that Qualcomm was the
 4 supplier, it could still refuse to supply chips and
 5 how -- I do not quite see how these problems go away.
 6 You have a differently structured market but the refusal
 7 to supply and the overcharging of licence fees could
 8 still remain in that alternative model.
 9 MR WILLIAMS: Yes, but two points, sir. The first point is
 10 NLNC involves leveraging the need for chipsets to obtain
 11 higher FRAND rates. Of course Qualcomm can always seek
 12 a non-FRAND royalty.
 13 MR TURNER: Well, there are lots of permutations and
 14 combinations. You could have the manufacturer refusing
 15 to pay the royalty or you could have Qualcomm
 16 encouraging the manufacturer not to pay the royalty --
 17 sorry, Apple encouraging the manufacturer not to pay the
 18 royalty. There are all sorts of permutations.
 19 MR WILLIAMS: The two points really are, first of all, NLNC
 20 involves leveraging chipset dependence and, by
 21 definition, a chipset manufacturer is not dependent on
 22 Qualcomm for chips. So that leverage could not be
 23 exercised against the chipset manufacturer. So that is
 24 point 1.
 25 MR TURNER: Well, the chipset manufacturer still has the

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1 challenges of being able to have the technology. That
 2 does not change. So they may not be able to produce
 3 chips of the right quality. They may not be able to
 4 produce 5G chips because Apple is the only -- sorry,
 5 Qualcomm is the only manufacturer with the capacity.
 6 That all still remains.
 7 MR WILLIAMS: Yes. I do not think the submission is that if
 8 you take out NLNC, it is plain sailing to overtake
 9 Qualcomm. I think the question is: is there
 10 a distortion of competition in the market?
 11 The submission I am making is that NLNC creates the
 12 distortions I have been identifying, or at least it
 13 creates the effects I have been identifying, and of
 14 course in the counterfactual there would not be an NLNC
 15 so you would not have that inflationary mechanism; you
 16 would just have competition with fair rates from
 17 Qualcomm.
 18 MR TURNER: It depends what you mean by the counterfactual.
 19 MR WILLIAMS: Yes. Sorry, I was talking about the narrow
 20 counterfactual. I was talking about the NLNC
 21 counterfactual because I think your point to me was,
 22 well, you could still have Qualcomm -- I am sorry, you
 23 could still have Qualcomm charging too high a royalty at
 24 the chipset level and I said one thing we do take out is
 25 distortions of NLNC.

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1 So there is a third aspect of this, Madam, but
 2 I have run out of time. Shall I just tell you what the
 3 point is?
 4 THE CHAIR: Yes.
 5 MR WILLIAMS: It is the exclusionary impact of it, which is
 6 effectively it is the barriers to entry point put
 7 higher. What we say is Qualcomm used RTL to suppress --
 8 actively to suppress competition at the chipset level.
 9 I will give you a document -- we quote this in our
 10 skeleton, but I will give you a documentary reference.
 11 It is really important one but I have just timed out,
 12 I am afraid. It is 207, slide 41, and it is
 13 a presentation on pricing which --
 14 THE CHAIR: What is the reference?
 15 MR WILLIAMS: It is {POF/207/41}.
 16 THE CHAIR: Is the abuse that you are alleging exploitative
 17 or exclusionary?
 18 MR WILLIAMS: Well, now I am on to the potential
 19 exclusionary impact of this. I am not making
 20 a freestanding case. The point I am just going to make,
 21 I am going to bring it back to NLNC. I am not going off
 22 on some total --
 23 THE CHAIR: So you are not making a freestanding case of
 24 exclusionary abuse?
 25 MR WILLIAMS: No, I am only making this point to the extent

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1 it feeds back in to the NLNC.
 2 This is an internal Qualcomm slide.
 3 THE CHAIR: You can give us the reference and we will look
 4 at it .
 5 MR WILLIAMS: Okay. It is 207/41. We say one can see from
 6 that Qualcomm has the objective of using its dealings
 7 with chipset manufacturers to exclude them from the
 8 market, to make life difficult for them, and we say that
 9 then feeds back in--to the assessment of dominance.
 10 Now, Qualcomm says this arrangement with MediaTek,
 11 which made it difficult for them to sell to unlicensed
 12 customers, only endured until 2013 and the simple point
 13 we make is that a practice which has exclusionary
 14 effects until 2013, it will obviously affect the state
 15 of the market thereafter. It is going to affect
 16 structure of competition in the following years. Many
 17 of the negotiations we are interested in occurred
 18 in 2013 so we say all of this comes back to reinforce
 19 Qualcomm's dominance. It all comes back to reinforce
 20 the theory of harm where we say Qualcomm has been able
 21 to deploy market power in the chipset markets to inflate
 22 royalties .
 23 THE CHAIR: All right. Thank you. I just want to just ...
 24 (Pause)
 25 I asked Mr Moser this morning if he was going to get

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1 into the details of each of the separate negotiations
 2 with Apple and Samsung and what effectively, at each
 3 time point, you say were the constraints on Apple and
 4 Samsung that meant that they could not seek a FRAND
 5 determination. I think that it would be useful just to
 6 have that set out in writing. It might save you time
 7 having to go to all of this tomorrow, but could I --
 8 rather than you taking us through that in the time that
 9 you do not really have tomorrow, could we just have that
 10 on a very short note, a couple of pages, what you say at
 11 each point in time, specifically given what Qualcomm
 12 have said in their skeleton argument about the different
 13 situation of each of the licence negotiations, what you
 14 say for each of the relevant negotiations were the
 15 constraints operating on Apple and Samsung which meant
 16 that at each of those specific points in time there was
 17 an abuse of Qualcomm's dominant position.
 18 If you are relying on the RTL or the non-assert
 19 agreements, for example, the agreement with MediaTek,
 20 which agreement are you relying on and what are the
 21 terms of the agreement because you do say that -- you
 22 reference this in your skeleton argument.
 23 MR WILLIAMS: Yes, I am sorry, I just ran out of time.
 24 THE CHAIR: No, it is all right. But the point is made in
 25 sort of quite general terms at paragraph 15 of your

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1 skeleton argument. Insofar as you say that feeds in to
 2 each one of the specific licence negotiations, which is
 3 the agreement -- which is the non-assert agreement that
 4 you are talking about, is it MediaTek or is it something
 5 else, and what are the terms of that agreement? Because
 6 15 is put at a quite high level of generality .
 7 MR WILLIAMS: Yes.
 8 THE CHAIR: Now, please, can you just set out the specifics
 9 and the same in relation to the abuse of dominance.
 10 Rather than making a sort of general point, I would like
 11 to see what you say about each specific licence
 12 negotiation.
 13 MR WILLIAMS: Okay. On that last point -- sorry, you need
 14 to go, Madam.
 15 THE CHAIR: Yes, I do.
 16 I am not expecting a sort of closing
 17 submission-style document but, rather, at an even higher
 18 level than a pleading, really a sort of set of bullet
 19 points as to what is your case on each of the licence
 20 negotiations. I am not expecting it to be more than
 21 a couple of pages.
 22 MR WILLIAMS: I think I understand.
 23 THE CHAIR: Could you do that by at some point on Wednesday
 24 because it would be desirable to have that before we get
 25 into the meat of the evidence.

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1 MR WILLIAMS: Yes.
 2 THE CHAIR: Thank you very much.
 3 9.45 tomorrow.
 4 (4.25 pm)
 5 (The court adjourned until 9.45 am
 6 on Tuesday, 7 October 2025)
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