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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 – Tuesday 4th 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, CHARLOTTE MCLEAN, DANIEL ALEXANDER KC and DAVID IVISON (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

1 Friday, 31 October 2025
 2 (10.30 am)
 3 Closing submissions by MR WILLIAMS
 4 THE CHAIR: Good morning, Mr Williams.
 5 MR WILLIAMS: Good morning, Madam.
 6 Members of the Tribunal, can I start by explaining
 7 the plan on our side for closing submissions. Mr Moser
 8 and I are adopting the same broad split as we did in
 9 opening but we are going to do it the other way around
 10 and begin at the beginning, with the theory of harm and
 11 market power. I am going to start by outlining the
 12 building blocks of the theory of harm and the nature of
 13 the abuse in broad terms and I will then address the
 14 question of why the case we advance is distinct from
 15 excessive pricing, which we know is an issue which has
 16 been of interest to the Tribunal.
 17 I will then cover what are broadly the four economic
 18 topics: market definition; dominance, including Apple
 19 and Samsung's particular dependence on Qualcomm, with
 20 a particular focus on the key points in time for the
 21 purposes of the claim; the economics as it bears on
 22 abuse, and then, before I hand over the baton, I will
 23 hopefully today deal with RTL, which is slightly out of
 24 the natural sequence but it is the convenient way to do
 25 it so that I can hand over.

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1 I am hoping to hand over to Mr Moser by around lunch
 2 today. He will then deal with abuse. There are
 3 obviously many sub-topics within that heading and he'll
 4 cover the more fact-intensive issues relating to that
 5 and that will take us to the end of today and into some
 6 of Monday.
 7 At some point on Monday, Ms McAndrew is going to
 8 deal with one topic within abuse, which is what we have
 9 called the "silencing issues", and then if time permits,
 10 Mr Moser and Mr Armitage will sweep up on anything that
 11 is left over. That is where we are going and who is
 12 dealing with what.
 13 My plan is to stay in open, if I can. To do that,
 14 I want to refer to or point to paragraphs of our written
 15 closing. I do not know whether the Tribunal has that to
 16 hand?
 17 THE CHAIR: Yes, we do.
 18 MR WILLIAMS: I am grateful.
 19 If that is satisfactory, I will do that so I can
 20 stay in open. If the Tribunal finds it unhelpful and we
 21 need to go into closed, then we can do that as and when.
 22 So I will start with the theory of harm. The
 23 Tribunal has seen the theory of harm expressed in two
 24 ways, one in is in the bargaining model and the other is
 25 in what has been described as the narrative theory of

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1 harm and this was discussed in the hot-tub. It seemed
 2 to us that one did not need to read too closely between
 3 the lines to see that the Tribunal does not feel it
 4 needs "fancy economics", to use your phrase Madam, to
 5 establish the theory of harm and there are two reasons
 6 for that.
 7 First, as ---
 8 THE CHAIR: If you want to seek to persuade us otherwise,
 9 please do, but that was a question that I put to
 10 Mr Noble, given the way that the evidence had come out
 11 on this point.
 12 MR WILLIAMS: Yes. Well, let me introduce the topic and we
 13 can see where we go, but the first point is that, as
 14 Mr Turner, I think, particularly explored with Mr Noble
 15 in the hot-tub, there is a clear narrative to the theory
 16 of harm and of course there are points of economics that
 17 bear on the abuse and I will be dealing with those, for
 18 example the question of why Qualcomm takes the rent on
 19 the licensing royalty, rather than in the chipset
 20 market. Of course we will get into that, but the basic
 21 logic of the theory of harm, in my submission is clear
 22 and I will come to that now.
 23 The second reason is that the heart of the case is
 24 then whether the theory of harm fits the facts and we
 25 accept that and, as the Tribunal will have seen from our

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1 written closing, we have very much focused on trying to
 2 establish the facts that support the theory of harm,
 3 both at a general level and specifically in relation to
 4 Apple and Samsung.
 5 So I am going to outline the building blocks that
 6 make up the theory of harm and then how we populate that
 7 with evidence, which I hope will give the Tribunal
 8 a route map for really the rest of the closing.
 9 The first point is that OEMs, including Apple and
 10 Samsung, depended on Qualcomm for sale of chips and
 11 related technical support. I am not going to refer to
 12 technical support every time in my submissions, but I am
 13 treating both as necessary to allow OEMs to make
 14 handsets. This issue of dependence is central and it
 15 has a number of aspects to it. One is the sheer scale
 16 of Qualcomm's presence in the market, as expressed
 17 through market shares which, as we say in our closing,
 18 give rise to a legal presumption of dominance. Another
 19 is Qualcomm's market leadership in terms of the quality
 20 and the technical capability of its products and how far
 21 ahead of the competition it was. Another is the extent
 22 of the alternatives that were available to Apple and
 23 Samsung at any one point in time.
 24 The Tribunal has seen this question of dependence is
 25 contested and it is contested even at points in the

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1 story where Qualcomm has 100% market share, or
 2 thereabouts. We deal with that issue through two
 3 lenses. First of all, through dominance as a general
 4 matter and then in relation to Apple and Samsung in
 5 particular. At the risk of stating the obvious, this
 6 first building block is critical because it is the
 7 source of the leveraging power that Qualcomm had over
 8 OEMs and that includes very large counterparties, like
 9 Apple and Samsung, and we say it is central to
 10 understand the balance of power in the negotiations that
 11 we are dealing with and the tendency of the conduct to
 12 distort those negotiations. It is not an issue that one
 13 can really postpone until page 98 of a skeleton
 14 argument, which is the approach that Qualcomm takes,
 15 because we say it is the springboard for everything.
 16 The second building block is that Qualcomm's conduct
 17 put OEMs at risk of disruption to chipset supply if they
 18 would not accept the licensing terms that Qualcomm was
 19 prepared to offer. The language that Mr Noble uses is
 20 "credible threat", but the Tribunal has our point that
 21 that does not mean that express or even veiled threats
 22 are necessary. What we mean is that Qualcomm has the
 23 credible ability to cut off or disrupt the supply of
 24 chips so we are saying there is a threat to the supply,
 25 rather than that Qualcomm has threatened to cut off

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1 supply. Sometimes there were threats. Sometimes there
 2 were not. But either way, we say the OEM was operating
 3 at risk and we have used that language of risk to avoid
 4 the suggestion that there has to be an express threat
 5 every time.
 6 The credibility of the risk has two aspects. The
 7 first is the extent of an OEM's dependence on Qualcomm,
 8 which I have touched on, and the other is how did
 9 Qualcomm conduct itself? That is a question of fact.
 10 THE CHAIR: So do you say it is enough that Qualcomm has, if
 11 it wanted, the ability to cut off the supply, even if it
 12 made --- and I know you say that it did make threats, but
 13 let us just assume a situation where Qualcomm had not
 14 made any threats at all.
 15 MR WILLIAMS: To a specific OEM?
 16 THE CHAIR: To a specific OEM. It was simply that --- it is,
 17 you say, a dominant undertaking that could have refused
 18 to supply. That is enough, you say?
 19 MR WILLIAMS: No. No. Sorry, let me make a second part of
 20 the submission. I hope this will answer your question,
 21 Madam. The first point is dependence and the second is
 22 what is --- what is the nature of the conduct? So how
 23 did Qualcomm conduct itself in licensing negotiations as
 24 a general matter? Is its description of the chipset
 25 supply practice a complete or adequate description of

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1 the overall approach that it took? What was the
 2 rationale for the conduct, including what is the
 3 motivation for the separation of the two businesses?
 4 What were the risks for an OEM in a renegotiation
 5 situation and what might happen in the situation where
 6 the OEM uses a CM who has a licence?
 7 So the first plank is what is the nature of the
 8 conduct? Now, the second point I am going to come to
 9 is: was the OEMs' reasonable understanding of the
 10 threat --- the risk that they faced consistent with the
 11 nature of the conduct? That is the point I am going to
 12 come to shortly, and we say it was. What one sees is,
 13 on the one hand, the body of conduct which is capable of
 14 establishing that risk to chipset supply and, secondly,
 15 OEMs understanding that and I am going to come to that
 16 in just a moment.
 17 So it is not just the fact that it had the ability
 18 to do it; we say that there is a course of conduct,
 19 a practice, which establishes that approach and creates
 20 that risk in a given situation.
 21 THE CHAIR: Let me just be a bit more precise about it. You
 22 say there was a course of conduct which establishes that
 23 approach. What approach do you mean?
 24 MR WILLIAMS: The approach whereby Qualcomm was prepared to
 25 disrupt chipset supply or to use the risk of chipset

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1 supply as leverage in these negotiations.
 2 So I am going to make the submission in a moment
 3 where I sort of explain how we put the whole body of
 4 evidence together, but essentially what we say is that
 5 Apple, for example, was not the subject of direct
 6 threats, but what one sees in the evidence is Apple
 7 believing, at all material times, that if it did not
 8 conform to Qualcomm's preferred licensing terms there
 9 was a risk that the supply would be disrupted. If it
 10 challenged the royalty rates, there was a risk that its
 11 supply would be disrupted.
 12 THE CHAIR: But you accepted that it is not just about the
 13 fact that a dominant undertaking has the ability to
 14 refuse to supply a customer. Am I right in thinking
 15 that you are not saying that if there is a dominant
 16 undertaking who has the ability to cut off supply to
 17 a customer, that is sufficient?
 18 MR WILLIAMS: No, I am not saying the ability to cut off
 19 supply.
 20 THE CHAIR: The ability to cut off a supply is not enough.
 21 MR WILLIAMS: No.
 22 THE CHAIR: There must be something which leads the customer
 23 reasonably to believe that the undertaking will cut off
 24 supply in a certain situation?
 25 MR WILLIAMS: May, yes.

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1 THE CHAIR: Or may cut off supply.
 2 MR WILLIAMS: Yes.
 3 THE CHAIR: A simple conceivable risk, is that sufficient?
 4 How certain does the risk have to be?
 5 MR WILLIAMS: Well, look, can I just get to the next part of
 6 my submission and answer it?
 7 THE CHAIR: No. I think I just need to know in a sort of
 8 very concise way what your case is. Where is the best
 9 paragraph of your closing submissions which sets out
 10 what you say, in an absolute nutshell, Qualcomm did
 11 which characterised the theory of harm? I have 163 in
 12 front of me. Is that it?
 13 MR WILLIAMS: Yes, exactly, Madam. That is where I was
 14 going to go.
 15 THE CHAIR: All right. So you say, leaving aside the
 16 departing from competition on the merits point. I mean,
 17 that is a conclusory sentence. I have the second
 18 sentence in 163 underlined. You say:
 19 "Qualcomm leverages the prospect of chipset supply
 20 disruption to secure its desired licensing outcomes."
 21 Is that the best articulation of the theory of harm?
 22 MR WILLIAMS: I was going to point to paragraphs 161 to 164,
 23 Madam, because what we say in those paragraphs is
 24 essentially that one starts with the chipset supply
 25 practice. One starts with an admitted practice, which

1 is to say that the supply of chips is conditional on the
 2 conclusion of a licence.
 3 THE CHAIR: You do not say that that itself is the abuse?
 4 MR WILLIAMS: No. What we say is that that forms part of
 5 this wider approach, which is intended to and does exert
 6 leverage.
 7 THE CHAIR: Okay. But I think we need, as I said a minute
 8 ago —
 9 MR WILLIAMS: So when one sees the way that Qualcomm
 10 approaches licensing negotiations with a range of OEMs,
 11 including Samsung, it exerts threats. It uses threats
 12 in those negotiations to apply pressure.
 13 THE CHAIR: But we are not talking about — your claim is
 14 not about the range of OEMs. Your claim is about Apple
 15 and Samsung. So in relation to Apple and Samsung, what
 16 exactly was the abuse? Is it that Qualcomm gave those
 17 OEMs to believe — to understand that it would or quite
 18 likely might refuse to supply chips if they were to —
 19 if they were to invoke litigation or FRAND arbitration?
 20 MR WILLIAMS: The position is different for Apple and
 21 Samsung because, as we have set out, Samsung was the
 22 recipient of direct threats at various points. What we
 23 say is that to understand the nature of the practice,
 24 one has to look at the conduct as a whole and the
 25 conduct across the market.

1 THE CHAIR: All right, but I think we need to understand, in
 2 an absolute nutshell, what the conduct was. Can you
 3 describe in one sentence what the abuse was?
 4 MR WILLIAMS: Well, I think the way we tried to summarise it
 5 was paragraph 2 of the skeleton, which we then develop,
 6 which reflects what we said in the further note and then
 7 we tied — we develop that in paragraph 3. What we say
 8 is that there is this overall conditionality of the
 9 supply of chips contingent on accepting licensing terms.
 10 It starts with the chipset supply practice, but it is
 11 then reinforced by the use of threats in particular
 12 situations, and if one puts all that together and one
 13 puts it together with the internal materials, one can
 14 see that Qualcomm is using the threat of — and the
 15 risk — I should say the risk of supply disruption. If
 16 I can put it this way, Madam, and this is probably the
 17 answer to your question: it is using the risk of supply
 18 disruption as a lever in negotiations, and Qualcomm took
 19 an approach to these negotiations across the market.
 20 Sometimes OEMs were on the direct receiving end of the
 21 conduct. Some of them were not and Apple was not —
 22 THE CHAIR: So in relation to Apple and Samsung, you are
 23 saying Qualcomm used the risk of supply disruption as
 24 a lever in negotiations?
 25 MR WILLIAMS: Yes, but it used it because the practice was

1 always there, Madam. The practice was always there. As
 2 far as Samsung was concerned, it was on the direct
 3 receiving end of threats. Apple understood that
 4 Qualcomm was prepared to act in that way if it did. One
 5 of the submissions I was going to make in a few moments,
 6 but I will make it now is we see in the Apple evidence
 7 that Apple apprehended disruption to chipset supply if
 8 it did not accept Qualcomm's terms, even though it was
 9 not on the receiving end of direct threats. What we say
 10 is, well, is Apple imagining that there is that risk?
 11 We say it is not imagining it because we see that that
 12 is exactly how Qualcomm is prepared to conduct itself.
 13 So Qualcomm establishes this basic conditionality and
 14 then it uses that conditionality, or is prepared to use
 15 that conditionality as lever in the licensing
 16 negotiations.
 17 THE CHAIR: The conditionality being what? That if in the
 18 negotiations Apple and Samsung did not accept Qualcomm's
 19 terms, it would withdraw the supply of chips?
 20 MR WILLIAMS: Yes, and/or if they brought a challenge, their
 21 supply was at risk and there is a whole range of conduct
 22 from across the market which we say goes to establish
 23 that that is in fact how Qualcomm conducted itself and
 24 Apple and Samsung were subject to that overall approach
 25 in the same way as everyone else. That is the

1 submission I was going to come on and develop in
2 a moment, Madam, about the importance of cross-market
3 evidence.

4 THE CHAIR: Right. Okay. Thank you.

5 MR WILLIAMS: So I was saying that the third building block
6 is that there is this risk and we have now covered some
7 of the submissions I was going to make about how we say
8 that risk is established.

9 The third building block is that if OEMs — is that
10 OEMs cannot make — if OEMs cannot make handsets using
11 Qualcomm's chips, then they lose profits. They may lose
12 those profits because they cannot make phones at all.

13 It may be that there is disruption to production or
14 product development. It may be that not being able to
15 make a handset with a particular type of chip means that
16 rivals steal a march and steal shares so there are
17 a range of possibilities, but if the OEM does not have
18 a credible substitute for the Qualcomm product, then
19 cutting off supply puts a spoke in the wheel of the
20 OEM's business. So that is why we see witnesses talking
21 about how devastating it would be to lose chip supply
22 and the staggering impact it would receive and so on.

23 So the point is not hard to understand, in my
24 submission, but it is established by factual evidence.

25 The fourth point is related to the third, which

1 is —
2 MR TURNER: Presumably even if there is an interruption in
3 chip supply, sorry, if there is a refusal to supply
4 chips, that is — even if you have an alternative
5 supply, there is still going to be a significant
6 interruption because there is an element of bespoke —

7 MR WILLIAMS: That is right. There is a time interruption,
8 as well as the quality interruption and all the other —
9 yes, exactly right, sir. I mean, there is evidence in
10 the case about how once a chip had been designed into a
11 phone, you could not just pull it out and stick another
12 chip in. That is exactly right.

13 MR TURNER: Yes.

14 MR WILLIAMS: So the fourth point is related to the third
15 point, which is that the risk of losing profits
16 incentivises the OEM from pursuing the FRAND
17 determination because if they pursue FRAND, they risk
18 suffering disruption to supply. This is principally
19 a factual question about the impact of the conduct and
20 OEM's understanding of how Qualcomm might act, which is
21 a point I was just making and the Tribunal has factual
22 evidence from OEMs about how they felt constrained from
23 challenging Qualcomm's rates. It has factual evidence
24 about how Qualcomm actually acted when there was
25 litigation on foot and it has the Apple example of how

1 it did not bring proceedings and then it did bring
2 proceedings, which Mr Moser will come to.

3 Then the last building block is that this all drives
4 up the OEMs willingness to pay higher royalties to avoid
5 the downside risk of a business disruption. The OEM is
6 prepared to pay a higher royalty to avoid a much larger
7 business loss and a point is taken that we have not
8 proven that the OEM was incentivised to pay the
9 overcharge rather than suffer the lost profits, but that
10 is a non-point in my submission and I will come to that.

11 So putting it together. The economic mischief, we
12 say, is a distortion of the process of bargaining over
13 royalty rates. We do not say Qualcomm totally refused
14 to negotiate at all. Clearly we do not say that. What
15 we say is that there was a negotiation, but it was
16 distorted or skewed because Qualcomm's conduct polluted
17 what should have been a negotiation about the value of
18 the technology being licensed with an extraneous cost or
19 risk which is the cost or risk of disruption to supply
20 and OEMs should be protected from that by the FRAND
21 regime.

22 So the essence of the abuse is distorting the
23 negotiation in one market by exercising leverage or
24 pressure in an adjacent market.

25 Now, of course, we need to satisfy the Tribunal that

1 that is what happened on the facts, but we say if we can
2 satisfy the Tribunal of that, it is not conceptually
3 hard to understand why it is an abuse. That is why it
4 is not competition on the merits and why it is capable
5 of distorting the process of bargaining over a licence.

6 So the specific question the Tribunal has raised in
7 the — a specific question the Tribunal has raised in
8 the course of the trial is why this is not an excessive
9 pricing case? Now, we did deal with this in our
10 skeleton argument, but I am going to develop that point,
11 if that would assist the Tribunal? We address it at 156
12 to 158 and I am going to make three points. They are
13 quite long points, but there are three of them.

14 The fundamental point is, as I have just said, the
15 economic mischief, as I have outlined it, is distorting
16 the process of bargaining that generates the price,
17 whereas in an excessive pricing case the economic
18 mischief or the theory of harm is charging a price that
19 bears no reasonable relation to the economic value of
20 the product.

21 So in an excessive pricing case the distortion of
22 competition is found in the level of the price itself
23 or, to put it as we do in paragraph 158 of our closing
24 {EAOS/4/43}, the abusive conduct and its effects are not
25 distinct and that is not the case here, because here we

1 say the abusive conduct distorts the process of
 2 bargaining and the pricing effects are downstream of
 3 that distortion . So that is the first point.
 4 The second point, and I hope this is not stating the
 5 obvious, but it is not the case that any abuse that has
 6 a price effect has to be assessed as an excessive
 7 pricing case. Other forms of related market abuse are
 8 likely to have price effects . That might be true of
 9 abuses that are usually analysed as exclusionary, like
 10 tying or refusal to supply, which then rebound and lead
 11 to higher prices on the related market. If a claimant
 12 were to say that it had suffered loss --- financial loss
 13 because an exclusionary abuse had led to higher prices ,
 14 it would not have to show that those prices meet the
 15 test for excessive pricing and, in our submission ---
 16 THE CHAIR: The damage is the exclusion --- is the harm to
 17 the structure of competition by, say, excluding
 18 a competitor, but we are not --- I do not think you are
 19 talking about an exclusionary abuse as such here.
 20 MR WILLIAMS: No, we are not.
 21 THE CHAIR: You are not.
 22 MR WILLIAMS: I am just ---
 23 THE CHAIR: Do you accept that you are talking about an
 24 exploitative abuse?
 25 MR WILLIAMS: Yes, we are talking about exploitative abuse.

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1 But your point, Madam, the damage is the damage to the
 2 structure of competition. Well, we say the same thing
 3 about the leveraging abuse. We say the damage there is
 4 done to the bargaining process, to the negotiation
 5 process.
 6 Now, I want to look at the Apple App Store case
 7 which is Music Streaming which is at {AB3/31.2} in
 8 authorities bundle 5, which I think you have in pdf,
 9 Madam. I think the reference starts at page 842.
 10 THE CHAIR: Authorities 3, page 842.
 11 MR WILLIAMS: Sorry, authorities 5/842. I understood you
 12 had a separate pdf.
 13 THE CHAIR: Yes.
 14 MR WILLIAMS: Just to provide some context, the decision
 15 concerned Apple's anti-steering provisions which
 16 prevented developers from steering customers to cheaper
 17 purchasing mechanisms outside of the App Store and Apple
 18 charged a fixed commission fee of 30% or 15% to
 19 developers in-app purchases. The complainant in this
 20 case was Spotify. The Commission concluded that the
 21 anti-steering terms were an unfair trading condition
 22 under Article 102(a) and this case was analysed as an
 23 exploitative abuse, which I will show you in a moment.
 24 Although it was an exploitative abuse, the
 25 Commission made clear that excessive pricing principles

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1 do not apply. Can we look at 160 on Opus, please, and
 2 it is 1001 in your pdf, Madam {AB3/31.2/160}. If the
 3 Tribunal reads down to somewhere on the beginning of the
 4 next page, paragraph 544.
 5 THE CHAIR: Where would you like us to start?
 6 MR WILLIAMS: Paragraph 544 gives the --- the reason why the
 7 point is relevant will become clear as you read into it .
 8 It is down to the second line of the next page
 9 {AB3/31.2/161}. (Pause)
 10 THE CHAIR: Right.
 11 MR WILLIAMS: If we then move on to 548, that is where you
 12 can see that the Commission is clear that this is an
 13 exploitative abuse. So that is on 162 or 1003
 14 {AB3/31.2/162}. It is towards the end of the paragraph.
 15 It says:
 16 "Rather, the analysis focusses exclusively ..."
 17 THE CHAIR: Yes.
 18 MR WILLIAMS: If one then turns to 163, or 1005, one can see
 19 the test that the Commission applies {AB3/31.2/163}.
 20 THE CHAIR: So this is unfair trading terms.
 21 MR WILLIAMS: Yes, it is an exploitative abuse under the
 22 same limb as excessive pricing. So there is a distinct
 23 test at 555 --- sorry, on the next page, I think.
 24 THE CHAIR: So it sets out an established --- fairly
 25 established conditions for unfair trading conditions as

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1 an abuse.
 2 MR WILLIAMS: Yes. Then the Commission went on to find that
 3 the provision caused harm to consumers downstream in
 4 a variety of monetary and non-monetary ways. I will
 5 just give you the paragraph references for this, if
 6 I may. It is 576 and 599. I then want to pick it up on
 7 page 178 of Opus or 1019 {AB3/31.2/178}. Here we see
 8 a number of arguments run by Apple, including, at 640,
 9 that the commission fee does not constitute unfair
 10 prices. If we then move through, the Commission says,
 11 at 644 on the next page {AB3/31.2/179}, that the --- it
 12 is not necessary to show that the monetary consequences
 13 for consumers satisfy the test for excessive pricing .
 14 That is 644.
 15 THE CHAIR: So this is an unfair trading terms case and it
 16 is said that that does not --- the fact that there is an
 17 unfair trading term imposed --- or unfair trading
 18 conditions imposed is enough. You do not have to go
 19 further and show that that led to an excessive price .
 20 MR WILLIAMS: It is an exploitative abuse with financial
 21 consequences and the exploitative abuse is established
 22 by a particular set of principles and it is not
 23 necessary to establish that the consequential price is
 24 an excessive price, but this is consumers and I am going
 25 to now deal with the Commission itself, if we then move

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1 on to 678 on page 185 or 1026 {AB3/31.2/185}. If you
 2 look at 678 through to 680. (Pause)
 3 THE CHAIR: Yes. That is just saying if you are alleging an
 4 abuse from unfair trading conditions, you do not also
 5 have to meet the test of excessive pricing.
 6 MR WILLIAMS: Yes, that is right, because --- but this is
 7 a case in which one has anti-steer provisions which
 8 result in streaming services paying a commission which
 9 they would not otherwise pay and consumers paying higher
 10 prices in consequence and the Commission is clear that
 11 none of the financial consequences need to satisfy the
 12 tests for an excessive price because the abuse is found
 13 in other conduct. Here it is the anti-steer provisions.
 14 THE CHAIR: So are you saying that this case is analogous to
 15 unfair trading conditions, the unfair trading condition
 16 being that the OEMs were not permitted to access FRAND
 17 arbitration or determination?
 18 MR WILLIAMS: No. I am saying that this case is analogous
 19 in the sense that you have on the one hand abusive
 20 conduct which includes here --- in fact the abusive
 21 conduct here includes specifically the actual --- the
 22 commission is part of the engine room of the conduct,
 23 because you have the commission and then you have an
 24 anti-steer provision and so it is very --- the payment of
 25 this commission is very closely bound up with the

1 abusive --- an exploitative abuse and the test for
 2 establishing the abuse is found by focusing on the
 3 abusive conduct, the distortive conduct, rather than by
 4 focusing on the outturn of that, which is the price, and
 5 we are saying that is the approach we take in this case.
 6 The abuse here is the conduct which distorts the process
 7 of negotiation. The abuse is not the level of the fee,
 8 the level of the royalty. That is the consequence of
 9 the abuse.
 10 In fact, the point goes further because Apple's
 11 conduct in relation to the in-app purchasing mechanism,
 12 this whole issue, was the subject matter of the Apple v
 13 Kent case very recently and that is in the bundle at
 14 {AB2/50} and it also in tab 23 of AB5 and the Tribunal
 15 concluded in that case that the commission is an
 16 excessive price. So you have a very recent example of
 17 a claimant and a Competition Authority looking at the
 18 same practice but finding two abusive practices, two
 19 different distortions of competition. The Tribunal
 20 found --- this Tribunal found that the outturn of the
 21 practice was an excessive price, but the
 22 European Commission found that the anti-steer provisions
 23 that were part of the means to that end were a different
 24 form of exploitative conduct, a different economic
 25 theory of harm. So we say that is a clear worked

1 example of the point I am making that you can draw
 2 a distinction between the abusive conduct which creates
 3 the distortion which distorts the process leading to
 4 payment of the price and whether the price is itself
 5 abusive.
 6 So that is my second point. I said it was a long
 7 point, I am sorry.
 8 MR RIDYARD: Are you saying in the Kent case that --- sorry,
 9 I have not caught up on my reading on that one, but are
 10 you saying that that was an excessive pricing case so
 11 did meet the United Brands criteria.
 12 MR WILLIAMS: Yes, but in Spotify the Commission did
 13 not need to analyse it in that way.
 14 MR RIDYARD: I understand you said that.
 15 MR WILLIAMS: Indeed, it specifically found it did not need
 16 to analyse it in that way in order to find the prior
 17 abuse.
 18 MR RIDYARD: Yes. I do not know what the CAT said in the
 19 Kent case, but did they say they did not have to go that
 20 high but they chose to go that high in terms of their
 21 bar or is that explained?
 22 MR WILLIAMS: Can we come back to you on that, sir, if we
 23 may, a bit later? I think the point I am making is that
 24 the mere fact that one has conduct that could be
 25 excessive pricing at the end of a distorted process does

1 not mean either that you have to analyse the case under
 2 those principles or that it is the only thing going on.
 3 That is the submission I am making.
 4 THE CHAIR: What exactly is the exploitation? You can see
 5 that in an unfair terms case you exploit the fact that
 6 you have dominance to impose an unfair term; in an
 7 excessive pricing case, you exploit the fact that you
 8 have dominance to make the buyer take a product at an
 9 excessive price. What is the exploitation here? What
 10 is Qualcomm making Apple and Samsung do?
 11 MR WILLIAMS: It is exploiting their need for chips, their
 12 dependence on it for chips, to allow it to leverage the
 13 licensing negotiations.
 14 THE CHAIR: Well, leverage is ---
 15 MR WILLIAMS: It is exploiting their dependence on chips to
 16 create a situation where Apple and Samsung, like
 17 everyone else, are under additional pressure in
 18 licensing negotiation to pay a higher rate than they
 19 would otherwise pay.
 20 MR RIDYARD: You are saying the FRAND regime is a sort of
 21 antidote to the market power in SEPs and you are saying
 22 that they are using this mechanism to deny access to
 23 that mechanism?
 24 MR WILLIAMS: Yes, well, to deny it or make OEMs fear
 25 disruption if they pursue it, yes.

1 MR RIDYARD: Well, then it is denying them, is it not,
 2 because it is not attractive for me to go to FRAND
 3 arbitration because I will have to close my phone
 4 business down whilst it happens?
 5 MR WILLIAMS: I think the Tribunal — I am not being
 6 semantic. I am saying they do not need to specifically
 7 say you cannot do it. It is creating an environment
 8 where that is not an attractive option. That is exactly
 9 how we put it, because of the risk of the consequences.
 10 So that is two of my points about excessive pricing.
 11 The third point is to now apply those principles in
 12 the FRAND context and it is true that it is part of our
 13 case, as you put to Mr Mowser in opening, Madam, that
 14 the rates charged in this case were not FRAND and it is
 15 also true that a price that is not FRAND may be an
 16 excessive price, but for the reasons I have been
 17 developing that does not mean that the present case can
 18 only be brought as an excessive pricing case because the
 19 inflated price may be generated by another form of
 20 abusive conduct.
 21 There is also the important converse point that
 22 a price may be non-FRAND without being excessive. That
 23 is the point that is made by Mr Justice Birss in
 24 Unwired Planet 757. Can we go there? It is
 25 {AB2/22/168}. It is 1609 of the pdf, Madam, if you

1 wanted that, of the AB2 pdf.
 2 THE CHAIR: 1609?
 3 MR WILLIAMS: Yes. So paragraph 756 refers to Attheraces
 4 and the test for excessive pricing and 757 says:
 5 "If the rate imposed is FRAND then it cannot be
 6 abusive."
 7 I am going to come to that point now, but then it
 8 says:
 9 "But a rate can be higher than the FRAND rate
 10 without being abusive too."
 11 So it is not enough for it to be non-FRAND for it to
 12 be an excessive price.
 13 THE CHAIR: If the rate imposed is FRAND and it cannot be —
 14 MR WILLIAMS: I am going to deal with that point now.
 15 MR TURNER: The German courts take a different view of that,
 16 do they not?
 17 MR WILLIAMS: I am sorry?
 18 MR TURNER: The German courts take a different view. Do
 19 they not approach FRAND on the basis that if you are
 20 outside the FRAND range you are abusive. No one has
 21 addressed us on that.
 22 MR WILLIAMS: No, I have not addressed you on German law.
 23 I was not planning to either, sir.
 24 MR TURNER: It is part of the interpretation of the ETSI
 25 contract, is it not?

1 MR WILLIAMS: Can we take that point away?
 2 But what we say one takes from 757 is it would not
 3 be enough for us to show that the price was not FRAND
 4 and that makes it very clear, in my submission, that
 5 these two forms of economic mischief are not the same
 6 and the mere fact that we alleged that the price is
 7 non-FRAND does not turn this into an excessive pricing
 8 case.
 9 Now to deal with the first part of that where
 10 Mr Justice Birss says "If the rate imposed is FRAND then
 11 it cannot be abusive" and, in our submission, that is
 12 because the form of the abuse he is analysing is
 13 excessive pricing per 756. It is based on the level of
 14 the price or, more accurately, the level of an offer
 15 that was made, as I will show the Tribunal now.
 16 It makes perfect sense that a price that is at
 17 a permissible level under the FRAND regime, the
 18 regulatory regime cannot be excessive, i.e. at a level
 19 that is anticompetitive in itself, but that is not
 20 saying that if the price is within the FRAND range that
 21 wipes the slate clean even if there has been some other
 22 abusive and distortive conduct elsewhere. It is simply
 23 saying that the rate itself cannot be abusive, which is
 24 what is at issue in this case. Our case is not that the
 25 rate was abusive, the royalty rate; our case is that the

1 conduct — what I have called the leveraging conduct is
 2 abusive and it is instructive to go on and look at what
 3 Mr Justice Birss was dealing with in Unwired Planet,
 4 which is not an argument that an unfair price was paid
 5 but an argument that an abusive offer was made. One
 6 sees that in 758 and in 759 we see Unwired Planet's
 7 defence, which includes, in numbered point (1), that the
 8 offers were made in the context of good faith
 9 negotiations. The judge goes on to say he is going to
 10 set out the principles to deal with when conduct in
 11 negotiations is in itself abusive. He says that in 761.
 12 Then the key reasoning is in 762, 763 and 765 on the
 13 next page {AB2/22/169}. So we see in 762 "[i]t is
 14 possible to distinguish three kinds of price: there is
 15 a price which has been agreed..., a price [that is]
 16 demanded... or a price that is advanced in a
 17 negotiation".
 18 "...[t]he distinctions may not... be clear cut
 19 but... I ... agree [they] are all capable of being
 20 abusive but that does not mean they are the same kind of
 21 thing or must be judged in the same way."
 22 Then if we look at 763, the judge refers to expert
 23 evidence and, in particular, he refers halfway through
 24 the paragraph to Professor Neven's evidence that the
 25 idea of making an offer in the context of a negotiation

1 which is so outrageous that you cannot expect there to
2 be a process of convergence. It would disrupt the
3 negotiation rather than help it. Then in 765, if you
4 read 765, he then effectively adopts that point.
5 (Pause)

6 So this is a modified test, Madam. It is not
7 excessive pricing in the ordinary sense. It is
8 a modified test that is setting out when making an
9 excessively high offer is abusive because it distorts
10 the negotiation process, as distinct from actually
11 charging a higher price for which a different --- an
12 unfair price for which a different test would apply.

13 One sees that then in 774, because what the judge
14 goes on to do is to say, well, the offers that were made
15 were not FRAND, but they were not so far above FRAND
16 that they were disruptive of the negotiations.

17 So this is a further illustration of the point that
18 one can have a distortion of the negotiation process
19 that is economically distinct from actually charging an
20 excessive price under the established principles.

21 MR TURNER: Just so I am clear where all this is going. You
22 say that or it might be said that if the price is FRAND,
23 it cannot be an excessive price, but you say that is not
24 the answer. You have to look at the negotiation process
25 because you have in your crosshairs the prospect of

1 a price within a FRAND range which is on the higher end
2 so it is not an excessive process. Is that where all
3 this is going?

4 MR WILLIAMS: I am sorry, I am now --- I should have said ---
5 yes, I am now --- because 757 is the key paragraph, I did
6 not want to go to it for one point and then not tease
7 out, but, yes, we say the rates are not FRAND, but we
8 say because the essence of the abuse is a distortion of
9 the negotiation rather than the charging of the
10 excessive price, we say it is possible in principle to
11 have a distortion of the negotiation and an inflated
12 price within the FRAND range and we give a worked
13 example in our skeleton.

14 MR TURNER: Right. In terms of whether FRAND is a range or
15 whether it is a price, that has been a point of some
16 controversy, although I think the --- is this right, the
17 Court of Appeal in Unwired Planet said it was a range.
18 Have I got that right?

19 MR WILLIAMS: We have proceeded in our worked example on the
20 basis that it is a range.

21 MR TURNER: What does that mean, that it is a range?

22 MR WILLIAMS: What does it mean that it is a range?

23 MR TURNER: Yes.

24 MR WILLIAMS: When the court determines the terms of a FRAND
25 licence, it establishes what the royalty might be within

1 a range and using a range of different evidence.

2 MR TURNER: The court has to come up with a figure?

3 MR WILLIAMS: I see, what is the outturn of that? I believe
4 the position, although this bit is not on my desk, but
5 I believe the position is that in a FRAND case the
6 licensor would be permitted to charge the top of the
7 range but if I have got that wrong --- yes, that is
8 broadly the position. I might be simplifying, but ---

9 MR TURNER: Right. One can have a range in the sense that
10 reasonable Tribunals might --- are never going to come to
11 the same figure, they are all going to come to different
12 figures, but that is not the same as a range, that is
13 just the nature of the legal process, so it is no
14 different to the speed of a car, there is only --- the
15 car is going one speed, but different Tribunals may form
16 different views as to what the precise speed is to
17 a decimal point.

18 MR WILLIAMS: That is true. The determination is that the
19 license at the point is FRAND.

20 MR TURNER: Yes. So if we are talking about distortions
21 within a FRAND range, just knowing the juridical basis
22 for that range is an aspect of that argument and I do
23 not have that clear in my mind at the moment.

24 MR WILLIAMS: Sorry to talk over you, sir. It is perhaps
25 more accurate to say a price that is inflated but is

1 below the FRAND price which might be the top of that
2 range.

3 MR TURNER: Right.

4 THE CHAIR: But this paragraph, 765, is not saying you can
5 have an abuse even if it is within the FRAND range; it
6 is saying the opposite. Even if it is above the FRAND
7 range, it has to be so far off in the clouds that it is
8 a disruption of the negotiations itself that that will
9 then fall foul of Article 102.

10 MR WILLIAMS: Yes, sorry. In this case the abuse is the
11 level of the offer. So I was --- perhaps the point was
12 a bit too subtle, Madam. I was simply saying that the
13 Tribunal was there distinguishing between an abuse which
14 is an excessive price and an abuse which identifies
15 a distortion in the negotiation process, rather than the
16 charging of the price. It is a variant on the classic
17 excessive price which is you priced so far above cost
18 and it is out of kilter with the value of the product.
19 This is saying this is even higher again and the reason
20 that that price is an abuse is because it has distorted
21 the process of negotiation.

22 Of course the issue in that case is: is the level of
23 the offer so high that it is abusive? Obviously it is
24 an answer to that to say, well, the level of the offer
25 is not so high that it is abusive because it is actually

1 FRAND. That makes perfect sense, but that is because
2 the focus there is on the level of the offer, the level
3 of the price and, for the reasons I have given, that is
4 not this case.

5 Madam, that is what we say about the interaction
6 with excessive pricing. The fundamental point is the
7 abuse we allege is not that the rate was an abusive
8 rate; it is that it was generated by a distorted process
9 of bargaining.

10 So I had a topic now which, if I may, I will just
11 race through. I think we have more or less covered it
12 in your questions to me, Madam, but I just want to make
13 sure I did not lose out any of the points in the
14 interchange, because there is a question which we have
15 addressed in our skeleton at 161 to 164, in part, and ---
16 which is how far this case is just about Apple and
17 Samsung and the case has got narrow aspects, such as
18 does it matter if the markets are OEM-specific? Does it
19 matter where countervailing buyer power comes in? But
20 it has wider implications in terms of the evidence that
21 we are asking the Tribunal to take into account.

22 We say that Qualcomm's account of what the subject
23 matter of the case is is broadly what is the position in
24 relation to its chipset supply practice and what
25 happened in a series of specific negotiations with Apple

1 and Samsung. We say that that is not exclusively what
2 this case is about and that leaves out very, very
3 important aspects of the evidence. This case is about
4 the overall practice or approach taken by Qualcomm
5 across the market and across OEMs which we say existed
6 and operated to give Qualcomm leverage in royalty
7 negotiations. Mr Moser is going to cover this. One
8 sees it in Qualcomm's internal strategy documents. One
9 sees it in strands of its conduct which are just not
10 explicable on the basis of the chipset supply practice
11 as Qualcomm characterises it.

12 THE CHAIR: All right. But you rely on the all OEMs point
13 to then focus on what happened in Apple and Samsung and
14 say in those cases, they feared disruption because this
15 was a practice applied across the industry.

16 MR WILLIAMS: Yes, exactly.

17 THE CHAIR: But you are not saying that in abstract we have
18 to make any findings about Lenovo or BlackBerry of any
19 of the others? You are relying on the other OEMs to say
20 that that was the reason why Apple --- or part of the
21 reason why Apple and Samsung feared disruption?

22 MR WILLIAMS: If you look at the list of issues, there is
23 a question --- there is an issue about whether this is
24 competition on the merits and then there is an issue
25 about effects, the capability of the conduct having an

1 effect on Apple and Samsung, and the way we put the case
2 is we understand you have structured the list of issues
3 in that way at the effects end, but if you want to
4 understand whether the conduct is competition on the
5 merits, you should look at the conduct as a whole. We
6 are not asking you to find that the conduct was capable
7 of having effects on Lenovo or on anyone else, because
8 you have excluded that from the list of issues, but when
9 you decide whether this is competition on the merits,
10 you have to decide what the conduct is and we say that
11 the whole canvas informs that question.

12 MR TURNER: But if Apple had threatened to withdraw chip
13 supply to BlackBerry and Lenovo ---

14 MR WILLIAMS: Apple?

15 MR TURNER: I beg your pardon, if Qualcomm had threatened to
16 withdraw chip supply to BlackBerry and Lenovo but not
17 threatened --- either explicitly or implicitly --- to
18 withdraw chip supply to Apple, what are you saying is
19 the relevance of the evidence with regards to BlackBerry
20 and Lenovo?

21 MR WILLIAMS: Well, I sort of made a version of the point
22 earlier, but there is evidence from Apple saying that
23 they feared that Qualcomm would act in a certain way in
24 these negotiations and that it would withdraw supply and
25 would disrupt supply and the question for the Tribunal

1 is: is Apple imagining that? We say it is not imagining
2 it ---

3 MR TURNER: That evidence does not link it to Lenovo and
4 BlackBerry.

5 MR WILLIAMS: Well, the Tribunal will see evidence where
6 Apple says, "We basically got the message about what
7 Qualcomm was prepared to do" and Mr Moser will come to
8 that later on.

9 MR TURNER: Okay.

10 MR WILLIAMS: But the point --- the sort of short point I am
11 making is that you see on the one hand conduct vis-à-vis
12 other OEMs, albeit including Samsung, and then you see
13 Apple fearing consequences which --- or a pattern of
14 conduct which is consistent with what we have seen here
15 and it is not a coincidence.

16 MR TURNER: Well, there is not a direct cause and effect.

17 I mean, it goes back to the question the President put
18 to you earlier. I mean, one could understand it might
19 be rational for, let us say, Apple not to want to poke
20 the bear, the bear being Qualcomm, in circumstances
21 where it is entirely dependent on Qualcomm for its
22 chips.

23 MR WILLIAMS: Yes, yes.

24 MR TURNER: But that would seem not to be sufficient ---

25 MR WILLIAMS: It is more than that. It is the understanding

1 of the conditionality . That is what --- it is --- there
 2 is the admitted element of conditionality and we say
 3 that the conditionality goes further than the sort of
 4 benign chipset supply practice . It is the willingness
 5 to use that conditionality to apply pressure in
 6 licensing negotiations and to avoid scrutiny of the
 7 rates through litigation .
 8 MR TURNER: But to what extent do we have to make
 9 determinations with regards to Lenovo and BlackBerry?
 10 That just seems to be of no direct relevance .
 11 MR WILLIAMS: Well, it is of direct relevance to the extent
 12 that the Tribunal has --- well, the question is really
 13 what was really going on here? Is it a benign practice
 14 that is designed to protect against patent exhaustion,
 15 which is what Qualcomm says, or is there more to it? We
 16 say there is clearly more to it when one looks at the
 17 evidence as a whole . We say you have internal documents
 18 saying that Qualcomm saw the ability to use this
 19 leverage as a stick , and Mr Moser is going to come on to
 20 that, and we say that is what it was doing and ---
 21 THE CHAIR: All right. To make out your case then, do you
 22 accept that you have to show that Apple --- let us just
 23 take Apple --- looked at what was going on in relation to
 24 other OEMs, saw that Qualcomm was applying pressure on
 25 other OEMs by threatening to withdraw their chipset

1 supply and therefore reasonably believed that Qualcomm
 2 would, or might well, do the same for it?
 3 MR WILLIAMS: It is not as tidy as that, Madam, but we do
 4 say that Apple understood that Qualcomm's practice was
 5 based on conditionality .
 6 THE CHAIR: But from what? Because if there was not
 7 a threat to it to --- to Apple itself but you are relying
 8 on the other OEMs, what is the linkage between the other
 9 OEMs and Apple? You have to then say Apple looked at
 10 what Qualcomm was doing with, let us say, Lenovo, knew
 11 that and therefore understood from that, otherwise you
 12 do not have where did it understand it from .
 13 MR WILLIAMS: I understand the point you put to me, but what
 14 we say is that Apple reasonably understood that Qualcomm
 15 was prepared to act in this way . Mr Moser will show you
 16 the evidence of Apple, first of all, of the risk that
 17 Apple apprehended and, secondly, the evidence which goes
 18 to the question of why it apprehended that .
 19 THE CHAIR: All right.
 20 MR WILLIAMS: I do not think we --- we do not say Apple
 21 specifically knew about what happened to Lenovo . I do
 22 not think we say that .
 23 THE CHAIR: Then how can you say --- what is the basis on
 24 which you say --- you do not have to take me to the
 25 evidence, but you are explaining the theory of harm .

1 What is the basis on which Apple understood it? If it
 2 was not a direct threat made to it, how did it gain that
 3 understanding?
 4 MR WILLIAMS: Well, the starting point is that it understood
 5 the conditional --- the basic conditionality that is
 6 implicit in the licensing practice .
 7 THE CHAIR: What do you mean, the basic conditionality?
 8 MR WILLIAMS: The fact that it needed a licence, a licence
 9 needed to be put in place .
 10 THE CHAIR: Yes, but you do not say that that led --- that
 11 led to the abuse . You say the abuse is more than the
 12 chipset supply practice . You say that the abuse is that
 13 Qualcomm might withdraw supply, even if there was
 14 a licence in place, if the licensee invoked litigation .
 15 So that is different .
 16 MR WILLIAMS: No, that is right, but the Tribunal has the
 17 evidence from Apple . It will see it . The submission
 18 I can make really abstract from the evidence is what we
 19 see on the one hand is a body of conduct that Qualcomm
 20 is prepared to act in a certain way . You then have the
 21 essential conditionality that is part of the chipset
 22 supply practice and then you have Apple's understanding
 23 that Qualcomm is prepared to use disruption to supply in
 24 order to put pressure on Apple in negotiations .
 25 THE CHAIR: But can I just ask you, in the abstract, you do

1 not have to take me to the evidence, but Apple's
 2 understanding gained from what?
 3 MR WILLIAMS: Well, sorry, the point I was going to come to
 4 is I think there is a degree of inference, Madam, but
 5 there is some evidence of Apple listening to what
 6 Qualcomm said in the context of an investor call, which
 7 Mr Moser will come to a bit later on, and there is
 8 also --- sorry, and there is Apple drawing inferences
 9 from what I have described as the conditionality . The
 10 Tribunal is going to have to form a view based on the
 11 evidence as to whether, as I say, Apple is imagining
 12 this risk or whether Apple has formed an impression that
 13 is consistent with the conduct .
 14 THE CHAIR: But I am still not getting what is the relevance
 15 of the OEMs . If you are saying Apple drew the inference
 16 from, number 1, an investor call with Qualcomm and,
 17 number 2, the conditionality, i.e. the chipset supply
 18 practice of Qualcomm, then that has nothing to do with
 19 the OEMs . If you are saying that Apple understood,
 20 because of its knowledge of the other OEMs, then I can
 21 see that we need to look at the other OEMs . So exactly
 22 how do the other OEMs tie in with the theory of harm?
 23 What is it about that that led to the understanding?
 24 MR WILLIAMS: Well, the point I was making, Madam, is that
 25 one has to form a view as to whether Apple's

1 understanding of the risk is reasonable and the way we
 2 put the case in broad terms is that Apple's case ---
 3 Apple's understanding and impression as to how Qualcomm
 4 is prepared to conduct itself is reasonable because it
 5 is consistent with the way Qualcomm did conduct itself.
 6 THE CHAIR: All right. But that is not answering my
 7 question. So where did Apple's understanding come? If
 8 it came from Qualcomm's direct conduct vis-à-vis Apple
 9 and conditionality which is, again, you say it is just
 10 Qualcomm's supply practice, that is something Qualcomm
 11 does vis-à-vis Apple, that does not involve the other
 12 OEMs. Where do the other OEMs come in?
 13 MR WILLIAMS: I think for the moment, Madam, the way I put
 14 it is to say that the failure --- the departure from
 15 competition on the merits is the overall practice, as
 16 I have described it, and Apple's apprehension of the
 17 risk is consistent with the overall practice and we see
 18 specific evidence that Apple understands that this is
 19 the way Qualcomm is prepared to conduct itself across
 20 the market.
 21 MR TURNER: You talk about whether the risk is reasonable
 22 and if you were in Qualcomm --- hypothetically in
 23 Qualcomm and were drawing up a risk register, you would
 24 have to put the failure of your supplier to supply --- if
 25 you are in Apple, sorry, and you are drawing up a risk

1 register, you would have to put Qualcomm's ceasing to
 2 supply chips on that register. I mean, it must be
 3 a risk and it must be a risk for the simple reason that
 4 Apple does not know what Qualcomm will do. So it is
 5 a risk. That is --- and even if it had a letter from
 6 Qualcomm saying, "We will not do this", it might have
 7 a different colour on the risk register, but it would
 8 still be there as a risk. It is always going to be
 9 a risk and so just saying is it a rational risk or not
 10 does not seem sufficient to get you home.
 11 MR WILLIAMS: No, sorry. I am sorry if I was not clear.
 12 MR TURNER: That is what you said.
 13 MR WILLIAMS: What I said is Apple reasonably understood ---
 14 what I meant to say, whether or not I said it. Apple
 15 reasonably understood that Qualcomm was prepared to
 16 conduct itself in a particular way. I think the
 17 position --- I will be corrected if I am wrong when we
 18 take a break --- is that the Tribunal is going to have to
 19 draw an inference as to whether Apple's apprehension of
 20 the risk that it faced was reasonable but the point ---
 21 THE CHAIR: No, we have to --- before we do that, we need to
 22 understand where you are getting the understanding from.
 23 So you can talk about whether that was reasonable, but
 24 where do you get the understanding from and if you are
 25 saying that it is from conduct of Qualcomm vis-à-vis

1 Apple, that is one thing; if you are saying, on the
 2 other hand, that it is from Apple's knowledge of other
 3 OEMs, then that is a direct linkage between the other
 4 OEMs and this case.
 5 So I am just trying to get at which of those two it
 6 is in this case.
 7 MR WILLIAMS: I think the reason I am not giving you
 8 a direct answer is because I think one has to infer ---
 9 one has to infer from Apple's perception of the risk
 10 that ---
 11 THE CHAIR: Well, it is all right. Maybe we could just move
 12 on and review it later, but you have got our question.
 13 MR WILLIAMS: We have.
 14 THE CHAIR: Exactly how do the other OEMs tie in with the
 15 theory of harm and ---
 16 MR WILLIAMS: This is part of the problem with the division
 17 of labour.
 18 THE CHAIR: All right. Why don't you move on.
 19 MR WILLIAMS: Yes. Sorry, I mean, one note that was passed
 20 to be me but I did not read while I was answering your
 21 questions is we did take you to a document in opening
 22 which said what Apple's perception of the industry view
 23 of the policy is. We can give you the reference.
 24 MR MOSER: If I can just give the reference to that
 25 document. I think it might be confidential, but it is

1 the starting point. It is the jumping-off point,
 2 whatever the phrase is. It is {POF/493/1}. It is an
 3 Apple internal email and you will see what it says in
 4 the first paragraph and you will see what it says about
 5 Qualcomm's licensing programme. That's the beginning of
 6 the quest for what Apple knew about what was thought
 7 across the industry.
 8 THE CHAIR: It does not make any specific point about
 9 Qualcomm refusing to supply.
 10 MR MOSER: No, that is ---
 11 THE CHAIR: It says the programme and you do not say that
 12 the chipset supply policy was abusive.
 13 MR MOSER: That is why I say it is the jumping-off point and
 14 we will see a lot of other documents that I will show
 15 you either today or on Monday.
 16 THE CHAIR: Yes. I think at some point, by the end of your
 17 submissions, you need to explain, with precision, how
 18 the other OEMs' story ties in with the theory of harm.
 19 Are you saying that Apple understood what was happening
 20 with other OEMs and, therefore, from that, gained
 21 a perception about Qualcomm's conduct or are you not?
 22 If you are not saying that Apple knew what happened with
 23 the OEMs, then precisely how does the story about the
 24 other OEMs have a bearing on the theory of harm? You do
 25 not have to answer that now but by the end of your

1 submissions.
 2 MR WILLIAMS: So the point I was coming to is, as I say, the
 3 case that we put is based on a market-wide approach. We
 4 will come back to your question, Madam. The premise for
 5 all of that is Qualcomm having dominance on a wider
 6 market. So I will come on to the market now.
 7 The Tribunal does ultimately have to decide whether
 8 the conduct is capable of having an effect on Apple and
 9 Samsung. That has got three aspects. First of all,
 10 were Apple and Samsung subject to the same practice as
 11 the rest of the market? We say the answer to that is
 12 "yes". We do not see any trace in Qualcomm's closing of
 13 an argument that its conduct differed across OEMs and of
 14 course it would not help Qualcomm to impose an inflated
 15 rate on one OEM only. So we say that whatever the
 16 conduct is, it was consistent and common across the
 17 market and that is partly why we say the wider evidence
 18 is relevant, but we will come back to that.
 19 So were they subject to the same conduct as everyone
 20 else? Yes. Were they dependent on Qualcomm, like
 21 others? Yes. Thirdly, is there something about the
 22 negotiations with Apple and Samsung which means that the
 23 conduct did not bite on them? We will ultimately say,
 24 having looked at the evidence in detail, the answer to
 25 that is "no".

1 So we appreciate that coming back to the question
 2 of --- we looked at in opening about the importance of
 3 what the market is and where one considers
 4 countervailing buyer power and so on, one could
 5 ultimately approach the case pragmatically and say,
 6 well, the case has a number of component parts and as
 7 long as the Tribunal considers them all, then the
 8 economic framework is not decisive and it does not
 9 matter exactly what the market is.
 10 The substance of the questions is obviously more
 11 important than which box they go into, but what we do
 12 strongly resist is the idea that this case is only about
 13 Apple and Samsung and that the whole economic framework
 14 should be set up in a way that leaves everything else on
 15 one side, but, apart from anything else, we say
 16 Mr Noble's economic framework is clearly right on the
 17 merits and that is what I was going to come to next.
 18 We are a bit early for a break, but we could have
 19 one now, rather than get into that?
 20 THE CHAIR: That is fine. We understand the last point you
 21 make. I think that these are distinct questions. One
 22 can still --- one can look at the market definition on an
 23 OEM-agnostic basis and still then focus in the abuse
 24 section, as you have, I think, rightly said, on the
 25 position of Apple and Samsung. The fact that you might

1 not look at countervailing buyer power on your case in
 2 relation to dominance does not mean that you do not look
 3 at it as one must ---
 4 MR WILLIAMS: Yes, exactly.
 5 THE CHAIR: --- in relation to abuse, yes. All right.
 6 Thank you very much. We will take a ten-minute
 7 break.
 8 (11.36 am)
 9 (Short Break)
 10 (11.46 am)
 11 MR WILLIAMS: Market definition. I made some fairly
 12 detailed submissions in opening and you now have our
 13 written closing. As you have heard, our case is based
 14 on Mr Noble's view, which in turn relies on evidence
 15 from industry participants which now includes
 16 Mr Katouzian, evidence of chipset pricing in the market,
 17 including the CDMA adder and so on, and Qualcomm's own
 18 internal documents. As far as self-supply is concerned,
 19 we rely on the tiny scale of external supply by Samsung
 20 until the 5G era which then needs a bit more scrutiny.
 21 I will not go back over all the evidence, but I will
 22 make some --- an overarching submission, if I may. You
 23 have my point from opening that this --- Mr Noble is not
 24 breaking new ground. The Commission has looked at all
 25 this and Mr Noble's approach is to the same effect.

1 Qualcomm says that the Commission's findings are not on
 2 point for two reasons. One is that the --- one of the
 3 decisions relates to dongles not handsets, but that does
 4 not affect any of the core reasoning. The other is
 5 the Commission's findings relate to other OEMs, but that
 6 is, in my submission, a circular submission because the
 7 point we are debating is whether that is a relevant
 8 point of distinction.
 9 We say that Dr Padilla's approach is certainly novel
 10 and we go further and say that it is strained and
 11 problematic and, in my submission, the deficiencies of
 12 Dr Padilla's framework have become clearer as the trial
 13 has gone on.
 14 THE CHAIR: Yes, but just before you launch into that, can
 15 you help us on this: is there anything in the law which
 16 might help us on when it would be appropriate to define
 17 "OEM-specific" as opposed to "OEM-agnostic" markets? Is
 18 there any precedent that helps us with the test to
 19 apply?
 20 MR WILLIAMS: I mean, I think on the --- there is a framework
 21 on the price discrimination side which we started to
 22 explore with Dr Padilla in cross-examination. I am not
 23 aware, as I stand here, that there is anything similar
 24 on the OEM --- on the distinct requirements aspect of his
 25 approach, but I am hoping to cut through those pretty

1 quickly on the evidence anyway, Madam, because the first
 2 point I was going to make is that Mr Katouzian was
 3 cross-examined on the issues and Mr Katouzian accepted
 4 the clear logic of Mr Noble's position on basically all
 5 these issues about market definition and
 6 substitutability . The concessions he made were in
 7 confidential session, I believe, and so they are
 8 designated confidential for now. I do not think they
 9 will ultimately be confidential, but the Tribunal will
 10 recall them, I hope. We have them in our skeleton at
 11 various points, 37, 42 and 45.

12 Although Qualcomm says no weight should be given to
 13 RFI responses provided to the Commission, presumably it
 14 does not say no weight should be given to Mr Katouzian's
 15 evidence, which says the same thing as the RFI
 16 responses. That is leaving aside the realism of the
 17 idea that we could produce all these OEMs in class
 18 action proceedings in any event.

19 The second point is that Dr Padilla has pursued
 20 various economic arguments which did not stand up to the
 21 scrutiny of a trial . I will try and take them quickly
 22 because I think the Tribunal knows what we say about
 23 them.

24 In terms of substitutability between standards,
 25 Dr Padilla accepted in the hot-tub that his price

1 overlap analysis does not test for substitutability . So
 2 we say that is basically accepting that the analysis is
 3 not probative of anything.

4 He then diverted into what were two new arguments.
 5 One was the steering mechanism, OEMs steering customers
 6 onto different standards through marketing, which was
 7 unforeshadowed in any of the evidence and, as the
 8 Tribunal saw, this idea of steering was positively
 9 contradicted by the evidence I put to Dr Padilla. That
 10 is paragraph 56 of our closing {EAOS/4/17}.

11 The second new argument was that data relating to
 12 UMTS CDMA showed a continuous variation in mix and
 13 showed substitution between them and then --- that was in
 14 cross-examination, he said that point did not help
 15 either side. So that one came and went very quickly as
 16 well. Just before I move on to another topic, Qualcomm
 17 says in its closing at paragraph 320 {EAOS/5/106}, that
 18 the CDMA adder is a charge for additional functionality,
 19 but that is not the issue. The question is not whether
 20 CDMA is an additional functionality, but whether it was
 21 a premium that Qualcomm could impose because Qualcomm ---
 22 CDMA was in its own distinct market? We say the
 23 evidence is clear on that: see paragraph 50 of our
 24 skeleton.

25 So that is substitutability across standards.

1 In terms of OEM-specific markets we do say, as I put
 2 to Dr Padilla, that his view on price discrimination
 3 markets hardened up in oral evidence, but the key point
 4 is that he has not carried out any analysis of pricing
 5 across the market. The point of this analysis is to say
 6 that Apple and Samsung paid different prices compared to
 7 anyone else, but he has not done any analysis of pricing
 8 across the market taking account of rebates and
 9 discounts. What that means ultimately is that he has
 10 not established price discrimination . So, in my
 11 submission, that argument does not even get off the
 12 ground. But this issue was also important because it
 13 showed perhaps most clearly that the whole thesis of
 14 OEM-specific markets is self-contradictory because the
 15 idea is that pricing --- the prices charged for Apple and
 16 Samsung are so distinct compared to the prices charged
 17 to others that they are in their own market. So it's
 18 the actual prices charged to them, but when it was put
 19 to him that price discrimination would be defeated by
 20 supply-side substitutability , Dr Padilla said, well,
 21 that could not happen because all of the suppliers are
 22 in the market, but that is obviously having the point
 23 both ways. One cannot say these prices are a distinct
 24 market, but then say but in fact there is no supply-side
 25 substitution because everything is in the market. The

1 whole thing is having it both ways.

2 So what that really amounts to is accepting
 3 Mr Noble's point that there is supply-side substitution
 4 and that is why Mr Noble says price discrimination would
 5 be defeated and that is footnote 119 in the Commission's
 6 guidelines .

7 MR RIDYARD: Substitution between what, sorry?

8 MR WILLIAMS: Between suppliers. So ---

9 MR RIDYARD: Everything or ---

10 MR WILLIAMS: Sorry, this is --- we are talking about chips
 11 of the same standard. I am sorry.

12 MR RIDYARD: That is accepted by ---

13 MR WILLIAMS: Yes, it is accepted, but we then have the
 14 circular argument about whether there is any other
 15 supplier that can constrain it , yes.

16 Then we have the other limb of the OEM-specific
 17 argument which is that Apple and Samsung have distinct
 18 requirements, but, as the Tribunal saw, that turned out
 19 simply to say that Apple and Samsung started and stopped
 20 and started selling handsets conforming to different
 21 standards at different times to each other and other
 22 OEMs. That is not a distinct --- such a distinct
 23 requirement. It is just about when they phased in
 24 handsets and phased them out. There is simply no
 25 evidence at all that, for example, once Apple decided to

1 make --- the pricing of 5G chips to Apple was constrained
2 by the fact that it chose to make the transition at
3 a different time from other OEMs.

4 So we just say none of these points have stood up to
5 scrutiny. I do want to deal with a related issue which
6 is bidding markets, which is an issue that was given
7 some focus in the oral evidence. Dr Padilla said in his
8 report that these are bidding markets so that market
9 shares are not informative, but he accepted in
10 cross-examination that he had not considered the
11 criteria for bidding markets when these were put to him
12 and, in my submission, we showed in cross-examination
13 that the recognised criteria are not met. There is no
14 evidence at all that purchases by Samsung were the sort
15 of bulk contracts that may amount to a bidding market
16 and such evidence as there is to the opposite effect.

17 As far as Apple is concerned, the question is was
18 there effective competition? Were all suppliers equally
19 well placed? It is clear that there were no other
20 credible suppliers for the exclusive contract that Apple
21 entered into in either 2011 or 2013, because of
22 Qualcomm's total dominance of CDMA and then LTE.

23 Paragraph 328 of Qualcomm's closing {EAOS/5/108}
24 basically accepts that, but it seems to advance a sort
25 of free floating idea that these are nonetheless bidding

1 markets based on the fact that there are bids.

2 In my submission, that is not a tenable approach and
3 it is also not consistent with Churchill Gowns, which
4 I would just like to go, if I may. This is {AB2/33/20}.
5 Of course Mr Ridyard will be very familiar with this.

6 THE CHAIR: Authorities 2.

7 MR WILLIAMS: The pdf page, sorry, Madam, is 2694 in AB2.

8 THE CHAIR: Thank you.

9 MR WILLIAMS: So one sees in 56, Ede & Ravenscroft contend
10 that whilst accepting that the markets do not meet all
11 the criteria for a perfect bidding market, the
12 competitive conditions are sufficiently close to the
13 benchmark and there is then discussion of whether that
14 argument is tenable.

15 The next page, paragraph 57 {AB2/33/21}, Churchill
16 through their expert reject that argument with reference
17 to the Klemperer criteria which run parallel to the CMA
18 criteria, which we looked at with Dr Padilla.

19 Then 58 explains that if Ede & Ravenscroft want to
20 advance that argument, they are going to need to provide
21 robust evidence and look at the matter closely. That
22 theme is then picked up through the following
23 paragraphs. 61 explains the need for full analysis. 62
24 deals with the need to consider whether the contracts
25 are lumpy, which is the point we make about Samsung.

1 So we say there are obvious parallels with this case
2 where there has just been no analysis of this. There
3 has just been broadbrush references to the fact that
4 there are bids and next to nothing by way of analysis of
5 any sort of bidding process in relation to anybody, let
6 alone is there a credible case that the criteria are
7 satisfied or close to being satisfied.

8 So if we stand back from these various issues around
9 market definition, the bottom line is that on the
10 markets defined by Mr Noble, Qualcomm has a market share
11 of somewhere between 50% and 100% and there is a strong
12 presumption of dominance and Dr Padilla's approach to
13 market definition, it does mitigate those numbers to
14 some extent by introducing other constraints into the
15 market, like overlapping standards, and the constraint
16 of self-supply, and we do say that, given the shifting
17 basis of the argument here and the fact that several of
18 these points are weak and undeveloped, one does find it
19 hard to avoid the conclusion that the net has been cast
20 around to try and identify arguments that reduce the
21 risk of a finding of dominance and some of this has
22 skirted pretty closely to the line between expert
23 opinion evidence and argument.

24 I do say that in part because there was an
25 argumentative flavour to some of Dr Padilla's answers in

1 cross-examination when I would put a point to him and he
2 would deflect and say that my question was inconsistent
3 with some other part of our case. The Tribunal will
4 have its own impressions about that. I will not spend
5 time trying to persuade you about it, but I will give
6 you one reference because, having made the point,
7 I should make it good with at least one example. It is
8 {EAOS/3/37} 142, lines 2 to 13 and this is a situation
9 where I asked Dr Padilla to look at a ---

10 THE CHAIR: Which day of the transcript?

11 MR WILLIAMS: This is Day 9. {EAOS/3/37}.

12 THE CHAIR: Do you have the internal page number?

13 MR WILLIAMS: It is 142. At the top of 142 I asked
14 Dr Padilla to look at a graph which shows 100% market
15 share. (Pause)

16 You will see his answer down to line 13.

17 So it is a simple point. I asked Dr Padilla to look
18 at a graph which shows 100% market share and before
19 I asked any question, he took the opportunity to suggest
20 that the exclusion of Samsung's self-supply from the
21 graph suggested that these were OEM-specific markets.
22 That was actually wrong because this was the whole
23 market excluding self-supply, which is Mr Noble's
24 approach, but it was nothing to do with what I was
25 asking about and I had not actually even asked

1 the question, but Dr Padilla took the opportunity to
2 sort of argue the case, in my submission.

3 So this is a matter for the Tribunal, but we do say
4 some of Dr Padilla's evidence has veered towards
5 argument and we invite the Tribunal to weigh that, but
6 on the issues we are dealing with for now, we say we are
7 clearly right on the merits in any event.

8 MR RIDYARD: Sorry, it might be useful, not right now, but
9 at some point for you to clarify what are the
10 circumstances in which you would — because of price
11 discrimination or whatever, in which you would regard an
12 OEM—specific market as being the right way of looking at
13 things.

14 MR WILLIAMS: We can take that away.

15 MR RIDYARD: Yes.

16 MR WILLIAMS: I think the position on price discrimination
17 markets is difficult because if one looks at the
18 Commission's guidance and indeed Dr Padilla's own book,
19 which I can give you the reference to if you like, he
20 says, look, there are formidable obstacles to price
21 discrimination markets from supply—side substitution and
22 it is common ground that within a standard there is
23 supply—side substitution within a standard. So in
24 a sense I — it is difficult for me to set up a case
25 which has not been advanced for me to knock it down.

1 All we say is that the way that this case has been put
2 on price discrimination does not make it right. I will
3 see whether I can improve on that answer.

4 MR RIDYARD: Thank you.

5 MR WILLIAMS: Moving to dominance. If Mr Noble is right
6 about the definition of the market, then Qualcomm's
7 market shares are not just very high but at times there
8 is a monopoly or something close to it so we are clearly
9 in the territory of a presumption of dominance.
10 Dr Padilla did not pursue the idea that market share
11 should be measured by volume, rather than value, but, as
12 set out in our note on market shares at {X/2.1}, we say
13 the presumption would be engaged either way because the
14 position is the same on both measures.

15 It does bear emphasis, again, that Mr Katouzian made
16 concessions in his evidence which are said to be
17 confidential, but I think the Tribunal will know what
18 I am referring to, which support the case that we
19 advance. We give the references at 27 of our closings.
20 Those concessions go directly to the points the Tribunal
21 has to decide, but one sees them dealt with at the very
22 end of Qualcomm's submissions about dominance at
23 paragraph 362, where Qualcomm says that the Tribunal
24 should not attach weight to them. I mean, it does bear
25 emphasis this is a senior individual from the Qualcomm

1 business with decades of experience working in the
2 chipset market and he has been put forward to address
3 the question of whether Qualcomm faced chipset
4 competition. The idea that he simply slipped into
5 making concessions because he did not understand what he
6 was being asked about is just not credible, in my
7 submission. So significant weight should be attached to
8 that evidence.

9 The same is true of the submission in the same
10 paragraph, 362, internal documents referring to Qualcomm
11 as [redacted or as a redacted] are not evidence of
12 market power. That is addressed in paragraph 33 of our
13 closing {EAOS/4/11}. The Napp case says evidence from
14 undertakings themselves may be particularly significant
15 and even decisive because it provides an unvarnished
16 view of the market from those involved in it.

17 So that is the sort of framework.

18 One can, on one view, cut the discussion on
19 dominance short on CDMA and LTE because at the points in
20 time that matter for our claim, the position on those
21 standards is that Qualcomm had 100% share of CDMA
22 in 2008/2009 and they had an almost 100% share in LTE
23 in 2013. Qualcomm has sought to suggest that these are
24 vibrant markets that are the subject of vigorous
25 competition and healthy expansion, but that is just not

1 the picture that the Tribunal has seen in the evidence.
2 In 3G CDMA there was a single competitor, VIA, that over
3 many, many years creeps up to a market share that never
4 exceeds 15%. It never sold a multi—mode chip, which
5 Mr Katouzian accepted gave Qualcomm a significant
6 competitive advantage. It did not sell a chip to Apple
7 and it sold a small proportion of chips only to
8 Qualcomm, very small, so — sorry, to Samsung.

9 THE CHAIR: When you refer to Mr Katouzian's various
10 concessions, can we take it that the main points on
11 which you rely are set out in your closing submissions?

12 MR WILLIAMS: Yes, they are all set out.

13 THE CHAIR: All right.

14 MR WILLIAMS: They basically go to substitutability and
15 broadly the question of dominance.

16 THE CHAIR: I am just checking there is not anything else
17 that is not in your closing submissions?

18 MR WILLIAMS: No, it is all there. I am trying to give you
19 the overview really rather than take you back through
20 all of it.

21 THE CHAIR: That is helpful. Thank you.

22 MR WILLIAMS: So that is 3G CDMA. For LTE—CDMA, there is no
23 competition at all until at least 2015 when MediaTek
24 enters the frame, you know, many years into the — four
25 or five years after the market has kicked off. Then,

1 later on, we see Intel, which acquired VIA but did not
 2 supply LTE chips until, I think, 2017 — LTE—CDMA, yes.
 3 In the hot—tub Dr Padilla suggested that this was
 4 evidence of competition through entry, but, in our
 5 submission, the example shows the opposite. Intel's
 6 inability to enter other than by acquisition and even
 7 then only at the very tail end of the LTE—CDMA era, it
 8 actually tells you the opposite story.

9 MR RIDYARD: Sorry, it entered by acquisition, but it did
 10 not acquire the incumbent, did it? It did not acquire
 11 the dominant firm so it is, surely — that is I think
 12 the point Dr Padilla made. Acquisition is part of
 13 entry.

14 MR WILLIAMS: Yes, sorry, my point is not that it did not
 15 happen and it did not create a presence in the market.
 16 My point is is this a sufficiently powerful point to
 17 demonstrate that this is a market that is constrained by
 18 entry? That is the point I was making. Entry or
 19 expansion, depending on how you analyse it. It does not
 20 happen until LTE—CDMA is on the way out basically.
 21 So ...

22 There has been a sort of weak suggestion that
 23 Qualcomm was constrained by the possibility of combining
 24 an LTE and 3G CDMA chip, but there is very, very limited
 25 evidence of this. At paragraph 87 of our closing

1 {EAOS/4/24} we cite a Qualcomm internal document which
 2 suggests that the multi—mode feature was must—have and
 3 we say this is just another example of a totally
 4 marginal point that has been given a profile it just
 5 does not merit.

6 For LTE—UMTS, Qualcomm's share was 100% in 2013 and
 7 it was still 65%, even by 2016. MediaTek gradually
 8 obtains a share of something like 20%, but the Tribunal
 9 has heard evidence about how it could only compete at
 10 the lower end of the market. That is paragraph 88 of
 11 our closing {EAOS/4/23}. Again, Mr Katouzian made
 12 concessions about this. There is a suggestion in
 13 Qualcomm's closing, again in 362 {EAOS/5/121}, that
 14 Qualcomm was not dominant, it was just the best, but of
 15 course technological advantages can themselves be
 16 a source of market power.

17 In paragraphs 104 and 105 {EAOS/4/29} of our closing
 18 we have sought to address Mr Ridyard's question about
 19 the relevance of differentiation by quality in a single
 20 market. I hope you saw that. But there are basically
 21 two points. The first is that in a differentiated
 22 market it is relevant in principle to understand
 23 competitive dynamics in particular segments, because
 24 there may still be market power which is not constrained
 25 by substitution from other parts of the market. We cite

1 the Wieland—Werke case in relation to that. It is
 2 a mergers case but it goes to that question as to
 3 whether market power in a premium segment or high—end
 4 segment is necessarily constrained by a wider market.
 5 That is the first point.

6 The second point we make is that Qualcomm has both
 7 very high market shares and the premium offer in the
 8 most profitable part of the market which no one else
 9 could match. So it is the aggregation of those factors
 10 that we say heightens Qualcomm's market power, the fact
 11 that it does not face any competition for certain
 12 products within the market.

13 So the Tribunal knows that the position changes
 14 somewhat in 2016 when Intel arrives on the scene and
 15 takes Apple from Qualcomm, but that was after
 16 several years of trying and failing to do so, in large
 17 measure because of Qualcomm's exclusive contract with
 18 Apple, which is capable of being a barrier to entry and
 19 we say was a barrier to entry, and we deal with the
 20 facts relating to that in 296 of our closing
 21 {EAOS/4/85}.

22 Just to round this off, because we are going to go
 23 to Mr Noble's report anyway, can we just bring up again
 24 {POE/21/38} which is the graph the Tribunal has seen
 25 many times. It is interesting to see in 2016 when Intel

1 starts to really gain a foothold that what happen is not
 2 that Qualcomm's market share falls, but actually it
 3 ticks up and MediaTek's share ticks down. We say that
 4 is really clear evidence of the resilience of its market
 5 power and the fact that it is not being effectively
 6 constrained by entry or expansion, because you see this
 7 major development in the market where Intel comes in and
 8 yet Qualcomm not only maintains its position but
 9 actually seems to do even better than it had been in
 10 terms of share, even though it has lost business to
 11 Intel.

12 So this whole thesis about Qualcomm being
 13 constrained by entry or expansion, this is a major event
 14 in the market and we saw what happens.

15 So if we then turn on within the report to 42, we
 16 have the same graph for 5G. Just to remind you which is
 17 that we see Qualcomm starts with 75 — page 42
 18 {POE/21/42}, in the same document. Is it coming?
 19 I will speak to it as it comes up. It just reminds you
 20 that Qualcomm starts with 75% of the market and then it
 21 stays there every year more or less until the present
 22 day. Dr Padilla said that this was endogenous, by which
 23 I think he meant this was driven by the choices that
 24 Apple was making, but that was not true in 2019 because
 25 Apple did not have any — did not buy any chips in 2019

1 and those chips did not come on—stream until 2020. So
 2 in truth what has happened is Apple has acted in
 3 line with the market.
 4 MR RIDYARD: Mr Williams, there must come a point — just
 5 going back to the LTE chart, there must come a point
 6 where the decline in even a high market share is so
 7 significant that you do reach the conclusion that
 8 dynamic competition is working effectively?
 9 MR WILLIAMS: Yes, that is true. There would come a point,
 10 although here it never went below 65. The significance
 11 of the event of 2016, the point I was making there, was
 12 that even though you have this major event which you
 13 might expect to sort of be a catalyst for change in the
 14 market, in fact Qualcomm stays where it is. So the
 15 question the Tribunal has to decide is — one of the
 16 main ways the case is put against me is, well, look,
 17 there is this constraint, there is constraint — there
 18 is constraint from expansion, but that is a good
 19 illustration, sir, that where one sees on one view major
 20 change, in fact you do not see that effect. What you
 21 see is Qualcomm continuing to tick over. So of course
 22 there could come a point and it does slide off
 23 eventually when 5G comes into focus, but I am simply
 24 making — I made that point really in the context of the
 25 case that is made against me in terms of entry and

1 expansion.
 2 I do not think the graph on page 42 has come up, but
 3 I was going to move on now anyway. It is a straight
 4 line running across from 75% and it is more interesting
 5 actually in terms of what you see — what happens below
 6 that in terms of the interaction between Samsung and
 7 MediaTek.
 8 So Mr Katouzian was cross—examined and the Tribunal
 9 saw all the evidence through 2018 of Qualcomm's
 10 confidence in its leadership of the market, its
 11 technological advancement in mmWave compared to others.
 12 We can see it now. The next biggest player we can now
 13 see is MediaTek which from 2020 takes something like
 14 a 20% market share, [redacted]. I am going to come on
 15 to deal with them in a bit more detail when I deal with
 16 Apple and Samsung in a minute.
 17 There is also evidence of Qualcomm consciously
 18 imposing price premia over its competitors in 5G as well
 19 as 3G CDMA and we set that out 100 to 102 of our
 20 skeleton. It is only when we get to 5G that the
 21 constraint exerted by Samsung's self—supply becomes any
 22 sort of issue. Just to cover this off, Samsung never
 23 self—supplied 3G CDMA. It did not supply LTE 3G CDMA
 24 until 2018 and in 2013 barely even supplied itself with
 25 LTE. We know that in 2013 Samsung was 90% dependent on

1 Qualcomm for LTE and in the following year it was still
 2 over 80% dependent. Both years Samsung supplied only
 3 10% to itself. So we explored this in the evidence.
 4 Samsung obviously had the incentive to self—supply as
 5 much as it could and one can see, from {ORI/261/15} that
 6 it ramps up over time but even by 2015 it is still using
 7 Qualcomm for 60% of its chips. So there is really no
 8 serious suggestion that it was able to offer constraint
 9 in the early years when it could not even supply itself.
 10 That is not the right document, sorry, but it does not
 11 matter. It is {ORI/261.15}. In any event, what is
 12 clear is that in 2008, 2009 and 2013 there just is no
 13 material constraint from self—supply which are the years
 14 that matter.
 15 I just want to deal with two points of law to round
 16 off on dominance, if I may. In paragraph 330 of their
 17 closing {EAOS/5/108}, Qualcomm refer to the case of
 18 Cisco in support of the proposition that market shares
 19 should be approached with caution in dynamic markets.
 20 I will try and take this quickly. If the Tribunal wants
 21 to see it, you can see it. It is {AB3/17}. This was
 22 about Microsoft acquiring Skype and Cisco objected to
 23 the merger, but it was cleared by the Commission. If we
 24 look at page 15 {AB3/17/15}, paragraph 52 —
 25 THE CHAIR: What pdf page is it?

1 MR WILLIAMS: I am sorry, Madam. I am going to go to 1355
 2 in AB3. Sorry, I have the references. I just keep
 3 forgetting to read them out.
 4 THE CHAIR: All right.
 5 MR WILLIAMS: So one can see in 52, there is a paragraph
 6 which says, about four lines down:
 7 "First, in this respect, it took the view that
 8 market shares are not particularly indicative of
 9 competitive strength in a fast—growing market ..."
 10 So that is the Commission's view.
 11 If we then move on to page 67 — sorry,
 12 paragraph 67, bottom of page 17, pdf 1357 {AB3/17/17}.
 13 It says there:
 14 "[Cisco] criticised the factors put forward in the
 15 contested decision in order to qualify the significance
 16 of market shares."
 17 It says the criticism is unfounded.
 18 MR TURNER: I have lost where you are reading?
 19 THE CHAIR: It is the very last two lines, is it?
 20 MR WILLIAMS: The very end right at the bottom of the page.
 21 It is saying Cisco criticised the factors put forward in
 22 the decision to qualify the significance of market
 23 shares. This is the Commission saying market shares are
 24 not very significant.
 25 Then 68, one can see the facts which is that there

1 was significant fluctuation in market shares over
 2 seven months and 69 talks about ephemeral market shares:
 3 "Large market shares may turn out to be ephemeral."
 4 I think there is one thing we can say about
 5 Qualcomm's market shares is that they are not ephemeral.
 6 We are obviously not looking at a period as short as
 7 seven months, we are looking at periods of many, many
 8 years. So this case does not really help my learned
 9 friends at all .
 10 Then the other legal point is countervailing buyer
 11 power where I made my submissions in opening about
 12 whether countervailing buyer power should be assessed
 13 with reference to a single customer or across the market
 14 and we went to Irish Sugar and the Motorola case. In
 15 paragraph 326 of their closing {EAOS/5/107} Qualcomm
 16 cite the Flynn case which will be familiar to you from
 17 a former life , Madam, and they say that that clarified
 18 the law following Irish Sugar and Motorola. I mean,
 19 I think the point that is being made is that
 20 paragraph 204, which is quoted in their skeleton at 326,
 21 refers to the buyer, singular and, hence, one can have
 22 countervailing buyer power of a single buyer. The
 23 submission we made was you have to look at the position
 24 across the market, but that was a case in which there
 25 was only one customer for Phenytoin, which was the NHS.

1 In fact that point is made in the same paragraph,
 2 paragraph 204. So the question that we are dealing with
 3 is whether countervailing buyer power is assessed at the
 4 level of a single customer or across the market just did
 5 not arise and Irish Sugar is not referred to.
 6 So, in my submission, it is just not dealing with
 7 the point and it is certainly not overruling Irish Sugar
 8 and the Motorola approach.
 9 So then moving on to Apple and Samsung's specific
 10 dependence and building on the points you have seen
 11 about the overall market position. Now, the Tribunal
 12 has seen that 3G CDMA was essential for certain major
 13 markets, including China and the US, and I did want to
 14 take you to one document which I think is illuminating
 15 on this. It is {POF/134}.
 16 MR TURNER: Can I just ask you: where was the evidence in
 17 the --- on how widespread CDMA 2000 was in the factual
 18 evidence? I have heard --- if somebody could give me the
 19 references at some point.
 20 MR WILLIAMS: Where you say how widespread ---
 21 MR TURNER: You say it was the present in the US and China.
 22 MR WILLIAMS: Do you mean what were the volumes compared to
 23 UMTS, for example?
 24 MR TURNER: Just any evidence on it, which carriers were
 25 using CDMA 2000, which jurisdictions, which --- I have

1 heard it being referred to in open court on a number of
 2 occasions. I just was not --- it was the evidential
 3 basis for it. I do not think there is anything arising
 4 on it. I just want to know where it is.
 5 MR WILLIAMS: We can deal with that, I am sure.
 6 THE CHAIR: I think it is just the references for which
 7 jurisdictions it has been used in and how widely. So we
 8 know it was being used in the US with certain carriers .
 9 MR TURNER: Certain carriers, yes.
 10 MR WILLIAMS: To some extent it has been dealt with through
 11 the expert evidence and you are saying you want to see
 12 the factual ---
 13 MR TURNER: What evidence there is. If there is not
 14 anything, let us know. If it is in the expert evidence,
 15 let us know. I do not understand it to be in dispute.
 16 THE CHAIR: Probably somewhere in the technical evidence I
 17 would have thought.
 18 MR WILLIAMS: We will tidy that up for you. I am sure there
 19 are plenty of places. We will find the best one for
 20 you.
 21 MR TURNER: Just while you are there, can I raise
 22 a similar --- sorry to take you out of your course. Also
 23 there is a reference to the need for backwards
 24 compatibility for 5G, that it is not necessary when you
 25 get to 5G for it to be backwards compatible with,

1 I think, 3G CDMA. Again ---
 2 MR WILLIAMS: That is a judgment Mr Noble has made actually.
 3 MR TURNER: That is just --- again, if I could just have the
 4 references for that. The last thing ---
 5 THE CHAIR: Before you move on then, also I think can you
 6 include backwards compatibility with 3G UMTS because
 7 I think the extent to which the 5G handsets were all
 8 multi-mode or were not multi-mode backwards to 3G either
 9 UMTS or CDMA goes to the point that has been somewhat
 10 debated in the closing submissions about Mr Gonell's
 11 evidence about the scope of the 3G licences and whether
 12 those covered 5G.
 13 MR WILLIAMS: Is it convenient to get references like this
 14 on a page of paper?
 15 MR TURNER: Yes, that would be perfect. Thank you very
 16 much.
 17 There is one more. The different types of 5G, there
 18 was the mmWave, I think, which was used by one carrier
 19 only. Again, I just do not recall reading that in the
 20 evidence so if that, again, could be put on the piece of
 21 paper as well.
 22 MR WILLIAMS: Does the Tribunal need these by the end of the
 23 trial ?
 24 MR TURNER: The end of the trial is fine, yes. No urgency.
 25 MR WILLIAMS: I think we can get them.

1 MR TURNER: Are you asking for longer than the end of the
2 trial ?
3 MR WILLIAMS: I was just wondering. I am sure we can do it
4 over the weekend.
5 MR TURNER: If you need a couple of extra days, that is
6 absolutely fine, yes.
7 MR SAUNDERS: It may be helpful if we could see this so we
8 could try to agree it, if possible.
9 MR TURNER: Yes, that would be perfect.
10 MR WILLIAMS: That would be helpful, but it might take a bit
11 longer.
12 THE CHAIR: Yes, of course, if that takes a bit longer,
13 because I know you are all busy working on your oral
14 closing submissions, if it takes a bit longer than the
15 end of the trial, then a few days will be fine.
16 MR WILLIAMS: Yes, {POF/134}. This is part of the
17 context — goes to part of your context, because this is
18 about China Telecom adopting CDMA at the time, but it
19 is — could we blow that up, please. Thank you. Now,
20 it might be best for the Tribunal just to sort of read
21 the paragraph starting:
22 "We had assumed ..."
23 (Pause)
24 In fact, perhaps start at:
25 "Since our preliminary recommendation to spin ..."

1 That is coming back to — that is coming back to the
2 separation of the two businesses.
3 MR TURNER: So the author of this document is who? This is
4 a Qualcomm document?
5 MR WILLIAMS: This is a Qualcomm document. So:
6 "Since our preliminary recommendation to spin, China
7 has re—organised the carriers and China Telecom will own
8 the CDMA2000 network. This is extremely positive news
9 for us. From a spin perspective, it militates against
10 spinning for at least the following reason ... "
11 Then read the next paragraph.
12 THE CHAIR: What does "spin" mean?
13 MR WILLIAMS: It means separate the licensing and the
14 chipset businesses. It is that issue. (Pause)
15 Really we take two points from this. The first is
16 that Korean manufacturers, like Samsung, will want and
17 need to supply CDMA into these regions. Qualcomm refers
18 to itself as the pre—eminent supplier. It talks about
19 OEMs being reliant on it for continued supply.
20 Then at the — toward the end of the paragraph, it
21 says:
22 "I believe that this will help us grow our business
23 as one company. If we were two companies, they would
24 rely entirely on QCT, but would have no incentive not to
25 attack QTL."

1 We said in our skeleton — I think one other
2 document was our case in a nutshell and this is another
3 document which is our case in a nutshell which is
4 identifying the dependence on OEMs on Qualcomm for
5 particular types of chips and the fact that that reduces
6 the risks of attacks on the licensing business because
7 of the dependence for chips. That is what that is
8 clearly saying. So it is an extremely illuminating
9 document, but I was taking the Tribunal to it as
10 an example of how 3G CDMA was essential for certain
11 major markets. Here it is China.
12 I said in opening that Qualcomm had found a few
13 emails between Samsung and Qualcomm which referred to
14 VIA and that these were a drop in the ocean. That is
15 still my submission after the trial. I mean,
16 paragraph 334 of Qualcomm's closing refers to this
17 {EAOS/5/109}. It boils down to one episode in 2009,
18 where VIA tried and failed to take share off Qualcomm,
19 even though Qualcomm were still charging higher prices.
20 It is paragraph 101 of our closing. This is really not
21 the stuff of rebutting the presumption of market — of
22 dominance based on a 100% market share. We do say that
23 this is indicative of a more general approach where
24 every conceivable point has been taken to resist what we
25 say is an inevitable finding of dominance in each of

1 these markets. One can understand why Qualcomm is
2 resisting this notion of dependence because it is the
3 first critical building block of the theory of harm, but
4 we do say there is a lack of realism in some of the
5 submissions that are made in this part of the case.
6 Paragraph 345 of Qualcomm's closing {EAOS/5/114}
7 deals with the equivalent issue for Apple and it is
8 equally thin gruel, in my submission. It is, again,
9 more or less one email chain which refers to the
10 possibility that Apple might choose a competitor,
11 although in that email chain Qualcomm is still proposing
12 to charge Apple a CDMA premium. So it is, again, not
13 a compelling basis on which to rebut a presumption of
14 dominance based on 100% market share. Apple never
15 bought a single chip from VIA and the Tribunal has
16 Apple's views about its dependence on Qualcomm — that
17 is 109 of our closing — for 3G CDMA and its views on
18 the lack of credibility of VIA at 110.
19 So if we move to LTE. I have already addressed the
20 position in 2013 when Qualcomm has, again, more or less
21 100% market share and I have dealt with the position on
22 Samsung self—supply. There was no constraint, no
23 material constraint, from self—supply in 2013. The
24 volumes are just too tiny. [redacted].
25 If we just look at Qualcomm's closing on this, 338

1 {EAOS/5/111}. [redacted]. Now, if we do bring up
 2 {ORI/261.15}, you can see the names of the suppliers.
 3 If we bring up {ORI/261.15} — sorry, I am not being
 4 clear. If you look at the table of shipments to
 5 Samsung, you have Qualcomm and Samsung and then you have
 6 effectively everyone else and you can see the volumes
 7 are absolutely de minimis at this time. In fact, the
 8 Tribunal knows that two of these players left the
 9 market. One of them left citing Qualcomm's dominance as
 10 a reason for doing so and the Tribunal knows Intel did
 11 not gain any traction until much later. Then the rest
 12 of the evidence cited in paragraph 338 refers to
 13 a document from a year later. So that is all after the
 14 event. So, again, no serious basis for rebutting the
 15 presumption of dominance.
 16 Now, there is an additional angle in relation to
 17 Samsung and LTE—CDMA because part of our case relates to
 18 the 2009 negotiation, which was the original negotiation
 19 of the LTE SEP rate. 2009 was the very beginning of LTE
 20 and the agreement at that time is actively anticipating
 21 the advent of LTE. It is totally clear that — sorry,
 22 Samsung was totally dependent on Qualcomm for 3G CDMA at
 23 that time and it would have been equally clear it would
 24 be totally dependent when LTE—CDMA came along, as
 25 anticipated in the agreement, and if we could look at

1 {POD/7} at the bottom of page 32 {POD/7/32}, please.
 2 This is evidence — I was not going to read any of this
 3 out. I was going to say, this is evidence of Samsung
 4 relating to its relationship with Qualcomm about CDMA at
 5 this — at about this time. Then we sort of read on to
 6 the next page. It starts at — probably only need to
 7 read from the bottom of 32 on to the next page when the
 8 Tribunal is ready.
 9 THE CHAIR: Well, you want us to read from the bottom so let
 10 us go over the next page now {POD/7/33}.
 11 MR WILLIAMS: The next page, please. (Pause)
 12 THE CHAIR: Where do you want us to read to?
 13 MR WILLIAMS: Well, you can get the flavour of it down to
 14 the end of the sentence that starts, "With that
 15 standard ..." because it carries on in similar vein
 16 after that. You will see there is reference to
 17 particular providers in the last extract which goes
 18 partly to this question.
 19 THE CHAIR: All right.
 20 MR WILLIAMS: But I think the Tribunal will see that the
 21 extent of the perceived dependence. So we say this is
 22 an obvious instance where looking ahead Samsung would
 23 have known that it was — its dependence on Qualcomm for
 24 CDMA at that time was going to move into the new era of
 25 LTE—CDMA, that they were negotiating an LTE—CDMA licence

1 and in a world where Samsung was going to want to
 2 continue to supply Verizon and Sprint and so on, we say
 3 the need for Qualcomm chips would have been perfectly
 4 clear.
 5 Now, Qualcomm deals with this in its closing at 335
 6 and 337 {EAOS/5/110–111}. We go back to the two chip
 7 solution, which I have already addressed and I have
 8 already said that really that point just cannot bear the
 9 weight that is put upon it. There is reference to two
 10 Samsung phones from 2011 and we just say — it is
 11 a totally inadequate basis for saying that Qualcomm's
 12 total dominance in CDMA would have been constrained.
 13 Now, for Apple and LTE, our closing refers to two
 14 particular points. There is its need for multi—mode
 15 chips, including CDMA, in the context of a global SKU
 16 statutory. That is a single chip around the world. We
 17 deal with that in paragraph 112 {EAOS/4/31}. That was
 18 of relevance, given the importance of CDMA markets for
 19 Apple, including in the US, and we quote, at 114 of our
 20 closing {EAOS/4/32}, an internal Qualcomm document that
 21 says without Qualcomm, Apple would lose big parts of
 22 North America, China and Japan. So it is quite clear.
 23 There is also evidence of Apple's need for premium
 24 chips where we cite evidence from Apple witnesses which
 25 Mr Katouzian also corroborated.

1 Now, the position obviously changed for Apple and
 2 LTE from 2016, but that is a long time after the 2013
 3 negotiation and Qualcomm deals with this at 346 and
 4 following of its closing. I can skip over 346
 5 {EAOS/5/115} because that deals with the position
 6 before 2013. I am not going to go over CDMA again at
 7 349 {EAOS/5/116}.
 8 The main point is 350 {EAOS/5/116}, which refers to
 9 evidence of Apple telling Qualcomm that there is
 10 a threat and it said that — yes, the threats from
 11 Intel. I can say that. It says Qualcomm did not know
 12 if Apple was bluffing, but the fact — the mere fact
 13 that Apple referred to a possible alternative does not
 14 rebut a presumption of dominance arising from 100%
 15 market share. As to whether Apple was bluffing or
 16 whether Qualcomm knew whether Apple was bluffing,
 17 paragraphs 295 and 296 {EAOS/4/85} of our closing set
 18 out the evidence that using Intel was not a plausible
 19 option for Apple at that time because Apple would lose
 20 its rebates and the idea that Qualcomm did not know that
 21 is totally incredible because it is the whole part of —
 22 the whole point of Qualcomm's strategy to tie Apple in
 23 with those exclusive arrangements, but none of this
 24 rebuts the presumption of dominance at that stage
 25 anyway.

1 Then, again, in 350.3 {EAOS/5/117} there is evidence
 2 "Apple slides" and we say all this is Apple just
 3 thinking about how it can generate some credible
 4 competition to Qualcomm but, as the Tribunal knows,
 5 failing to do so at that time.

6 Then the rest of it deals with events after the BCPA
 7 so I do not need to spend time on that.

8 MR RIDYARD: Mr Williams, I think here you seem to be
 9 talking about concerns that the exclusivity rebate with
 10 Apple made it very expensive for Apple to switch to
 11 other chipsets suppliers. That I can sort of see, that
 12 argument, but it seems to be an argument from
 13 a different case. I mean, is it part of your case here
 14 or —

15 MR WILLIAMS: Well, I think the point I am making is that
 16 Qualcomm says, "We do not know if they were bluffing".
 17 I was responding to that. I was saying the idea that
 18 Qualcomm did not know if this was a real threat, we say
 19 Qualcomm had got Apple where it wanted it.

20 MR RIDYARD: Because they knew it was very costly for Apple
 21 to switch. Even if there were suppliers out there, it
 22 was extremely expensive for them to switch to them.

23 MR WILLIAMS: It was the bluff point I was dealing with
 24 really in what was Qualcomm's real perception of the
 25 situation.

1 So none of that supports the proposition that Apple
 2 had a serious alternative at a point where Qualcomm had
 3 basically 100% market share — 97% market share.

4 Coming then to 5G. Now, the Tribunal saw this issue
 5 explored in detail in the cross-examination of
 6 Mr Katouzian and the overall point that became apparent
 7 through Mr Armitage's cross-examination is that there
 8 was a stark mismatch, in my submission, between the
 9 tenor of the evidence Mr Katouzian gave in his second
 10 statement about the extent of the competitive threat
 11 that Qualcomm faced in the run-up to 5G in April 2019
 12 and the very, very robust Qualcomm internal view at that
 13 time about how far ahead it was. The Tribunal saw,
 14 through the documents, that Qualcomm believed it was far
 15 in the lead, right through 2018, into 2019, and
 16 everything since then has proven them right. We saw
 17 where its market share has sat at all times.

18 Of course Qualcomm can point to odd emails along the
 19 way where Qualcomm has contemplated that there might be
 20 competition and there is a specific issue about Intel,
 21 which I will come to, but Qualcomm has never been in any
 22 doubt about its leadership on 5G, both generally and
 23 because of the position in relation to mmWave, which
 24 remained important for Verizon, and we can cover that
 25 off, as Mr Turner has asked.

1 There are three competitors to consider on
 2 5G: MediaTek, Samsung and then, for Apple in particular,
 3 there is Intel. It is right to say that MediaTek
 4 established itself more quickly in 5G than 4G and it has
 5 hovered around 20% since 2020, but it is a supplier that
 6 never sold Apple a single chip and there is nothing to
 7 suggest that it was seriously in the running for Apple's
 8 5G deal. In fact, paragraph 121 of our closing
 9 {EAOS/4/33} sets out evidence that it is very unlikely
 10 MediaTek would even have been ready if it had been
 11 a candidate. So we can clear MediaTek away.

12 In terms of Samsung's relationship with Qualcomm, it
 13 has taken around 50% of chips from Qualcomm since 2019,
 14 a bit less, I think, in the first year. This is
 15 paragraphs 139 and 140 of our closing {EAOS/4/38}.

16 THE CHAIR: Are these multi-mode chips?

17 MR WILLIAMS: Multi-mode back to LTE. They are at least
 18 back to LTE. I do not think we are splitting out
 19 anything in the market share figures.

20 So there is a very high proportion overall and
 21 a particularly high percentage, as we set out in
 22 paragraph 140, in relation to flagship phones worldwide.
 23 Although MediaTek has sold to Samsung, it has taken
 24 share at the expense of itself, rather than at
 25 Qualcomm's expense. That is paragraph 141 of our

1 closing {EAOS/4/39}. We say that is a very revealing
 2 fact because even though Samsung has the incentive to
 3 self-supply to the extent possible, one can see, first
 4 of all, the extent of its dependence on Qualcomm and,
 5 secondly, the impotence of the threat from Samsung as an
 6 external supplier. It is a total flight of fancy to
 7 suggest that Exynos was in a position to constrain
 8 Qualcomm in relation to Apple, given that it was not
 9 even able to supply itself, and there is absolutely
 10 nothing to suggest that it could have supplied the very,
 11 very significant volumes that Apple needed.

12 MR RIDYARD: Is that admitting that MediaTek must be better
 13 than Samsung then? You are saying that the MediaTek
 14 sales have cannibalised Samsung's own self-supply and
 15 you have also said Samsung will self-supply whenever
 16 possible, so does that mean MediaTek is higher quality
 17 than Samsung's own?

18 MR WILLIAMS: I mean, I cannot give evidence. One has to
 19 read something into the fact that Samsung itself has
 20 chosen to use MediaTek — well, in terms of the
 21 measurement of the share, it has taken more from
 22 MediaTek than it has taken from itself and there appears
 23 to have been a shift. So one has to read something into
 24 that.

25 MR RIDYARD: You also say that Samsung would always

1 self—supply, if it could.
 2 MR WILLIAMS: Well, that is what Mr Katouzian says.
 3 MR RIDYARD: Yes.
 4 MR WILLIAMS: So there — but there does seem to be
 5 a perception. That does suggest that Samsung has that
 6 perception, yes, I agree, but it could depend on
 7 particular needs. It is very difficult to say.
 8 MR RIDYARD: Yes.
 9 MR WILLIAMS: So we say that there is no credible suggestion
 10 really that MediaTek and Samsung were in the running for
 11 Apple. As I say, MediaTek has never sold to Apple
 12 a chip and we point to Qualcomm's internal documents, at
 13 paragraph 123 of the closing, which tells you what
 14 Qualcomm thought Apple's options were {EAOS/4/34}.
 15 Obviously its position with Intel is different
 16 because it is a fact that Apple had a plan to use Intel
 17 for 5G and Qualcomm understood that for a time, like
 18 everyone else. It is a fact that Intel — it is also
 19 a fact that Intel failed to make it on 5G and never made
 20 a 5G chip and Dr Padilla described Intel as "a failure".
 21 He said that {Day 7/108:10}. So the question is when
 22 did it become apparent to everyone that Intel was not
 23 going to make it?
 24 As to what Apple thought, the Tribunal has Ms Mewes'
 25 evidence that Apple considered itself over a barrel

1 because it needed Qualcomm's 5G chips and that was why
 2 it settled with Qualcomm. I am not going to deal with
 3 the settlement. I am just going to deal with whether
 4 Qualcomm needed — sorry, Apple needed Qualcomm's chips
 5 at that time and specifically whether Intel was
 6 a credible option.
 7 The Tribunal has seen evidence that Apple was late
 8 to the market with 5G. It was over a year behind and
 9 paragraphs 118 and 119 of our closing {EAOS/4/33} quote
 10 Qualcomm internal documents which consider the time —
 11 the issue of time pressure on Apple. That was all put
 12 to Mr Katouzian and we say that is very strong evidence
 13 that there was real urgency for Apple and it could not
 14 delay. It needed to make a decision at that time, which
 15 is one of the issues that arises: could it just hold on?
 16 The key point is dealt with in 124 and 125 of our
 17 closing {EAOS/4/34–35}, which deals with Qualcomm's
 18 assessment towards the end of 2018 of whether Intel
 19 could meet Apple's requirements and, as I say, when it
 20 reached that view. We say the position is clear on the
 21 documents and we invite the Tribunal to rely on those
 22 documents. [redacted].
 23 So what does Qualcomm say? I am just going to focus
 24 on the material from 2019, rather than the earlier
 25 material which does not shed any light on the position

1 at 2019. I put to Dr Padilla these earlier documents
 2 that do not shed light on the position when it matters.
 3 So 356.3 of Qualcomm's closing {EAOS/5/119} refers
 4 to a Reuters article to which Mr Katouzian was taken in
 5 re—examination and it reports that Apple has spoken to
 6 MediaTek and Samsung. That may or may not be true. It
 7 does not say when they spoke. All sorts of things are
 8 reported and there is an irony in the fact that when
 9 Mr Katouzian was taken to Qualcomm's own internal
 10 documents, he called them extrapolations, but he —
 11 THE CHAIR: Which document are you talking about?
 12 MR WILLIAMS: 356.3 of my learned friend's skeleton. This
 13 is a Reuters article. It says it is public knowledge
 14 but it is something that has been reported in the press.
 15 We just say there is an irony in the fact that when he
 16 is taken to their own documents, he says these are just
 17 extrapolations, but somehow this is high authority as to
 18 what everyone thought at the time. The Tribunal can do
 19 a lot better than this article in deciding what Apple's
 20 options were.
 21 356.4 and 5 {EAOS/5/118}, I am just going to tread
 22 carefully because these are confidential. Mr Bailey
 23 took Mr Noble, so this is an attempt to sort of get the
 24 facts up by cross—examining Mr Noble, about some
 25 documents from later in time which he said shows other

1 suppliers were still in the running into 2019. It
 2 was — the Tribunal may recall how these documents are
 3 characterised. You can see they were characterised in
 4 the same way, towards the end of the second line, how
 5 the documents are obtained.
 6 THE CHAIR: Sorry, what are you asking us to look at?
 7 MR WILLIAMS: Do you see the penultimate word on — perhaps
 8 it is easier — in 356.5 it says "Apple continued to
 9 evaluate", in second line, and then there is the word.
 10 THE CHAIR: Yes.
 11 MR WILLIAMS: Yes. So that is how this was characterised.
 12 Mr Noble — it was put to Mr Noble that is what they
 13 were and he said, "Well, are they that, because these
 14 numbers are in a range? It does not look like that to
 15 me". With respect, he was right about that so it was
 16 put to him that that is what these were. In fact, the
 17 document does not show anything really. What it shows
 18 is Apple continuing to benchmark shortly before it
 19 entered into a contract but, I mean, the effect of the
 20 evidence is not really that that is what they are. It
 21 just does not look like that at all, but, anyway,
 22 certainly in my submission an unsatisfactory way to try
 23 and establish the facts when we can see it is clear from
 24 the earlier Qualcomm internal material what they
 25 considered the position to be.

1 I can skip over 357.1 because that is from much
 2 earlier in time {EAOS/5/119}.

3 357.2 {EAOS/5/119}, you can read the first two and
 4 a half lines of that just to see what the point being
 5 made is. This is a document that concerns Qualcomm's
 6 business plans. You see towards the end of the
 7 paragraph there is a reference to "baseline planning
 8 assumption". We deal with this in our closing at 128
 9 {EAOS/4/35}. The simple point is this is December 2018
 10 when Qualcomm did not have a contract with Apple and it
 11 is not surprising if a baseline planning assumption does
 12 not include a contract that it does not have, but that
 13 is quite separate from what Qualcomm thought that
 14 Apple's real options were, as to which you have to read
 15 this together with 124 and 125 of our skeleton
 16 {EAOS/4/34}, which tell you what Qualcomm thought
 17 Apple's options were and what it really thought about
 18 the Qualcomm threat — sorry, the Intel threat.

19 So the Tribunal has a lot of evidence painting the
 20 picture here.

21 We come back to Ms Mewes. She has given sworn
 22 evidence. We do not ask the Tribunal to take that
 23 evidence at face value on whether they were over
 24 a barrel, whether they needed chips, but we do say that
 25 evidence is strongly corroborated by the material the

1 Tribunal has seen and there is nothing to suggest that
 2 it is anything other than honest and accurate evidence
 3 about whether Apple really had another option.

4 So, Madam, that takes me to the end of that topic
 5 and I see the time.

6 THE CHAIR: Yes. All right. Thank you.

7 MR WILLIAMS: I am running a bit behind because of our
 8 discussion earlier. I will look at it over lunch and
 9 try and get through what I have got left as quickly as
 10 I can.

11 THE CHAIR: All right.

12 MR WILLIAMS: What I might do is I will discuss with
 13 Mr Moser whether we make any tweaks to the order in
 14 which we do things and whether RTL comes later.

15 THE CHAIR: On any view, Mr Moser will be starting this
 16 afternoon?

17 MR WILLIAMS: It will not be very long before Mr Moser
 18 starts.

19 THE CHAIR: Thank you very much.

20 Well, do you want us to come back at 1.55 then?

21 MR WILLIAMS: I would be grateful.

22 THE CHAIR: Yes, all right. We will do that. 1.55.
 23 (12.56 pm)

24 (The luncheon adjournment)

25 (1.55 pm)

1 THE CHAIR: Yes, Mr Williams.

2 MR WILLIAMS: Madam, just to let you know. There is
 3 a slight change of plan. I am going to deal with the
 4 economic issues as they relate to abuse and we are going
 5 to postpone RTL until further down the batting order and
 6 just use the time in that way.

7 THE CHAIR: All right.

8 MR WILLIAMS: We have addressed the main economic issues
 9 that bear on abuse in our closing and in fact Qualcomm
 10 has addressed broadly speaking the same issues so we
 11 have identified the same targets. I am going to just
 12 pick up a few points and respond to some of what is said
 13 in Qualcomm's closing about those issues.

14 The first point I wanted to pick up is a short point
 15 that is made in paragraph 386 of our closing, which is
 16 that Dr Padilla did accept a key plank of our case that
 17 in circumstances where an OEM has essentially 100% of
 18 the market, then it is able, first of all, to make a
 19 credible threat of the withdrawal of chip supply and,
 20 secondly, that can lead to inflated royalty rates. We
 21 give the reference to Dr Padilla's oral evidence there
 22 and in fact our summary of the evidence is a bit
 23 compressed because when one reads the evidence, he does
 24 go on and say that that situation can lead to inflated
 25 royalty rates. So that is a key building block of the

1 case and we say it is important that Dr Padilla accepted
 2 that.

3 The second point is an issue that was taken up with
 4 Mr Noble in the hot—tub by you, Madam, and Mr Ridyard,
 5 which is why Qualcomm would seek to take the overcharge
 6 on the royalty and not on the chipset. There are two
 7 key answers to that which we give in paragraph 393 of
 8 our closing {EAOS/4/117}. Part of the answer relates to
 9 a point made in Dr Padilla's evidence in the hot—tub,
 10 where he said, well, the customer is the same in both
 11 markets and that the point we make is that the customers
 12 are not always the same because there are customers that
 13 pay the royalty who are not chipset customers. There
 14 are OEMs who buy chips from Qualcomm, but also buy chips
 15 from some other suppliers but they pay the royalty on
 16 everything. So this is our point that the royalties
 17 operate like an industry—wide tax and Qualcomm has the
 18 incentive to tax the industry, rather than just charge
 19 its own customers. We do say that that is an important
 20 point in understanding Qualcomm's incentives as to where
 21 it takes the rent.

22 The second answer Mr Noble gave is that there is
 23 some risk of entry into the chipset market, but no risk
 24 of entry into the licensing market and so if Qualcomm
 25 can find a way of exploiting its market power in the

1 licensing market, then that is to be preferred.
 2 Now, Qualcomm offers various responses to this point
 3 in its skeleton argument. This is paragraphs 212
 4 through and following. The first point that they make
 5 is that Mr Noble's point or his position is inconsistent
 6 with his view that barriers to entry are high. We say
 7 that is not right. High barriers to entry or expansion
 8 does not mean entry or expansion is impossible. The
 9 Tribunal has seen the evidence on this, whereby
 10 sponsoring Intel was a challenging project for Apple
 11 over many years, but Apple did get there so one can
 12 sensibly say that the barriers are high but not
 13 insurmountable.

14 The second point that is made is that Mr Noble's
 15 argument does not work or his position does not work
 16 because the OEM can fix the problem by sponsoring entry
 17 either way. We say that argument is missing the point
 18 for this reason: if Qualcomm increases chipset prices
 19 itself, then it increases the risk of entry without
 20 sponsorship. It is creating an opportunity for
 21 competition in the chipset market, but if it increases
 22 licensing revenues, then chipset rivals have to compete
 23 with what is still a lower chipset price and, in that
 24 event, Qualcomm's only really likely to face
 25 a competitive response in the chipset market through

1 sponsorship, which is the case study we have seen with
 2 Apple and Intel and, in essence, we say it is obvious
 3 that the risk of entry is greater in a situation where
 4 Qualcomm leaves the goal open in the chipset market
 5 itself, rather than in a situation where the customer
 6 has those do the hard yards of sponsorship. So we say
 7 the two situations are really quite different.

8 The last point on this issue is that Mr Noble
 9 referred to MFNs as a factor which potentially
 10 disincentivised sponsorship and, in my submission, this
 11 is a second order point because, for the reasons I have
 12 already given, entry is less likely where sponsorship is
 13 required than where the chipset price is higher. So
 14 this is a second order point, but nevertheless Qualcomm
 15 says, well, then if MFNs operate, then the whole theory
 16 of harm collapses and, in my submission, this point is
 17 not right either.

18 What Mr Noble is saying is that if an OEM were to
 19 obtain a lower rate, then that would potentially cascade
 20 through the industry and that is something that they
 21 will take into account, but with the abuse by Qualcomm,
 22 as you know, our case is that they have a market-wide
 23 licensing practice which allows it to impose inflated
 24 royalties on everyone and there has been no successful
 25 challenge to those rates. So there is no inconsistency.

1 Rates are inflated. MFNs do not operate to take the
 2 rates down. All Mr Noble was saying is that an OEM
 3 deciding whether to sponsor entry is going to weigh up
 4 the fact that it will be affording an advantage to its
 5 rivals.

6 We ---

7 MR TURNER: Sorry, I am losing context a little bit. Just
 8 going back to Mr Noble's first point, you say that
 9 the --- so in a classical situation where you have
 10 monopoly rights, you keep everyone out of the market and
 11 you put the product on the market and you charge an
 12 elevated price, as your entitlement under your monopoly
 13 right but, as you rightly point out, in this case you
 14 are forced to not be a monopolist, if you want to be
 15 part of this scheme, the ETSI scheme, whatever, so
 16 therefore you have to pull out a royalty rate precisely
 17 for the reasons you were saying Mr Noble said so that
 18 you can charge not only the people who are buying your
 19 chips but charge everyone else in the industry who is
 20 not buying your chips, or at least certain --- so I mean
 21 that is just the state of affairs. There is nothing ---
 22 I am not sure why that is a point in your favour or why
 23 that is a criticism of Qualcomm or how it feeds in to
 24 the abuse?

25 MR WILLIAMS: The point is that they charge it across the ---

1 MR TURNER: Yes, that they pull it out of the price of chip,
 2 with the reasons we have just discussed, and then they
 3 have a separate royalty that they charge across the
 4 industry, including the people who buy their chips.
 5 There is nothing wrong with that. That is a consequence
 6 of the way the market is structured.

7 MR WILLIAMS: No, right, I think I made that point in the
 8 context of the incentives to do --- why would you do
 9 this? Well, one reason you might do it is if you can
 10 inflate the royalty and then charge everyone that
 11 royalty ---

12 MR TURNER: Irrespective of whether you inflate it or not ---

13 MR WILLIAMS: I am answering --- the way the issue
 14 crystallised was why would you do this? You have market
 15 power on the chipsets and the point is that if you put
 16 the chipset price up, your chipset customers pay that,
 17 whereas if you can inflate --- if you can increase the
 18 royalty, then that is paid by everybody.

19 THE CHAIR: Your primary response is because if you charge
 20 a monopoly rent --- licensing --- at the SEP licensing
 21 end, you have less of a risk of a competitive entry ---
 22 competitive response to entry than if you extract it at
 23 the chipset level, but does that deal with the question
 24 that was asked in opening submissions, which is: well,
 25 okay, the competitive response might be a bit different,

1 but, ultimately, if you try to extract a monopoly profit
 2 at the SEP licensing end, that is precisely where it is
 3 constrained by FRAND. Where is the analysis of whether
 4 the different entry position can outweigh the
 5 disincentive of trying to get a monopoly profit in
 6 a FRAND-constrained market?
 7 There are factors that go both ways so one has to ---
 8 you know, the benefit is that you do not have
 9 potentially such a great competitive response because it
 10 is more limited.
 11 MR WILLIAMS: The disadvantage, Madam, is the FRAND regime.
 12 THE CHAIR: Yes, exactly.
 13 MR WILLIAMS: But of course one then goes back into the
 14 theory of harm and the impact of the conduct on the
 15 availability of the FRAND regime. So our position is
 16 consistent, Madam, because --- and I think Mr Noble said
 17 this. What he said is the effect of the conduct is to
 18 disable or make less attractive that safety valve. So
 19 you are charging the rent in the market where you do not
 20 face competition and you are dealing with the factor
 21 that is intended to control your market power in that
 22 context absent the conduct. So I think it is --- the
 23 points all work together, Madam, when it is looked at
 24 like that.
 25 MR RIDYARD: Can I just ask about what all this means for

1 chipset pricing and your view on chipset pricing. So
 2 you are saying that --- and I think I understand your
 3 answers up to now. You are saying that Qualcomm
 4 refrains from exploiting its market power in chipsets,
 5 even though it has market power, because it would rather
 6 get it from the royalties, for reasons of arithmetic
 7 which I kind of understand.
 8 MR WILLIAMS: It refrains from taking all of its rent, yes.
 9 MR RIDYARD: All of it, yes. So you are saying that when we
 10 look at the chipset pricing, for example, the CDMA
 11 chips, you make a point in your closings about the CDMA
 12 adder which is pretty large, what is it, \$5 or
 13 something, and you characterise that as being sort of
 14 monopoly pricing.
 15 MR WILLIAMS: We do.
 16 MR RIDYARD: How do you know --- it is like 30% uplift or
 17 something on the normal price. It just seems quite
 18 large to me, but are you saying that that 30% uplift, if
 19 that is what it is, is not as much as the monopoly price
 20 would be? How do we know what the monopoly price would
 21 be?
 22 MR WILLIAMS: Well, I do not think I can give you a sort of
 23 quantitative answer to that question.
 24 MR RIDYARD: No. But it is more of a conceptual point. I
 25 find it quite strange that this was not sort of laid out

1 in Mr Noble's reports and was not thrashed out between
 2 Mr Noble and Dr Padilla before it came to the hot-tub
 3 really. It just seemed like a very seat-of-the-pants
 4 kind of rationalisation of what might be going on. It
 5 is strange to me it was not brought out a lot sooner
 6 than it has been. I wonder what you can comment on
 7 that.
 8 MR WILLIAMS: Well, I think from memory the question of ---
 9 this question of barriers to entry being high but not
 10 insurmountable, that issue was ventilated, but I think
 11 that has been the subject of debate between the experts.
 12 I do not know if the debate went quite one stage further
 13 to the extent that it was thrashed out in the hot-tub
 14 where this question was, what is the incentive to do
 15 this? I cannot give a quantitative answer to your
 16 question. But I think the conceptual answer, I think,
 17 is that there are --- there is a monopoly rent. There
 18 are economic reasons --- rational economic reasons why
 19 Qualcomm would choose to extract it in the licensing
 20 market, as I have said, and we say that that is what the
 21 Qualcomm internal strategy documents say. They say that
 22 they are using their chipset market power to obtain
 23 inflated revenues in the licensing market so there is
 24 a coherence to the whole thing.
 25 MR RIDYARD: But you are also saying that they used their

1 particular monopoly in CDMA to extract a particular
 2 extra price on CDMA chips.
 3 MR WILLIAMS: On that chip, yes. On that chip.
 4 MR RIDYARD: But so maybe they have --- you are saying they
 5 have more market power in CDMA chips than other chips
 6 and therefore, even consistent with your general theory
 7 about them not exploiting their market power to its full
 8 potential in chips, because they have more in CDMA than
 9 elsewhere, they are able to take more liberties in CDMA
 10 than in UMTS?
 11 MR WILLIAMS: The position is more extreme. You have seen
 12 the evidence. The position is more extreme in CDMA, is
 13 it not, because they effectively owned the technology
 14 for many years and that was reflected in their market
 15 share and the competition they faced was always pretty
 16 minor and then that carried through into LTE-CDMA as
 17 well? But I am not sure I can take it any further than
 18 I have, sir. If I have further reflection, then we have
 19 more time on Monday.
 20 THE CHAIR: So I am still --- just returning to your point
 21 about do you think there is no inconsistency between
 22 your case and the various competing incentives. One
 23 thing that still troubles me is why would Qualcomm
 24 engage in this very complex manoeuvre of trying to
 25 disable FRAND, establish mechanisms, so in order to get

1 round that they have to effectively make threats to
 2 refuse to supply, explicit or implicit, and that is your
 3 case, that there have been those threats, risking
 4 serious antitrust intervention, when they could just sit
 5 on their dominant position in the chipset market and
 6 charge their price which the only way of getting at that
 7 would be an excessive pricing case, which would be quite
 8 difficult. So instead of just kind of getting the money
 9 in that market, where there would not be this complex
 10 mechanism of having to threaten people to refuse to
 11 supply a product for which there is a licence, you know,
 12 they embark on this sort of quite convoluted strategy.
 13 Why would they want to do that?

14 MR WILLIAMS: Well, I think the answer comes back to the
 15 point about entry, Madam, which is that if they put the
 16 price up in the chipset market, if they really exploit
 17 market power to extract the monopoly rent in the chipset
 18 market, there is a heightened risk of entry and then the
 19 whole thing collapses. They do not have market power in
 20 the chipset market. They cannot charge higher prices
 21 for chips. They cannot apply the policy to extract the
 22 rent in the licensing market and the whole ecosystem
 23 collapses.

24 THE CHAIR: But you accept that there is no economic
 25 analysis of how this could actually have worked, as in

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1 what the risk of entry was and how that affected their
 2 incentives at the time, given all of the problems on the
 3 other side of the equation?

4 MR WILLIAMS: Well, sorry, when you say there is no economic
 5 analysis, I mean, there is --- do you mean there is no
 6 sort of ---

7 THE CHAIR: Well, quantitative analysis.

8 MR WILLIAMS: There is not a quantitative analysis, but
 9 I think what we are talking about is incentives,
 10 I think, and I think ---

11 THE CHAIR: Yes.

12 MR WILLIAMS: --- I think I have given a number of reasons
 13 why the incentives operate as they do and why, if
 14 Qualcomm conducted themselves differently, the whole
 15 thing might come crashing down.

16 THE CHAIR: All right.

17 MR WILLIAMS: So I was just finishing off on MFNs and I was
 18 just going to say we deal with MFNs at 395 of our
 19 closing {EAOS/4/118} and we say Qualcomm --- although
 20 they say MFNs bring the whole theory of harm down,
 21 Qualcomm has 20 or 30 years of experience of MFNs and
 22 the extent to which there is factual evidence of MFNs
 23 dragging royalty rates or being exercised, I mean, there
 24 is a total dearth of evidence. We have a couple of
 25 examples and we have dealt with them in our closing at

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1 395 and if this really were the killer blow, then one
 2 might have expected to see a bit more on the other side
 3 about it, rather than sort of abstract theoretical
 4 points. We have dealt with the two specific examples
 5 that have been given in.

6 Now, the third point is asymmetry and this is dealt
 7 with at 388 and 399. I am afraid I need to clarify
 8 something in our closing, for which I bear
 9 responsibility so I will deal with that now. There is
 10 a section of the transcript where two different issues
 11 relating to quantification were dealt with and this bit
 12 of our closing mixes them up. The first is whether
 13 there is an asymmetry between Qualcomm on the one hand
 14 and an OEM in terms of the extent to which it will lose
 15 profits if they do not do chipset deal and the extent to
 16 which they can recoup some of those profits through
 17 other means. This is the idea of Qualcomm displacing
 18 chipset sales and being able to make chipset sales to
 19 other OEMs. That is one issue.

20 The second issue is whether an OEM that suffered
 21 from the abuse had the incentive to pay the inflated
 22 royalty, rather than find itself unable to make chips.
 23 I am afraid these paragraphs do not separate out those
 24 two points because they got a bit mixed together in the
 25 transcript.

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1 So dealing with that second point, paragraph 219 of
 2 Qualcomm's closing {EAOS/5/76} says Mr Noble has done
 3 a back of the envelope calculation to explain why an OEM
 4 would pay the higher royalty, rather than suffer the
 5 loss of chips and see its business grind to a halt.
 6 This is the point that we say is a non-point. Mr Noble
 7 explained in his oral evidence the lost profits for
 8 Apple, if it cannot make phones, run to billions. Now,
 9 you do not have the make-up of that number. We can give
 10 you the make-up of that number on a sheet of paper, if
 11 you want. It is a high level calculation, but we can
 12 give that to you, but it is a simple calculation.
 13 Perhaps it is best if we produce that over the weekend
 14 so that the other side can see it, but they say it is
 15 a back of the envelope calculation. It is a sort of X
 16 times Y number.

17 MR JOWELL: Forgive me, but we think that the evidence has
 18 closed in our submission.

19 MR WILLIAMS: Yes, the evidence --- Mr Noble has given
 20 evidence that number would run into billions. If the
 21 evidence is closed, then I can stop there. I am not
 22 aware that that is contested.

23 What we say is it is clear on any view that a number
 24 of that order of magnitude is going to dwarf the
 25 royalties that --- the extra royalties that Apple would

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1 pay if it pays a dollar , a few dollars , on each of the
 2 200 million iPhones that it makes every year. The
 3 numbers are just totally incomparable and that is why
 4 Mr Noble says this is totally clear—cut. It is obvious
 5 that Apple is going to pay the extra royalty , rather
 6 than see its business grind to a halt. So that is why
 7 we say it is a non—point. If the Tribunal — if the
 8 evidence is closed, then that is one thing, but we say
 9 that number is billions and the numbers are just not
 10 even on the same — in the same ballpark.

11 Now, the first issue was the asymmetry point and
 12 what Mr Ridyard put to Mr Noble was that that was logic,
 13 rather than quantification. I should be clear that is
 14 fair .

15 [Fire alarm].

16 (Pause)

17 THE CHAIR: I think we should proceed.
 18 MR WILLIAMS: So, yes, Mr Noble put — Mr Ridyard put to
 19 Mr Noble that his position was logic, rather than
 20 quantification, and that is fair, but we do say it is
 21 a perfectly sound position. I mean, if Apple does not
 22 make 5G phones or does not make CDMA phones and consumer
 23 demand is displaced, then it is pretty clear that
 24 Qualcomm is going to pick up some of that business
 25 upstream, given its total dominance in relation to the

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1 chipset markets. So we make that point.
 2 But more generally in relation to this, there is the
 3 point that we make in 392 of our closing {EAOS/4/117}
 4 that one should not simply focus on the lost revenue in
 5 chipset market because that is not the way that Qualcomm
 6 thought about this. It is not the way that it ran its
 7 business. I put this to Dr Padilla with reference to
 8 Apple internal documents and he accepted that for
 9 Qualcomm it would make decisions about whether to
 10 maintain chipset supply or whether to withdraw the
 11 business, having regard to its incentives across its
 12 business, and the Tribunal has our submissions about how
 13 Qualcomm chose to trade off those incentives. We say it
 14 is very clear that Qualcomm were happy to see Apple walk
 15 away as a chipset customer and were happy — they were
 16 willing to see Apple walk away as a chipset customer and
 17 to lose those revenues because of the importance of
 18 sustaining higher royalties rates. That is the way that
 19 they operated.

20 So those are the points I just wanted to highlight.

21 Just to respond very briefly to a few of the points
 22 made in Qualcomm's skeleton argument from paragraph 216.
 23 Picking it up 216.1, it says here:

24 "Qualcomm repeatedly.. "

25 This is about Qualcomm's offers of FRAND arbitration

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1 to Apple and, as you will see from our closing, we say
 2 this offer is not disproof of the theory of harm. It
 3 was made during the period when Mr Noble finds that
 4 Apple had improved bargaining power and Apple then did
 5 indeed go on to litigate .

6 There is a constant refrain that the events of this
 7 period undermine our economic theory of harm and that is
 8 wrong. Mr Moser will come on to the detail of that.

9 At 216.2, it says it is not credible that Qualcomm
 10 would disrupt or cut off chipset supply to Samsung, but
 11 the fact is threats were made to Samsung and indeed if
 12 this point were really true, it would mean Samsung was
 13 immune from the chipset supply practice which, as far as
 14 we are aware, has never been suggested at all.

15 We deal in our closing with the question of whether
 16 Qualcomm would have cut off chipset supply specifically
 17 during the period of its dispute with Apple, which was
 18 a point which was explored in cross—examination.

19 THE CHAIR: When you say threats were made to Samsung, the
 20 threats that are referred to are long before the
 21 relevant period. So we are talking about Samsung's
 22 purchase of Qualcomm's chipsets during the relevant
 23 period and that is the comment that is made here because
 24 they were talking about this particular period of time.
 25 What is the relevance of threats that were made ten or

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1 more years earlier ?

2 MR WILLIAMS: Well, this comes back to the exchange that we
 3 had earlier on, Madam, about OEMs' understanding of how
 4 Qualcomm was prepared to conduct itself. I mean, we say
 5 that is — we had a conversation about Apple and we will
 6 come back to that, but we say the position for Samsung
 7 is clear. It was on the direct receiving end of threats
 8 over a period and we say that those threats were in the
 9 context of the practice that is at issue and Samsung
 10 would have understood that that was the way in which
 11 Qualcomm was prepared to implement the practice.

12 THE CHAIR: Yes. But a long time earlier in which — at
 13 a time at which the market dynamic which is referred to
 14 by Qualcomm here was not the same.

15 MR WILLIAMS: No, no, sorry, just to be clear, I did go on
 16 to say, insofar as this point is made specifically
 17 about the 2016 to 2018 period, our case does not depend
 18 on the Samsung — on Samsung fearing disruption to its
 19 chipset supply in that period because that is not the
 20 period that we say matters for the case. So — but the
 21 other point I make — well, if this point were really
 22 true, it would mean Samsung was effectively immune from
 23 the practice and that, in my submission, is not right .

24 MR RIDYARD: Mr Williams, sorry, you say that period does
 25 not matter for the case, but I mean all the periods

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1 matter, do they not? They are all interesting to learn
 2 lessons from so is that 16/18 period not
 3 interesting precisely because Qualcomm has no leverage
 4 over Samsung then? So why did something not happen to
 5 the royalty rates? The mechanism that you are relying
 6 on to keep the royalty rates elevated too high has
 7 disappeared so why is there not something to observe
 8 then?

9 MR WILLIAMS: Well, that was the period when all of the
 10 proceedings were going on and it appears, and I do not
 11 mean to give evidence, that there was a --- the line was
 12 held and at the end of that period there was then
 13 a renegotiation, particularly in the Samsung or in the
 14 KFTC decision, so that appears to have been the
 15 position. So there was a holding of the line until the
 16 end of the process.

17 THE CHAIR: But if there was not any leverage, why did
 18 Samsung not exploit the lack of leverage to bring the
 19 royalty rates down?

20 MR WILLIAMS: Well, I think the factual answer appears to be
 21 that they were all involved in those ongoing proceedings
 22 and that the line was held in the meantime.

23 THE CHAIR: But if you accept ---

24 MR WILLIAMS: Of course Qualcomm contested those proceedings
 25 so matters were in abeyance.

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1 THE CHAIR: Yes, but the fact that they were involved in
 2 proceedings is not a reason why at a period in which
 3 there was no leverage being exerted over them, which you
 4 accept, and you say as much in paragraph 377, you do not
 5 say that Qualcomm leveraged its chipset market power in
 6 these negotiations, so at that point why does Samsung
 7 not go "Yippee, we are going to now get the royalty rate
 8 down to what we wanted"?

9 MR WILLIAMS: Well, I mean, we tried to shortcut this point,
 10 Madam. Mr Noble --- his evidence was that in fact he
 11 thought that there was a credible risk.

12 THE CHAIR: There was ---

13 MR WILLIAMS: That Samsung would have --- sorry, that Samsung
 14 would have --- that it was a realistic possibility that
 15 Qualcomm would have cut off chipset supply in that
 16 period.

17 THE CHAIR: But that is not what you are saying. You accept
 18 there was not any leverage in the negotiations in that
 19 period. That is what you say in paragraph 377. You say
 20 that then you invite the Tribunal to find that the
 21 amendments resulted in only modest changes which were
 22 insufficient to inflate the prior inflation. Fine,
 23 but ---

24 MR WILLIAMS: Well, we say that by 2018, Madam, because that
 25 was a point of transition from one standard to the next.

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1 I mean the position is quite different over time. So
 2 what --- what paragraph 377 is dealing with is it is
 3 dealing with the specific balance of power as at the
 4 point of the renegotiation.

5 THE CHAIR: Yes, but, I mean, to go back to Mr Ridyard's
 6 question, why in that period do you not see reduction in
 7 the royalty rates commensurate with the lack of
 8 leverage?

9 MR WILLIAMS: Well, sorry, Madam, I did not say that there
 10 was a lack of leverage. What I said was our case arises
 11 because of the leveraging of rates in a prior period and
 12 then what appears to have happened on the facts is that
 13 there was then --- there were then proceedings and that
 14 during the course of those proceedings the parties
 15 locked horns in the course of the proceedings. There
 16 were the FTC proceedings, there were the proceedings in
 17 the KFTC and it appears as a matter of fact that for all
 18 of the OEMs that they got to the end of that process and
 19 that the rates were not renegotiated in the meantime.
 20 So we see Apple and Samsung, there is a 2013 position,
 21 and then we see the next rates that emerge are 2018 or
 22 2019. So that appears to be the position in fact. So
 23 I did not say that there was no scope for leverage. In
 24 fact, Mr Noble said that there was.

25 The mere point I was making was that the rates that

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1 we say were inflated were inflated prior to that period
 2 and then that was the position through that period.

3 THE CHAIR: Just before you move on, because we are at this
 4 part of your closing submissions, there is a point at
 5 paragraph 380 {EAOS/4/113}, at the end of that
 6 paragraph, where you say that around the same time,
 7 there was --- let me just see --- there was a settlement
 8 agreement {EAOS/4/114}, then you say that the provisions
 9 of the settlement agreement amounted to an abuse of
 10 Qualcomm's LTE SEP market power. So that is a
 11 completely different point. It is not a leverage point.
 12 It is not about the chipset supply practice. It seems
 13 to be a pure abuse of the supposedly leveraged market
 14 power, the SEP market power. I do not understand that
 15 at all. That does not seem to have been --- bear any
 16 resemblance to your pleaded case. I note that Qualcomm
 17 does not address this in their closing submissions,
 18 presumably because that is as new to them as it is to
 19 us.

20 Where does this come from and am I right in thinking
 21 it is not pleaded or is it pleaded somewhere and, if so,
 22 where?

23 MR WILLIAMS: Madam, can we deal with this when we deal with
 24 silencing. I hear your question. We think the point is
 25 pleaded because we think that the practices that are ---

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1 some of the — the abuse in relation to the rates is
 2 pleaded as an abuse of the dominant position on the
 3 chipset market, but that the case is pleaded generally
 4 as an abuse of a dominant position and the silencing
 5 provisions are not pleaded in the same way and the
 6 reason the point is significant is because obviously the
 7 point of the FRAND regime is to protect licensees under
 8 the FRAND regime and we say that a provision that is —
 9 or an agreement that is entered into between a SEP
 10 licensor and a SEP licensee, which seeks to disable that
 11 protection for the licensee, is capable of being an
 12 abuse in the SEP licensing market, irrespective of
 13 whether it is leveraged by chipset market power. That
 14 is a submission that we were going to develop.
 15 THE CHAIR: I understand you say it is an abuse in that
 16 market, but of course you are saying that the main
 17 allegation of abuse is in the SEP licensing market. The
 18 point is the mechanism of the abuse, which is said to be
 19 an abuse of their SEP market power, because at that time
 20 you are not saying that there was a leverage of chipset
 21 market power because that was the time at which there
 22 was — there were challenges to the royalties. So it is
 23 the mechanism of the abuse that —
 24 MR WILLIAMS: When you say the mechanism, do you mean the
 25 fact that it is an abuse of SEP market power rather

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1 than —
 2 THE CHAIR: Yes.
 3 MR WILLIAMS: Yes, sorry.
 4 THE CHAIR: I just wanted — when you get to it, I think you
 5 will need to explain exactly where that is pleaded and
 6 take us to the relevant pleading.
 7 MR WILLIAMS: Yes.
 8 THE CHAIR: All right.
 9 MR WILLIAMS: No, we understand what you are putting.
 10 THE CHAIR: Okay.
 11 MR WILLIAMS: I do not want to take up too much more time.
 12 I will take these last few points as quickly as I can.
 13 217 of Qualcomm's skeleton argument makes a point
 14 about the pattern of the results and the indirect
 15 mechanism {EAOS/5/74}. I hope the Tribunal has our
 16 answer to this. The indirect mechanism does not mean
 17 that everyone pays the same rate and self-evidently
 18 people do not pay the same rate; it means that the rates
 19 that are paid are not independent and they are —
 20 THE CHAIR: Yes, I do have a question about that. To what
 21 extent is that relevant to the case — this case at all?
 22 I mean, where does it come into Apple and Samsung, if
 23 they were licensed at all times, one way or the other?
 24 It seems to us that, on its face, the Apple and Samsung
 25 situations, whatever may be said about others, were not

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1 non-licence situations but were existing licence
 2 situations and that seems to be recognised at various
 3 points in your closing submissions. What is your
 4 position on that?
 5 MR WILLIAMS: So, yes, one way or another they were
 6 licensed. That is true. Samsung directly, Apple
 7 through the CM perspective, and you will hear more about
 8 that, and then there is the 5G position where Apple was
 9 ultimately licensed. I mean, Apple was not licensed for
 10 5G in 2019. It was licensed for other things. That is
 11 part of the case. But it comes back to the point that
 12 we started to debate earlier on, Madam, which is what is
 13 the nature of the conduct? What are the risks that
 14 exist? In a situation where an OEM had a licence, were
 15 they at risk of disruption or not? If an OEM with
 16 an existing licence sought to challenge the rate, was
 17 there a result — was —
 18 THE CHAIR: No, that is a different point. The point that
 19 is raised at 217 is the alternative counterfactual. You
 20 have two possible counterfactuals: one, direct
 21 mechanism, and, two, the indirect mechanism, and the
 22 indirect mechanism is a tainted comparator point. So it
 23 is not about whether there was a fear of a risk of
 24 disruption. That is the direct mechanism. The indirect
 25 mechanism is even if you cannot show that there was

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1 a problem in that way, even if there was a negotiation
 2 for a licence, that would be based on a tainted
 3 comparator. I am just wondering how that relates to the
 4 facts of this case?
 5 MR WILLIAMS: Well, it is — there are two aspects. We say
 6 that the direct mechanism is not as narrow as Qualcomm
 7 says it is because we say that there is a risk of
 8 retaliation if an OEM with a licence seeks to challenge
 9 the rate. That is one of the factual issues.
 10 As far as the indirect mechanism is concerned, it is
 11 also true that an additional layer of concern would be
 12 that if an OEM with a licence sought to bring that sort
 13 of litigation that other inflated rates would go
 14 into the equation.
 15 As I read the point in paragraph 217.1, in
 16 particular, was it would seem to be saying if your
 17 indirect mechanism is right, then you would expect to
 18 see clustering of rates in the leveraging analysis.
 19 THE CHAIR: Yes.
 20 MR WILLIAMS: That is what I thought that was saying.
 21 THE CHAIR: But my question was not really about what
 22 Qualcomm was saying, but what you were saying.
 23 MR WILLIAMS: I am sorry.
 24 THE CHAIR: I just want to know — you are relying on
 25 Mr Noble is relying on his indirect mechanism. How do

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1 you say that the indirect mechanism related to the facts
 2 of this case? Are you saying that in some of the
 3 licensing negotiations, and which — and, if so, which
 4 ones, given that you accept that Apple and Samsung were
 5 licensed, one way or the other, so are you saying that
 6 in some negotiations there was a pegging of rates that
 7 tainted comparators and then if so —

8 MR WILLIAMS: Sorry, two points. We have some factual
 9 evidence about the way in which Qualcomm approached the
 10 negotiations with Apple and Samsung in which it made —
 11 in which it sought to support its position with
 12 reference to rates across the market so that is part of
 13 the factual matrix.

14 [redacted].
 15 THE CHAIR: All right. Are you saying that any particular
 16 licence negotiations were affected by pegging to
 17 comparator rates and, if so, which ones? I mean,
 18 I appreciate this may be a question for Mr Moser but you
 19 could answer in the abstract and then Mr Moser can give
 20 us the detail.

21 MR WILLIAMS: There is an issue about the application of an
 22 MFN which I think most directly raises the point that
 23 you raise, Madam. I think otherwise it is more a factor
 24 that is of a general nature in terms of the way in which
 25 parties — the consequences that the parties feared if

1 they actually were to bring proceedings, but I think
 2 perhaps we need to reflect on that a bit more. I do not
 3 want to answer entirely on the hoof.

4 THE CHAIR: All right.
 5 MR WILLIAMS: Sticking in 217, I was just making the short
 6 point really that, first of all, this point about
 7 clustering is premised on people paying the same rate
 8 when that is not just the way it works.

9 Secondly, if one looks at the graph, and I will not
 10 go to it now because of time, {EAOE/12/22}, in fact you
 11 can see some clustering, which is what Mr Noble said in
 12 the hot—tub. You can see some clustering around the top
 13 left of the graph. You can see some clustering of OEMs
 14 that have characteristics in common in the bottom of the
 15 graph. I am talking in generality. I am not naming any
 16 OEM. I am just saying general terms you can see
 17 clustering. So, anyway, that is the point.

18 I think we have dealt with the point at 217.2 and
 19 the reference I wanted to give is paragraph 198 of our
 20 closing {EAOS/4/55} where we deal with the way in which
 21 Qualcomm made reference in licensing negotiations to its
 22 portfolio of licences. So that is part of our answer to
 23 your question, Madam, about the extent to which this
 24 specifically came into the equation, rather than just
 25 being a background factor.

1 THE CHAIR: Yes.

2 MR WILLIAMS: I think the rest of these points are mostly
 3 questions of fact. We were a bit surprised to see
 4 Sultan of Brunei making a comeback at paragraph 218.4.
 5 Mr Noble gave convincing evidence, in my submission,
 6 that none of the examples that were put to him cast
 7 doubt on his evidence, in part because they materially
 8 changed the fact pattern by suggesting that these were
 9 existential scenarios. When it was put to him that this
 10 was an existential scenario for Qualcomm, Mr Noble gave
 11 robust evidence about that too.

12 That only leaves leveraging, which is dealt with
 13 from paragraph 221. I suspect you have our case about
 14 the leveraging analysis, but I will try and give it to
 15 you in a couple of bullet points.

16 It is positioned in paragraph 221 as a cross—check
 17 on whether there is an abuse so it is not now suggested
 18 that it is capable of showing that there were no effects
 19 or that conduct was incapable of having effect. It is
 20 now just a cross—check. In my submission that is a
 21 downgrading of the case that has been advanced following
 22 the evidence and understandably so.

23 It is also suggested, and was suggested by
 24 Dr Padilla, that the point of his analysis was not
 25 really about the all OEMs analysis but just the Apple

1 and Samsung analysis and that is not how we read the
 2 evidence at the time. That seemed to us to be
 3 downgrading the all OEMs analysis too. In my
 4 submission, the all OEMs analysis suffers from serious
 5 flaws because of the weakness of the controls. We dealt
 6 with that in our skeleton argument and so we are not
 7 surprised to see that being downgraded as well.

8 Then when it came to Apple and Samsung, I put to
 9 Dr Padilla, I said, well, if this is the case, that is
 10 consistent with your graph, is it not and he said, well,
 11 that is not what I have tested for and I do not
 12 criticise him for that. That is not what he was testing
 13 for. He was testing for correlation between dependence
 14 and royalty rates, but, in my submission, it is not
 15 testing for our case. There is no virtue in doing an
 16 empirical analysis if it does not test for the right
 17 thing and plainly we say this is not a case where one
 18 can just simply eyeball numbers on a graph and expect
 19 the theory of harm to jump off the page. Obviously that
 20 is why one normally applies controls in a regression.
 21 So the question is: is the conduct capable of inflating
 22 rates relative to the counterfactual? It is not about
 23 this relationship between dependence and the rates that
 24 are payable and, in my submission, that all clearly
 25 came through the evidence in the hot—tub.

1 So I have overrun and I will stop there, Madam.
 2 THE CHAIR: All right. Thank you very much, Mr Williams.
 3 Closing submissions by MR MOSER
 4 MR MOSER: If I can just re-arrange myself or, rather,
 5 things, for a minute. (Pause).
 6 I know I only have until 4.30 because it is
 7 Halloween and then I will turn into a pumpkin. I do
 8 have sometime on Monday morning so what I am proposing
 9 to do this afternoon is essentially deal with all those
 10 things that are not about taking you through the
 11 documents on Apple and Samsung and use the time on
 12 Monday most usefully to do the negotiations with Apple,
 13 the negotiations with Samsung and the other OEM points
 14 and then ---
 15 THE CHAIR: Yes. When are you finishing on Monday?
 16 MR MOSER: At 12.30.
 17 THE CHAIR: So you have two and a half hours on Monday?
 18 MR MOSER: Yes. It seems to me that that is a decent amount
 19 of time for those things. There will then be some
 20 sweep-up of myself and the team dealing with things like
 21 silencing and objective justification, territoriality
 22 and so on.
 23 THE CHAIR: That will need to come within the two and a half
 24 hours.
 25 MR MOSER: It will.

1 THE CHAIR: If you are confident that you are going to be
 2 able to get through all the negotiations in, say, around
 3 two hours on Monday.
 4 MR MOSER: Yes. It is not just that because I do also have
 5 a number of things on my list. If I can reach the
 6 negotiations with Samsung this afternoon, I will
 7 definitely start. So it is not a deliberate --- I am not
 8 going filibuster.
 9 THE CHAIR: No. Do you want to give us an overview of what
 10 issues you propose to cover this afternoon?
 11 MR MOSER: I do. I am going to start with a short
 12 responsive section on the law on abuse. My learned
 13 friend Mr Williams has dealt with part of it, but there
 14 are parts that he has not reached. Then a recap of the
 15 counterfactual and what Qualcomm in their closings call
 16 "the FRAND context", which will be mainly about FRAND.
 17 A very brief recap of what we say is the conduct,
 18 literally a minute or two. That is the third thing.
 19 The fourth thing is the internal evidence. It is
 20 an important part of the evidence we have not touched on
 21 today yet, what Qualcomm intended, the intention of
 22 Qualcomm, which goes to abuse, but also goes to
 23 objective justification.
 24 The fifth point is what we say is a new case founded
 25 on what Mr Gonell said on product licences and patent

1 licences.
 2 Then sixth is going to be Samsung and Apple.
 3 Seventh the other OEMs and my learned friend Ms McAndrew
 4 will be dealing with silencing separately and that will
 5 be on Monday. Then we will sweep up on objective
 6 justification, the FRAND defence and territoriality,
 7 I would hope in less than half an hour at the end.
 8 So coming first on further responsive submissions on
 9 the law of abuse. Three main points of dispute on the
 10 law arise from the written closings. One, the relevance
 11 of the conduct in question not falling within
 12 a recognised category of abuse. Two, the question of
 13 the interaction between our case and excessive pricing,
 14 which my learned friend Mr Williams has already dealt
 15 with. I will just briefly touch on that. Three, the
 16 requirement for actual or potential effects, and a few
 17 miscellaneous points I will explain at the end.
 18 So theme 1 about the categories of abuse. It is
 19 a theme, of course, running through the submissions of
 20 the class representative that the categories of abuse
 21 are not closed and Qualcomm pays lip service to this and
 22 says, "We agree", but actually they say: oh no, but you
 23 must not create any new abuse. It is not actually in
 24 dispute between us what the law is. The principle was
 25 discussed, for example, and I am not going to turn up

1 many of these, but just because it is the basics, by the
 2 CAT in Royal Mail v Ofcom at {AB2/29/107} and in the pdf
 3 version it is page 2334. That is paragraph 339 about
 4 what is settled case law:
 5 "It is settled case law that an authority or court
 6 may rely on the principles underlying Article 102,
 7 rather than [on] the narrower scope of the examples of
 8 abusive conduct it lists ... "
 9 THE CHAIR: Yes.
 10 MR MOSER: The point is at all times, and that is at the end
 11 of that extract in 79:
 12 "... at all times an eye must be kept [the last
 13 lines] on the basic wrong itself ... "
 14 Over the page, at 347 {AB2/29/110}, the finding
 15 that --- sorry, maybe a few pages on. Anyway:
 16 "... 102 is concerned with the effects of the
 17 conduct of dominant undertakings, and not its form... "
 18 The same point is one that you have made, Madam, of
 19 course, in the Cabo case at paragraph 307.
 20 Despite saying that they agree with all of that in
 21 their submissions, both in opening on Day 2 and also,
 22 for instance, paragraph 201 of their closings they
 23 say: ah, but you must not create new or sui generis
 24 categories.
 25 Now, we do not understand that, with respect. That

1 contradicts the legal principles that they accept apply.
2 On the logic of their case, which is there is no need to
3 depart from the existing categories, no new abuse could
4 ever be identified.

5 It is an argument that simply goes too far, because
6 you could always argue that the existing categories must
7 adequately protect consumers and therefore stifle any
8 argument brought by a class representative.

9 We are certainly not saying the categories are
10 unlimited. We have put forward a case on entirely
11 conventional principles, starting with the objective
12 standard of abuse, as we have described in our closing
13 at 148 to 150 {EAOS/4/41}.

14 So we reject this idea that you cannot have a new
15 category, but we can also say that what you see in the
16 authorities supports us because, first of all, the first
17 point made against us is if there is a similarity or
18 a potential overlap between our abuse, as we allege it,
19 and an existing category, then you should not expand it.
20 A similar argument was run in Google Shopping. That is
21 the authority at {AB3/28}. It starts at 2112 of the
22 pdf. It failed in Google Shopping. Just to foreshadow
23 that, I want to go to this decision because it makes the
24 point that even if conduct looks a bit similar in some
25 respects to an established form of abuse, that does not

1 mean it must be argued that characterising it as another
2 form of abuse is wrong or creates legal uncertainty, as
3 is also suggested.

4 THE CHAIR: What were the abuses in question there?

5 MR MOSER: In that case the Commission found that Google's
6 treatment of its comparison shopping services, as
7 compared to competitors, amounted to an abuse of
8 dominance. Google argued the Commission was required to
9 show that the conduct satisfied the conditions in
10 relation to refusal to supply and especially the Bronner
11 case law on essential facilities. If we look at
12 {AB3/28/63}, that is 2174 of the pdf, at paragraph 199,
13 that is what they argued there. If you look at the part
14 starting "The second part of the fifth plea ..." And
15 then down a few lines:

16 "[Cannot run it] without satisfying the conditions
17 identified in the case law and, in particular, those
18 applicable to infrastructures qualifying as essential
19 facilities."

20 So that is Bronner.

21 The General Court acknowledged, yes, it was a bit
22 like an essential facility. However, it concluded the
23 conduct could be distinguished and the General Court
24 approved of the Commission's approach and that is
25 summarised at paragraph 223 on page 68. 2179 of the pdf

1 {AB3/28/68}. At 223 one goes down to the second line:
2 " ... the Commission did not refer, or at least not
3 expressly, to the conditions set out in Oscar Bronner in
4 finding the abuse had to have been established. On the
5 contrary ... the Commission relied on the case law
6 applicable to abusive leveraging in order to conclude
7 that the anti-competitive practices at issue were
8 established. The Commission found ... Google was
9 leveraging its dominant position on the market for
10 general search services in order to favour its own
11 comparison shopping service on the market for comparison
12 shopping services, such favouring leading to
13 the potential or actual foreclosure of competition ... "

14 THE CHAIR: I think that is an exclusionary abuse,
15 leveraging leading to the exclusion of competitors on a
16 leveraged market.

17 MR MOSER: Yes, but we say nothing turns on whether it is an
18 exclusionary or an exploitative abuse for the basic
19 principle, but just because something is a bit like one
20 abuse does not mean that you have to prove it as such.
21 So they did not have to prove it as Oscar Bronner.

22 THE CHAIR: All right. So what category is this then or how
23 do you characterise it?

24 MR MOSER: It was a new category, which is
25 self-preferencing.

1 THE CHAIR: No, in this case.

2 MR MOSER: Oh, in our case, well, you can give it a name.
3 We used to call it NLNC. That was found to be an
4 unhelpful label, but it is leveraging conduct of, you
5 know, a kind which Qualcomm has engaged in and we say it
6 sits ill in their mouth to say: look, we have engaged in
7 this particular kind of conduct, for the reasons
8 Mr Williams has explained, where we do not take the rent
9 on the chipsets, which will be subject to excessive
10 pricing, we take a different approach and then say to
11 us, but, therefore, it is not open to you to run
12 a convoluted case of abuse. We are running the case on
13 abuse to match the conduct of the abuse.

14 THE CHAIR: I am a bit lost. So you describe Google's
15 category of abuse very concisely, self-preferencing.
16 What is this? It is not refusal to supply. It is ---
17 because you say that would be an established category.
18 It is not, you say, excessive pricing. What is it? If
19 it were to be written up in Mr Bailey's textbook, what
20 would it be?

21 MR WILLIAMS: Ask Mr Bailey.

22 THE CHAIR: No, I am asking you. I think Mr Bailey would
23 say "Not an abuse". What are you saying it is?

24 MR MOSER: Well, he would today because he is paid to say
25 that.

1 THE CHAIR: All right.
 2 MR MOSER: It is the Qualcomm --- it is the Qualcomm royalty
 3 abuse.
 4 THE CHAIR: No, I mean, that does not make sense. That is
 5 just a sort of what you label it, but what is the kind
 6 of abuse substantively? I mean leveraging is not an
 7 abuse itself. The leveraging in Google Shopping was
 8 leveraging from one market into the other leading to an
 9 exclusion of competitors, self-preferencing.
 10 MR MOSER: Yes.
 11 THE CHAIR: So what is this kind of conduct? Leave aside
 12 the label you put on it as a headline.
 13 MR MOSER: Yes. You can label it NLNC.
 14 THE CHAIR: No, that is not a description of the abuse.
 15 What is the substantive abuse akin to self-preferencing
 16 or refusal to supply or excessive pricing? What
 17 substantively is this abuse?
 18 MR MOSER: Well, I will see if I can think of a snappy
 19 nickname either in the course of this afternoon or by
 20 Monday.
 21 THE CHAIR: We have had kind of a few years to think of
 22 that.
 23 MR MOSER: The essence of the abuse is that the threatening
 24 to cut off chipset supply without the safety valve of
 25 FRAND is unlawful. So that is the essential part of

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1 what we are alleging.
 2 Qualcomm calls its conduct CSP and suggests that
 3 that is equivalent to what we are criticising.
 4 THE CHAIR: Well, okay, that is a threat of refusal to
 5 supply.
 6 MR MOSER: Yes, a threat of ---
 7 THE CHAIR: Is that it?
 8 MR MOSER: Well, a threat of refusal to supply without the
 9 safety valve of FRAND in the context of the royalty
 10 space.
 11 THE CHAIR: Okay. Threat of refusal to supply without the
 12 safety valve of FRAND.
 13 MR MOSER: Yes.
 14 THE CHAIR: So it is a particular kind of a threat of a
 15 refusal to supply?
 16 MR MOSER: It is a particular kind of threat of refusal to
 17 supply. It is also a particular kind of leveraging,
 18 because you are leveraging your chipset power into the
 19 royalties.
 20 THE CHAIR: Okay.
 21 MR MOSER: For a number of straightforward reasons that have
 22 just been discussed and also because, as we heard from
 23 Mr Gonell's cross-examination, when they were talking to
 24 the IRS, you cannot charge \$10 on a \$5 chip in the
 25 chipset market. They found another way of doing it. It

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1 is not as straightforward as that. We would be happier
 2 to bring an excessive price case on conduct that was as
 3 straightforward as that. The conduct is more convoluted
 4 and so, you know, give it the label ---
 5 MR TURNER: A measure of certainty is perhaps required. Is
 6 it a threat of refusal to supply, the motive being
 7 because you do not want someone to go to FRAND
 8 proceedings, or is it a threat of refusal to supply if
 9 you go to FRAND proceedings? They are two different
 10 things. One is it is the going to the FRAND proceedings
 11 part of the threat.
 12 MR MOSER: I think you are right it is the latter, because
 13 what are people reasonably apprehending? They are
 14 apprehending that if they challenge the rate, the
 15 chipsets are going to be cut off --- the supply is going
 16 to be cut off. So, yes, it is properly ---
 17 MR TURNER: It is a quite specific threat in that respect.
 18 MR MOSER: Yes. It only works in this unique situation
 19 where you have dominance really in both of these two
 20 markets.
 21 MR TURNER: I understand.
 22 MR MOSER: So it is not perhaps surprising that it has not
 23 arisen before and therefore the siren call for formalism
 24 from the other side should be rejected.
 25 That really deals with the first part of the case

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1 law aspect.
 2 The second part has already been dealt with by---
 3 THE CHAIR: If you are describing it as a refusal to supply
 4 case or a threat of refusal to supply case, I understand
 5 that. That is a fairly classic type of abuse, but not
 6 very far away from --- I mean, a classic type of abuse is
 7 a refusal to supply. You say it is the threat of
 8 a refusal to supply so it is not very far away from
 9 that.
 10 MR MOSER: No.
 11 THE CHAIR: The question is whether that is what you
 12 characterise the abuse as, but, I mean, we have noted
 13 that that is how you put it.
 14 MR MOSER: Well, we have described it, if you look at, for
 15 instance, paragraph 162, I think, of our closing
 16 submissions {EAOS/4/45} ---
 17 THE CHAIR: I mean, 162 is not a Whish and Bailey bullet
 18 point. 162 is a whole load of facts that you rely on.
 19 What I was trying to get at was how would you
 20 characterise this if you were writing this up in
 21 a textbook so we can understand the essence of the
 22 substantive conduct that is alleged. It is all right.
 23 I have written down the threat of refusal to supply if
 24 you go to FRAND so we can proceed on that basis.
 25 So that is, you say, it is a more --- Mr Williams

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1 said that is an — he accepts that it is an exploitative
2 abuse.

3 So what I wanted to ask about that, now you are
4 talking about the legal test, is where does the test of
5 capability of producing an anticompetitive effect come
6 in, because that is a test that is applied to
7 exclusionary abuses and that is the sense it was used in
8 the Cabo case? How is this relevant at all, because if
9 you make a threat of refusal to supply, either you make
10 it or you do not? One does not normally then start
11 talking about capability of producing an anticompetitive
12 effect because it is quite obvious what you are doing,
13 in the same way that if you apply an unfair trading
14 term, you do not then ask, well, is that capable of
15 having an anticompetitive effect, you just ask, well,
16 does the dominant company apply — enforce an unfair
17 term or not?

18 MR MOSER: If I had a footnote to what my learned friend
19 Mr Williams said, it would be that the boundary between
20 an exclusionary and an exploitative abuse is not hard
21 and fast. It is not always particularly helpful. For
22 instance, our citation from Bellamy & Child at
23 paragraph 155 of our skeleton, which is at {AB4/1.1/3},
24 and in the additional authorities it is {AB5/10/432}.
25 What that shows is that there may be — I will not read

1 it all out, but there is no clear-cut or absolute
2 distinction in practice between the two categories of
3 abuse. Some abuses, such as refusal to supply, and the
4 imposition of time, may be both exploitative and
5 exclusionary.

6 THE CHAIR: But you have already at numerous points in this
7 trial confirmed that you are not alleging an
8 exclusionary abuse.

9 MR MOSER: Well, no, but in this case the conduct is not
10 easily described as one or the other. The RTL is an
11 exclusionary abuse which often buttresses the main
12 abusive conduct.

13 THE CHAIR: No, it is not. No, it is not. You have said
14 repeatedly you are not saying it is an exclusionary
15 abuse. It is not an abuse at all on its own. At the
16 most, it buttresses whatever that may mean, but we will
17 get on to that. So you have said that — you have
18 confirmed that you are not alleging an exclusionary
19 abuse for the RTL. Repeatedly in the course of this
20 trial it has been confirmed that it is not alleged that
21 there is an exclusionary abuse so we are down to
22 exploitative abuse.

23 My question was: what is the relevance of the
24 capability of the anticompetitive effect test in the
25 context of the abuse that you are alleging?

1 MR MOSER: First of all, I am trying to get across the
2 point, perhaps unsuccessfully, that these are not neat
3 categories into which this abuse can fit.

4 THE CHAIR: No, you have made that point, but in relation
5 to — in relation to the abuse, as you have described
6 it, where do we need to ask ourselves whether it is
7 capable of producing an anticompetitive effect?

8 MR MOSER: Well, the main abusive conduct is the leveraging
9 of chipset dominance to cut off access to the FRAND
10 regime and that concerns distortion of the competitive
11 process in the form of cutting off the FRAND safety
12 valve, but otherwise —

13 THE CHAIR: Yes, all right, but why do we need to conduct a
14 test of capability of producing anticompetitive effect?
15 I mean, if it is essentially a kind of refusal to supply
16 case, either there is a kind of refusal to supply, as
17 you described, or there is not.

18 MR MOSER: I do not want to get too hung up on the label of
19 refusal to supply. The classic refusal to supply would
20 involve establishing an essential facility, for
21 instance, just like the classic excessive pricing case
22 involves establishing the price. Our abuse involves
23 a disablement of a framework that is intended to govern
24 the bargaining position of the parties in the FRAND
25 context.

1 THE CHAIR: I understand that, but where does the capability
2 test that you have articulated at 152 come into that?
3 How does it fit in analytically to the question of
4 whether the abuse is made out? One can see — you know
5 where it fits in in an exclusionary abuse case.

6 MR MOSER: It is because of the distortion of the
7 negotiations over the rate. We can go right back to
8 Hoffmann—La Roche, the classic exploitation is the
9 exploitation that means it becomes directly harmful to
10 consumers because of the effect on the rate. There is
11 no particular magic in this and that is why it is
12 exploitative. It is not the other competitors. The
13 disablement of the framework, which governs the
14 bargaining position of the parties, is exploitative in
15 its effect because it affects in the end through pass-on
16 to the consumers. So it is an exploitative abuse that
17 occurs between competitors. That is why the
18 descriptions are not always helpful. I do not know
19 whether that has answered the question, but that is the
20 way that we put it and that is the way that this abuse
21 works.

22 It sits ill in the mouth of the dominant company to
23 say, well, we have set up a rather, if we are right,
24 complicated system that has this effect and you
25 cannot — you cannot touch us therefore because there is

1 not already a neat category of abuse that deals with it .
 2 I mean, in their closing submissions they make all
 3 sorts of points. They seek, for instance, to rely on
 4 the recent case of Gutmann, just because that is
 5 a recent authority on exploitative abuse as far as I can
 6 see. That was a completely different case. I do not
 7 know whether you want me to address it at all, but I can
 8 dismiss that easily . That was an argument about the
 9 information provided to consumers about rail fares and
 10 the distortion of the OEMs' negotiation process by
 11 cutting off access to FRAND was a completely different
 12 situation . I do not think Gutmann informs matters at
 13 all . They have referred to the cases that were cited in
 14 Gutmann, Deutsche Post, DSD and Meta, but none of these
 15 cases are of assistance . They concern completely
 16 different abuses and, in particular , the end point of
 17 the competitive process. So their ways of meeting this,
 18 we say, are entirely inapt.
 19 So I mean that concludes my submissions on, you
 20 know, these --- on sui generis and also on it is not an
 21 excessive pricing case.
 22 The final substantive point in relation to abuse is
 23 the extent to which we have to establish anticompetitive
 24 effects in order to show a case on abuse. This is of
 25 course the trial on liability . We do not say that we

1 have to demonstrate, let alone quantify, effects beyond
 2 the threshold required for an infringement and, again,
 3 we have relied on an entirely standard point that we
 4 have to establish capacity or capability to produce
 5 anticompetitive effects , as recently established again
 6 in Cabo.
 7 The question of the level of effects which must be
 8 demonstrated for an abuse, and, again, I want to go
 9 sparingly to authorities but I want to show you, if
 10 I may ---
 11 THE CHAIR: I am still struggling. That was the question
 12 I was just asking you about, the relevance of Cabo to
 13 this case. What are we looking at when or what do you
 14 say we have to look at in applying this capability test
 15 in the present case?
 16 MR MOSER: Well, shall we have a look at paragraph 325 of
 17 Cabo.
 18 THE CHAIR: Well, no, I just want you to answer the question
 19 as to how we concretely apply this in this case. What
 20 are we looking at in terms of capability?
 21 MR MOSER: Well, what we have to show is that the conduct
 22 was capable of hindering the maintenance of the
 23 development of competition in the relevant market.
 24 THE CHAIR: That is the test, but how do you say that
 25 applies to this case?

1 MR MOSER: Well, that was --- that development was foreclosed
 2 or prevented by precisely the abuse that we criticise .
 3 THE CHAIR: What development was foreclosed or prevented?
 4 MR MOSER: Well, the setting of the royalty price was
 5 distorted by the negotiations that led to the inflated
 6 rates.
 7 THE CHAIR: That is just about the setting of the price. In
 8 what respect --- how do you say the capability of
 9 producing an anticompetitive effect applies in this
 10 case? What is the anticompetitive effect that you say
 11 was --- we have to apply a capability test to?
 12 MR MOSER: The anticompetitive effect is that the OEMs were
 13 unable to negotiate freely with Qualcomm and therefore
 14 unable to reach a freely negotiated and fair royalty
 15 rate.
 16 THE CHAIR: All right. But that is nothing to do with the
 17 capability test . You are saying we have to apply a test
 18 of capability , rather than actual effects , so what do we
 19 have to conclude that Qualcomm's conduct was capable of
 20 doing, even if we do not go down an actual effects
 21 analysis?
 22 MR MOSER: Well, Qualcomm's conduct was capable of affecting
 23 the level of the royalty .
 24 THE CHAIR: Okay. So you say that insofar as the capability
 25 test is relevant, it is that it could affect the level

1 of the royalties .
 2 MR MOSER: Indeed, and we say it was likely. We do not have
 3 to go that far . The authorities speak of "reasonably
 4 likely ", "capable". All these seem to be synonyms, if
 5 you look at the authorities . There is some caviling
 6 over whether we have to show a "positive likelihood",
 7 but, you know, I do not think I have to take you back to
 8 the authorities that, for instance, in British Airways,
 9 at 293, "capable of having", "likely to have", those are
 10 all synonyms for the same thing. "Capable of producing
 11 the effects ", as you say, and the effect is as I have
 12 described.
 13 Mr Justice Roth in Streetmap called it the test for
 14 being "reasonably likely to harm the competitive
 15 structure of the market".
 16 THE CHAIR: I am not talking about harming the competitive
 17 structure here. You have just articulated that the
 18 capability test in this case, insofar as you understand
 19 it, is simply that it was capable of affecting the
 20 price .
 21 MR MOSER: Yes.
 22 THE CHAIR: I am not talking about competitive structures.
 23 You are just talking about the output of the royalty
 24 negotiations.
 25 MR MOSER: Yes, that is correct, but it has to be borne in

1 mind that that is done by distorting the negotiating
 2 process. That is our abuse case. So it is, I am
 3 afraid, not only but also. The negotiating process is,
 4 in my respectful submission, the competitive structure
 5 in question and that is then capable of affecting the
 6 royalty.
 7 THE CHAIR: No, in that case you are saying nothing about
 8 capable, you are not saying it was capable of affecting
 9 the negotiating process. You say it did affect the
 10 negotiating process, because it did put Apple and
 11 Samsung in fear that if they invoked FRAND, they would
 12 be cut off.
 13 MR MOSER: Yes, to that extent I am overachieving on my test
 14 and we have put it conservatively because the test is
 15 "reasonably likely".
 16 THE CHAIR: So are you saying that it is sufficient that
 17 Qualcomm's conduct was capable of making Apple and
 18 Samsung fear or do you say that they did have to fear
 19 because that is the way I understood Mr Williams to put
 20 his case, that they did actually fear that if they
 21 invoked FRAND, they would be cut off?
 22 MR MOSER: "Capable" is the test. So we can meet that test
 23 amply. It is of course our case that they did actually
 24 fear it.
 25 THE CHAIR: So are you saying the test is whether they were

1 capable — Qualcomm's conduct was "capable" of making
 2 them fear?
 3 MR MOSER: That is the test, the legal test that we have to
 4 meet: was it capable? As I think I said a few moments
 5 ago, I think the way I put it was capable of distorting
 6 the negotiating process and you will see from documents
 7 that we are going to go to, now probably on Monday, they
 8 did fear the conduct. The capability was to distort the
 9 negotiating process and the outcome was that it was
 10 reasonably likely that it would increase the royalty
 11 rate.
 12 So we say we easily surmount these tests as far as
 13 the conduct is concerned and I do repeat that the
 14 conduct is the conduct in its entirety.
 15 THE CHAIR: Were you going to go on to the counterfactual?
 16 MR MOSER: Yes. Just before I go on to the counterfactual,
 17 I mean, I am being asked whether we need to take
 18 a break? I have a couple more points about the law
 19 before I come to the counterfactual.
 20 THE CHAIR: All right. Yes, we can take a break now.
 21 MR MOSER: Okay.
 22 (3.14 pm)
 23 (Short Break)
 24 (3.26 pm)
 25 MR MOSER: Next, I would like to address the counterfactual,

1 but in particular what Qualcomm calls the FRAND context.
 2 Qualcomm's position has consistently been, as we
 3 understand it, that the CSP, as they call it, is
 4 something that is effectively forced on them by the law
 5 on patent exhaustion and implied licence so if it does
 6 not get SEP licences in place before the chips are
 7 delivered or sold, then there is a risk that the SEP
 8 licence may never be agreed and the customer will later
 9 argue that it is not obliged to pay or not obliged to
 10 pay FRAND because the patent rights have become
 11 exhausted in the meantime.
 12 At paragraph 250 of Qualcomm's closing, it is
 13 asserted that we accept that the CSP is commercially
 14 justified and reasonable. That is a misleading
 15 characterisation to this extent, because we do not
 16 dispute that it is commercially justified and reasonable
 17 for a SEP owner to take steps to guard against patent
 18 exhaustion or implied licence that may prevent them from
 19 obtaining FRAND remuneration for their patent rights,
 20 but we absolutely do not accept that the conduct as
 21 applied is a commercially justified or reasonable way of
 22 doing so. I have already addressed you on the conduct
 23 as applied, nickname pending, but it is as described,
 24 the threat to cut off chipset supply if there was
 25 a FRAND challenge. We have had that in a nutshell from

1 Mr Williams and then, as best I could, with assistance
 2 from Mr Turner this afternoon.
 3 But there is a straightforward and practical
 4 solution to the problem of exhaustion, such as it is,
 5 and that is consistent with what Mr Rogers told us in
 6 his cross-examination, where he said you can contract
 7 around exhaustion and still can. That is referred to in
 8 our closings at paragraph 226. So Qualcomm —
 9 MR TURNER: Just back up because I find this confusing. So
 10 we just need to be clear about what we mean by
 11 "exhaustion" and these may be questions as much for
 12 Qualcomm as they are for you, but, as I understand it,
 13 if you — the argument goes if you sell chips without
 14 a licence, then the person who purchases those chips may
 15 say, "Well, I can now sell them on to other people. The
 16 rights are exhausted or other people can use that as
 17 a defence if they want to buy them, to be precise".
 18 MR MOSER: Yes.
 19 MR TURNER: As a general matter that principle of exhaustion
 20 of rights, insofar as it applies generally under
 21 European law, and big question mark whether we are
 22 talking about European law, but let us assume we are for
 23 the moment, under European law you cannot contract out
 24 of exhaustion. You cannot, at least not generally.
 25 Maybe there is an area of law I am not familiar with,

1 but there is a -- but there is a different thing which
 2 may be if you sell -- if you sell your chips to somebody
 3 and there is not a licence in place, the issue, as
 4 I understand it, and I may have got this wrong which is
 5 why I am asking the question, the issue, as I understand
 6 it, is you have not yet been paid your royalty on those
 7 because you have not agreed a price. So you have sold
 8 the chips and if you want to later come along and obtain
 9 your royalty payment under your patents, it might be
 10 said it is too late but you say, no, in those
 11 circumstances, you can contract out and say, well, you
 12 pay the royalty later.

13 Is that -- those are the parameters or have I got it
 14 completely wrong?

15 MR MOSER: I respectfully understand it the same way that
 16 you do.

17 MR TURNER: Right.

18 MR MOSER: As far as I understood it until the most recent
 19 new explanation in relation to product licences, which
 20 I will come back to, that is how I understood the other
 21 side to be running it. I thought there was nothing
 22 between us on how exhaustion works.

23 What I understood Mr Rogers to be saying was not
 24 that you can contract out of exhaustion but you can
 25 contract around it, by which I take it that he meant

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1 that you can agree, for instance, on what a FRAND
 2 royalty is upfront, in which case that is fine, but, if
 3 you cannot, certainly what we would say is the contract
 4 can then provide for a dispute resolution mechanism that
 5 allows chips to be supplied while the dispute is
 6 resolved.

7 MR TURNER: I understand.

8 MR MOSER: That is really all we say about the FRAND
 9 context. There has been a lot of --

10 MR TURNER: An alternative way to that would be to say,
 11 well, look, pending our resolution, I am going to charge
 12 you double for the chips or triple for the chips or
 13 something and then we can sort out the balance of
 14 payments in due course. That would be another way of
 15 doing it.

16 MR MOSER: Absolutely. In a nutshell, that is all the
 17 counterfactual involves.

18 MR TURNER: Yes.

19 MR MOSER: What has been said against us is a variety of
 20 things. They have said, well, you are relying on recent
 21 English jurisprudence, the details of that are not
 22 clear. It has not been explained whether the same
 23 applies in foreign law and all the rest of it, but my
 24 respectful submission is that the fact that our proposed
 25 counterfactual complies with recent English case laws is

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1 grist to our mill, but it is by no means essential to
 2 follow exactly the solution reached in this case or
 3 that. The case law clearly establishes it is consistent
 4 with FRAND that a willing licensee should make available
 5 interim licences, pending a final determination of FRAND
 6 terms, should not attempt or threaten to enforce its
 7 SEPs to obtain injunctive relief to secure leverage in
 8 negotiations over FRAND. The English Court of Appeal
 9 was prepared to make declarations, but we do not look
 10 only to recent English case law. What we say is there
 11 are ways of dealing with this, plainly, in the FRAND
 12 regime.

13 One of the examples we have cited were the
 14 commitments given by Samsung, as it happens, in 2014 to
 15 the European Commission to resolve the proceedings where
 16 it was alleged that Samsung behaved anti-competitively
 17 by seeking injunctive relief in respect of its LTE SEPs.
 18 The decision was in the bundle. We have added a copy of
 19 the commitments actually given by Samsung. These can be
 20 seen --

21 MR TURNER: Just remind me, which decision is this?

22 MR MOSER: This is the decision -- I do not have the
 23 reference it to now. Somebody will give it to me. But
 24 it was the Commission investigation which alleged that
 25 Samsung had behaved anti-competitively. The decision

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1 reference is going to be given to me. I was going to
 2 show you a copy of the commitments which were given by
 3 Samsung as they are at {POF/434.1}. This was
 4 a framework which the Commission and Samsung clearly
 5 considered workable. That is something else. Ah,
 6 there. So at A.1, bottom half of the page, Samsung
 7 undertakes it will not file a claim seeking injunctive
 8 relief in the EEA for infringement of its SEPs against
 9 any potential licensee who signed and returned
 10 an invitation to negotiate and who thereafter complies
 11 with the framework for determining FRAND terms for a
 12 licence for SEPs as the means for determining FRAND
 13 terms.

14 There is -- if we go over the page {POF/434.1/2} --
 15 a simple scheme. At 1.a.i the parties are to negotiate
 16 for a mandatory negotiation period of 12 months. B, if
 17 the agreement is not reached in that time, they will
 18 submit the matter to arbitration or court determination.
 19 Then there is a scheme for mandatory determination set
 20 out at page 4 of this document from paragraph 5
 21 {POF/434.1/4}. It is essentially that the parties can
 22 choose arbitration or court if they do not agree, then
 23 court determination is the default. That is at 6. The
 24 rules for arbitration are set out at 9. Over the page,
 25 the procedure for court determination is set out at 10.

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1 It was the English Patents Court or the United Patents
 2 Court, UPC.
 3 That is one possible solution for how to hold the
 4 ring.
 5 A similar framework was imposed it may be
 6 recalled —
 7 MR TURNER: Sorry, where was the bit on what to do about the
 8 exhaustion and the royalties that have not been paid in
 9 the — that is in there somewhere, is it?
 10 MR MOSER: Forgive me, I do not think so. The point is that
 11 it sets out the scheme for the FRAND determination in
 12 the event that they do not agree.
 13 MR TURNER: Well, was Samsung supplying chips? Not in this
 14 case?
 15 MR MOSER: Not in this case.
 16 MR TURNER: So one needs to keep in mind — yes. I mean the
 17 problem of exhaustion which we were on only arises if
 18 you are selling chips, as I understand it. It does not
 19 arise if it is a mere FRAND negotiation as
 20 a licensor /licensee.
 21 MR MOSER: That is correct. There are ways to hold the
 22 ring.
 23 MR TURNER: But you say, in any event, there are contractual
 24 ways to hold the ring, even in those circumstances —
 25 MR MOSER: Yes.

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1 MR TURNER: — which would involve having to — a final
 2 reckoning as to all outstanding royalties that are owed
 3 once you have established what FRAND is.
 4 MR MOSER: Exactly. There was a similar situation discussed
 5 in the Motorola case, where the US FTC imposed a similar
 6 structure in the Motorola v Google situation in 2013 and
 7 I can get you the reference.
 8 Now, we say, in our written closings, that the
 9 discussions in opening about implementation, so whether
 10 it has to be the mid—point or otherwise in the interim,
 11 that is beside the point. It really does not matter.
 12 There is a whole range of possible options. You can
 13 have no interim payments.
 14 THE CHAIR: Yes, it is clear we do not need to make — reach
 15 a decision on exactly where in the range that would have
 16 fallen, but just to set this in its context. This point
 17 is made, your paragraphs 221 to 226, that is dealing
 18 with the counterfactual and no licence situation.
 19 Can you tell me which negotiations in this case that
 20 would have been relevant for?
 21 MR MOSER: It would have been relevant in any negotiation
 22 where the counterpart would have been left without
 23 a licence.
 24 THE CHAIR: No, but which ones for Apple and Samsung,
 25 because you are going to be dealing with the facts?

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1 Mr Williams accepted that for the most part, at least,
 2 there was not a no licence situation so can you tell us
 3 which are the exceptions on the facts where the no
 4 licence would have been a counterfactual?
 5 MR MOSER: Certainly, as we understand the facts, the
 6 situation involving Apple, when it had to move to 5G,
 7 I know there is the new case being run, but at that
 8 stage they did not have a licence, it seems, for 5G
 9 chips, multi—mode or otherwise, and reasonably
 10 apprehended a problem. So that could have been such
 11 a situation.
 12 Samsung —
 13 MR TURNER: I mean, there is an issue around that, is there
 14 not, whether they were covered under the (inaudible —
 15 overtalking)?
 16 MR MOSER: There is, and I will come back to it.
 17 THE CHAIR: Leaving aside that. So if you are correct about
 18 the correct — the interpretation and accuracy of
 19 Mr Gonell's point, then you say that the Apple 5G
 20 licence was a situation where there was not an existing
 21 licence that would have covered them. What else? Any
 22 of the Samsung negotiations or any of the other Apple
 23 negotiations?
 24 MR MOSER: Well, not any of the other Apple negotiations
 25 while they were using the CMs. [redacted].

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1 THE CHAIR: All right. But on the facts as we have them,
 2 you say the only actual no licence situation was — on
 3 Apple's side was the 5G licence. What about Samsung?
 4 Was there any situation where you say there actually was
 5 a no licence situation?
 6 MR MOSER: I am being told something. Just a second.
 7 (Pause)
 8 So Samsung 2008/2009, that was a new licence for
 9 LTE. They had to bring LTE within scope.
 10 THE CHAIR: So Samsung 2008 to 2009. So you say that was
 11 not covered by the earlier Samsung licence?
 12 MR MOSER: For LTE, yes.
 13 THE CHAIR: LTE.
 14 MR MOSER: Because, again, it was a generational shift.
 15 THE CHAIR: Right. Is that it then? Apple 5G and
 16 Samsung 2008 to 2009?
 17 MR MOSER: Yes. Apple at any time if their CMs had been
 18 pressured to cut them off.
 19 So my point is simply there are a number of options,
 20 interim payments at preferred rates subject to
 21 repayment, intermediate interim payments, no interim
 22 payments but compensation for delayed receipt, a number
 23 of ways of holding the ring in a FRAND situation. One
 24 should not, in my respectful submission, become fixated
 25 by the particular implementation.

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1 The point, as far as the abuse and objective
2 justification eventually will be concerned, is that what
3 they call the CSPs therefore were not the only way to
4 achieve Qualcomm's stated objective, which is avoiding
5 the problems caused by exhaustion, at least as we have
6 understood the case so far.

7 We know, of course, that eventually, [redacted] and
8 there is even Mr Gonell's evidence, and that was at ---
9 it is in his statement at paragraphs 17 and 18 that
10 Qualcomm was willing to subject disputed terms to
11 binding arbitration process after an impasse has been
12 reached on agreed terms. So it cannot be a big step to
13 offer arbitration before or prospectively, if the
14 parties cannot agree.

15 So that really is all I wanted to say about the
16 counterfactual and the FRAND context.

17 I will skip over definition of the conduct because
18 we have dealt with it and I will go to my fourth point,
19 which is the first substantive evidential point and that
20 is Qualcomm's intentions.

21 THE CHAIR: Well, could we take this the other way around?
22 Can you deal first with the new case on product patent
23 licences and then go to the internal evidence because
24 I think once you are done with the new case, that ends
25 the sort of high level points and then you are getting

1 into the detail?

2 MR MOSER: Of course. That makes perfect sense.

3 So the new point. As a general comment, the terms
4 of licensed products versus licensed patents are not
5 terms that you are going to find in the licence
6 agreement or in the CM SULAs. So that came up in
7 cross-examination towards the end of my
8 cross-examination of Mr Gonell. I will come in due
9 course as to what I did or did not put to him, but
10 I submit that is not the --- that cannot be the decisive
11 issue.

12 THE CHAIR: Are you saying that we need to --- I mean, on
13 your case, do we not need to look at the licences and
14 see what they said?

15 MR MOSER: Exactly. It is not really a matter for the
16 witness evidence. It is a matter for what the licences
17 clearly say.

18 THE CHAIR: So you have referenced one of the CDMA SULAs.

19 MR MOSER: Yes.

20 THE CHAIR: Do you have a reference for one of the UMTS
21 SULAs?

22 MR MOSER: Not immediately to hand. I was going to use the
23 Foxconn SULA.

24 THE CHAIR: All right. Do you say that the UMTS ones were
25 the same or effectively the same?

1 MR MOSER: Effectively the same. So, for instance, the
2 Samsung SULA was effectively broadly the same, just with
3 a different effective date. That was brought in
4 line in 2009 to include LTE, but we say did not include
5 LTE before 2009, but can I take it in stages and take
6 you through the CM --- the Foxconn SULA which is the one
7 that was actually raised in evidence?

8 THE CHAIR: Yes.

9 MR MOSER: Maybe it helps, before that, if I say just some
10 very obvious things about licences.

11 You can limit your licence contractually in
12 different ways. You can have a patent licence which is
13 limited in terms of the kind of products which it
14 permits the licensee to make and sell so, say, mobile
15 phones. Then you can use the licence to make mobile
16 phones but if you use it to make laptops, you are in
17 breach. Or you can have a patent licence that is
18 limited in terms of the patents which it covers, so
19 patents A, B and C, and you can use those in your
20 products, but if you use X, Y or Z, then you are in
21 breach. Or you can have a licence which is limited in
22 terms of the products and the patents which it covers.
23 So it says the licensee is licensed under patents A, B
24 and C only to make mobile phones. Then the licensee can
25 rely on the licence as a defence if it makes mobile

1 phones and is sued for infringement of patents A, B or
2 C. It cannot rely on that licence if it makes laptops
3 and is sued for infringement of any of the patents and
4 it cannot rely on that licence if it makes mobile phones
5 and uses patents X, Y or Z.

6 We say that the CM licence, and to all intents and
7 purposes licences that matter, fall into this latter
8 category. So if we turn to the CM licence {POF/95}, the
9 SULA, originally entered into in October 2005 ---

10 THE CHAIR: This is the Foxconn SULA?

11 MR MOSER: It is. Foxconn 2005. 5.1 is the operative
12 provision. That is at page 10 {POF/95/10}. You will
13 see it is a licence. I went through this with
14 Mr Gonell. "Grant of Licence From QUALCOMM." Then,
15 over the page at 11 {POF/95/11}:
16 "Qualcomm hereby grants ..."

17 MR TURNER: Hold on. Do we need to read 5.1 or not? Do we
18 just need to note it?

19 MR MOSER: Well, if we can have both up:

20 "Grant of the licence ... Subject to the terms and
21 conditions ... "

22 Grants an upfront licence :

23 "Qualcomm hereby grants to the licensee a personal,
24 non-transferable, worldwide and non-exclusive licence
25 under Qualcomm's Intellectual Property solely for

1 Wireless Applications to [(a)] make and import and use
 2 Subscriber Units, [(b)] sell (and offer to Sell) such
 3 Subscriber Units."
 4 MR TURNER: But we need to keep in a mind the definition of
 5 "Qualcomm intellectual property" which probably does not
 6 matter for present purposes and "subscriber units"?
 7 MR MOSER: Exactly. Just before we go to that, just note at
 8 the end of 5.1, about four lines up, it says:
 9 "No other, further or different licence is ----"
 10 THE CHAIR: Yes, all right. It is what we say it is here.
 11 So then the definition of subscriber units.
 12 MR MOSER: I am told that the another reason it is UMTS as
 13 well is because UMTS is CDMA-based.
 14 THE CHAIR: So Qualcomm's intellectual property is defined
 15 on page 7.
 16 MR MOSER: Yes {POF/95/7}.
 17 THE CHAIR: Qualcomm's technically necessary IPR and
 18 commercially necessary IPR.
 19 MR MOSER: Yes.
 20 THE CHAIR: It does not define that by reference to
 21 a generation.
 22 MR MOSER: No, but it then says "Qualcomm's Technically
 23 Necessary IPR" which is at --- I am afraid one has to
 24 leap around a bit --- at page 9 {POF/95/9};
 25 "... includes only each claim of any patents ...

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1 issued on, prior to or after the Effective Date..."
 2 THE CHAIR: All right.
 3 MR MOSER: "[By] which [(i)]the Party and/or its Affiliate
 4 has the right to license to the other Party ... "
 5 THE CHAIR: So that means?
 6 MR MOSER: The effective date?
 7 THE CHAIR: No, no, what do you say the effect of the
 8 technically necessary IPR definition is? What does that
 9 mean in terms of the generation? Does that mean
 10 anything about --- does it restrict it to a particular
 11 generation?
 12 MR MOSER: We say that it must be clear that it ought to be
 13 beyond dispute that 4G SEPs and 5G SEPs do not satisfy
 14 the definition of Qualcomm intellectual property
 15 because ---
 16 THE CHAIR: Which particular terms?
 17 MR MOSER: Because of the effective date. So the effective
 18 date at the time was 2005. Eventually it goes to 2009.
 19 If they were issued after 14 April ---
 20 MR TURNER: It says "issued on, prior to or after". That
 21 seems to imply any time between the ---
 22 THE CHAIR: Any time whatsoever.
 23 MR TURNER: Are we misreading that?
 24 MR MOSER: But Mr Gonell accepted that ---
 25 THE CHAIR: No, you just told us that it is not for

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1 Mr Gonell to give evidence and we should look at the
 2 licence so we are just doing that for the moment. So
 3 you say --- what is it that you say excludes 4G in this
 4 definition or 5G, sorry?
 5 MR MOSER: You have to read on. Sorry, I was reading on.
 6 "... the Party and/or its Affiliates has the right
 7 to license to the other party without payment of
 8 royalties or any other consideration to any third party
 9 and (ii) are essential to the manufacture, use or sale
 10 of Subscriber Units and/or Components which comply with
 11 the specifications of the CAI..."
 12 THE CHAIR: But what bit limits this in terms of the
 13 generations and what is the limitation?
 14 MR MOSER: If you then go to the CAI, as Mr Gonell did ---
 15 MR TURNER: Which page is that?
 16 MR MOSER: Page 3 {POF/95/3}. We see what is included. The
 17 TIA's IS-95 digital cellular standard.
 18 MR TURNER: (Inaudible).
 19 MR MOSER: You can read it. (Pause)
 20 MR TURNER: So that --- sorry, without wrapping a towel round
 21 my head and interpreting this, your point is that does
 22 not include, for example, 5G?
 23 MR MOSER: Exactly, or LTE.
 24 MR TURNER: Or LTE. So then where are we if you have a chip
 25 which includes these patents but does not --- sorry, it

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1 is very inconvenient looking at these on a screen where
 2 you cannot get pages up more than one page up at a time.
 3 MR MOSER: Well, I say that under this SULA, that chip is
 4 licensed for CDMA patents, but not for any of the later
 5 patents.
 6 THE CHAIR: That then goes against the --- what I understand
 7 to be accepted which was the CMs were licensed for 4G.
 8 MR MOSER: I am sorry, that --- what is it that we accepted?
 9 THE CHAIR: I thought the CMs were licensed for 4G.
 10 I thought it was accepted that the CMs were licensed for
 11 4G. So under what, if that means what you say it does?
 12 MR MOSER: I think what we accepted is that Apple understood
 13 that. Apple of course never saw the licence, as we have
 14 explained in closing. In fact, it appears that they
 15 were not so licensed because ---
 16 MR TURNER: I see, Apple never saw this?
 17 MR MOSER: No, and the licence always remains a licence
 18 under Qualcomm's intellectual property, as that term is
 19 defined in the agreement. So it is not a general
 20 licence to all of Qualcomm's portfolio and the licensee
 21 does not get a licence to 5G SEPs just because it
 22 happens to make, for instance, a 5G multi-modal device
 23 that meets the definition of "subscriber unit" in other
 24 ways.
 25 MR TURNER: I wonder what Apple's interpretation of this

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1 document was, not — Apple's interpretation of the
 2 position was? We do not have any evidence on that. It
 3 is a question of statement.
 4 MR MOSER: Well, Apple must have been of the view that it
 5 could not get 5G chips because that is what we know from
 6 Ms Mewes' evidence they felt they needed to renegotiate.
 7 MR TURNER: Yes, Ms Mewes.
 8 MR MOSER: Leaving that aside, the rather strange position
 9 appears to be that at all material times the CMs and
 10 OEMs were left under the impression by Qualcomm that
 11 they did have a full portfolio licence and I do not know
 12 whether Qualcomm is going to argue that, for instance,
 13 included commercially necessary IPRs somehow could
 14 include 5G or 4G, but the reality appears to be that
 15 that was not so and, yet, Qualcomm was quite happy to
 16 flex apparently non-existent muscles when it came to
 17 upgrading generations in order to extract higher royalty
 18 rates. It is a very odd situation.
 19 MR TURNER: Sorry, could I ask for a hard copy of this
 20 document, not now, Monday is fine?
 21 MR MOSER: Yes.
 22 THE CHAIR: You say that the other SULAs, which refer to
 23 UMTS, were in the same form?
 24 MR TURNER: Thank you very much.
 25 MR MOSER: Well, we will have to check whether there is any

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1 that actually refers specifically to UMTS, but UMTS its
 2 CDMA-based so it is my understanding that, yes, all
 3 relevant SULAs are in the same form, but we will go back
 4 and check that.
 5 So —
 6 MR TURNER: So in terms of Apple's understanding of the
 7 position, all you have is the Mewes hearsay —
 8 MR MOSER: Yes.
 9 MR TURNER: — for better or worse. Sorry, that is not
 10 a pointed criticism.
 11 MR MOSER: And what Qualcomm says in its evidence.
 12 THE CHAIR: So Qualcomm's evidence is Mr Gonell and
 13 Mr Gonell says this covered 4G and 5G. His evidence is
 14 that at all times Apple was covered through its CMs.
 15 MR MOSER: [redacted]. There was then the extrapolation
 16 that said, yes, but if it is multimodal, you can go
 17 back, but that is not what the licence says.
 18 THE CHAIR: I looked at that section of the transcript. He
 19 agreed with you that this did not specifically licence
 20 5G SEP, but it said — he then said the point is that it
 21 licensed the product and if the product was a multi-mode
 22 product, it was licensed under this.
 23 MR MOSER: Yes, but that is what we do not understand,
 24 because although we disagreed with it and said it was an
 25 abuse, we at least understood Qualcomm's position, as it

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1 was originally pleaded and presented, which is that if
 2 an OEM wants to implement a cellular standard lawfully,
 3 it needs a licence to all of the SEPs for the standard
 4 and that the devices will implement. They are entitled
 5 they say in their original case to insist that the
 6 technology protected by SEPs is not implemented by those
 7 who are not licensed and to obtain FRAND for granting
 8 licences.
 9 So it is reasonable to refuse the chipsets, they
 10 said. That is the CSP, as we understood it.
 11 We said the way they did that was a contravention of
 12 the law, but at least we knew what they were getting at.
 13 We do not understand the logic of their new position.
 14 The new position appears to be licences agreed covering
 15 a limited subset of Qualcomm SEPs. Qualcomm then allows
 16 the licensee to sell products which implement technology
 17 protected by a completely different subset of SEPs,
 18 which are not formally licensed without attempting to
 19 agree an updated licence and it does so because the
 20 original licence, as well as being limited to a subset
 21 of Qualcomm's SEPs, was also limited to a particular
 22 description of product.
 23 MR TURNER: So what was the — sorry, I may be getting very
 24 confused. If you forget 5G for a minute and then focus
 25 on the LTE, what was the — the same arguments bite, do

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1 they not, that you have to interpret this contract
 2 broadly, otherwise the contract manufacturers would have
 3 been unlicensed with respect to the sale of backwards
 4 LTE chips?
 5 MR MOSER: Yes.
 6 MR TURNER: So whatever the black letter lawyers might end
 7 up concluding, if we go through this contract carefully,
 8 the fact is in practice it is understood this contract
 9 covered more than 3G, it covered LTE and therefore, by
 10 parity of reasoning, the same would apply to 5G, 6G, 7G,
 11 8G, and so forth?
 12 MR MOSER: Indeed. I mean, what Mr Gonell was essentially
 13 doing was giving an opinion of how he thought this might
 14 work, but that is not what the contract says.
 15 MR TURNER: No, but that is how the parties were behaving.
 16 MR MOSER: That is the new allegation, but if they were —
 17 MR TURNER: Well, no, I am sorry, it is not the new
 18 allegation. This is the only licence in place, as
 19 I understand it, for the supply of 4G chips which
 20 I understand Foxconn is providing.
 21 MR MOSER: If that is so then, as a matter of black letter
 22 law, it was an extremely risky undertaking because
 23 either, because we are taking the 4/5G example, the
 24 implementers are then infringing the 4G and 5G SEPs
 25 because they are not covered in the licence or they

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1 become exhausted or the subject of an implied licence.
 2 MR TURNER: So what is the applicable law for this
 3 contract? Californian, is it?
 4 MR MOSER: Yes, Californian.
 5 THE CHAIR: So Mr Gonell says in his second witness
 6 statement Apple was covered by the CM's licences;
 7 paragraph 10, I think. If you took issue with that, why
 8 did we not have anything in the opening submissions
 9 saying, you know, Mr Gonell is not right, here is the
 10 relevant licence, this is what the terms mean, and that
 11 is going to be put to Mr Gonell as a matter of evidence?
 12 I mean, you did take him through it, he gave his answer
 13 and there was no pushback on the point that he made in
 14 the cross-examination that there is a distinction
 15 between a product and a patent licence and that
 16 distinction meant that this licence applied not only to
 17 3G products, but to multi-mode products that
 18 incorporated the 3G standards?
 19 MR MOSER: Well, I certainly disagreed with him by saying
 20 this is not --- it cannot at all be the case that given
 21 everything we have heard. Maybe I could have repeated
 22 that. I say nothing turns on the sort of formality of
 23 whether I disagreed with him again after he gave the
 24 next answer. The case, as we understood it, was that an
 25 OEM that has concluded a licence for an individual SEP,

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1 but not the remainder of the SEPs, would infringe those
 2 non-licensed SEPs when it sends the end devices and the
 3 contract appears to us to be clear.
 4 THE CHAIR: I am sorry. I may have misunderstood something.
 5 Has this trial or has it not proceeded on the basis that
 6 the licences covered 4G? Because when I asked you which
 7 were the negotiations for which --- for which there would
 8 have been the no licence situation, you did not say
 9 Apple's LTE negotiation. You said Apple 5G presumably
 10 because, and that is the way I understood it, you
 11 accepted that CM licences covered 4G.
 12 MR MOSER: As I say, it appears that Qualcomm and Apple
 13 proceeded on that basis, Apple, without really knowing
 14 or without knowing at all the terms of the CM SULAs.
 15 THE CHAIR: It is not about whether Qualcomm and Apple
 16 proceeded, but whether in these proceedings, is there
 17 something in the opening submissions or in the pleadings
 18 which --- by which either side articulated its position
 19 on this and in particular you took issue with the
 20 licence as covering 4G?
 21 MR MOSER: In the case of Samsung, the position was
 22 rectified. In the case of Apple, we took issue with the
 23 5G aspect. We did not take issue with the 4G aspect
 24 simply because at that stage they were proceeding under
 25 the CM's licences and, you know, no party has said

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1 before that such a distinction was going to be drawn.
 2 MR TURNER: But presumably it suited parties to --- insofar
 3 as there is a question of construction here, it suited
 4 the parties to behave as if this was covering LTE. It
 5 meant the contract manufacturers were licensed. It
 6 meant Qualcomm was getting its money. Just looking at
 7 this for the first time, it is not entirely clear what
 8 it all means, but this does not look like a self-evident
 9 point. This looks like potentially a very difficult
 10 point of construction, if there is merit in it, and in
 11 order to --- for us to reach a view on that, first of
 12 all, we need to be invited to do that well in advance of
 13 closing submissions and, secondly, it is a Californian
 14 contract. We are not in a position to, without
 15 evidence, deal with a difficult nuance which it may be.
 16 As I say, we will hear from Qualcomm whether they say it
 17 is clear against them, clear in their favour or
 18 a difficult point of construction. But just to say at
 19 the moment that this means that everyone was harbouring
 20 under or had a misapprehension of what this contract
 21 meant is difficult to invite the Tribunal to reach that
 22 conclusion.
 23 MR MOSER: There are a number of points there. As far as
 24 the construction of the contract is concerned, nobody
 25 has alleged or brought any evidence that Californian

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1 contract law is different from English contract law for
 2 these purposes.
 3 Secondly, the interpretation of the contract ---
 4 MR TURNER: This point of contract had not been lined up.
 5 You had not lined up this point of contract in order to
 6 give Qualcomm an opportunity to do that.
 7 MR MOSER: Well, we ---
 8 MR TURNER: You had not said that it did not cover 4G and it
 9 did not cover 5G and this is why. This is all new, is
 10 it not?
 11 MR MOSER: I mean, we raised it in written closing in
 12 relation to Mr Gonell's cross-examination. We can
 13 address you in greater detail on that point on Monday,
 14 if you would prefer, but my overall point on this is
 15 that it is not, with respect, we say, a matter of
 16 complex interpretation of the contract because the
 17 contractual wording seems fairly clear.
 18 THE CHAIR: No, I think Mr Turner's point was that if you
 19 had taken issue with what was said in the evidence by
 20 Mr Gonell, this would have had to be set up much earlier
 21 than the closing submissions. We would have had to be
 22 alerted, I think, from the opening submissions that you
 23 took issue with the assertion that there was --- that
 24 these contracts covered Apple and we would have needed
 25 to be shown, at some point before now, the licences for

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1 you to make that good. That is Mr Turner's point.
 2 MR MOSER: Yes. Well, I did put these matters to Mr Gonell.
 3 It is said that I did not challenge him on paragraph 54
 4 of his witness statement. I did. That was the point of
 5 my cross-examination on paragraph 5.1 of the licence.
 6 So these matters were put to Mr Gonell. He made his
 7 point about the difference between the product licence
 8 and patent licence, which, as far as we were concerned,
 9 was a new way of putting it, which they have seized on.
 10 There was nothing we could pre-advertise about that
 11 because he had not said it until he was in the witness
 12 box.
 13 MR TURNER: He said it in his second report, paragraph 10,
 14 did he not?
 15 MR MOSER: Yes, paragraph 10, I think, of his second
 16 statement, which I did put to him.
 17 MR TURNER: Yes.
 18 MR MOSER: He said what he said and we disagreed with him.
 19 So that is the way that it emerged. Until it
 20 emerged in this way in cross-examination, we had not
 21 understood it to have been put like that at all because,
 22 as I say, that did not seem to us how the case had been
 23 pleaded or run hitherto.
 24 MR TURNER: In practice, you are inviting us to reach
 25 a conclusion that Mr Gonell was wrong and that the

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1 contract manufacturers have been unlicensed during LTE
 2 production and that Apple somehow knew this and that
 3 just seems --- that is a big, big, big point.
 4 MR MOSER: No so, I mean, perhaps the liberating thought on
 5 this is the following: as far as our case in relation
 6 to 2019 is concerned, we do not say that Apple knew
 7 about the contractual interpretation. It is plain, we
 8 say, on the evidence that Apple thought in 2019 it
 9 needed a new licence, as Samsung thought in 2009 it
 10 needed a new licence. That is the basis on which both
 11 parties were negotiating. So there is this oddity about
 12 the facts and the underlying contract that it appears
 13 Qualcomm may have been content, perhaps so as not to
 14 disturb the existing royalty arrangements, to let
 15 matters go with the CMs and perhaps others, but the
 16 liberating thought is that whatever --- whatever the
 17 correct answer, Apple was clearly under the impression
 18 in 2019 that it needed a new 5G licence and Apple of
 19 course did not know the terms of this contract. So I am
 20 not saying that Apple proceeded on any understanding of
 21 the law.
 22 So ---
 23 THE CHAIR: It needed a new 5G licence or it wanted --- it
 24 wanted some kind of rebate or whatever in relation to
 25 the CMs? Which?

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1 MR MOSER: Well, it was negotiating on the basis that
 2 it needed to obtain 5G chipsets from Qualcomm and also
 3 it felt it could not fall back on the CMs.
 4 THE CHAIR: All right. When you take us to the facts on
 5 Monday, you do need to take us to the documents which
 6 you say show that Apple thought that it could not fall
 7 back on the CMs for the 5G and that it needed itself to
 8 be licensed.
 9 MR TURNER: Needed its own licence so it could go out into
 10 the market and source chips from other places.
 11 MR MOSER: Well, indeed. It is consistent with what we have
 12 said about the Mewes evidence all along.
 13 THE CHAIR: Well, no.
 14 MR MOSER: But I will come back to it on Monday.
 15 THE CHAIR: I think we need to see the documents which you
 16 say show that Apple thought it actually needed its own
 17 5G licence in order to go into the market with 5G
 18 phones.
 19 MR MOSER: Understood.
 20 So there is much more I could say about how it has
 21 been pleaded and put and so on, but that is the essence
 22 of it.
 23 THE CHAIR: All right.
 24 MR MOSER: I think that is as far as I want to take it
 25 today.

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1 THE CHAIR: Did you want to --- so that is what you want to
 2 say about the product patent licences?
 3 MR MOSER: Yes.
 4 THE CHAIR: Do you now want to start on the internal
 5 evidence because we have some --- we have 20 minutes?
 6 MR MOSER: Yes, absolutely, if that is convenient?
 7 THE CHAIR: Yes, of course.
 8 MR MOSER: So the internal evidence of Qualcomm. As you
 9 know, we contend that in order to understand the nature
 10 and the purpose of Qualcomm's conduct, as well as its
 11 capacity to produce anti-competitive effect, we want to
 12 look at Qualcomm's own intentions and understanding and
 13 it is already addressed in paragraphs 165 to 178 of our
 14 written closings. We go through various categories of
 15 Qualcomm internal documents.
 16 Importantly, you will recall Project Phoenix and
 17 I am afraid I believe I need to go into closed for
 18 Project Phoenix. I think it is outer ring confidential.
 19 THE CHAIR: All right. So we are now in closed session.
 20 (4.12 pm)
 21 In Private
 22 (4.34 pm)
 23 (The court adjourned until 10.00 am
 24 on Monday, 3 November 2025)
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