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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 Tuesday, 4 November 2025  
 2 (10.00 am)  
 3 Closing submissions by MR SAUNDERS  
 4 THE CHAIR: Yes, Mr Saunders.  
 5 MR SAUNDERS: Good morning, members of the Tribunal. If  
 6 I may, I was picking up topics yesterday a little bit.  
 7 If I may, I will briefly touch upon, I think, seven  
 8 different topics. So on my list are points on  
 9 exhaustion, Mr Turner's questions; there are some  
 10 aspects of FRAND; the Apple/Qualcomm litigation,  
 11 a little bit about the chronology of what went on there  
 12 and what was in issue; the FRAND defence; leveraging;  
 13 the chipset supply practice and Mr Gonell's evidence;  
 14 the Foxconn agreements. Then, finally, some points on  
 15 silencing.  
 16 So that is -- unless there is anything else  
 17 specifically which it would assist the Tribunal for me  
 18 to address, that is what I was proposing.  
 19 THE CHAIR: Thank you. That is very helpful. So you are  
 20 sort of the sweep-up middle ground between Mr Jowell and  
 21 Mr Bailey.  
 22 MR SAUNDERS: Yes, the meat in the sandwich.  
 23 Before we get on to that list, can I just pick up a  
 24 very brief point on the hearsay evidence that the Class  
 25 Representative has relied upon. Mr Jowell, in his

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1 submissions, referred to them as being "self-serving  
 2 statements of some of the Apple executives." That is of  
 3 course I would say right and it is right, but there is  
 4 another reason some care is needed with some of that  
 5 evidence. Quite large chunks of what the class  
 6 representative relies upon come from investigatory phase  
 7 depositions in the FTC. So what happens is that the FTC  
 8 subpoenas witnesses and then asks them, in essence,  
 9 a series of largely leading questions, some of which you  
 10 have seen, and then key documents have been gathered and  
 11 are presented as exhibits in that process. So it is  
 12 almost akin to assembling a witness statement under our  
 13 procedure, except you do it through the mode of  
 14 a deposition at some document which have been selected.  
 15 If you -- if I could just turn to Mr Blevins'  
 16 investigation. I am not going to go to the detail of it  
 17 so I can do it in open court, but it is {POG/2/3}. Just  
 18 in the bottom left-hand corner, so, yes, just zoom in on  
 19 the bottom half of the document on the left, you will  
 20 see, by way of the appearances, who is there. It is --  
 21 we have the FTC, Apple's representatives and that is it.  
 22 So there is no testing of that evidence at all in that  
 23 procedure.  
 24 Just to make the point good in relation to  
 25 Mr Williams as well, it is {POG/13/2}. Again, if you

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1 look on the bottom right-hand corner of that page, you  
 2 see just the same.  
 3 Now, so that is the position.  
 4 Mr Blevins, we understand left Apple  
 5 in September 2022, but obviously at the time of these  
 6 subpoenas he was an Apple employee.  
 7 Now, what weight do you put on that material? Well,  
 8 we say none or at least only when corroborated by  
 9 contemporaneous documents and, as my learned friend  
 10 Mr Jowell explained, there have been an awful lot of  
 11 those disclosed in this case, just around half  
 12 a million.  
 13 The other point to make about it, of course, is  
 14 quite a lot of it is opinion evidence by some of those  
 15 Apple executives. When asked a question, "Would you  
 16 rather pay less?" they give a rather unsurprising answer  
 17 in effect. So we say some care is needed with that  
 18 evidence. It is not -- whilst it is correct, as my  
 19 learned friend said, that it is sworn, it has not been  
 20 tested.  
 21 The same can be said of Ms Mewes' evidence in the  
 22 Apple v Optis trial. She was not cross-examined on the  
 23 issues in this case but critically, in that case, they  
 24 did not have the 1782 document production that we have  
 25 had here. So at various points in the chronology

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1 Mr Jowell took you to documents -- internal Apple  
 2 documents that we have obtained in these proceedings  
 3 that explain part of the Apple broader strategy and the  
 4 genesis of that strategy as it relates to Qualcomm.  
 5 I will not go through that material in open court,  
 6 obviously, but that -- none of that was available in  
 7 that trial and, in any event, Mr Gonell responded to it  
 8 in his second statement and that was left largely  
 9 unchallenged in the box.  
 10 So that is just a brief point about the weight that  
 11 should be put on that evidence.  
 12 So the first on the list of topics that I had was  
 13 exhaustion. Now, the starting point in relation to  
 14 exhaustion is that there is very little between us.  
 15 There is no real dispute that the CSP is commercially  
 16 justified and a commercially reasonable practice and, as  
 17 Mr Rogers explained in his first statement, at  
 18 paragraph 30 {IRC/4/8}, the policy arose because if  
 19 Qualcomm sold baseband chipsets for an OEM that was  
 20 unlicensed, it could argue the sale permitted the OEM to  
 21 practise the SEPs that are implemented in the baseband  
 22 chipset. So -- there was no challenge to the substance  
 23 of that account.  
 24 MR TURNER: Sorry, I do not fully understand that. Can you  
 25 explain that? What is the problem? You have not

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1 agreed — just explain to me this exhaustion problem as  
 2 a practical matter. I am not sure I fully understand  
 3 it .  
 4 MR SAUNDERS: As a practical matter, if you sell — so  
 5 Qualcomm has spent a lot of money on research and  
 6 development in relation to the telecom standards.  
 7 MR TURNER: It has not — it has a potential purchaser of  
 8 its chips who has not agreed a licence.  
 9 MR SAUNDERS: Yes.  
 10 MR TURNER: So just what happens next?  
 11 MR SAUNDERS: It depends what legal system we are operating  
 12 under. Exhaustion is a defence to a claim of patent  
 13 infringement which is obviously what is left if there is  
 14 no licence or Qualcomm has not been paid out. So how  
 15 does the issue arise? If —  
 16 MR TURNER: Let us assume we are in the US for present  
 17 purposes.  
 18 MR SAUNDERS: And obviously Mr Rogers was speaking in  
 19 particular about US law.  
 20 If I sell you a chip under US law and the product  
 21 I am selling substantially embodies technology that is  
 22 claimed in a number of my patents, then you are — you  
 23 can raise, in your defence to my infringement action, an  
 24 argument that I have exhausted my patents rights in  
 25 respect of the sale of that chip.

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1 MR TURNER: So the infringement action you are bringing —  
 2 notionally bringing against the person you have just  
 3 sold the chips to.  
 4 MR SAUNDERS: Yes, that is it. The problem is if you do not  
 5 get paid out — if you do a lot of — so, as we  
 6 explained again in opening, there is about \$100 billion,  
 7 around that figure, of investment in research and  
 8 development that has gone to the standards and also the  
 9 development of some aspects of other technology. If the  
 10 price of the chip does not include a reasonable royalty  
 11 in respect of the inventions that are covered by the  
 12 patent, then effectively you get them — there is  
 13 an argument that you get them by way of an exhausted  
 14 right.  
 15 MR TURNER: So if you go to Huawei v ZTE, it may not be  
 16 necessary to turn it up, but at paragraph 60 that  
 17 discusses whether or not one can get — maybe we should  
 18 turn it up so we do not get it at cross—purposes.  
 19 MR SAUNDERS: Can I come back to Huawei v ZTE. I was going  
 20 to pick that up in the context of FRAND.  
 21 MR TURNER: Well, I want to pick it up in the context of  
 22 exhaustion. Do we have the reference for the president?  
 23 MR SAUNDERS: AB3, tab 19, page 7.  
 24 THE CHAIR: Is this authorities S3 for me, because —  
 25 MR SAUNDERS: Yes, authorities bundle 3. Hopefully we can

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1 help you with the pdf page number {AB3/19/12}.  
 2 MR TURNER: As I understand the court, it is in paragraph 60  
 3 where considering a position where we are dealing with  
 4 the chip supplier —  
 5 THE CHAIR: I am not there. I need the bundle.  
 6 (inaudible). No, that is not right.  
 7 MR TURNER: Do we have another reference?  
 8 THE CHAIR: Are you sure it is the third authorities bundle  
 9 because I have — I think I have a slightly different  
 10 division of bundles for some reason? (Pause)  
 11 NEW SPEAKER: I think it is at 1487.  
 12 THE CHAIR: Yes, that is right. I am there. Thank you.  
 13 MR TURNER: So, as I understand it, paragraph 60, the court  
 14 is contemplating the situation where a proprietor of  
 15 SEPs has not yet agreed the terms of the licence and  
 16 they are considering whether you can get an injunction  
 17 at that point.  
 18 MR SAUNDERS: Yes.  
 19 MR TURNER: Looking at it from the other perspective, so an  
 20 implementer does not have to get the licence first  
 21 before they start making their handsets. They can start  
 22 making the handsets, start negotiating the licence and,  
 23 in those circumstances, they will not be enjoined, at  
 24 least not according to Huawei v ZTE.  
 25 MR SAUNDERS: Yes. So the law — so this is, as it were, in

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1 relation to the interplay between Article 102 and  
 2 whether injunctive relief can be sought in proceedings  
 3 without a potential breach of Article 102.  
 4 What Huawei v ZTE deals with is the German procedure  
 5 where essentially there is an initial offer made by the  
 6 patentee. There is then a counter—offer made by the  
 7 implementer. The court essentially has to look at them  
 8 and says, "Is this within — I think they call it the  
 9 FRAND corridor?" and then, if necessary, they will go on  
 10 and grant an injunction, if the implementer is not  
 11 sufficiently within the safety zone of the FRAND  
 12 corridor by way of its offer.  
 13 That is, in my submission, a different point to  
 14 exhaustion. I will come on, if I may —  
 15 MR TURNER: Well, I am just taking it in stages.  
 16 MR SAUNDERS: Yes, of course.  
 17 MR TURNER: So at least, on this analysis, discuss the scope  
 18 of the analysis, you can start implementing the SEPs as  
 19 an implementer and at the same time be a willing  
 20 licensee and negotiate the licence. I think the same  
 21 point has been made in Unwired Planet also.  
 22 MR SAUNDERS: Yes.  
 23 MR TURNER: So we are not — so the same would apply to  
 24 patent proceedings.  
 25 MR SAUNDERS: So those are situations where the implementer

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1 is unlicensed at the start and they are not buying  
 2 chips.  
 3 MR TURNER: Exactly.  
 4 MR SAUNDERS: So exhaustion does not arise.  
 5 MR TURNER: I understand that.  
 6 MR SAUNDERS: There is then a question ---  
 7 MR TURNER: Just take it in stages. I have not asked you  
 8 a question yet. I am trying to build up some common  
 9 ground.  
 10 MR SAUNDERS: Yes, of course.  
 11 MR TURNER: So, in those circumstances, why, when it comes  
 12 to a chip supplier, must they insist on getting  
 13 a licence in place before they sell the chips, where if  
 14 you were a bare SEP owner you just have to negotiate as  
 15 you go along?  
 16 MR SAUNDERS: You are worse off than the bare SEP owner.  
 17 MR TURNER: Sorry, I have not asked the question yet. In  
 18 particular, why is it that you cannot merely supply  
 19 chips on the basis that once you have agreed the licence  
 20 that past royalties will be paid? So just have  
 21 a contract and, as an alternative, why do you not just  
 22 bump the price of the chips up?  
 23 MR JOWELL: So there are quite a lot of --- I mean, we have  
 24 obviously opened submissions in relation to whether you  
 25 could increase the price of the chips, which would

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1 obviously be a much --- an option where you are dominant  
 2 in that market, you could just jack up the price of the  
 3 chips and not have to worry about FRAND at all and that  
 4 is --- this is why this slightly contrived mechanism  
 5 which the claimant are saying.  
 6 MR TURNER: You merely say, look, we have not agreed  
 7 a licence fee, in the interim we are going to have to  
 8 add X dollars on to the price of the chip to make sure  
 9 that we do not end up out of pocket because of the  
 10 exhaustion principles that you are discussing.  
 11 MR SAUNDERS: Yes, although --- so that is --- so implicit in  
 12 that question, sir, is a question of whether you could  
 13 licence as a matter of theory at the chip level. So  
 14 essentially you sell the chip with, as it were, an  
 15 all-in price.  
 16 MR TURNER: It is just your chip. You are not licensing  
 17 your competitors.  
 18 MR SAUNDERS: I mean, Mr Rogers accepted as a matter of  
 19 theory you can do that, although the licensing  
 20 experts --- Mr Gonell explained in his cross-examination  
 21 why that is actually rather difficult. The reason being  
 22 that you have --- you have some patents that are --- that  
 23 are engaged with the chip itself. You also have  
 24 a royalty that --- there is no dispute in this case that  
 25 we are entitled to charge a royalty on the base price of

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1 the phones, subject to caps and various other things, so  
 2 it does not scale infinitely and so, in those  
 3 circumstances, you end up having to license twice  
 4 because you have to ---  
 5 MR TURNER: No, that cannot be right, Mr Saunders, surely.  
 6 You do not have a licence in place. You are talking  
 7 about the OEM. You are supplying chips to the OEM and  
 8 you --- of course you may have claims to chips, you may  
 9 have claims to chips in handsets, you may have a variety  
 10 of claims, but you just simply say, "Look, pending  
 11 agreement of the terms of the licence, I am going to add  
 12 on a nominal licence fee to the cost of the chip". That  
 13 seems a perfectly straightforward or --- and avoids the  
 14 necessity to say "You cannot have any chips while we are  
 15 negotiating the licence".  
 16 MR SAUNDERS: Well, that particular scenario is envisaging  
 17 that you park a royalty on to a chip in circumstances  
 18 where at the point of sale it may not be known which  
 19 devices and which markets that chip is going into. It  
 20 is also ---  
 21 MR TURNER: Why would you not know? This is an implementer  
 22 who is wanting to make phones ---  
 23 MR SAUNDERS: Well, some ---  
 24 MR TURNER: Wanting to use your chips. You know what you  
 25 are supplying.

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1 MR SAUNDERS: Well, sir, because some implementers may buy  
 2 a stock of chips and then have to be chased around the  
 3 world to understand where they have ended up and in what  
 4 products, because there are separate patents that  
 5 potentially read on to the device. This was a debate in  
 6 this case initially. It was originally the CR's  
 7 position that the --- it was originally the CR's position  
 8 that all of the patents read on to the chip, but that ---  
 9 MR TURNER: I cannot see that is right. So this is an OEM  
 10 who is going to put the chip in a phone and they need to  
 11 have the chip licence and they need to have all claims  
 12 licensed, whether it is chip claims or whether it is  
 13 phone claims, this just need a licence to cover  
 14 everything, and you have not yet agreed a fee with them  
 15 so, in the interim, you have two options open to  
 16 you: one is to say, well, you have to agree --- once we  
 17 settle the terms of the licence, you have to agree to  
 18 pay royalties from the past, back royalties, you have to  
 19 backdate your royalty payments, or, secondly, in the  
 20 interim, I am going to add the cost of these royalties  
 21 to the chip pending agreement. Then we can net off at  
 22 the end of this process.  
 23 Those seem to be perfectly straightforward and  
 24 whether the claims are to chips or to handsets is  
 25 neither here nor there.

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1 MR SAUNDERS: No, but, sir — well, the first point is in  
 2 relation to that is a theoretical one. So this does not  
 3 have the position of being chipset supply neutral,  
 4 obviously, because — and there is a lack of  
 5 transparency as to the all—in rate in those  
 6 circumstances, which can cause problems for other  
 7 reasons, but, secondly, the — it is much more  
 8 difficult, and has not been explored in evidence in this  
 9 case, as to whether this is practically doable.  
 10 Mr Gonell — hopefully we can find the bit of  
 11 Mr Gonell's evidence where he explained that that was  
 12 not a practical stand. You have to remember that  
 13 Qualcomm is licensing into a market where everybody else  
 14 is licensing at the end device level. What you are  
 15 positing, sir, is changing that model and saying that  
 16 commercially it is totally feasible to just park  
 17 a royalty on to the chip.  
 18 MR TURNER: No, I am not suggesting that all, Mr Saunders.  
 19 I am envisaging the implementer is making handsets and  
 20 that royalty can be assessed by reference to the  
 21 handsets.  
 22 MR SAUNDERS: That is an interim licence arrangement  
 23 strictly — properly analysed.  
 24 MR TURNER: You can call it that. You can put the price on  
 25 the chips. You can call it an interim licence. You can

1 have ways of saying: look, pending negotiations, we will  
 2 have an interim position, whatever that is, whether it  
 3 is a price on a chip or an agreement to pay backdated  
 4 royalties, but you are saying, no, no that is not  
 5 possible. Because of the principles of exhaustion, the  
 6 only option is not to supply pending agreement of the  
 7 terms of the licence and that is what I am having  
 8 difficulty with at the moment.  
 9 MR SAUNDERS: So I think that may be where — I apologise —  
 10 we may be at slightly cross—purposes.  
 11 MR TURNER: Right.  
 12 MR SAUNDERS: As a matter of theory, there are a number of  
 13 theoretical issues engaged by the question, sir. The  
 14 first of those is: could there be an interim licence  
 15 arrangement of some form? Could you park the royalty on  
 16 the chip and then sell the whole thing as one all—in  
 17 package? The third one, which was the more fundamental  
 18 question, which, as I understand it, is not disputed  
 19 with the CR, is why have the chipset supply policy in  
 20 the first place and the answer to that is to avoid  
 21 exhaustion upon sale of an unlicensed chip.  
 22 Now, the solution to that is to contrive some form  
 23 of licence, either by way of charging royalties further  
 24 up the chain or by way of charging an interim licence  
 25 arrangement. I will come on to address, if I may, later

1 on the interim licence scenario, but that is — neither  
 2 of those are strictly questions of exhaustion.  
 3 Exhaustion arises — I mean, exhaustion, insofar as it  
 4 is a question in this case, is a question for — is  
 5 essentially why does the chipset supply policy exist as  
 6 it does? The question, sir, you are asking is how can  
 7 you contrive ways of circumventing that?  
 8 MR TURNER: You say the problem is exhaustion, but then when  
 9 I say, well, why is that a problem, you say it is  
 10 because we are not going to get a royalty on our chips.  
 11 So all I am putting to you is there are a number of ways  
 12 around that.  
 13 MR SAUNDERS: Yes and —  
 14 MR TURNER: It is not —  
 15 MR SAUNDERS: So theoretically, yes, but real life is not  
 16 nearly that straightforward for the reasons that  
 17 Mr Gonell explained and also the licensing experts have  
 18 explained as well. I will get you the references in due  
 19 course.  
 20 But it has never been part of — I mean, the CR has  
 21 not seriously persisted in a case saying that it should  
 22 have been charged — that there should be royalty parked  
 23 on the sale of a chip as an all—in price. The debate is  
 24 about interim licences in the context of FRAND and what  
 25 obligations might give rise to an interim licence and

1 even that, in my submission, is rather petered away  
 2 because in the closing the CR has rather backed off the  
 3 detail of that, but the details of this proposal really  
 4 do matter actually because one has to look quite  
 5 carefully at what the source of the obligations are and  
 6 exactly what it is that Qualcomm was — is now being  
 7 said, after the event, that I should have done.  
 8 So, I mean, whilst these are — if I may, I will  
 9 come back to those points in relation to FRAND, but it  
 10 is very important to keep these points separate, in my  
 11 submission. I accept that my answer was, well, because  
 12 you are not paid out on the chip, and that is why the  
 13 chipset supply policy exists in its basic form, but  
 14 that does not prevent you contriving a different way of  
 15 being paid out on the chip as a matter of theory, but  
 16 the real world is not that straightforward and we simply  
 17 have not had the evidence in this case. We have had  
 18 a little bit of evidence but we have not gone into that  
 19 as an issue because it has not been an issue between the  
 20 parties.  
 21 Sir, I think you have had the delight of hearing an  
 22 exhaustion case very recently on copyright exhaustion.  
 23 As you observed, there are different regimes that arise  
 24 under EU law. There is the English law position and  
 25 also the US law position. I am not sure if it would be

1 of assistance to take you through that very briefly or  
 2 not ---  
 3 MR TURNER: Do the differences matter for present purposes?  
 4 MR SAUNDERS: I mean, the EU position is one that you cannot  
 5 contract out of. The English law position is ---  
 6 operates by way of an implied licence and so we put in  
 7 the skeleton argument the Betts v Willmott and United  
 8 Wire v Screen Repair Services and there is a good  
 9 summary by Mr Justice Arnold in HTC v Nokia. So those  
 10 are --- that is, as it were, the framework.  
 11 The position in the US is that we have LG v Quanta  
 12 and some of the subsequent cases, Jazz Photo which was  
 13 then overturned by Lexmark and so on. That is also  
 14 dealt with in HTC v Nokia with a subsequent postscript  
 15 that in Lexmark the Supreme Court overturned Jazz Photo.  
 16 So, I mean, as far as it --- the key test in the US  
 17 is the technology substantially embodied in the product  
 18 that you sell? Exhaustion in the US is an evaporation  
 19 as opposed to an implied licence so it operates  
 20 following Quanta to remove the rights ab initio.  
 21 So I think that is the only other point.  
 22 The only other thing, can I just mention, is we did  
 23 put in --- I do not know, sir, if you recall, earlier on  
 24 in the case some of these issues came up in relation to  
 25 the non---assert agreements and both parties put in

1 position statements earlier on about that. Those are at  
 2 {ORH/35.1} and {ORH/35.2}. We deal with the Lexmark ---  
 3 some of the later case law in {ORH/35.2/6},  
 4 paragraphs 20 to 21.  
 5 So the key thing, in terms of applicable law, the  
 6 applicable law is the place where you bring the  
 7 infringement action for exhaustion test. Slightly  
 8 different in relation to agreements because there  
 9 a choice of law provision is the one to be applied and  
 10 here Californian law.  
 11 So that --- unless, sir, there is anything further  
 12 you need on exhaustion, I think that hopefully gives you  
 13 the basic floor. That, as we say, there was no serious  
 14 challenge to the evidence in Mr Rogers' first statement  
 15 on all of that so --- and that is the genesis of the  
 16 policy and the fact that Qualcomm was selling into  
 17 a market in which end---device licensing was already  
 18 established.  
 19 So the second topic is some aspects of FRAND and we  
 20 have already touched on one of those. Can I just pick  
 21 up a couple of other queries which I think, sir, you had  
 22 from Friday. You asked about the jurisprudential basis  
 23 of FRAND as a range, rather than a single set of terms.  
 24 MR TURNER: The Court of Appeal in ---  
 25 MR SAUNDERS: Unwired Planet. I can just give you paragraph

1 reference to that.  
 2 MR TURNER: What does it mean?  
 3 MR SAUNDERS: What does it mean?  
 4 MR TURNER: Yes.  
 5 MR SAUNDERS: Well, it may be worth just turning up the  
 6 paragraph.  
 7 MR TURNER: Yes, it might be.  
 8 MR SAUNDERS: So it is {AB2/28/41}. That is the authorities  
 9 bundle 2 and in my Lady's pdf, page 2251 --- sorry, 2195.  
 10 So you may recall at first instance Mr Justice Birss  
 11 set a single set of terms. He said that those were  
 12 worldwide and if was wrong about that, he also set a UK  
 13 country---specific set of terms. The Court of Appeal  
 14 overturned him on that in paragraph 121 and I will just  
 15 read what --- so they say they came to a separate  
 16 conclusion:  
 17 "Patent licences are complex and, having regard to  
 18 the commercial priorities of the participating  
 19 undertakings and the experience and preferences of the  
 20 individuals involved, may be structured in different  
 21 ways in terms of, for example, the particular  
 22 contracting parties, the rights to be included ... the  
 23 geographical scope ... products ... royalty rates and  
 24 how they are to be assessed... Further, concepts such  
 25 as fairness and reasonableness do not sit easily with

1 ... a rigid approach."  
 2 One of the things that you may have ---  
 3 MR TURNER: So he is not saying that there is a range of  
 4 FRAND for a given party in a different situation?  
 5 MR SAUNDERS: No, it is saying --- no, it is. So the effect  
 6 of it is that there could be multiple agreements with  
 7 a given party, which are all FRAND within the FRAND?  
 8 MR TURNER: Depending on other variables, is that right?  
 9 MR SAUNDERS: No. Sir, there is no --- the point being made  
 10 is that it is not a precise science in essence, because  
 11 the touchstone is fairness and reasonableness.  
 12 MR TURNER: Structuring in different ways, different  
 13 parties, the rights you are talking about, the  
 14 geographical scope.  
 15 MR SAUNDERS: Yes, but if we carry on in the paragraph:  
 16 "... concepts such as fairness and reasonableness do  
 17 not sit easily with such a rigid approach. In our  
 18 judgment it is unreal to suggest that two parties,  
 19 acting, fairly and reasonably, will necessarily arrive  
 20 at precisely the same set of licence terms as two  
 21 parties, also acting fairly and reasonably... "  
 22 MR TURNER: So they are not, at least explicitly, saying for  
 23 a single party there is more than one --- for a single  
 24 party, with all other things being equal, that there is  
 25 a range of rates?

1 MR SAUNDERS: No, they are saying --- they say, to the  
 2 contrary, the reality is that a number of sets of terms  
 3 may all be fair and reasonable in a given set of  
 4 circumstances. So that is what we --- so that is the  
 5 basis of the fact that the finding that unlike --- at  
 6 first instance, there could be multiple sets of FRAND  
 7 terms between --- because they overturned  
 8 Mr Justice Birss on this point. He was concerned about  
 9 what he called the "Vringo problem" which is the sort of  
 10 ships passing in the night with different offers, both  
 11 of which are FRAND, but they are different. How do you  
 12 deal with that? The Court of Appeal says you can have  
 13 multiple terms.  
 14 Now, the consequence is, as long as they are both  
 15 FRAND, the SEP holder can choose what it offers, because  
 16 your obligation to offer a set of terms is met by  
 17 offering a FRAND set of terms and so I can make this  
 18 point good and --- but, in that case, it would have been  
 19 both FRAND --- if there is a global set of terms that is  
 20 FRAND, that is all that had to be offered and that is,  
 21 as it were, how the Supreme Court squared the  
 22 jurisdiction problem in Unwired Planet, because you have  
 23 an English Property right, the infringed patent, that  
 24 could give rise to an injunction, but the price of  
 25 buying your consent under Section 60 of the Patents Act

1 is those take a global licence and it is that --- the  
 2 terms of that global licence that were declared. So  
 3 that is how you can --- the English court --- that is both  
 4 justiciable and there is jurisdiction to grant that  
 5 relief.  
 6 Just while we are in that document --- in the Court  
 7 of Appeal decision, could we --- it also goes on to make  
 8 the point that country-by-country licensing would be  
 9 "madness", picking up on Mr Justice Birss' famous words,  
 10 and consistent with that licensing experts in this case  
 11 agree that all real-world licences are global and just  
 12 for your note, that is paragraph 4.1 of the joint expert  
 13 statement.  
 14 Now, what follows is that if multiple terms are  
 15 FRAND, a SEP owner is not in breach of its obligation to  
 16 offer a FRAND licence if it selects the ones most  
 17 favourable to it. The Court of Appeal in InterDigital v  
 18 Lenovo confirmed that in paragraph 275. So that is  
 19 {AB2/41/70}. I do not --- I will just give you the  
 20 reference.  
 21 Just to also pick up another point in the case law,  
 22 in Apple v Optis, the smallest saleable unit argument ---  
 23 that is the argument that a royalty should be based on  
 24 the price of the chip --- was rejected at first instance  
 25 by Mr Justice Marcus Smith and that was not appealed by

1 Apple to the Court of Appeal. The Court of Appeal also  
 2 commented on aspects of Apple's licensing framework and  
 3 that is something that we have seen in this case. If we  
 4 can just look at as well very briefly {AB2/46/26}. If  
 5 we just zoom in on the bottom of the page,  
 6 paragraph 122. So that one is pdf page 4761, I think,  
 7 Madam.  
 8 So you will see --- so this is Apple v Optis.  
 9 THE CHAIR: Sorry, pdf page 4761 of which bundle?  
 10 MR SAUNDERS: Pdf page 4444 of --- this is bundle 2.  
 11 THE CHAIR: All right. Got it.  
 12 MR SAUNDERS: Thank you.  
 13 THE CHAIR: Yes.  
 14 MR SAUNDERS: I am not sure, sir, if you are there?  
 15 THE CHAIR: Yes.  
 16 Q (By Mr Saunders)  
 17 MR SAUNDERS: I can take you to paragraph 122. So:  
 18 "Having got this is far, when one puts together the  
 19 judge's clear finding that Apple's Framework included  
 20 indefensible elements such as an insistence on patent by  
 21 patent licensing (which manifestly would involve a  
 22 degree of hold out) ... "  
 23 "Hold out" obviously being essentially an  
 24 implementer stringing things out and not accepting a  
 25 FRAND licence:

1 " ... with the spread of values implied by the Apple  
 2 Comparables ... there is only one, hardly surprising  
 3 conclusion. When it can do so, Apple's significant  
 4 negotiating strength leads some parties to agree lower  
 5 rates than would be agreed between a willing  
 6 licensor/willing licensee."  
 7 I will not mention in open court but you may recall  
 8 that chimes slightly with some of the 1782 documents  
 9 that we have seen.  
 10 So country-by-country licensing is madness. No one  
 11 does it in the real world. The evidence in this case is  
 12 that all licences are global, let alone patent by  
 13 patent. That is, as it were, madness on madness:  
 14 buttressed madness.  
 15 So it is, as the Court of Appeal have identified,  
 16 symptomatic of holding out, in that case I accept, not  
 17 this one.  
 18 Now, just while we are just looking at market power  
 19 of implementers, can I take you very briefly to the  
 20 joint expert statement {POE/29/7} and then paragraph 5.1  
 21 and paragraph 5.2. So you will see:  
 22 "Major SEP licensees have substantial advantages and  
 23 greater bargaining power than smaller players due to  
 24 their greater financial resources, ability to pursue  
 25 potential litigation and the importance of their

1 business to licensors ."  
 2 So this is the agreed statement:  
 3 "Well—resourced licensees can use litigation , or the  
 4 threat of litigation , as a negotiating tactic to obtain  
 5 better license terms. Apple and Samsung are in a tier of  
 6 their own due to their significance as licensees (based  
 7 on their size and sales volumes) and having very  
 8 significant financial resources and expertise."  
 9 Then it goes on, 5.2, to explain that they can  
 10 defend SEP litigation and essentially the position is  
 11 that you are left trying to chase people around the  
 12 world and although it is not a pleasant message for the  
 13 court, but when one looks at the size of the value of  
 14 these agreements, lawyers are relatively cheap in  
 15 comparison with the sums of money here. So you can see  
 16 the rational incentive to defend cases to see if you can  
 17 obtain a negotiating position.  
 18 Over the page, page 5.7 — paragraph 5.7 and  
 19 paragraph 5.8, just look at that very briefly  
 20 {POE/29/8}. So 5.7 at the bottom:  
 21 "Samsung and Apple are both extremely sophisticated  
 22 companies with the ability to perform tough licensing  
 23 negotiations."  
 24 They agree a position in relation to Nokia.  
 25 Then just over the page, if we can have a look at

1 that {POE/29/9}, where the parties had agreed that  
 2 compensation in relation to Samsung, Nokia emphasised  
 3 how it would save significant transaction costs and so  
 4 on:  
 5 "... Samsung and Apple are both capable of waging  
 6 a long and extensive global litigation battle, which  
 7 leaves them in a strong bargaining position. Apple's  
 8 and Samsung's negotiation teams also always showed up  
 9 well prepared with sophisticated arguments and  
 10 approaches."  
 11 5.8:  
 12 "Not being among the leading contributors to  
 13 cellular communications standards ... Apple has engaged  
 14 in extensive regulatory efforts to influence  
 15 politicians , competition authorities, [other] standards  
 16 setting bodies, and the broader public trying to shape  
 17 the licensing regime for cellular SEPs in favour of  
 18 implementers."  
 19 You may recall Mr Rogers' evidence in relation to  
 20 top—down. That is I think he explained an Apple  
 21 innovation.  
 22 Now, so that is the agreed statement of the  
 23 licensing experts.  
 24 MR TURNER: Sorry, just going back to InterDigital v Lenovo,  
 25 why are we looking at UK authorities?

1 MR SAUNDERS: Well, yes, that is a very good question,  
 2 because, again, the English case law has developed very  
 3 recently and that is a point we make in relation to the  
 4 interim licence proposals that the CR makes because one  
 5 thing we say it is entirely illegitimate —  
 6 MR TURNER: That is a separate point, whether we have regard  
 7 to recent case law, but in terms of why are we looking  
 8 at UK case law at all?  
 9 MR SAUNDERS: Why, as opposed to any other?  
 10 MR TURNER: As opposed to Californian case law or Korean  
 11 case law.  
 12 MR SAUNDERS: The answer is there is very little public case  
 13 law where these issues have been ventilated. They have  
 14 seen articulation —  
 15 MR TURNER: They are different contracts.  
 16 MR SAUNDERS: They are different contracts, although some of  
 17 the principles that have been established are arguably  
 18 at broader —  
 19 MR TURNER: Which principles are common to all  
 20 jurisdictions? I mean, the concept of FRAND, as  
 21 I understand it, is common to all jurisdictions.  
 22 MR SAUNDERS: So the way that that works is because the  
 23 FRAND undertaking is an undertaking — so it is given by  
 24 the — the SEP holder that declares the SEP to ETSI,  
 25 pursuant to the declaration made under the ETSI rules,

1 the applicable law of that declaration is French law.  
 2 MR TURNER: Yes.  
 3 MR SAUNDERS: So there is — some case law has touched on  
 4 what the correct — the court has heard evidence of  
 5 French law experts to construe that contract in effect .  
 6 MR TURNER: But why are we focusing on ETSI?  
 7 MR SAUNDERS: Why ETSI?  
 8 MR TURNER: Yes.  
 9 MR SAUNDERS: Because many of the declarations are to ETSI  
 10 in relation to — so 4G standards are — and 5G ETSI  
 11 has — through GPP.  
 12 MR TURNER: But the US SSO.  
 13 MR SAUNDERS: The US SSO is one of the ANSI Institutes, but  
 14 some of the other standards have different declared  
 15 terms.  
 16 MR TURNER: But, as I understand it, common to all these  
 17 SSOs is the concept of FRAND.  
 18 MR SAUNDERS: FRAND or RAND.  
 19 MR TURNER: Or RAND.  
 20 MR SAUNDERS: Yes.  
 21 MR TURNER: What about the concept of a willing licensee and  
 22 a willing licensor?  
 23 MR SAUNDERS: So a willing licensee and a willing licensor  
 24 are concepts which, through English case law, have been  
 25 developed in the context of whether somebody — whether

1 somebody is behaving consistently with the French law  
 2 contract.  
 3 MR TURNER: Yes, I understand that.  
 4 MR SAUNDERS: So that is ---  
 5 MR TURNER: What would the position be in the US?  
 6 MR SAUNDERS: So the position in the US is I am not aware of  
 7 a case where those questions have come up. In the US  
 8 they deal with it in a slightly different way. They  
 9 deal with it as to whether it is a question of good  
 10 faith, so whether you have entered into a good faith  
 11 negotiation and we put --- there is footnote in our  
 12 skeleton argument which deals with the US authorities on  
 13 that.  
 14 MR TURNER: Which footnote?  
 15 MR SAUNDERS: Let me see if I can ---  
 16 MR TURNER: Remind me and I will pick that up.  
 17 MR SAUNDERS: Footnote 21 which is ---  
 18 MR TURNER: I will find it.  
 19 MR SAUNDERS: Page 7 of the internal --- thank you. It is on  
 20 the screen {EAOS/5/41}.  
 21 So English lawyers tend to view a good faith  
 22 negotiation commitment, unless it gives rise to some  
 23 kind of Braganza duty or something, under English law  
 24 you have a rather hard-edged --- hard-nosed, perhaps,  
 25 view of commercial negotiations. That is not the same

1 for US law and we deal with those authorities.  
 2 MR TURNER: Given these negotiations, obviously we are  
 3 concerned with various negotiations. We have  
 4 negotiations with Apple, negotiations with Samsung. We  
 5 have negotiations with other OEMs which may or may not  
 6 be of peripheral relevance, and in terms of looking at  
 7 the behaviour and indeed whether it was legitimate to  
 8 raise the question of supply, to take a particular  
 9 position, and I appreciate you say you did not threaten  
 10 to cut off supply, but if that issue were to arise, it  
 11 is not clear to me that the relevant law would be the  
 12 law of the UK. It would seem to be potentially US or  
 13 Korea, depending on whether ---  
 14 MR SAUNDERS: Potentially the US and via the good faith  
 15 obligation that we have identified here. Again, if  
 16 there is an agreement which says --- you can take ---  
 17 I will not mention the particular agreement, but you may  
 18 have it in mind, one of --- there is a particular  
 19 agreement which has a good faith renegotiation  
 20 provision. That deals with that. So that is an  
 21 actionable --- there is a potential cause of action  
 22 there. It was never exercised, as we know.  
 23 You see, I mean, the difficulty with this debate in  
 24 a way is that this is --- we are now at such an  
 25 abstraction from the facts of the case and even to

1 a certain degree from the way that the CR is putting it  
 2 against me, because we are, as Mr Jowell developed  
 3 yesterday, I mean, this scenario just did not arise and  
 4 those ---  
 5 MR TURNER: Both in your skeleton arguments, you both refer  
 6 to UK law and the obligations under ETSI and I just  
 7 wondered --- that seems almost to be common ground that  
 8 that is the way you have analysed this. It only refers  
 9 to the US ---  
 10 MR SAUNDERS: No, the ETSI commitment is taken into account  
 11 in US case law. You see that in some of the earlier  
 12 decision, Motorola, and so on, and there are cases where  
 13 there has been expert evidence in US proceedings as to  
 14 the effect of the French law undertaking as well. So  
 15 they deal with that by reference to the foreign law,  
 16 insofar as it is a question of ETSI. Insofar as we are  
 17 dealing with the position in relation to a concluded  
 18 agreement, then it is the applicable law of the state of  
 19 California as to how that is to be construed, including  
 20 its approach to good faith.  
 21 MR TURNER: But if it is your behaviour in negotiations that  
 22 you are going to arrive at a licence but you have not  
 23 arrived at that licence yet, your behaviour is --- has to  
 24 be governed by multiple --- laws of multiple contracts  
 25 presumably, is that right?

1 MR SAUNDERS: No. If you have not --- if I am a SEP holder  
 2 and you, sir, come to me and say, "I see you have some  
 3 declared standard essential patents, give me a licence",  
 4 then I have --- assuming that I have declared those to  
 5 ETSI as being essential to the standard, what you are ---  
 6 although you may not be saying it, you are saying,  
 7 "I want to rely on your French law undertaking to ETSI.  
 8 I consider myself somebody for which there is  
 9 a stipulation pour autrui under French law and I am  
 10 a qualifying person to take the benefit of that", a bit  
 11 like a contract for the benefit of third persons, "I am  
 12 a qualifying person to take the benefit of that and so  
 13 therefore I am entitled to a licence on FRAND terms".  
 14 I may make you an offer. You may make me  
 15 a counteroffer. The question of whether you are willing  
 16 or not comes into the assessment of whether you are, as  
 17 it were, a qualifying person under French law.  
 18 MR TURNER: Presumably --- I do not know how it works, but  
 19 presumably you make declarations to ETSI and to the US  
 20 SSO; is that right?  
 21 MR SAUNDERS: So I think the --- I need to be careful about  
 22 which standards --- so for CDMA I think they are done to  
 23 the US standards bodies. For 3G and 4G, they are  
 24 normally done direct to ETSI, but that --- I am afraid  
 25 I do not know --- that is --- I'm afraid, I do not know

1 the factual position. We would have to double-check  
 2 that.  
 3 So, as I say, it is — if you are an unlicensed  
 4 person, you are seeking to rely upon the French law  
 5 undertaking. That is the way that the analysis has  
 6 taken place.  
 7 MR TURNER: But only — if you are implementing in Korea —  
 8 MR SAUNDERS: No, if you are implementing in Korea or China,  
 9 you take the benefit of the French law undertaking.  
 10 MR TURNER: I see.  
 11 MR SAUNDERS: So the Chinese OEM will say — and says — so,  
 12 for example, in —  
 13 MR TURNER: So you only declare to one SSO?  
 14 MR SAUNDERS: Yes, normally, unless, for example, there is  
 15 a China-specific standard in which case it is  
 16 possible — I do not know — you may declare also to a  
 17 Chinese SSO.  
 18 MR TURNER: I understand.  
 19 MR SAUNDERS: Now, the applicable law of that undertaking  
 20 should be French law.  
 21 MR TURNER: Yes.  
 22 MR SAUNDERS: However, some courts do not apply, so China,  
 23 very notably, applies Chinese law to the undertaking  
 24 with some consequences which may not be consistent with  
 25 what everybody thought when they were declaring the

1 patent, but that is a different issue to the ones we are  
 2 concerned with here.  
 3 So that is — so it is that French law undertaking.  
 4 So, for example, if a Chinese OEM is sued — so, for  
 5 example, the Unwired Planet case is an example of this.  
 6 Unwired Planet commenced its proceedings on English  
 7 intellectual property rights, those that had a monopoly  
 8 that applies only to the United Kingdom. In its  
 9 defence, Huawei says: I would like to take the benefit  
 10 of your undertaking to ETSI on a global — on a UK —  
 11 their primary position was UK — and we will have that  
 12 FRAND licence that you have undertaken to provide.  
 13 MR TURNER: So if you refuse to supply chips to Apple in —  
 14 and Apple's manufacturers are in the US and you have not  
 15 got a concluded licence, I appreciate we are drifting  
 16 away from the facts of this case —  
 17 MR SAUNDERS: We are a lot, yes.  
 18 MR TURNER: But what will the — just briefly explain what  
 19 the applicable law is. You say you are entitled not to  
 20 license because they are not acting in good faith, let  
 21 us say.  
 22 MR SAUNDERS: Yes, so — well —  
 23 MR TURNER: Then how does ETSI get into that?  
 24 MR SAUNDERS: So ETSI never does anything. Well, save for  
 25 one — so ETSI — apart from one very recent case,

1 Samsung v ZTE where someone tried to do something in  
 2 front of ETSI, but normally ETSI — in all previous  
 3 litigation, ETSI has never done anything. It is the  
 4 recipient — it sets the standards, but it is the  
 5 recipient of the undertaking.  
 6 MR TURNER: French law.  
 7 MR SAUNDERS: French law. So if you come — so, in those  
 8 circumstances, the implementor would say, "We want to  
 9 rely a upon your French law undertaking to ETSI and you  
 10 have not given a good faith undertaking or you have not  
 11 behaved in a way consistent with your undertaking". We  
 12 come on in a minute actually to the Apple v Qualcomm  
 13 litigation.  
 14 MR TURNER: That would be argued out —  
 15 MR SAUNDERS: That would be argued out in the US, yes.  
 16 MR TURNER: Yes, I see.  
 17 MR SAUNDERS: This is the thing. These procedures have been  
 18 available — I do not know the position in relation to  
 19 Korea, but certainly in the US there has been litigation  
 20 over time. There has been litigation in the UK. It was  
 21 only really in 2020 that UK confirmed it had  
 22 jurisdiction to set a global rate as the price of buying  
 23 yourself off an injunction for the UK market, but this  
 24 litigation has always been available. One of the things  
 25 that we see from the documents in the case is that you

1 see some of the other OEMs talking about litigation  
 2 options and we see Apple and Samsung analysing that as  
 3 well and, I mean, this is — and, in my submission, it  
 4 is hardly surprising that they should think like that  
 5 because there are large sums of money available and no  
 6 shortage of lawyers for some of these litigants who are  
 7 perfectly capable of contriving whatever procedure they  
 8 like.  
 9 So, sir, that was available. What is very striking  
 10 on the facts, to come back to the facts of this case,  
 11 is, as far as Samsung is concerned, the issue just did  
 12 not arise and, as my learned friend Mr Jowell developed  
 13 in relation to Apple, we were given — we offered  
 14 arbitration and various other things in the context of  
 15 that global litigation.  
 16 MR TURNER: It was a hypothetical position I was putting to  
 17 you, yes.  
 18 MR SAUNDERS: So can I just turn very briefly to the interim  
 19 licence position. We dealt with that very briefly in  
 20 our skeleton argument. In opening, the class  
 21 representative put quite a lot of emphasis on the  
 22 Panasonic case, a very recent decision of the Court of  
 23 Appeal, and some of that interim licence case law in  
 24 England. Rather less emphasis on that in closing and  
 25 I will just address you on where the emphasis of the

1 argument seems to have shifted. But it is no longer  
 2 asserted against us that there is any specific process  
 3 that Qualcomm should have followed or that we should  
 4 have done anything in particular, but, again, when you  
 5 are looking at this submission, it is extraordinarily,  
 6 in my submission, inchoate. It has not been fleshed out  
 7 or thought through and it is very difficult to simply —  
 8 to say, well, it can all be sorted out.

9 The answer is there is no obligation that has been  
 10 identified against us as the source of it. There is no  
 11 detail as to what should happen on an interim basis and  
 12 then, essentially, what they want to do is re—run the  
 13 rules — the game that has happened by imposing a set of  
 14 subsequent rules developed very recently through this  
 15 later —

16 MR TURNER: But the subsequent rules you are talking about  
 17 is the interaction between the English and the German  
 18 courts with regard to interim —

19 MR SAUNDERS: Well, so, the one thing that — no, sir, there  
 20 has been — the subsequent rules I am talking about are  
 21 the English case law on interim licences which the Court  
 22 of Appeal has developed in Panasonic.

23 MR TURNER: But there is a lot of law in Panasonic which is  
 24 beyond that and there are some general principles which  
 25 are summarised which include the concept of FRAND, the

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1 concept of a willing licensor and a willing licensee.  
 2 Those are not recent developments. One can find them  
 3 going back to Unwired Planet.  
 4 MR SAUNDERS: Some of them are based on Apple v Optis and  
 5 InterDigital v Lenovo, which are decisions of the Court  
 6 of Appeal in the last two years. For example, take one  
 7 issue, which is does a FRAND licence include full  
 8 payment for the past? Now, that was something — so in  
 9 the real world, as the experts agreed in this case and  
 10 agreed in many previous cases, it is very difficult to  
 11 get paid for past use of your inventions because the  
 12 only solution that the SEP holder has is to chase people  
 13 around the world and try and catch up with them and then  
 14 limitations periods apply and you are trying to get per  
 15 patent damages and so on.

16 Mr Justice Mellor in InterDigital for the first time  
 17 said actually FRAND requires you to pay for the past.  
 18 Now, that is the controversial principle which has been  
 19 established in English law through that interpretation  
 20 and is now baked into some of the approach in Panasonic,  
 21 but it is not a real—world principle because, as the  
 22 experts agree, real—world licences do not take that  
 23 benefit and some of the comparators that are used in  
 24 FRAND negotiations have never been done like that.

25 So one has to be slightly careful about taking

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1 Panasonic as being a sort of general series of  
 2 principles. They are — it is an incremental  
 3 development of recent English case law.

4 Now, obviously were we in a FRAND case and the court  
 5 were being asked to set a reasonable royalty, some of  
 6 that material may well be binding upon the Tribunal, but  
 7 the exercise here is a different approach, which is: are  
 8 there principles to be plucked out of that case law that  
 9 should be read back in time to the decade earlier? In  
 10 my submission, you have to be very careful if you are  
 11 doing that because you have to look very carefully at  
 12 what the source of those principles are.

13 MR TURNER: But the obligation to negotiate in good faith  
 14 and to be a willing licensor and a willing licensee hold  
 15 out/hold up. I mean, those go back to Unwired Planet,  
 16 do they not?

17 MR SAUNDERS: Yes, sir, they go back to Unwired Planet.  
 18 Willing licensor/licensee, the case law is actually much  
 19 later than Unwired Planet. So it is Nokia v Oppo and  
 20 some of that.

21 MR TURNER: But is it any more than saying you have to  
 22 negotiate in good faith?

23 MR SAUNDERS: Well, the manifestations of that are — the  
 24 question is — so that is tied up in English procedure  
 25 with a whole series of questions about when an

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1 implementer has to undertake to the English court to  
 2 accept a court—determined licence. So that is quite  
 3 a different — I mean, again, part of the problem — the  
 4 difficulty with looking at this case law is it is  
 5 through the lens of English jurisdiction as much as  
 6 anything else.

7 THE CHAIR: So this is all about, is it not, the no licence  
 8 counterfactual?

9 MR SAUNDERS: Yes, absolutely. Well, this is — well, it  
 10 is not the no licence — the — it is not really even  
 11 the counterfactual, I think. These are cases on no  
 12 licence.

13 THE CHAIR: Yes.

14 MR SAUNDERS: So where somebody comes and says, "I would  
 15 like to take the benefit of your undertaking and please  
 16 give me a licence".

17 THE CHAIR: But the idea of an interim licence arose in  
 18 relation to the debate about what the no licence  
 19 counterfactual is. It is not relevant in a licence  
 20 counterfactual.

21 MR SAUNDERS: Precisely.

22 THE CHAIR: As I understand it, your position is that it is  
 23 very difficult to construct this no licence  
 24 counterfactual as suggested by the class representative  
 25 and Mr Noble, because that is in large part based on

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1 recent jurisprudence of the English courts. So in a no  
 2 licence situation, is it your --- well, what is your  
 3 position as to what should happen in a no licence  
 4 situation for there not to be an abuse of a dominant  
 5 position, if there is one?  
 6 MR SAUNDERS: Well, my Lady, the answer --- the short answer  
 7 to that is it does not arise in this case.  
 8 THE CHAIR: Yes, I know.  
 9 MR SAUNDERS: But the other ---  
 10 THE CHAIR: But supposing you are wrong on that.  
 11 MR SAUNDERS: So in my submission the way I could be wrong  
 12 on it is by analogy pulling out principles from that  
 13 case law. I am not saying I am wrong, but that is the  
 14 only way in which that issue could arise, because what  
 15 you have to do is look at some supervenient principle of  
 16 law that one plucks out of that case law and then apply  
 17 it retrospectively to the facts of this case and that ---  
 18 THE CHAIR: But let us take an example. Supposing you are  
 19 wrong on the need to get a licence for 5G for Apple.  
 20 Let us suppose that there was a need to get a 5G licence  
 21 at that point, contrary to what Mr Gonell says. So that  
 22 is a situation in which there might theoretically be  
 23 a no licence situation. In that case, what do you say  
 24 is the proper way to behave? I know you say that the  
 25 actual (inaudible) lies with the counterfactual, but

1 what do you say that is?  
 2 MR SAUNDERS: The answer is you negotiate and you reach  
 3 a commercial deal, which is precisely what Qualcomm has  
 4 done in this case and in myriad others.  
 5 THE CHAIR: You negotiate and reach a deal in a situation  
 6 where it is understood that if you do not reach a deal,  
 7 then either side can invoke FRAND litigation?  
 8 MR SAUNDERS: Yes, because that is the --- it may well be  
 9 that the implementer --- well, there are options open to  
 10 parties. As I said a moment ago, there is no shortage  
 11 of lawyers in this area, but these are highly, highly  
 12 sophisticated counterparties, particularly ---  
 13 THE CHAIR: What happens if you cannot reach a deal or  
 14 litigate in the time available? What happens if you  
 15 need the licence before you would have been able to  
 16 conclude FRAND litigation? That is the situation in  
 17 which the question about an interim licence might arise.  
 18 MR SAUNDERS: Well, my Lady, what we would say about that  
 19 is, firstly, that is not an issue that we need to ---  
 20 that I would invite the Tribunal to grapple with,  
 21 particularly as it regards --- as it potentially affects  
 22 Qualcomm's business more generally.  
 23 THE CHAIR: Well, no, it is not whether you are inviting us  
 24 to grapple with it, but whether it arises on the facts  
 25 that we found. If we find as a matter of fact there was

1 a need for a 5G licence, we might have to deal with this  
 2 question.  
 3 MR SAUNDERS: Well, I can address you on whether there was  
 4 the need for a 5G licence.  
 5 THE CHAIR: I am asking you to answer a question on the  
 6 hypothetical I am putting to you.  
 7 MR SAUNDERS: No, I appreciate that, my Lady, but part of  
 8 the reason why I am hesitant is because questions of  
 9 this hypothetical nature in these sorts of proceedings  
 10 often get taken out of context and replayed in other  
 11 jurisdictions in other cases and that is why I am ---  
 12 THE CHAIR: Could you just answer the question.  
 13 MR SAUNDERS: Well, my Lady, the evidence is that Qualcomm  
 14 acts very quickly to find ways to deal with things and  
 15 will find ways to keep people licensed while other  
 16 things are negotiated, if it is necessary to organise  
 17 this sort of scenario, but that is something that is  
 18 done by --- is a fact-specific assessment. There is no  
 19 obligation identified against us that it is  
 20 a one-size-fits-all position and it is heavily fact  
 21 dependent on the scenario at the time.  
 22 MR TURNER: That is why is it not the answer that you have  
 23 to act as a willing licensor and the counterparty acts  
 24 as a willing licensee in those negotiations or, if you  
 25 prefer to paraphrase it, they both need to both act in

1 good faith, which seems a very similar concept, and that  
 2 is not a newly invented legal device; that is just the  
 3 way you should approach these negotiations.  
 4 MR SAUNDERS: Yes, it is, and, you know, as Mr Gonell  
 5 explained in his evidence, there have been many ways in  
 6 which Qualcomm has dealt with a situation in which  
 7 a party wants to negotiate licence terms whilst facing  
 8 the expiry of a licence and we can ---  
 9 MR TURNER: You say that is how Qualcomm approaches its  
 10 negotiations.  
 11 MR SAUNDERS: Of course we do, yes. Of course we do, sir.  
 12 If you cannot reach a deal for whatever, then  
 13 ultimately, if necessary, FRAND litigation is  
 14 a potential option, but ---  
 15 MR TURNER: If we do not have the willing licensor and  
 16 willing licensee concept, the question is what should be  
 17 in its place?  
 18 MR SAUNDERS: Well ---  
 19 MR TURNER: I am suggesting to you that it has always been  
 20 clear under these ETSI contracts you have to approach  
 21 them as a willing licensor and a willing licensee. That  
 22 is how they work.  
 23 MR SAUNDERS: Yes, the reason I am slightly pausing is  
 24 because of some nuances developed in very recent case  
 25 law which ---

1 MR TURNER: That I understand.  
 2 MR SAUNDERS: I mean, in a way, I may be overthinking the  
 3 question before I say "yes", but the answer is Qualcomm  
 4 has always dealt with these situations flexibly with  
 5 people who — where we need to negotiate term and we  
 6 have done that. Mr Gonell gave evidence on that and  
 7 explained, for example, what would happen in relation to  
 8 Huawei and that is the way that Qualcomm has always done  
 9 business. There is absolutely nothing on the facts in  
 10 relation to Apple and Samsung that engages any of this,  
 11 in my submission.

12 Now, the other point which — the other thing relied  
 13 upon was the Commission Motorola decision. I will just  
 14 touch on that extremely briefly and then move on. That  
 15 is — sorry, the Commission Samsung decision. The  
 16 Samsung decision, you have to be extremely careful  
 17 about, because Samsung was before Huawei v ZTE and  
 18 Samsung sought unqualified preliminary injunctions and  
 19 injunctions against Apple and then essentially the  
 20 question in the Supreme Court was: do you apply the  
 21 Samsung approach in the commitment decision or do you  
 22 apply the German Orange Book approach with the staged  
 23 negotiation? So that is not good law, the Samsung  
 24 decision. I can give you the references for that and  
 25 will not take you through them. Actually, if you look

1 in the Supreme Court decision in Huawei v ZTE  
 2 {AB2/30/42} and the memo — the key thing is the memo,  
 3 12/1021 is the statement of objections is Samsung. So  
 4 as you trace through how that law would develop, Samsung  
 5 is not good law. It is pre—Huawei v ZTE.

6 As far as the other thing that was suggested was you  
 7 should have offered the Motorola v Google FTC settlement  
 8 and you have already heard Mr Jowell on that. So that  
 9 is not a good point.

10 So that, if it is — if I may, I will leave FRAND  
 11 there. Is that a convenient moment? I think we are  
 12 finishing at half 12 today, is that right?

13 THE CHAIR: Yes.

14 MR SAUNDERS: Not finishing, but the short adjournment.

15 THE CHAIR: Let us rise and take ten minutes.

16 (11.09 am)

(Short Break)

18 (11.20 am)

19 MR SAUNDERS: So the next topic on my list was the Apple v  
 20 Qualcomm litigation and I think this was in response to  
 21 a question from the Chair in which she asked about the  
 22 chronology of that litigation, if that would assist to  
 23 go through that briefly? I am afraid I need to be in  
 24 inner ring confidential to do that.

25 THE CHAIR: All right.

1 MR SAUNDERS: I think there may be some people at the back  
 2 of the court. They are all okay.

3 (11.21 am)

In Private [redacted]

5

In Open Court

7 (11.33 am)

8 MR SAUNDERS: (Inaudible) in large part because under the  
 9 counterfactual if they had obtained a FRAND  
 10 determination, then they would have ended up paying, we  
 11 say, if the effect of the alleged abuse is to park it  
 12 within that FRAND range, then we could have legitimately  
 13 have charged that anyway. So that is, as it were, the  
 14 intellectual circuit there.

15 So that is FRAND.

16 Leveraging is the next thing. Can I — you will  
 17 see that we dealt with a number of points, and I do not  
 18 propose to take you through the detail again of the  
 19 leveraging analysis. It is the only quantitative  
 20 evidence before the Tribunal and there is a lack of  
 21 correlation which, as Dr Padilla explained, is not  
 22 something we think you can say, well, that is in itself  
 23 a probable one, the answer to the entire case, but it is  
 24 entirely, we say, it probative as a cross—check on  
 25 whether there is abuse, and it is entirely consistent

1 with the position which my learned friend Mr Jowell was  
 2 developing yesterday to the effect that when one looks  
 3 at the negotiations, there simply is no leveraging of  
 4 chipset supply in relation to Apple and Samsung.

5 Three parts to the analyses Apple, Samsung and then  
 6 other OEMs as a whole. You will see in the skeleton  
 7 argument we make a number of points that a lot of the  
 8 criticisms are in relation to other OEMs, particularly  
 9 the position of the China ones, but when it comes to  
 10 some of the confounding factors that Mr Noble  
 11 identified, you have to look at the magnitude of those  
 12 because if they are going to shift, even in relation to  
 13 the other OEM analysis — I will not give you the  
 14 figure, but it is a very substantial amount that is  
 15 needed to make a correlation where there is no  
 16 correlation.

17 THE CHAIR: I think that was Dr Padilla's point in the  
 18 hot—tub, was not even.

19 MR SAUNDERS: Yes. We dealt with this — someone may be  
 20 able to help me with —

21 THE CHAIR: That was the point at which Dr Padilla said  
 22 Mr Noble's point just was not fair.

23 MR SAUNDERS: No, exactly, he said it was not fair and then,  
 24 actually, strikingly, Mr Noble then does not come back  
 25 on that point. Now, despite, quite understandably,

1 concern from --- expressed by Dr Padilla. We have given  
2 you the references there in the skeleton argument to  
3 that exchange and you can see it.

4 Now, so in order to push these numbers up and make  
5 something where there is nothing, we are talking about  
6 a big shift actually and you will see I have given you  
7 the references there in closing.

8 The other point just to mention on leveraging is the  
9 indirect mechanism. Now, there were two indirect  
10 mechanisms that Mr Noble relies upon and this is the  
11 reason why he says --- his primary reason that you will  
12 see from the joint statement why he says that we should  
13 not be engaging in the whole exercise of the analysis is  
14 because he says there is correlation between data points  
15 within it, but, again, that must be only --- I mean no  
16 one is saying that the Apple-specific analysis or the  
17 Samsung-specific analysis does not inter-relate with the  
18 progression of their position over time. That is  
19 a point about the other OEM scattering at best.

20 He posits two mechanisms. His first one is that  
21 non-discrimination is something that could be used to,  
22 as it were, drag up rates. So there is no evidence that  
23 that was ever raised with Apple and Samsung. Actually,  
24 the issue came up at a CMC where we said what is your  
25 case on this --- I will just give you the reference for

1 that {H/56/27}. So you will see Mr Jowell:  
2 "... we say this is a new case. If they want to  
3 bring it, it requires an amendment to the pleadings and  
4 ... case seems to allege that Qualcomm's conduct  
5 affected other OEMs, other than Apple and Samsung, but  
6 that by some alchemy this resulted in Apple and Samsung  
7 paying the alleged super-competitive royalties."

8 Then, Madam, just if we can go over the page  
9 {H/56/28}:

10 "It's not alchemy ... There's a reference to the  
11 non-discrimination."

12 Then Mr Jowell says:

13 "Non-discrimination, but if that is the case, then  
14 if that is their allegation, then they need to --- it  
15 needs to be properly --- ... it's a new claim actually  
16 because it's a new causal link.

17 "Secondly, it needs to be properly particularised.  
18 We need to know which other OEMs it is said were invoked  
19 as some sort of benchmark in the negotiations with Apple  
20 or Samsung and we need to know how it is alleged that  
21 Qualcomm invoked the non-discrimination requirement in  
22 FRAND as against Apple and Samsung by reference to that  
23 benchmark."

24 So that was, as it were, the gauntlet that was  
25 thrown down.

1 Then there was an RFI response that was then  
2 re-served following that hearing and if we can just look  
3 at that is {ORB/20/11}, paragraph 17b in the middle of  
4 the page. You will see there:

5 "is able instead to demand royalties at a  
6 supra-competitive level, including by reference to the  
7 fact that it has already extracted royalties at that  
8 level from other OEMs in the market [and then they  
9 delete] so that it would be discriminatory to apply  
10 a different rate."

11 So that was the response: to drop the plea.

12 THE CHAIR: Sorry, I am not following this. Response to  
13 request 3.

14 MR SAUNDERS: You will see the red strike-through is the  
15 deletion of the allegation that it would be  
16 discriminatory to apply a different rate.

17 THE CHAIR: All right. But it is still relying on general  
18 references to royalties but ---

19 MR SAUNDERS: It is, but not non-discrimination prong. That  
20 is the point. So, this no --- they ditch that allegation  
21 as it affects Apple and Samsung. So not only is Mr ---  
22 that is Noble mechanism 1. Not only is that, we would  
23 say, theoretical, but --- and there is no explanation of  
24 how anyone could have done this, because you do not tend  
25 to get to see your competitor's confidential agreements

1 in these negotiations, something both the licensing  
2 experts agree does not happen, but actually it is not  
3 being alleged specifically in relation to Apple and  
4 Samsung.

5 The second mechanism which Mr Noble posits is that  
6 when you do a FRAND challenge, the outside option of  
7 FRAND determination, comparator agreements are used and  
8 you are stuck because the comparators you are using are  
9 ones that suffer from the conduct which it is alleged to  
10 be abusive.

11 THE CHAIR: The tainted comparator point.

12 MR SAUNDERS: That is it exactly. That is his second  
13 mechanism.

14 Now, Dr Padilla's response to that is, well, that is  
15 a very unrealistic way of looking at this, but actually  
16 it is a little bit worse than that because in every  
17 English FRAND determination --- I am not saying that is  
18 categorical --- there has always been argument about  
19 whether agreements are good comparators or not and that  
20 is exactly why the Mewes evidence came into the Apple v  
21 Optis proceedings, but Mr Noble's position is also  
22 inconsistent with Dr Chowdhury's evidence, which the CR  
23 relied upon for certification, because Dr Chowdhury says  
24 if the licences were tainted by NLNC, they would not be  
25 good comparators and so they should be excluded from the

1 analysis and so she says go off and do a top-down  
 2 process or possibly a whittled down set of comparators.  
 3 MR RIDYARD: Is she not there saying because all the  
 4 licences are tainted ---  
 5 MR SAUNDERS: Well, she is saying when it comes to assessing  
 6 damages in this case, I would exclude these tainted  
 7 licences is what she is saying.  
 8 MR RIDYARD: Yes.  
 9 MR SAUNDERS: So, I mean, it is not inconsistent as a matter  
 10 of principle, but that is the reality. There would be  
 11 argument about this, if that was the position that was  
 12 being taken by an OEM setting a licence in the  
 13 hypothetical. They would say these are not good  
 14 comparators, they are tainted and there would be some  
 15 argument about that and the court would form a view as  
 16 to whether they could be relied upon.  
 17 THE CHAIR: So your point is that the approach suggested by  
 18 Dr Chowdhury was consistent --- the methodological  
 19 approach that she suggests is consistent with the idea  
 20 that in a FRAND determination one would strive to  
 21 exclude tainted comparators?  
 22 MR SAUNDERS: Precisely. Precisely.  
 23 MR RIDYARD: May I ask another question that goes back  
 24 a point? Anyone who is licensing a SEP knows the FRAND  
 25 regime exists so would you not expect Qualcomm, or

1 anyone else in that position, to be making sure that  
 2 their pricing structure across different licensees was  
 3 going to be defensible or was consistent? I mean,  
 4 surely they would be taking good steps to make sure ---  
 5 MR SAUNDERS: Yes, of course, that is part of running  
 6 a licensing business.  
 7 MR RIDYARD: Yes.  
 8 MR SAUNDERS: But --- you know, the --- I mean, obviously, you  
 9 have seen the data. I will not mention it in open  
 10 court.  
 11 MR RIDYARD: Yes.  
 12 MR SAUNDERS: But there are people, you know, not all paying  
 13 the same price.  
 14 MR RIDYARD: There is a fair amount of variation.  
 15 MR SAUNDERS: There is.  
 16 MR RIDYARD: I can see that.  
 17 MR SAUNDERS: But the non-discrimination element of FRAND is  
 18 not absolute and ---  
 19 MR RIDYARD: No, but surely it would be --- sorry, it would  
 20 be quite a major factor, would it not, when you are  
 21 deciding how to deal with any individual OEM. You would  
 22 be thinking even if this OEM might have different  
 23 situation from others, then I need to be careful about  
 24 giving them a royalty which is out of line with everyone  
 25 else so you would be striving for consistency, would you

1 not, when you set your licensing terms?  
 2 MR SAUNDERS: You are striving for consistency and Qualcomm  
 3 does have a published programme. I will come on to this  
 4 actually in a moment. They have licensing statements  
 5 about how they conduct licensing --- public statements  
 6 for transparency reasons, but, yes, I mean, that is part  
 7 of running a business, but, again, in the real world, if  
 8 you are conducting one of these negotiations, there are  
 9 a myriad of consultancies that will help you price your  
 10 offer and help you price otherwise and they use all the  
 11 sort of data points that Dr Chowdhury is talking about.  
 12 Some of those are things that favour the implementer  
 13 who, rather understandably, want to pay less and that is  
 14 where the arguments arise.  
 15 MR TURNER: It quite interesting InterDigital v Lenovo where  
 16 Mr Justice Mellor declined to use Samsung's licence for  
 17 InterDigital as a comparator because of Samsung's  
 18 bargaining power.  
 19 MR SAUNDERS: Yes. Well, that is --- that is one of a piece  
 20 with --- one of the other issues in InterDigital v Lenovo  
 21 was the programme rate, because the little minnows had  
 22 agreed prices but big players, like the ones we are  
 23 talking about, negotiate extremely hard, as you would  
 24 imagine.  
 25 So the other point, finally, to note on is this is

1 that Mr Noble's own evidence on this is not even saying  
 2 that that mechanism, the FRAND mechanism, is ubiquitous.  
 3 We have put the reference in the skeleton argument, but  
 4 his conclusion is based on the express assumption that  
 5 they are good comparators. The answer to it is, well,  
 6 why on earth would you assume that?  
 7 So the point, we say, falls away.  
 8 THE CHAIR: I do not understand that. Can you give me the  
 9 reference to the skeleton argument?  
 10 MR SAUNDERS: Yes, Noble 7 ---  
 11 THE CHAIR: Give me the reference to your closing  
 12 submissions on this point, because you were just  
 13 referring to it, I think.  
 14 MR SAUNDERS: Yes, hang on a second. (Pause)  
 15 It is the paragraph entitled "Indirect mechanisms:  
 16 Mr Noble's fallback argument" page 15 to 16.  
 17 THE CHAIR: I am looking at your closing submissions. It is  
 18 around 75, I think, page 75.  
 19 MR SAUNDERS: Page 75. I am grateful. It is actually  
 20 page 73, internal page 69, bundle-page 73, internal 69.  
 21 THE CHAIR: What paragraph?  
 22 MR SAUNDERS: Paragraph 217 {EAOS/5/73}. The point I was  
 23 just developing was paragraph 217.2, just at the bottom  
 24 of that page, but the key points just over the page,  
 25 page 70 internal-page numbering, page 74 {EAOS/5/74} in

1 the bundle, is that actually Mr Noble — if you look  
 2 carefully at what Mr Noble's evidence is, he makes  
 3 an assumption for this model which is not a valid  
 4 assumption. He makes an assumption on this point,  
 5 because he assumes that they are good comparators where  
 6 we would say there is absolutely no basis on which to —  
 7 THE CHAIR: I am completely lost. You are not talking about  
 8 the leveraging framework, you are talking about his  
 9 bargaining framework.  
 10 MR SAUNDERS: No, so this is in a part of — it is in the  
 11 part of his skeleton — part of the skeleton argument  
 12 addressing the bargaining framework, but the indirect  
 13 mechanisms in paragraph 217 are the two mechanisms that  
 14 Mr Noble develops in response to Dr Padilla as to why  
 15 the leveraging analysis does not work.  
 16 THE CHAIR: Right, I see.  
 17 MR SAUNDERS: So he says these two indirect mechanisms lead  
 18 to data correlation and so therefore you cannot look at  
 19 this as if each licence was an independent event. They  
 20 are clumped.  
 21 THE CHAIR: Yes.  
 22 MR SAUNDERS: The second point is in relation to the FRAND  
 23 determination point and then, just over the page, the  
 24 point I was rather badly trying to develop, was  
 25 {EAOS/5/75} if you look at his — the language in his

1 report, you will see that he actually makes the  
 2 assumption as the basis of that second mechanism that  
 3 they are good comparators and our simple point is, well,  
 4 that is just an unreal assumption. I am sorry, Madam,  
 5 do you — do you want me to turn it up — will it assist  
 6 if I turn —  
 7 THE CHAIR: Are you just telling us look at your  
 8 paragraph 217.2 and I will read it?  
 9 MR SAUNDERS: Yes, that is it. I can take you to the report  
 10 but the references are there.  
 11 THE CHAIR: The paragraph will be read.  
 12 MR RIDYARD: Just one other point before you move on to the  
 13 next topic. What should we make of the fact that  
 14 Qualcomm's internal comments were saying there was  
 15 a strong correlation between chipset share and royalty  
 16 rates?  
 17 MR SAUNDERS: Well, yes, so that material is not — I mean,  
 18 as the Tribunal observed when my learned friend was  
 19 taking you to it, it is far from clear exactly the  
 20 context of those, the push/pull and so on, but actually,  
 21 again, I will not take you back through the documents,  
 22 but you will see from those documents when you look at  
 23 them one of them is talking in particular about a  
 24 totally changing business model to be a sort of  
 25 IP—licensing model where the chip designs were licensed

1 and that is the context of push/pull. So actually we  
 2 say there is nothing. There is absolutely nothing in  
 3 those documents when properly considered. One of them  
 4 is so blue sky it is not even related to this licensing  
 5 model at all. So all that my learned friend is doing is  
 6 plucking out little sentences. It is all to do with  
 7 China compliance and the potential complete change to  
 8 the business.  
 9 So that, unless there is anything else, is  
 10 leveraging.  
 11 Can I come on to deal with the licence products?  
 12 Now, the class representative has suggested this is  
 13 a new argument. We say it is not. But at the very  
 14 latest it was certainly addressed in Mr Gonell's second  
 15 statement, as my Lady has already observed. So we have  
 16 always pleaded that Apple and Samsung were able to sell  
 17 licensed products and then, paragraph 121 of the defence  
 18 {IRA/2/76}, sets that out in relation to — so  
 19 paragraph 121 at the top of the page:  
 20 "Samsung could therefore rely on the... 1993..  
 21 Licence to supply licensed multi—mode LTE devices."  
 22 Just at the bottom of that paragraph. That is the  
 23 pleaded position and always has been.  
 24 There is also an RFI response at {ORB/7.1/49} in  
 25 similar terms.

1 THE CHAIR: That is Samsung.  
 2 MR SAUNDERS: That is Samsung.  
 3 THE CHAIR: You need to give us the references for Apple.  
 4 MR SAUNDERS: The contract manufacturers is at paragraph 132  
 5 of the defence {IRA/2/79}. So that is that.  
 6 I am sorry, it is IRA — that is the page that must  
 7 not be displayed. It defaults to the most confidential  
 8 page in the entire case.  
 9 THE CHAIR: All right. Your point is that Apple —  
 10 MR SAUNDERS: I will give you the reference {IRA/2/79},  
 11 paragraph 132.  
 12 Then just to work through, Mr Rogers' first witness  
 13 statement, paragraph 38 —  
 14 MR TURNER: Hold on, we do not have paragraph 79 up yet.  
 15 MR SAUNDERS: Oh, I am sorry. (Pause)  
 16 That is the contract manufacturers.  
 17 Mr Rogers deals with it, IRC, at paragraph 38 of his  
 18 first statement and actually this is a document that we  
 19 have not seen yet, but we should put up on the screen  
 20 because I think it helps explain the picture a little  
 21 bit. He refers there to the LTE licensing statement  
 22 {POF/171} which — again, if the system is not working,  
 23 I will just read, if I may, out what that says.  
 24 THE CHAIR: Wait a minute. You are now reading a reference  
 25 that he gives —

1 MR SAUNDERS: He gives that, yes.  
 2 THE CHAIR: — at paragraph 38.  
 3 MR SAUNDERS: That is right.  
 4 THE CHAIR: I looked at this. So one of those who gives  
 5 a string of references and one of those is to Qualcomm's  
 6 licensing statement.  
 7 MR SAUNDERS: That is it.  
 8 THE CHAIR: You have included the reference to this in your  
 9 closing submissions.  
 10 MR SAUNDERS: Precisely, December 2008.  
 11 THE CHAIR: Yes.  
 12 MR SAUNDERS: What that says — and so it is the bottom of  
 13 page 2 {POF/171/2} of that document:  
 14 "In most cases, multi-mode LTE or WiMax devices that  
 15 also implement 3G CDMA standards will be covered by  
 16 Qualcomm's existing 3G CDMA licence agreements. As  
 17 previously communicated to the industry, with respect to  
 18 multi-mode LTE/3G CDMA devices and WiMax/3G CDMA  
 19 devices, Qualcomm expects that it will not charge  
 20 a royalty rate on such multi-mode devices for use of  
 21 both Qualcomm's standards essential LTE and/or WiMax  
 22 patents and standards essential 3G CDMA patents that is  
 23 greater than [its] 3G CDMA royalty rate... "  
 24 THE CHAIR: Yes. It is an expectation.  
 25 MR SAUNDERS: Well, it is a statement — a public statement

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1 to the industry, first of all, that in most cases these  
 2 agreements cover those devices, so it is consistent with  
 3 product licensing, and it is also saying there is no  
 4 extra charge for the later standards.  
 5 Then, just to complete the evidence, that was also  
 6 discussed in his oral evidence so that {Day4/169}.  
 7 THE CHAIR: You are talking about Rogers?  
 8 MR SAUNDERS: Yes, {Day4/169/172-173}.  
 9 So the understanding, we would submit, is that the  
 10 existing licences were understood to cover multi-mode  
 11 LTE devices and there is no reason why the same would  
 12 not apply to 5G multi-mode devices and that is precisely  
 13 what Mr Gonell said in his oral evidence. We dealt with  
 14 that in paragraph 79.2 of our closing.  
 15 That seemed to be common ground with the class  
 16 representative in respect of 4G, because, as I think  
 17 my Lady observed, their further notice on  
 18 negotiations — so NLNC did not apply to Apple  
 19 before 2019 because the CM — prior to 2019 Apple was  
 20 licensed via its CMs.  
 21 Then Mr Turner, on Day 10, said:  
 22 "Whatever the black letter lawyers might end up  
 23 concluding, if we go through this contract carefully,  
 24 the fact is in practice it is understood this contract  
 25 covered more than 3G, it covered LTE and therefore, by

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1 parity of reasoning ... 5G, 6G, 7G [whatever]."  
 2 Now, that is — Mr Moser said "Indeed". The key  
 3 point is that it must be multi-mode with CDMA. So if  
 4 you sell a 6G, 7G, 8G multi-mode phone, that is not  
 5 going to be a licensed product under those agreements  
 6 because you do not have CDMA in there.  
 7 THE CHAIR: Or multi-mode UMTS?  
 8 MR SAUNDERS: Yes. If you just go back to UMTS, UMTS is  
 9 WCDMA so is a CDMA product. If it is LTE, LTE uses  
 10 OFDMA, which is a different interface, and so therefore  
 11 not a licensed product on the way that those agreements  
 12 work.  
 13 THE CHAIR: Yes. But your point is that UMTS is a type of  
 14 CDMA.  
 15 MR SAUNDERS: UMTS is a type of CDMA. There is no dispute  
 16 about that.  
 17 THE CHAIR: All right. So actually when we were looking at  
 18 the Foxconn SULA and it referenced "CDMA", you say that  
 19 covers CDMA on its own, UMTS and any multi-mode 4G.  
 20 MR SAUNDERS: Yes. If I made a 15G phone, which also did  
 21 CDMA, it is a licensed product. So then a royalty is  
 22 due and then it will sell you chips. If I can just turn  
 23 up — there is one definition in the Foxconn SULA.  
 24 Now, Mr Turner, we would submit was entirely right  
 25 to say that one has to be quite reticent about getting

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1 on the fly into questions of construction of licences,  
 2 because this is, in any event, a question of Californian  
 3 law and under Californian law extrinsic evidence is  
 4 admissible as far as the construction of the agreement  
 5 is concerned. So this is something which — just to  
 6 make that good, you can see that from some of the other  
 7 briefs that are in the bundle, for example, the Dolby  
 8 brief at {POF/924.4/26}. So the court has not had the  
 9 benefit of expert evidence on the principles or even  
 10 a discussion of the principles and we certainly do not  
 11 accept that you construe a Californian law agreement as  
 12 if it were an English law agreement.  
 13 So our primary position is you should not go there  
 14 but, in any event, actually when you look at it, I will  
 15 just draw one definition to you which you will see as  
 16 well, which is the definition of "subscriber unit". So  
 17 that is {POF/95/8-9}. So if we look at that, bottom of  
 18 page 8. I am afraid it is still down. That is the  
 19 definition of "subscriber unit". It is a "complete CDMA  
 20 telephone." That is the point and that is what triggers  
 21 the licensed product in 5.1 and the royalty.  
 22 MR TURNER: Take that a little bit more slowly.  
 23 MR SAUNDERS: You will see:  
 24 "'Subscriber Unit' means a complete CDMA telephone,  
 25 including but not limited to ... all or any part of

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1 Qualcomm's Intellectual Property... "

2 MR TURNER: Hold on, just give me a second. Just take us

3 through very slowly.

4 MR SAUNDERS: Yes, the only slight --- I am just at a slight

5 disadvantage because I do not have one myself.

6 THE CHAIR: Your point is what?

7 MR SAUNDERS: The only point I am drawing to your attention

8 on this question of construction is it is that

9 definition of "subscriber unit" which you will see the

10 operative definition in clause 5.1.

11 MR TURNER: Let us look at 5.1.

12 MR SAUNDERS: So "Subscriber Units" means a complete CDMA

13 telephone, ie one that --- you will see there that

14 "transmissions in accordance with the CIA", which is the

15 CDMA ---

16 MR TURNER: Just slow down. I am looking at 5.1.

17 MR SAUNDERS: 5.1.

18 THE CHAIR: Yes, but that is one of the definitions in 5.1

19 but one of the other definitions, and, I think, the one

20 that is relied upon by the class representative, is

21 a reference to a "licence under Qualcomm's intellectual

22 property" and "Qualcomm's intellectual property" is then

23 not defined as including --- well, "Qualcomm's

24 intellectual property" then refers to "Qualcomm's

25 technically necessary IPR".

1 MR SAUNDERS: Yes.

2 THE CHAIR: Then that takes you to a definition which ---

3 MR SAUNDERS: Is time-limited. That is point.

4 THE CHAIR: That is the point. This is the --- and this is

5 the point about whether any of the subsequent patents

6 came in under that.

7 MR SAUNDERS: Yes. So the simple position is that in order

8 for --- to buy chips and, as we have developed in the

9 pleadings and Mr Gonell has explained in response to

10 Ms Mewes' evidence which came into the case very late,

11 you do not have to be licensed to --- formally licensed

12 to all of the SEPs. You can buy chips if you are paying

13 a royalty and, as we have seen from the LTE licensing

14 statement, actually that is an unchanged royalty for

15 subsequent standards for LTE. The phones have to be

16 licensed products, ie are they a product which falls

17 within the scope of that definition? They are that if

18 they are multi-mode and include CDMA and --- so the

19 upshot and, as, Madam, you summarised it yesterday, is

20 that the sea of licences and also Samsung's licences

21 cover multi-mode devices, 4G and 5G, but they do not

22 include formal licences to all 4G and 5G SEPs, because

23 of the way that the capture dates work. That is because

24 there is a distinction between a product licence and

25 a licence to the patent.

1 So that is the position in relation to that.

2 Obviously I have already addressed you on Mr Gonell's

3 evidence where I asked Mr Gonell about those and we do

4 not demur from his answers as well. You have those

5 references in our submissions.

6 MR TURNER: Sorry, why does the definition of "'Subscriber

7 Unit' means a complete CDMA telephone"...

8 MR SAUNDERS: Yes, so a telephone which works in accordance

9 with the common air interface which is, in turn,

10 a CDMA --- the various bits and definitions of CDMA.

11 MR TURNER: So the definitions of CDMA are?

12 MR SAUNDERS: It is a phone that does that and if it happens

13 to do something else, it is still a licensed products.

14 MR TURNER: That is a submission rather than pointing to a

15 phrase in the agreement?

16 MR SAUNDERS: No, that is the way the agreement works, in my

17 submission, but, again, as I say, these questions of

18 construction are --- we urge you not to ---

19 MR TURNER: But nothing in this agreement expressly deals

20 with the position for a multi-mode phone?

21 MR SAUNDERS: No, because it is the CDMA --- but what it does

22 do is cloak --- it does two things. It says by

23 definition they are licensed products, insofar as they

24 include CDMA, because it is not limited to --- it is not

25 a CDMA terminal that does CDMA and nothing else, as you

1 would imagine. Then, secondly, insofar as they happen

2 to do --- insofar as they do that, a royalty is due.

3 THE CHAIR: But the problem we have is that all of these

4 submissions on construction have come very late in the

5 day. They have come for the first time really in

6 closing submissions. As you say, we do not have any

7 expert evidence on Californian law. It has not really

8 been explored properly with the witnesses, not least

9 because, due to the way in which the class

10 representative's case was advanced, they were not taking

11 a point on construction as it related to 4G.

12 MR SAUNDERS: Yes.

13 THE CHAIR: So we now have a position where each of you are

14 making submissions to us on the construction of this,

15 but you are saying, and I can take your point, well, do

16 not go there because you cannot really go there.

17 MR SAUNDERS: Yes, I say you should not go there, but

18 actually you have heard evidence from Mr Gonell and we

19 do not back away from that and also you have his witness

20 statement which deals with the point as well.

21 THE CHAIR: But ultimately are you saying to us the question

22 may not really turn on the specific construction anyway

23 because what we have to look at is not what the position

24 was as a matter of legal technicality, but the way that

25 it was understood by the parties, as to which we have

1 Mr Gonell's evidence and we have Mr Rogers' evidence.  
 2 MR SAUNDERS: Yes.  
 3 THE CHAIR: We do not have, you say, evidence to the  
 4 contrary.  
 5 MR SAUNDERS: Precisely.  
 6 THE CHAIR: All right.  
 7 MR SAUNDERS: That, I submit, is the end of this point, or  
 8 should be.  
 9 The next point I had in my list was silencing, if  
 10 I could turn to that. Now, first of all, can we just  
 11 look at the pleading on silencing. This is {IRA/1/17}.  
 12 This is the claim form. You will see the heading  
 13 "Qualcomm's additional measures to sustain and reinforce  
 14 its NLNC and RTL policies". Then, as my learned friend  
 15 Ms McAndrew took you, those are there set out in respect  
 16 of each of Apple and Samsung.  
 17 Then if we can just look at the abuse plea, which is  
 18 paragraph ---  
 19 THE CHAIR: Which paragraph?  
 20 MR SAUNDERS: I am just looking at paragraph 39(a) at the  
 21 bottom of that page and over the page {IRA/1/18}.  
 22 Then the abuse plea is at paragraph 67 on  
 23 {IRA/1/34}. You will see there:  
 24 "In implementing the NLNC and RTL Policies ..."  
 25 Then the amendment:

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1 "... and Qualcomm's additional measures to buttress  
 2 and sustain those policies (described at paragraph 39A  
 3 above)."  
 4 There is the allegation of abuse. So this is, as it  
 5 were, a buttress to a buttress, something which no doubt  
 6 would have interested Mr Noble who told us he was a big  
 7 fan of medieval architecture, or perhaps a freestanding  
 8 buttress, but it is not a freestanding allegation of  
 9 abuse.  
 10 Now, the CR took you to Unwired Planet. There was  
 11 a discussion with Mr Turner about that. In my  
 12 submission, that is precisely right because the way  
 13 that, sir, you identified that, the ---  
 14 MR TURNER: I am trying to remember what the point was.  
 15 MR SAUNDERS: The point, sir, I can turn it up again. It is  
 16 paragraph 735 of Unwired Planet at first instance  
 17 {AB2/22/163}. For my Lady, it is pdf, volume 2,  
 18 page 1604. So it is paragraph 735. Then I should say  
 19 that Ms McAndrew said paragraph 735 is clear, you cannot  
 20 prevent recourse to FRAND on an ongoing basis. You can  
 21 settle an extant dispute, but a settlement agreement  
 22 which includes forward looking restrictions is not  
 23 permissible, but, as, sir, you rightly said, it is  
 24 actually a different point in that case, which is that  
 25 you are not an unwilling licensee just because you, in

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1 parallel to negotiating a licence, start FRAND  
 2 negotiations. That is all he is saying.  
 3 Now, no challenge clauses generally, not that I am  
 4 averse to there being more work for competition lawyers,  
 5 what you cannot get into is a Zeno's paradox of  
 6 never-ending FRAND challenges and actually the industry  
 7 experts have given evidence, agreed evidence, about the  
 8 role of non-challenge clauses in settlement agreements.  
 9 If we could just turn that up at {POE/29/19}. Then it  
 10 is just at the bottom:  
 11 "Although most licences are entered into through  
 12 arm's-length negotiations, FRAND licence terms are often  
 13 heavily disputed matters, and it is not unusual for  
 14 parties to enter into a licence agreement only after  
 15 some amount of litigation. It is therefore a frequent  
 16 concern that one of the parties could turn back after  
 17 securing a negotiated licence, reflecting compromises  
 18 made by both parties, and continue to seek better terms  
 19 for itself ... "  
 20 So this is the trouble. If you have a negotiated  
 21 settlement, after protracted negotiation and/or global  
 22 litigation or whatever, if you --- if it were that by  
 23 principle you could then re-open the negotiation the day  
 24 after the negotiation, then, in effect, you are  
 25 ratcheting down the rate or at least you are trying to

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1 increase the risk of a ratcheting down rate and the mere  
 2 fact of doing that, if you are a big licensee, is a way  
 3 of putting pressures on the SEP owner to agree  
 4 a non-FRAND rate.  
 5 So that is why, in the real world, there are no  
 6 challenge clauses or there is a finality to the  
 7 commercial terms that have been agreed for a period of  
 8 time as a result of those negotiations. There is  
 9 nothing anti-competitive about that, in my submission.  
 10 It just reflects the fact that parties have reached  
 11 a commercial compromise and they do not want to be in  
 12 endless litigation.  
 13 Now, the mere fact that there are no challenge to  
 14 the FRAND rate clauses in a settlement, we submit, is  
 15 perfectly proper, because otherwise you get into this  
 16 endless ratcheting and endless dispute which cannot be  
 17 right as a matter of principle, but my learned friends  
 18 relied upon the Motorola decision in relation to this,  
 19 but the Motorola decision arises in a rather different  
 20 context to the settlement agreement in relation to  
 21 Apple.  
 22 In Motorola the settlement agreement did not  
 23 determine a FRAND royalty rate, but provided that  
 24 royalties would be set by Motorola and then a court  
 25 would examine and determine whether they were FRAND.

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1 Motorola, I should just say, that decision is the sister  
2 decision of the Samsung commitment decision, so before  
3 Huawei v ZTE.

4 Motorola also said that the specification of the  
5 FRAND rate could not depend on the validity of the SEPs  
6 because that would be inconsistent with the conclusion  
7 of the settlement agreement and then Apple said, well,  
8 we still have to be to challenge the invalidity of your  
9 SEPs and so if you are going to say we cannot do that,  
10 that is void and the Commission found that that was  
11 potentially not something that could be included, a no  
12 challenge to validity clause, in a settlement agreement,  
13 but it is easy to see why that could be the case because  
14 there is a public interest in committing people to  
15 challenge monopolies and it is, we would say,  
16 1,000 miles apart from the scenario that led to the  
17 settlement between — from the worldwide litigation  
18 between Apple and Qualcomm.

19 So, now, the CR accepts that you can settle an  
20 extant dispute and that is what occurred in relation, we  
21 say, to Apple and Samsung. It is only, they say, that  
22 you have to do a subsequent revisit of FRAND rates,  
23 but, again, you have my submission that that is not —  
24 you certainly do not get that from Motorola. If that  
25 were a requirement, then there would be

1 a never—ending — a never—ending ratcheting of rates.  
2 You get into precisely the sort of Charlie Brown  
3 situation which Mr Rogers described.

4 Now, we have addressed in our closings the  
5 position — so Mr Jowell has already addressed the BCPA  
6 and it is also addressed at paragraph 240 of our written  
7 closing. The Samsung settlement agreement is addressed  
8 at paragraph 241 of our closing and, again, you can read  
9 that at your leisure.

10 As far as impairing Which?'s ability to obtain  
11 information needed to prove its claims, now, there is an  
12 interesting — the claimant is, in my submission,  
13 walking a rather narrow tightrope on this because what  
14 they have not done is reveal what conversations they  
15 have had or the basis on which any of these people have  
16 said that they will not give evidence. It is perfectly  
17 possible, for example, that they were not assisted by  
18 being provided witnesses because — for a whole myriad  
19 of reasons, other than anything to do with the  
20 relationship with Qualcomm, for example, which has sued  
21 Apple in this very Tribunal in relation to Cloud Storage  
22 for a claim worth several billion pounds.

23 So one can see how, faced with such class action, it  
24 may be that someone may not be entirely keen on helping.  
25 Who knows, because we have simply had no explanation of

1 what the position is and they have not waived privilege  
2 in any of those communications. In any event,  
3 Mr Blevins no longer works for Apple, but, aside from  
4 all of that, they have not put forward any of these  
5 witnesses in a way that — to enable us to test their  
6 evidence.

7 As far as the actual clauses in the agreements  
8 themselves are concerned, the relevant clauses are  
9 paragraph 3.9 in the Samsung agreement and the Samsung  
10 agreement, we say, does not prevent — they all have  
11 carve-outs:

12 "Shall not prevent Samsung was responding to a  
13 lawful process issued by any third party."

14 There we are. That was a possibility.

15 As far as Apple is concerned, clause 4.7.3, so that  
16 is {POF/905/12}. That is a confidential document so  
17 I will not read out every aspect of it, but Apple —  
18 nothing in the agreement is to prevent any actions to  
19 comply with or respond to a lawful request of an  
20 administrative or other governmental body or subpoenas,  
21 discovery requests, testimony or otherwise. So we say  
22 those clauses actually did not properly construe or  
23 prevent Apple and Samsung assisting. If it is being  
24 said against us that they did, that is not correct.

25 It is obviously for the CR to make its case as it

1 sees fit.

2 So I think, unless — that is the end of my list.

3 Is there anything else on which I can assist you before  
4 I hand over to Mr Bailey?

5 THE CHAIR: No, thank you very much, Mr Saunders.

6 So we can then start Mr Bailey's submissions now and  
7 I think you have until 2.30, is that right — hang on.  
8 3.30.

9 MR BAILEY: Yes, Madam.

10 THE CHAIR: All right.

11 Closing submissions by MR BAILEY

12 MR BAILEY: May it please the Tribunal. I am going to  
13 structure my submissions under three heads. First,  
14 market definition. Secondly, market shares and bidding  
15 markets. Thirdly, the issues of dominance and the  
16 distinct concept of dependency during the negotiations  
17 that are said to be relevant for these damages claims.

18 Turning to market definition. I would like to  
19 address four points, please. The first is the President  
20 asked a question on Friday {Day10/48} whether there was  
21 any authority as to when customer—specific markets  
22 should be defined. I have liaised with my learned  
23 friend about this and both of us would commend the  
24 Commission's 2024 Market Definition Notice on this  
25 point. I understand my learned friend may also take the

1 Tribunal to certain parts of the recent judgment in Kent  
2 because he raised that with me this morning. I will  
3 sort of let him address you on that point and I would  
4 like to take you to the notice, if I may.

5 There are just two passages which, in my submission,  
6 are relevant and informative. So the notice is on Opus  
7 at {AB1/6/14} and I do hope, Madam, that in your pdf  
8 this will be in authorities bundle 1 at page 222.

9 THE CHAIR: Yes.

10 MR BAILEY: The first passage I would like to draw the  
11 Tribunal's attention to is paragraph 35. It is in the  
12 part of the notice dealing with supply substitution, but  
13 the reason for drawing your attention to it is because  
14 it starts by recognising that when — beginning at the  
15 first line — customers purchase bespoke products, and  
16 it gives some examples, where customers issue calls for  
17 tenders, construction projects or trains or gas  
18 turbines, in such cases there may be no or limited  
19 demand substitution between bespoke products for  
20 different customers. From the perspective of demand  
21 substitution, each such bespoke product could then  
22 constitute its own relevant markets.

23 Now, pausing there. We do rely upon that because  
24 one of the points that is identified by Dr Padilla is  
25 that Apple and Samsung had distinctive chipset

1 requirements, and I took you to some of the evidence on  
2 the bespoke nature of chipsets in opening. For your  
3 note, that is {Day3/7–8} which is at {POS/10/3}.  
4 I acknowledge, of course, that what the Commission goes  
5 on to do here is to say that where there is evidence of  
6 supply-side substitution, that may be an answer to the  
7 customer-specific market and mean that actually you have  
8 a customer-agnostic market, and my fourth point is going  
9 to be supply-side substitution. So I promise to come  
10 back to that point because I know that the class  
11 representative and its economic expert relies upon it.

12 The second part of the notice that deals with  
13 customer-specific markets is to be found on page 28 in  
14 Opus or page 236, my Lady, of your pdf and it is  
15 paragraphs 88 to 89 {AB1/6/28}. This is where the  
16 Commission recognised that where there is price  
17 discrimination between customers or customer groups,  
18 such that conditions of competition are different  
19 between those customers or customer groups, that may  
20 warrant the definition of a separate relevant market.

21 So we sort of say that there are — Mr Ridyard asked  
22 on Friday what are the circumstances in which you could  
23 have a customer-specific market. We say that there are  
24 sort of two pointers that are worth considering in this  
25 regard. The first is whether the products themselves

1 are bespoke from a demand perspective and the second is  
2 whether there is evidence of price discrimination.

3 That takes me on to my second of four points, which  
4 is dealing with the question of price discrimination.  
5 Now, as the Tribunal knows, we address this in  
6 paragraph 310 of our written closings. That is at  
7 {EAOS/5/104}. But in oral closing the class  
8 representative said that there had been no analysis done  
9 of pricing. That was at {Day10/51} {POS/20/14}. I am  
10 conscious that the Tribunal has not been taken to the  
11 data that relates to the different prices paid by OEMs,  
12 including Apple and Samsung, and so, before lunch, if  
13 may, I just want to show the Tribunal that data. That  
14 is to be found at {ORI/257/1} and it is an Excel  
15 spreadsheet so we need to open that up, please.

16 THE CHAIR: Just to remind you, we are in open session.

17 MR BAILEY: Yes, Madam. When I go to this, I am going to  
18 point you to look at some —

19 THE CHAIR: Cells.

20 MR BAILEY: Not cells, Madam. We are going to go the tab  
21 marked, "Qualcomm chipset prices by OEM", which is the  
22 fourth tab that I want to show you.

23 THE CHAIR: I see.

24 MR BAILEY: What this shows is a range of average prices  
25 paid by all OEMs for Qualcomm's top selling baseband

1 chipsets between the years 2006 and 2023. What you can  
2 see in the grey bars are the range of prices that are  
3 paid by all of the customers and you can see that the  
4 length of the grey bars, it is fair to say, varies over  
5 time and in some years you can see, for example,  
6 2020/2021, you can see the length of the grey bar there  
7 and then in other years, of course, it is different. So  
8 I accept that there is a variation over time, but you  
9 can also see the sort of diversity of prices that are  
10 paid.

11 Now, could you just scroll down slightly, please, to  
12 show the Tribunal. You can see the blue dot and who  
13 that is. You can see the red dot and who that is. If  
14 one then looks at the blue and red dots, they are  
15 plotting the particular modems that were bought by those  
16 two entities and you will note that they are never the  
17 same. Indeed, moreover, at times there was considerable  
18 difference between them. For example, in 2014, and  
19 again in 2020, and again in 2021.

20 Whenever they both buy the same baseband chipset,  
21 one of them always pays less than the other. That is  
22 the blue dot pays less than the red dot.

23 Then, lastly, the other thing that is quite telling,  
24 particularly in the early years, if you look at 2006  
25 to 2011 of course, it is actually relatively rare that

1 the blue and red dots are buying and same chipset in the  
2 same year. We say that that chimes with the point that  
3 Dr Padilla made about the distinctive chipset needs.

4 So those are the points that I would invite the  
5 Tribunal to take from this data.

6 Now, Dr Padilla in the hot-tub said: well, you can  
7 identify the customers, you can see that they pay  
8 different prices. He said there is no arbitrage and,  
9 therefore, this is price discrimination. That is at  
10 {Day7/24} {POS/14/7}. In response to that, to be fair,  
11 the class representative's economist said: well, the  
12 data you are looking at here --- and this is true --- it  
13 relates to headline prices and it has not factored in  
14 rebates, for example.

15 The response we would make to that is that it is  
16 true, no one has looked at that data, looking with the  
17 rebates taken into account, but we know that the rebates  
18 that were negotiated and agreed by Apple and Samsung  
19 were negotiated individually. They were  
20 customer-specific. If you look at the MIA, 2007,  
21 {POF/114} or the strategic incentive agreement with  
22 Samsung, 2009 {POF/211}. We say, given we know that the  
23 rebates were individually negotiated and given we know  
24 that the headline prices are materially different, we  
25 say that justifies finding that the conditions of

1 competition are different as between Apple and Samsung.

2 I might just address my third point, if I may.  
3 I have about a minute before the lunch and then I will  
4 pause.

5 My third point concerns demand-side substitution  
6 across chipsets that are compatible with different  
7 generations of standards. We address that in  
8 paragraph 312 of our written closings. That is at  
9 {EAOS/5/104}. The class representative addressed this  
10 on Friday at {Day10/52} {POS/20/14} and essentially  
11 sought to doubt the relevance of the fact that Apple and  
12 Samsung sold handsets compatible with different  
13 generations at different times.

14 Now, in my respectful submission, that really misses  
15 the point. The point was accurately captured by  
16 Dr Padilla in the hot-tub. We might just want to  
17 briefly look at that at {Day7/66} which is at  
18 {POS/14/18}. The Tribunal will no doubt recall that  
19 what happened during the hot-tub was that Dr Padilla  
20 explained that Apple and Samsung had a certain  
21 discretion in the purchase of the chipsets and that  
22 Samsung could vary the product mix and that Apple could  
23 vary the time and speed or slowness that it moved from  
24 one generation to the next.

25 Just for your note, members of the Tribunal,

1 Mr Katouzian made a similar point about that {Day6/141}  
2 which is at {POS/13/37}.

3 We say that Dr Padilla's observation about the  
4 varying at the margin of chips for different generations  
5 is also borne out by a real world example that if you  
6 look at Apple in 2011, it was buying 3G UMTS chips from  
7 Infineon and then, in early 2011, it was buying 3G CDMA  
8 chips from Qualcomm for its iPhone 4 and it was  
9 competing head-on with Samsung's first LTE Galaxy S2.  
10 So you can see the handsets were competing, even though  
11 Apple had gone all in on the 3G and Samsung was  
12 a year --- was ahead and had gone with LTE. That point  
13 is captured by Dr Padilla at paragraph 196, which is at  
14 {E/22/65}.

15 We also see, and this will be my final point on  
16 this, that if you look at what Apple was telling  
17 Qualcomm at the time, one can see that Apple was  
18 considering the mix between different types of chipsets  
19 at different periods. So this is now in 2018. Can  
20 I just show the Tribunal {POF/836}. My learned friend,  
21 Mr Jowell, showed you this yesterday, but I would like  
22 to draw your attention to a different point. We are  
23 now, just to orientate ourselves, in 2018 and this is  
24 Mr Koliander. He is the vice-president of sales for QCT  
25 at the time. Essentially the point that is relevant is

1 at the penultimate paragraph of the email, the bottom of  
2 page 1.

3 You see a reference to "Aaron" and Aaron is  
4 Mr Schafer. Mr Schafer is the senior director in  
5 Wireless Procurement at Apple. He confirmed --- well,  
6 could I just ask you to read that paragraph because  
7 I believe it may be confidential. On the first page,  
8 the one that says, "Aaron confirmed ..." and "Mav" is  
9 obviously a reference to Apple. (Pause)

10 THE CHAIR: Yes.

11 MR BAILEY: So you will recall that of course great emphasis  
12 is put on Ms Mewes saying they are over a barrel and  
13 they had to have 5G, but you can see here that actually  
14 what they were doing is they were carefully looking at  
15 the flexibility that they had, the discretion that they  
16 had to work out which generation of chip that they would  
17 seek to substitute.

18 So we say that when, in particular, there is  
19 a transition from one generation to the next --- I think  
20 Mr Noble also recognises this --- where there is that  
21 transition period, there is a period in which chips for  
22 different generations were competing on the demand side.  
23 One sees that particularly for Apple and Samsung.

24 Madam, I see the time so I should stop there.

25 THE CHAIR: Yes. Good. Thank you very much. So we will

1 return at 2.30.  
 2 MR BAILEY: Madam, do you mean 1.30?  
 3 THE CHAIR: I mean 1.30. Thank you.  
 4 (12.34 pm)  
 5 (The luncheon adjournment)  
 6 (1.33 pm)  
 7 THE CHAIR: Yes, Mr Bailey.  
 8 MR BAILEY: I am grateful, my Lady.  
 9 The fourth point on market definition concerns  
 10 supply—side substitution. Now the class representative,  
 11 echoing Mr Noble, says that that is a complete answer to  
 12 customer—specific markets and, as you heard on Friday,  
 13 that is because they refer to supply substitution within  
 14 a given standard.  
 15 Now, that is also common ground between the economic  
 16 experts. Our response to that is that if the Tribunal  
 17 is with us that on the demand side, there is  
 18 substitution between chipsets for different generations,  
 19 then supply—side substitution is no answer. So  
 20 I accept, if the Tribunal concludes that there is no  
 21 demand—side substitution across generations, then  
 22 I accept supply—side substitution is an answer, but, of  
 23 course, my case, as also supported by Dr Padilla, is  
 24 that on the demand side there is substitution between  
 25 chipsets for different generations and therefore

1 supply—side substitution is no answer to that.  
 2 So really it comes down — we set this out in  
 3 paragraph 314 —  
 4 MR RIDYARD: Mr Bailey, there has to be enough substitution.  
 5 I am sure you know that.  
 6 MR BAILEY: Mr Ridyard, you are absolutely right, as always,  
 7 and — well, I hope, anyway, but, yes, it is a question  
 8 of sufficiency and so we would say that there has to be  
 9 evidence of a sufficient supply—side substitution but  
 10 I think, on that, the economic experts were agreed that  
 11 because capacity is unconstrained and these are fabless  
 12 businesses, therefore there would be such within the  
 13 standard so really it just comes down to whether the  
 14 Tribunal finds demand—side substitution across  
 15 generations.  
 16 I am going to turn to the second head of my  
 17 submissions and that is market shares, their  
 18 significance, and also the related topic of bidding  
 19 markets. Now, at one point in oral closing on Friday,  
 20 the class representative said one could cut short the  
 21 discussion purely on the basis of market share figures.  
 22 That is at {Day10/59}. That is {POS/20/16}. Now, we do  
 23 not advocate shortcuts and we do not say that you should  
 24 shortcut by reference to market shares. We respectfully  
 25 agree with the approach that this Tribunal adopted in

1 the Socrates case. I would just like to show you how it  
 2 approached market shares. That is at {AB2/21/37}.  
 3 My Lady, in your pdf I hope it is authorities bundle 2  
 4 at page 1420.  
 5 What we can see, picking it up at paragraph 119, you  
 6 have the well—known and classic definition of  
 7 "dominance" laid down by the European Court, which we  
 8 are familiar with. Then in paragraph 120, and the  
 9 reason why I commend this to you is because in that case  
 10 the expert for the claimant, Socrates, Mr Williams, had  
 11 defined a relevant upstream market in which the  
 12 Law Society had 100% market share. That was the share  
 13 of the market for accreditation for training in relation  
 14 to residential conveyancing. What the Tribunal goes on  
 15 to say is that you cannot simply jump from 100% market  
 16 share to assuming that that means market power. You can  
 17 pick that up halfway down, where it says:  
 18 "We do not think it is appropriate to regard the  
 19 Law Society as dominant either ... from the moment that  
 20 the [Credit Qualification Scheme] was launched, or when  
 21 a single, small lender made that ... accreditation  
 22 a requirement."  
 23 Then this is the key principally we rely on:  
 24 "The fact that an undertaking may hold 100% of  
 25 a particular a market is obviously relevant [and

1 I absolutely accept that but I also urge that it ]...  
 2 does not automatically mean that it has significant  
 3 market power."  
 4 Then the Tribunal goes on to cite Hoffmann—La Roche,  
 5 which is also worth reading because you see there the  
 6 European Court say that:  
 7 "A substantial market share as evidence of the  
 8 existence of a dominant position is not a constant  
 9 factor and its importance varies from market to market  
 10 according to the structure of these markets ...  
 11 production, supply and demand... "  
 12 So we say that market shares, yes, are relevant, as  
 13 a useful first indication, but they do not automatically  
 14 mean substantial market power.  
 15 You will have seen we have set out various reasons  
 16 for that in paragraphs 328 to 331 of our written  
 17 closings, which are {EAOS/5/108}.  
 18 Now, leaving aside fact that the market share  
 19 figures relied upon by the class representative do not  
 20 include self—supply, other than of course for 5G, we do  
 21 say that an important aspect of chipset markets is the  
 22 bidding market dynamic.  
 23 Now, in oral closing {Day10/55} it was suggested  
 24 that there is insufficient evidence on this issue. You  
 25 were taken to the Tribunal's decision in Churchill gowns

1 for that. So we respectfully disagree with that and  
 2 would suggest that there is a body of witness,  
 3 documentary and expert evidence on bidding markets.  
 4 I would just like to briefly, if I may, identify those  
 5 for you.  
 6 So, first of all, there is Mr Katouzian's first  
 7 witness statement. That is, just for your reference, at  
 8 {IRC/3/1}. He provides an overview of competition for  
 9 the Samsung socket in paragraphs 34 and 35 at page 8  
 10 {IRC/3/8} and of Apple's product cycles and product  
 11 requirements at paragraphs 61 to 64 at page 14  
 12 {IRC/3/14}. What he explains in those paragraphs is  
 13 that, as one would expect — they are confidential so  
 14 I need to be slightly careful — there are differences  
 15 for how Samsung approach matters and Apple approach  
 16 matters. I am going to address you on that when we get  
 17 to the documents, but nonetheless what is clear is that  
 18 use and evaluation of competing bids is carried out, as  
 19 one would expect, by the sophisticated powerful  
 20 customers.  
 21 Now, when it came to the economic expert evidence,  
 22 I accept that there was a difference of view, so  
 23 Dr Padilla was unequivocal that this is a type of  
 24 bidding market. That is {Day9/26}. Mr Noble, on the  
 25 other hand, he was more guarded, saying that he would

1 not classify it as a so-called "classic bidding market".  
 2 THE CHAIR: But if that was Dr Padilla's view, why that was  
 3 not developed in his evidence on market definition and  
 4 dominance? Because I would have expected to see it  
 5 there. It was raised by the Tribunal as a question as  
 6 to whether this was an appropriate lens through which to  
 7 look at the market power question, but Dr Padilla jumped  
 8 on the bandwagon, but why — and if that was what he  
 9 thought, then it should have been developed earlier  
 10 really, should it not?  
 11 MR BAILEY: Yes, Madam, that is a fair observation.  
 12 I obviously cannot speak for Dr Padilla. He sets out  
 13 his analysis in his fourth report. He does say, and  
 14 I will need to find the paragraphs in his fourth report,  
 15 that Apple in particular made use of competitive  
 16 tenders. You will see, if you look, for example, at  
 17 paragraph 155, which is at {E/22/53}, it seemed to be  
 18 common ground between Mr Noble and Dr Padilla that these  
 19 were — there were references in the evidence to  
 20 bargaining markets, ones in which they were bilateral  
 21 negotiations and sort of you are familiar with the  
 22 influence of outside options, but I accept that the  
 23 point was not developed by the economists.  
 24 What I would say, however, is that ultimately,  
 25 whether the chipset markets display characteristics as

1 bidding markets comes down to a question of fact. You  
 2 have Mr Katouzian's evidence, and I am going to now take  
 3 you to some of the documentary evidence and that does  
 4 sustain scrutiny when it comes to how competition played  
 5 out.  
 6 Just before I come to the documents, it has been  
 7 said, as the Tribunal will have seen, in their written  
 8 closings, at paragraphs 93 to 94, that the CMA's  
 9 guideline on assessment of market power has not been  
 10 satisfied. That is paragraph 4.4 of the CMA guideline  
 11 at {AB1/3/14}. Our response to that is when one reads  
 12 the paragraph, the CMA is not there laying down minimum  
 13 or mandatory criteria. Madam, in your pdf it is at AB1,  
 14 page 51. What you can see from the paragraph that is  
 15 relied upon, and this is us just to orientate ourselves  
 16 in the part of the guideline dealing with market shares  
 17 and where they may not have significance as a proxy for  
 18 market power, you can see that the opening sentence  
 19 talks about auctions and tenders and then the second  
 20 sentence acknowledges few suppliers, but competition  
 21 might be intense.  
 22 Then all the CMA does is just say it is more likely  
 23 to be the case where, and then it identifies large  
 24 infrequent tenders, suppliers not subject to capacity  
 25 constraints and suppliers that are not differentiated.

1 I fully accept that that is more likely to be the case,  
 2 but I think it is also well-established that you can  
 3 have a sort of spectrum where one end of the spectrum  
 4 you have a pure bidding market that plays out according  
 5 to the tender sort of type criteria, but you may also  
 6 have markets which exhibit one or more of those  
 7 characteristics and, in my submission, you do have  
 8 evidence that in this case there were large infrequent  
 9 tenders and the experts were agreed that chipset  
 10 suppliers are not subject to capacity constraints.  
 11 So we do say that this should not be applied in some  
 12 way mechanically, laying down mandatory criteria.  
 13 Indeed the CMA itself says it would not apply its own  
 14 guideline in that way. For your note that is at  
 15 paragraph 1.2 at page 4 {AB1/3/4} of Opus or page 14 of  
 16 the pdf.  
 17 MR RIDYARD: Mr Bailey, would you agree that — I mean  
 18 I know there is multiple criteria and you are right  
 19 there is not a simple one-zero answer to this question,  
 20 but the one that is highlighted in the CR's closings is  
 21 this notion of different suppliers being equally well  
 22 placed or at least able to displace one another in the  
 23 contract. Would you agree that that is a critical  
 24 criterion?  
 25 MR BAILEY: I would not say it was a critical criterion.

1 I would accept that it is a relevant factor for the  
2 Tribunal to consider and when I come on in my  
3 submissions to deal dominance and distinct concept of  
4 dependency, I will seek to show the Tribunal the various  
5 alternatives that were available both to Apple and to  
6 Samsung at the relevant times.

7 MR RIDYARD: Just to follow that. If you are looking at  
8 a particular slot in a particular phone, is it not  
9 reasonable to say that for it to be a bidding market  
10 there have to be two people who could fill that slot so  
11 in that sense they are equally capable of filling the  
12 slot?

13 MR BAILEY: Yes. A different way of putting the same point,  
14 I hope, is that in order for it to be a bidding market,  
15 there needs to be at least two or more credible  
16 alternatives in the eyes of a customer, because if  
17 actually they only have an outside option that is not  
18 credible or plausible, then I would accept that does not  
19 create the right dynamic, but we would say that, for  
20 example, in relation to Apple, Intel was viewed as  
21 a credible alternative and indeed actually won RFPs at  
22 various points in time. I mean, that takes me to sort  
23 of the factual evidence.

24 THE CHAIR: When you say if there are not two credible  
25 alternatives, it does not create the correct dynamic,

1 what do you mean by creating the correct dynamic? What  
2 dynamic are you talking about that is informative for  
3 our assessment here?

4 MR BAILEY: Yes, well, so the dynamic is identified —  
5 I took you in opening to the Independent Media judgment  
6 and the dynamic really is that you award a limited  
7 number of high value contracts and specifically what  
8 that means is, even if you have won a series of recent  
9 tenders, it does not mean that your competitor will be  
10 unsuccessful next time round. The Tribunal identified  
11 that in Independent Media. In closing, the class  
12 representative cites, Madam, one of your cases,  
13 General Electric, and that is at {AB3/8/54}.

14 THE CHAIR: That is going back a long way.

15 MR BAILEY: Pardon, Madam.

16 THE CHAIR: I said that is going back a long way.

17 MR BAILEY: It is a long way, but it is one of your greatest  
18 hits, Madam. One of the relevant paragraphs that is  
19 omitted from the class representative's closings at  
20 paragraph 74 is actually the very first one where the  
21 court, at paragraph 149, and I would invite the Tribunal  
22 to read that paragraph, because in my submission that is  
23 not cited by the class representative. It ought to have  
24 been and it is squarely consistent with what the  
25 Tribunal cited in Independent Media and it makes the

1 dynamic point that I have just made about the fact that  
2 the number of recent wins does not necessarily mean that  
3 one of the credible competitors will be unsuccessful  
4 next time round.

5 Madam, in your pdf, that its AB3, at page 490.

6 Turning then, as I — turning then to the  
7 documentary record. One thing in our submission comes  
8 through very clearly is that Apple did periodically  
9 issue RFPs, request for proposals. We have cited some  
10 at paragraphs 349 and 351 of our written closing and the  
11 Tribunal will recall the 2012 presentation that my  
12 learned friend Mr Jowell took you to at {POF/312/7}  
13 which underscored the commercial value of chipset  
14 contracts awarded by Apple. Even the class  
15 representative acknowledges that Apple is a possible  
16 exception for this bidding markets point. That is at  
17 paragraph 93 of its closings.

18 [Redacted]. Can I just show you a second document  
19 that makes the same point at a different time. This is  
20 at {POF/653/3}. So this is in 2016 and it is  
21 confidential but could I ask the Tribunal to read the  
22 paragraph that begins:

23 "The main purpose ..."  
24 (Pause)

25 So we say that that paragraph shows you the approach

1 that was being adopted. It was not just simply socket  
2 to socket. There was actually a sort of different  
3 approach where one is looking at the award of multiple  
4 contracts. One can see — I will not turn it up — the  
5 same point later on {POF/767/3}. As to the value of the  
6 Samsung sockets, we rely in that regard on  
7 Mr Katouzian's oral evidence {Day6/190:16–18}. So it is  
8 {POS/13/49}. So we just say that this is part of the  
9 economic context of chipset markets and so we say that  
10 when you are evaluating whether or not Qualcomm held  
11 a dominant position at any moment in time, and similarly  
12 when you are evaluating whether Apple and/or Samsung  
13 were dependent in any way, we say that one should take  
14 that context into account, specifically by reference to  
15 the factual evidence that I have drawn your attention  
16 to.

17 There is a further point to make about market shares  
18 and it is that the experts agree that capacity for  
19 chipsets is unconstrained. Just for your note, that is  
20 Mr Noble's eighth report at paragraph 2.43 {E/21/27} and  
21 Dr Padilla's fourth report at paragraph 277 {E/22/90}.  
22 We do say that is relevant because it means that even if  
23 you are a relatively small-scale supplier, having a sort  
24 of relatively small share of a particular market, there  
25 was nothing to stop you from expanding production if you

1 had won a supply contract. We see an example of that  
 2 where Intel, in 2015, go from 0% of the UMTS—LTE  
 3 chipsets to supplying around half of Apple's chipsets  
 4 in 2016. So you can see that capacity in that sense is  
 5 not a particular constraint.  
 6 Before I turn to my third head, can I also just  
 7 perhaps address one other aspect of the legal principles  
 8 and this concerns countervailing buyer power. I would  
 9 like, if I may, to start on a harmonious note. We agree  
 10 with the class representative with what they say in  
 11 paragraph 77 of their written closings. That is at  
 12 {EAOS/4/22}. We agree that buyer power is not binary  
 13 and we agree that it is a question of degree.  
 14 But can I also clear up what I hope is  
 15 a misunderstanding about our reliance on another one of  
 16 your cases, my Lady, Phenytoin. It was suggested in  
 17 oral closing that we had relied on the Tribunal's  
 18 judgment in Phenytoin for a proposition about whether  
 19 buyer power related to a single buyer and that is not  
 20 the point. Rather, the point is that we say the  
 21 Tribunal as in that case, helpfully clarified the  
 22 concept of countervailing buyer power. That's at  
 23 paragraph 204 of the Tribunal's judgment. It was not  
 24 appealed. That is at {AB2/267} and, Madam, in your pdf  
 25 it is authorities bundle 2 at page 1888.

1 The reason we drew attention to this is because the  
 2 Tribunal will recall in opening, and, again, in  
 3 paragraph 76 of their written closing, the class  
 4 representative is seeking to draw a distinction between  
 5 buyer power on the one hand and general bargaining power  
 6 on the other. We say you cannot draw that distinction.  
 7 If we could go back, I am afraid, to the Flynn judgment.  
 8 Thank you very much. You can see here the Tribunal set  
 9 out the correct position in my respectful submission:  
 10 "Countervailing buyer power as it is normally  
 11 understood in competition law terms relates to the  
 12 bargaining position of the buyer."  
 13 So that is why we say you cannot draw a distinction  
 14 between the two of them:  
 15 "... and [it] could arise ... if a commercially  
 16 significant buyer [and I would accept 'or buyers'] was  
 17 able to make a credible threat to switch to a competing  
 18 supplier."  
 19 So it is the legal principle we take from the  
 20 opening sentence of paragraph 204 and not any other  
 21 point from that case.  
 22 My learned friend relied in opening on the judgment  
 23 of the General Court in Irish Sugar and that is to be  
 24 found at {AB3/5/31}, which is page 284 of authorities  
 25 bundle 3 of the pdf. We had said in closing, in

1 relation to that, that really it is concerned with the  
 2 facts of the case. One can see that if one looks at the  
 3 paragraphs relied upon. So they rely on paragraph 97  
 4 and paragraph 98. 97 deals with the Commission. 98  
 5 says the court says the Commission was not wrong. If we  
 6 look in 97, what we see is the argument that was raised  
 7 by Irish Sugar was that two of the customers were  
 8 sufficiently strong to counteract its dominant position  
 9 and the Commission gave two reasons for why that was not  
 10 enough. The first is the applicant's other customers  
 11 representing we don't know percentage of sales volume so  
 12 they did not have commercial strength. So we say that  
 13 is clearly a fact-specific finding. Then, secondly, the  
 14 Commission refers to particular features of the EU  
 15 scheme relating to sugar which meant that the two larger  
 16 customers could not find alternative sources of supply.  
 17 Well, again, quintessentially that is concerned about  
 18 particular types of sugar. Then if one reads  
 19 paragraph 98, which I am not going to do, what one sees  
 20 is the court simply say, well, the Commission did not  
 21 get it wrong. Well, that is fine but the court, unlike  
 22 the Tribunal in Phenytoin, does not lay down here or  
 23 anywhere in this judgment a point of law which this  
 24 Tribunal then needs to apply to the facts of this case.  
 25 So we say that the Irish Sugar judgment is not on

1 point. It is on its own facts. The same is true of the  
 2 Motorola decision which was also relied upon and, as to  
 3 that, I just simply refer to paragraph — recital 266 of  
 4 the Motorola decision, where the Commission rejects  
 5 Apple's buyer power in the specific context of Motorola  
 6 having sought and obtained an interim injunction in  
 7 Germany. That is at {AB3/18/56}, which is at page 1425  
 8 of the authorities bundle 3.  
 9 So I just wanted to address that so that the  
 10 Tribunal could see what we say is the applicable law on  
 11 that issue. That is by way of a prelude to my third and  
 12 final head, which relates to the allegations of  
 13 dominance and the distinct question, which is central to  
 14 the class representative's case, about dependence on  
 15 Qualcomm for various chipsets. I would — I am going to  
 16 address them both at the same time, as we go through our  
 17 journey across the years, over the different chips, but  
 18 I do emphasise at the outset that there is  
 19 a distinction. "Dominance", as understood by lawyers,  
 20 and I hope — I will be corrected if I am wrong —  
 21 economists, refers to the idea of substantial market  
 22 power, the ability to act appreciably independently from  
 23 customers and competitors. "Dependency" is a different  
 24 concept, which is essentially saying that there are no  
 25 alternatives that are available to Apple and Samsung

1 that are credible. You do not need to take my word for  
2 that. That was way in which it was put by the class  
3 representative in oral closings at {Day10/4} {POS/20/2}.

4 So what I propose to do to give you a route map of  
5 the remainder of my submissions is I propose to start  
6 with Samsung and address the competitive landscape in  
7 08/09 for the negotiation of the 2009 amendment, then  
8 move to the focus on 2013 and the dialogue that took  
9 place in that year, and then I will move to the new  
10 point that arises in relation to 2022, because, as  
11 I understand it, from paragraph 377 of the written  
12 closings, they are not making any argument in relation  
13 to the 2018 amendment.

14 THE CHAIR: Yes. You say that the two are different  
15 concepts. So how does dependency feed into dominance?  
16 Are you saying that if there is a dependency  
17 established, then you would accept that there is also  
18 dominance established or not?

19 MR BAILEY: I am not sure I would go far as to equate those  
20 two. I would accept that if dependency is established,  
21 that is a relevant factor for the Tribunal's assessment  
22 of dominance because dependency in that sense must  
23 relate to and inform your evaluation of market power.  
24 The reason why I would not simply jump from saying  
25 "dependency equals dominance" is because I would urge

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1 you, as indeed, Madam, you did in your Cabo judgment,  
2 emphasise that you need to do a holistic assessment and  
3 there will be various inputs to the question of market  
4 power. You will look at not only the options available  
5 to the major customers. You will look at the  
6 competitors as well. You will look at the negotiations  
7 that take place. So there has to be sort of a broader  
8 perspective taken, rather than simply looking at  
9 dependency equalling dominance.

10 THE CHAIR: All right. So formally one needs to look at  
11 lots of things, but in what situation would there not be  
12 dominance if you had found that there was dependency in  
13 the sense of no credible alternatives? What might  
14 outweigh the dependency, in other words?

15 MR BAILEY: Madam, do you recall in the cross-examination,  
16 at Day 9 I explored the concept of "prospective market  
17 weakness" with Mr Noble and I think actually that was  
18 one that Mr Ridyard also raised during the hot-tub.  
19 That might be a situation where there may be dependency  
20 today, I am buying chips from you and I have to because  
21 I am dependent upon you, but I am developing my own  
22 self-supply and I expect in a year's time that will be  
23 coming on-stream and I will say goodbye to you as my  
24 current supplier.

25 So I would say that is an example of a situation

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1 where there is an option. It does not exist today, but  
2 I do think it is credible and it will exist in the  
3 foreseeable future and therefore that would be one  
4 example of how dependency does not mean you have  
5 substantial market power.

6 MR RIDYARD: But if I am looking to --- with a bidding market  
7 sort of description, if I am looking to fill a slot ---  
8 I am making phones and I am looking to fill a slot for  
9 a particular phone now, if I am dependent on one of the  
10 suppliers, does that not mean that there can only be one  
11 name on my tender list and, therefore, there cannot be  
12 competition?

13 MR BAILEY: Well, for that slot at that time, yes, but  
14 market power has to be durable and if actually you in  
15 six months' time believe you will have your self-supply  
16 option coming on-stream, then, whilst, yes, I would  
17 agree on Day 1 when that socket is awarded you are  
18 dependent, but if actually you know in six or 12 months'  
19 time you will have your own option, then I would suggest  
20 that the market power is not durable.

21 THE CHAIR: Well, durable is a relative concept.

22 MR BAILEY: It is, Madam. Yes, that must be right and this  
23 must be fact-specific. So it cannot be good enough for  
24 me to say, well, I might think about self-supply in  
25 five-years' time. That is not credible, it is not

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1 concrete, but if actually as we know Samsung did  
2 from 2010 onward have self-supply and was developing it,  
3 then, of course, that would be one example of where you  
4 would have not equated dominance and dependency.

5 I suppose a different point might be that obviously  
6 within the standard the experts agree there is  
7 supply-side substitution so it may well be that on Day 1  
8 you are dependent on me, but you may decide, as indeed  
9 Apple decided, they do not want to necessarily always  
10 buy chips from a particular supplier and therefore they  
11 might want to sponsor a new entrant and we know the  
12 efforts and lengths to which Apple did for that purpose.  
13 In other words, hypothetically, if Apple were dependent  
14 upon Qualcomm at a particular moment, it may be that  
15 Apple decides to sponsor new entry and it will work and  
16 collaborate with that other entrant and, again, that  
17 would be another answer to dependency equaling  
18 dominance. Again, I take ---

19 MR RIDYARD: That is not supply-side --- sponsorship of new  
20 entry not supply --- supply-side substitution has to be  
21 immediate, does it not?

22 MR BAILEY: Yes, it does, sir. You are quite right. I was  
23 eliding two admittedly separate concepts. You are quite  
24 right, sir. Sponsoring entry is more of a sort of  
25 short- to medium-term issue and the supply-side

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1 substitution is more of an immediate issue, but I was  
2 trying to give you examples in answer to the president's  
3 question of why you cannot equate in all circumstances  
4 dominance and dependency.

5 It might be helpful actually, when we go through,  
6 I will seek to show you why we say Apple and Samsung  
7 were not dependent upon — because the way it is put in  
8 written closing by the class representative, it is put  
9 at a very, very high level. It is said they were nearly  
10 totally or completely dependent, as if they had  
11 absolutely no option whatsoever and I would seek to  
12 persuade you that they did have a credible option at the  
13 critical times.

14 So I am going to start then with the negotiation of  
15 the 2009 amendment and we say that Samsung exercised  
16 a material competitive constraint on Qualcomm, including  
17 on its supply of 3G CDMA chips, in two ways  
18 in 2008/2009. The first of those is that Samsung used  
19 its demand for 3G UMTS chips in order to put competitive  
20 pressure on Qualcomm. Now, we have cited some of the  
21 objective evidence of Samsung doing that in  
22 paragraphs 334 and 335 of our written closing, but what  
23 the class representative says in response is that, well,  
24 look, that is no more than a drop in the ocean, no more  
25 than a small handful of documents.

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1 Now, just to explain why we say this matters. What  
2 we have tried to do is identify contemporaneous  
3 documents that show how Samsung was using its selection  
4 of UMTS chips in order to put pressure on Qualcomm in  
5 relation to its CDMA prices. We particularly identify  
6 a sequence in the months August to December of 2009.  
7 Now, that is a critical time at which the 2009 amendment  
8 is going to be finalised, signed in November 2009. What  
9 I would like to do, if I may, is briefly show the  
10 Tribunal three extracts that are in addition to those in  
11 our written closings.

12 The first document is one that we cite. It is  
13 [Redacted]  
14 That is first of the two constraints.  
15 The second constraint is relating to VIA. We have  
16 set out the position on VIA in paragraph 334 of our  
17 written closings. We know that Qualcomm, at the time,  
18 took seriously the VIA threat. We cite, for example, at  
19 paragraph 334.2 of our closings, how Qualcomm needed to  
20 consider the collaboration between Samsung and VIA.  
21 These were not idle threats. We know that Samsung went  
22 on to use VIA 3G CDMA chips in 2011. That is at  
23 paragraph 337 of our closings.

24 So what does the class representative say about VIA?  
25 Well, essentially it makes two points. The first is it

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1 says, well, VIA is not a credible alternative because it  
2 only had a small share of the 3G CDMA market, assuming  
3 you define a market as suggested by the class  
4 representative. I of course accept, if you do define  
5 a market that is 3G CDMA on that figure 3.2 of  
6 Mr Noble's eighth report, it has a relatively small  
7 share between sort of 5% and 15%, but you already have  
8 my submission that market shares are not the whole story  
9 and you already know that the experts agree that  
10 capacity is unconstrained and so we say that current  
11 market shares are not a reason why VIA could not compete  
12 effectively.

13 MR RIDYARD: But to draw that conclusion, okay, you have  
14 your point on the supply side? It is unconstrained, we  
15 get that, but your challenge is to show on the demand  
16 side that they are credible alternatives for what the  
17 customer wants.

18 MR BAILEY: Yes.

19 MR RIDYARD: That is where it is a bit tougher for you to  
20 get across the line.

21 MR BAILEY: Can I show you just a variety of customers that  
22 used VIA. I admit this is a document from 2015 so one  
23 has to bear that in mind, but it is a document that was  
24 when Intel bought VIA, it did various due diligence, as  
25 you would expect, on the VIA business and it is quite

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1 informative because it sets out some of the stats, the  
2 profile of VIA Telecom. It is at {POF/603} and page 1  
3 tells you that Intel are buying VIA Telecom and page 1  
4 tells you that the codename imaginatively was "Vine".  
5 When we see references to "Vine", it means VIA. If we  
6 go, please, to page 13 {POF/603/13}, this is looking  
7 back, but it is quite informative to see what Intel  
8 thought about the VIA company profile.

9 You can see, first of all, a description on the top  
10 left about the size of the workforce, but the bit that  
11 I particularly wanted to draw your attention is to the  
12 third bullet up from the bottom which is that it had  
13 shipped 150 million units. It had actually around 70  
14 customers, mainly in China, including HTC and Huawei.  
15 You can see at the bottom point it says:

16 "Only viable alternative to QCOM for CDMA."

17 So if we are talking about credible alternatives,  
18 and we are talking about dependency, at least Intel's  
19 perception — not just only Qualcomm's but Intel's  
20 perception — was VIA is only viable alternative and  
21 reference has been made to the parts of the world that  
22 had CDMA networks. If you look at the table on the  
23 right-hand side, it is quite interesting to see that VIA  
24 had shipped ten phone models with Verizon. So we heard  
25 a lot about Verizon. Moreover, had the highest volume

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1 CDMA phone in Japan, which is one of other countries  
2 that had a CDMA network.

3 We say if you look at it from that perspective, both  
4 from the carriers and also from the OEMs, the final  
5 point, if I may, on this, just while we are here, you  
6 will notice the bullet on the right-hand side at the  
7 bottom "LTE solutions by partnering" and we have  
8 HiSilicon, that is Huawei's self-supply arm, Samsung,  
9 MOT, which we think is Motorola, and I am afraid I do  
10 not know what GCT stands for but nonetheless what we can  
11 see is VIA is perceived more widely across carriers in  
12 other OEMs in on the demand side as a credible  
13 alternative.

14 MR RIDYARD: It is the only one who is even in with a shout,  
15 is it not?

16 MR BAILEY: It is the only one that is supplying 3G CDMA,  
17 yes. What we also know is that, going back to Samsung,  
18 Samsung collaborated with VIA. There are various  
19 documents that set out the close working relationship  
20 between Samsung and VIA. They are set out in  
21 paragraphs 334.3, 335.2 of our written closings and we  
22 know that that collaboration goes on for several years.  
23 It starts in 2009, but even in 2016, and I will not go  
24 to it but it is a confidential document, but it is cited  
25 at paragraph 340 of our written closings, it is not

1 a flash in the pan. It is an alternative that was used  
2 and they work with it and they launched phones using the  
3 3G CDMA chip and we say, therefore, the idea that  
4 Samsung had complete dependence upon Qualcomm is not  
5 correct.

6 Moreover, we know that Qualcomm at the time  
7 perceived VIA as a competitive threat. We see that, for  
8 example, in the document cited actually on the page that  
9 we have up in paragraph 334.1 in a strategic plan  
10 in 2008 {EAOS/5/110}. Already Qualcomm had identified  
11 VIA as a threat, that contemporaneous document.  
12 Moreover, that VIA was going to be potentially in  
13 a handset with Verizon and Samsung. So the other side  
14 emphasised Verizon a number of times. Well, here we see  
15 Verizon is contemplating using a VIA chip for Samsung  
16 phones.

17 So we say the story on 3G CDMA is not open and shut.  
18 There are important competitive constraints that need to  
19 be grappled with and this is not a drop in the ocean;  
20 this is focusing on objective evidence at the relevant  
21 time.

22 Now, the other allegation that has been adumbrated  
23 in relation to the 2009 amendment is that Qualcomm had  
24 prospective market power in LTE in 2009. I say  
25 "prospective" because, of course, no LTE chips came off

1 the production line until Q2 2010. You can see that  
2 from Mr Noble's figure on {E/21/27}.

3 Now, we say it is pretty obvious why the class  
4 representative is running, if I may say so, this rather  
5 ambitious case of dominance a year before any commercial  
6 shipment of LTE and it is because they know that their  
7 claims for damages from leveraging 3G CDMA dominance are  
8 time-barred before 26 June 2017. But our response to  
9 prospective LTE dominance is that there is no evidence  
10 to support it. There have been various references to  
11 "thin gruel" in closing submissions. Well, we do not  
12 even have a bowl for the gruel when it comes to LTE  
13 prospective dominance, but I would actually like to make  
14 good that submission, if I may, and I would like to just  
15 quickly take you through what I say is the sum total of  
16 case on LTE in 2009.

17 We start with Mr Noble's eighth report at  
18 paragraph 3.89 {E/21/69}. This is where the class  
19 representative's economic expert sets out a point that  
20 we begin, we agree:

21 "Samsung and Apple are sophisticated customers with  
22 well-informed expectations."

23 Then it goes on to say that they would "anticipate  
24 that Qualcomm would occupy a strong position as a  
25 supplier of LTE chipsets and of 5G chipsets". Now,

1 I fully accept and I will address the points made in  
2 relation to 5G, but if one looks for the evidence in  
3 relation to LTE chipsets in 2009, well, there are no  
4 dates provided, there are no details that are given,  
5 there are no contemporaneous documents that are cited,  
6 even though Mr Noble told the Tribunal that he had  
7 looked at a large volume of documents. In fact, one  
8 looks at the eighth report and it does not address LTE  
9 in 2009. In fact, the market share figures, they begin  
10 only in 2010.

11 So one then wants to continue the cryptic story and  
12 look at joint experts' statement to see if there is any  
13 further light that is shed and one goes at {E/24/19} —  
14 and I am sorry this seems a little bit like a detective  
15 work, but it is important to sort of track down what  
16 exactly is being said. At paragraph 33.1 you will see  
17 here the proposition is whether:

18 "Qualcomm held prospective market power in relation  
19 to LTE and 5G chipsets at the time it negotiated with  
20 Apple and Samsung."

21 So it is a promising proposition, but it does seem  
22 to be suggesting we are going to be told something about  
23 the position. What one sees is a few lines down — it  
24 is the penultimate — the last sentence, we are told:

25 "Similarly, when OEMs negotiated prior to the LTE

1 transition (for example, Samsung (2009)), Qualcomm  
2 exercised actual market power as an unavoidable trading  
3 partner for LTE—CDMA chipsets (see my response to  
4 Proposition 31)."

5 So we now are told that there is this anticipation  
6 of dependency on LTE—CDMA and we should go to  
7 proposition 31. So if we do that, back a page, please,  
8 to page 18 {E/24/18}. You will see in proposition 31  
9 that Mr Noble there sets out his opinion that Qualcomm  
10 meets the threshold of unavailable trading partner for  
11 LTE—CDMA chipsets and he has citations to his ninth  
12 report. Now, for reasons of time, I will not go to  
13 them, paragraphs 2.31, paragraphs 3.46. What I can  
14 absolutely say is that neither of those paragraphs say  
15 anything about LTE in 2009. So we are sort of being led  
16 around and being told, well, just look here and look  
17 there, but actually there is no evidence to support the  
18 contention.

19 Now, in oral closing the class representative did,  
20 for the very first time, refer to some hearsay evidence,  
21 not cited by Mr Noble, but the hearsay evidence of  
22 Mr Injung Lee, which is to be found at {POD/7/33}. It  
23 was said, on Day 10 at page 78 {Day10/78} this shows  
24 that Samsung would be totally dependent on Qualcomm when  
25 LTE—CDMA came along. Well, in my submission, when one

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1 looks at Mr Lee's statements, and I will not be reading  
2 them out because they are 1782 outside advisors only,  
3 but if one looks at what Mr Lee says in his deposition,  
4 what you see is he is not talking about the very  
5 chipsets with which we are concerned, LTE—CDMA. He is  
6 talking about something different, and the — what we  
7 would say, when you look at his hearsay evidence, it  
8 does not come close to saying that Samsung anticipated,  
9 in 2009, that Qualcomm would occupy a dominant position  
10 in LTE chips.

11 MR RIDYARD: Mr Bailey, could it be argued that if the 3G  
12 CDMA argument works, then it must apply to the LTE—CDMA  
13 chips as well because of the need for backward  
14 compatibility? If there is only one 3G CDMA chipset  
15 producer, then almost — is it not almost by definition  
16 there can only be one LTE—CDMA chipset supplier?

17 MR BAILEY: Well, sir, of course we do know that Samsung, of  
18 course, had an LTE modem and it paired it with a 3G CDMA  
19 VIA modem, so in that sense if one is thinking about  
20 dependency I would — my submission would be that  
21 Samsung is not dependent in that respect and so that  
22 would be my answer to that point.

23 MR RIDYARD: That is fine, but — that is fine as far as it  
24 goes, but that is also the answer to the 3G —

25 MR BAILEY: Yes, it is.

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1 MR RIDYARD: I know the further you go on in time I suppose  
2 you could argue things change.

3 MR BAILEY: I suppose the point though on prospective market  
4 power is that the experts appeared to be agreed that it  
5 was a factual issue as to whether Qualcomm and Samsung  
6 both anticipated that in the foreseeable future Qualcomm  
7 would be the only game in town and my point on this is  
8 that there is no evidence to support that. So I am not  
9 sure I would accept purely on the basis of dependency on  
10 3G CDMA that it necessarily follows that that would be  
11 the case for LTE, certainly not LTE—UMTS.

12 MR RIDYARD: Okay, I can see that on LTE—UMTS, but I am  
13 really focusing my question on the —

14 MR BAILEY: Yes, and you have my submission that essentially  
15 the outside option would be VIA being paired with  
16 Samsung LTE.

17 So three main points on this issue. First, Mr Noble  
18 and the class representative have not identified any  
19 contemporaneous documentary evidence in relation to  
20 a prospective supply of LTE chips in 2009.

21 Second, we do know that Samsung was developing its  
22 own in—house LTE supply at this time. For the  
23 Tribunal's reference, that is {ORI/206.1/3}.  
24 [Redacted]. So we just sort of say, well, when you have  
25 that factual matrix, there really is not a case for

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1 prospective dominance in 2009.

2 I am going to move, if I may, to the 2013  
3 negotiation. We have addressed this in our closings and  
4 that is at paragraphs 337 to 338. The class  
5 representative says, again, that Samsung was in a state  
6 of near complete dependence on Qualcomm for LTE chips.  
7 Just for your note, that is at paragraph 138 of  
8 closings.

9 I would like, if I may, to make four points on that.  
10 The first two of which I can make in open court and  
11 then, my Lady, I would ask the Tribunal then to move  
12 into private session so I can address you on some of the  
13 documents after that.

14 So the first — of my four points, the first is the  
15 class representative has spoken highly of Mr Katouzian  
16 and his oral evidence and we would say that his evidence  
17 on the question of dependency for LTE is also relevant  
18 and probative. He explained that Samsung LSI was  
19 a credible LTE alternative for Samsung in October 2013.  
20 That is at {Day6/72} {POS/13/19}, but Mr Katouzian was  
21 not alone in having that view.

22 My second point is that Mr Grubbs also shared that  
23 view and he acknowledged in cross—examination that  
24 alternative LTE chipsets were available before  
25 BlackBerry launched its first LTE mobile phone in 2013.

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1 For your reference, that is {Day3/35:8–25} {POS/10/10}.  
 2 My third point is that there were credible LTE  
 3 alternatives available to Samsung in 2013 and, as  
 4 I said, we have addressed that in our written closings,  
 5 but I would like to raise an additional matter and that  
 6 takes me to a document which is 1782 and is outside  
 7 advisors only so I need to ask my client to leave and go  
 8 into private.

9 THE CHAIR: So we will go into private session now.  
 10 (2.31 pm)

In Private [Redacted]  
 In Open Court

13 (3.21 pm)

14 THE CHAIR: Please do carry on.

15 MR BAILEY: So the class representative relies very heavily  
 16 on a claim by an Apple in-house lawyer in separate  
 17 proceedings that Apple was over a barrel for 5G chips  
 18 in 2019. We would invite the Tribunal, when evaluating  
 19 the claims made by a witness that has not given live  
 20 evidence in these proceedings, that the Tribunal should  
 21 look at the contemporaneous documents, both Apple's and  
 22 Qualcomm's, and give weight to what those documents  
 23 show, as I have addressed you on Apple. As my learned  
 24 friend Mr Saunders addressed you this morning, the  
 25 High Court in the Optis proceedings did not have the

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1 benefit of any of the 1782 disclosure that has been  
 2 obtained in this case.  
 3 Now, the Tribunal will be pleased to hear that I am  
 4 in the sort of final stretch and I wish to tie up a few  
 5 loose ends, if I may. The first of those is that the  
 6 class representative criticised my cross-examination of  
 7 Mr Noble by reference to Apple documents. Now, as to  
 8 that, it was Mr Noble who claimed in paragraph 3.89 of  
 9 his eighth report that Apple anticipated Qualcomm would  
 10 have a strong position in 5G and it was Mr Noble who  
 11 felt comfortable to refer in his reports to various  
 12 documents, hand-picked by him, including Apple 1782  
 13 documents. That is in footnote 125 at {E/21/57}. In my  
 14 submission, it was perfectly proper for us to ask him  
 15 about what those documents showed and to seek to  
 16 understand his opinion on the competitive position in  
 17 5G. He was the only person, in fact, that we could  
 18 address those documents within these proceedings.

19 The next thing to address is that the class  
 20 representative plays down both Samsung and MediaTek as  
 21 competitors for the Apple 5G socket. I would like to  
 22 address that head-on.

23 For Samsung, the class representative asserts that  
 24 it is inherently implausible that it would have supplied  
 25 premium chipsets to Apple. We just say that that is

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1 patently wrong. I can refer you to four different  
 2 sources that show Samsung was competing credibly for the  
 3 Apple 5G socket. The first was a Reuters press release  
 4 at {POF/868.1}. That was in August 2018. Sorry,  
 5 a Samsung press release in August 2018 which refers to  
 6 the fact that Samsung had a 5G chip with both Sub-6GHz  
 7 and 5 mmWave capability. So Samsung itself announced  
 8 in 2018 that it had 5G chip capacity.

[Redacted].

10 Finally, you will have the point set out in  
 11 paragraph 356.5 of our written closings. It is about —  
 12 it is a confidential document so I will not mention it,  
 13 but it is a further indication we, would say, of the  
 14 point that I am making.

15 As to MediaTek, paragraph 120 of the written  
 16 closings of the class representative goes as far as to  
 17 say that MediaTek being a credible option is unsupported  
 18 by the evidence. Again, in my respectful submission,  
 19 that is just wrong. There are at least three items of  
 20 evidence on this point. The first is a confidential  
 21 Apple document. It is {POF/864/1}. The second, we can  
 22 look at this is, it is {POF/862.1/1}. It is a Qualcomm  
 23 email in July 2018. I will not read it out, but we can  
 24 look at it. You can see, just from the subject line, it  
 25 is a Mav update 2019/2020. Could I ask the Tribunal,

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1 please, to read the third paragraph:

"Mav feels ... "

(Pause)

4 We say, when you read that paragraph, you can see  
 5 clearly Qualcomm's understanding during the period when  
 6 the GPLA is being negotiated in mid-2018 and in fact  
 7 come February 2019, Apple is still in talks with  
 8 MediaTek and that is public knowledge because there is  
 9 a Reuters article that refers to it being in such talks  
 10 and that is at {POF/895.2/2}.

11 That then leaves what was Qualcomm anticipating and  
 12 believing at the time of the GPLA? We have summarised  
 13 the contemporaneous documents in paragraph 357 of our  
 14 written closings at {EAOS/5/119}. But there is just one  
 15 point to add, if I may. [Redacted]. Certainly Apple was  
 16 not dependent on Qualcomm. In fact, actually, you can  
 17 see that the competition continues thereafter.

18 So what we say in conclusion, my Lady, sirs, is that  
 19 Apple and Samsung were competitive constraints on  
 20 Qualcomm, certainly Qualcomm could not ignore the two  
 21 largest customers for chipsets at the particular points  
 22 in time that are relevant for these claims, but, even if  
 23 you were against me on that, we do respectfully ask the  
 24 Tribunal to reject the contention that Apple and Samsung  
 25 were completely dependent upon Qualcomm for chipsets at

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1 these points in time.  
 2 So, unless there is anything else I can do to assist  
 3 the Tribunal, those are Qualcomm's closing submissions.  
 4 THE CHAIR: Thank you very much, Mr Bailey.  
 5 Submissions in reply by MR MOSER  
 6 THE CHAIR: Mr Moser.  
 7 MR MOSER: Members of the Tribunal, in reply, we are going  
 8 to stick to the same division of topics as in closing.  
 9 I am going to address you on the law and evidence of  
 10 abuse. Ms McAndrew is going to address you briefly on  
 11 silencing. Mr Ivison on patent law and Mr Williams on  
 12 dominance.  
 13 On the law of abuse, I have five points. The first  
 14 is if we cast our mind back, it seems a long time ago  
 15 now, my learned friend Mr Jowell KC attacked our abuse  
 16 case, describing it variously as a "free-for-all" or  
 17 "seeking to sidestep existing categories of abuse",  
 18 while still paying, as we say, lip service to the  
 19 categories not being closed.  
 20 In relation specifically to the case of Gutmann  
 21 that, again, they relied on, as in writing, we do not  
 22 disagree, of course, with Sir Peter Roth that categories  
 23 are not unlimited, but that is far from the case in this  
 24 claim.  
 25 My learned friend then enumerated a series of kinds

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1 of abuse which he said this claim was not. Notably, he  
 2 omitted to mention leveraging, which is a well-known  
 3 practice that in the right context can lead to abuse  
 4 and, as I explained in context — in closing that  
 5 context is the abusive conduct is leveraging dominance  
 6 in one market, in this case chipsets, by making supply  
 7 conditional on the acceptance of terms in a related  
 8 market, in this case for licences, inhibiting customers'  
 9 access to regulatory protection in that related market,  
 10 in this the case the FRAND regime.  
 11 On that note, this morning my learned friend  
 12 Mr Saunders KC had three opportunities to respond on  
 13 whether Qualcomm would supply chips pending negotiations  
 14 on royalty and three times he failed to do so. My  
 15 learned friend Mr Ivison is likely to come back to that,  
 16 but that is the exact context I described.  
 17 In relation to extant agreements, the same conduct  
 18 has effect via the Sword of Damocles; the known risk of  
 19 refusal to supply if the customer seeks to precipitate  
 20 a challenge. By precipitating a challenge, I mean in  
 21 the way that Tribunal heard first-hand from Mr Blumberg  
 22 of Lenovo when they sought to renegotiate.  
 23 Regarding the point about abuse being not merely  
 24 a fear, the objective point my Lady raised, our  
 25 articulated abuse is not that OEMs just feared chipset

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1 supply disruption. The point is Qualcomm deliberately  
 2 adopted a course of conduct that generated fear and it  
 3 is the conduct, the course of conduct, that is the focus  
 4 of our case.  
 5 The second point on the law of abuse is that  
 6 yesterday afternoon my learned friend took you to the  
 7 App Store decision. I need not go to it, but it was, at  
 8 recital 576, seeking to argue via a footnote that  
 9 exploitative abuse has a higher general threshold for  
 10 effects and this requires an actual or positive  
 11 likelihood of effects. Now, with respect, we say that  
 12 is not right. If we turn to another part of that  
 13 decision, the App Store decision, at recital 540, which  
 14 is {AB3/31.2/159} and that is bundle AB5, page 1000 for  
 15 my Lady. We see what it says at recital 540 where:  
 16 "... the Court of Justice explicitly rejected the  
 17 requirement of a causal link between the dominant  
 18 position and the abuse ... "  
 19 I will not read it all out, but they returned to  
 20 that — the Commission returns to that subject at  
 21 recitals 546 and 547 at page 161 of this {AB3/31.2/161}.  
 22 It is page 1102 of the pdf. 546 and 567 when they come  
 23 up, we will see also warn against a higher threshold in  
 24 one case. I think we are stuck. No, there we are.  
 25 "... contrary to Apple's view, the causal link

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1 between the dominant position of the undertaking  
 2 concerned and the conduct in question is also not  
 3 required to distinguish exploitative from exclusionary  
 4 abuses [and so forth]."  
 5 Similarly, in 547, on the case law in relation to  
 6 102.  
 7 So the test is the same for exploitative and for  
 8 exclusionary and for good reasons, because some cases,  
 9 as I said in closing, involve both exploitative and  
 10 exclusionary abuses.  
 11 THE CHAIR: Sorry, you are going a little bit fast.  
 12 MR MOSER: I am sorry, I am conscious of the time.  
 13 THE CHAIR: So if I carry on reading at paragraph 547 —  
 14 MR MOSER: Yes.  
 15 THE CHAIR: — it says:  
 16 "The case law concerning exploitative abuses ...  
 17 consisting in the imposition of unfair trading  
 18 conditions does not require the demonstration that the  
 19 conduct of the dominant company is liable to foreclose  
 20 competitors. Foreclosure effects can only relate to  
 21 undertakings that are competing in the market, not to  
 22 conducts that is harming consumers who are not  
 23 undertakings and therefore do not compete in any  
 24 market."  
 25 Then:

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1 "Accordingly, if there were a requirement for the  
 2 Commission to show the capability to foreclose... "  
 3 So it is being said that there is a different test,  
 4 because the nature of the abuses are different and that  
 5 was the point that I was putting to you before.  
 6 MR MOSER: But the nature of the abuses are different. So  
 7 you analyse it differently, but my point is a different  
 8 one, which is that you do not apply a different  
 9 standard. There is not a general higher threshold just  
 10 because the nature of the abuse is different. I say we  
 11 get that — I am sorry to have taken it so quickly, but  
 12 we get that from the totality of the three extracts  
 13 I have taken you to.  
 14 Point three on the law of abuse is that, contrary to  
 15 my learned friend's suggestion, we do not agree that the  
 16 test for effects is higher than capability. His  
 17 suggestion I think was it involves showing effects on  
 18 the balance of probabilities. The threshold is the  
 19 capacity or capability of producing anti-competitive  
 20 effects and I gave you my submissions on  
 21 {Day10/139:22-24} and {Day10/141:3-16} and  
 22 {Day10/142:1-7}. The class representative has proceeded  
 23 here, we say, on entirely conventional competition law  
 24 principles. The cases use different words: likely,  
 25 capable, tends, liable, plausible. It is a threshold

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1 somewhere above the "merely possible" but below the  
 2 "balance of probabilities".  
 3 The fourth point on the law is that phrase "strong  
 4 and compelling evidence". We submitted — I do not  
 5 propose to turn it up — based on Phones 4U at  
 6 paragraph 83 and Purple Parking, at paragraph 185, that  
 7 there is no higher standard of proof because of the  
 8 quasi-criminal nature of competition law. My learned  
 9 friend did not engage with that case law, but he did  
 10 keep using the phrase "strong and compelling evidence",  
 11 we sensed, as though it meant some higher standard were  
 12 required.  
 13 Just to reiterate: it is not.  
 14 The law on abuse point five is there need not be an  
 15 imposition for exploitative abuse. The requirement  
 16 for an imposition arises in the context of unfair terms  
 17 and prices. We do not argue about our abuse falling  
 18 into these categories. The focus is not on unfairness  
 19 but distortion of the competitive bargaining process  
 20 and, in any event, as pointed out by the Chair, if we  
 21 are right, then in effect the OEMs had no choice.  
 22 That is all I wanted to say on the law of abuse.  
 23 I come then to the facts as my learned friend  
 24 addressed them. On Apple, he addressed the first period  
 25 up to 2017. He came there to the MIA and the

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1 unleveraged rate. The essence of that submission was if  
 2 the MIA was not influenced by chipset leveraging, that  
 3 conclusively establishes the rate was a competitive one.  
 4 That, with respect, we say is wrong. The starting point  
 5 is the MIA rate was a reduction to a CM rate which we  
 6 say was itself likely inflated as a result of the  
 7 conduct. My learned friend said, well, it is  
 8 implausible for the prevailing rate to have been  
 9 affected by conduct in this way because dominance  
 10 started later, 2006, which he speculated is an  
 11 impossibly short period before the MIA which was  
 12 in 2007, but we say that is an arid submission. If it  
 13 is true that the class representative had to pick — the  
 14 class representative had to pick some starting point for  
 15 the allegation of dominance. We rely on 2006 for that  
 16 purpose but we have also seen examples of pre-2006  
 17 behaviour which evidence the conduct and effect which it  
 18 was capable of having on negotiations between Qualcomm  
 19 and the OEMs, even before that period.  
 20 Secondly, in any event, the discount was not given  
 21 because of the value of the patents or dominance. It  
 22 was given because Apple agreed not to use a competing  
 23 standard which was WiMax.  
 24 My learned friend relied, as he did in opening, on  
 25 a memorable email from Mr Jobs where he claims that

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1 Apple were clearly delighted, but we say it is clear  
 2 from the overwhelming weight of the evidence that Apple  
 3 thought the MIA rate was far too high so at most this  
 4 shows that Apple thought getting a rebate was better  
 5 than not getting a rebate.  
 6 There was also an assertion about extraordinarily  
 7 tightly drawn guarantees of supply. Now, our case is  
 8 set out in our closing submissions at paragraph 336, but  
 9 in essence the terms of the STA and the 2013 agreement  
 10 and the 2015 statement of work, they did not amount to a  
 11 continuous supply of chipsets agreements. They were no  
 12 more than a wind-down provision, as Mr Gonell accepted  
 13 in cross-examination. So Apple had no comfort that if  
 14 it challenged Qualcomm it would be able to access  
 15 chipsets on an ongoing basis for new iPhones, which it  
 16 released then at the rate of several a year. [Redacted]  
 17 Of course it is the 36 months my learned friend decided  
 18 to cite, but it is still only wind-down and we would not  
 19 want you to get the impression from my learned friend's  
 20 submissions that Apple had a genuine, by which I mean  
 21 future-facing, supply guarantee during the currency of  
 22 the litigation.  
 23 My learned friend then made some points on  
 24 {POF/669}, if we can briefly go to that. He said this  
 25 was a plan of record, you remember. Apparently it is

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1 1782 I will not — thank you. I will not read anything  
 2 out. If you look at page 2 {POF/669/2}, you may  
 3 remember his point was about an alternative supplier.  
 4 You will see our closing submissions in paragraphs 316  
 5 to 317 on what was in fact fundamental to Apple's  
 6 ability to challenge Qualcomm.

7 Then in the second period from 2017 to 2019, my  
 8 learned friend says Qualcomm did not cut off or disrupt  
 9 Apple's access to chipsets for future phones in this  
 10 period, but we actually had not understood it to be  
 11 controversial that Qualcomm did not sell Apple material  
 12 volumes of chipsets for use in new handsets during the  
 13 currency of the litigation. There is a dispute of fact  
 14 as to why that was. Mr Williams will deal with that.

15 But then importantly, and I want to spend a few  
 16 minutes on that, there were the five reasons my learned  
 17 friend gave about why Apple had other alternatives  
 18 in 2019 at the time of settlement. His first reason was  
 19 Apple was covered by the CM licences. Now, first, Apple  
 20 did not know the terms of the CM licences and, secondly,  
 21 we know that by 2019 it had come to suspect that they  
 22 did not cover 5G. My learned friend admitted they did  
 23 not know the terms of the licenses, but he sought to  
 24 deflect this point by reading some small print. It is  
 25 again a confidential slide, but we need not read it. I

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1 remind you of it {POF/835/4} and the small print in the  
 2 bottom left—hand corner. Now, unfortunately for  
 3 Qualcomm, that seems to say the opposite of what my  
 4 learned friend said. If you look at it, and in  
 5 particular that word "separate", we say that only shows  
 6 that Apple was right to think that 5G, including MM 5G,  
 7 was not in the extant licence with the CMs.

8 This document and the fact it was sent to Apple is  
 9 the only documentary basis that Qualcomm has identified  
 10 in support of its case that it would have and Apple  
 11 understood it would have supplied Apple with chips under  
 12 the CM licences. We say it shows nothing at all.

13 As we saw, the Apple court document — I will not  
 14 read it out or go to it but {ORI/116/23} — that  
 15 confirms they were not covered.

16 Apple had belatedly discovered this true position  
 17 and reasonably considered it needed a licence which  
 18 covered all relevant LTE and 5G SEPs.

19 My learned friend did not point to anything which  
 20 suggested Apple would not need such a licence in  
 21 relation to 5G.

22 Reason two: Qualcomm offered FRAND arbitration.  
 23 Qualcomm continues to peddle this which is, in my  
 24 respectful submission, a very weak argument, because it  
 25 is so obvious that Qualcomm only offered anything like

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1 an appropriate arbitration when pushed to the absolute  
 2 extreme. Even then, Qualcomm refused to arbitrate the  
 3 antitrust issues, as is admitted, and of course it would  
 4 be wholly artificial to deal with FRAND, the fruits of  
 5 the poisoned tree, without an available antitrust  
 6 argument. They effectively offered only half an  
 7 arbitration, their half. This was a critical exclusion.  
 8 Clearly, Apple could not litigate FRAND without being  
 9 able to explain why they said the comparators were not  
 10 appropriate.

11 Reason three: Apple's opposition to a worldwide  
 12 FRAND determination by their counsel. Nothing new was  
 13 said about this. It is dealt with in writing.

14 Reason four: [Redacted]. That immediately raises  
 15 the question of the royalty rate, as raised by the  
 16 Tribunal, wholly realistic in a situation where there  
 17 was ongoing litigation. That led to a discussion of the  
 18 timeline and the two weeks point. We say it emerged  
 19 clearly that it is a myth that somehow everything would  
 20 have been sorted in two weeks. Ms Mewes said Apple was  
 21 over a barrel. It needed 5G, as it were, yesterday.  
 22 The jury might or might not have declared that the rate  
 23 was FRAND for 3G and 4G. My learned friend Mr Saunders  
 24 accepts this morning, realtime transcript page 50, that  
 25 those proceedings would not lead to a 5G resolution.

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1 My learned friend Mr Jowell's suggestion that Apple  
 2 could have entered in some sort of 5G licence and then  
 3 sued for what he called "chipset duress" is, with  
 4 respect, not serious.

5 The fifth reason was the suggestion that Qualcomm  
 6 was not yet dominant. It is — again, that is something  
 7 Mr Williams will deal with. I will just say that is  
 8 just not right.

9 Very briefly on Samsung. Repeatedly said that the  
 10 original licence for Samsung was necessarily untainted.  
 11 We say that is meaningless. It is not a question of  
 12 tainted or untainted, it just a question of an  
 13 uncompetitive rate. Mr Rogers accepted {Day4/160} that  
 14 the old licence required renegotiation after all  
 15 these years.

16 On the earlier threats, my learned friend made  
 17 submissions about, well, they arose in acrimonious  
 18 circumstances, irrelevant how the conflicts arose. The  
 19 important point is Qualcomm established its  
 20 modus operandi by Mr Lupin and others and the context  
 21 anyway, even back in 2001 or 2002, in particular, was  
 22 also royalty of supply.

23 On the 2013 negotiations, my learned friend said  
 24 almost nothing. His witness statement — his witness in  
 25 oral evidence was much clearer than my learned friend,

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1 accepting there were 2013 negotiations, on which you  
2 have my submissions.

3 On OEMs, my learned friend said even less, apart  
4 from saying something about a long spoon, although it is  
5 not clear who is said to be the devil in this scenario.  
6 It certainly cannot be Mr Grubbs or Mr Blumberg, large  
7 parts of whose evidence, including on direct threats,  
8 were not even challenged. You have our submissions on  
9 this and our fundamental point that in a class action of  
10 this kind much needs to be inferred and the Tribunal  
11 must look holistically at the evidence, including OEMs.

12 Territoriality . I do not disagree with my learned  
13 friend on what he says about territoriality . We simply  
14 pointed out in closings that while Chapter I prohibition  
15 contains express wording, Chapter II simply says "may  
16 affect", the linguistic difference not a point that has  
17 been considered, but we say Qualcomm's conduct  
18 comfortably satisfies the EU law test, as my learned  
19 friend Mr Armitage said, from the European Commission's  
20 own infringement decision against Qualcomm.

21 Very briefly , my last remark, Mr Saunders made some  
22 deprecating remarks about the evidence, the hearsay  
23 evidence being self-serving Mr Jowell had already said  
24 and also he said it was investigatory. He admitted it  
25 was sworn. I just wanted to point out it was tested

1 later at trial and "self-serving" is generally doing  
2 a lot of work in these submissions. No one has alleged  
3 that it was false and the language being used is very  
4 careful.

5 So I am sorry to have gone at such a break-neck  
6 speed. I will hand over now to Ms McAndrew.

7 Submissions in reply by MS MCANDREW

8 THE CHAIR: Thank you, Mr Moser.

9 MS MCANDREW: I have been allocated a three-minute window in  
10 which I am going to attempt to make four points in reply  
11 on silencing .

12 The first point is that my learned friend's  
13 submissions did not address the class representative's  
14 point that the clauses in the Apple and Samsung  
15 settlement agreements went significantly further than  
16 what was required to settle the extant disputes which  
17 existed between those parties and Qualcomm in 2019  
18 and 2018 respectively.

19 I will not repeat the particular clauses that  
20 I referred to yesterday because they are, some of them,  
21 confidential , but they emerge from my submissions in the  
22 transcript {Day11/83-86}.

23 Second, my learned friend focused on the public  
24 interest in the final settlement of disputes. The short  
25 point on that is that that analysis cannot on any view

1 apply to the BCPA which, as the Tribunal is aware, was  
2 not a settlement of extant litigation between Apple and  
3 Qualcomm.

4 My third point relates to the clauses which the  
5 class representative says are likely to inhibit Apple  
6 and Samsung's willingness to participate in these  
7 proceedings. I am not authorised to waive the class  
8 representative's privilege on this point and there is no  
9 basis for criticising the class representative for  
10 adopting that position, nor for drawing any adverse  
11 inference on that basis. We simply invite the Tribunal  
12 to look at the clauses and their objective meaning.

13 My fourth point relates to my learned friend's  
14 submissions on the Motorola decision. I referred to  
15 that decision primarily on the narrow basis for the  
16 proposition that the mere inclusion of a clause in  
17 a settlement agreement does not, without more, render it  
18 immune from competition law challenge. Mr Saunders  
19 sought to distinguish that decision on various factual  
20 bases. One of those was that the Motorola silencing  
21 clause prevented Apple from challenging the validity of  
22 SEPs in subsequent negotiation. I understood  
23 Mr Saunders to accept that such a clause was  
24 objectionable because there is a public interest in  
25 challenging unjustified monopolies, which is what the

1 holder of a SEP that is declared -- of a patent which is  
2 declared to be a SEP but is in fact invalid would have  
3 and I just wanted to note that that is not a valid point  
4 of distinction in this case. The terms of the clause  
5 are confidential , but the Tribunal will see what I mean  
6 if it turn to {POF/905/10} and clause 4.2.7.

7 (Pause)

8 THE CHAIR: Which clauses do you want to look at?

9 MS MCANDREW: It is clause 4.2.7, Madam.

10 THE CHAIR: All right.

11 MS MCANDREW: Unless I can assist further, that is all I had  
12 to say. I think it is now Mr Ivison in the batting  
13 order.

14 THE CHAIR: Thank you.

15 Submissions in reply by MR IVISON

16 MR IVISON: I will try and rattle through these points to  
17 give Mr Williams time to finish his points.

18 The primary submission I want to make is that the  
19 wheels have really rather come off Qualcomm's attempts  
20 to justify its chipset supply policy on any principled  
21 basis. We say it is not motivated by concerns of  
22 exhaustion, implied licence, and even if it were, it is  
23 plainly not the only course to effectively deal with  
24 those concerns.

25 Mr Saunders, as Mr Moser said, had, we think, three

1 chances to say that Qualcomm would be prepared to supply  
2 chips whilst proceedings for FRAND determination were  
3 underway. He did not. What you got was some rather  
4 vague assurances that Qualcomm will act quickly and  
5 has --- is able to find ways to keep people licensed.

6 We say that is really --- the failure to answer those  
7 points really speaks for itself .

8 If you are not satisfied the justifications offered  
9 for the chipset policy do not stack up and you are  
10 satisfied that there were alternative ways of addressing  
11 those purported concerns, then in our submission you  
12 need to give very careful consideration to why Qualcomm  
13 has this policy at all . In our submission, the answer  
14 is, consistent with the evidence you have heard, that  
15 the leverage which linking chips supply to SEP licensing  
16 provides in negotiations is the value to Qualcomm and  
17 enables it to sustain royalty rate which are much higher  
18 than anyone else is able to extract .

19 Mr Saunders said at one point there is no real  
20 dispute that the chipset supply policy is commercially  
21 justified in a commercially reasonable practice. We say  
22 that is a deeply unfair mischaracterisation of Which?'s  
23 position . We have accepted that it is not unreasonable  
24 to take steps to ensure that exhaustion arguments do not  
25 prevent the recovery of FRAND royalties, but we do not

1 accept that the CSP is either commercially justified or  
2 reasonable and that is an important part of our case.  
3 Mr Saunders took you to the Apple v Optis judgment. We  
4 do note that, as on other occasions in this case,  
5 Qualcomm has sought to rely on evaluative findings  
6 recorded in judgments, despite having successfully spent  
7 a long time arguing that the class representative should  
8 not be allowed to do that.

9 Mr Saunders read part of paragraph 122 of the  
10 judgment of the Court of Appeal to you but not all of  
11 it . If you do read all of it , you will see that the  
12 Qualcomm licence was excluded as being a useful  
13 comparable agreement in that case because its rates were  
14 so far out of line with the licences and the judge  
15 accepted effectively that would have been taken to the  
16 cleaners and the Court of Appeal found that that  
17 conclusion was properly supportable. So any ability  
18 which Apple may have had to exercise its muscle on the  
19 case of some parties, as referred to in that paragraph,  
20 it was not able to use that against Qualcomm.

21 Mr Saunders suggested that in those proceedings  
22 Ms Mewes was not cross-examined on issues relevant to  
23 this case. Ms Mewes was cross-examined for, I think,  
24 two days. The judgment records that she bore the brunt  
25 of Optis's attacks on Apple and you can see from the

1 hearsay extract document at {POD/7.1/73} that her  
2 cross-examination did directly address a number of the  
3 issues raised in this case.

4 I turn now to alternatives to the chipset supply  
5 policy . Mr Saunders criticised a lack of detail on our  
6 side, but identified no practical impediment whatsoever  
7 to implementing our suggested alternative to the chipset  
8 supply policy which would address their purported  
9 concerns about exhaustion implied licence. It is really  
10 not a complicated proposition. Qualcomm wants to supply  
11 chips and the customer wants to buy the chips. In or  
12 accompanying the chip supply agreement, Qualcomm can  
13 secure an agreement from the customer that it will pay  
14 FRAND royalties on each and every device incorporating  
15 one of Qualcomm's chips, even if the amount cannot be  
16 agreed immediately, and there will be a dispute  
17 resolution mechanism to deal with that possibility if  
18 agreement cannot be reached immediately.

19 Mr Rogers said that exhaustion can be contracted  
20 around. This is a way of contracting around exhaustion  
21 which ensures that Qualcomm will be paid FRAND royalty  
22 in respect of every device containing a Qualcomm chip.  
23 Clearly it could be done.

24 I said in closing --- in my speech in closing that we  
25 think that Qualcomm accepted that the contract

1 manufacturer and Samsung SULAs did not formally include  
2 licences to all 4G and 5G SEPs. Mr Saunders did not  
3 really challenge that submission and there was no answer  
4 to the capture period point which I canvassed with you.

5 Mr Saunders accepted that under the policy "you do  
6 not need to be formally licensed to all of the SEPs in  
7 order to receive chips." We do not think those words  
8 have previously been uttered by Qualcomm in these  
9 proceedings. That is not the case which we had  
10 understood ourselves to be meeting at the outset of the  
11 trial . We do invite you to look carefully at  
12 paragraph 132 of the defence and also, for example, at  
13 paragraph 73 of Mr Gonell's first statement in which he  
14 describes the CM licences as "full portfolio licences",  
15 a term which he defines in paragraph 14 of that  
16 statement.

17 You will find no clear public statement that the  
18 policy, as now explained, is the policy of Qualcomm. It  
19 is a policy which we say could be, or not, in an  
20 arbitrary way. If it suited Qualcomm to say you do not  
21 have a licence to all of the SEPs you will be  
22 implementing, so you need to take a separate licence  
23 before we will supply you with new chips, there is  
24 actually nothing to stop it from saying that and doing  
25 that. So it is not a situation in which it can be said

1 that a chipset supply policy provides an implementer  
2 with any enforceable protection. It is just something  
3 that Qualcomm says that it does.

4 On the point of — there was a point raised about  
5 the lack of evidence of California law. I say there is  
6 no law of contract in which I am aware that can  
7 transform a licence which is expressly stated not to  
8 imply any other further or different licence which  
9 section 5.1 of the SULA does into one which does imply  
10 such a licence. You will find that provision at  
11 {POF/95/11}.

12 You can of course have a mutual agreement, perhaps  
13 even one which is unspoken and arises out of a course of  
14 conduct which amounts to patent licence, but that does  
15 not transform the meaning of the word in a formal  
16 written document but it may supplement that formal —  
17 the agreement in that formal written document.

18 THE CHAIR: What do you say about the point that this has  
19 all been raised really in closing submissions without  
20 expert evidence of — without evidence of Californian  
21 law and that ultimately the question is not the precise  
22 interpretation of the agreement, but what was understood  
23 by the parties as to which the evidence before us  
24 is Gonell and Rogers.

25 MR IVISON: Well, if it is understood by the parties that

1 there is effectively a licence that covers all the  
2 patent rights, then that is in fact the situation which  
3 Qualcomm says the chipset supply policy is designed to  
4 avoid. It is a situation where there is an implied  
5 agreement or an understanding about patent licences and  
6 that is the justification given in Qualcomm's pleadings.  
7 You will see that at paragraph 49.2 of the defence, for  
8 example.

9 So, unless you have any further questions, I will  
10 let Mr Williams take over.

11 THE CHAIR: No, I do not understand that last answer. You  
12 say that is something which Qualcomm says the chipset  
13 supply policy is designed to avoid.

14 MR IVISON: The justification given for the chipset supply  
15 policy is that it is necessary to foreclose arguments of  
16 implied licence or exhaustion on the part of Qualcomm  
17 customers, but if what is going on —

18 THE CHAIR: I am not talking about an implied licence on  
19 exhaustion, I am just talking about whether there was  
20 an understanding that it was not necessary to get  
21 a further licence. They might have wanted to negotiate  
22 one to secure better terms or whatever, but what is said  
23 was that it was understood that they did not have to  
24 because they were covered by the Apple in its case, by  
25 the CM licences, Samsung by its earlier licences. That

1 is the point and it is not about an implied licence for  
2 exhaustion.

3 MR IVISON: Well, Mr Gonell's evidence was that those  
4 agreements did not cover all those patents that were  
5 required so the question is: if there is some  
6 understanding, what is nature of that? Is it a form of  
7 patent licence, albeit one that is not written down in  
8 a formal document? Well, if it is, as I say, we say  
9 that is precisely what the CSP is supposed to avoid.

10 THE CHAIR: All right. So it comes down, I think, rival  
11 interpretations of what Mr Gonell was saying. We have  
12 your submission on that. Thank you.

13 MR IVISON: I think it is — I do not think it is really  
14 suggested that the CM licences were full portfolio  
15 licences.

16 THE CHAIR: Well, we have your submission. Thank you.  
17 Mr Williams.

18 Submissions in reply by MR WILLIAMS

19 MR MOSER: Can I just say, for 2019, you have my submissions  
20 on why Apple thought it needed the licence, but I will  
21 not repeat them.

22 Mr Williams is our final speaker.

23 THE CHAIR: Thank you.

24 MR WILLIAMS: Madam, members of the Tribunal, I will start  
25 with Mr Bailey's submissions and then see what else

1 I have time for.

2 The theme of Mr Bailey's submissions was that Apple  
3 and Samsung were not completely dependent on Qualcomm at  
4 the relevant times and that does overstate our case, as  
5 I think might have been explored with him. The way we  
6 put it is based on an absence of credible alternatives  
7 for the relevant types of chips at the relevant points  
8 in time.

9 Mr Bailey referred you to paragraph 37 of the  
10 Commission guidelines in relation to OEM—specific  
11 markets. That paragraph was talking about demand for  
12 bespoke products and the Tribunal has my point that we  
13 are a very long way from requirements for bespoke  
14 products because what we have here is Apple and Samsung  
15 buying chips complying with particular standards, just  
16 at somewhat different times. In my submission, Qualcomm  
17 has not begun to show that that is sufficient to  
18 establish an OEM—specific market.

19 As far as price discrimination is concerned,  
20 Mr Bailey said that I had said that there had been no  
21 analysis of pricing. That is not the submission I made.  
22 Could we just look at {POS/20/14} internal page 51,  
23 please. If we look at lines — could we blow that up,  
24 please, on page 51. I said:

25 " ... he has not done any analysis of pricing across

1 the market taking into account rebates and discounts."  
 2 That was the point. Mr Bailey showed you the  
 3 diagram with the bars and the dots and the point I was  
 4 making is that there has been no analysis of the bars,  
 5 taking into the account rebates and discounts. That is  
 6 why I said that Dr Padilla has not actually established  
 7 price discrimination because he is comparing Apple and  
 8 Samsung prices to everyone else's, but he has not  
 9 actually analysed everyone else's prices.  
 10 Mr Bailey's response to that was to say, okay, but  
 11 if the rebates were individually negotiated then that  
 12 shows that there is a sort of OEM-specific conditions of  
 13 competition, but I just repeat the point that Dr Padilla  
 14 has not shown that the upshot of that is price  
 15 discrimination, which is obviously the point of this.  
 16 Now, you put your exam question to Mr Bailey ---  
 17 Mr Ridyard in relation to CDMA chip pricing. His answer  
 18 was it is only the prices to Apple that increase.  
 19 I think you have our point from our closing about this.  
 20 That is not Dr Padilla's market. When I cross-examined  
 21 Dr Padilla, I said "If you put up prices to Apple, there  
 22 will be supply-side substitution" and he said "No, there  
 23 will not because all of the supplies are already in the  
 24 market" and that is why we say it is not really an  
 25 OEM-specific market. So we do say when one subjects

1 this argument to scrutiny, it just does not hang  
 2 together.  
 3 Bidding markets. I do not have very much to add.  
 4 The Tribunal has my submission about this. There has  
 5 been no analysis of bidding markets against any  
 6 criteria. Paragraph 328 of the written closing is the  
 7 extent of it. This is an economic issue and there has  
 8 been no economic analysis. I showed the Tribunal  
 9 Churchill. The analysis in that case fell short of what  
 10 was required and in this case we have even less than the  
 11 Tribunal had in Churchill. There was an attempt in  
 12 Mr Bailey's submissions to patch this bit of the case  
 13 together using some new documents that had not  
 14 previously been referred to in this part of the case and  
 15 in fact that happened quite a lot in Mr Bailey's  
 16 submissions. There is only so much I can say in  
 17 relation to documents that were referred to in the last  
 18 hour, but in my submission none of them move the dial on  
 19 any of the issues and certainly on bidding markets  
 20 Qualcomm have not made them out by a long chalk.  
 21 You have my submissions on Irish Sugar. Mr Bailey  
 22 said that that is fact specific, but of course the same  
 23 principles were picked up and applied in Motorola on  
 24 different facts so we do not accept that.  
 25 Moving then to market power. We start with Samsung

1 2008/2009 and the battle of the gruel jokes. It is  
 2 obviously true that Samsung played the cards that it had  
 3 in 2008 and 2009, but the fact of the matter is that at  
 4 the end of playing those cards Qualcomm kept the  
 5 business and it did so on the basis of the documents on  
 6 the basis of a significant pricing gap to its competitor  
 7 [Redacted]. So in my submission we are a million miles  
 8 away from rebutting the presumption of dominance based  
 9 on this evidence.  
 10 LTE-CDMA. In my submission, Mr Noble's view is  
 11 completely clear from the passages of the JES --- sorry,  
 12 this is the prospective dominance point. It is  
 13 completely clear from the passages of the JES Mr Bailey  
 14 showed you Mr Bailey looked around for evidence of  
 15 dominance. He was only looking for that evidence  
 16 because he does not start with the fact that Qualcomm as  
 17 good as owned 3G CDMA and had 100% market share at the  
 18 time and for many years and indeed that remained the  
 19 position in relation to LTE-CDMA which incorporated  
 20 3G CDMA as the backward-compatible element and as you  
 21 said Mr Ridyard, "if you start from there, one does not  
 22 need to look around for additional evidence". So that  
 23 is what I have to say about that.  
 24 There was an interaction with Mr Ridyard about  
 25 premium and non-premium. You have my submissions in

1 closing about that. I just want to respond to a point  
 2 Mr Bailey made that Mr Noble has not within his analysis  
 3 distinguished between or --- sorry, has not identified  
 4 competition for a premium segment within a wider LTE  
 5 market. That actually is not Mr Noble's approach. If  
 6 you look at his eighth report, {POE/21/23},  
 7 paragraphs 2.32 and 2.33, he there explains that there  
 8 may be different competitive dynamics in relation to  
 9 different segments of the market within a wider market.  
 10 Madam, you put our case to Mr Bailey in relation to  
 11 Samsung in 2022 so that --- I do not need to say more  
 12 about that.  
 13 I also do not need to say very much ---  
 14 THE CHAIR: Which bit of my comments are you referring to?  
 15 MR WILLIAMS: You put to Mr Bailey, well, is the position  
 16 not that Samsung continued to depend on Qualcomm for 50%  
 17 of its supply even though it has its own self-supply.  
 18 THE CHAIR: Yes.  
 19 MR WILLIAMS: That is point we make.  
 20 THE CHAIR: Yes.  
 21 MR WILLIAMS: So there is not very much I need to say in  
 22 relation to Apple.  
 23 In relation to 2013, Mr Bailey focused on a document  
 24 from 2010 and of course we recognise that Apple explored  
 25 its options as the LTE era dawned, but by 2013 the world

1 had moved on. Qualcomm had, first of all, 100% of the  
 2 market or thereabouts at the time and, secondly, it had  
 3 tied Apple in with exclusivity rebates. I dealt with  
 4 all that in my closing submissions.  
 5 There was a new document referred to again in this  
 6 part of the case {POF/365} which I saw for the first  
 7 time. I would simply say, as I looked at the first  
 8 paragraph of that email, reading it for the first time,  
 9 it did not suggest at there was an immediate constraint  
 10 from Intel at that time.  
 11 Finally, in this part of the case, 5G. Mr Bailey  
 12 said our argument under 5G can only work on the basis of  
 13 prospective market power and Mr Jowell, similarly, said  
 14 yesterday, on page 155 {Day11/155}, this was all at  
 15 a time before Qualcomm had even sold any 5G chips. That  
 16 is not right. There were Qualcomm device — sorry,  
 17 there were devices on the market by April 2019  
 18 incorporating Qualcomm chips and obviously those chips  
 19 had been supplied through 2018 for the purposes of  
 20 product development. So that is why we say, on proper  
 21 analysis, this is not really prospective market power;  
 22 it is a real market for real chips.  
 23 Then, finally, Mr Bailey made submissions about  
 24 Apple's options in 2019. He referred to an email from  
 25 mid-2018, long before the relevant decisions were made,

1 and, as I submitted — was it Friday? I cannot  
 2 remember; Friday — our closing refers to Qualcomm's own  
 3 contemporaneous assessment of what Apple's options were  
 4 in late 2018. That is paragraph 123 of our closing  
 5 {EAOS/4/34}. So what we say, we say what we see now is  
 6 an ex post facto attempt to build a picture of what  
 7 Apple's options were, which is not really what Qualcomm  
 8 thought at the time.  
 9 So just a couple more points in response to  
 10 Mr Jowell. He said yesterday that Apple was dual  
 11 sourcing from Intel from 2014 and the submission that  
 12 was made that that — that the reason Apple did not sue  
 13 Qualcomm in 2017 was not because it had then broken its  
 14 dependence on Qualcomm but because it was a strategic  
 15 move and it had actually broken its dependence much  
 16 earlier. In fact the agreement with Intel was reached  
 17 in mid-2014, but Intel did not actually supply chips for  
 18 any iPhone put on the market before September 2016, so  
 19 there was a full two-year lag before those phones came  
 20 to market.  
 21 One can see that from Mr Katouzian's statement.  
 22 There is the diagram on {IRC/3/13}. One can see it from  
 23 the volume data {ORI/261/15}. So the position in fact  
 24 is clear.  
 25 Then just a couple of points on the economics to

1 finish off.  
 2 Mr Jowell came back to the question of whether  
 3 Qualcomm had the incentive to take the rent on the  
 4 licence of the chip. He made two points about that.  
 5 One was that Qualcomm could not leverage across  
 6 standards because an OEM could always take a licence for  
 7 a particular standard. Mr Moser has dealt with this  
 8 point. It is not the way Qualcomm operated and we do  
 9 not see how it deals with the fact that everyone needed  
 10 CDMA functionality in a multi-mode chip. Everyone  
 11 needed backwards compatibility with LTE. So we say that  
 12 really does not answer the point.  
 13 The other point is that Mr Noble's position is said  
 14 to be inconsistent with his position on high barriers to  
 15 entry and I think you have my submissions about that.  
 16 We are not dealing just with entry; we are dealing with  
 17 expansion. Barriers to entry are high. Barriers to  
 18 expansion are high but they are but not insurmountable.  
 19 We have seen some evidence of expansion. It is  
 20 obviously difficult, but it has happened and the simple  
 21 point is that if the chipset price had been higher, then  
 22 expansion would have been easier than in a world where  
 23 the chipset price was at the level where it is.  
 24 Then, finally, Mr Jowell said that the idea that  
 25 Qualcomm would choose to take the rent on the licence,

1 not the chip, is theoretical and evidenced and  
 2 implausible. In our submission, that is wrong. In his  
 3 ninth report Mr Noble considers Qualcomm's incentives in  
 4 the context of what is known about how it saw the  
 5 relationship between its chipset and licensing business  
 6 and he makes the point that Qualcomm would be expected  
 7 to forego chipset revenues to secure licensing revenues.  
 8 That is {POE/23/37}, paragraph 3.45 and footnote 138.  
 9 There he refers back to the Project Phoenix and Berlin  
 10 materials that are discussed in his first report.  
 11 So we say actually Mr Noble's analysis is grounded  
 12 in the facts and based on material which Dr Padilla did  
 13 not actually consider at all.  
 14 So, Madam, those are the points that I wanted to  
 15 make in reply.  
 16 THE CHAIR: Thank you.  
 17 Thank you very much to all of you. It will come as  
 18 no surprise that we are reserving judgment. You will be  
 19 notified in due course.  
 20 MR WILLIAMS: I did not give you the reference to Kent,  
 21 Madam. Should we send that in separately to the  
 22 OEM-specific market? There is a tangential  
 23 consideration of the paragraph —  
 24 THE CHAIR: Oh. Well, do you want to just give it to us  
 25 now.

1 MR WILLIAMS: So it is paragraphs 145, 146, 161 and 162 and  
 2 172.8. It is not an OEM-specific market in the same way  
 3 that arises in this case, but it is — the question  
 4 is could one find separate markets for individual  
 5 customer groups and the paragraphs of the guidance that  
 6 we have been looking at in this case in relation to  
 7 price discrimination, they are — they are considered in  
 8 footnote to paragraph 161.

9 THE CHAIR: All right. Thank you.  
 10 The last point of housekeeping is I think you were  
 11 going to send us an agreed note with some references.  
 12 Is that still in progress or contemplation?

13 MR WILLIAMS: I cannot say we have made a great deal of  
 14 progress this week —

15 THE CHAIR: In contemplation, if not progress?

16 MR WILLIAMS: — but we will now progress that important  
 17 workstream, Madam.

18 THE CHAIR: Yes. Can I just — can we just discuss the  
 19 timescale. Are you able to get that to us within the  
 20 next week?

21 MR WILLIAMS: I would have thought so.

22 THE CHAIR: Yes. We obviously do not need —

23 MR SAUNDERS: I think the pen is with my learned friend so  
 24 it would be helpful if he could indicate when he  
 25 anticipates getting us a copy.

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1 MR WILLIAMS: I cannot do that on my feet. I will liaise  
 2 with Mr Saunders.

3 THE CHAIR: I think I will just say it would be helpful if  
 4 you got it to us within the next week.

5 MR SAUNDERS: Yes, as long as we do not get it an hour  
 6 before it is due, if that can be achieved.

7 THE CHAIR: Yes. I am sure Mr Williams has heard that.

8 MR WILLIAMS: I will give him an hour and a half!

9 MR SAUNDERS: Very good.

10 THE CHAIR: Thank you very much. Thank you to everybody.  
 11 We know that a lot of work has gone into this. We are  
 12 very grateful to everyone's submissions. As I have  
 13 often said, it is — the Tribunal is always very happy  
 14 to hear from junior counsel as well as leading counsel  
 15 and we are very pleased that we could do that during the  
 16 course of this trial. So thank you all very much. You  
 17 will be notified of a draft judgment in due course.

18 At the moment I do not anticipate that we have any  
 19 further questions, but it may be that we have some  
 20 discrete questions that we need some further help on, in  
 21 which case we will let you know. All right. Thank you  
 22 very much.

23 (4.18 pm)  
 24 (The court concluded)  
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