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IN THE COMPETITION

Case No. : 1382/7/7/21

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 6th October 2025 – 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

APPEARANCES

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

1 Tuesday, 7 October 2025
2 (9.45 am)
3 (Proceedings delayed)

4 (9.50 am)
5 Housekeeping

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

13 Is that all right with everyone?

14 MR BAILEY: Yes, Madam.

15 MR MOSER: Yes.

16 THE CHAIR: All right.

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

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

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1 particular, Apple and Samsung.

2 THE CHAIR: Yes.

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

5 THE CHAIR: Of course not.

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

9 THE CHAIR: Yes.

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

13 THE CHAIR: Yes, I have.

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

20 THE CHAIR: I understand.

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

23 THE CHAIR: I understand. That seems entirely
24 sensible.

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

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

16 THE CHAIR: Yes.

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

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

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

3 THE CHAIR: Yes.

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

7 Madam, if you turn over to the second page ---

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

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

16 THE CHAIR: I've just been given this.

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

23 THE CHAIR: Yes.

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

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

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

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

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

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

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

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

21 THE CHAIR: Yes. I mean —

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

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

4 MR BAILEY: Yes, Madam.

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

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

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1 position we are in pro tem.

2 THE CHAIR: Right. All right.

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

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

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

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

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1 confidential will not roll back any information that we
 2 have —
 3 THE CHAIR: That is the way I understood their
 4 proposal. They said that quite explicitly they could not
 5 speak to the position of third parties.
 6 Now, Ms Abraham, I do not know if you saw the
 7 relevant bit from the transcript yesterday and were able to
 8 appreciate the problem that I had because we got to part of
 9 the depositions where, of course, I can read what is said
 10 there. I could not ask the question about that in
 11 circumstances where the question I was wanting to ask was an
 12 entirely generic question. It did not relate to any
 13 specific confidential figures, and it related to matters
 14 which actually have been discussed in open court, in the
 15 course of the submissions on abuse, and will necessarily
 16 have to proceed in open court because we are talking about
 17 abusive conduct in relation to Apple and Samsung and the way
 18 in which it is said that Qualcomm's conduct was abusive in
 19 relation to each of those.
 20 I am obviously not very attracted by the idea that
 21 we will have to have the entirety of the abuse submissions
 22 at some point in closed session. Obviously, if there are
 23 specific figures that need to be referred to, everyone can
 24 find a way of dealing with that, but in terms of generic
 25 questions about the way that the abuse is said to have

1 operated and Qualcomm's response to that, it is going to be
 2 very difficult to have that in closed session.
 3 Are you able to make any constructive proposal as
 4 to the way forward because although vast swathes of the 1782
 5 documents are marked as "confidential", a lot of the
 6 material there is the subject of submissions that are being
 7 made and have been made in open court and in the course of
 8 the parties' skeletons as a general proposition, without
 9 anyone suggesting that that is confidential?
 10 MS ABRAHAM: Of course I hear what you say, Madam.
 11 In relation to the 1782 documents, there are two hurdles.
 12 The first is that I am actually not instructed in relation
 13 to the 1782 documents for Apple, because Freshfields are not
 14 instructed in relation to 1782. It is a US process and so
 15 there is a different firm, but the second point is that the
 16 Tribunal, this Tribunal, just does not have vires to change
 17 the classification of the 1782 documents because that is
 18 regulated by the US court order and you will remember that
 19 at the PTR, which you were at and I was not, you made
 20 an order for the parties to be able to challenge
 21 confidentiality claims in the 1782 documents under that US
 22 court procedure. So there was provision for that to happen.
 23 It seems not to have resulted in the outcome that you would
 24 have liked, but I am afraid that there is nothing the
 25 Tribunal can do about that because it is a matter for the US

1 court because that is how that disclosure came into this
 2 litigation.
 3 So that is the specific point.
 4 I understood that it was a 1782 document that
 5 raised the particular issue that led to you making some
 6 comments yesterday. I can speak to the rest of the Apple
 7 confidentiality position.
 8 THE CHAIR: Yes.
 9 MS ABRAHAM: Insofar as the documents have come in
 10 through normal disclosure. So from Apple's perspective, the
 11 bottom line is we are not suggesting that anyone has ever
 12 closed the door to any question ever being raised about
 13 confidentiality of specific documents, but there has been,
 14 further to your directions at the PTR, a really extensive
 15 and frankly also really expensive process.
 16 THE CHAIR: Well, yes, I have seen and was
 17 somewhat horrified at the amount of money that has been
 18 spent on this.
 19 MS ABRAHAM: I think you have the figure for
 20 Qualcomm, but you do not have the figure for Apple.
 21 THE CHAIR: I am sure there will be a lot of
 22 expense on all sides.
 23 MS ABRAHAM: Yes. The reason we did that was
 24 because we were aware that if we needed to defend our
 25 confidentiality in relation to documents that would not be

1 covered by your general approach and actually quite a lot of
 2 the documents in the bundle that are marked as
 3 "confidential" are confidential because they are covered by
 4 your general approach that you set out the PTR — I am not
 5 sure whether you are with me. Do you remember that at the
 6 PTR you set out some principles according to which document
 7 would be prima facie confidential and a party would be able
 8 to apply for de-designation?
 9 THE CHAIR: Well, it is somewhat in the mists of
 10 time so —
 11 MS ABRAHAM: Shall I just explain —
 12 THE CHAIR: No, I think you should just go on
 13 because I think we just need to reach a landing point on
 14 this sooner rather than later.
 15 MS ABRAHAM: Just to be clear: there are — I will
 16 give you the bottom line — about 150 documents, Apple
 17 documents, that we understand are in issue, just to give my
 18 client as an example. Of those we went through them all
 19 extremely carefully over August, very tight deadlines,
 20 fantastic efforts from those instructing me, and indicated
 21 that we would not claim confidentiality at all over about 60
 22 of them. About 40 of them were prima facie confidential
 23 under the approach you had set out at the PTR and there were
 24 about 40 — these are just round figures — over which we
 25 made confidentiality claims because they would not be

1 covered by your indication of what was confidential and we
 2 said they should be treated as confidential. So we made
 3 that application. 27-page witness statement from Tyler
 4 Shelton in support of it. Happily, Mr Turner read that
 5 material before the September hearing and was satisfied —
 6 was persuaded that all of that material was confidential.
 7 Now, if there were to be any suggestion that any
 8 of that material should no longer be treated as
 9 confidential, that is an issue that Apple would want to take
 10 up with the Tribunal for all of the reasons that are set out
 11 in Mr Shelton's witness statement which persuaded Mr Turner.

12 THE CHAIR: All right. Okay.

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

18 THE CHAIR: Yes.

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

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

8 THE CHAIR: Yes, all right.

9 MS ABRAHAM: I am grateful.

10 THE CHAIR: Thank you.

11 Mr Moser, do you want to say anything?

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

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

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

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

8 THE CHAIR: Have you discussed that with
 9 Ms Abraham?

10 MR MOSER: Not yet.

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

13 MR MOSER: Yes.

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

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

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

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

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

25 So is the way forward that, absent any further

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

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

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

21 THE CHAIR: Yes.

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

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

9 MR MOSER: We would certainly say "yes".

10 THE CHAIR: All right.

11 MR MOSER: That is our position.

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

15 MR MOSER: That is exactly the point.

16 THE CHAIR: That is my -- I mean, that is my
17 concern. Mr Jowell.

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

24 THE CHAIR: All right. So you --

25 MR JOWELL: But obviously insofar as we possibly

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

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

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

8 THE CHAIR: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

3 THE CHAIR: Yes.

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

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

12 Mr Saunders, did you want to make a comment?

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

19 THE CHAIR: Oh.

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

23 THE CHAIR: Well, I do not know.

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

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

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

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

7 THE CHAIR: Yesterday morning.

8 MR SAUNDERS: Yes.

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

13 MR SAUNDERS: Yes.

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

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

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

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

1 MR MOSER: We will do that.

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

5 MR MOSER: Yes.

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

9 So the way I think ---

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

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

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

1 would solve that problem.

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

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

9 MR BAILEY: Yes, provided the court directs that
10 therefore ---

11 THE CHAIR: Yes, all right. I will direct that.

12 I will make your Rule 102 order and the way that we will
13 proceed will be that in respect of Qualcomm's
14 confidentiality , as and when we get to it, we will proceed
15 on the basis that is set out in Qualcomm's letter.

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

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

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

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

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

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

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

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

14 MR MOSER: Yes.

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

18 All right. Let us proceed on that basis. So
 19 I will just now rise and see if Mr Turner has arrived. When
 20 he has, we will continue the hearing and we will need to
 21 finish very promptly at 4.30, ideally 4.25 today. As you
 22 know, there is a whole lot of swearings in so I need to get
 23 to one over in the RCJ after court today. All right. So
 24 I will rise and see if we can bring in Mr Turner now.
 25 (10.22 am)

1 (Short Break)
 2 (10.25 am)
 3 Opening submissions by MR ALEXANDER
 4 THE CHAIR: Yes, Mr Alexander. I hope fairly
 5 concisely we are going to hear from you on I think the FRAND
 6 point.
 7 MR ALEXANDER: I was really going to say almost
 8 nothing and start with good news, which is in relation to
 9 the technical material, the Tribunal has been sent a letter,
 10 I think, this morning, indicating that it has been agreed
 11 that there is no need to cross-examine on any of the
 12 technical evidence.
 13 THE CHAIR: Yes.
 14 MR ALEXANDER: Subject to the approval of the
 15 Tribunal, there is an approach that has been set out in
 16 a letter that was sent this morning.
 17 THE CHAIR: Yes, I have seen that. That seems
 18 entirely sensible.
 19 MR ALEXANDER: So I think we need say no more
 20 about that. There is very slight reference in the documents
 21 to this material, but I anticipate it will play no role.
 22 THE CHAIR: Okay. That is music to our ears. So
 23 we do not need to deal with any cross-examination of the
 24 technical experts.
 25 What about Melin and Schneider?

1 MR ALEXANDER: We are working on that after at the
 2 moment, bearing in mind your indication. We anticipate that
 3 it may be sensible to try and deal with it on the same
 4 basis, partly following the indication from you,
 5 Madam Chairman, yesterday. It is background in many ways.
 6 THE CHAIR: Yes.
 7 MR ALEXANDER: It is not irrelevant background
 8 because the context in which this arises is obviously the
 9 subject matter of the abuse in some sense is SEPs, but it
 10 could easily be something else and one does need to
 11 understand a little bit about that regime and it is
 12 appropriate that that material comes from an expert. So in
 13 terms of the actual issues that the Tribunal has to decide,
 14 at least for our side, we do not anticipate there will be
 15 a great deal in that, which is why we have put a proposal to
 16 my learned friend to say, "Let us deal with that evidence on
 17 the basis that both sides can refer to material if they want
 18 to, but there is no need to have cross-examination on it".
 19 I think my learned friend is considering that at the moment
 20 and we will try and sort that out for the Tribunal by the
 21 end of the week. We obviously have an indication from you
 22 that if there is to be cross-examination, the issues need to
 23 be identified, the points in the skeletons to which they go
 24 need to be identified and so on.
 25 THE CHAIR: Absolutely.

1 MR ALEXANDER: There may be a way forward. I just
2 cannot tell you what that way forward is today.

3 THE CHAIR: Of course. No, and I did not ask you
4 to indicate that today.

5 MR ALEXANDER: That is the good news.

6 THE CHAIR: Can we take it that, on any basis, if
7 there is going to be cross-examination, it will be no more
8 than half a day in terms of looking at the timetable?

9 MR ALEXANDER: Certainly that would be our
10 anticipation and it may be that it can reduce very
11 significantly .

12 THE CHAIR: All right. Thank you.

13 MR ALEXANDER: But we are working on that basis in
14 any event.

15 THE CHAIR: Yes.

16 MR ALEXANDER: So the only other aspect that
17 I have been asked to address is what might be called the IP
18 aspects and I think my Lady said at one point during one of
19 the earlier hearings this is not an IP case, it is a
20 competition case.

21 THE CHAIR: Yes.

22 MR ALEXANDER: Although the subject matter is IP
23 rights, and I just want to address you very briefly on why
24 there is a particular vulnerability in relation to pricing
25 in relation to those rights, there are really no IP issues

1 at all . We are not dealing with validity infringement, even
2 valuation in some fundamental sense of the rights, but there
3 is a short section in the Which? skeleton dealing with the
4 FRAND context which again is substantially background
5 material. There is reference to the --- some of the UK case
6 law and reference to why some of these issues of evaluation
7 are so difficult in this particular context and why, if
8 I may put it like this, there is a vulnerability in this
9 market to what might be called overpricing.

10 I can just very briefly address you on why there
11 is that kind of vulnerability , just for two or
12 three minutes, and then that will be me done, if that is
13 a convenient way forward?

14 THE CHAIR: Yes.

15 MR ALEXANDER: What we are dealing with is SEPs.
16 Obviously we talk about standards here. Essentially they
17 are design contributions to a system, but one things one
18 knows about the SEP regime is that one does not know
19 necessarily whether something that is declared to be
20 essential is in fact essential whether at the outset or
21 indeed even sometimes after litigation because there may be
22 appeals and so forth.

23 THE CHAIR: I mean, is it now agreed that we do
24 not have to decide that issue?

25 MR ALEXANDER: You do not need to decide --- well,

1 my Lady ---

2 THE CHAIR: Do we have to decide whether any of ---
3 whether any of Qualcomm's claimed SEPs were in fact SEPs?

4 MR ALEXANDER: No, you do not --- not only do you
5 not need to decide that issue, we do not envisage that that
6 was really ever in issue. You will see, I think, in the
7 competition materials, which is not my part of the case,
8 that --- and I do not think I am saying anything
9 confidential --- I hope not at least --- there was a debate as
10 to whether there ought to have been more intensive scrutiny,
11 if I may put it like that, as to the basis of the
12 intellectual property claims in the valuation exercise in
13 question, but this does not concern this Tribunal at all .

14 One of the reasons why this is such a difficult
15 exercise is because trying to work out whether even a single
16 patent is truly essential, genuinely valid and what its
17 contribution is, is an extremely difficult exercise. One
18 can see that from the case law in the United Kingdom.

19 THE CHAIR: I understand that. There was just
20 a sniff in some of the evidence, I think, that there is
21 a debate as to whether some of Qualcomm's claimed SEPs were
22 essential. I just wanted to know how much we needed to get
23 into that in your answer is not ---

24 MR ALEXANDER: You do not need to get into it at
25 all, but there was certainly hot debate. One of the debates

1 that you will see in the evidence is how this ought to have
2 been evaluated. So if one thinks about it being difficult
3 for a single patent, when one multiplies this with the many
4 thousands of patents, obviously it becomes a very, very
5 difficult exercise to undertake. There are different
6 positions in different countries. There may be different
7 laws under which this may need to be evaluated and so forth.

8 The second point which you will have picked up
9 from the FRAND section is there is no, as it were,
10 international FRAND Tribunal to which the ETSI regime is
11 established. It is not like a situation where one has, for
12 example, the copyright Tribunal.

13 THE CHAIR: I understand. That is why people hop
14 all over the world making FRAND claims.

15 MR ALEXANDER: And why all of these disputes arise
16 and partly there is no agreed standard as to valuation as to
17 how you approach valuation. There are different
18 methodologies that are approached in different courts.

19 So partly because of that, you have uncertainties
20 at every level. No established standards of evaluation
21 which one might say is a recipe for a market in which, if
22 there is power to dictate prices by other means than proper
23 valuation system, the market is particularly vulnerable to
24 that because people cannot say, well, this is the standard,
25 this is a cost-plus valuation or whatever the position may

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

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

12 THE CHAIR: Hold out and hold up.

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

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

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

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

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

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

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

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

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

1 MR TURNER: Which case was that?

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

5 MR TURNER: Yes.

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

10 So I think, subject to ---

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

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

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

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

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

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

1 leveraging analysis of Dr Padilla, as well as, as you would
 2 expect, the technical and patent expert evidence, both
 3 licensing and engineering, and he may also touch on issues
 4 as to the context of the FRAND obligations and FRAND
 5 defence. Then, finally, Mr Bailey will be dealing with
 6 market definition and dominance.
 7 THE CHAIR: All right.
 8 MR JOWELL: So we have given consideration to how
 9 we might most assist the Tribunal.
 10 THE CHAIR: Yes.
 11 MR JOWELL: With your permission, my submissions
 12 will be divided into three parts.
 13 THE CHAIR: Just in terms of timing, are you able
 14 to finish by about 4.25 today between three of you? Is that
 15 going to be too tight? I am aware it is now 10.45. If you
 16 needed, it struck us that we could possibly have another 10
 17 or 15 minutes at the start of tomorrow morning to finish or
 18 we could start a little early tomorrow morning. Can you
 19 reflect on that and just let us know after lunch?
 20 MR JOWELL: We will indeed. It may well be very
 21 desirable to have that extra time and I doubt that the
 22 cross-examination of the two witnesses tomorrow will take
 23 all day.
 24 THE CHAIR: In which case, we could just start at
 25 10.30.

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR JOWELL: That is correct.

20 THE CHAIR: Yes.

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

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

1 chipset supply policy come about? Well, in a moment I will
2 show you a little bit of an extract from the evidence of
3 Dr Jacobs who was one of the founders of Qualcomm back in
4 1985. He had previously been a university professor of
5 electrical engineering and he, along with a number of his
6 colleagues, who were — a number of whom were also
7 distinguished scientists, electrical engineers, specialising
8 in the field of wireless telecommunications, founded
9 Qualcomm and the scientists patented a number of inventions
10 and they started off by licensing those patents to mobile
11 telecommunications companies. In accordance with the
12 approach that was already prevalent in the industry, they
13 licensed those patents as a portfolio and at the end—device
14 level, so not at the component or chipset level.

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

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

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

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

15 MR JOWELL: Patents for CDMA.

16 THE CHAIR: SEP patents.

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

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

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

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

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

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

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

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

1 first question and answer.

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

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

7 THE CHAIR: Okay. (Pause)

8 By the way, is this confidential?

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

11 THE CHAIR: Okay.

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

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

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

1 research and development, coming close now to I think
2 a staggering \$100 billion, which is an enormous sum for
3 a private company in a particular industry. Perhaps,
4 unsurprisingly, given the sheer scale of that investment,
5 Qualcomm has not stopped innovating. It has patented
6 further inventions that relate to later standards, such as
7 3G-CDMA, 4G-LTE and 5G, with constant updates and accretions
8 within all of those standards. Of course while some of the
9 original patents may have by now expired, the overall number
10 of patents that Qualcomm owns has grown hugely over
11 the years with a patent portfolio now exceeding 100,000
12 patents.

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

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

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

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

11 Now, I should just mention three —

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

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

19 MR TURNER: You could do that.

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

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

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

1 wireless, it just does not have a licensing model, it simply
 2 supplies the component with the relevant set, it is
 3 exhausted, it is an all-in price.
 4 MR JOWELL: Exactly.
 5 THE CHAIR: But you say that is because it did not
 6 have the licensing of the SEPs for those wireless components
 7 first.
 8 MR JOWELL: Exactly.
 9 THE CHAIR: It does not have a licensing business
 10 in relation to those SEPs.
 11 MR JOWELL: Exactly.
 12 THE CHAIR: Yes.
 13 MR JOWELL: It is just a different — just a
 14 business model and perhaps one day they would — maybe
 15 Qualcomm one day will just say, "Maybe we should have a
 16 licensing business", but there are all sorts of reasons why
 17 one does not choose to develop a licensing business.
 18 THE CHAIR: When you say that this is
 19 a commercial — reasonable commercial practice which is not
 20 objected to or is understood by — as reasonable by, you
 21 understand, Which?, is that — where do you — where do you
 22 get that understanding from? Is that is from the discussion
 23 yesterday of —
 24 MR JOWELL: I think I get that understanding from
 25 their latest skeleton argument and from my learned friend's

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

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

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

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

15 MR JOWELL: Well, it is —

16 THE CHAIR: Or is it not?

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

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

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

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1 reasonable terms.

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

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

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

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

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

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

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

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

8 THE CHAIR: Yes, all right.

9 MR TURNER: In due course.

10 MR JOWELL: Yes.

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

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

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

20 THE CHAIR: All right.

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

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

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

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1 forgive me, paragraph 42.

2 MR TURNER: Paragraph 42?

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

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

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

11 THE CHAIR: All right.

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

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

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

19 THE CHAIR: Yes.

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

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

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

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

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

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

1 it.

2 THE CHAIR: If you say that you are selling your

3 chips only to entities that are licensed, as you say, it

4 takes two to tango. The licence has to be agreed by both

5 parties?

6 MR JOWELL: It does, and the point I simply make

7 is that what one sees — what you will see in the evidence

8 here is that — certainly with Apple and Samsung, one is

9 about as far from imposing — effectively dictating terms as

10 one could possibly imagine because there is — what one sees

11 are protracted, difficult negotiations with give and take on

12 both sides.

13 So if the essence, if you like, the hallmark of

14 the abusive conduct is the effective dictation of terms, you

15 just do not find it in the evidence.

16 So, now, the original claim form also emphasised

17 various — or emphasises, I should say, various other

18 supposed features of NLNC that go even further than

19 an allegation of effective dictation. They come close to an

20 allegation of extortion by a refusal to supply. If we could

21 go back again to paragraph 33, which is on {A/1/14}, you see

22 it goes on to say:

23 "If an OEM refuses to agree" —

24 MR TURNER: Where are you reading?

25 MR JOWELL: Paragraph 33, the second sentence:

1 "If an OEM refuses to agree to such

2 a licence, Qualcomm threatens to cut off or actually

3 cuts off that OEM's supply of chipsets. In some

4 instances, Qualcomm also withholds sample chipsets ..."

5 And so on.

6 Another pleaded allegation is that you see it in

7 68(f)(ii) on page 36 {A/1/36}, is that Qualcomm avoids all

8 technical discussions and refuses to supply patent charts.

9 MR RIDYARD: Mr Jowell, I am struggling to

10 understand what dictating terms would look like and how you

11 distinguish it from not dictating terms. Because if you

12 take that language you just read out, if an OEM refuses to

13 agree to such a license, Qualcomm would cut off supply.

14 MR JOWELL: Yes.

15 MR RIDYARD: If you change that to if, after

16 discussions, the two parties could not agree a licence, then

17 Qualcomm would cut off chipset supply, would it not? Would

18 it?

19 MR JOWELL: Well, it might or might not. I mean,

20 as you have seen, sometimes it is prepared to say, "Well, if

21 we cannot agree, let us go to an arbitration".

22 MR RIDYARD: But how do we distinguish, you know,

23 dictating terms from negotiations where it turns out you do

24 not agree on a price?

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

1 in a sense, this is not — it is not my problem, but clearly

2 if you make — they are alleging — I mean, it seems to be

3 the natural reading of the claim form is it is effectively

4 that they are saying these are take it or leave it terms.

5 You know, these are our terms. If you do not like it, you

6 just will not get any chips and that is that and there is no

7 negotiation, or very little, and it is a qualitative

8 difference, but what you will see is actually you see

9 a proposal, you see pushback, you see concessions, you see

10 prices changing and so on.

11 MR RIDYARD: The price is always going to be too

12 high from the point of view of the buyer, is it not, because

13 the buyer would always like to have it lower?

14 MR JOWELL: I accept that, exactly.

15 MR RIDYARD: The same with Qualcomm, they would

16 always like to have it higher.

17 MR JOWELL: Yes, I agree, but I think the only

18 point I am making is that what you do not see is you do not

19 see anything — what you do see is give and take and you

20 give from Qualcomm in this period with these customers,

21 substantial give as I will show you.

22 THE CHAIR: Let us suppose — and I know it is not

23 your case — Qualcomm did have market power to the extent

24 that Apple and Samsung had to buy. Then what kind of

25 a negotiation is that because ultimately — I think this is

1 what Mr Ridyard is getting at — you have a sort of

2 negotiation but the end result of that from Apple and

3 Samsung's perspective cannot be that they walk away because

4 they need the chipsets? So one might say, well, it is

5 a negotiation and there is a bit of give and take, but

6 ultimately they know that they have to agree to something.

7 Walking away is not the option in that, whereas what you are

8 describing is that there is pushback, there is hard-fought

9 negotiations, but that can only be the case if neither side

10 is compelled to agree, but if one side is compelled to agree

11 because you do not have another option, then that is not an

12 open negotiation.

13 MR JOWELL: Well, I think there are two answers to

14 that. One is that what one actually sees in this case is

15 that both sides are reliant on each other. There is mutual

16 dependency and these are — in these two cases, these are,

17 as I will come on to, the most important customers of

18 Qualcomm. So it cannot — it is a disaster if it stops

19 supplying either of them. So it is not as though, you know,

20 the walkaway does not have enormous repercussions for

21 Qualcomm as well.

22 The second point I will make is simply the one we

23 have been on already, which is that actually, in default of

24 an agreement, what one does not see is Qualcomm cutting off

25 continuity of supply. One sees continuity of supply by

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

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

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

10 MR JOWELL: Yes.

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

16 MR JOWELL: Yes.

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

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

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

6 THE CHAIR: That is your second point.

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

9 THE CHAIR: Yes.

10 MR JOWELL: That is manifest.

11 THE CHAIR: All right.

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

15 MR JOWELL: Certainly.

16 THE CHAIR: All right. Thank you.

17 (11.35 am)

(Short Break)

18 (11.46 am)

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

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

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

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

16 To which Mr Moser replied:

17 "Yes."

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

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1 both Apple and Samsung, despite their litigation.

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

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

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

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1 never do.
 2 As regards the allegation of an implicit fear or
 3 implicit threat, supposedly disabling access to a FRAND
 4 determination, this is an allegation that is so ethereal, it
 5 is effectively untestable. As Mr Ridyard observed, it would
 6 be unobservable. In our submission, abuse cannot properly
 7 consist in untested potential conduct or be based on
 8 subjective fears of a customer. It must be grounded in some
 9 actual, specifiable conduct. In any event, in the present
 10 case, as we will see when we get into the facts, when it
 11 comes to these particular OEMs, in this particular period,
 12 the notion that they — that whatever an NLNC is meant that
 13 they could not litigate is just demonstrably false, because
 14 not only could Apple have alleged that Qualcomm's rates were
 15 not FRAND, but it actually brought litigation alleging that
 16 its rates were not FRAND. As it so happened, Apple was so
 17 confident and manifestly undeterred that it went a bit
 18 further.
 19 It did not only litigate, it also instructed its
 20 contract manufacturers not to pay any royalties in the
 21 meantime. So not even this interim halfway house payment,
 22 not a bean. Despite all of that, Qualcomm continued loyally
 23 to supply Apple with chipsets for over two years. So we do
 24 say it really is impossible to say that conduct meant that
 25 an OEM was unable to go to court when the OEM did go to

1 court and did not pay royalties in the meantime.
 2 Even harder, when, as I will come on to show you,
 3 that the OEM was offered the option of a FRAND arbitration,
 4 an offer which Apple declined to take up.
 5 As for Samsung, in 2016 it positively intervened
 6 in court proceedings in Korea in support of the KFTC
 7 decision. True, those proceedings were not actually a FRAND
 8 determination, but they were all about Qualcomm's licensing
 9 practices and, as I will show you, they were an attempt by
 10 Samsung to drive down Qualcomm's royalty rates.
 11 So that is NLNC.
 12 What about the other aspects of the claim, the
 13 various buttressing allegations? Well, the principal one is
 14 what it calls "a refusal to licence". Now, the claim form
 15 describes end-device licensing as the corollary of refusal
 16 to supply. You see that in paragraph 34(b) of the claim
 17 form, which is in {A/1/14}.
 18 Now, it is fair to say, I think, that's those two
 19 practices are two sides of the same coin, but it would be
 20 perhaps more accurate to put it other way round, that's what
 21 the CR calls refusal to licence is the corollary of
 22 end-device licensing. If a patent holder licences
 23 exhaustively only at the end-device level, then, by
 24 definition, it does not license exhaustively at the
 25 component level, but it is wrong to characterise it as

1 a refusal, because end-device licensing actually has meant
 2 that Qualcomm has not sought to license those same patents
 3 to chipset suppliers or to historically collect any
 4 royalties from chipset suppliers.
 5 So the chipset suppliers have been in the
 6 fortunate position of having had access to the standardised
 7 technology but without paying any royalties to Qualcomm.
 8 So, to characterise it as a refusal is inapposite and
 9 a rather better moniker might be that that the Ninth
 10 Circuit Court of Appeals gave in the United States, which
 11 they describe it as "no licence, no problem".
 12 Now, importantly, the CR has withdrawn its
 13 allegation that refusal to license is an independent abuse.
 14 You will see the references in footnote 8 of our skeleton
 15 argument. The licensing experts have conceded that
 16 end-device licensing is industry standard. You will see the
 17 references in paragraph 2 of our skeleton argument. So it
 18 is very hard to see what possible significance RTL really
 19 could have here. Mr Williams averted to the possibility of
 20 multi-level licensing in the counterfactual. Mr Saunders,
 21 if needs be, may address you on that possibility in due
 22 course, which the experts suggest introduces all sorts of
 23 complications.
 24 As for the exclusionary case, that has really
 25 disappeared to a vanishing point now. It is so half-hearted

1 that we would really suggest that neither side waste any
 2 further time on it.
 3 THE CHAIR: Can I ask you to waste a few more
 4 minutes on it now?
 5 MR JOWELL: Yes.
 6 THE CHAIR: The exclusionary case, I think that is
 7 the point about the non-assert agreements. Can you explain
 8 what your position is on that?
 9 MR JOWELL: On the non-assert arrangements,
 10 effectively the position with regard to those is really
 11 that, as I say, Qualcomm has not sought to block access to
 12 its standardised technology to anyone, including chipset
 13 suppliers. It has not initiated — historically initiated
 14 litigation asserting its cellular SEPs against chipset
 15 suppliers. The particular licence example that is given
 16 with MediaTek, the restriction, if it can be called that,
 17 was removed in 2013 and the MediaTek licence terminated
 18 in 2016.
 19 THE CHAIR: What was the — can you explain what
 20 was the restriction there?
 21 MR JOWELL: Well, essentially it was not really
 22 a restriction at all; it was purely that, in the case of
 23 certain of these contractual provisions, that they had
 24 agreed, they had agreed as a condition of the non-assert
 25 not — that the chipset supplier was — would lose the

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

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

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

16 THE CHAIR: The MediaTek restriction was removed
17 in 2013?

18 MR JOWELL: 2013, yes.

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

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

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

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

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

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

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

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

22 MR JOWELL: Yes.

23 THE CHAIR: All right. Thank you.

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

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

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

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

1 manufacturers.

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

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

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

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

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

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

1 there was actually no opportunity for the chipset supply
 2 policy to have any leveraging effect as regards these
 3 particular OEMs. Now, the reasons for that are slightly
 4 different — similar but slightly different in relation to
 5 Apple and Samsung.
 6 Now, in the case of Apple, as I said it did not
 7 obtain a direct licence until 2019. It had the licences of
 8 the contract manufacturers. Because of that, there is
 9 actually no realistic threat of chipset supply disruption
 10 because it could fall back on the safety net of the existing
 11 licences of its contract manufacturers. Put another way,
 12 Apple could seek a direct licence from Qualcomm and, if it
 13 did not like the terms of that direct licence, then it had
 14 the right to go for a FRAND determination. At worst,
 15 seeking a FRAND determination would have meant Apple would
 16 temporarily have had to pay the full royalty rates of its
 17 CMs without the benefit of reduced rates, but temporarily
 18 paying higher rates is scarcely a problem for a company with
 19 Apple's financial muscle.
 20 MR RIDYARD: Does that fallback work for all
 21 future technologies?
 22 MR JOWELL: Not necessarily for all future
 23 technologies, I accept that, except, as I will come on to,
 24 there was the benefit of the possibility of a FRAND
 25 arbitration, which was offered, including future

1 technologies. I will show you, but I will need to take —
 2 I do not have in my mind the ambit of the contract
 3 manufacturers' licences so I may need to come back to you on
 4 that.
 5 THE CHAIR: You say that at the worst a FRAND
 6 determination —
 7 MR JOWELL: I am told the CM's licences did cover
 8 future technologies.
 9 MR RIDYARD: Okay. So even when the new
 10 generation comes along, it was an automatic inclusion?
 11 MR JOWELL: So I am instructed, yes.
 12 THE CHAIR: You were saying that at the worst the
 13 FRAND determination would have meant that Apple would
 14 temporarily have had to pay full royalty rates. What do
 15 mean by that? Do you not accept this kind of thought
 16 experiment of a mid—point as per Panasonic v Xiaomi?
 17 MR JOWELL: Well, we do not accept that, but
 18 the — no, the point is — the point I am making is this: as
 19 we will come on to, there is the price that the contract
 20 manufacturers pay to Qualcomm under their licences and then
 21 what happened was Apple negotiated special rebates,
 22 effectively, whereby it would pay less. So what I am saying
 23 is that in the worst possible scenario, and even this
 24 probably would not actually transpire, is it would not get
 25 benefit of those rebates while it was —

1 THE CHAIR: I see.
 2 MR JOWELL: But what Qualcomm could not do is cut
 3 off supply to the chipset manufacturers because the
 4 chipsets, as long as they kept paying royalties, is because
 5 the chipset manufacturers had their own contract. But what
 6 is so ironic about this is of course that in the actuality,
 7 what Apple did was it instructed its chipset manufacturers
 8 not even to pay those royalties and what happens? No,
 9 Qualcomm keeps supplying.
 10 So it is really an extraordinary allegation to say
 11 that there is some kind of fear of FRAND.
 12 MR TURNER: Is there any — remind me, is there
 13 any evidence of the circumstances around that? The
 14 correspondence with the contract manufacturers and the
 15 basis i.e the basis on which Apple told them to stop paying
 16 royalties or Qualcomm's response to that.
 17 MR JOWELL: We will see some documents and they
 18 just say, "Let us just do it" because what they do — first
 19 of all, as you will see, Apple are very — it is very
 20 clever. First of all, they negotiate these — they put in
 21 place a belt and braces, so they negotiate these really long
 22 security of supply arrangements and — with Qualcomm for
 23 existing chipset supply. Then they get Intel as
 24 an alternative supplier and then stop paying royalties. So
 25 it is a very tough strategy that they adopted. It is about

1 as far as fear of a FRAND determination as you can get.
 2 As for Samsung, they did have a direct licence,
 3 but the licence in its original format was negotiated at
 4 a time in 1993, well before Qualcomm had sold any chipsets
 5 at all, and over a decade before Qualcomm's alleged to be
 6 dominant in any chipset market. I just note for the record
 7 that at paragraph 146 of the Class Representative's skeleton
 8 argument, it recognises the obvious point that on its theory
 9 a non—dominant company cannot extract higher royalties via
 10 NLNC. So it follows that the 1993 licence was free of any
 11 leveraging and that is the licence that remains in force,
 12 but, and this is an important but, it was quite wrong for
 13 Mr Moser, I think, to suggest yesterday that the royalty
 14 rate under that licence remained applicable throughout the
 15 period. It did not. As I will show you, there was
 16 significant subsequent amendments to that licence in 2009,
 17 in 2018 and 2019.
 18 Now, if the Class Representative's case was right,
 19 you would expect royalty rates to be going up, but they do
 20 not go up, they go down, and none of them show any signs at
 21 all of being imposed on the terms demanded by Qualcomm.
 22 They are freely and vigorously negotiated over long periods
 23 in the context of supply assurances given by Qualcomm. The
 24 terms of each are successively more and more favourable to
 25 Samsung.

1 MR TURNER: Is there anywhere that is set out
 2 clearly how the royalty rates changed over time?
 3 MR JOWELL: We will try to --- we can try to
 4 provide that, yes. I mean, the actual --- the way they come
 5 about is quite complex. We can try to give ---
 6 MR TURNER: For both Apple and Samsung.
 7 MR JOWELL: Yes. Mr Saunders will come on to
 8 that.
 9 So, importantly, the final point about Samsung is
 10 it had the benefit of a most favoured nation clause. So
 11 that's ensured that it was offered the best royalty rates
 12 and terms that were offered to other OEMs. So, in that way,
 13 Samsung could ride on the coattails of any other OEM that
 14 was not subject to any actual or implicit threat of chipset
 15 disruption and there certainly were such other OEMs that
 16 were not dependent on the purchase of chipsets from
 17 Qualcomm. Some of them did not buy any Qualcomm chipsets.
 18 So, against that background, can I start the dive
 19 into the chronology. We have used --- you will see probably
 20 in a bit more detail than I can go through in our skeleton
 21 argument, we have divided it up between agreements on
 22 royalties, which starts at paragraph 34, and then agreements
 23 on chipset supply and then the litigation, the settlement
 24 and so on in the successive paragraphs. What I will try to
 25 do is just to put it all together and take you through it

1 all chronologically.
 2 THE CHAIR: You can assume that we have read your
 3 skeleton argument.
 4 MR JOWELL: I am grateful. I will just show the
 5 documents because you probably should see them.
 6 Could I give you an overview of whose chips were
 7 in the iPhones from time to time. If we go to {C/3/13},
 8 please. Could we just focus on the diagram at the top,
 9 please, so we can actually see it. You will see the first
 10 iPhone was sold in ---
 11 MR TURNER: Which document is this?
 12 MR JOWELL: This is one of the witness statements.
 13 I think it sets it out at a convenient place. We can see
 14 some of this in the expert evidence as well.
 15 You see the first iPhone was sold in mid-2007 and
 16 it was initially a 2G GSM phone. The first 3G iPhone, aptly
 17 named "3G", was launched about a year later in 2008.
 18 Initially, the type of 3G chipsets that were used were not
 19 3G CDMA but, rather, 3G-UMTS. The CR does not allege that
 20 Qualcomm occupied a dominant position in the supply of
 21 either 2G GSM or 3G UMTS chipsets.
 22 Further to that, the chipsets in those additional
 23 phones in the 2G and 3G were supplied by Infineon, a large
 24 German semi-conductor manufacturer, the wireless division of
 25 which was later purchased by Intel in January 2011. Those

1 initial iPhones, as all of them, were manufactured by
 2 contract manufacturers, such as Compal, Pegatron, and so on.
 3 They had their own direct licences. You can see an example
 4 of, say, the Compal one which was entered into in 2000
 5 {POF/15}. I do not plan to go to it. So those were the
 6 underlying arrangements.
 7 At that time, when those original agreements with
 8 the contract manufacturers were entered into in 2000 and on
 9 other occasions, there is no allegation that Qualcomm
 10 occupied a dominant position. So they were necessarily free
 11 at that point of any leveraging.
 12 Now, the financial terms on which Apple ultimately
 13 paid royalties, as I indicated a moment ago, were not fixed
 14 by those agreements between Qualcomm and the contract
 15 manufacturers. That is because about six months before
 16 Apple started selling its first iPhone, Apple entered into
 17 a direct agreement with Qualcomm called the "Marketing
 18 Incentive Agreement" or MIA, which was signed
 19 in January 2007. It is just worth bearing in mind at this
 20 point Qualcomm is not supplying or even about to supply
 21 chipsets to Apple. So Apple has not yet made its first
 22 phone and Qualcomm is not supplying the chipsets for those
 23 first --- for the phones for the first three and
 24 a half years. So it is way before any kind of dependency
 25 could arise.

1 Now, you will see the MIA at {POF/115}. You will
 2 see, if I can read you the recitals:
 3 "Whereas Qualcomm has developed and
 4 commercialised certain Code Division Multiple Access
 5 (CDMA) technology for use in terrestrial wireless
 6 communications systems; Whereas Apple has developed
 7 certain proprietary audio-visual distribution,
 8 encoding, presentation and other technology; Whereas
 9 and Qualcomm desires to provide certain incentives to
 10 Apple for production or promotion of certain Apple
 11 phones."
 12 So it is ostensibly, at least designed to
 13 incentivise Apple to use certain forms of CDMA technology.
 14 The agreement is to last until December 2012.
 15 Now, the key clause is clause 5, which is on
 16 page 2, please {POF/115/2}. I will not read it out, but, in
 17 summary, what it means is that Apple receives a marketing
 18 incentive equal to the excess of the amount that the
 19 licensee pays over \$7.50 per phone. So, in other words,
 20 economically the effect is that insofar as any of Apple's
 21 contract manufacturers pay more than \$7.50 a phone in
 22 royalties to Qualcomm, Qualcomm rebates the difference to
 23 Apple.
 24 Now, if we go over to page 3 {POF/115/3}, you see
 25 clause 8. If I could just read that to you, "Qualcomm

1 chipsets" it says:
 2 "Apple agrees that it will consider information
 3 that Qualcomm makes available to Apple with respect to
 4 future Qualcomm chipsets so that Apple may reasonably
 5 determine whether Qualcomm's offerings will be suitable for
 6 use in Apple Phones. Qualcomm and Apple executives will
 7 meet at least semi-annually to exchange such information and
 8 Apple will give Qualcomm an opportunity to bid before
 9 awarding such chipsets to any other supplier."

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

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

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

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

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

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

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

12 "Agree?"

13 The answer:

14 "Great news."

15 At the top, you see:

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

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

22 So I think it really all speaks for itself .

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

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

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

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

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

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

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

1 Qualcomm.
 2 Consistent with that then, in late September 2012,
 3 Apple announces the iPhone 5, single sourced from Qualcomm,
 4 whilst continuing to source chipsets for its legacy devices
 5 from Intel.
 6 Now, the MIA was due to expire in December 2012
 7 and it — what happens next is a negotiated replacement for
 8 that agreement with two agreements that are called the FATA
 9 and the BCPLA, which were both executed in February 2013 and
 10 effective from 1 January 2013. So by this stage, yes, Apple
 11 is buying Qualcomm chipsets, but I think it is pretty clear
 12 from the terms of these agreements and arrangements that
 13 there is no meaningful chipset dependency at this stage or
 14 certainly none that translates into only ability to achieve
 15 higher royalties.
 16 Now, if you will permit me, I think I will have to
 17 go into closed session from now. The only persons present
 18 should be members of the 1782 outer confidentiality ring.
 19 So that does include certain in-house counsel.
 20 THE CHAIR: Yes. Does the transcriber need us to
 21 rise for a few minutes until that is done? You are going to
 22 go into closed session until lunchtime?
 23 MR JOWELL: Yes.
 24 THE CHAIR: We will do that. Can someone please
 25 notify us when you are ready.

1 (12.26 pm)
 2 (Short Break)
 3 (12.30 pm)
 4 In Private
 5 In Open Court
 6 (2.38 pm)
 7 THE CHAIR: I am not sure if the live feed has
 8 been interrupted for the closed session, but it should then
 9 be back on.
 10 MR JOWELL: So if I may then come on to make a few
 11 remarks about the economic evidence and about the law.
 12 Obviously I will address this in more detail in closing.
 13 Starting with the economics. Mr Noble, as you
 14 have seen, relies here on a theoretical bargaining model.
 15 It is a model that relies upon a whole number of assumptions
 16 which will need to be explored in evidence. Self-evidently,
 17 it can only be as reliable as those assumptions, but it is
 18 important, in our submission, also to bear in mind a more
 19 general point and that is that insofar as the model is
 20 seeking to be useful, it must at least approximate to the
 21 relevant reality in key respects. It is not enough to say,
 22 in our submission, this is a model of how NLNC could
 23 hypothetically in some circumstances, perhaps even in
 24 general circumstances, bring about an anticompetitive
 25 outcome of the elevation of royalties; it is surely

1 necessary also to ask where one is dealing with a specific
 2 claim, like the present one, on specific facts, with
 3 specific counterparties, to ask: yes, but could it in these
 4 particular circumstances, with these particular
 5 counterparties, give rise to the — and give rise to the
 6 sort of effect that is being hypothesised?
 7 The core theory here is that the — on which the
 8 model is based is that the CSP disables the purchaser by
 9 reason of the fear of chipset supply disruption, if they
 10 terminate the licence, from having access to the outside
 11 option of a resort to FRAND litigation or arbitration, but
 12 how is that remotely plausible in the circumstances of
 13 Apple? I mean, Apple had no direct license. It could rely
 14 on its CM's licences as a fallback. It actually embarked in
 15 litigation on the FRAND issue and it was repeatedly offered
 16 a FRAND arbitration which it declined. It is not simply
 17 that the assumptions of the model are wrong; it is that just
 18 the model is not applicable at all in these kind of
 19 circumstances. What one sees, as with many models when they
 20 are just demonstrably falsified, is you see an ad hoc
 21 adjustment to then try and repair it and it is said: well,
 22 it may well be that it did not apply in 2016 to 2019, but
 23 then in 2019 the model suddenly comes back to life to be
 24 applicable in the — by reason of the advent of 5G, but,
 25 again, that just is simply not plausible. It does not fit

1 the facts.
 2 The second point I would make about a theoretical
 3 model of this nature is that surely one needs to have some
 4 way of empirically testing such a model. There needs to be
 5 some kind of a yardstick by which it is measured and yet we
 6 have no empirical testing here by Mr Noble at all. The
 7 closest we have are reliance on selected snippets really
 8 from documents and snippets of hearsay evidence, but no
 9 proper empirical testing. The only empirical testing we
 10 have in this case is that devised by Dr Padilla which
 11 Mr Saunders will come on to.
 12 The third point I should say something about the
 13 fallback argument of Mr Noble and the CR that the courts or
 14 arbitrators somehow cannot be relied upon to reach a fair
 15 FRAND determination because the comparators themselves may
 16 be tainted. This is what they call the "poisoned well
 17 theory".
 18 It has two flaws. First — I am sure it has many
 19 more, but let me describe two of them. The first is it is
 20 so vague as to be unprovable or unfalsifiable. No specific
 21 contaminated comparators are even identified so we cannot
 22 even say, well, you say that is contaminated but it was not,
 23 because it is just a general wave of your hand kind of
 24 argument. Secondly, it is also just not plausible, because
 25 Apple and Samsung were perfectly capable in any FRAND

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

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

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

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

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

8 First of all, as I mentioned previously, the
 9 Tribunal has ruled that insofar as there are claims based on
 10 3G CDMA dominance, those claims for damages are time-barred,
 11 save for the period after 26 June 2017, the ruling is in the
 12 bundle at {H/41}. So it is important to consider whether
 13 any part of the claim for the early claim period ---

14 THE CHAIR: But they are time-barred except for
 15 the period?

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

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

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

1 only dominance that is alleged at that time is 3G CDMA.
 2 If I can just show you that. It is in the claim
 3 form at {IRA/1/38}.

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

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

9 THE CHAIR: Yes.

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

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

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

18 The lower (i):
 19 "Further alternatively, the amendment to
 20 Qualcomm's 1993 licence with Samsung in 2009
 21 established ..."

22 Then it gives you the royalty rate.
 23 Then:
 24 "At the time of that amendment Which?
 25 understands that ..."

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

3 Then it says:
 4 "Qualcomm leveraged its dominant position in
 5 respect of 3G CDMA chipsets to impose higher royalties for
 6 LTE SEPs."

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

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

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

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

1 5G dominance could have begun; in other words, it is
 2 negotiated in a dominance black hole or in the absence of
 3 dominance.
 4 If that is right, of course, then there is then no
 5 claim in relation to that either.
 6 So the claim for Samsung then becomes limited to
 7 that six-month period, even theoretically.
 8 The final reason why precision is required here is
 9 that it is not plausible, in our submission, to suggest that
 10 one could have leveraging from chipset supplied for devices
 11 on one standard to elevated royalties paid on devices
 12 related to a different standard. We explain this point in
 13 our skeleton argument at paragraphs 12.5 and 102. Very
 14 briefly, as I think I mentioned earlier, Qualcomm's supply
 15 practice only requires the OEM have a licence for the
 16 particular products it wishes to buy from Qualcomm. It does
 17 not have to have a licence in place for products it does not
 18 buy from Qualcomm.
 19 So an OEM could agree to a licence covering
 20 certain devices, like 5G multi-mode devices but not agree
 21 a licence covering others, like 4G multi-mode. That meant
 22 that if Apple wanted to buy or needed to buy desperately,
 23 according to the CR's case, Qualcomm's 5G chipsets, it had
 24 to have a licence that covered 5G phones in respect of 5G
 25 standards and also in respect of any previous standards that

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1 it was backward compatible with. So it had to have
 2 a licence, if you like, for 5G multi-mode devices, but if
 3 Apple was also selling LTE-UMTS phones, as it was, and that
 4 is what the claim is on, it did not, at least under the
 5 chipset supply policy, need at the same time to enter into
 6 a licence in respect of those phones for the LTE-UMTS
 7 standards, unless of course it wanted to buy Qualcomm's
 8 LTE-UMTS chipsets.
 9 So the output is that Apple, if it genuinely felt
 10 that it was dependent on 5G chipsets and that was inflating
 11 its royalties for LTE-UMTS on LTE-UMTS phones, it could
 12 simply have restricted the scope of the licence it had
 13 entered into with Qualcomm to a licence in respect of 5G
 14 multi-mode phones and left itself unlicensed for LTE-UMTS
 15 phones and then sought a --- if it did like the terms of ---
 16 for LTE-UMTS, it could then have sought a FRAND
 17 determination.
 18 So, again, in short, this just is not --- this is
 19 not a plausible thesis here about chipset leveraging from
 20 one standard to another, because it can be circumvented by
 21 the OEM appropriately structuring its licence arrangements.
 22 Finally, if may, I come to the law, and I will be
 23 very brief. There are going to be, of course, many legal
 24 issues, as you expect, that I will not be dealing with today
 25 but will deal with in closing, such as extraterritoriality .

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1 Nothing should be read into that at all .
 2 THE CHAIR: Yes. On extraterritoriality are you
 3 really pursuing this point?
 4 MR JOWELL: Yes, we are. Yes, we are, because
 5 this is an example --- if you think about what we are doing
 6 here, we are debating what happened between an American
 7 company and another American company in America and an
 8 American company and a Korean company in America and Korea.
 9 THE CHAIR: We are talking about the way it feeds
 10 through in to payments for phones sold in this country.
 11 MR JOWELL: In this country. But that in itself
 12 is not the test. The test is there must be a direct effect .
 13 There must be --- there must be some immediacy and some
 14 directness in the effect, otherwise an antitrust violation
 15 anywhere in the world, however indirectly it may trickle
 16 through into the prices of goods sold here, would give rise
 17 to an antitrust claim. That is not the law, as we
 18 understand it.
 19 THE CHAIR: Is the Tail End Charlie in your
 20 skeleton argument.
 21 MR JOWELL: It is, but I do not back away from it.
 22 THE CHAIR: I know you have spent so much money on
 23 this litigation that you want to take every conceivable
 24 point, but that does not mean that it is right to do so and
 25 to put everyone to the expense of addressing that point.

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1 Please will you take that away.
 2 MR JOWELL: We will, but of course I should say
 3 this: the Tribunal does not --- the Tribunal may feel that it
 4 is able to dispose of this case without necessarily
 5 addressing every single point, as Tribunals often do.
 6 THE CHAIR: Yes. That does not mean that you need
 7 to advance every conceivable point, even if it is hopeless.
 8 MR JOWELL: We will take it on but we respectfully
 9 submit that it is not a hopeless point for the reasons
 10 I have just outlined.
 11 What we do say about the law is this: first of
 12 all, we respectfully submit that this is not a case in which
 13 the Tribunal should accede to the claimant's invitation to
 14 invent a new form of sui generis abuse in law. The chipsets
 15 supply practice of not supplying to unlicensed customers is
 16 in itself not abusive conduct. That, as I have said, based
 17 upon the claimant's skeleton argument, appears to be common
 18 ground. If there is an abuse here, it must be found in some
 19 other conduct. So, for example, if Qualcomm charged
 20 excessive and unfair royalties, that might be an abuse in
 21 the form of excessive pricing or it might be a violation of
 22 FRAND or it might be both. Similarly, if Qualcomm
 23 deliberately cut off supply to an existing customer that was
 24 willing to enter into a licence but that sought a FRAND
 25 determination or a FRAND arbitration, then that conduct of

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

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

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

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

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

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

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

25 The third point we would make is that if you were

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR SAUNDERS: We will make that work.
 2 THE CHAIR: Yes, all right. If you were to tell
 3 me that it is really tight, we can sit a bit early tomorrow,
 4 but I do not want to get everyone back early.
 5 MR SAUNDERS: I think we are okay. If I could
 6 come back on that, depending on how ---
 7 THE CHAIR: Let us do the FRAND bit now.
 8 Opening submissions by MR SAUNDERS
 9 MR SAUNDERS: Just to give you a road map on what
 10 I was going to deal with. I am going to deal with
 11 leveraging and the Padilla report on that. Some aspects of
 12 what Class Representative calls the "FRAND context" and, in
 13 particular, this new hypothetical interim licence with FRAND
 14 to be determined some time down the track.
 15 The starting point is we say that some
 16 considerable care is needed with that section of my learned
 17 friend's skeleton argument entitled, "The FRAND context", so
 18 that is paragraphs 116 to 142 of their skeleton, and with
 19 a number of the submissions made that related to it
 20 yesterday and today. What I will do just in opening is
 21 telegraph some of the points on which there is
 22 a disagreement and then we can address you on the law in
 23 more detail in closing, but we now know where are we at this
 24 stage in the litigation.
 25 We now know from Mr Moser's submissions yesterday,

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

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

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

23 Now, that is the first point.

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

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

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

16 Then what happens ultimately when the FRAND rate
 17 is determined? Is the implementer going to pay in full for
 18 the past? It was only confirmed in English law in

19 *InterDigital v — in the InterDigital v Lenovo case —*

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

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

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

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

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

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

16 MR SAUNDERS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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1 the counterfactual as an intellectual exercise, that is not
 2 an answer to how one approaches the counterfactual, but it
 3 is, we say, incumbent upon the Class Representative to spell
 4 out in a little bit more detail how they say that these
 5 particular two OEMs at the relevant times, whatever they are
 6 saying those times are, qualified under this counterfactual
 7 to invoke some kind of process.

8 THE CHAIR: But it is your submission I am trying
 9 to work out. Mr Jowell said, "But we did offer FRAND
 10 negotiation". I am trying to work out what should have
 11 happened in your submission if that offer had been accepted.
 12 How would that have then played out? It is a very simple
 13 question. Who would have paid what then?

14 MR SAUNDERS: My Lady, I need to go back to the
 15 exact terms of the proposal that was made. I know that is
 16 a frustrating answer in a sense, but it is buried in the
 17 correspondence that we were looking at earlier on.

18 THE CHAIR: All right.

19 MR SAUNDERS: In my submission, it does not take
 20 away from the general point, which is that where one is
 21 looking at developing a counterfactual of this type, largely
 22 on the fly, by reference to some very recent case law of the
 23 English courts, in a dispute, as my learned friend Mr Jowell
 24 was explaining, between two American companies and a South
 25 Korean and American company. It is, in my submission, quite

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1 difficult to see how English procedural remedies are the key
 2 to a counterfactual and then to roll them back to the
 3 relevant period. This is why all of this, in my submission,
 4 is very inchoate in the way it has been developed by my
 5 learned friends.

6 Now, as I say, I can address you on what actually
 7 happened as a matter of fact, but, in my submission, it is
 8 appropriate for my learned friends to explain their case
 9 first as to exactly what they say should have happened.

10 MR TURNER: The central allegation, as
 11 I understand it, is that you explicitly or implicitly
 12 refused to supply chips while these negotiations were going
 13 on and you say that is not the case and I am not sure
 14 whether we need to get beyond that and analyse ---

15 MR SAUNDERS: No, our primary position is it does
 16 not arise on the facts.

17 MR TURNER: So you will not be inviting us to
 18 determine whether Apple and Samsung were willing licensees?

19 MR SAUNDERS: Well, the question of whether ---
 20 because what I am trying to suggest is that it is
 21 inherent ---

22 MR TURNER: It is a fairly binary question.

23 MR SAUNDERS: Well, it is. The answer is I think
 24 if my learned friends are going to pursue that
 25 counterfactual, they have to establish that the

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

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

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

11 MR TURNER: That is a separate question.

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

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

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

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

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

6 THE CHAIR: I think we have that point.

7 MR SAUNDERS: You have that point, my Lady.

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

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

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

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

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

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

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

12 MR TURNER: Yes, I understand.

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

1 non-discrimination did not apply to that.

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

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

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

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

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

1 middle of an agreed term.
 2 So, again, I can address — there is some material
 3 in the bundle about this, but just to make it clear, again,
 4 that that is another area of dispute between us about the
 5 underlying FRAND mechanism.
 6 Finally, one point which the Class Representative
 7 makes in paragraph 139 is that FRAND licences must allow for
 8 variations if the underlying IP rights change. Now, again,
 9 some care is needed with that. That was true in relation to
 10 the Unwired Planet licence, but that was done for very
 11 specific jurisdictional reasons and it is not a common term
 12 that is found in licences that have not been settled under
 13 English court procedure.
 14 Now, whether it makes any difference depends on
 15 the scope of the portfolio and do not forget that some of
 16 those cases are about very small portfolios where individual
 17 patents, if they drop off, mean that there is hardly
 18 anything left in the portfolio. That of course is a very
 19 different position to Qualcomm with whatever it is,
 20 150,000–odd patents and applications.
 21 So I just wanted to highlight when we come to
 22 closings those are some of the areas on which there is
 23 dispute. I do not know whether any of those points will
 24 matter for the ultimate determination, but it is important.
 25 I do not want it to be suggested that in some way all of

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1 that is some kind of agreed position, it is not.
 2 THE CHAIR: Quite.
 3 MR SAUNDERS: This case law is actually a lot more
 4 complicated —
 5 THE CHAIR: I think we have that point.
 6 MR SAUNDERS: — these cases are a lot about
 7 establishing English jurisdiction and the development of
 8 this case law, viewed as a historical series of cases, is
 9 not really germane to identifying a series of principles
 10 that can be just plucked out of a case last year and saying
 11 that applies across the relevant period. It is far more
 12 complicated than that.
 13 THE CHAIR: We will rise for five minutes.
 14 I think really we do not have very much time for you to
 15 address us on leveraging, because we do really want to get
 16 to the market definition and dominance points and I would
 17 like, if possible, for Mr Bailey to be able to finish his
 18 closed sessions comments today. So maybe just —
 19 MR SAUNDERS: I will be very fast. I just need to
 20 show you the relevant pages and just draw out a couple of
 21 things from the diagrams.
 22 THE CHAIR: Just a few minutes, please.
 23 (3.25 pm)
 24 (Short Break)
 25 (3.38 pm)

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1 In Private
 2 (4.25 pm)
 3 (The court adjourned until 10.30 am
 4 on Wednesday, 8 October 2025)
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