IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1382/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 6th October 2025 – Wednesday 5th November 2025

Before:

Mrs Justice Bacon

Derek Ridyard

Justin Turner KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Consumers' Association

Class Representative

v

Qualcomm Incorporated

Defendant

A P P E A R AN C E S

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

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

Tuesday, 7 October 2025

(9.45 am)

(Proceedings delayed)

(9.50 am)

Housekeeping

THE CHAIR: Good morning, everyone. It is just me now, because, as you might have heard, Mr Turner has been stuck in rail problems and he will be here later. So I thought it most sensible for me just to use the time and for us to have a discussion now about confidentiality and then we will rise and come back in with the full panel to continue the hearing.

Is that all right with everyone?

MR BAILEY: Yes, Madam.

MR MOSER: Yes.

THE CHAIR: All right.

Thank you. So I've just received a flurry of correspondence this morning. I cannot say that I have completely digested it all, but perhaps, Mr Bailey, you can explain where you have got and to what your proposal is, having regard to the various concerns expressed by third parties so that we can try and find a constructive way forward.

MR BAILEY: Yes, Madam. Qualcomm has liaised both with the Class Representative and, so far as possible, in

particular, Apple and Samsung.

THE CHAIR: Yes.

MR BAILEY: But anything I am about to say I am not speaking on their behalf.

THE CHAIR: Of course not.

MR BAILEY: Leading counsel for Apple is here and no doubt will address you in relation to her client's concerns.

THE CHAIR: Yes.

MR BAILEY: I do not know if you have received a letter that my solicitors sent to the Tribunal this morning?

THE CHAIR: Yes, I have.

MR BAILEY: It is not yet on Opus, but this provides some of the context to this issue and it also sets out a proposal which Qualcomm is making and has liaised constructively with the Class Representative to seek to find a way forward at least insofar as Qualcomm's confidential information is concerned.

THE CHAIR: I understand.

MR BAILEY: I should make crystal clear, it is paragraph 3, Madam.

THE CHAIR: I understand. That seems entirely sensible.

MR BAILEY: Yes, Madam. I did have a short

discussion before court with leading counsel for Apple and the point was made that this proposal, of course, can only relate to requests for confidential treatment made by Qualcomm. Insofar as there are confidential figures in, for example, a licensing agreement and the counterparty claimed confidentiality, then it is not really in our remit to undercut or in any way qualify that, although I think what we were suggesting was, insofar as there are licensing agreements that refer to specific figures or the identity of customers, then we do not read those out. In fact, the Class Representative suggested very constructively that we might agree a list of codenames for the various counterparties and other OEMs and suppliers which the parties and the Tribunal could use and that was the process adopted in BGL.

THE CHAIR: Yes.

MR BAILEY: So we say that those are the really sensitive items, but it would then mean that for the rest of the document, insofar as Qualcomm is concerned, and I believe the Class Representative, it would be possible for the Tribunal, the parties, the witnesses to be able to speak freely to them.

Madam, the only other qualification you will notice in the last sentence of that paragraph is that we would ask that a direction is made by the Tribunal under

Rule 102.5 which restricts the use of the documents to the purpose of these proceedings.

THE CHAIR: Yes.

MR BAILEY: And subject to that protection, we hope that that is a way that we have sought to really pare back Qualcomm's request for confidential treatment.

Madam, if you turn over to the second page ——

THE CHAIR: Before we go there. So in the rainbow of confidentiality highlighting, which of the —— what colour or other designation is given to documents which are confidential to Qualcomm as opposed to Apple and Samsung, because I am not sure that the highlighting —— oh, I see, right.

MR BAILEY: We tried to provide a little rainbow for you this morning.

THE CHAIR: I've just been given this.

MR BAILEY: That is right. We prepared this, Madam, so that's for both counsel and the Tribunal, if it would be of assistance, could see the different levels of protection and you can see that essentially there are five different types of confidentiality and they have all been highlighted in different colours.

THE CHAIR: Yes.

MR BAILEY: On the right—hand side it identifies who are able to see those types of information. Essentially

it goes from the strictest ring relating to the 1782 information, for which even my own clients are not able to see that material, and that is highlighted in grey, and then you can just see, working down, it identifies who can see and who cannot. I believe both sides are working to this colour scheme and so you ask about Qualcomm information, Madam. Well, essentially it runs through all of the different confidentiality .

THE CHAIR: Is this a new colour scheme that overrides the colour scheme in the skeleton arguments?

MR BAILEY: It is the same as the skeleton arguments, Madam, but you are right to point out that there has been a change and you can see that we have tried to identify that the "1782 external eyes only" is now grey in a red box and it used to be green because the Apple settlement sum is now highlighted in green. So there has been that the change, but we hope it nonetheless is clear as to which colour refers to what and who can see what.

So what we would propose is that where one gets to a particularly sensitive figure, obviously we just ask the Tribunal to read it to themselves and if, for example, there is, for example, in Dr Padilla's third report, there is a particular chart that sets out some highly sensitive figures, it may be necessary to deal with that chart to sit for a short period in private.

THE CHAIR: All right. So that gives a key as to who is within each of the confidentiality rings, which seems extremely complicated to me, but, anyway, I am not going to revisit that now.

According to you, the colour—coding is the same as in the skeleton arguments. That is good. I understand that there has been some revisions to the bundles which we will sort out at lunchtime or after court, but when you say that you are —— that you are making this proposal in respect of Qualcomm's confidential information, if I am reading, for example, the skeleton —— one of the skeleton arguments and I see that something's highlighted in pink or blue, how do I know whether that is Qualcomm's claim to confidentiality or somebody else's?

MR BAILEY: Madam, at the moment you would not be in a position to know that. If it would be of assistance, I can take instructions to see if, in relation to the skeletons in the first instance, at least my instructing solicitors can identify who has claimed the relevant information to be confidential.

THE CHAIR: Yes. I mean ——

MR BAILEY: There is this problem that the confidentiality in some ways is often shared and so there is only some —— we can only make a proposal so far as Qualcomm is concerned.

THE CHAIR: Yes. I mean, that is the problem. The problem arises when, for example, I need to ask a question.

MR BAILEY: Yes, Madam.

THE CHAIR: Because if it is simply a matter of read this paragraph, that is absolutely fine, because everyone in the courtroom can read the paragraph, but the example yesterday was I wanted to ask a question, I think it was of Mr Moser, and the question seemed to me an obvious one to be able to ask on the basis of the submissions that the parties that have been made in open court, but because the question related to something that was in the, I think, the 1782 documents, because it arose out of a deposition, I did not know if I could ask that question in open court. That is the difficulty .

MR JOWELL: Can I rise to say that in the course of my submissions this morning, I will be going to some of the documents that are confidential and my proposal would be that at least pro tem we will just have to go into private session and then at a certain point into an inner ring private session where even our own —— it will have to be external solicitors and counsel only, because, in my submission, that is the only practical way, because one cannot simply always just point at a document and say, "See what I mean" and so, unfortunately, I think that is the

position we are in pro tem.

THE CHAIR: Right. All right.

MR BAILEY: Madam, at the hearing in front of Mr Turner at the beginning of September, Mr Turner made very clear that this was all pro tem and everything I think all parties, including the third parties, accepted that of course when the Tribunal comes to write its judgment and there are particular things the Tribunal wishes to say to give the reasons, that's this regime and those bits of information would need to be rereviewed in light of that. So it is not as if we want to sort of stop things for ever.

I, for my part, also have a similar issue in relation to market definition and dominance. There are a number of contemporaneous document which third parties have claimed to be confidential which I cannot address you on and you cannot ask me about if we are doing it in open court.

THE CHAIR: Yes, all right. So who else wants to make submissions on this? Ms Abraham?

MS ABRAHAM: Thank you. So we were pretty concerned by Qualcomm's proposal as set out in the letter that we received about an hour ago, but with Mr Bailey's clarification this morning, we are content with Qualcomm's proposal, so far as it concerns Qualcomm's documents, because it does not affect us. What Mr Bailey is saying is that their changes to the information that they claim is

confidential will not roll back any information that we have ——

THE CHAIR: That is the way I understood their proposal. They said that quite explicitly they could not speak to the position of third parties.

Now, Ms Abraham, I do not know if you saw the relevant bit from the transcript yesterday and were able to appreciate the problem that I had because we got to part of the depositions where, of course, I can read what is said there. I could not ask the question about that in circumstances where the question I was wanting to ask was an entirely generic question. It did not relate to any specific confidential figures, and it related to matters which actually have been discussed in open court, in the course of the submissions on abuse, and will necessarily have to proceed in open court because we are talking about abusive conduct in relation to Apple and Samsung and the way in which it is said that Qualcomm's conduct was abusive in relation to each of those.

I am obviously not very attracted by the idea that we will have to have the entirety of the abuse submissions at some point in closed session. Obviously, if there are specific figures that need to be referred to, everyone can find a way of dealing with that, but in terms of generic questions about the way that the abuse is said to have

operated and Qualcomm's response to that, it is going to be very difficult to have that in closed session.

Are you able to make any constructive proposal as to the way forward because although vast swathes of the 1782 documents are marked as "confidential", a lot of the material there is the subject of submissions that are being made and have been made in open court and in the course of the parties' skeletons as a general proposition, without anyone suggesting that that is confidential?

MS ABRAHAM: Of course I hear what you say, Madam. In relation to the 1782 documents, there are two hurdles. The first is that I am actually not instructed in relation to the 1782 documents for Apple, because Freshfields are not instructed in relation to 1782. It is a US process and so there is a different firm, but the second point is that the Tribunal, this Tribunal, just does not have vires to change the classification of the 1782 documents because that is regulated by the US court order and you will remember that at the PTR, which you were at and I was not, you made an order for the parties to be able to challenge confidentiality claims in the 1782 documents under that US court procedure. So there was provision for that to happen. It seems not to have resulted in the outcome that you would have liked, but I am afraid that there is nothing the Tribunal can do about that because it is a matter for the US

court because that is how that disclosure came into this litigation.

So that is the specific point.

I understood that it was a 1782 document that raised the particular issue that led to you making some comments yesterday. I can speak to the rest of the Apple confidentiality position.

THE CHAIR: Yes.

MS ABRAHAM: Insofar as the documents have come in through normal disclosure. So from Apple's perspective, the bottom line is we are not suggesting that anyone has ever closed the door to any question ever being raised about confidentiality of specific documents, but there has been, further to your directions at the PTR, a really extensive and frankly also really expensive process.

THE CHAIR: Well, yes, I have seen and was somewhat horrified at the amount of money that has been spent on this.

MS ABRAHAM: I think you have the figure for Qualcomm, but you do not have the figure for Apple.

THE CHAIR: I am sure there will be a lot of expense on all sides.

MS ABRAHAM: Yes. The reason we did that was because we were aware that if we needed to defend our confidentiality in relation to documents that would not be

covered by your general approach and actually quite a lot of the documents in the bundle that are marked as "confidential" are confidential because they are covered by your general approach that you set out the PTR —— I am not sure whether you are with me. Do you remember that at the PTR you set out some principles according to which document would be prima facie confidential and a party would be able to apply for de—designation?

THE CHAIR: Well, it is somewhat in the mists of time so ——

MS ABRAHAM: Shall I just explain ——

THE CHAIR: No, I think you should just go on because I think we just need to reach a landing point on this sooner rather than later.

MS ABRAHAM: Just to be clear: there are —— I will give you the bottom line —— about 150 documents, Apple documents, that we understand are in issue, just to give my client as an example. Of those we went through them all extremely carefully over August, very tight deadlines, fantastic efforts from those instructing me, and indicated that we would not claim confidentiality at all over about 60 of them. About 40 of them were prima facie confidential under the approach you had set out at the PTR and there were about 40 —— these are just round figures —— over which we made confidentiality claims because they would not be

covered by your indication of what was confidential and we said they should be treated as confidential. So we made that application. 27—page witness statement from Tyler Shelton in support of it. Happily, Mr Turner read that material before the September hearing and was satisfied —— was persuaded that all of that material was confidential.

Now, if there were to be any suggestion that any of that material should no longer be treated as confidential, that is an issue that Apple would want to take up with the Tribunal for all of the reasons that are set out in Mr Shelton's witness statement which persuaded Mr Turner.

THE CHAIR: All right. Okay.

MS ABRAHAM: Could I —— sorry, just before I stop, sorry to interrupt you, but could I just highlight there are a couple of other categories over which we have no control which it might just be useful for you to have in your sights.

THE CHAIR: Yes.

MS ABRAHAM: So there is also this category of what we have called "Qualcomm internal documents." I think there are 126 of them that contain third—party information. I do not know how many contain information confidential to Apple. It was agreed at that September hearing that those documents would be treated as confidential to the extent they looked like they had third—party confidential

information in and we have never seen them. I am not complaining about that. We have not seen them because they might also have information confidential to Samsung or to Qualcomm or someone else, but if there were to be any question of challenging that confidentiality, again, we would need to be heard on that and there would be a totally new corpus of documents to us.

THE CHAIR: Yes, all right.

MS ABRAHAM: I am grateful.

THE CHAIR: Thank you.

Mr Moser, do you want to say anything?

MR MOSER: I will say this, and I will ask my learned friend Mr Armitage to chip in if there is something I miss because he has been dealing with it, but my learned friend has been talking about certain documents, the 150 documents, but they have been dealt with so they are in a sense not in issue.

What has not been dealt with is the hearsay document that we talked about yesterday, the 75 pages or so. Now, leaving aside all matters of 1782 and whatever, these are also documents which are simply in Apple's control so they can take a view on these documents. They do not have to ——

THE CHAIR: Well, not if it is protected by US court order and we —— there has been no challenge to the

confidentiality designation pursuant to that.

MR MOSER: Well, I mean, in my respectful submission, it is far from obvious. If they also hold these documents in and of themselves, then quite independently of the court production in the United States, I submit they could look at the 75 pages and say, well, these are matters we do not object to being disclosed.

THE CHAIR: Have you discussed that with Ms Abraham?

MR MOSER: Not yet.

THE CHAIR: Is this the first she hears of that proposal?

MR MOSER: Yes.

THE CHAIR: Well, I cannot really expect her to respond to that on her feet.

MR MOSER: We will take that away. It is something that occurred to me as I listened to her.

THE CHAIR: I think that is maybe something you should then discuss with her. Leaving aside the idea that Apple can simply override the terms of the 1782, the order protecting the 1782 documents, how do you propose that we proceed? I think the progress that we have made is that Qualcomm, in respect of its documents, agrees to confidentiality proceeding on the basis of its letter. That is very helpful. That will mean, I hope, that in due

course, when we get closing submissions, there will be less redaction for confidentiality and that also in the course of the cross—examination, the parties' submissions, when we get to something that is highlighted as confidential but is now not going to be regarded as confidential, someone will tell me. Obviously following my discussion from Mr Bailey, I cannot tell that from looking at a document and the highlighting whether it is Qualcomm's designation or whether it is somebody else's. In due course, that may make things easier.

But in terms of the way to proceed with the rest of the documents, is there any —— without asking Apple to redo its confidentiality exercise, which I am loath to do at this point, and leaving aside any solution that you might be able to get to in relation to the 1782 documents, I just cannot address now without having —— without everyone having had the time to consider it, are we simply going to arrive at the point where if one wants to make extensive submissions on, for example, the hearsay documents, it is not going to be really possible for that to be done in open court. I know you are valiantly trying not to go into closed session, but the effect of that is that you make a submission on a document or someone makes a submission on a document and I simply cannot ask a question about it.

So is the way forward that, absent any further

progress that is made in relation to the swathes of hearsay documents, that we are just going to have to deal with those in confidential session? That may mean taking some things out of order, but at the moment I do not see any way round it. I am certainly not going to ask the parties to go away and spend millions more pounds re—reviewing the confidentiality at this point. All I am interested in is finding a workable way to deal with this in the course of the trial.

MR MOSER: Madam, absolutely, yes. So first on the points Mr Bailey made, we welcome those. Those are in fact the production of discussions between the parties so they are agreed and helpful. It will assist.

As far as the latter point is concerned, I am afraid, as my learned friend Mr Jowell said, we will have to reach a point where we have to deal with that in private. There is certainly no request for Apple to re—do the 150 documents, whatever it is, and it is, as you rightly say, not as though the parties have not spent time and a lot of money on trying to produce the most workable solution.

THE CHAIR: Yes.

MR MOSER: So there will come a time also in cross—examination, for instance, where in order to be able to discuss this, we will have to go into private for a short time.

THE CHAIR: But is it accepted that if I am not referring specifically to the deposition, as in if I am not asking a specific question about what somebody said and how a sentence in the hearsay document is to be interpreted, can I ask in open court a general question about Qualcomm's conduct vis—à—vis Apple that does not involve referring specifically to any confidential information? Is that accepted across the board?

MR MOSER: We would certainly say "yes".

THE CHAIR: All right.

MR MOSER: That is our position.

THE CHAIR: Because a lot —— there have been submissions on that which are not highlighted as confidential in the skeleton arguments.

MR MOSER: That is exactly the point.

THE CHAIR: That is my —— I mean, that is my concern. Mr Jowell.

MR JOWELL: I am afraid I think it is difficult to answer that question entirely in the abstract. It will have to depend somewhat on the precise question and of course there may be some questions that can be posed but the answers might have to be given either by reference to a document or in private.

THE CHAIR: All right. So you ——

MR JOWELL: But obviously insofar as we possibly

can, we will answer it in public, of course.

THE CHAIR: Okay. Ms Abraham, do you have any comment on that?

MS ABRAHAM: No. I mean, in the same way that it is difficult for Mr Jowell to answer the question in the abstract, it is doubly difficult for me because I have not even seen these documents.

THE CHAIR: Yes.

MS ABRAHAM: The hearsay documents, that is to say, yes.

THE CHAIR: But my point is if I am not asking a question about something in the hearsay documents but I am asking a general question about Qualcomm's conduct vis—à—vis Apple and Apple's response, as long as I am not referring to any specific confidential document, are you happy that that can be asked and answered in general terms in open court?

MS ABRAHAM: As long as there is no reference to confidential information. So information over which we have claimed confidentiality, then, of course, there can be no objection and the other thing is that of course we are not trying to stand in the way of having a workable trial so we recognise that there needs to be a discussion between the bench and the parties and, hopefully, there will not be any slips but they do sometimes happen.

THE CHAIR: All right. So let me give an example.

I am trying to find example then. So an example that I have in a skeleton argument, let us say paragraph 250 of Which?'s skeleton argument, 250, I am going to read it out loud because it is not highlighted:

"Samsung's belief that Qualcomm might cut off chip supply was well—founded."

So that refers to a belief of Samsung that Qualcomm might cut off chip supply. That's the kind of —— that is the kind of point that I want to be able to probe in open court or I may want to be able to probe. Now, is it that I can ask the question but the answer might involve —— if the answer involves referring to some of the hearsay documents, then the answer would have to be given in closed session?

MS ABRAHAM: That may very well be the case in relation to that instance. Of course that is a Samsung point so I have no idea.

THE CHAIR: No, but that is —— I am just giving that as an example of the kind of question that I might want to ask.

MS ABRAHAM: I am not sure that there is —— I am not sure I can provide any enlightenment. I am trying to be as helpful as I can, but I cannot really answer that in the abstract.

What I can do is give you some examples, if that

is helpful, of the sort of narrative material over which we have claimed confidentiality.

THE CHAIR: Yes.

MS ABRAHAM: I do not have the trial bundles. I do not have any of the documents, but I have a copy of our witness statement, if that is a helpful kind of guide?

THE CHAIR: No, that is all right. We are going to have to hear from —— we are going to have to reach a landing point on this I think in relatively short order so that we can continue with the rest of the hearing. Thank you, Miss Abraham.

Mr Saunders, did you want to make a comment?

MR SAUNDERS: The only point being just in relation to this skeleton argument, there is a further iteration provided on Monday because we noticed that there were a couple of places where 1782 material was coloured in, but then a paragraph underneath revealed essentially the contents of the 1782 material unredacted.

THE CHAIR: Oh.

MR SAUNDERS: So if you are using Which?'s skeleton argument, please use the latest version of it where that has been fixed.

THE CHAIR: Well, I do not know.

MR SAUNDERS: We need to check that, but it is just —— it was suddenly noticed there are certain figures in

Which?'s skeleton argument that are unredacted that are highly confidential.

THE CHAIR: It will come as no surprise to you —— when was this filed, yesterday?

MR SAUNDERS: So this was corrected, I think, on Monday morning.

THE CHAIR: Yesterday morning.

MR SAUNDERS: Yes.

THE CHAIR: Well, it will not come as a surprise to you that I have extensively marked up the skeletons and I am working from hard copy documents which I obviously started reading in before yesterday.

MR SAUNDERS: Yes.

THE CHAIR: So —— all right. Well, no, I do not have the latest version. I have in front of me the version that I have read and marked up last week.

MR SAUNDERS: Yes. Let us see —— maybe an easier thing for you might be if we provide a list of the paragraphs that were changed and then you do not have to start fresh on a new document.

THE CHAIR: I think you probably better do that. If you say that the version that I have and have marked up is not the latest, then maybe just send to my clerk ——

MR SAUNDERS: This is my learned friend's so it is for them.

MR MOSER: We will do that.

THE CHAIR: Someone will need to send to the Tribunal a list of the paragraphs so it is easily identified and then we can just add on markings manually.

MR MOSER: Yes.

THE CHAIR: Rather than replacing pages, because I have extensively marked up in manuscript my own copies. Let us do that.

So the way I think ——

MR MOSER: Before you say that, there is just one point I think Mr Bailey was going to come on to but Mr Armitage wanted to add a point on the market share figures. And then I think we are complete on ——

THE CHAIR: Honestly, I do not think we can descend into that level of detail right now. The way we will have to proceed ——

MR BAILEY: Madam, I hesitate to interrupt, it is only on the market share information, the proposal is that the parties agree that actually the information can be read out in open court provided the Tribunal directs that, because the only concern in relation to the market share data in relation to IDC and Strategy Analytics (inaudible) is that we have a contract that prevents us from disclosing it, but if the court were to order that and both parties are in agreement that the court should order that, then that

would solve that problem.

So yesterday when Mr Williams took you to the various figures in Noble 8, you would be able to then talk about those in open court so we hope that would be a constructive suggestion which my learned friend made to me and my client agrees with.

THE CHAIR: So this is your proposal to deal with it and that is by consent.

MR BAILEY: Yes, provided the court directs that therefore ——

THE CHAIR: Yes, all right. I will direct that. I will make your Rule 102 order and the way that we will proceed will be that in respect of Qualcomm's confidentiality, as and when we get to it, we will proceed on the basis that is set out in Qualcomm's letter.

That will affect all subsequent markings up of documents that are now filed. I am absolutely not going to require that all documents that have been filed already be subject to a further process of redesignation for confidentiality. I do not want any more money to spent on this, and time, unnecessarily, but for future documents, including closing submissions, Qualcomm's proposal will apply.

When we are in open court, if we get to documents that are marked as "confidential" but now which can be ——

or, rather, passages in those documents which can be undesignated, then someone will just need to tell the Tribunal so that we are aware of that.

For the rest, it appears apparent that, without spending a lot of —— a lot further time and expense on all sides, we are going to have to proceed with the current confidential designations, but what we will do, I think, will have to be that when it looks like we are getting to points where heavy reliance is going to be placed on, for example, the hearsay documents, we will have to go into closed session. So I would invite the parties to try and ensure that the closed session materials are grouped together so that we do not have to keep going in and out of closed session but, so far as possible, we have one point during the day when we are in closed session and can deal with all of the confidential materials.

Now, I know that that will involve taking some things out of order, but that is probably the only way to do it.

This will have to be on the basis that our judgment will not have any —— when it is circulated in draft, will not have any confidentiality markings. It is impossible for us to know at this stage what we can and cannot say. We are not in a position to go back to everything to try and work out what is confidential and what

is not. There will then have to be a process of review of that document. It may be that we have a provisional redacted version that is published, followed by a further version later on after everyone has had a chance to make further submissions. That has been done in other cases. It is an established procedure. So I think that is probably the best that we can do.

In relation to Mr Moser's proposal about the 1782 documents, I think that, Mr Moser, you will need to discuss that with Apple and Samsung and if you then have an application to make in that regard that can be made in good enough time that it can be resolved in the course of the trial, then you should make that application.

MR MOSER: Yes.

THE CHAIR: But I do not think that that can be debated really now, without Apple and Samsung having had a chance to consider that.

All right. Let us proceed on that basis. So I will just now rise and see if Mr Turner has arrived. When he has, we will continue the hearing and we will need to finish very promptly at 4.30, ideally 4.25 today. As you know, there is a whole lot of swearings in so I need to get to one over in the RCJ after court today. All right. So I will rise and see if we can bring in Mr Turner now.

(10.22 am)

(Short Break)

(10.25 am)

Opening submissions by MR ALEXANDER

THE CHAIR: Yes, Mr Alexander. I hope fairly concisely we are going to hear from you on I think the FRAND point.

MR ALEXANDER: I was really going to say almost nothing and start with good news, which is in relation to the technical material, the Tribunal has been sent a letter, I think, this morning, indicating that it has been agreed that there is no need to cross—examine on any of the technical evidence.

THE CHAIR: Yes.

MR ALEXANDER: Subject to the approval of the Tribunal, there is an approach that has been set out in a letter that was sent this morning.

THE CHAIR: Yes, I have seen that. That seems entirely sensible.

MR ALEXANDER: So I think we need say no more about that. There is very slight reference in the documents to this material, but I anticipate it will play no role.

THE CHAIR: Okay. That is music to our ears. So we do not need to deal with any cross—examination of the technical experts.

What about Melin and Schneider?

MR ALEXANDER: We are working on that after at the moment, bearing in mind your indication. We anticipate that it may be sensible to try and deal with it on the same basis, partly following the indication from you, Madam Chairman, yesterday. It is background in many ways.

THE CHAIR: Yes.

MR ALEXANDER: It is not irrelevant background because the context in which this arises is obviously the subject matter of the abuse in some sense is SEPs, but it could easily be something else and one does need to understand a little bit about that regime and it is appropriate that that material comes from an expert. So in terms of the actual issues that the Tribunal has to decide, at least for our side, we do not anticipate there will be a great deal in that, which is why we have put a proposal to my learned friend to say, "Let us deal with that evidence on the basis that both sites can refer to material if they want to, but there is no need to have cross—examination on it". I think my learned friend is considering that at the moment and we will try and sort that out for the Tribunal by the end of the week. We obviously have an indication from you that if there is to be cross—examination, the issues need to be identified, the points in the skeletons to which they go need to be identified and so on.

THE CHAIR: Absolutely.

MR ALEXANDER: There may be a way forward. I just cannot tell you what that way forward is today.
THE CHAIR: Of course. No, and I did not ask you to indicate that today.
MR ALEXANDER: That is the good news.
THE CHAIR: Can we take it that, on any basis, if there is going to be cross-examination, it will be no more than half a day in terms of looking at the timetable?
MR ALEXANDER: Certainly that would be our anticipation and it may be that it can reduce very significantly.
THE CHAIR: All right. Thank you.
MR ALEXANDER: But we are working on that basis in any event.
THE CHAIR: Yes.
MR ALEXANDER: So the only other aspect that I have been asked to address is what might be called the IP aspects and I think my Lady said at one point during one of the earlier hearings this is not an IP case, it is a competition case.
THE CHAIR: Yes.
MR ALEXANDER: Although the subject matter is IP rights, and I just want to address you very briefly on why there is a particular vulnerability in relation to pricing in relation to those rights, there are really no IP issues

at all. We are not dealing with validity infringement, even valuation in some fundamental sense of the rights, but there is a short section in the Which? skeleton dealing with the FRAND context which again is substantially background material. There is reference to the -- some of the UK case law and reference to why some of these issues of evaluation are so difficult in this particular context and why, if I may put it like this, there is a vulnerability in this market to what might be called overpricing.
I can just very briefly address you on why there is that kind of vulnerability, just for two or three minutes, and then that will be me done, if that is a convenient way forward?
THE CHAIR: Yes.
MR ALEXANDER: What we are dealing with is SEPs. Obviously we talk about standards here. Essentially they are design contributions to a system, but one things one knows about the SEP regime is that one does not know necessarily whether something that is declared to be essential is in fact essential whether at the outset or indeed even sometimes after litigation because there may be appeals and so forth.
THE CHAIR: I mean, is it now agreed that we do not have to decide that issue?
MR ALEXANDER: You do not need to decide -- well,

my Lady --
THE CHAIR: Do we have to decide whether any of -- whether any of Qualcomm's claimed SEPs were in fact SEPs?
MR ALEXANDER: No, you do not -- not only do you not need to decide that issue, we do not envisage that that was really ever in issue. You will see, I think, in the competition materials, which is not my part of the case, that -- and I do not think I am saying anything confidential -- I hope not at least -- there was a debate as to whether there ought to have been more intensive scrutiny, if I may put it like that, as to the basis of the intellectual property claims in the valuation exercise in question, but this does not concern this Tribunal at all.
One of the reasons why this is such a difficult exercise is because trying to work out whether even a single patent is truly essential, genuinely valid and what its contribution is, is an extremely difficult exercise. One can see that from the case law in the United Kingdom.
THE CHAIR: I understand that. There was just a sniff in some of the evidence, I think, that there is a debate as to whether some of Qualcomm's claimed SEPs were essential. I just wanted to know how much we needed to get into that in your answer is not --
MR ALEXANDER: You do not need to get into it at all, but there was certainly hot debate. One of the debates

that you will see in the evidence is how this ought to have been evaluated. So if one thinks about it being difficult for a single patent, when one multiplies this with the many thousands of patents, obviously it becomes a very, very difficult exercise to undertake. There are different positions in different countries. There may be different laws under which this may need to be evaluated and so forth.
The second point which you will have picked up from the FRAND section is there is no, as it were, international FRAND Tribunal to which the ETSI regime is established. It is not like a situation where one has, for example, the copyright Tribunal.
THE CHAIR: I understand. That is why people hop all over the world making FRAND claims.
MR ALEXANDER: And why all of these disputes arise and partly there is no agreed standard as to valuation as to how you approach valuation. There are different methodologies that are approached in different courts.
So partly because of that, you have uncertainties at every level. No established standards of evaluation which one might say is a recipe for a market in which, if there is power to dictate prices by other means than proper valuation system, the market is particularly vulnerable to that because people cannot say, well, this is the standard, this is a cost-plus valuation or whatever the position may

be, where everyone has agreed that a valuation takes place in a particular way.

That has given rise to an enormous amount of litigation in different countries, but the landing point, just to conclude on really the whole of this aspect, that the English courts have, in our submission, increasingly got to is this: the system involves avoiding two evils. I use the term "evil" because that is a term that Lord Justice Arnold has used in one of the —— in fact, two of the recent cases in FRAND. One is the evil of hold out and the other ——

THE CHAIR: Hold out and hold up.

MR ALEXANDER: Hold out and hold up. The earlier cases have really been concerned primarily with "hold out". What they have sought to do is that you need to submit a particular FRAND determination on a global portfolio valuation basis and, once that has been done, if you do not take the licence, then you are going to be injuncted. That is the English approach. Then to some extent that deals with hold out because you can say: well, actually, there is a valuation, there is a valuation process, the penalty, the enforcement in some senses, you get an injunction if you do not pay.

THE CHAIR: Yes, but just parking that point there before you move quickly on, I think yesterday we were told

that the landing point in the interim, the holding position, if you like, while the precise figure is being debated or litigated, is a figure somewhere in the middle. Can you just confirm that ——

MR ALEXANDER: Let me just elaborate on that, because that is really a product of relatively recent jurisprudence in this country and it is the jurisprudence relating to what is called an "interim licence". The two —— the main case on that is Panasonic v Xiaomi, we do not need to go to that, where essentially the SEP owner and the implementor had committed to the English court's resolution process, but nonetheless the SEP owner was going to other courts around the world saying, "We want an injunction to shut your business in whatever country it was". The response of the English court, which was in some sense in line with the approach taken in the copyright Tribunal, was to say, well, pending resolution of what is genuinely FRAND, you should not be using, in this case, patent power, not market power, but patent power, to try and secure more advantageous terms than would be FRAND. That is a breach of a duty of good faith, breach of procedural and substantive rules under ETSI.

So the English court said, "We cannot force an interim licence on parties, but we can declare that if you do not enter into an interim licence, that would be a breach

of the relevant provisions". The terms of the interim licence were: one party had said we are claiming X, another party said they should only be claiming Y, some method for having a mid—point —— it is not exactly a mid—point, but it was a mid—point of interim payments pending resolution. The submission that may be made, possibly more by the competition lawyers than the IP lawyers, is that is in some sense a sensible and rational approach to dealing with this issue. There should be a method whereby everyone can get to a resolution as to what is FRAND and that resolution should not take place under the threat of market exclusion. That is the remedy, essentially, that the Court of Appeal in two cases has said is an appropriate remedy.

The submission then would be, and this is not a matter really for me but for the competition lawyers, that that approach by analogy is a sensible way of thinking about what ought to happen in what might be called "an ideal counterfactual situation".

MR TURNER: So the interim payment, is that then adjusted?

MR ALEXANDER: The interim payment is then fully adjustable and that is one of the key factors in this whole issue, is that people not —— there was in one of the cases a suggestion that the interim payment should not be adjustable, but there should be simply a payment.

MR TURNER: Which case was that?

MR ALEXANDER: That was one of the —— I think that was the Samsung case, but I can check in relation to that. It was not something that the court endorsed.

MR TURNER: Yes.

MR ALEXANDER: But the point is that unless you have a mechanism there you can perform the adjustment, which is not shadowed by the threat of market exclusion, you have a real risk of overpayment.

So I think, subject to ——

THE CHAIR: So the ideal counterfactual situation, if I add what you have just said to Mr Moser's submissions yesterday, your counterfactual is that Apple and Samsung would have been able to and felt able to proceed to a FRAND negotiation and if that did not succeed to FRAND litigation, with them paying in the interim a mid—point interim figure and they should have been —— and you say they should have been able to do that and felt able to do that, but your submission or Mr Moser's submission, when he makes the point, is that they were not able to do that or did not feel able to do that?

MR ALEXANDER: That is a question for you to evaluate on the evidence relating to what I call the competition side of the case.

THE CHAIR: Yes. I am just understanding: this is

the counterfactual that has been put forward by you?
MR ALEXANDER: Yes.
THE CHAIR: So you have added to what Mr Moser has said by answering the question about what would have been paid in the interim. All right.
MR ALEXANDER: Yes.
THE CHAIR: You say that that is following, for example, Panasonic v Xiaomi, that is how the negotiation would work and the holding situation would work in a sort of normal FRAND framework?
MR ALEXANDER: Yes, I think I put it like this: that jurisprudence may give guidance to this Tribunal as to what —— as to how it should think about the counterfactual.
THE CHAIR: Yes, all right. But ultimately we will need to sort of pin down what we think is the counterfactual, but I understand.
MR RIDYARD: Just one question which may be to think about later, but all of this is premised on the idea that if only the users had access to FRAND, then something —— they get a better deal out of it. Ultimately that is what it is about. It is denial of that access that is the problem we are talking about.
But how confident can anyone be that getting access to a FRAND determination would deliver a better deal,

given how complicated and messy it is to actually achieve a FRAND determination?
MR ALEXANDER: Well, that is probably a matter for evidence, possibly not even in this trial, but there is in the skeleton some reason to believe that —— on the basis of the English case law on FRAND, there is reason to believe that that will be the case, because if one looks at the cases, the ultimate decision in relation to what was regarded as FRAND, once the full evidence had been gone through, was very far removed from the demands that were made originally by the SEP owner. We have given three instances of that in our skeleton.
On that basis, one might say that there is material from which one can conclude that if that outside option is not available, for whatever reason, and there is material from which one can conclude there was pressure to settle, in a sense, on higher terms, the terms in question would be unlikely to be those that would ultimately be determined to be FRAND.
MR RIDYARD: Thank you.
MR ALEXANDER: In some cases, very significantly so. In the Apple v Optis case, there was a claim for —— it was a very large award ultimately, but the claim originally was, I think, for over ten times as much.
Unless I can assist you further at this stage,

that is all on IP and FRAND.
THE CHAIR: All right. Thank you very much.
I should say, Mr Alexander, the Tribunal is not demanding your presence at parts of the trial which do not concern you so please do not feel you have to stay out of courtesy to the Tribunal. Stay if you need to.
MR ALEXANDER: I was going to say, if it is all right, I might not be here for most of it, but will return for the closing.
THE CHAIR: Yes, absolutely understood. I do not think it is useful for people to be around and be incurring expense of being around when they are not needed. Thank you.
MR ALEXANDER: Thank you, my Lady.
THE CHAIR: Mr Jowell, do you want to tell us how you are going to divide up your submissions?
Opening submissions by MR JOWELL
MR JOWELL: Yes, indeed. The Tribunal will be pleased to hear that you will hear from all three of us today. I will start off and I will be focusing on the allegation of abuse and the Class Representative's theory of harm. I anticipate that I will take up this morning and a little bit into the afternoon.
Then Mr Saunders will take up the baton and he will take you to some of the key points relating to the

leveraging analysis of Dr Padilla, as well as, as you would expect, the technical and patent expert evidence, both licensing and engineering, and he may also touch on issues as to the context of the FRAND obligations and FRAND defence. Then, finally, Mr Bailey will be dealing with market definition and dominance.
THE CHAIR: All right.
MR JOWELL: So we have given consideration to how we might most assist the Tribunal.
THE CHAIR: Yes.
MR JOWELL: With your permission, my submissions will be divided into three parts.
THE CHAIR: Just in terms of timing, are you able to finish by about 4.25 today between three of you? Is that going to be too tight? I am aware it is now 10.45. If you needed, it struck us that we could possibly have another 10 or 15 minutes at the start of tomorrow morning to finish or we could start a little early tomorrow morning. Can you reflect on that and just let us know after lunch?
MR JOWELL: We will indeed. It may well be very desirable to have that extra time and I doubt that the cross—examination of the two witnesses tomorrow will take all day.
THE CHAIR: In which case, we could just start at 10.30.

MR JOWELL: Indeed.
THE CHAIR: All right.
MR JOWELL: So what I would like to do, if I may, is start off and make some key points about the nature of the claim of abuse and I will stay in open court for those points.
Then, and this will take up most of my submissions, I think it would be helpful to show the Tribunal some of the most important underlying contemporaneous documents, because we apprehend you might not have had a chance really to look at those. What I would like to do is to take the key documents in chronological order relating, first, to Qualcomm's relations with Apple in the relevant period and then to do the same with Samsung. Unfortunately, since some of those documents are confidential, we will need to go into closed submission for at least part of those submissions.
Finally, at the end, I would like to come back and make some points about the economics and also about the law. Obviously, as you would expect, I will not be giving my detailed submissions on the law in my opening submissions. I will save those for closing if I may.
So starting then, if I may say something about the ambit and the nature of the Class Representative's case. The Class Representative takes aim at certain policies or

practices of Qualcomm which they say amounted to abusive exploitation of its alleged dominant position in certain chipset markets and it claims that that operated to unlawfully inflate the royalties on separate SEP licensing markets.
Now, it makes allegations about those practices generally for all customers and essentially for all time, or at least for all times when it is alleged that there was dominance in the chipset markets, but the Tribunal will appreciate and has already, I think, remarked to my learned friend, that the actual case is circumscribed by the nature of the claim as a class action and the CR is here purely in a representative capacity seeking damages said to have been served by that particular class. That class has been defined by the CR's own choice as "restricted to certain persons who made purchases from two particular manufacturers of particular phones over a particular time period". The two particular manufacturers, of course, are Apple and Samsung, two of the largest companies in the world, each of which have been frequently ruled to be dominant in their own smartphone ecosystem and it is unusual in the least to see them cast in the role as the immediate victims of an exploitative abuse. For a number of reasons that I will come on to, Apple and Samsung were not and are not in a comparable position to smaller OEMs or other OEMs that

Qualcomm also does business with.
As for the particular phones, those are identified in the annex to the claim form, which you can see at {IRA/1/66} —— we do not need to go to it —— but they are all 4G LTE Apple and Samsung mobile phones purchased during the relevant period in the UK. Now, all of those phones would have used the LTE–UMTS or LTE–UMTS–GM chipsets. So they are not CDMA phones and that is because no UK network operator has ever used CDMA. In addition, they are not 5G phones, not even those that are backward compatible to LTE technology.
So the relevant royalties that the CR claims were inflated were royalties payable in relation to UMTS LTE technology on LTE phones. That, as I will come back to later, is of some significance when it comes to the allegation that there could have been any leveraging from dominance in 5G or indeed 3G chipsets.
Finally, as to the time period, we are limited to the phones purchased from October 2015 to January 2024. So it becomes critical to focus on the circumstances surrounding the licensing agreements entered into by Apple and Samsung that applied to LTE phones purchased within that timeframe. How Qualcomm acted in relation to licences outside that timeframe is not really relevant and this period is, again, somewhat unique, not least because of the

very active litigation and regulatory activity engaged in by both Apple and Samsung, specifically targeting Qualcomm during that period.
Now, I am sure it will not have escaped you why I seek to emphasise this rather fundamental point.
THE CHAIR: Well, no, because that is the reason why I asked yesterday that Which? could set out a summary of its case, particularly on abuse, particularly in relation to the relevant licensing agreements that are applicable for this period of time. We are very interested to see what is said about that particular period of time.
MR JOWELL: Indeed, and that is absolutely crucial, if I may say so. When one sees in the Class Representative's skeleton argument —— one is regaled with tales of what happened to Curitel in 2001 or a Taiwanese company called BenQ in 2004 or LG in 2003, frankly, it is impossible to see what conceivable relevance any of that has, not least because a number of those allegations are at a point of time before it is alleged that Qualcomm was even dominant. The dominance alleged in these proceedings only starts —— is alleged to start in 2006.
In any event, it would be wrong to accede to this invitation to try to extrapolate from these relations between Qualcomm and smaller OEMs to what happened as between Qualcomm and Apple and Samsung in the relevant

period, and particularly inappropriate to do so in light of the very thin evidence before you. There is very little documentary evidence. What one has is unsubstantiated hearsay and the occasional quote from a document, often taken entirely out of context.

So we say it is neither practical, nor proportionate, nor fair to try and resolve these allegations which are at best of tangential relevance and certainly not within the context of a trial lasting five weeks.

So what matters is what happened between Apple and Samsung in relation to these phones in this period.

Now, before I dive further into that chronology, I do want to take a few points about the content of the pleaded abuse and our defence to that allegation. That is because for much of the run—up to this trial, and I am afraid to say even actually during this trial, the precise nature of the NLNC abuse has been very difficult to pin down. NLNC itself is essentially a slogan and, like many slogans, it can have a myriad of meanings. The content of the core of the abuse has varied and certainly the emphasis has varied from pleading to pleading and from CMC to CMC.

Now, we appreciate of course we must be pragmatic and we must meet the case as it is put now and not as it once might have been put, but, even now, there remains a lack of clarity and precision. So let me try to start, if

I may, by providing some clarity from our side about what Qualcomm admits and avers about its own practices.

So Qualcomm admits that it has a practice whereby, in very broad summary, it does not sell to unlicensed customers. That is what Qualcomm calls its chipset supply practice. The practice, as the CR likes to point out, is unique in the industry and its uniqueness, it is suggested, or sometimes suggested, renders it somehow inherently suspect or a departure from competition on the merits, but once one understands a little bit about the history of Qualcomm's business model, it is actually not suspect at all.

So in a moment I want to take you to some evidence ——

THE CHAIR: So if one was to define "NLNC" as being exactly contiguous with what you describe —— have just described now, you do not have a problem with admitting that?

MR JOWELL: That is correct.

THE CHAIR: Yes.

MR JOWELL: We fully admit that we do not sell to unlicensed customers, but, as I will come on to, that does not now seem to be the problem. That is not said to be in itself abusive, I think, by the Class Representative.

So if I may: why did this come about? Why did the

chipset supply policy come about? Well, in a moment I will show you a little bit of an extract from the evidence of Dr Jacobs who was one of the founders of Qualcomm back in 1985. He had previously been a university professor of electrical engineering and he, along with a number of his colleagues, who were —— a number of whom were also distinguished scientists, electrical engineers, specialising in the field of wireless telecommunications, founded Qualcomm and the scientists patented a number of inventions and they started off by licensing those patents to mobile telecommunications companies. In accordance with the approach that was already prevalent in the industry, they licensed those patents as a portfolio and at the end—device level, so not at the component or chipset level.

You will see from Mr Gonell's evidence, paragraph 27, that the first licences were agreed in 1990, first with AT&T and Motorola, and within a few years they had licensed many of the other OEMs in the telecoms industry, Nokia, LG, and so on. If you want to look at a neutral example of one of those licences, a rather typical one, for you note you can see the Nokia one which is at {POF/1.2}. Most of these licences are in very similar form. You will see an upfront royalty, a running royalty per device. Certain of the licences were granted in South Korea, where they were negotiated —— the terms of the

licences were negotiated under the aegis of an arm of the Korean government and one of those licensees in Korea was Samsung. We will come on to look at the Samsung 1993 licence shortly.

But just to be clear: these original licenses being negotiated in this period 1990 to 1994, they were negotiated in a period of time when Qualcomm was unquestionably not in a dominant position. The reason that I say "unquestionably" is because, in that period, Qualcomm simply did not have a chipset business at all. It was only in the business of licensing patents. It was only several years later, in about 1995 or ——

THE CHAIR: When you say "licensing patents", patents for what?

MR JOWELL: Patents for CDMA.

THE CHAIR: SEP patents.

MR JOWELL: Well, they were not actually all at that point —— they were not —— at that early point they were not yet SEPs, but they later became SEPs. So it is pre—SEPs as well, which is important also because, if you like, they did not have the benefit at that point of it being an accepted standard yet. The standards, I think, started —— the first standard, I think, was 1994. So we are pre—dominance, pre—any chipset sales, pre—any standards.

Then it is only later, 1995 and 1996, after it

already had an established licensing business, that Qualcomm then, subsequently, started supplying chipsets in commercial quantities. It actually began selling physical products largely to demonstrate that its patent technology worked.

THE CHAIR: Is that because the patents read onto the chipset? They were implemented on the chipset?

MR JOWELL: In part. In part. So they started supplying, if you like, sample chips and said, " Look here. Our patent does work. Here is an example". Then they then started selling chipsets in commercial quantities from 1995.

Of course it is not even alleged that they were in a dominant position in any chipset market until years later, 2006.

But even at this early stage, when they started selling chipsets, this gave rise to a dilemma for Qualcomm and that was the dilemma of the possibility of exhaustion and of a serious risk, which posed a serious risk to the existing —— the pre—existing licensing business.

So if I could show you this passage of Dr Jacobs's deposition. It is from the FTC proceedings. I will not be able to read it out because it is confidential, but if I could invite you to read it. It is in {POD/8.1/60}. If you look at the very bottom of the page, you see, "Irwin Jacobs, Qualcomm". If we can go over the page, please {POD/8.1/61}. If I could just invite you to read the

first question and answer.

THE CHAIR: Where on the page do you want us to go?

MR JOWELL: Sorry 61, page 61. The top of page 61. If you just read that short paragraph at the top, the answer there.

THE CHAIR: Okay. (Pause)

By the way, is this confidential?

MR JOWELL: This is confidential for the moment. I am told it is not —— no longer confidential.

THE CHAIR: Okay.

MR JOWELL: Okay. If you turn —— if you wanted to see this in more —— in more technical terms, you will see it from a lawyer's perspective, the technical issue of exhaustion for your note is —— you can see described by Mr Rogers at paragraphs 28 to 32 of his witness statement, which is in {C/4/7—8} and Mr Gonell also avers to it in his witness statement at paragraph 25 at page {C/5/9}.

So one has a problem of —— a technical problem of the exhaustion of the —— potential exhaustion and so in order to rectify that, one needs to ensure that there is a licence there in place in advance.

As you have seen, you can see from Mr Rogers' evidence, since those early years, Qualcomm has not stood still. It has continued to re—invest huge amounts in

research and development, coming close now to I think a staggering $100 billion, which is an enormous sum for a private company in a particular industry. Perhaps, unsurprisingly, given the sheer scale of that investment, Qualcomm has not stopped innovating. It has patented further inventions that relate to later standards, such as 3G—CDMA, 4G—LTE and 5G, with constant updates and accretions within all of those standards. Of course while some of the original patents may have by now expired, the overall number of patents that Qualcomm owns has grown hugely over the years with a patent portfolio now exceeding 100,000 patents.

So that is the historic origin and justification for the chipset supply policy. It essentially came about from a historic accident that the licensing business came first and the chipset business came second, that together with this concern about exhaustion to sell the chips to an unlicensed customer.

It is a perfectly understandable and reasonable commercial practice to only supply licensed OEMs. This now seems, very belatedly, to be conceded by the Class Representative. It may be added that the practice has actually got an added advantage, which is that it means that the royalty rate is chip—supplier neutral because it means that it does not matter whose chips the OEM buys, whether

that be Qualcomm's or a competitor's, the OEM is always going to be paying the same amount.

Now, to point out, as my learned friend did in his opening submissions, ah, but, in some other parts of Qualcomm business, such as wireless, it does not operate the chipset supply practice, is, if I may say so, an entirely irrelevant point, because it does not simply have a licensing business in wireless. So it does not need it, because it sells the components on an exhausted basis. It is just a different business model.

Now, I should just mention three ——

MR TURNER: Sorry, the reason for the —— I am not sure whether this matters, but in the case of the chips for —— you are selling chips for phones, you could —— mobile devices, you can wrap in the licence fee into the cost of the chip when you sell that?

MR JOWELL: Yes, that is right. You mean you could do that?

MR TURNER: You could do that.

MR JOWELL: Yes, you could do that, but Qualcomm do not. That comes back to this —— the fact that they had this licensing business and they started with a licensing business.

MR TURNER: You would still need a separate licence for those manufacturing their own chips, you would

still need a separate licence?
MR JOWELL: Forgive me.
MR TURNER: Sorry, you would still need to have a licensing division to license those people who are acquiring their chips from manufacturers other than Qualcomm?
MR JOWELL: Indeed, exactly. Then you would get into real problems or complications, serious complications, because it would cease being chipset—supplier neutral, if you like, because you would —— the licence would only ——
MR TURNER: Have two different models.
MR JOWELL: Exactly.
MR TURNER: But when you move into other technologies, I appreciate you do not have to have an identical business model across your business, but is there any reason why ——
MR JOWELL: It is just —— well, I think what —— the reason is essentially that having a licensing model, like that, there are burdens of having that in terms of, you know, enforcing the intellectual property and so on and sometimes, you know, that may be justifiable and sometimes it may not. It may also simply be the fact that, well, this one started, as I have said, with a licensing model, whereas the other one just —— that never —— that never came about.
MS ABRAHAM: So are you saying with things like

wireless, it just does not have a licensing model, it simply supplies the component with the relevant set, it is exhausted, it is an all—in price.
MR JOWELL: Exactly.
THE CHAIR: But you say that is because it did not have the licensing of the SEPs for those wireless components first.
MR JOWELL: Exactly.
THE CHAIR: It does not have a licensing business in relation to those SEPs.
MR JOWELL: Exactly.
THE CHAIR: Yes.
MR JOWELL: It is just a different —— just a business model and perhaps one day they would —— maybe Qualcomm one day will just say, "Maybe we should have a licensing business", but there are all sorts of reasons why one does not choose to develop a licensing business.
THE CHAIR: When you say that this is a commercial —— reasonable commercial practice which is not objected to or is understood by —— as reasonable by, you understand, Which?, is that —— where do you —— where do you get that understanding from? Is that is from the discussion yesterday of ——
MR JOWELL: I think I get that understanding from their latest skeleton argument and from my learned friend's

submissions, but we have really struggled to tease that out of them, but it does seem to me that the device is no longer said to be —— I will show you. I think it is paragraph 154 and 155 of their skeleton, where they do make clear that the vice is no longer said to be simply not supplying unlicensed customers. In fact, they say, boldly, that it is obviously not their case that they suggest that.
THE CHAIR: That is 155.
MR JOWELL: Yes.
THE CHAIR: This is the discussion of the counterfactual and I think I understood that also from the discussion with Mr Moser yesterday of what the counterfactual was.
MR JOWELL: Yes.
THE CHAIR: It was not that Qualcomm should sell licences bundled with the chipset but, rather, that Qualcomm should not be preventing access to the FRAND negotiation framework.
MR JOWELL: It is actually a somewhat new case and I will come on to that and show you that.
Before I do, let me just clear up three possible misconceptions about the chipset supply policy. First of all, Qualcomm does not always insist that there is a direct licence with the customer before chipsets are supplied. For example, you will see that with Apple prior to 2019 there

was no direct licence between Apple and Samsung —— and Qualcomm.
THE CHAIR: Because the licence was at the level of the contract manufacturers?
MR JOWELL: Indeed. That is precisely the point.
The same indirect, if you like, call it that way, licence arrangement also occurred with Motorola in a period after 2013.
That is important actually because, as I will come on to, that left Apple free to negotiate and, if necessary, litigate the terms of a direct licence with Qualcomm, because it had the contract manufacturers' licences to fall back on.
A second point I should clarify is that Qualcomm's licences —— licence agreements generally relate to defined licensed products which are identified usually by the cellular standard or standards that those products practice. Qualcomm's chipset supply practice does not require that an OEM have a licence in place for licensed products that is the not buying from Qualcomm. So if you are buying 5G chipsets, you need a licence for 5G phones, but you do not need a licence to get those 5G chipsets for 4G phones.
Thirdly, the third point I should clarify is this: the chipset supply policy does require there to be a licence as a condition of supply, but it does not —— it is

not part of it to always insist that every element of the licence has to be finalised before supply will commence. There are occasions where Qualcomm and an OEM have agreed that a particular licence terms within a licence will be determined by some form of agreed dispute resolution procedure. Mr Gonell describes this in his first witness statement at paragraphs 17 to 19. Could I just show you that because I think it is significant, given the way that the case is now put. It is in {C/5/6}, or it is in tab 24 of the core bundle. If I could perhaps just invite you to read paragraphs 17 to 19. (Pause)

THE CHAIR: Is this not —— is this kind of arrangement what is proposed by Which? as the counterfactual?

MR JOWELL: Well, it is ——

THE CHAIR: Or is it not?

MR JOWELL: It does seem to be, that is right. If we go to ——

THE CHAIR: Is this not what you said you could not have because it would not have worked and no one asked for it?

MR JOWELL: Well, the key point is this: it takes two to tango. So it can work if both sides are prepared to agree to the terms, but, as I will come on to with Apple and show you, both sides were not prepared to agree to

reasonable terms.

So for an arbitration —— for there to be an agreed arbitration, you have to agree on the arbitration mechanism. There are —— in most cases it is fair to say that both sides prefer the certainty of an agreement that is buttoned down in advance.

THE CHAIR: But are you saying that if Apple had asked, you would have agreed a mid—point holding royalty and then subjected the remainder, if you wanted a higher royalty, to negotiation and/or litigation and that would have been possible?

MR JOWELL: I do not know and I do not have instructions as to whether we would have agreed this new mechanism —— interim mechanism with —— which has been —— which the English courts have very recently created with Apple, but what I will show you is that there were arbitration —— a FRAND arbitration was proposed to Apple, repeatedly, on the most reasonable terms one can really imagine and I will show you that in due course.

MR TURNER: There were no FRAND arbitration clauses —— FRAND rate arbitration clauses put into any agreements? There were never agreements that were entered into with an arbitration clause for a FRAND rate?

MR JOWELL: Well, there were agreements —— there are agreements with agreements, if you like, to renew on

terms to be arbitrated and that arbitration would take place in the context of the FRAND obligation.

MR TURNER: Can you take us to those at some point?

MR JOWELL: Yes, I can. If you want to see an example of one, I can show you that, but it will have to be, I think, in closed session.

THE CHAIR: Yes, all right.

MR TURNER: In due course.

MR JOWELL: Yes.

So if I could take you next to Mr Rogers' statement, which is in {C/4/1}. This is in the core bundle at tab 23.

THE CHAIR: Is this still your point that there was no insistence that every element of the licence be finalised?

MR JOWELL: Yes. Again, I just want to show you the other bit of evidence, if I may. This is, I think, confidential.

THE CHAIR: All right.

MR JOWELL: If we —— paragraph 43 {C/4/12}, please. Sorry, core bundle, tab 23, paragraph 43.

THE CHAIR: That paragraphs is not marked up as confidential.

MR JOWELL: It is {C/4/12}. So you can see ——

forgive me, paragraph 42.

MR TURNER: Paragraph 42?

MR JOWELL: Yes. It contains confidential —— forgive me {IRC/4/12}.

THE CHAIR: Is this one of those places where this is no longer claimed to be confidentiality because it is Qualcomm's confidentiality?

MR JOWELL: May I take instructions on that? Is this —— is paragraph 42 still confidential? It may be that Apple may have an interest in this.

THE CHAIR: All right.

MR JOWELL: For the moment, we had better keep that.

THE CHAIR: But most of this seems to be an issue for Qualcomm. (Pause)

Anyway ...

MR JOWELL: I am told it can be referred to openly.

THE CHAIR: Yes.

MR JOWELL: So, as you see, in appropriate cases, Qualcomm is prepared to enter into these types of arrangement. Typically both sides prefer to have it resolved in advance.

Now, for your note, if you wish to look at an example of a case, and this I think is confidential, you

can see one if you go to {POF/479/13}, paragraph 3.43(b).
THE CHAIR: This is an example of ——
MR JOWELL: Of Qualcomm being prepared to enter into an agreement ——
THE CHAIR: With whom?
MR JOWELL: I am not sure I am allowed to say that.
MR TURNER: Well, point us to where we can identify what the context is.
MR JOWELL: On the first page of the document {POF/479/1).
THE CHAIR: The first page of the document. Yes, all right.
MR JOWELL: I am told I can say it is Huawei.
THE CHAIR: So if we go to page 13.
MR JOWELL: You see (b) and you can read the terms there. (Pause)
THE CHAIR: All right. So this is an example of precisely what you are saying.
MR JOWELL: Yes.
So that is the chipset supply practice and its limitations, if you like.
What then is said to be the abuse? What is NLNC? You will recall that in the run—up to this trial, on multiple occasions, we have sought to tease out of the Class

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Representative what actually is the precise conduct that is said to constitute the alleged abuse. We say is it (inaudible) many RFIs seeking to elicit? Is it just the CSP, which we admit, or is it the CSP plus something else and, if so, what is the plus and what turns this innocuous and lawful chipset supply policy into the abusive and unlawful NLNC?
We got to a stage where it became very puzzling because no one has ever contested that Qualcomm cannot have a —— maintain both a patent licensing business and a chipset supply business. Indeed, any such suggestion would be rather absurd. The CR accepts, or at least its licensing expert accepts, that end—device licensing is standard practice and, following an earlier amendment, it also accepted that the corollary of end—device licensing, not licensing at the component level, what it calls "refusal to supply", is not independently abusive.
The CR also did not seem to contest the existence of the problem with exhaustion.
So that left it very unclear to us what alternative conduct or business model the CR proposed that Qualcomm could and would have adopted instead of the CSP in order to —— for Qualcomm to comply with competition law.
Now, my learned friend took you back to the pleaded case in the claim form yesterday. If we could just

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go back to that. If we go to paragraph 33 at {A/1/14}. This is where we are introduced to the concept of NLNC. My learned friend showed you the first sentence:
"Pursuant to the NLNC policy, any OEM wishing to purchase chipsets (including LTE chipsets) from Qualcomm must also agree to take a separate licence permitting it to use Qualcomm's associated SEPs on the terms demanded."
If you put a full stop before the words "on the terms demanded", we have admitted that. You see that from paragraph 51 of our defence. That is the chipset supply policy, or one way of framing it, but what we do not accept is that Qualcomm imposes its licences on the terms demanded.
Now, my learned friend now says, well, that does not mean on a take it or leave it basis, but he says there is still room for negotiation. That is actually not very clear from the pleaded case, because if we go on, if we may, to page 15 {A/1/15}, so the next page, and you see 34(d), we see that —— you see the first line:
"The terms on which OEMs take licences for Qualcomm's SEPs pursuant to the NLNC policy are effectively dictated by Qualcomm."
That allegation of effective dictation is repeated, if you go forward to page 34, please {A/1/34}, and you see 68 —— forgive me, over the page, in fact, to the

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next page, 35 {A/1/35}, you see here again:
"This skewed negotiation process [in (d)] enables Qualcomm effectively to dictate the terms of its LTE SEP licences."
So it is twice suggested that Qualcomm effectively dictates terms.
This suggestion actually even still creeps in to the Class Representative's skeleton argument. So you see, for example, in paragraph 5 of their skeleton argument they say:
"If the OEM is not prepared to accept the terms offered by Qualcomm, then Qualcomm will not supply it with chipsets."
Which, again, seems to be a take it or leave it allegation.
Now, the reference that is given actually interestingly to support that in the skeleton, which is {POF/592/6}, does not actually support that proposition at all. Forgive me, page 6 —— no, page 5, forgive me {POF/592/5}. You will see that simply says, in the bottom bullet:
"Qualcomm will sell its baseband/modem chips only to entities that are licensed under Qualcomm's cellular SEPs."
So nothing to suggest that it is take it or leave

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it.

THE CHAIR: If you say that you are selling your chips only to entities that are licensed, as you say, it takes two to tango. The licence has to be agreed by both parties?

MR JOWELL: It does, and the point I simply make is that what one sees —— what you will see in the evidence here is that —— certainly with Apple and Samsung, one is about as far from imposing —— effectively dictating terms as one could possibly imagine because there is —— what one sees are protracted, difficult negotiations with give and take on both sides.

So if the essence, if you like, the hallmark of the abusive conduct is the effective dictation of terms, you just do not find it in the evidence.

So, now, the original claim form also emphasised various —— or emphasises, I should say, various other supposed features of NLNC that go even further than an allegation of effective dictation. They come close to an allegation of extortion by a refusal to supply. If we could go back again to paragraph 33, which is on {A/1/14}, you see it goes on to say:

"If an OEM refuses to agree" ——

MR TURNER: Where are you reading?

MR JOWELL: Paragraph 33, the second sentence:

"If an OEM refuses to agree to such a licence, Qualcomm threatens to cut off or actually cuts off that OEM's supply of chipsets. In some instances, Qualcomm also withholds sample chipsets ..."

And so on.

Another pleaded allegation is that you see it in 68(f)(ii) on page 36 {A/1/36}, is that Qualcomm avoids all technical discussions and refuses to supply patent charts.

MR RIDYARD: Mr Jowell, I am struggling to understand what dictating terms would look like and how you distinguish it from not dictating terms. Because if you take that language you just read out, if an OEM refuses to agree to such a license, Qualcomm would cut off supply.

MR JOWELL: Yes.

MR RIDYARD: If you change that to if, after discussions, the two parties could not agree a licence, then Qualcomm would cut off chipset supply, would it not? Would it?

MR JOWELL: Well, it might or might not. I mean, as you have seen, sometimes it is prepared to say, "Well, if we cannot agree, let us go to an arbitration".

MR RIDYARD: But how do we distinguish, you know, dictating terms from negotiations where it turns out you do not agree on a price?

MR JOWELL: Well, I think —— I suppose it would ——

in a sense, this is not —— it is not my problem, but clearly if you make —— they are alleging —— I mean, it seems to be the natural reading of the claim form is it is effectively that they are saying these are take it or leave it terms. You know, these are our terms. If you do not like it, you just will not get any chips and that is that and there is no negotiation, or very little, and it is a qualitative difference, but what you will see is actually you see a proposal, you see pushback, you see concessions, you see prices changing and so on.

MR RIDYARD: The price is always going to be too high from the point of view of the buyer, is it not, because the buyer would always like to have it lower?

MR JOWELL: I accept that, exactly.

MR RIDYARD: The same with Qualcomm, they would always like to have it higher.

MR JOWELL: Yes, I agree, but I think the only point I am making is that what you do not see is you do not see anything —— what you do see is give and take and you give from Qualcomm in this period with these customers, substantial give as I will show you.

THE CHAIR: Let us suppose —— and I know it is not your case —— Qualcomm did have market power to the extent that Apple and Samsung had to buy. Then what kind of a negotiation is that because ultimately —— I think this is

what Mr Ridyard is getting at —— you have a sort of negotiation but the end result of that from Apple and Samsung's perspective cannot be that they walk away because they need the chipsets? So one might say, well, it is a negotiation and there is a bit of give and take, but ultimately they know that they have to agree to something. Walking away is not the option in that, whereas what you are describing is that there is pushback, there is hard—fought negotiations, but that can only be the case if neither side is compelled to agree, but if one side is compelled to agree because you do not have another option, then that is not an open negotiation.

MR JOWELL: Well, I think there are two answers to that. One is that what one actually sees in this case is that both sides are reliant on each other. There is mutual dependency and these are —— in these two cases, these are, as I will come on to, the most important customers of Qualcomm. So it cannot —— it is a disaster if it stops supplying either of them. So it is not as though, you know, the walkaway does not have enormous repercussions for Qualcomm as well.

The second point I will make is simply the one we have been on already, which is that actually, in default of an agreement, what one does not see is Qualcomm cutting off continuity of supply. One sees continuity of supply by

Qualcomm giving assurances of —— continued assurances of supply and a willingness to enter into arbitration with Apple, which we see, in default.

So coming back to the claim form. One has this medley of other allegations ——

THE CHAIR: So actually what you are saying is even if Qualcomm had market power, it did not exercise that market power because it was giving assurances that it would continue to supply?

MR JOWELL: Yes.

THE CHAIR: But I think your —— that was your second point, but your first point was effectively actually going to the prior question of whether there is market power because you say these were the most important customers so Qualcomm could not stop supplying them.

MR JOWELL: Yes.

THE CHAIR: So you have two responses. The fact that Apple and Samsung did have that negotiation strength, you say, shows that Qualcomm did not have market power vis—à—vis those OEMs and, secondly, you say, even if, contrary to your primary case, if it did have market power, it did not exercise the power in the way that it could have done because it gave assurances of continuity of supply.

MR JOWELL: Yes, I think that is a fair summary, although the first point about market power, there may also

be a more soft—edged —— softer edged version of that, which is that you could potentially still have market power but nevertheless in the case of these particular customers, they are so important that you would not choose to exercise that market power because ——

THE CHAIR: That is your second point.

MR JOWELL: That may be the second point. Well, the second point is that they did not choose to exercise it.

THE CHAIR: Yes.

MR JOWELL: That is manifest.

THE CHAIR: All right.

Can I just suggest: we have been going for some time now. Would this be a good point to just rise for a five—minute break for the transcriber?

MR JOWELL: Certainly.

THE CHAIR: All right. Thank you.

(11.35 am)

(Short Break)

(11.46 am)

MR JOWELL: So faced with this medley of allegations about effectively dictating terms, refusing patent claim charts, cutting off supply or threatening to cut off supply, none of which happened in the claim period with regard to Apple and Samsung, we sought to elicit clarity as to what the actual abuse consisted of. As we ——

as I have mentioned, we do now have, I think, clarity from paragraphs 154 to 155, that it is not suggested that we are obliged to supply unlicensed customers or that we cannot license at all indeed.

The Class Representative has now reframed its central allegation NLNC in a different way. Perhaps in two different ways. So the one way that it has been put is that there was an exchange with the Chair yesterday in page 32 of yesterday's transcript {Day1/32}, in which your Ladyship asked:

"So your case will require you to show that Qualcomm —— that when FRAND litigation was initiated Qualcomm withdrew its supply of chips or it threatened that it would do so if the counterparty, the OEM, had initiated FRAND litigation?"

To which Mr Moser replied:

"Yes."

Now, that way of formulating the abuse is at least concrete and falsifiable and if it is tested against the evidence, at least in the period we are concerned with and with these manufacturers we are concerned with, you will find it to be falsified, because there was no cutting off of supply or threats to cut off supply in relation to the initiation of FRAND litigation. Quite to the contrary. Qualcomm agreed to continuity of supply arrangements with

both Apple and Samsung, despite their litigation.

Perhaps because it knows that, the CR also, however, on other occasions, puts its claim a more amorphous way and it adopts the idea, first floated by Mr Noble, of the licence of an agreement —— licence with an agreement to agree and it calls this very vague suggestion being prepared to agree to license a willing licensee.

Now, just pausing there. I do somewhat object because we are getting very, very far now from the literal wording of "no licence, no chips". It appears that Qualcomm is perfectly entitled to say "no licence, no chips". What Qualcomm is apparently not entitled to say is "seek a FRAND arbitration, no chips", or "willing licensee, no chips". This is actually a different case. Allied to this, the CR also suggested that there is no need for it to prove any actual threats or actual chipsets cessation of supply against a particular OEM. It is enough, it seems, that there is an implicit threat or even just a fear on the part of the OEM customer.

Now, as regards the willing licensee issue, I have already shown you that from Mr Gonell and Mr Rogers' evidence that Qualcomm has in appropriate circumstances been prepared to enter into agreements to arbitrate the terms of its licence agreements. So we do not accept that is something that as a matter of general policy Qualcomm would

never do.

As regards the allegation of an implicit fear or implicit threat, supposedly disabling access to a FRAND determination, this is an allegation that is so ethereal, it is effectively untestable. As Mr Ridyard observed, it would be unobservable. In our submission, abuse cannot properly consist in untested potential conduct or be based on subjective fears of a customer. It must be grounded in some actual, specifiable conduct. In any event, in the present case, as we will see when we get into the facts, when it comes to these particular OEMs, in this particular period, the notion that they —— that whatever an NLNC is meant that they could not litigate is just demonstrably false, because not only could Apple have alleged that Qualcomm's rates were not FRAND, but it actually brought litigation alleging that its rates were not FRAND. As it so happened, Apple was so confident and manifestly undeterred that it went a bit further.

It did not only litigate, it also instructed its contract manufacturers not to pay any royalties in the meantime. So not even this interim halfway house payment, not a bean. Despite all of that, Qualcomm continued loyally to supply Apple with chipsets for over two years. So we do say it really is impossible to say that conduct meant that an OEM was unable to go to court when the OEM did go to

court and did not pay royalties in the meantime.

Even harder, when, as I will come on to show you, that the OEM was offered the option of a FRAND arbitration, an offer which Apple declined to take up.

As for Samsung, in 2016 it positively intervened in court proceedings in Korea in support of the KFTC decision. True, those proceedings were not actually a FRAND determination, but they were all about Qualcomm's licensing practices and, as I will show you, they were an attempt by Samsung to drive down Qualcomm's royalty rates.

So that is NLNC.

What about the other aspects of the claim, the various buttressing allegations? Well, the principal one is what it calls "a refusal to licence". Now, the claim form describes end—device licensing as the corollary of refusal to supply. You see that in paragraph 34(b) of the claim form, which is in {A/1/14}.

Now, it is fair to say, I think, that's those two practices are two sides of the same coin, but it would be perhaps more accurate to put it other way round, that's what the CR calls refusal to licence is the corollary of end—device licensing. If a patent holder licences exhaustively only at the end—device level, then, by definition, it does not license exhaustively at the component level, but it is wrong to characterise it as

a refusal, because end—device licensing actually has meant that Qualcomm has not sought to license those same patents to chipset suppliers or to historically collect any royalties from chipset suppliers.

So the chipset suppliers have been in the fortunate position of having had access to the standardised technology but without paying any royalties to Qualcomm. So, to characterise it as a refusal is inapposite and a rather better moniker might be that that the Ninth Circuit Court of Appeals gave in the United States, which they describe it as "no licence, no problem".

Now, importantly, the CR has withdrawn its allegation that refusal to license is an independent abuse. You will see the references in footnote 8 of our skeleton argument. The licensing experts have conceded that end—device licensing is industry standard. You will see the references in paragraph 2 of our skeleton argument. So it is very hard to see what possible significance RTL really could have here. Mr Williams averted to the possibility of multi—level licensing in the counterfactual. Mr Saunders, if needs be, may address you on that possibility in due course, which the experts suggest introduces all sorts of complications.

As for the exclusionary case, that has really disappeared to a vanishing point now. It is so half—hearted

that we would really suggest that neither side waste any further time on it.

THE CHAIR: Can I ask you to waste a few more minutes on it now?

MR JOWELL: Yes.

THE CHAIR: The exclusionary case, I think that is the point about the non—assert agreements. Can you explain what your position is on that?

MR JOWELL: On the non—assert arrangements, effectively the position with regard to those is really that, as I say, Qualcomm has not sought to block access to its standardised technology to anyone, including chipset suppliers. It has not initiated —— historically initiated litigation asserting its cellular SEPs against chipset suppliers. The particular licence example that is given with MediaTek, the restriction, if it can be called that, was removed in 2013 and the MediaTek licence terminated in 2016.

THE CHAIR: What was the —— can you explain what was the restriction there?

MR JOWELL: Well, essentially it was not really a restriction at all; it was purely that, in the case of certain of these contractual provisions, that they had agreed, they had agreed as a condition of the non—assert not —— that the chipset supplier was —— would lose the

benefit of the non—assert if they sold to an unlicensed customer, but many of the chipset suppliers just did not take out these —— did not have any contractual arrangements with Qualcomm. As I have said, Qualcomm did not in fact demand any licence fees from these chipset suppliers and the insertion of this particular provision with MediaTek, as I said, was removed before the relevant period commenced.

THE CHAIR: So you say that other chipset suppliers, other than MediaTek, did not agree non—asserts with that condition?

MR JOWELL: I do not know. I am not sure that that is true of all of them, but a number of them did not. A number of the significant ones did not have contractual arrangements. They just took the benefit of the standardised technology.

THE CHAIR: The MediaTek restriction was removed in 2013?

MR JOWELL: 2013, yes.

THE CHAIR: So it was just an unconditional non—assert after that?

MR JOWELL: It was —— yes, a contractual arrangement. It certainly did not have that —— it did not have that condition, certainly.

THE CHAIR: Because your point that you have just made about RTL and device licensing is that, in effect, you

were not —— this was not something that was imposed on the chipset supplier but, rather, they benefited from Qualcomm foregoing the royalty that it could otherwise have insisted upon. So what you are saying is, "And, by the way, when Qualcomm did insist on a quid pro quo of not supply to unlicensed OEMs", you are saying that that was removed in 2013?

MR JOWELL: It was, as far as MediaTek was concerned, certainly.

THE CHAIR: Were there any others who were restricted beyond that date?

MR JOWELL: I would need to get instructions as to precisely on that, but I certainly understand that Intel and —— I will be corrected if I am wrong, but I believe that Intel and Samsung did not have any contractual arrangements in the relevant period.

THE CHAIR: Okay. It is also something for the Class Representative to address in the short summary, that's part of the specific question that I have asked them to cover, because at the moment it seems to be unclear what is said in their paragraph 15.

MR JOWELL: Yes.

THE CHAIR: All right. Thank you.

MR JOWELL: So we say really there is no —— I mean, there has been —— in terms of the exclusionary case

more generally, there has just been no attempt to show that chipset suppliers were excluded by Qualcomm's conduct in this period. Actually what you see is considerable growth of some of the —— a number of these rival chipset suppliers, like MediaTek, in this period. Mr Bailey will, no doubt, show you some of that.

Now, before I just finally come on to the —— dive into the actual documents, which I have probably spent too long not doing that, but I would actually like, if I may, just to give you some overview of why it is that there was simply no possibility of any leverage here as against Apple and Samsung.

So, first of all, these are both self—evidently huge companies with incomparable buyer power in the industry. They were uniquely powerful, but it is not merely their general economic and commercial muscle. Qualcomm depends on each of them for their patronage because they are its two largest customers. Samsung's buyer power is particularly strong for two reasons. First, it made its own chipsets for many of its own mobile phones which gave it an immediate in—house alternative and, secondly, as Mr Katouzian observes in his witness statement, paragraph 27, it was —— Samsung was and remains a foundry for Qualcomm chipsets. So Qualcomm was doubly dependent on it, both as its major customer and also it was one of its

manufacturers.

So for Qualcomm to have voluntarily cut off chipset supply to either of these key customers would have been an act of monumental commercial self—harm and was therefore never a realistic alternative.

Mr Gonell and Mr Rogers both explain in their statements the importance of Apple and Samsung as customers and their buyer power in the period.

THE CHAIR: This has really strayed into Mr Bailey's submissions, because you are actually going back to ——

MR JOWELL: It is to a degree, but it is also something we will see when we will come into the factual —— you will see reflected in the factual documents.

Now, what we see in the documents is, in many cases, Apple and Samsung using Qualcomm's dependence on them as major customers of Qualcomm's chipsets as a means to try and get reductions of royalty rates. So, in other words, quite the reverse of what the CR alleges, which is that they allege, well, the dependency on the chipsets by the OEMs allows Qualcomm to increase rates. Actually it is —— if one looks at the underlying documents, one sees it is really the reverse.

Secondly, because of the particular chronology and circumstances of their respective licensing arrangements,

there was actually no opportunity for the chipset supply policy to have any leveraging effect as regards these particular OEMs. Now, the reasons for that are slightly different —— similar but slightly different in relation to Apple and Samsung.

Now, in the case of Apple, as I said it did not obtain a direct licence until 2019. It had the licences of the contract manufacturers. Because of that, there is actually no realistic threat of chipset supply disruption because it could fall back on the safety net of the existing licences of its contract manufacturers. Put another way, Apple could seek a direct licence from Qualcomm and, if it did not like the terms of that direct licence, then it had the right to go for a FRAND determination. At worst, seeking a FRAND determination would have meant Apple would temporarily have had to pay the full royalty rates of its CMs without the benefit of reduced rates, but temporarily paying higher rates is scarcely a problem for a company with Apple's financial muscle.

MR RIDYARD: Does that fallback work for all future technologies?

MR JOWELL: Not necessarily for all future technologies, I accept that, except, as I will come on to, there was the benefit of the possibility of a FRAND arbitration, which was offered, including future

technologies. I will show you, but I will need to take —— I do not have in my mind the ambit of the contract manufacturers' licences so I may need to come back to you on that.

THE CHAIR: You say that at the worst a FRAND determination ——

MR JOWELL: I am told the CM's licences did cover future technologies.

MR RIDYARD: Okay. So even when the new generation comes along, it was an automatic inclusion?

MR JOWELL: So I am instructed, yes.

THE CHAIR: You were saying that at the worst the FRAND determination would have meant that Apple would temporarily have had to pay full royalty rates. What do mean by that? Do you not accept this kind of thought experiment of a mid—point as per Panasonic v Xiaomi?

MR JOWELL: Well, we do not accept that, but the —— no, the point is —— the point I am making is this: as we will come on to, there is the price that the contract manufacturers pay to Qualcomm under their licences and then what happened was Apple negotiated special rebates, effectively, whereby it would pay less. So what I am saying is that in the worst possible scenario, and even this probably would not actually transpire, is it would not get benefit of those rebates while it was ——

THE CHAIR: I see.

MR JOWELL: But what Qualcomm could not do is cut off supply to the chipset manufacturers because the chipsets, as longs as they kept paying royalties, is because the chipset manufacturers had their own contract. But what is so ironic about this is of course that in the actuality, what Apple did was it instructed its chipset manufacturers not even to pay those royalties and what happens? No, Qualcomm keeps supplying.

So it is really an extraordinary allegation to say that there is some kind of fear of FRAND.

MR TURNER: Is there any —— remind me, is there any evidence of the circumstances around that? The correspondence with the contract manufacturers and the basis i.e the basis on which Apple told them to stop paying royalties or Qualcomm's response to that.

MR JOWELL: We will see some documents and they just say, "Let us just do it" because what they do —— first of all, as you will see, Apple are very —— it is very clever. First of all, they negotiate these —— they put in place a belt and braces, so they negotiate these really long security of supply arrangements and —— with Qualcomm for existing chipset supply. Then they get Intel as an alternative supplier and then stop paying royalties. So it is a very tough strategy that they adopted. It is about

as far as fear of a FRAND determination as you can get.

As for Samsung, they did have a direct licence, but the licence in its original format was negotiated at a time in 1993, well before Qualcomm had sold any chipsets at all, and over a decade before Qualcomm's alleged to be dominant in any chipset market. I just note for the record that at paragraph 146 of the Class Representative's skeleton argument, it recognises the obvious point that on its theory a non—dominant company cannot extract higher royalties via NLNC. So it follows that the 1993 licence was free of any leveraging and that is the licence that remains in force, but, and this is an important but, it was quite wrong for Mr Moser, I think, to suggest yesterday that the royalty rate under that licence remained applicable throughout the period. It did not. As I will show you, there was significant subsequent amendments to that licence in 2009, in 2018 and 2019.

Now, if the Class Representative's case was right, you would expect royalty rates to be going up, but they do not go up, they go down, and none of them show any signs at all of being imposed on the terms demanded by Qualcomm. They are freely and vigorously negotiated over long periods in the context of supply assurances given by Qualcomm. The terms of each are successively more and more favourable to Samsung.

MR TURNER: Is there anywhere that is set out clearly how the royalty rates changed over time?

MR JOWELL: We will try to —— we can try to provide that, yes. I mean, the actual —— the way they come about is quite complex. We can try to give ——

MR TURNER: For both Apple and Samsung.

MR JOWELL: Yes. Mr Saunders will come on to that.

So, importantly, the final point about Samsung is it had the benefit of a most favoured nation clause. So that's ensured that it was offered the best royalty rates and terms that were offered to other OEMs. So, in that way, Samsung could ride on the coattails of any other OEM that was not subject to any actual or implicit threat of chipset disruption and there certainly were such other OEMs that were not dependent on the purchase of chipsets from Qualcomm. Some of them did not buy any Qualcomm chipsets.

So, against that background, can I start the dive into the chronology. We have used —— you will see probably in a bit more detail than I can go through in our skeleton argument, we have divided it up between agreements on royalties, which starts at paragraph 34, and then agreements on chipset supply and then the litigation, the settlement and so on in the successive paragraphs. What I will try to do is just to put it all together and take you through it

all chronologically.

THE CHAIR: You can assume that we have read your skeleton argument.

MR JOWELL: I am grateful. I will just show the documents because you probably should see them.

Could I give you an overview of whose chips were in the iPhones from time to time. If we go to {C/3/13}, please. Could we just focus on the diagram at the top, please, so we can actually see it. You will see the first iPhone was sold in ——

MR TURNER: Which document is this?

MR JOWELL: This is one of the witness statements. I think it sets it out at a convenient place. We can see some of this in the expert evidence as well.

You see the first iPhone was sold in mid—2007 and it was initially a 2G GSM phone. The first 3G iPhone, aptly named "3G", was launched about a year later in 2008. Initially, the type of 3G chipsets that were used were not 3G CDMA but, rather, 3G—UMTS. The CR does not allege that Qualcomm occupied a dominant position in the supply of either 2G GSM or 3G UMTS chipsets.

Further to that, the chipsets in those additional phones in the 2G and 3G were supplied by Infineon, a large German semi—conductor manufacturer, the wireless division of which was later purchased by Intel in January 2011. Those

initial iPhones, as all of them, were manufactured by contract manufacturers, such as Compal, Pegatron, and so on. They had their own direct licences. You can see an example of, say, the Compal one which was entered into in 2000 {POF/15}. I do not plan to go to it. So those were the underlying arrangements.

At that time, when those original agreements with the contract manufacturers were entered into in 2000 and on other occasions, there is no allegation that Qualcomm occupied a dominant position. So they were necessarily free at that point of any leveraging.

Now, the financial terms on which Apple ultimately paid royalties, as I indicated a moment ago, were not fixed by those agreements between Qualcomm and the contract manufacturers. That is because about six months before Apple started selling its first iPhone, Apple entered into a direct agreement with Qualcomm called the "Marketing Incentive Agreement" or MIA, which was signed in January 2007. It is just worth bearing in mind at this point Qualcomm is not supplying or even about to supply chipsets to Apple. So Apple has not yet made its first phone and Qualcomm is not supplying the chipsets for those first —— for the phones for the first three and a half years. So it is way before any kind of dependency could arise.

Now, you will see the MIA at {POF/115}. You will see, if I can read you the recitals:

"Whereas Qualcomm has developed and commercialised certain Code Division Multiple Access (CDMA) technology for use in terrestrial wireless communications systems; Whereas Apple has developed certain proprietary audio—visual distribution, encoding, presentation and other technology; Whereas and Qualcomm desires to provide certain incentives to Apple for production or promotion of certain Apple phones."

So it is ostensibly, at least designed to incentivise Apple to use certain forms of CDMA technology. The agreement is to last until December 2012.

Now, the key clause is clause 5, which is on page 2, please {POF/115/2}. I will not read it out, but, in summary, what it means is that Apple receives a marketing incentive equal to the excess of the amount that the licensee pays over $7.50 per phone. So, in other words, economically the effect is that insofar as any of Apple's contract manufacturers pay more than $7.50 a phone in royalties to Qualcomm, Qualcomm rebates the difference to Apple.

Now, if we go over to page 3 {POF/115/3}, you see clause 8. If I could just read that to you, "Qualcomm

chipsets" it says:

"Apple agrees that it will consider information that Qualcomm makes available to Apple with respect to future Qualcomm chipsets so that Apple may reasonably determine whether Qualcomm's offerings will be suitable for use in Apple Phones. Qualcomm and Apple executives will meet at least semi—annually to exchange such information and Apple will give Qualcomm an opportunity to bid before awarding such chipsets to any other supplier."

Now, that clause gives a rather clear indication of who at that time held the whip hand so far as chipset supply was concerned. Qualcomm was not supplying Apple with its chipsets for the early iPhones and it clearly wanted to do so.

Unsurprisingly, the contemporaneous evidence shows that Apple did not consider at the time that it was being exploited in any way, shape or form by this deal, quite contrary. It thought it had a great deal. You can see that if we go to {POF/111}, please. If we could make this a little larger. It is an email at the bottom, you will see, from the late great Steve Jobs and you see he says —— Steve Jobs wrote:

"I spoke with Paul Jacobs (CEO) and Steve Altman, (President) of Qualcomm this afternoon.

"The good part: They are willing to rebate us for

any payments above $7.50 per phone that we make to one of our licensed ODMs. They have met our request.

"The not—so—good part: They want this to expire at the end of 2010 and to limit it to [certain] phones. They see this as an... 'incentive' to get us into their camp (regular royalty rate ....

"I will try to push the expiration date to the end of 2012, which would be 5 years from the first shipment of our 3G phone in early 2008, and get them to eliminate the cap on the number of phones. If they would agree to this, I think we should take it.

"Agree?"

The answer:

"Great news."

At the top, you see:

"I agree. We should take it with the extension to 2012 and the elimination of the cap."

That is what they did, as you can see from the term of the MIA. They got what they wanted, they got extension and they got the elimination of the cap on numbers.

So I think it really all speaks for itself.

As I have said, Apple did not use Qualcomm chips initially. It did not use them for its early phones coming out in early 2010, but Qualcomm finally did, after three and

a half years, get its foot in the door for chipset supplied to Apple. If we go to, please, {POF/210}. You see this is the Strategic Terms Agreement that was entered into in December 2009, just in advance of Apple first buying material amounts of Qualcomm chipsets. It established the basic supply terms for the sale of any Qualcomm CDMA and UMTS chipsets and software to Apple. It does not mandate supply; it just creates the framework. As you can see from the recitals, you will see the third recital:

"Whereas Qualcomm desires to provide certain incentives to Apple for production or promotion of certain products which incorporate such components ..."

If we could go, please, to page 4 {POF/210/4}, and if we can focus in on clause 4.5, which is not confidential, the large —— this is a real mouthful, this clause, 4.5, and —— but it is a continuity of supply provision. In brief summary, it provides that if —— it provides that if Qualcomm was entitled to exercise a general right of termination in a licence with a contract manufacturer, then instead of simply terminating that agreement with the contract manufacturer in its entirety, Qualcomm would be obliged to instead offer to enter into negotiations to amend the agreement, such that the contract manufacturer could continue to manufacture Apple's products without interruption, provided they paid their royalties.

So this is another aspect to this, which is that you see that Qualcomm constantly ensures that it has these contractual provisions that effectively ensure continuity of supply and negative any ability to exercise any market power, if there was any.

Now, not long after this agreement, Apple then dual sourced chipsets for the iPhone 4, the UMTS version that was released in 2010, and it dual sourced from Qualcomm and Infineon. It then used only Qualcomm chipsets for the CDMA iPhone which was released in February 2011. Then for the iPhone 4S, which I vaguely remember, released in October 2011.

Then if we can go forward to {POF/257}, if we can just expand this a little. I show you this really because it is an email that has gone down in Qualcomm lore. As you can see, Qualcomm was asked by Apple to meet what it called "a man on the moon challenge", which was to accelerate the development of an LTE modem by about a year to support the launch of iPhone 5 which was the first LTE—enabled iPhone that Apple released. Mr Katouzian explains in his evidence —— you will see it in his second statement in particular —— at 6(c), paragraph 6(c) —— Qualcomm worked tirelessly to meet various Apple deadlines. It invested a huge amount of resource in this, even though it had no firm commitment from Apple that it would ultimately buy any of the chipsets from

Qualcomm.

Consistent with that then, in late September 2012, Apple announces the iPhone 5, single sourced from Qualcomm, whilst continuing to source chipsets for its legacy devices from Intel.

Now, the MIA was due to expire in December 2012 and it —— what happens next is a negotiated replacement for that agreement with two agreements that are called the FATA and the BCPLA, which were both executed in February 2013 and effective from 1 January 2013. So by this stage, yes, Apple is buying Qualcomm chipsets, but I think it is pretty clear from the terms of these agreements and arrangements that there is no meaningful chipset dependency at this stage or certainly none that translates into only ability to achieve higher royalties.

Now, if you will permit me, I think I will have to go into closed session from now. The only persons present should be members of the 1782 outer confidentiality ring. So that does include certain in—house counsel.

THE CHAIR: Yes. Does the transcriber need us to rise for a few minutes until that is done? You are going to go into closed session until lunchtime?

MR JOWELL: Yes.

THE CHAIR: We will do that. Can someone please notify us when you are ready.

(12.26 pm)

(Short Break)

(12.30 pm)

In Private

In Open Court

(2.38 pm)

THE CHAIR: I am not sure if the live feed has been interrupted for the closed session, but it should then be back on.

MR JOWELL: So if I may then come on to make a few remarks about the economic evidence and about the law. Obviously I will address this in more detail in closing.

Starting with the economics. Mr Noble, as you have seen, relies here on a theoretical bargaining model. It is a model that relies upon a whole number of assumptions which will need to be explored in evidence. Self—evidently, it can only be as reliable as those assumptions, but it is important, in our submission, also to bear in mind a more general point and that is that insofar as the model is seeking to be useful, it must at least approximate to the relevant reality in key respects. It is not enough to say, in our submission, this is a model of how NLNC could hypothetically in some circumstances, perhaps even in general circumstances, bring about an anticompetitive outcome of the elevation of royalties; it is surely

necessary also to ask where one is dealing with a specific claim, like the present one, on specific facts, with specific counterparties, to ask: yes, but could it in these particular circumstances, with these particular counterparties, give rise to the —— and give rise to the sort of effect that is being hypothesised?

The core theory here is that the —— on which the model is based is that the CSP disables the purchaser by reason of the fear of chipset supply disruption, if they terminate the licence, from having access to the outside option of a resort to FRAND litigation or arbitration, but how is that remotely plausible in the circumstances of Apple? I mean, Apple had no direct license. It could rely on its CM's licences as a fallback. It actually embarked in litigation on the FRAND issue and it was repeatedly offered a FRAND arbitration which it declined. It is not simply that the assumptions of the model are wrong; it is that just the model is not applicable at all in these kind of circumstances. What one sees, as with many models when they are just demonstrably falsified, is you see an ad hoc adjustment to then try and repair it and it is said: well, it may well be that it did not apply in 2016 to 2019, but then in 2019 the model suddenly comes back to life to be applicable in the —— by reason of the advent of 5G, but, again, that just is simply not plausible. It does not fit

the facts.

The second point I would make about a theoretical model of this nature is that surely one needs to have some way of empirically testing such a model. There needs to be some kind of a yardstick by which it is measured and yet we have no empirical testing here by Mr Noble at all. The closest we have are reliance on selected snippets really from documents and snippets of hearsay evidence, but no proper empirical testing. The only empirical testing we have in this case is that devised by Dr Padilla which Mr Saunders will come on to.

The third point I should say something about the fallback argument of Mr Noble and the CR that the courts or arbitrators somehow cannot be relied upon to reach a fair FRAND determination because the comparators themselves may be tainted. This is what they call the "poisoned well theory".

It has two flaws. First —— I am sure it has many more, but let me describe two of them. The first is it is so vague as to be unprovable or unfalsifiable. No specific contaminated comparators are even identified so we cannot even say, well, you say that is contaminated but it was not, because it is just a general wave of your hand kind of argument. Secondly, it is also just not plausible, because Apple and Samsung were perfectly capable in any FRAND

determination of alleging that other comparators were potentially contaminated and should not be used on a precautionary basis, rather like in cartel cases one often says, well, the immediate post period or the immediate pre—period should not be used because it could still be contaminated by the cartel either having had later effects or begun earlier.

So they did not —— they could easily have circumvented that problem and there clearly are non—contaminated comparators that can be used, such as, for example, the Nokia agreement in 2008 or the —— or indeed the agreements entered into before Qualcomm became dominant.

Now, of course Apple and Samsung might not have liked those comparators and what they tell you, but they are still uncontaminated comparators and of course there are other kinds of comparators that they could go to, like the licence royalties payable on other portfolios.

The third point on the economic side that I would like to just raise to your attention is the importance of the nexus between dominance and abuse. Now, Mr Noble takes the position that it is necessary to distinguish different markets based on different standards, in particular, markets for 3G CDMA, 4G LTE—CDMA and 5G LTE. He recognises that such markets existed for different time periods, albeit, as Mr Bailey will come on to, there is a lot of —— a

considerable amount of lack of clarity as to what those periods are actually alleged to be, but, importantly, it is not enough to say, again with a wave of the hand: well, there is some sort of dominance on one or other of these three markets at all relevant times in the period. That analysis does not wash and it is important not to allow it to wash. That is for three reasons.

First of all, as I mentioned previously, the Tribunal has ruled that insofar as there are claims based on 3G CDMA dominance, those claims for damages are time—barred, save for the period after 26 June 2017, the ruling is in the bundle at {H/41}. So it is important to consider whether any part of the claim for the early claim period ——

THE CHAIR: But they are time—barred except for the period?

MR JOWELL: From 26 June 2017. That was your ruling at {H/41} when the amendment was introduced and upheld by the Court of Appeal or permission not granted.

So if any part of the claim for the early period is based on 3G CDMA dominance, then it can only begin to run from that period of time.

This is particularly important as regards Samsung because, as we have seen, the royalty rate payable in the early part of the claim period was set by the 2009 amendment. At that time, there was no LTE dominance. The

only dominance that is alleged at that time is 3G CDMA.

If I can just show you that. It is in the claim form at {IRA/1/38}.

THE CHAIR: Your point is, in short, in relation to Samsung, the claim could only be a leveraging of CDMA dominance because the rate was set in 2009?

MR JOWELL: Correct, for the period in time at least up to the 2018 amendment.

THE CHAIR: Yes.

MR JOWELL: So they would be left for the early period up to 2018, there would be a six—month period left for CDMA.

If you see —— if one sees here paragraph 68(i) at the top, if you can read —— I do not know quite why it is confidential, but you see:

"In April 2019 Qualcomm entered into an agreement ..."

The lower (i):

"Further alternatively, the amendment to Qualcomm's 1993 licence with Samsung in 2009 established ..."

Then it gives you the royalty rate.

Then:

"At the time of that amendment Which? understands that ..."

Then if you could read to yourself the next sentence. (Pause)

Then it says:

"Qualcomm leveraged its dominant position in respect of 3G CDMA chipsets to impose higher royalties for LTE SEPs."

So it is clear that the only allegation for 2009 could be CDMA.

Of course that may be —— maybe I am attributing too much Machiavellian thought to them —— but it may be of course that is why they preferred to focus on what happened in 2013 where, rather irrelevantly, Samsung tried to re—open negotiations, but that was not —— what happened in 2013 was not contractually operative.

So that is one reason why it is important to look at these different markets separately.

Another reason is that it is important to know when one of these alleged dominant chipset markets begins and when each of them ends because, as I said, it is only the dominance that gives rise to the ability to leverage and only, of course, give rise to a cause of action. Again, this becomes important with regard to Samsung because the 2018 Samsung amendment was negotiated at a point of time, even I think on Mr Noble's approach, after LTE dominance had ended but before, we would say, at least, any

5G dominance could have begun; in other words, it is negotiated in a dominance black hole or in the absence of dominance.

If that is right, of course, then there is then no claim in relation to that either.

So the claim for Samsung then becomes limited to that six—month period, even theoretically.

The final reason why precision is required here is that it is not plausible, in our submission, to suggest that one could have leveraging from chipset supplied for devices on one standard to elevated royalties paid on devices related to a different standard. We explain this point in our skeleton argument at paragraphs 12.5 and 102. Very briefly, as I think I mentioned earlier, Qualcomm's supply practice only requires the OEM have a licence for the particular products it wishes to buy from Qualcomm. It does not have to have a licence in place for products it does not buy from Qualcomm.

So an OEM could agree to a licence covering certain devices, like 5G multi—mode devices but not agree a licence covering others, like 4G multi—mode. That meant that if Apple wanted to buy or needed to buy desperately, according to the CR's case, Qualcomm's 5G chipsets, it had to have a licence that covered 5G phones in respect of 5G standards and also in respect of any previous standards that

it was backward compatible with. So it had to have a licence, if you like, for 5G multi—mode devices, but if Apple was also selling LTE—UMTS phones, as it was, and that is what the claim is on, it did not, at least under the chipset supply policy, need at the same time to enter into a licence in respect of those phones for the LTE—UMTS standards, unless of course it wanted to buy Qualcomm's LTE—UMTS chipsets.

So the output is that Apple, if it genuinely felt that it was dependent on 5G chipsets and that was inflating its royalties for LTE—UMTS on LTE—UMTS phones, it could simply have restricted the scope of the licence it had entered into with Qualcomm to a licence in respect of 5G multi—mode phones and left itself unlicensed for LTE—UMTS phones and then sought a —— if it did like the terms of —— for LTE—UMTS, it could then have sought a FRAND determination.

So, again, in short, this just is not —— this is not a plausible thesis here about chipset leveraging from one standard to another, because it can be circumvented by the OEM appropriately structuring its licence arrangements.

Finally, if may, I come to the law, and I will be very brief. There are going to be, of course, many legal issues, as you expect, that I will not be dealing with today but will deal with in closing, such as extraterritoriality.

Nothing should be read into that at all.

THE CHAIR: Yes. On extraterritoriality are you really pursuing this point?

MR JOWELL: Yes, we are. Yes, we are, because this is an example —— if you think about what we are doing here, we are debating what happened between an American company and another American company in America and an American company and a Korean company in America and Korea.

THE CHAIR: We are talking about the way it feeds through in to payments for phones sold in this country.

MR JOWELL: In this country. But that in itself is not the test. The test is there must be a direct effect. There must be —— there must be some immediacy and some directness in the effect, otherwise an antitrust violation anywhere in the world, however indirectly it may trickle through into the prices of goods sold here, would give rise to an antitrust claim. That is not the law, as we understand it.

THE CHAIR: Is the Tail End Charlie in your skeleton argument.

MR JOWELL: It is, but I do not back away from it.

THE CHAIR: I know you have spent so much money on this litigation that you want to take every conceivable point, but that does not mean that it is right to do so and to put everyone to the expense of addressing that point.

Please will you take that away.

MR JOWELL: We will, but of course I should say this: the Tribunal does not —— the Tribunal may feel that it is able to dispose of this case without necessarily addressing every single point, as Tribunals often do.

THE CHAIR: Yes. That does not mean that you need to advance every conceivable point, even if it is hopeless.

MR JOWELL: We will take it on but we respectfully submit that it is not a hopeless point for the reasons I have just outlined.

What we do say about the law is this: first of all, we respectfully submit that this is not a case in which the Tribunal should accede to the claimant's invitation to invent a new form of sui generis abuse in law. The chipsets supply practice of not supplying to unlicensed customers is in itself not abusive conduct. That, as I have said, based upon the claimant's skeleton argument, appears to be common ground. If there is an abuse here, it must be found in some other conduct. So, for example, if Qualcomm charged excessive and unfair royalties, that might be an abuse in the form of excessive pricing or it might be a violation of FRAND or it might be both. Similarly, if Qualcomm deliberately cut off supply to an existing customer that was willing to enter into a licence but that sought a FRAND determination or a FRAND arbitration, then that conduct of

cutting off supply might, depending on the circumstances, also amount to an abuse, but either of those forms of conduct would be caught by the existing categories of abuse, such as excessive pricing in the former case or refusal to supply an existing customer without objective justification in the other. Those established forms of abuse, certainly together with the FRAND commitment itself, are ample to protect competition in a competitive structure. There is no need, in our submission, to create some novel form of abuse consisting of NLNCing, whatever that might mean. It is simply unnecessary.

The second point I would respectfully make on the law is that labelling the chipset supply policy a form of leveraging just does not advance matters. The General Court in the shopping case, which I will show you in closing, it is Google Shopping, it is in the authority bundle at {AB3/28} and we cite the passage in our skeleton argument at footnote 13, it makes the point that leveraging is a generic term for conduct that may or may not be abusive. It is not an abuse —— form of abuse in itself. It is an umbrella term for a collection of specific abuses, such as tying, bundling and, most recently, self—preferencing.

All of those specific forms of abuse are typically at least exclusionary, not exploitative, and they also all have their own specific conditions for their application.

So there must also be special circumstances if the dominance and the abuse are in separate markets.

In the case of, for example, tying and bundling abuses, the conditions require that there must be evidence of foreclosure of effective competition. It is not —— tying is not an abuse in and of itself. It has certain requirements and those include foreclosure.

Now, simply conditioning the existence of the supply of a product on the existence of a prior licence, which is what the chipset supply policy is, is clearly not a form of abuse in itself, regardless of whether there is dominance in the licence or dominance in the supply of the product in question. Calling it "leveraging", I am afraid, does not turn it into an abuse.

So if one were to have some form of new form of leveraging, there would have to be a very specific identifiable conduct that —— with specific requirements that are identified. What we have instead is really the claimants making it up as they go along, seeking to pick at strands of novel British jurisprudence on FRAND to try and create some kind of hypothetical abuse here. We respectfully suggest that you should not accede to that. The existing forms of abuse, familiar ones, amply —— are ample there to capture any mischief.

The third point we would make is that if you were

to create some new form of abuse, it must require something more than the possibility of an effect. Even in the case of exclusionary abuses, there must be a capability, which has been —— and by "capability", we really mean likelihood —— of an effect. The effect cannot be purely hypothetical.

Now, in the case of an exploitative abuse, like this, we would say, well, if you are saying there has been exploitation, you have to show actual exploitation. You cannot have a mere potential for exploitation and that, in a sense, one sees that from the Humber Oil case where the judgment makes clear that simply trying it on in negotiations is not enough. You actually have to impose the price.

THE CHAIR: So you say for an exploitative abuse there has to be ——

MR JOWELL: Actual exploitation, but on any conceivable view you surely have to show that there has to be a likelihood of actual exploitation.

If the hypothesised effect here operates via the disabling of access to FRAND litigation or FRAND arbitration, leading to supposed inflated royalty rates, then the claimant must show, with cogent empirical evidence, that such a causal mechanism was positively likely to have taken place in the relevant circumstances. On the facts of this case, given the counterparties, given the type of

royalties and phones and given the specific time period and what was going on in that time period, that is simply something that the claimant manifestly cannot do and has not done.

With that, I will hand over, if may I, to Mr Saunders.

THE CHAIR: Is now an appropriate time for a short break? It depends how long you are going to be?

MR SAUNDERS: My Lady, yes, I think so. The only thing I would just flag, if I may, is I am going to ask you to sit in external eyes—only configuration, which is the very highest tier of confidentiality while we look at the leveraging report.

THE CHAIR: We should have a break so that we can do.

MR BAILEY: We can have a break and then configure, but just to telegraph to everybody that we will switch into that very soon.

THE CHAIR: Yes. I hope that Mr Bailey is not going to similarly be spending any time in closed session or how are we going to manage that because we have gone in and out already once today.

MR SAUNDERS: Yes. I think the tier that I need to be in is not the same tier that Mr Bailey needs to be in so I can drop down but I think if it is —— I know ——

THE CHAIR: What about Mr Bailey?
MR BAILEY: Madam, I have sought to divide my submissions into two halves, the first half being in open court and the second half being in private, particularly so that I can take you through documents and there are different levels of confidentiality. Some of them are the highest level because they are 1782 materials.
THE CHAIR: Could we do the second half tomorrow or how long is each half?
MR BAILEY: So I would imagine the second half will be slightly longer because it is going through documents but I can ——
THE CHAIR: Or alternatively we could do the second half now. Is that possible?
MR BAILEY: That would mean just taking essentially dominance before market definition, but insofar as we are happy to do topics out of order ——
THE CHAIR: So Mr Saunders, are you going to do the whole of your submissions ——
MR SAUNDERS: No, so I need to address you on FRAND which can happen in open court and where we are on the state of the evidence which can happen in open court. It is just when we go into the leveraging report with the numbers in it, then that has to be in external eyes only.
THE CHAIR: How about you do the FRAND bit now.

How long do you need on that?
MR SAUNDERS: Maybe ten minutes, 15 minutes.
THE CHAIR: Okay. So why do you not do the FRAND bit now. We will carry on as we are, then we will rise, allow the reconfiguration to take a place. We will then go into closed session. You can then do the remainder of your submissions in closed session. That is a super confidentiality ring, as I understand it.
MR SAUNDERS: Yes.
THE CHAIR: All right. Then after that we will then go straight into Mr Bailey's submissions and I think we should then start your submissions on the —— in confidential session. If you need to then spill over into tomorrow, then so be it, but let us see if we can get through most of this today and then —— so that we do not have to then rise again today to go back into open session and get realtime switched on because it is now on, I think.
MR BAILEY: I am very grateful and I will operate in that way. If it is possible, you did indicate that in so far as up to no more than a maximum of half an hour tomorrow morning, if need be, in which case I would hope to actually deal with that all in open court.
THE CHAIR: Yes, all right. Let us do that. What is the indication for the remainder of time tomorrow? Are we going to still be comfortably within a day, assuming ——

MR SAUNDERS: We will make that work.
THE CHAIR: Yes, all right. If you were to tell me that it is really tight, we can sit a bit early tomorrow, but I do not want to get everyone back early.
MR SAUNDERS: I think we are okay. If I could come back on that, depending on how ——
THE CHAIR: Let us do the FRAND bit now.

Opening submissions by MR SAUNDERS

MR SAUNDERS: Just to give you a road map on what I was going to deal with. I am going to deal with leveraging and the Padilla report on that. Some aspects of what Class Representative calls the "FRAND context" and, in particular, this new hypothetical interim licence with FRAND to be determined some time down the track.
The starting point is we say that some considerable care is needed with that section of my learned friend's skeleton argument entitled, "The FRAND context", so that is paragraphs 116 to 142 of their skeleton, and with a number of the submissions made that related to it yesterday and today. What I will do just in opening is telegraph some of the points on which there is a disagreement and then we can address you on the law in more detail in closing, but we now know where are we at this stage in the litigation.
We now know from Mr Moser's submissions yesterday,

on the counterfactual, that at least in part the Class Representative's claim rests on a novel bit of English procedure which, as Mr Alexander explained this morning, it is common ground, only came into English law very recently. That is for a licensee to come and seek an interim licence, pay on some or other basis —— and I will come back to what that might be —— and then have a FRAND determination.
Now, it is said that this should be open to all persons, to all OEMs, that my learned friends call a "willing licensee", but what is their case on Apple —— whether Apple and Samsung were willing licensees and when do they say that should be assessed because, as you will recall, we saw that term a moment ago —— I will not go back to the document —— but there is —— if it is being said that some aspects of their behaviour over time amounted to them being willing licensees within the sense of that magical term, then there very much is a dispute on that.
So what does the Class Representative say about Apple and Samsung and how, on the facts of those negotiations, made them willing to take a licence as determined by some third party?
The reason that that matters is there is some law on what a willing licensee means for the purposes of FRAND. It has to be somebody who is prepared to submit to a FRAND rate as determined, regardless of the outcome. So you do

not get to place pre—conditions, in short, on how the process is going to work. You cannot say this is going to be an individual patent—by—patent FRAND assessment if the FRAND licence is a global portfolio licence. I can take you to the law more in closing, but at various times Mr Justice Birss, as endorsed by the Court of Appeal, described that kind of arrangement as "madness". It is part of a product of the way the FRAND litigation works over time, because one of the things that happens in FRAND negotiations is that the OEM says: well, I know that you cannot catch me because I may not take a licence to you, but your only solution is to sue me for patent infringement in all sorts of different courts around the world. You will only get damages on the individual patents on which you sued in some of those courts. It is only when English law changed, and I will come onto that in a second, that suddenly some other remedies opened up.

So what actually is this hypothetical counterfactual because it is not —— just to wave a hand and say, "oh, well, we will give it to a willing licensee" is not, in my submission, enough. They need to spell out how they say that Apple and Samsung fall into that category.

Now, that is the first point.

The second point is what are they're saying about what gets paid in the meantime? My learned friend says you

pay on something on the basis of between what the SEP holder is asking and what the OEM is offering. If that is right, any rational OEM will put in a low bid for that process which will not be anything approaching a FRAND rate. Generally speaking, it will come as no particular surprise to the Tribunal, but OEMs do not want to pay —— they want to pay as little as possible for their licences and that is the dynamic that you see in a lot of these negotiations.

How is it to be determined what the rate is? Even in the Xiaomi case, as I understand it, it was not in fact halfway between the two. I think my learned friend Mr Alexander mentioned that this morning. It was a bit more complicated than that. Is it being said, for example, there is some interim determination by some arbitrator or a court. How is that to be done?

Then what happens ultimately when the FRAND rate is determined? Is the implementer going to pay in full for the past? It was only confirmed in English law in InterDigital v —— in the InterDigital v Lenovo case ——

MR TURNER: So how does this point arise because, as I understand, your position is you did supply chips, you were willing to supply chips so why does the willing licensee point matter?

MR SAUNDERS: Well, the willing licensee point matters, because this is the counterfactual that my learned

friends are saying is the non—abusive counterfactual, even on their case. So obviously we say ——

MR TURNER: So it is on the hypothesis you did in fact, contrary to what you are submitting, refuse to supply chips. That is how it arises?

MR SAUNDERS: On a hypothesis that there is such person as a willing licensee who qualifies to take the benefit of the ETSI undertakings is the way that the hypothesis works, but the point I am trying to just emphasise to the Tribunal is that this situation is an awful lot more complicated than I think has been credited by my learned friends.

THE CHAIR: So you said —— well, you said, Mr Jowell said that at various points in time Qualcomm offered FRAND arbitration.

MR SAUNDERS: Yes.

THE CHAIR: So under the FRAND framework, if I could call it that loosely, what do you say should have happened if that offer had been accepted?

MR SAUNDERS: Well, so Qualcomm, without going back over those —— some of those documents, but broadly Qualcomm acted as a willing licensor by offering to have an open—ended FRAND arbitration —— open—ended, I mean in the sense that there were no pre—conditions applied to how it would work. It was not suggested that it would have to be

a patent—by—patent arbitration or that it was just a FRAND determination of the rate for the portfolio.

THE CHAIR: It was a willing licensor and let us suppose the offer had been accepted by Apple at the point when you say it was refused, so what would then have happened or should have happened if the FRAND framework had operated in a "normal" way? Would it have been Apple would have to pay something or they would have paid nothing?

MR SAUNDERS: I mean this is why the whole situation is so unreal, because Apple had the comfort of being protected by the —— not only did they have the chipset supply assurances, but it was licensed through the contract manufacturers.

THE CHAIR: Except they were not paying at that point.

MR SAUNDERS: Well, that was at the stage where they had stopped all payments to Qualcomm.

THE CHAIR: So they stopped paying. So if the FRAND framework had been accepted, if Apple had said, okay, we will submit to a FRAND dispute resolution process, what should have happened under the FRAND context?

MR SAUNDERS: Well, FRAND —— the answer is that is not a standard FRAND negotiation, because, generally speaking, an implementer paying nothing at that stage is not behaving as a willing licensee. That's the short point.

THE CHAIR: So you are saying ——
MR TURNER: Is that right?
MR SAUNDERS: You do not ——
MR TURNER: You can be willing to negotiate but not actually paying on a day—to—day basis.
MR SAUNDERS: Yes, but you are not behaving as a willing licensee unless you are committing to pay a FRAND rate.
MR TURNER: You may be committing but why do you actually have to write a cheque at the end of each month?
MR SAUNDERS: So —— well, you do not necessarily. I suppose it is possible you could put money in escrow or something.
MR TURNER: Just pay in due course. It is just a debt owing.
MR SAUNDERS: Again, this is not —— these are not the facts of ——
THE CHAIR: No, but I am not asking you about the facts. I am trying to winkle out what counterfactual is and in this case you say, well, this counterfactual case put forward by the Class Representative goes nowhere because actually we did offer FRAND arbitration. So I am just trying to work out what would have happened or what should have happened —— not what did happen, what should have happened —— under the normal FRAND framework if Apple had

said, yes, let us go and do a FRAND process?
MR SAUNDERS: Well, because the problem is that the —— so the normal FRAND framework, as it has been introduced to the Tribunal, is the English procedural FRAND framework.
THE CHAIR: Go on that and answer the question on that basis.
MR SAUNDERS: But that is not —— it depends on the jurisdiction where this is determined. There are different procedures in different jurisdictions which —— I mean, this is why —— all I want to do at this stage in opening is just highlight there is some considerable complexity here.
THE CHAIR: You could at least just give us the bullet point of what you say had an English FRAND process played out.
MR SAUNDERS: At that stage there was no known English FRAND process for dealing with this, because that was invented by implementers in Lenovo and Xiaomi v Panasonic several years after the event. So, I mean, this is —— as I say, because this is one of the difficulties with this whole debate, is that we are drifting so far from —— we are dealing with a counterfactual that is, in my submission, ill —thought through but we are also dealing with a situation which is a long way from the underlying facts.
Now, I accept that for the purposes of looking at

the counterfactual as an intellectual exercise, that is not an answer to how one approaches the counterfactual, but it is, we say, incumbent upon the Class Representative to spell out in a little bit more detail how they say that these particular two OEMs at the relevant times, whatever they are saying those times are, qualified under this counterfactual to invoke some kind of process.
THE CHAIR: But it is your submission I am trying to work out. Mr Jowell said, "But we did offer FRAND negotiation". I am trying to work out what should have happened in your submission if that offer had been accepted. How would that have then played out? It is a very simple question. Who would have paid what then?
MR SAUNDERS: My Lady, I need to go back to the exact terms of the proposal that was made. I know that is a frustrating answer in a sense, but it is buried in the correspondence that we were looking at earlier on.
THE CHAIR: All right.
MR SAUNDERS: In my submission, it does not take away from the general point, which is that where one is looking at developing a counterfactual of this type, largely on the fly, by reference to some very recent case law of the English courts, in a dispute, as my learned friend Mr Jowell was explaining, between two American companies and a South Korean and American company. It is, in my submission, quite

difficult to see how English procedural remedies are the key to a counterfactual and then to roll them back to the relevant period. This is why all of this, in my submission, is very inchoate in the way it has been developed by my learned friends.
Now, as I say, I can address you on what actually happened as a matter of fact, but, in my submission, it is appropriate for my learned friends to explain their case first as to exactly what they say should have happened.
MR TURNER: The central allegation, as I understand it, is that you explicitly or implicitly refused to supply chips while these negotiations were going on and you say that is not the case and I am not sure whether we need to get beyond that and analyse ——
MR SAUNDERS: No, our primary position is it does not arise on the facts.
MR TURNER: So you will not be inviting us to determine whether Apple and Samsung were willing licensees?
MR SAUNDERS: Well, the question of whether —— because what I am trying to suggest is that it is inherent ——
MR TURNER: It is a fairly binary question.
MR SAUNDERS: Well, it is. The answer is I think if my learned friends are going to pursue that counterfactual, they have to establish that the

counterfactual —— that the two OEMs in the matter in this case, Apple and Samsung, were willing licensees at specific points in time, such that they can take advantage of the counterfactual situation.

THE CHAIR: But you are not advancing a case that they were not willing licensees and therefore you did not have to supply them with chips? You're not advancing that as a positive case?

MR SAUNDERS: No, I am not, but I want to know what the case is on their behalf.

MR TURNER: That is a separate question.

MR SAUNDERS: We have seen evidence today where they were described as "unwilling licensees" and one of the things, depending on what my learned friends say about that, we say that does not constitute being a willing licensee at all, because you cannot pre—condition the determination of FRAND in that way. You cannot say we are going to do one patent and then if you win on that patent on a technical basis you pay on that, then we will do another patent and if you win on that patent, we will pay on that one. The idea being that we will here until 2097.

So the answer is —— it is my learned friends need to do a much better job.

THE CHAIR: You have said it is all very complicated and it is not described simplistically by the

Class Representative but you are going to then develop your position on that in closing submissions.

MR SAUNDERS: Yes. This is just to telegraph that this is not a straightforward issue and the way it has been developed on the fly is very unsatisfactory.

THE CHAIR: I think we have that point.

MR SAUNDERS: You have that point, my Lady.

If I could just highlight a couple of other things where there is something between us on the English law in so far as that is relevant. It is said, first of all, that SEPs are not property rights with the same status as of other patents. You have to be —— that position is a little bit more nuanced than my learned friend presents. Again, to take the benefit of the FRAND —— the contractual FRAND undertaken, you have to be a qualifying person or willing licensee. This is essentially the same point I have just been addressing you on.

It is said that in paragraph 129 of my learned friend's skeleton that Mr Justice Mellor has held that FRAND precludes the charging of royalties which vary on the selling price of the end—user device. So this is the ad valorem way of calculating royalties.

MR TURNER: That finding was not overturned by the Court of Appeal?

MR SAUNDERS: That is quite wrong. No, that is

right. My misunderstanding. You have the point, but it is ——

MR TURNER: No, I do not understand the point. Just repeat it. I think we may be at cross—purposes.

MR SAUNDERS: What I am saying is there is nothing that precludes ad valorem royalty being set as a matter of principle. The question is the extent to which it ceases to be FRAND because there is a disconnect between the overall price of the product and what is contributed by the cellular SEPs and that is why you see caps in various of these agreements.

MR TURNER: Yes, I understand.

MR SAUNDERS: It is said that there are various points being made about non—discrimination being used as a stick, rather than implementor's shield. Now, non—discrimination, insofar so far as that has arisen under English law, it has been where an OEM says that the terms that it is being offered in litigation discriminate against a previous licensor. So to give one example, in the Unwired Planet case, Mr Justice Birss did not permit the Samsung settlement agreement that was reached in the course of the litigation to be under the non—discrimination head because essentially at that time Unwired Planet was strapped for cash so it was under duress when it entered into that licence so that he said it was not a proper comparator and

non—discrimination did not apply to that.

What we have never —— what we have not seen in any law, and this is a challenge to my learned friends, is non—discrimination being used as a basis to uprate by the SEP holder. That just is not how it arises under English law.

In paragraph 140 it is said that where licences of long or indefinite duration, it would:

"Clearly not be compatible with the FRAND obligation for the licensor to insist on maintaining the previously agreed terms."

The assertion that that is "clearly" the case is doing a lot of work in that paragraph. There is no authority identified to support that statement and, again, we are not aware of any. Licences, like many other commercial bargains, are not generally unwound on —— what you cannot do is look at them in retrospect and identify who was the winner and who was the loser. If someone sells an awful lot of phones, they may have done very well out of the deal that they struck five years ago. If they sold hardly any, they may not have done very well at all, but looking at it retrospectively is not a legitimate approach.

The problem is that both sides enter into an agreement with imperfect knowledge and that is why generally predictability that the parties value is not upended in the

middle of an agreed term.

So, again, I can address —— there is some material in the bundle about this, but just to make it clear, again, that that is another area of dispute between us about the underlying FRAND mechanism.

Finally, one point which the Class Representative makes in paragraph 139 is that FRAND licences must allow for variations if the underlying IP rights change. Now, again, some care is needed with that. That was true in relation to the Unwired Planet licence, but that was done for very specific jurisdictional reasons and it is not a common term that is found in licences that have not been settled under English court procedure.

Now, whether it makes any difference depends on the scope of the portfolio and do not forget that some of those cases are about very small portfolios where individual patents, if they drop off, mean that there is hardly anything left in the portfolio. That of course is a very different position to Qualcomm with whatever it is, 150,000—odd patents and applications.

So I just wanted to highlight when we come to closings those are some of the areas on which there is dispute. I do not know whether any of those points will matter for the ultimate determination, but it is important. I do not want it to be suggested that in some way all of

that is some kind of agreed position, it is not.

THE CHAIR: Quite.

MR SAUNDERS: This case law is actually a lot more complicated ——

THE CHAIR: I think we have that point.

MR SAUNDERS: —— these cases are a lot about establishing English jurisdiction and the development of this case law, viewed as a historical series of cases, is not really germane to identifying a series of principles that can be just plucked out of a case last year and saying that applies across the relevant period. It is far more complicated than that.

THE CHAIR: We will rise for five minutes. I think really we do not have very much time for you to address us on leveraging, because we do really want to get to the market definition and dominance points and I would like, if possible, for Mr Bailey to be able to finish his closed sessions comments today. So maybe just ——

MR SAUNDERS: I will be very fast. I just need to show you the relevant pages and just draw out a couple of things from the diagrams.

THE CHAIR: Just a few minutes, please.

(3.25 pm)

(Short Break)

(3.38 pm)

In Private

(4.25 pm)

(The court adjourned until 10.30 am on Wednesday, 8 October 2025)

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