IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1382/7/7/21

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 AN 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

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

aspects of FRAND and what is required and so forth. I am seeking those as distinct points. I do not know what you mean by extraterritoriality, but I assume you are seeing them as distinct points.
MR MOSER: I do not mean that. I mean just the competition law aspect.
MR TURNER: Absolutely.
MR MOSER: But your intervention, if may say so, is timely, because there is one matter before I get to the Apple evidence. We have carved out a hopeful ten minutes for this, which is that my learned friend Mr Ivison, talking of junior counsel, wishes to follow on briefly in relation to my submissions on Qualcomm's new patent licence argument, particularly exchanges with you, Mr Turner, and with your leave, he will address you on that before I start.
Closing submissions by MR IVISON
MR IVISON: Two related issues have arisen in relation to this point about the scope of Qualcomm's SEP licences in terms of the patents which were licensed.
The first is that we sought to address in cross-examination a narrow point which arose from paragraph 10 of Gonell 2 and Qualcomm's arguments based on it and that was that section 5.1 of the CMs' licences have enabled Apple to obtain Qualcomm 5G chips in 2019.

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

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

debate that he was having with Mr Moser in cross—examination in that part of the transcript was that he was drawing a distinction between the SEP licence and the product licence.

MR IVISON: But there are not two different things in the SULAs. There is only one licence and it is limited both in terms of SEPs and in terms of products.

THE CHAIR: Right.

MR IVISON: You will recall we looked at the definition of Qualcomm's intellectual property and it has two limbs: one is technically necessary IPR and I do not think it is suggested that that includes 4G or 5G SEPs because these are not CDMA—based technologies.

The other limb is Qualcomm's included commercially necessary IPR and our understanding of Qualcomm's position going into trial was that it was arguing that non—3G SEPs were caught by that limb. You can see that in paragraph 56.2 of Qualcomm's opening and the footnote in that paragraph and also from paragraph 54 of Gonell 1 which is referred into the footnote. Those are speaking specifically about the Samsung agreements, but they are in relevantly identical terms.

The problem with that argument, which Mr Moser explored with Mr Gonell in cross—examination, is that it does not recognise ——

THE CHAIR: Can we get paragraph 52 —— 56.2 of Qualcomm's opening submissions.

MR IVISON: Yes, it is {IRS/2/35}. There is talk about Samsung, but you will see it is 55.2 —— sorry, 56.2, and it is said here:

"[The] amendment had already clarified that Samsung had been licensed to supply any implementation of CDMA technology, including dual mode 4G UMTS/LTE mobile phones, since 1993)."

The footnote says:

"See paragraph 61 above."

I think that should be 51 above. It says:

"See also Gonell 1, §54. This is because the 1993 SULA covered CDMA SEPs and also any other 'Commercially Necessary IPR'."

THE CHAIR: Yes. That is consistent with their pleaded case, their paragraph 121 of the defence states, and if that can be brought up, just so you can see what I am referring to:

"The terms of the original ... licence were drafted to ... cover any CDMA implementation, including CDMA—UMTS and multimode LTE/UMTS... devices."

So then there was an explanation and then the conclusion was that Samsung could never have been in a no licence situation in respect of the supply of LTE

multi—mode devices.

So Qualcomm's position was that the —— for Samsung the 3G licences included 4G and 5G SEPs.

MR IVISON: It was, yes.

THE CHAIR: So are you drawing a distinction between Samsung and Apple?

MR IVISON: No. If you look at paragraph 132 of the defence, you will see a similar allegation is made about the CMs in the middle of the paragraph.

THE CHAIR: Yes.

MR IVISON: The problem with that submission is that it misses that the definition of "included commercially necessary IPR" in those agreements has a capture period. For Foxconn —— sorry, the capture period is for the CMs the patent issued on or before the effective date. For Foxconn, the effective date was originally 2005. You get that from {POF/95/3}. Then in 2009 the effective date was updated to 2009, 14 April.

So even if you accept that "commercially necessary IPR" should be understood to include non—3G SEPs, Qualcomm must accept, as Mr Gonell did, that it could not have included any 4G or 5G SEPs that were issued after the relevant capture period expired. So in the case of Foxconn, in April 2009.

Essentially the same point arises for the Samsung

SULA ——

MR RIDYARD: Could you just show us that in the agreement, the capture period.

MR IVISON: Yes, the 2005 agreement {POF/95/3}.

THE CHAIR: So are you saying that you understood Gonell's evidence to contradict Qualcomm's pleaded case on this?

MR IVISON: No, we understood his written evidence to be consistent with that case, but we understand his oral evidence not to be.

THE CHAIR: Yes.

MR IVISON: {POF/95/3} you have effective date. That is "the date first set forth above".

MR TURNER: Hold on, sorry, I beg your pardon. Carry on, please.

MR IVISON: If we go to —— you get the definition of "Included Commercially Necessary IPR" {POF/95/2}. Sorry, that is "Commercially Necessary IPR". We need "Included Commercially Necessary IPR" which is the next page, I think {POF/95/3}. Sorry, next page again {POF/95/4}. Yes, so {POF/95/4}.

"With respect to the Intellectual Property Rights being licensed by QUALCOMM, [(a)] all claims of any patents (foreign and domestic) which are issued on or prior to ——"

MR TURNER: Sorry, where are you? You are on {POF/95/4}?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIR: All right, thank you.

Closing submissions by MR MOSER

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

I was pursuing the matter with Mr Gonell in relation

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

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

I said I would short—circuit it in relation to this. I would like to persist with the line of questioning. I was told I should not and I said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIR: So closed session outer ring.

(10.35 am)

In Private (Redacted)

(10.35 am)

In Open Court

(12.36 pm)

Closing submissions by MR JOWELL

THE CHAIR: Mr Jowell.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But they never —— they then never have done.

So, as far as we are aware, that remains their

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

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

So that is my intended structure.

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

THE CHAIR: What is the PDF page?

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

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

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

MR JOWELL: It starts at 1289, I think.

THE CHAIR: Of the second PDF?

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

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

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

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

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

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

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

It then goes on to discuss the case of ^ Blanquart v Sony Europe and notes that {AB2/49/36}:

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

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

that crosses a specific line.

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

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

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

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

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

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

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

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

MR JOWELL: Yes, and ——

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

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

inadequate.

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

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

THE CHAIR: Yes.

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

THE CHAIR: We can read it.

MR JOWELL: You can see that.

THE CHAIR: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR JOWELL: Thank you.

(1.00 pm)

(The luncheon adjournment)

(2.00 pm)

THE CHAIR: Yes, Mr Jowell.

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

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

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

THE CHAIR: Which PDF page?

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

THE CHAIR: Mr Jowell, you may or may not be aware I am not using ——

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

THE CHAIR: All right.

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

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

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

THE CHAIR: All right. Thank you.

MR JOWELL: You see the paragraph there, 576:

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

You see that the footnote, 818, and the footnote is to the ^ SEN case, the ^ Servizio Elettrico Nazionale case, paragraph 44, and that quote says:

"... likely to cause direct harm to consumers."

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

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

THE CHAIR: I can get there.

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

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

That was Apple's submission:

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

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

{AB3/31.2/164}, you see paragraph 555. You see the conclusion:

"It follows from the above that Apple's Anti—Steering Provisions give rise to an (exploitative) abuse ... due to the imposition of unfair trading conditions, if: (i) they are unilaterally imposed ...; (ii) they are detrimental to the interests of iOS users".

So an acceptance that the trading conditions must be both imposed and have an appreciable and significant detrimental effect on the interests of trading partners or consumers.

The Commission then goes on to verify that they are indeed detrimental. So if you could go, please, to page 177 {AB3/31.2/177}, which is 636, which is 1018 of your bundle, Madam. You see paragraph 636:

"In view of the pass—on by music streaming service providers and the resulting higher prices for inapp subscriptions, the Commission concludes that the Anti—Steering Provisions are detrimental to the interests of those iOS users that end up paying higher prices for subscribing to music streaming services."

So, now, my learned friend is right to say that the Commission found that the pricing did not need to amount to excessive pricing, but it did find that the terms

were actually imposed and that pricing was actually affected and so therefore there was actual exploitation and material harm.

You can see that also if we go forward to page 179 {AB3/31.2/179}, where you see paragraph 644:

"The Commission rejects Apple's claim that monetary harm caused to consumers is irrelevant."

It goes on.

You will see in that paragraph that it notes that "because... [of the] need to pass—on the commission fee, ... [that] necessarily translates into higher prices for consumers." You see also there the reference to the finding that Apple's commission fee charged to developers constituted a substantial financial burden on music streaming services which was passed on.

THE CHAIR: Yes. Was this an unfair terms case?

MR JOWELL: It was.

THE CHAIR: So it was not necessary to show excessive pricing?

MR JOWELL: It was not necessary to show excessive pricing but they find it necessary to show both imposition of the terms, actual imposition and detriment to consumers in the form of higher pricing.

THE CHAIR: Yes. What distinction are you seeking to draw here?

MR JOWELL: Yes. So our point is that this does support the proposition that I advanced in opening that in an exploitative case it must be established that there is an actual effect, either in the form of an imposition of excessive prices in an excessive pricing case or in an unfair trading condition case there has to be the imposition of an unfair trading condition causing at least appreciable or significant harm to consumers or trading partners.

MR RIDYARD: Are you then saying that any effect compared to the counterfactual or any significant effect compared to the counterfactual is enough?

MR JOWELL: We do not —— no, we do not accept that, but we do accept that it has to be —— what they have to show is —— they have to show something that is imposed and significant at the barest minimum, but that is not enough because of course in effect there is a much more important prior question, which is: was there actual —— was there the abusive conduct which we have discussed? That requires for there to have been actual threats made, which there was not, but if there were actual threats, then there is a further condition that they have to get over, which is that there has to be —— there has to have been an actual effect as well for there to be an exploitative abuse.

THE CHAIR: I think you would accept that if there was a threat which effectively made it a condition of getting supply, that there was not a challenge to the royalty through FRAND, then that would have been imposed?

MR JOWELL: If it could also be shown —— it would also need to show that it then fed through into an actual effect, at least ——

THE CHAIR: When we are talking about the imposition point ——

MR JOWELL: Also a significant effect because otherwise there is no —— because you could have an effect ——

THE CHAIR: No, I understand.

MR JOWELL: You could have a threat that actually made no difference.

THE CHAIR: Yes.

MR JOWELL: But in this case you have neither the threat, nor an establishment of a significant difference.

So —— you also see that even if I am wrong that there needs to be a significant actual effect, there does at the very least have to be a likelihood of an effect and you will see the —— we have put in the references in our skeleton argument to ^ Streetmap and ^ Google case at paragraph 88 and ^ Post Danmark, paragraphs 63 to 67. So even in

exclusionary —— even if the exclusionary abuse test of capability applies, they would still have to show the likelihood —— the positive likelihood of an effect. It would not be sufficient to say, oh, well, there is possible effect. That is not what capability means, even in those exclusionary cases.

Now, if I may then —— that is all I wanted to say about the law, unless there is anything specifically you would like me to deal with? I would like, if I may, to turn to the facts of Apple and Samsung. The facts are of course very inconvenient for the Claimants, but facts are stubborn things.

Now, we have set out in detail and chronologically the facts relating to Apple in paragraphs 12 to 84 of our skeleton argument and I am not going to go through all of that in detail. What I would like to do is to remind you of the key reasons why we say that it is clear beyond doubt that the abuse, even in its most vague formulations, could not realistically have had any material impact on the LTE royalties that Apple paid and that it is quite easily demonstrable that the negotiations with Apple were not concluded on the basis that the supply of chipsets or related services were at risk of disruption if the OEMs did not accept Qualcomm's licensing terms and nor were they conducted where

a challenge to the rates would lead to —— but through a FRAND, a negotiation or litigation process would lead to disruption of chipset supply.

What I would like to do, if I may, is to divide the position into time periods. The one is the period up to early 2017, because that is the point at which Apple launched its litigation against Qualcomm and then stopped paying the royalties, and that is all effectively governed by the GPLA and that suite of agreements in April 2019, and the period before that, before early 1997, where the amount of LTE royalties was governed by the earlier agreements and the MIA and the BCPA.

So the first point about the early period is that here Apple of course had no direct licence with Qualcomm, but was licensed via the CMs. That meant that, as we say in the skeleton more than once, I am afraid, if it did not like the licence terms on offer from Qualcomm, it always had an option to seek a FRAND determination of a direct licence offer, if it sought one from Qualcomm. As it happened, it did not seek one, at least it did not seek one until 2016. That was not because it was threatened with chipset disruption by Qualcomm or even because it feared chipset disruption from Qualcomm. One can see that when one looks at the

contemporaneous documents.

The starting point is the MIA, which was negotiated in January 2007. There is simply no question that that cannot have been influenced by any fear of cessation of supply for a very simple reason: Apple was not receiving any chipsets from Qualcomm at that time and, as we observe in paragraph 16 of our written closing submissions, it was actually more than three years before Apple was due to launch a phone —— an iPhone with a Qualcomm chipset. It just makes no sense to speak of a fear of disruption or even prospective unavailability in that sort of context.

That is why the Claimant, at paragraph 301 of their closing submissions, concede, as I think they inevitably must, that the rate under the MIA was not subject to any chipset leveraging by Qualcomm, but then we are told, as Mr Moser said earlier, again, that in some way this rate was not a competitive rate or did not reflect the actual value of Qualcomm's SEPs. He refers to the Apple executives' depositions who say, ah, these were exorbitant, excessive amounts. Well, I am not entirely clear, I am afraid, what is meant by a competitive rate or the actual value of Qualcomm's SEPs in this sort of context. It cannot be a kind of platonic ideal of an actual value of Qualcomm's SEPs beyond how they are

valued in a marketplace negotiation free, as is now conceded, of any coercion, but a few points underline that.

First of all, you will have recalled from our opening submissions the memorable email from Steve Jobs in which he and his colleagues were clearly delighted with the deal that they obtained from Qualcomm and had sought to extend the duration and the scope of its terms. You will find that in our written closing, again, at paragraph 17.3.

So the self—serving statements of Apple executives in 2016 or 2018, when they are bringing litigation against Qualcomm, I am afraid, have to be seen against that backdrop.

Now, the second point is this, and before I get there I think we probably could go into closed session, I think.

THE CHAIR: All right. Which flavour of closed?

MR JOWELL: I think for the moment if we go into the 1782 but including in—house counsel.

(2.16 pm)

In Private (Redacted)

(2.15 pm)

In Open Court

(4.09 pm)

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

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

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

that rent on the regulated market.

That ostensibly makes no sense at all.

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

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

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

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

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

MR RIDYARD: I can see that.

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

"Barriers to entry in the chipset markets.

"In this section, I set out evidence that suggests

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

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

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

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

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

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

We respectfully agree with Dr Padilla that this is indeed a fairy tale.

MR RIDYARD: Is that —— I mean, he did not —— I know Goldilocks is a fairy tale, but he did not say that this theory is necessarily a fairy tale for that reason. Maybe there is a position that can be struck that sort of arbitrates between those two forces.

MR JOWELL: It is theoretically possible, but it seems to us to be —— first of all, it is completely unevidenced and rather implausible because it asks one to assume that they are going to —— how does —— as Dr Padilla says, it does not seem to be consistent with the entry barrier theory because if there are ——

MR RIDYARD: I can see the tension between the entry barrier point.

MR JOWELL: Yes. If those —— how does this all sit together that these entry barriers are so high and, yet, here we have them going to all of this trouble and all of this expense to relocate monopoly profits? In our submission, it does not provide a plausible economic rationale. It requires a very, very sort of unusual set of particular circumstances, none of which have been tested or evidenced.

The second ——

MR RIDYARD: I might be the only one that feels this way,

but I find it quite frustrating that these arguments were not properly sort of exposed in the expert reports and discussed between them at an earlier stage, but, you know, obviously we cannot do much about that now, but it would have been interesting had they been better aired I think.

MR JOWELL: Well, we understand that. We do note that —— I think Dr Padilla did raise this —— the point about the monopoly profit in his —— in the joint statements.

MR RIDYARD: In the joint statement, yes.

MR JOWELL: Yes. The other economic issue I should just mention is the indirect mechanism or the fruits of the poisoned tree argument. This is really an untestable argument because no specific tainted licences are identified that are said to have been a point of reference for either Apple or Samsung. It is also an argument that Mr Saunders may address you in a little more detail on this in the context of the leveraging analysis, but it is also a difficult —— an implausible point as well because if one steps back, you have all of the original licences, the pre—96 licences certainly are completely untainted, and indeed one is entitled to assume that all licences before the date on which dominance is alleged in 2006 are also untainted and then, on top of that, you have licences during the

period that were untainted at least by any direct leveraging, like the Nokia agreement in 2018, and indeed —— forgive me, Nokia agreement in 2008, and indeed the CR now concedes the Samsung agreement in 2018 was also untainted by leveraging.

So it is not as though there were not —— there are not other untainted licences out there and they also have the adjustments that were mandated by the NDRC, the Chinese regulatory authority which —— again, that was effectively a success regulatory challenge to Qualcomm's royalty rates.

So you have a number of these untainted rates that are there. You then have the fact that most of these licences have most favoured royalty clauses in them in one form or another and so that combination is likely to actually have the opposite effect of tainting. What you actually will probably have is, as I think Mr Williams put it, a cascade of lower rates flowing through the whole industry.

So we say it is an untestable proposition, but it is also an implausible one.

The final point I would like to make on the economic evidence is just this: ultimately the intuition behind ——

THE CHAIR: Well, a cascade can only have that effect if

everyone knows the terms of the other licences.

MR JOWELL: Yes, but under —— indeed that is true, but under the most favoured royalty clauses, there is typically an obligation on Qualcomm, and you can see in the evidence that it —— for example, with regard to Nokia, it fulfils that obligation, and indeed in relation to —— there are other examples too, that give the obligation to provide that information to the OEM and so they do operate.

Finally, I should make —— the final point I would like to make is this: the intuition behind the bargaining model has, as a necessary pre—condition, the notion that, although the threat of chipset supply disruption would inevitably hurt both parties, it would hurt Apple or Samsung more than it would hurt Qualcomm. As Mr Noble accepted, without the threat of chipset supply, disruption is not credible.

The fundamental problem for the whole bargaining model, as a useful model really, is that nothing has been done to actually verify that that is the case. All Mr Noble offered was an assertion that Qualcomm would be able to sell some of its chipsets elsewhere and a back—of—the—envelope calculation that Apple would make more money from its phones than Qualcomm does from selling its chipsets, but one also does need to bear in mind that Apple is far better resourced than Qualcomm

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

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

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

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

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

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

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

THE CHAIR: Can I have the PDF?

MR JOWELL: Yes, tab 18.

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

MR SAUNDERS: 532.

THE CHAIR: PDF 5.

MR SAUNDERS: 532.

THE CHAIR: Authorities PDF number 5, page 532.

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

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

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

THE CHAIR: All right.

MR JOWELL: The same is in the ^ Ennis judgment, which is {AB2/45.1}, which you will find in —— I think that this is not in AB5. It is only in AB2/45.1 because it was only added recently. This is the ^ Ennis judgment at —— if we can go to page 36 of this {AB2/45.1/36}. You will see from paragraph 90, and if we could have the next page as well {AB/2/45.1/37}, you see, again, in paragraphs 90 to 92, you see, again, on the basis of section 60A(2) of the Competition Act, it interprets Chapter II as also being subject to the implementation and qualified effects tests as apply under EU law.

THE CHAIR: All right. Thank you.

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

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

consider it necessary.

THE CHAIR: All right.

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

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

MR JOWELL: Yes.

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

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

THE CHAIR: Thank you.

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

THE CHAIR: Yes.

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

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

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