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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 6<sup>th</sup> October 2025 – Tuesday 4<sup>th</sup> 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**

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**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 Monday, 3 November 2025  
 2 (10.00 am)  
 3 Closing submissions by MR MOSER (continued)  
 4 THE CHAIR: Good morning, Mr Moser.  
 5 MR MOSER: Good morning. I will be spending most of the  
 6 rest of my time on the Apple/Samsung documents and, to  
 7 a lesser extent, the other OEMs and then Ms McAndrew  
 8 will deal with the silencing point.  
 9 You have our written submissions on RTL and I was  
 10 not planning to revisit that. There are two sweep-up  
 11 matters, objective justification and the FRAND defence,  
 12 which I propose to be quite short on. Finally, if you  
 13 feel the need to hear about it, Mr Armitage is prepared  
 14 to deal with extraterritoriality and effect on trade.  
 15 THE CHAIR: I think probably not. Although, I mean, the  
 16 Tribunal is always very happy to hear from junior  
 17 counsel. If there was something that you think needs to  
 18 be said, in addition to what is said in the written  
 19 submissions, then we would be of course delighted to  
 20 hear from him, but we are not requiring --- I think you  
 21 were saying there was one thing.  
 22 MR ARMITAGE: A 30 second point that is not mentioned in  
 23 the ---  
 24 MR TURNER: There is extraterritoriality, there is also the  
 25 question of applicable law when it comes to looking at

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1 aspects of FRAND and what is required and so forth.  
 2 I am seeking those as distinct points. I do not know  
 3 what you mean by extraterritoriality, but I assume you  
 4 are seeing them as distinct points.  
 5 MR MOSER: I do not mean that. I mean just the competition  
 6 law aspect.  
 7 MR TURNER: Absolutely.  
 8 MR MOSER: But your intervention, if may say so, is timely,  
 9 because there is one matter before I get to the Apple  
 10 evidence. We have carved out a hopeful ten minutes for  
 11 this, which is that my learned friend Mr Ivison, talking  
 12 of junior counsel, wishes to follow on briefly in  
 13 relation to my submissions on Qualcomm's new patent  
 14 licence argument, particularly exchanges with you,  
 15 Mr Turner, and with your leave, he will address you on  
 16 that before I start.

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17 Closing submissions by MR IVISON  
 18 MR IVISON: Two related issues have arisen in relation to  
 19 this point about the scope of Qualcomm's SEP licences in  
 20 terms of the patents which were licensed.  
 21 The first is that we sought to address in  
 22 cross-examination a narrow point which arose from  
 23 paragraph 10 of Gonell 2 and Qualcomm's arguments based  
 24 on it and that was that section 5.1 of the CMs' licences  
 25 have enabled Apple to obtain Qualcomm 5G chips in 2019.

1 That was an assertion first made in Mr Gonell's  
 2 second witness statement which was served on 5 August  
 3 this year.  
 4 The second thing that has happened is that what came  
 5 out for the first time in Mr Gonell's oral evidence on  
 6 that point has caused Qualcomm, we say, to make a major  
 7 adjustment to its case and that is one which, in our  
 8 submission, undermines the justification it has  
 9 previously given my client and the Tribunal for why it  
 10 developed and maintains the CSP.  
 11 We looked back at the transcript for Friday and we  
 12 think that the Tribunal may have formed the impression  
 13 that Qualcomm's position is still that the CMs'  
 14 licences --- the CMs' SULAs did include, one way or  
 15 another, licences for all the SEPs that the CMs and  
 16 Apple needed licenses to, whether 3G, 4G, 5G or 6G, for  
 17 that matter. That is not our understanding of  
 18 Qualcomm's position now. Our understanding is that  
 19 Qualcomm accepts, just like Mr Gonell did, that the  
 20 SULAs did not include licences for a substantial  
 21 proportion of the non-3G SEPs which the CMs and Apple  
 22 were implementing in their iPhones.  
 23 THE CHAIR: A few too many 'nots' in that.  
 24 MR IVISON: We understand that Qualcomm accepts, like  
 25 Mr Gonell, that the CM SULAs did not include licences

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1 for all of the SEPs that would be implemented in the 4G  
 2 and 5G iPhones.  
 3 THE CHAIR: Yes.  
 4 MR IVISON: I will just explain very briefly why we say that  
 5 and then I will show you one document which shows how  
 6 Qualcomm internally appraised the situation as well.  
 7 Mr Moser showed you Foxconn's SULA on Friday. You  
 8 will recall that section 5.1 contains a licence under  
 9 Qualcomm's intellectual property ---  
 10 MR TURNER: I did ask for a hard copy of that.  
 11 MR IVISON: Oh, did you not get one?  
 12 MR TURNER: If it could be handed up at some stage. Thank  
 13 you.  
 14 MR IVISON: You will recall that ---  
 15 MR MOSER: I thought we had handed it up on Friday, but we  
 16 will get you another one.  
 17 MR TURNER: Would you mind, sorry. It did not get into my  
 18 hand. Apologies.  
 19 THE CHAIR: Yes, I think Mr Gonell accepted that the 3G  
 20 licences did not, as such, include licences for all of  
 21 the 4G and 5G SEPs as such. What we had understood him  
 22 to say, and then it is a matter of debate as to whether  
 23 that is the right finding, but what we had understood  
 24 him to say was that there was --- the reason for his  
 25 paragraph 10 in his second witness statement and the

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1 debate that he was having with Mr Moser in  
 2 cross-examination in that part of the transcript was  
 3 that he was drawing a distinction between the SEP  
 4 licence and the product licence.  
 5 MR IVISON: But there are not two different things in the  
 6 SULAs. There is only one licence and it is limited both  
 7 in terms of SEPs and in terms of products.  
 8 THE CHAIR: Right.  
 9 MR IVISON: You will recall we looked at the definition of  
 10 Qualcomm's intellectual property and it has two limbs:  
 11 one is technically necessary IPR and I do not think it  
 12 is suggested that that includes 4G or 5G SEPs because  
 13 these are not CDMA-based technologies.  
 14 The other limb is Qualcomm's included commercially  
 15 necessary IPR and our understanding of Qualcomm's  
 16 position going into trial was that it was arguing that  
 17 non-3G SEPs were caught by that limb. You can see that  
 18 in paragraph 56.2 of Qualcomm's opening and the footnote  
 19 in that paragraph and also from paragraph 54 of Gonell 1  
 20 which is referred into the footnote. Those are speaking  
 21 specifically about the Samsung agreements, but they are  
 22 in relevantly identical terms.  
 23 The problem with that argument, which Mr Moser  
 24 explored with Mr Gonell in cross-examination, is that it  
 25 does not recognise ---

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1 THE CHAIR: Can we get paragraph 52 --- 56.2 of Qualcomm's  
 2 opening submissions.  
 3 MR IVISON: Yes, it is {IRS/2/35}. There is talk about  
 4 Samsung, but you will see it is 55.2 --- sorry, 56.2, and  
 5 it is said here:  
 6 "[The] amendment had already clarified that Samsung  
 7 had been licensed to supply any implementation of CDMA  
 8 technology, including dual mode 4G UMTS/LTE mobile  
 9 phones, since 1993)."  
 10 The footnote says:  
 11 "See paragraph 61 above."  
 12 I think that should be 51 above. It says:  
 13 "See also Gonell 1, §54. This is because the 1993  
 14 SULA covered CDMA SEPs and also any other 'Commercially  
 15 Necessary IPR!."  
 16 THE CHAIR: Yes. That is consistent with their pleaded  
 17 case, their paragraph 121 of the defence states, and if  
 18 that can be brought up, just so you can see what I am  
 19 referring to:  
 20 "The terms of the original ... licence were drafted  
 21 to ... cover any CDMA implementation, including  
 22 CDMA-UMTS and multimode LTE/UMTS... devices."  
 23 So then there was an explanation and then the  
 24 conclusion was that Samsung could never have been in  
 25 a no licence situation in respect of the supply of LTE

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1 multi-mode devices.  
 2 So Qualcomm's position was that the --- for Samsung  
 3 the 3G licences included 4G and 5G SEPs.  
 4 MR IVISON: It was, yes.  
 5 THE CHAIR: So are you drawing a distinction between Samsung  
 6 and Apple?  
 7 MR IVISON: No. If you look at paragraph 132 of the  
 8 defence, you will see a similar allegation is made about  
 9 the CMs in the middle of the paragraph.  
 10 THE CHAIR: Yes.  
 11 MR IVISON: The problem with that submission is that it  
 12 misses that the definition of "included commercially  
 13 necessary IPR" in those agreements has a capture period.  
 14 For Foxconn --- sorry, the capture period is for the CMs  
 15 the patent issued on or before the effective date. For  
 16 Foxconn, the effective date was originally 2005. You  
 17 get that from {POF/95/3}. Then in 2009 the effective  
 18 date was updated to 2009, 14 April.  
 19 So even if you accept that "commercially necessary  
 20 IPR" should be understood to include non-3G SEPs,  
 21 Qualcomm must accept, as Mr Gonell did, that it could  
 22 not have included any 4G or 5G SEPs that were issued  
 23 after the relevant capture period expired. So in the  
 24 case of Foxconn, in April 2009.  
 25 Essentially the same point arises for the Samsung

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1 SULA ---  
 2 MR RIDYARD: Could you just show us that in the agreement,  
 3 the capture period.  
 4 MR IVISON: Yes, the 2005 agreement {POF/95/3}.  
 5 THE CHAIR: So are you saying that you understood Gonell's  
 6 evidence to contradict Qualcomm's pleaded case on this?  
 7 MR IVISON: No, we understood his written evidence to be  
 8 consistent with that case, but we understand his oral  
 9 evidence not to be.  
 10 THE CHAIR: Yes.  
 11 MR IVISON: {POF/95/3} you have effective date. That is  
 12 "the date first set forth above".  
 13 MR TURNER: Hold on, sorry, I beg your pardon. Carry on,  
 14 please.  
 15 MR IVISON: If we go to --- you get the definition of  
 16 "Included Commercially Necessary IPR" {POF/95/2}.  
 17 Sorry, that is "Commercially Necessary IPR". We need  
 18 "Included Commercially Necessary IPR" which is the next  
 19 page, I think {POF/95/3}. Sorry, next page again  
 20 {POF/95/4}. Yes, so {POF/95/4}.  
 21 "With respect to the Intellectual Property Rights  
 22 being licensed by QUALCOMM, [(a)] all claims of any  
 23 patents (foreign and domestic) which are issued on or  
 24 prior to ---"  
 25 MR TURNER: Sorry, where are you? You are on {POF/95/4}?

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1 MR IVISON: Yes, "Included Commercially Necessary IPR".  
 2 MR TURNER: Okay.  
 3 MR IVISON: Then you will see that one of the features of  
 4 that is that the patents have to have been issued on or  
 5 prior to the effective date.  
 6 As I say, essentially the same point arises for the  
 7 Samsung SULA. The capture period was [redacted].  
 8 MR TURNER: So the patents have to be issued before the  
 9 effective date?  
 10 MR IVISON: Yes.  
 11 MR TURNER: How do we know when the patents were issued?  
 12 MR IVISON: It is the date of grant, so apparent on the  
 13 face.  
 14 MR TURNER: I know that — yes, I understand that. How do  
 15 we know the patents we are concerned with, the 4G and  
 16 5G, how do we know when they were issued?  
 17 MR IVISON: Well, the 4G — the first 4G release was 3GPP  
 18 release 8. That was 2008. You get that from figure 7  
 19 of Ingers—Andrews JES.  
 20 MR TURNER: That is the release of —  
 21 MR IVISON: The standard.  
 22 MR TURNER: That is the release of the chip.  
 23 MR IVISON: No, the standard.  
 24 MR TURNER: But that is not necessarily the same as the  
 25 effective date of the patent, is it?

1 MR IVISON: No, but, of course, it takes several years  
 2 usually for a patent to progress from application to  
 3 grant and many of the SEPs are filed shortly before the  
 4 standards are fixed.  
 5 We — you may recall that in his expert report  
 6 Dr Williams analysed 25 Qualcomm patents which he said  
 7 were a group of patents from different parts of the LTE  
 8 standard. The list of his patents is at {E/8/36} and  
 9 all the patent documents are in the bundle and we have  
 10 been through those and checked the grant dates on the  
 11 front of the document and all but one, so 96%, was  
 12 issued after April 2009.  
 13 MR TURNER: All but one?  
 14 MR IVISON: Sorry?  
 15 MR TURNER: So all but one were issued after the effective  
 16 date.  
 17 MR IVISON: Exactly.  
 18 MR TURNER: One was issued before the effective date, where  
 19 does that leave us? We have to get a licence for all of  
 20 them, you say.  
 21 MR IVISON: Yes.  
 22 So, insofar as Mr Gonell might have been understood  
 23 in his second statement to be saying that in 2019 Apple  
 24 could indirectly have obtained a licence to all of  
 25 Qualcomm's 5G SEPs, and that was a standard which was

1 released nearly a decade after the 2009 agreement, that  
 2 would have been wrong and Qualcomm would have known that  
 3 it would have been wrong and Mr Gonell readily accepted  
 4 that it would not — it would not be the case.  
 5 MR TURNER: You say that position is consistent with  
 6 paragraph 10 of the second statement of Mr Gonell?  
 7 MR IVISON: Well, the position as it was revealed in  
 8 cross—examination is not consistent.  
 9 MR TURNER: No, I appreciate that, but the statements in the  
 10 second — paragraph 10 of the second statement is  
 11 consistent with your submissions, is that right?  
 12 MR IVISON: Well, it is consistent with my submission that  
 13 the impression that Qualcomm was originally giving is  
 14 that these licences effectively covered everything.  
 15 That does seem to be what Mr Gonell is saying. You will  
 16 see if you look at his evidence, his written evidence,  
 17 you will see the term "full portfolio licence" is  
 18 littered throughout his evidence and he uses that term  
 19 to refer to the CM licences at paragraph 73 of his first  
 20 statement.  
 21 So —  
 22 MR TURNER: You did not put these points to him in  
 23 cross—examination. The point you are putting to the  
 24 Tribunal now, you did not put to him in  
 25 cross—examination.

1 MR IVISON: Well, we did put the point to him about the 5G  
 2 coverage of the licences. He accepted the point. The  
 3 Tribunal did not want Mr Moser to proceed with  
 4 cross—examination in relation to 4G when that might have  
 5 been addressed, so, yes.  
 6 As I said, I will show you one document which shows  
 7 Qualcomm's internal thinking at {POG/29/50}.  
 8 THE CHAIR: Well, you might — I mean, you might want at  
 9 some point to go back to the transcript on that, because  
 10 I think what happened was that Mr Moser started to  
 11 cross—examine Mr Gonell on 4G, I said that it is not  
 12 your case that the — this was a Contract Manufacturer's  
 13 point. I said something along the lines of it is not  
 14 your case that the Contract Manufacturer licences did  
 15 not cover 4G so I did not want cross—examination on that  
 16 point to proceed and then Mr Moser apparently — my  
 17 understanding was that he accepted that and then moved  
 18 on, not something if you do not have it immediately to  
 19 hand, but if that is not correct, then you should  
 20 probably show me the relevant bit of the transcript and  
 21 explain where the confusion arose.  
 22 MR IVISON: Well, my client's position is that the payments  
 23 that Apple was making to Qualcomm via its CMs were  
 24 payments that were in substance in respect of all the  
 25 necessary patent rights that it was implementing. It

1 does not entail an acceptance that SULAs were the way  
 2 that those patent rights were conveyed.  
 3 MR TURNER: So how were they conveyed?  
 4 MR IVISON: Well, I will come to that, if I may, in  
 5 a moment.  
 6 I said I would show you a document which shows how  
 7 Qualcomm knew about and accepted this point that I have  
 8 been discussing. It is {POG/29/50}. I am told this is  
 9 outer ring confidential so perhaps what you can do --- it  
 10 is Mr Gonell's deposition from 2018. He is being asked  
 11 about a document called a "strat plan" and it is  
 12 page 525.  
 13 MR TURNER: Yes.  
 14 MR IVISON: If you read from lines 9 to 23. (Pause)  
 15 THE CHAIR: On which page of the transcript?  
 16 MR IVISON: 525, top right.  
 17 MR TURNER: Is the answer, you say, from 19 to 23?  
 18 MR IVISON: That shows what Qualcomm was saying in its strat  
 19 plan presentation, yes. (Pause)  
 20 So I have explained to you what we had understood  
 21 Qualcomm's position to be, going into the trial, and you  
 22 may recall that in Mr Jowell's opening speech there was  
 23 an exchange in which Mr Ridyard asked whether new  
 24 generations of technology were automatically included in  
 25 CM licences. This is {POS/9/22}. We probably do not

1 need to look at it, but Mr Jowell originally said he did  
 2 not have the ambit of the CM licence in mind and then,  
 3 on instructions, he went back on that and said when  
 4 a new generation of cellular technology came along, it  
 5 was an automatic inclusion.  
 6 So that position appeared to be consistent with the  
 7 justification which has been given for the CSP in this  
 8 case, it is necessary to obtain the prior licence  
 9 covering all the patents that the customer will be  
 10 exploiting before they get supplied with chips, or else  
 11 they might argue later that some of the patent rights  
 12 have become exhausted or impliedly licensed, such that  
 13 it cannot recover the royalties that it says it is  
 14 entitled to, but that is not what we think Qualcomm is  
 15 now saying. We think that it accepts that it supplied  
 16 chipsets to customers who did have a formal licence  
 17 covering all of the SEPs that would be implemented in  
 18 the product.  
 19 If that is what Qualcomm is saying, in our  
 20 submission ---  
 21 THE CHAIR: I think that that is what they are saying.  
 22 I think my understanding is that they are saying that  
 23 the 3G licences on both sides for both Apple and Samsung  
 24 did cover the subsequent implementations so long as  
 25 those were backwards compatible, so as long as they were

1 multi-mode. Mr Jowell is nodding.  
 2 So I think --- they accept that if there was  
 3 a stand-alone 5G device or 4G that was not multi-mode,  
 4 it would not have been covered by the SULAs, but they  
 5 say they all were multi-mode and therefore they were  
 6 covered by the SULAs.  
 7 MR IVISON: Well, we do not understand them to be saying  
 8 that the SULAs conveyed licences to all of the 4G and 5G  
 9 SEPs and if they are, they can explain to you how they  
 10 say this.  
 11 If that is indeed the policy, that Qualcomm will  
 12 supply the customer which does not have all the  
 13 licences --- a formal licence in place for all of the  
 14 SEPs it will be implementing, then we say that does  
 15 seriously undermine the justification which you have  
 16 been given for the CSP because in that situation, if the  
 17 customer is partially licensed and partially unlicensed  
 18 formally, then what are the options?  
 19 THE CHAIR: Just to be clear: I mean, I am looking at  
 20 paragraph 79.2 of Qualcomm's written closings and also  
 21 paragraphs 176 to 177. So if you look at the end of ---  
 22 the end of 177, a licence --- they defined:  
 23 "a licenced product as a device that is capable of  
 24 engaging in telecommunications transmissions in  
 25 accordance with a CDMA air interface [and] will cover

1 all devices that practice CDMA standards, including  
 2 those that also practice also other standards (such as  
 3 LTE)."  
 4 So it is quite clear from Qualcomm's closing  
 5 submissions that they are advancing the argument that  
 6 the CM licences, and indeed it appears also Samsung's 3G  
 7 licences, covered multi-mode 4G and 5G devices.  
 8 MR IVISON: I do not think it is their position that they  
 9 covered --- they included formal licences to 4G --- all 4G  
 10 and 5G SEPs.  
 11 THE CHAIR: No, because they are drawing a distinction  
 12 between the product --- a product licence and a patent  
 13 licence.  
 14 MR IVISON: But they are not different licences.  
 15 THE CHAIR: All right. Well, we will no doubt hear from  
 16 Qualcomm's counsel, but while you have been making those  
 17 submissions, they have been vigorously shaking their  
 18 heads as to your interpretation of what they have said.  
 19 MR IVISON: Very well.  
 20 THE CHAIR: So you might want to proceed on the basis that  
 21 they do say that it was not necessary to --- for Apple  
 22 and Samsung to negotiate new licences at any point.  
 23 MR IVISON: But I do not --- it is right that they say that  
 24 it was not necessary, but that is not, as we understand  
 25 it, because the licences already covered all the

1 patents. It is because, as a matter of policy, Qualcomm  
2 would supply chips where a customer had an existing  
3 licence which covered at least some of its patents and  
4 where the description of the licensed product in that  
5 licence also fits the description of the new product  
6 that they would be selling.

7 MR TURNER: So, sorry, are you still coming to that kind of  
8 4G chips are licensed on your case?

9 MR IVISON: Well, if you have a situation where there is  
10 a formal licence in place for some of the patents but  
11 not others and you then supply chips to the customer who  
12 then puts them into phones, we can only see three  
13 possibilities : one, the customer has an implied licence  
14 of some sort that is not recorded in a written  
15 agreement; the other is that the unlicensed portion of  
16 those patents become exhausted; and the other is that  
17 the customer would be infringing and that does not seem  
18 to be plausible here.

19 So one way or the other those patent rights are not  
20 enforceable against the customer.

21 MR TURNER: Can that not just be interpreted as saying that  
22 the interpretation that Qualcomm are currently putting  
23 on the licence that — it is a licence to the product,  
24 the products are licensed, that that was the basis on  
25 which all the parties were acting, rather than, you

1 know, whether academically that is the right analysis  
2 sitting here today is sort of neither here nor there,  
3 that is the basis on which all the parties were  
4 behaving?

5 MR IVISON: That may be the case, but if that is the policy,  
6 as we have explained, it is one which we say is not  
7 justified by concerns over exhaustion, implied licences  
8 and so on. It is a policy which is susceptible to be  
9 exercised in an arbitrary manner. If it suits Qualcomm  
10 to supply chips in this situation, it supplied them. If  
11 it did not, they would just say, well, you do not have  
12 a licence to all the patents that you require and we  
13 will not supply you with chips until you take a new  
14 licence.

15 So we do say you should disregard the notion that  
16 Apple had a right to fall back on its CM licences to get  
17 5G chips and we do say that the credibility of the  
18 justification offered to you for the CSP is now  
19 seriously undermined.

20 THE CHAIR: All right, thank you.

21 Closing submissions by MR MOSER

22 MR MOSER: If I may, Madam, just a quick come back on the  
23 cross-examination point because it was addressing my  
24 cross-examination.

25 I was pursuing the matter with Mr Gonell in relation

1 to 4G {Day5/118} and I was asked whether this was just  
2 4G or general and I said, "well, it is general," and  
3 I was told, well, it is not your case and I said:

4 "No, but it is Qualcomm's case."

5 I said I would short-circuit it in relation to this.

6 I would like to persist with the line of questioning.

7 I was told I should not and I said:

8 "It is going to have the same effect when we come to  
9 5G."

10 I say that at 120 and I said I would pick it up  
11 under 5G and, as far as we were concerned, I did pick it  
12 up under 5G.

13 THE CHAIR: Yes, that was also my understanding. You picked  
14 it up under 5G.

15 MR MOSER: But that was having said I would do it under 5G  
16 but the effect is the same for 4G and 5G. That was the  
17 intro to that. So I will leave that there, if I may,  
18 because, as Mr Ivison has explained, it is really  
19 a matter of looking at the contract in the first  
20 instance, but bearing in mind the time, I will now go to  
21 the Apple documents and, as always, these matters are  
22 complicated. I make no criticism of anyone. It was not  
23 ten minutes, but I will proceed at pace, if I may.

24 Apple. It is common ground there are two  
25 negotiations which set the rate for Apple's LTE SEPs.

1 First, the negotiations in December 2013, which led to  
2 the BCPA and the FATA, which they entered into in  
3 February 2013. They provided for the discounts.

4 Second, the negotiations in early 2019, which led to  
5 the GPLA, the Global Patent Licence Agreement, which set  
6 Apple's LTE SEP royalty for 2019 onwards and also  
7 settled the global litigation.

8 The question for this Tribunal is whether Qualcomm's  
9 conduct was capable of distorting the bargaining process  
10 in those two negotiations and therefore inflating the  
11 royalties, capable of inflating the royalties, which  
12 Apple agreed to pay? Our case of course is it  
13 undoubtedly was the case.

14 As you heard on Friday, the essential context for  
15 these negotiations was Apple's near total reliance on  
16 Qualcomm for the relevant chipset supplies for LTE and  
17 3G CDMA chipsets in 2013 and 5G in 2019. That reliance  
18 is critical to a proper understanding of the dynamic  
19 been Apple and Qualcomm at both points in time.

20 I am going to show the Tribunal now the evidence  
21 that Apple understood its chipset supplies were at the  
22 risk of disruption, should it fail to agree terms during  
23 these negotiations that were acceptable to Qualcomm and  
24 by that I mean evidence, not only that Apple understood  
25 that Qualcomm had the ability to cut off its chipset

1 supplies, but also that it specifically believed that  
2 Qualcomm was prepared to use its chipset market power as  
3 a lever in licensing negotiations, such that Apple  
4 risked disruption to its supplies if it sought to  
5 challenge the royalty rates.

6 Now, it is clear from the questions on Friday that  
7 there is a particular need to understand the evidence on  
8 which we rely to establish this belief and so I will  
9 address that first. Having done that, I will turn,  
10 first, to the 2013 negotiations and, second, to  
11 the 2019.

12 So evidence establishing Apple's reasonable fear.  
13 A number of building blocks. The first building block  
14 is that Apple was itself subject to the conduct. It is  
15 common ground, in fact, between the parties, that the  
16 conduct applied across the market. There are different  
17 names for it, but the CSP conduct, as they called it,  
18 applied across the market. So Apple knew that the  
19 supply of chips was conditional on the conclusion of  
20 a licence. That was in fact the case. In our  
21 counterfactual the supply would not have been  
22 conditional on the final agreement for all aspects of  
23 the licence. That is not the way Qualcomm operated.

24 The second building block is evidence directly from  
25 Apple in the documents which shows its belief that

1 Qualcomm was prepared to use its ability to disrupt  
2 chipset supply to exert pressure on Apple in licensing  
3 negotiations, and this building block has two aspects.  
4 The first is evidence which shows Apple understood from  
5 its dealings with Qualcomm that Qualcomm was willing, if  
6 necessary, to disrupt Apple's supply of chipsets and,  
7 secondly, evidence that establishes that Apple was aware  
8 that Qualcomm would threaten the supplies of other OEMs  
9 as a negotiating lever.

10 To make this good, I want to take you to the  
11 evidence from multiple senior Apple executives in the  
12 FTC proceedings, to have it from the horse's mouth, as  
13 it were. I am afraid these are outer ring confidential  
14 documents so we will have to go into that.

15 THE CHAIR: So closed session outer ring.  
16 (10.35 am)

17 In Private (Redacted)  
18 (10.35 am)

19 In Open Court  
20 (12.36 pm)

21 Closing submissions by MR JOWELL

22 THE CHAIR: Mr Jowell.

23 MR JOWELL: May it please the Tribunal. As in opening,  
24 I will address the Tribunal on questions of abuse.  
25 Mr Saunders will then deal with all FRAND and

1 licensing—related matters and the leveraging analysis  
2 and he may also have a word to say about the silencing  
3 allegations and the new way that they have been put.  
4 Finally, Mr Bailey will address you on market definition  
5 and dominance. I imagine that I will probably take most  
6 of the rest of today, if not perhaps into tomorrow, but  
7 we have a lot of time tomorrow for Mr Saunders and  
8 Mr Bailey.

9 So abuse. Madam President, the precise nature of  
10 the abuse alleged in this case remains illusive. It  
11 appears in essentially two forms: a narrow form and  
12 a broader form. The narrow form is the formulation that  
13 appeared to be accepted by Mr Moser in opening — that  
14 is at page 39 of the transcript {Day1/39} — that its  
15 case was that Qualcomm has been preventing Apple and  
16 Samsung obtaining a FRAND determination, either at  
17 arbitration or in the courts, and that its case will  
18 require them to show that when FRAND litigation was  
19 initiated, Qualcomm withdrew its supply of chips or  
20 threatened that it would do so.

21 Mr Moser accepted a similar formulation on Friday,  
22 formulating the abuse as consisting of an alleged threat  
23 of refusal to supply if there is a FRAND challenge.

24 Now, that way of putting the case is clear enough.  
25 It requires, in our submission, a threat to have been

1 made, either overtly or expressly. It is not enough, of  
2 course, that there is a threat in a sort of general  
3 sense of an apprehension, but it requires a threat to  
4 have actually been made. But the problem with that  
5 formulation of the case, as I will come on to, is that  
6 it simply bears no relation to the facts. Qualcomm has  
7 never cut off its supply of chips or threatened to do so  
8 in response to a counterparty seeking a FRAND  
9 determination and it demonstrably did not do so in any  
10 of the relevant negotiations with either Apple or  
11 Samsung.

12 No doubt because they recognise that, the Claimants  
13 on other occasions formulate the abuse in a different  
14 and a much wider way. So we were told in the second  
15 paragraph of the Claimant's written closing submissions,  
16 for example, that the abuse is now said to consist in  
17 Qualcomm having conducted negotiations with OEMs on the  
18 basis that the supply of Qualcomm's chipsets or related  
19 services were at risk of disruption if the OEMs did not  
20 accept Qualcomm's licensing terms.

21 Now, that, of course, begs the question of how we  
22 are supposed to tell whether conduct was conducted on  
23 a particular basis and indeed what that formulation  
24 actually means in concrete terms. It is acknowledged in  
25 paragraph 3 of the written closing submissions that

1 Qualcomm's admitted chipset supply practice of not  
 2 selling chipsets to unlicensed OEMs is not inherently  
 3 unlawful and we are told that it is accepted that  
 4 something more is required, but then that makes it all  
 5 the more important, in our submission, to then identify,  
 6 with clarity, what is the critical additional alleged  
 7 conduct that turns the benign chipset supply practice,  
 8 as Mr Williams described it, into an abuse.

9 Now, in the written closing two things are  
 10 identified — two additional things. First, reference  
 11 is made to internal documents which are claimed to  
 12 reveal that the true rationale for Qualcomm's conduct  
 13 was the inflation of licensing revenue. Now, we of  
 14 course do not accept that those documents show any such  
 15 thing, but, in any event, it still begs the question  
 16 what is the actual conduct on the part of Qualcomm that  
 17 is being referred to here because it is not enough that  
 18 one has an internal rationale or intention? It is  
 19 well-established that intention does not amount to an  
 20 abuse. There must be some conduct and if authority is  
 21 needed for that, one can find it in the SEN case  
 22 which is in, for your note, the authorities bundle 3,  
 23 tab 29, page 66, at paragraphs 63 {AB3/29/66}.

24 So that then leads us to the second additional  
 25 factor that they have identified, and that is the use of

1 the overt and veiled threats to chipset supply, but then  
 2 we see in paragraph 8 of their written closing  
 3 submissions they do an about-face and we are told that  
 4 their case does not depend on demonstrating specific  
 5 conduct or threats, but, instead, that the prospect of  
 6 disruption was, as they put it, an inherent and  
 7 pervasive feature of each negotiation. It is said that  
 8 even if there were no express or implied threats, that  
 9 would be sufficient. It would be sufficient that OEMs  
 10 were aware that Qualcomm was prepared to cut off chips  
 11 in order to achieve its alleged licensing objectives.

12 Now, consistent with that formulation, Mr Williams,  
 13 in his oral submissions, on Friday, spoke in very vague  
 14 terms of Qualcomm somehow creating an environment, as he  
 15 put it, or having an overall approach that meant that  
 16 OEMs had particular apprehensions or perceived  
 17 particular risks.

18 Now, with respect, we say that the abuse formulated  
 19 in this way is a will-o'-the-wisp. It is  
 20 well-established that abuse is an objective concept and  
 21 it gives rise to a quasi criminal liability. I will  
 22 remind you of some recent case law to that effect. It  
 23 must consist, in our submission, in some form of  
 24 identifiable and verifiable conduct. It cannot exist in  
 25 the apprehension or fear of a counterparty that there is

1 a risk that a dominant undertaking might act in  
 2 a particular way; nor can it consist in an allegation as  
 3 vague as creating a particular environment or atmosphere  
 4 or indeed being regarded as having a particular  
 5 reputation in the industry. There must be some  
 6 identifiable acts or omissions such that one can verify  
 7 whether the conduct alleged has occurred.

8 If one does not do that, then dominance itself  
 9 becomes an abuse. We know that that is not the case.

10 Now, against that background, what I would like to  
 11 do, with the Tribunal's permission, is to address you in  
 12 the following order: first, I would like to address you  
 13 on certain aspects of the law and then I will come on to  
 14 the core of my submissions, which are the relevant facts  
 15 relating to, first, Apple and then Samsung. I do  
 16 appreciate that the Tribunal has — is a diligent one,  
 17 of course, and I will not simply repeat our written  
 18 closing submissions. I will seek to emphasise a few key  
 19 points and respond to the important points made by the  
 20 Claimants in their latest rounds of written and oral  
 21 submissions.

22 Once I have been through Apple and Samsung, I will  
 23 then very briefly respond on some of the other OEMs. It  
 24 is notable in the Claimant's written closing that they  
 25 focus very largely on those other OEMs, but, of course,

1 as we have stressed many times, this is a claim for  
 2 damages in relation to Apple and Samsung and the only  
 3 potential relevance we see of the other OEMs is if Apple  
 4 and Samsung actually knew about this specific conduct.  
 5 We have noted that the Tribunal asked on Friday whether  
 6 it was actually alleged that Apple and Samsung were  
 7 aware of the specific acts that are alleged on the part  
 8 of Qualcomm with regard to other OEMs. I am not sure  
 9 you got a very clear answer, but there is an answer in  
 10 the pleadings.

11 THE CHAIR: Well, Mr Moser did say this morning that he was  
 12 not saying that they knew of specific conduct.

13 MR JOWELL: Well, indeed, and if I could show you that we  
 14 actually asked about this in an RFI. If I could show  
 15 you this at {B/10/17}, please. You will see this was in  
 16 response to our question as to whether it was alleged  
 17 that Apple or Samsung knew about any of the other  
 18 conduct and you see the answer at (f):

19 "Pending disclosure and evidence, it is not the  
 20 Class Representative's case that Apple and/or Apple's  
 21 CMs and/or Samsung were aware of any specific threats  
 22 made by the Defendant to any other OEMs, but [they]  
 23 reserves the right to make such allegations ..."

24 But they never — they then never have done.  
 25 So, as far as we are aware, that remains their

1 position. That must inevitably mean, in our submission,  
2 that the details of Qualcomm's conduct with regard to  
3 other OEMs is irrelevant because then there can be, as  
4 the Tribunal observed, no causal connection between what  
5 was conduct in relation to those other OEMs and the  
6 knowledge or belief of Apple and Samsung.

7 In any event, I will then, finally, in the final  
8 part of my submissions, intend to make some observations  
9 about the factual and economic evidence and cover a few  
10 other miscellaneous matters.

11 So that is my intended structure.

12 So starting with the law, if I may. You may recall  
13 that in opening I made three brief submissions on the  
14 law and I understand from the Claimant's written closing  
15 that two of those are controversial and I would like to  
16 seek to make them good, as well as introduce a few other  
17 important propositions. If I could start with the  
18 recent <sup>^</sup> Gutmann judgment, which is in {AB2/49},  
19 please. Now, my learned friend is right to say that  
20 this — the facts alleged in relation to this abuse were  
21 rather different. It concerned the failure to make  
22 boundary fares sufficiently available and a failure to  
23 inform consumers about them.

24 THE CHAIR: What is the PDF page?

25 MR JOWELL: It is — I am just looking at the front page at

29

1 the moment. What I would like to do is to go to — we  
2 see on page 22 of this — we are trying to find it  
3 {AB2/49/22}. You see the section on the law starts on  
4 paragraph 49.

5 THE CHAIR: Is it authorities — is it PDF 2 or has it gone  
6 into the further authorities bundle?

7 MR JOWELL: It starts at 1289, I think.

8 THE CHAIR: Of the second PDF?

9 MR JOWELL: Of the latest PDF bundle. It is tab 22 of AB5,  
10 if that helps?

11 THE CHAIR: Yes, all right. I have got it. Thank you.

12 I am there.

13 MR JOWELL: It sets out a number of propositions which  
14 I know will be familiar to the Tribunal, including that,  
15 in the first subparagraph on 49, abuse is an objective  
16 concept relating to the behaviour of an undertaking,  
17 which is, of course, relevant to the point that I was  
18 making a moment ago.

19 If we pick it up, please, at paragraph 52, which is  
20 on page 23 {AB2/49/23}. We see that there is then  
21 a discussion of the <sup>^</sup> Deutsche Post and <sup>^</sup> DSD  
22 judgments and various other decisions.

23 If we go forward, please, to page 35 {AB2/49/35}, to  
24 paragraph 79, you see what the Tribunal says:

25 "We have no doubt that abuse is a broad concept, and

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1 that the concept of exploitative abuse by 'unfair'  
2 conduct should develop to reflect new patterns of  
3 commerce. However, that concept is not unlimited.  
4 Competition law is not a general law of consumer  
5 protection. And where the allegations concern systemic  
6 conduct, the fact that the dominant company could have  
7 carried out a particular aspect of its business better,  
8 or in a different way that would have benefited  
9 consumers, does not mean that this conduct crosses the  
10 line to constitute abuse. The law provides other means  
11 to investigate and potentially control the conduct of  
12 enterprises: the regulatory framework summarised above  
13 ..."

14 It then goes on to discuss the case of

15 <sup>^</sup> Blanquart v Sony Europe and notes that {AB2/49/36}:

16 "Questions as to how a fair market ought to be  
17 organised may be relevant to a market investigation,  
18 which the CMA and [Office of Rail Regulator] can  
19 instigate, but that is distinct from the question  
20 whether specific conduct of certain participants in the  
21 market constitutes an abuse ..."

22 So we respectfully do rely on that as a general  
23 statement, not just the notion that the concept of abuse  
24 is not unlimited or a general law of consumer protection  
25 but also on the fact that there must be specific conduct

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1 that crosses a specific line.

2 We do say that it supports our — the proposition  
3 that we advanced in opening that attempts to frame new  
4 forms of abuse should be regarded with some degree of  
5 circumspection. We accept, of course, that the  
6 categories of abuse are not closed and it is not always  
7 necessary to pigeonhole conduct into a specific existing  
8 category and that they can sometimes straddle two  
9 categories, but the law on abuse cannot be permitted to  
10 turn into a sort of jurisprudential free-for-all, which  
11 is just simply anchored by nothing more than the concept  
12 of competition on the merits.

13 There are established categories. They have been  
14 carefully delineated in the case law, with crafted  
15 requirements to substantiate an abuse of the particular  
16 type.

17 THE CHAIR: Yes. If this were the narrow formulation of  
18 a threat of refusal to supply, would you have a problem  
19 with that?

20 MR JOWELL: No. It seems to us that, on that formulation,  
21 it would fall within the established jurisprudence on  
22 refusal to supply, which has been outlined by the  
23 Tribunal most recently in the <sup>^</sup> Cabo judgment. There  
24 are well-established principles for that type of abusive  
25 conduct, but we do say that what you cannot do is

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1 effectively to introduce a new category just to  
2 circumvent or sidestep the established requirements of  
3 existing forms of abuse, simply by saying: well, this is  
4 a new sui generis variant. That would undermine all of  
5 the existing legal standards and create unacceptable  
6 legal uncertainty.

7 Now, the conduct could have been framed in this case  
8 as excessive pricing. Such a case has not been advanced  
9 and nor has one been based on an unfair trading  
10 condition and, as you see, the only one that --- part  
11 that remains as a coherent form of abuse is this  
12 allegation of a threat of refusal to supply, which falls  
13 squarely within the existing case law, in our  
14 submission.

15 Turning back, if I may, to the authority. If one  
16 goes to --- if one looks on page 36 {AB2/49/36} ---

17 THE CHAIR: I think possibly then the broad and the narrow  
18 formulation could be labelled in the following way: the  
19 narrow formulation is a threat of a refusal to supply;  
20 the broad formulation is a risk of refusal to supply.

21 MR JOWELL: Yes, and ---

22 THE CHAIR: I think that is what it comes down to.

23 MR JOWELL: I think that is right and we say a risk is  
24 simply not an abuse. It is not sufficiently anchored  
25 actual conduct and simply a perceived risk is

1 inadequate.

2 Indeed the next point made in paragraph 80 reminds  
3 one why one does have to have this kind of degree of  
4 concreteness here:

5 "It must be emphasised that abuse of dominance is  
6 prohibited and therefore unlawful. Such conduct renders  
7 a dominant company liable to potentially very  
8 significant fines, and is classified as quasi-criminal  
9 for the purpose of Art 6 of the [ECHR]."

10 THE CHAIR: Yes.

11 MR JOWELL: "That is why the Tribunal has held that 'strong  
12 and compelling' evidence is required to establish abuse  
13 ... The competition law prohibition of abuse" ---

14 THE CHAIR: We can read it.

15 MR JOWELL: You can see that.

16 THE CHAIR: Yes.

17 MR JOWELL: So the question the Tribunal must ask is whether  
18 the Claimant has provided strong and compelling  
19 evidence? Unfortunately the type of evidence that the  
20 Claimant relies on, as you have seen, falls very far  
21 short of that standard. Principally it relies on  
22 hearsay, sometimes second or third-hand hearsay, from  
23 depositions in the United States.

24 Now, importantly that hearsay is not to be confused  
25 with witness evidence or testimony, as it is sometimes

1 described by the Claimant in their written closing  
2 submissions. It is more in the nature actually of  
3 a sort of self-serving commentary, often given in  
4 response to leading questions, untested in some cases by  
5 any cross-examination, even in the US proceedings, and  
6 certainly untested in this Tribunal. We say it should  
7 be given little or no weight, certainly unless backed by  
8 clear contemporaneous documents. One should bear in  
9 mind in that respect that there has been no shortage of  
10 disclosure in these proceedings. There are --- I think  
11 there has been about half a million documents disclosed,  
12 including in response to the 1782 applications made in  
13 the United States to Apple, and, yet, when it comes down  
14 to it, one does not see much, or if any, contemporaneous  
15 documentary evidence being referred to to substantiate  
16 threats. Instead, we just see these allegations ---  
17 these hearsay allegations made in the self-serving way  
18 by Apple executives.

19 One then, if I can take you back to the authority,  
20 if we go to paragraph 83, there is another interesting  
21 point. This is over the next page, please {AB2/49/37}.  
22 You see it says:

23 "More fundamentally, [referring to a discussion in  
24 O'Donoghue and Padilla's valuable book] ... premised  
25 entirely on an unfair contractual 'term' which has been

1 imposed on the 'victim' of the exploitative abuse. That  
2 is of course consistent with the language of  
3 Art 102(a) ... as we have noted, in both Deutsche  
4 Telekom and DSD the customer wishing to use the service  
5 had no practical alternative to paying the impugned  
6 charge."

7 It notes that in "[i]n Meta, the courts stressed the  
8 BKA's finding that consumers", and you will see the rest  
9 of the paragraph, and then setting out the test for  
10 unfair trading conditions in the recent ^ Apple -  
11 App Store Practices decision.

12 So we say that, again, this is important because it  
13 shows that, at least for the two types of exploitative  
14 conduct that are identified in Article 102(a), there  
15 must have been an imposition of the unfair contract  
16 terms or an imposition of the unfair price and to  
17 similar effect you will recall the ^ Humber Oil  
18 judgment that was opened by my learned friend in  
19 opening, also effectively saying, well, it is not enough  
20 to make an excessive offer in the course of negotiations  
21 for there to be an abuse; the price must be imposed.

22 We say, generally, that when there is an allegation  
23 of an exploitative abuse, it is in the nature of that  
24 form of abuse that there must be some actual imposition,  
25 some material actual effect. Capability is not enough.

1 If we are wrong about that, we say, well, it is ---  
2 and it is just the capability standard that applies also  
3 to exploitative abuses, then our alternative case is  
4 that it must at least be likely , in the sense of more  
5 likely than not, and that is what "capability" means in  
6 the context even of the exclusionary abuses.

7 I do not think there is actually a difference  
8 between us and the Claimants on that latter point. The  
9 Claimant, I think, at least in opening, put it in such  
10 a way as to suggest that "capability" might mean a mere  
11 potential or possible effect , but I think Mr Moser  
12 seemed to accept on Friday that at least a reasonable  
13 likelihood was required, albeit I think he may cavil at  
14 a positive likelihood . In my submission, a likelihood  
15 is a likelihood and it does not matter whether you call  
16 it reasonable or positive .

17 Now, Mr Moser took you --- did take you to the recent  
18 ^ Apple App Store decision about Apple's  
19 anti-steering provisions, principally in relation to the  
20 submission that excessive --- effectively that  
21 exploitative abuses are not confined solely to excessive  
22 pricing, but it is also, in my submission, an  
23 interesting authority on this latter point that  
24 I mentioned, that there is a need for an imposition of  
25 the term and some material harm, some appreciable

1 significant harm, not merely a possibility of harm, but  
2 I see the time. It may be that it is better to open  
3 that after lunch.

4 THE CHAIR: Yes, that is a good idea. We will take an hour  
5 now and we will return at 2 o'clock. Thank you very  
6 much.

7 MR JOWELL: Thank you.  
8 (1.00 pm)

9 (The luncheon adjournment)  
10 (2.00 pm)

11 THE CHAIR: Yes, Mr Jowell.

12 MR JOWELL: If I could take you to the Apple Anti-Steering  
13 ^ App Store case, which is in {AB3/31.2}. Now,  
14 I should note that a bit of caution should be exercised  
15 with regard to this as an authority. First, because it  
16 is a post-Brexit Commission decision so in no way  
17 binding authority or even necessary even persuasive  
18 authority in this Tribunal but, secondly, it is all  
19 under appeal to the General Court. So --- but it is,  
20 I think, nevertheless, helpful in at least some  
21 respects.

22 Now, the Class Representative refers to it in its  
23 written opening and refers to paragraph 576 I think to  
24 support the proposition that the capability standard  
25 applies also to exploitative abuses. If we go to --- if

1 we could go, please, to that paragraph, it is page 167  
2 {AB3/31.2/167}.

3 THE CHAIR: Which PDF page?

4 MR JOWELL: It is on the screen, page 167.

5 THE CHAIR: Mr Jowell, you may or may not be aware I am not  
6 using ---

7 MR JOWELL: I am aware but I unfortunately --- so it starts  
8 on page 842 of the PDF.

9 THE CHAIR: All right.

10 MR JOWELL: And the actual paragraph we are looking at is ---  
11 we are just getting it for you. Forgive me, Madam.

12 THE CHAIR: Which PDF are we talking about, 1, 2, 3, 4 or 5?

13 MR JOWELL: 5. Tab 17. We are looking at paragraph 576.  
14 1008, I am told, page 1008.

15 THE CHAIR: All right. Thank you.

16 MR JOWELL: You see the paragraph there, 576:

17 "The Commission concludes that the Anti-Steering  
18 Provisions are detrimental to the interests of ... music  
19 streaming users ... in that they are liable to cause  
20 both direct monetary harm ... and non-monetary harm ...  
21 to them."

22 You see that the footnote, 818, and the footnote is  
23 to the ^ SEN case, the ^ Servizio Elettrico  
24 Nazionale case, paragraph 44, and that quote says:  
25 "... likely to cause direct harm to consumers."

1 So I think what is said is, well, by the use of the  
2 term "liable" and the footnote to "likely", it is  
3 a likelihood standard effectively .

4 Well, we say that, first of all, at a minimum, that  
5 confirms that it has to be likely , but, secondly, if you  
6 go back to --- if we can go to page 163 {AB3/31.2/163},  
7 paragraph 553. Forgive me, I am not sure what ---

8 THE CHAIR: I can get there.

9 MR JOWELL: Page 1004 of your bundle. You see it does  
10 accept --- the decision does accept that there is a  
11 requirement to show that trading conditions were  
12 actually imposed and had at least an appreciable  
13 detrimental effect . You will see it says:

14 "... contrary to Apple's claim, if certain trading  
15 conditions imposed by a dominant undertaking are  
16 (appreciably and not insignificantly ) detrimental to the  
17 interests of the trading partners ..., including  
18 consumers, and are not necessary or proportionate ...  
19 they can be qualified as unfair, without having to show  
20 that they have 'an unacceptable impact'."

21 That was Apple's submission:

22 "The very fact that those conditions are 'imposed'  
23 by the dominant undertaking ... means that the  
24 trading ... have no ... possibility ."

25 So if we go to the next page, please, to page 164

1 {AB3/31.2/164}, you see paragraph 555. You see the  
 2 conclusion:  
 3 "It follows from the above that Apple's  
 4 Anti-Steering Provisions give rise to an (exploitative)  
 5 abuse ... due to the imposition of unfair trading  
 6 conditions, if: (i) they are unilaterally imposed ...;  
 7 (ii) they are detrimental to the interests of iOS  
 8 users".  
 9 So an acceptance that the trading conditions must be  
 10 both imposed and have an appreciable and significant  
 11 detrimental effect on the interests of trading partners  
 12 or consumers.  
 13 The Commission then goes on to verify that they are  
 14 indeed detrimental. So if you could go, please, to  
 15 page 177 {AB3/31.2/177}, which is 636, which is 1018 of  
 16 your bundle, Madam. You see paragraph 636:  
 17 "In view of the pass-on by music streaming service  
 18 providers and the resulting higher prices for inapp  
 19 subscriptions, the Commission concludes that the  
 20 Anti-Steering Provisions are detrimental to the  
 21 interests of those iOS users that end up paying higher  
 22 prices for subscribing to music streaming services."  
 23 So, now, my learned friend is right to say that the  
 24 Commission found that the pricing did not need to amount  
 25 to excessive pricing, but it did find that the terms

1 were actually imposed and that pricing was actually  
 2 affected and so therefore there was actual exploitation  
 3 and material harm.  
 4 You can see that also if we go forward to page 179  
 5 {AB3/31.2/179}, where you see paragraph 644:  
 6 "The Commission rejects Apple's claim that monetary  
 7 harm caused to consumers is irrelevant."  
 8 It goes on.  
 9 You will see in that paragraph that it notes that  
 10 "because... [of the] need to pass-on the commission fee,  
 11 ... [that] necessarily translates into higher prices  
 12 for consumers." You see also there the reference to the  
 13 finding that Apple's commission fee charged to  
 14 developers constituted a substantial financial burden on  
 15 music streaming services which was passed on.  
 16 THE CHAIR: Yes. Was this an unfair terms case?  
 17 MR JOWELL: It was.  
 18 THE CHAIR: So it was not necessary to show excessive  
 19 pricing?  
 20 MR JOWELL: It was not necessary to show excessive pricing  
 21 but they find it necessary to show both imposition of  
 22 the terms, actual imposition and detriment to consumers  
 23 in the form of higher pricing.  
 24 THE CHAIR: Yes. What distinction are you seeking to draw  
 25 here?

1 MR JOWELL: Yes. So our point is that this does support the  
 2 proposition that I advanced in opening that in an  
 3 exploitative case it must be established that there is  
 4 an actual effect, either in the form of an imposition of  
 5 excessive prices in an excessive pricing case or in an  
 6 unfair trading condition case there has to be the  
 7 imposition of an unfair trading condition causing at  
 8 least appreciable or significant harm to consumers or  
 9 trading partners.  
 10 MR RIDYARD: Are you then saying that any effect compared to  
 11 the counterfactual or any significant effect compared to  
 12 the counterfactual is enough?  
 13 MR JOWELL: We do not — no, we do not accept that, but we  
 14 do accept that it has to be — what they have to show  
 15 is — they have to show something that is imposed and  
 16 significant at the barest minimum, but that is not  
 17 enough because of course in effect there is a much more  
 18 important prior question, which is: was there actual —  
 19 was there the abusive conduct which we have discussed?  
 20 That requires for there to have been actual threats  
 21 made, which there was not, but if there were actual  
 22 threats, then there is a further condition that they  
 23 have to get over, which is that there has to be — there  
 24 has to have been an actual effect as well for there to  
 25 be an exploitative abuse.

1 THE CHAIR: I think you would accept that if there was  
 2 a threat which effectively made it a condition of  
 3 getting supply, that there was not a challenge to the  
 4 royalty through FRAND, then that would have been  
 5 imposed?  
 6 MR JOWELL: If it could also be shown — it would also need  
 7 to show that it then fed through into an actual effect,  
 8 at least —  
 9 THE CHAIR: When we are talking about the imposition  
 10 point —  
 11 MR JOWELL: Also a significant effect because otherwise  
 12 there is no — because you could have an effect —  
 13 THE CHAIR: No, I understand.  
 14 MR JOWELL: You could have a threat that actually made no  
 15 difference.  
 16 THE CHAIR: Yes.  
 17 MR JOWELL: But in this case you have neither the threat,  
 18 nor an establishment of a significant difference.  
 19 So — you also see that even if I am wrong that  
 20 there needs to be a significant actual effect, there  
 21 does at the very least have to be a likelihood of  
 22 an effect and you will see the — we have put in the  
 23 references in our skeleton argument to ^ Streetmap  
 24 and ^ Google case at paragraph 88 and ^ Post  
 25 Danmark, paragraphs 63 to 67. So even in

1 exclusionary — even if the exclusionary abuse test of  
 2 capability applies, they would still have to show the  
 3 likelihood — the positive likelihood of an effect. It  
 4 would not be sufficient to say, oh, well, there is  
 5 possible effect. That is not what capability means,  
 6 even in those exclusionary cases.  
 7 Now, if I may then — that is all I wanted to say  
 8 about the law, unless there is anything specifically you  
 9 would like me to deal with? I would like, if I may, to  
 10 turn to the facts of Apple and Samsung. The facts are  
 11 of course very inconvenient for the Claimants, but facts  
 12 are stubborn things.  
 13 Now, we have set out in detail and chronologically  
 14 the facts relating to Apple in paragraphs 12 to 84 of  
 15 our skeleton argument and I am not going to go through  
 16 all of that in detail. What I would like to do is to  
 17 remind you of the key reasons why we say that it is  
 18 clear beyond doubt that the abuse, even in its most  
 19 vague formulations, could not realistically have had any  
 20 material impact on the LTE royalties that Apple paid and  
 21 that it is quite easily demonstrable that the  
 22 negotiations with Apple were not concluded on the basis  
 23 that the supply of chipsets or related services were at  
 24 risk of disruption if the OEMs did not accept Qualcomm's  
 25 licensing terms and nor were they conducted where

1 a challenge to the rates would lead to — but through  
 2 a FRAND, a negotiation or litigation process would lead  
 3 to disruption of chipset supply.  
 4 What I would like to do, if I may, is to divide the  
 5 position into time periods. The one is the period up to  
 6 early 2017, because that is the point at which Apple  
 7 launched its litigation against Qualcomm and then  
 8 stopped paying the royalties, and that is all  
 9 effectively governed by the GPLA and that suite of  
 10 agreements in April 2019, and the period before that,  
 11 before early 1997, where the amount of LTE royalties was  
 12 governed by the earlier agreements and the MIA and the  
 13 BCPA.  
 14 So the first point about the early period is that  
 15 here Apple of course had no direct licence with  
 16 Qualcomm, but was licensed via the CMs. That meant  
 17 that, as we say in the skeleton more than once, I am  
 18 afraid, if it did not like the licence terms on offer  
 19 from Qualcomm, it always had an option to seek a FRAND  
 20 determination of a direct licence offer, if it sought  
 21 one from Qualcomm. As it happened, it did not seek one,  
 22 at least it did not seek one until 2016. That was not  
 23 because it was threatened with chipset disruption by  
 24 Qualcomm or even because it feared chipset disruption  
 25 from Qualcomm. One can see that when one looks at the

1 contemporaneous documents.  
 2 The starting point is the MIA, which was negotiated  
 3 in January 2007. There is simply no question that that  
 4 cannot have been influenced by any fear of cessation of  
 5 supply for a very simple reason: Apple was not receiving  
 6 any chipsets from Qualcomm at that time and, as we  
 7 observe in paragraph 16 of our written closing  
 8 submissions, it was actually more than three years  
 9 before Apple was due to launch a phone — an iPhone with  
 10 a Qualcomm chipset. It just makes no sense to speak of  
 11 a fear of disruption or even prospective unavailability  
 12 in that sort of context.  
 13 That is why the Claimant, at paragraph 301 of their  
 14 closing submissions, concede, as I think they inevitably  
 15 must, that the rate under the MIA was not subject to any  
 16 chipset leveraging by Qualcomm, but then we are told, as  
 17 Mr Moser said earlier, again, that in some way this rate  
 18 was not a competitive rate or did not reflect the actual  
 19 value of Qualcomm's SEPs. He refers to the Apple  
 20 executives' depositions who say, ah, these were  
 21 exorbitant, excessive amounts. Well, I am not entirely  
 22 clear, I am afraid, what is meant by a competitive rate  
 23 or the actual value of Qualcomm's SEPs in this sort of  
 24 context. It cannot be a kind of platonic ideal of an  
 25 actual value of Qualcomm's SEPs beyond how they are

1 valued in a marketplace negotiation free, as is now  
 2 conceded, of any coercion, but a few points  
 3 underline that.  
 4 First of all, you will have recalled from our  
 5 opening submissions the memorable email from Steve Jobs  
 6 in which he and his colleagues were clearly delighted  
 7 with the deal that they obtained from Qualcomm and had  
 8 sought to extend the duration and the scope of its  
 9 terms. You will find that in our written closing,  
 10 again, at paragraph 17.3.  
 11 So the self-serving statements of Apple executives  
 12 in 2016 or 2018, when they are bringing litigation  
 13 against Qualcomm, I am afraid, have to be seen against  
 14 that backdrop.  
 15 Now, the second point is this, and before I get  
 16 there I think we probably could go into closed session,  
 17 I think.  
 18 THE CHAIR: All right. Which flavour of closed?  
 19 MR JOWELL: I think for the moment if we go into the 1782  
 20 but including in-house counsel.  
 21 (2.16 pm)  
 22 In Private (Redacted)  
 23 (2.15 pm)  
 24 In Open Court  
 25 (4.09 pm)

1 MR JOWELL: I would like to turn briefly to the economic  
2 evidence. The Claimants do not put a lot of emphasis on  
3 the bargaining model in their closing submission and so  
4 I think I can be fairly brief, but I just want to  
5 stress, if I may, three points.

6 The first is that the failure of the Claimant's  
7 economist, in light of the established one monopoly  
8 profit theorem, to provide a cogent explanation for why  
9 Qualcomm would choose or would have an economic  
10 incentive to choose to do what it suggests it is doing.  
11 As Dr Padilla pointed out, if Qualcomm does indeed have  
12 market power in chipsets, why would it not simply charge  
13 more for those chipsets, rather than seeking to extract  
14 monopoly rent on the royalties?

15 Now, more generally, one can well see that if you  
16 had two markets in which you could extract your monopoly  
17 rent and one was regulated and the other one — or the  
18 immediate one was regulated say, and the other market  
19 was unregulated, well, then, you can well see that in  
20 those circumstances it would certainly make sense to try  
21 to shift to extract your monopoly rent from the  
22 regulated market to the unregulated one, but here the CR  
23 asks us to hypothesise that Qualcomm has done the  
24 opposite, to decline to extract some monopoly rent on  
25 the unregulated chipset market and shifted it to extract

1 that rent on the regulated market.

2 That ostensibly makes no sense at all.

3 MR RIDYARD: Well, let us just push back a bit on that.  
4 There could be an asymmetry, could there not, between  
5 the two markets because even though Qualcomm has a high  
6 market share in the chipset market or markets, it is not  
7 always 100% and yet it is always 100% in the SEPs. So  
8 there is not a one-for-one relationship between the two  
9 markets.

10 MR JOWELL: Well, two responses to that. One is that it is  
11 alleged that — at least for significant periods it is  
12 alleged that Qualcomm has a 100% market share in the  
13 shares, at least according to the markets as defined by  
14 the Claimant so at least for significant periods of time  
15 that does not hold true on their market definition at  
16 least. But, secondly, in our submission, that would not  
17 enable you to extract, if you like, a higher — if you  
18 take — if all you are doing is leveraging the chipset  
19 monopoly and you put that over into royalties, that does  
20 not enable you to make any more money. It simply —  
21 even if it is spread over a larger number of  
22 transactions, if you like.

23 MR RIDYARD: But if the fruit from doing the abuse in the  
24 chipset market from the threats you issue in the chipset  
25 market is to raise the SEP rates for everything, then is

1 it not possible that what you are — if you choose to  
2 use this mechanism to get more return in the SEPs than  
3 in the chipsets, what you are getting on the SEPs is  
4 greater than what you are losing on the chipsets  
5 because —

6 MR JOWELL: Well, we would suggest in a sense it comes back  
7 down to the ability to tailor your licences and the  
8 licence scopes on that theory. So if we are right  
9 that — Mr Gonell is right that you can simply — that  
10 effectively you cannot really leverage from one standard  
11 to another, so it is always —

12 MR RIDYARD: I can see that.

13 MR JOWELL: Then that does not work. I do not think that  
14 that is the — I appreciate the point theoretically, but  
15 in our submission that does not work essentially for  
16 that reason. But additionally, I think Mr Noble's  
17 theory that he proposed was that it would encourage  
18 entry in the chipset market to put the rent — the  
19 theory he proposed at least was that that was why you  
20 would put it in the — on the SEP — on the royalties.  
21 That we find very difficult because if you go, for  
22 example, to {POE/21/43}, this is Mr Noble's eighth  
23 report, if you see 3.24:

"Barriers to entry in the chipset markets.

"In this section, I set out evidence that suggests

1 that the worldwide chipset markets are characterised by  
2 high barriers to entry, and hence the threat of entry is  
3 unlikely to be a significant competitive constraint in  
4 those markets."

5 Then it goes on page after page to explain why those  
6 markets — why those entries barriers are just so high.

7 For your note, you see that again in paragraph 30.1  
8 of the joint statement at {POE/24/17}. Perhaps we can  
9 just look at that as well. Anyway, you have the note.  
10 You have it on the note and you can read it.

11 We say, well, given that entry barriers are said to  
12 be so high, why would Qualcomm go to all this trouble to  
13 relocate its monopoly profits and particularly so when,  
14 as you observed, Madam Chairman, the relocation would  
15 require Qualcomm to engage in potentially risky  
16 business, potentially damaging for its own reputation  
17 and running into regulatory issues?

18 So we say this does not make — really make sense.

19 It is also difficult to square with the allegation  
20 that, on the Claimant's case, there is a CDMA price  
21 premium. As Dr Padilla observed, it requires a sort of  
22 Goldilocks state of affairs where there is a bit of rent  
23 extracted through chipset prices but just enough but not  
24 too much, leaving some over to be extracted through  
25 royalties.

1 We respectfully agree with Dr Padilla that this is  
 2 indeed a fairy tale.  
 3 MR RIDYARD: Is that --- I mean, he did not --- I know  
 4 Goldilocks is a fairy tale, but he did not say that this  
 5 theory is necessarily a fairy tale for that reason.  
 6 Maybe there is a position that can be struck that sort  
 7 of arbitrates between those two forces.  
 8 MR JOWELL: It is theoretically possible, but it seems to us  
 9 to be --- first of all, it is completely unevicenced and  
 10 rather implausible because it asks one to assume that  
 11 they are going to --- how does --- as Dr Padilla says, it  
 12 does not seem to be consistent with the entry barrier  
 13 theory because if there are ---  
 14 MR RIDYARD: I can see the tension between the entry barrier  
 15 point.  
 16 MR JOWELL: Yes. If those --- how does this all sit together  
 17 that these entry barriers are so high and, yet, here we  
 18 have them going to all of this trouble and all of this  
 19 expense to relocate monopoly profits? In our  
 20 submission, it does not provide a plausible economic  
 21 rationale. It requires a very, very sort of unusual set  
 22 of particular circumstances, none of which have been  
 23 tested or evidenced.  
 24 The second ---  
 25 MR RIDYARD: I might be the only one that feels this way,

1 but I find it quite frustrating that these arguments  
 2 were not properly sort of exposed in the expert reports  
 3 and discussed between them at an earlier stage, but, you  
 4 know, obviously we cannot do much about that now, but it  
 5 would have been interesting had they been better aired  
 6 I think.  
 7 MR JOWELL: Well, we understand that. We do note that ---  
 8 I think Dr Padilla did raise this --- the point about the  
 9 monopoly profit in his --- in the joint statements.  
 10 MR RIDYARD: In the joint statement, yes.  
 11 MR JOWELL: Yes. The other economic issue I should just  
 12 mention is the indirect mechanism or the fruits of the  
 13 poisoned tree argument. This is really an untestable  
 14 argument because no specific tainted licences are  
 15 identified that are said to have been a point of  
 16 reference for either Apple or Samsung. It is also  
 17 an argument that Mr Saunders may address you in a little  
 18 more detail on this in the context of the leveraging  
 19 analysis, but it is also a difficult --- an implausible  
 20 point as well because if one steps back, you have all of  
 21 the original licences, the pre-96 licences certainly are  
 22 completely untainted, and indeed one is entitled to  
 23 assume that all licences before the date on which  
 24 dominance is alleged in 2006 are also untainted and  
 25 then, on top of that, you have licences during the

1 period that were untainted at least by any direct  
 2 leveraging, like the Nokia agreement in 2018, and  
 3 indeed --- forgive me, Nokia agreement in 2008, and  
 4 indeed the CR now concedes the Samsung agreement in 2018  
 5 was also untainted by leveraging.  
 6 So it is not as though there were not --- there are  
 7 not other untainted licences out there and they also  
 8 have the adjustments that were mandated by the NDRC, the  
 9 Chinese regulatory authority which --- again, that was  
 10 effectively a success regulatory challenge to Qualcomm's  
 11 royalty rates.  
 12 So you have a number of these untainted rates that  
 13 are there. You then have the fact that most of these  
 14 licences have most favoured royalty clauses in them in  
 15 one form or another and so that combination is likely to  
 16 actually have the opposite effect of tainting. What you  
 17 actually will probably have is, as I think Mr Williams  
 18 put it, a cascade of lower rates flowing through the  
 19 whole industry.  
 20 So we say it is an untestable proposition, but it is  
 21 also an implausible one.  
 22 The final point I would like to make on the economic  
 23 evidence is just this: ultimately the intuition  
 24 behind ---  
 25 THE CHAIR: Well, a cascade can only have that effect if

1 everyone knows the terms of the other licences.  
 2 MR JOWELL: Yes, but under --- indeed that is true, but under  
 3 the most favoured royalty clauses, there is typically an  
 4 obligation on Qualcomm, and you can see in the evidence  
 5 that it --- for example, with regard to Nokia, it fulfils  
 6 that obligation, and indeed in relation to --- there are  
 7 other examples too, that give the obligation to provide  
 8 that information to the OEM and so they do operate.  
 9 Finally, I should make --- the final point I would  
 10 like to make is this: the intuition behind the  
 11 bargaining model has, as a necessary pre-condition, the  
 12 notion that, although the threat of chipset supply  
 13 disruption would inevitably hurt both parties, it would  
 14 hurt Apple or Samsung more than it would hurt Qualcomm.  
 15 As Mr Noble accepted, without the threat of chipset  
 16 supply, disruption is not credible.  
 17 The fundamental problem for the whole bargaining  
 18 model, as a useful model really, is that nothing has  
 19 been done to actually verify that that is the case. All  
 20 Mr Noble offered was an assertion that Qualcomm would be  
 21 able to sell some of its chipsets elsewhere and  
 22 a back-of-the-envelope calculation that Apple would make  
 23 more money from its phones than Qualcomm does from  
 24 selling its chipsets, but one also does need to bear in  
 25 mind that Apple is far better resourced than Qualcomm

1 and better able to withstand and absorb temporary  
2 financial losses and that is why, in our submission,  
3 absolute figures are not a good guide to which side is  
4 hurt more in these bargaining scenarios.

5 In addition, one has to consider not just the  
6 initial ramifications for Qualcomm of any cutting off of  
7 chipset supply but also the impact that that would have  
8 on other chipset sales and in the longer run.

9 Similarly, on the Apple side of the equation, it  
10 would not necessarily produce or sell fewer iPhones; it  
11 would just sell fewer with CDMA chipsets inside, and  
12 many, many, one would expect, customers would prefer to  
13 switch carriers, rather than to switch from an Apple  
14 phone to a different maker.

15 So the basic point is though that none of this has  
16 been modelled, still less properly estimated, so really  
17 any kind of back-of-the-envelope calculations are  
18 entirely worthless and the model has just got no robust  
19 foundation.

20 Finally, you will be pleased to hear I think I am  
21 going to make the deadline of 4.30, but I do want to  
22 make one point about extraterritoriality and I know  
23 I make it with some trepidation because I appreciate  
24 that it is perhaps not an argument that, Madam Chairman,  
25 you have indicated you find attractive, but I do want to

1 correct one point importantly and that is the suggestion  
2 that UK competition law is not subject to the  
3 territoriality principle at all, which is the submission  
4 that is made in the final paragraph of their written  
5 closing submissions and I make a few points on that.

6 First of all, I would observe that the Competition  
7 Appeal Tribunal has twice held, or at least assumed,  
8 that the qualified effects doctrine and the  
9 territoriality principle does apply to Chapter II, as  
10 well as to Article 102. If I can quickly show you that.  
11 The first case is <sup>^</sup> Epic, which is {AB2/31.1/27}.  
12 You will see that in paragraph 88.

13 THE CHAIR: Can I have the PDF?

14 MR JOWELL: Yes, tab 18.

15 THE CHAIR: I need the number of the bundle and the page  
16 number.

17 MR SAUNDERS: 532.

18 THE CHAIR: PDF 5.

19 MR SAUNDERS: 532.

20 THE CHAIR: Authorities PDF number 5, page 532.

21 MR JOWELL: You will see, just about eight lines up from the  
22 bottom, you see:

23 "In my view, the same test applies to determine the  
24 application of the Chapter II prohibition in UK  
25 competition law by reason of s[ection] 60A ..."

1 546 of the PDF. So it is paragraph 88, 546, and it  
2 is about eight lines up. (Pause)

3 THE CHAIR: All right.

4 MR JOWELL: The same is in the <sup>^</sup> Ennis judgment, which is  
5 {AB2/45.1}, which you will find in — I think that this  
6 is not in AB5. It is only in AB2/45.1 because it was  
7 only added recently. This is the <sup>^</sup> Ennis judgment  
8 at — if we can go to page 36 of this {AB2/45.1/36}.

9 You will see from paragraph 90, and if we could have the  
10 next page as well {AB/2/45.1/37}, you see, again, in  
11 paragraphs 90 to 92, you see, again, on the basis of  
12 section 60A(2) of the Competition Act, it interprets  
13 Chapter II as also being subject to the implementation  
14 and qualified effects tests as apply under EU law.

15 THE CHAIR: All right. Thank you.

16 MR JOWELL: Indeed, we say that it would be surprising if  
17 those tests ultimately — which found ultimately on the  
18 universally recognised principle of territoriality under  
19 public international law — we say that from  
20 <sup>^</sup> Wood Pulp at paragraph 18 — did not apply to  
21 domestic legislation modelled on Article 102.

22 So the test, we say, is that Tribunal must ask: was  
23 the conduct implemented here and, if not, did it have  
24 immediate effects here? That is a question of course  
25 for the Tribunal to decide on all the facts, should it

1 consider it necessary.

2 THE CHAIR: All right.

3 MR JOWELL: Those are my submissions, unless I can be of any  
4 further assistance.

5 THE CHAIR: Just to avoid bundle references continuing to be  
6 a little bit painful —

7 MR JOWELL: Yes.

8 THE CHAIR: — I just need the number from 1 to 5 as to  
9 which bundle it is and the page reference.

10 MR JOWELL: Understood. We will bear that in mind.

11 THE CHAIR: Thank you.

12 MR WILLIAMS: Madam, I spoke to Mr Bailey and Mr Saunders at  
13 lunch in relation to the questions I said we might  
14 address and in fact on three of the four questions, I do  
15 not think there is anything between us so I will not  
16 produce a note on that. I think they will be picked up  
17 by my learned friends in their submissions.

18 THE CHAIR: Yes.

19 MR WILLIAMS: The only other question was from Mr Ridyard  
20 about Kent and the excessive pricing finding and I just  
21 wanted to say, in relation to that, it is simply  
22 an application of classic excessive pricing principles.  
23 There was no variation on those principles in that case.  
24 So I do not know, if you have a more specific question,  
25 we can help answer that, but I think that was — so

1 I think I now do not need to produce a note.  
 2 THE CHAIR: All right. Thank you very much.  
 3 So we will be returning at 10 o'clock tomorrow.  
 4 (4.29 pm)  
 5 (The court adjourned until 10.00 am  
 6 on Tuesday, 4 November 2025)  
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