IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1382/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 29th July 2024

Before:
The Honourable Mrs Justice Bacon
(Chair)
Professor Robin Mason
Justin Turner KC
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Consumers' Association

Class Representative

v

Qualcomm Incorporated

Defendant

A P P E A R AN C E S

Jon Turner KC, Rob Williams KC and Antonia Fitzpatrick (instructed by Hausfeld & Co. LLP on behalf of Consumers' Association)

Daniel Jowell KC, Nicholas Saunders KC, Jonathan Scott and David Bailey (instructed by Norton Rose Fulbright LLP and Quinn Emanuel Urquhart & Sullivan LLP on behalf of Qualcomm Incorporated)

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Monday, 29 July 2024

(10.34 am)

Case management conference

MRS JUSTICE BACON: Some of you are joining us via live stream on our website, so I will start with the usual warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as contempt of court.

Mr Turner, if you could just hold off for one minute while I try and sort out my screens. (Pause)

Sorry, Mr Turner, we were just sorting out screens. I might have to get IT shortly, but yes, why don't you make a start.

MR JON TURNER: My Lady, I appear today with Mr Williams and Ms Fitzpatrick. For Qualcomm, you have Mr Jowell, Mr Saunders and Mr Bailey.

On housekeeping, you will find out that there have been some intensive exchanges of correspondence between the parties over the last days, including over the weekend, so it's been a bit of a moving feast.

You should have a hard copy, I believe, of the core bundle each and the rest electronically, which will be

hopefully displayed on the screen.

MRS JUSTICE BACON: I think that we only have one core hard copy being used. We are both using electronic versions.

MR JON TURNER: There is a proposed agenda in the core bundle, page 4, tab 1. It reflects an agreed order of play, and the timings are obviously going to be subject to how we get on and steers from the Tribunal.

MRS JUSTICE BACON: Yes.

MR JON TURNER: On our side, I will share the submissions with Mr Williams.

The first order of play on the agenda is the application by Qualcomm in relation to particulars.

MRS JUSTICE BACON: Yes, well I think at least up until around item 6, the review of the documents for privilege, we will follow the order that's suggested. I think then after that we might diverge a little bit.

But before you get into the order on the agenda, can I just check, I think we all have a core bundle, two supplemental bundles and a correspondence bundle. I'm a little bit alarmed if there's more documents that have come in over the weekend. Where are they?

MR JON TURNER: So I don't yet have those in hard copy myself. There have been letters exchanged by the parties which have been helpful in narrowing the position, narrowing the dispute between them.

I understand that these were supplied to the Tribunal electronically.

MRS JUSTICE BACON: As what, as an updated bundle?

MR JON TURNER: They have been included in a folder called "second correspondence bundle". Do you have it?

MRS JUSTICE BACON: I will be sent it.

MR JON TURNER: Right. I similarly do not have that in electronic or in hard copy form, but --

MRS JUSTICE BACON: So presumably, if you don't have it, then you're not going to be referring to it?

MR JON TURNER: Well there are things that will need to be referred to, but for the first part of the agenda, and certainly for the particulars, it won't make a difference. So there won't be a problem there while this is sorted out.

MRS JUSTICE BACON: All right, at what point are we going to need to look at that, which number?

MR JON TURNER: It may come in in relation to the application for disclosure on our side.

MRS JUSTICE BACON: Is that number 3?

MR JON TURNER: Yes, it's C in the agenda.

MRS JUSTICE BACON: All right, so until we get to that we won't need it, and by that time I will have sorted it out. I will make sure I have it during the transcriber break.

Is there anything else that is not the core bundle, the two supplemental bundles, or the two correspondence bundles, and the authorities bundle; is there anything else that we ought to be having?

MR JON TURNER: There may be one thing which is that we have discussed internally an updated draft order.

MRS JUSTICE BACON: I think we probably won't need to look at draft orders until we get to the end.

MR JON TURNER: No, but for seeing what we're now asking for on each side, to reflect --

MRS JUSTICE BACON: All right.

MR JON TURNER: My Lady, with that introduction, perhaps Mr Jowell should kick off with the first application.

MR JOWELL: I'm grateful.

May it please the Tribunal, the first application is found in tab 18 of the core bundle, starting at page 263. This application arises out of the previous hearing, when you will recall that the Class Representative applied for permission to serve expert evidence in relation to the supposed conduct of typical or normal licensing negotiations for SEPs in the mobile communications industry. The Class Representative submitted that, as they put it, a central pillar of their abuse case was that Qualcomm's negotiations with its licensees, in particular with Apple and Samsung,

deviated from that normal, that typical licensing negotiation.

That application revealed, if I can put it neutrally, a lack of particularity in the Class Representative's pleaded case as to the nature of this negotiating norm and the deviation from it, and also, we would submit, a lack of clarity in its case on abuse generally.

The Tribunal will recall that its response was, if I may summarise, to permit a certain amount of expert evidence confined to that, relating to the alleged content of a typical or normal licensing negotiation, but also at the same time to permit -- or indeed perhaps encourage us -- to raise, by way of a request for information, further clarification of the Class Representative's case. We did so and we served our fifth RFI, which you will find in the supplemental bundle at page 567, which is at tab 12, if you happen to have a hard copy. This is the Class Representative's response to that request.

We say that unfortunately there remain important aspects of the response that are incomplete or, to put it bluntly, simply evasive. So we seek an order for further clarification of the Class Representative's case in three respects. Those three respects you will see in our application, and perhaps if you turn to that in the core bundle at page 264.

You see in paragraph 3 we have (a), (b) and (c). (a) essentially seeks a response to our questions posed on a different basis, and the aim is essentially to smoke out where the allegation of deviation from a negotiating norm fits within the Class Representative's allegation of abuse generally and the content of the NLNC policy. The second, (b), concerns clarification of a new case that the CR might be running based upon its response to our RFI. The third, (c), seeks full and comprehensive particulars in response to our request 3 of RFI 5 in place of the merely illustrative examples that were provided.

If I could start off with that last one, (c), because it's really the most straightforward, and it can be dealt with relatively briefly. There are naturally enough, as I think both sides recognise, two parts to the allegation of deviation from a negotiating norm or a typical negotiation. One aspect is what is alleged to be the typical or normal features of the licensing negotiation in question, and the other aspect is how is it alleged that Qualcomm deviated from that norm in its negotiations with Apple and Samsung?

We respectfully submit that before we have to serve our evidence in this case, our witness statements and so on, and our expert evidence, we are entitled to

a properly particularised case from the Class Representative on both of those aspects. We therefore asked for particulars of both our aspects, the norm itself and the alleged deviation from the norm in our RFI.

In relation to the first aspect, the description of the negotiating norm, we received a rather high level, rather vague answer which, if you go to supplemental bundle 567, where one finds the response. If you could go, please, to 575.

MR JUSTIN TURNER: Sorry, I'm having bundle issues.

MR JOWELL: This is the supplemental bundle.

MR JUSTIN TURNER: I have a supplemental volume ...

MR JOWELL: It's tab 12 of the supplemental.

MR JUSTIN TURNER: I have a supplemental volume 2, and I have an SS volume 1, second supplemental.

MR JOWELL: No, it's supplemental --

MR JUSTIN TURNER: So I haven't got the first supplemental.

MR JOWELL: That's rather important.

Does somebody have a spare copy?

MR JUSTIN TURNER: Let's work off the electronic for now.

MR JON TURNER: We have a bundle we can hand up.

MR JUSTIN TURNER: I'd be very grateful, thanks.

MR JOWELL: If you go to 575, please, tab 12. You will see that our second request was particularisation of the

constituent elements of what we called the "SEP negotiation norm". That was a term the Class Representative didn't like, but nonetheless what one sees in paragraphs 9 and following are a description of what they say parties in these types of negotiations would ordinarily ask for and receive, in paragraph 11, and then in paragraph 12, a list of alleged various considerations that they say are typically taken into account.

Now this is a very vague answer, but it is at least apparently a complete answer, we hope it is complete, and we're prepared to live with it for now. Mr Melin, our expert, now knows the features, at least in general terms, that he has to address. No doubt we will get more details, more flesh on the bones, when we see Mr Schneider's report, and Mr Melin will have to respond to those. But we can live with that aspect.

But when it comes to the particulars of the respects in which it is alleged that Qualcomm's negotiations with Apple and Samsung deviated from this typical conduct, we only get an incomplete answer. You see that in response to our request 3, which is on page 577. Perhaps, actually, if you go back to see the request itself, you see it's on page 571, and what we asked was, in (a) and (b):

"Please identify each SEP licensing agreement

between Qualcomm and Apple, Apple's contract manufacturers or Samsung the negotiation of which is alleged to have departed from the norm."

And then:

"For each negotiation please particularise in which respects Qualcomm's conduct is alleged to have departed from the alleged norm."

The answer you see at paragraph 18 on page 577. You see it starts in paragraph 18. It says:

"The Class Representative is not in a position to provide particulars of every affected negotiation in the industry."

Now, just pausing there, that's not what we asked for, we didn't ask for particulars relating to every affected negotiation in the whole industry. We just asked for particulars of every affected negotiation between Qualcomm and each of Apple and Samsung for the relevant licences.

They then do give us two indicative examples, they say. They say these are indicative of the negotiating practice to which the NLNC policy has given rise. You will see those, I won't read them out because they're confidential, but it's just two examples.

We say, I'm afraid, that's just not sufficient. We have to serve witness statements in the not too distant

future. If it is alleged that in negotiating with Apple and Samsung, Qualcomm's negotiators deviated from some typical conduct, then we are entitled to know in advance of serving those statements so that we can try and locate the relevant witnesses and take their evidence on the point.

We can't be expected to go into trial in the dark and then be ambushed about supposed incidents in the conduct of the negotiations with Apple and Samsung where it's alleged that we deviated from some norm. You can't suddenly get to trial and then they say, "Ah, well, in 2018, for example, you failed to provide patent charts, or you refused to provide patent charts in these negotiations with Samsung." If they're going to make that sort of allegation, we need to know that in advance. We need to locate the relevant witnesses, identify the context, the documents and so on and prepare our case for trial.

This is all the more so if it's the case, as they suggest in their response, if one goes back to the core bundle at tab 21, page 304, where they say this at paragraph 18 ... forgive me --

MRS JUSTICE BACON: Is it 13?

MR JOWELL: Forgive me, paragraph 13, yes.

MRS JUSTICE BACON: We can read paragraph 13.

MR JOWELL: Yes.
MRS JUSTICE BACON: What they're saying is it's disproportionate for them to particularise every negotiation, but to rather provide high level responses to capture the general pleading point.
MR JOWELL: Yes.
MRS JUSTICE BACON: Is it possible to meet in the middle on this, and for a summary of what is relied on to be provided of rather the same level of generality as is provided in relation to, for example, their response, paragraph 12? So what they said at paragraph 12 is that typical negotiations will consider the following matters. What they could do is explain what they say, in general, characterise the non-typical negotiations.
MR JOWELL: It may be to an extent for some of those elements, but if it's for example alleged that, as I said, that Qualcomm refused to provide patent charts on a particular occasion, that needs to be particularised where and when. We need to know, and we need to know which licence negotiations are said to have been affected and when the deviation took place, because obviously these licence negotiations take place over a considerable length of time. We need to know we have the right witness to deal with the allegation.
So in a sense when you're talking about what are the

features of a typical negotiation, that is something that lends itself to a more general explanation, but when you're talking about a deviation from the norm, it does seem to us that at least in most respects you need to have dates and occasions and what it is that's said to have been done, otherwise we are completely in the dark to know what is the case we're actually meeting at trial.

MRS JUSTICE BACON: But you won't get to trial and be ambushed if the matters are properly set out in the evidence before trial.

MR JOWELL: But they have said they are not anticipating calling any witnesses of their own, so we're not going to find out from -- or at least not from Apple and Samsung.

MRS JUSTICE BACON: No. You have the Lenovo witness.

MR JOWELL: Possibly Lenovo, but we're not seeking particulars. We will come on to the relevance of that, but the core negotiations that really matter are the ones with Apple and Samsung, and in respect of those they're saying, "We're not going to call witnesses."

So we need to know, well, what is the case that you're advancing? It's really very fundamental, and we say very reasonable, to expect comprehensive particulars. You can't just say, "Here's an example."

They have had extensive disclosure of the documentary evidence pertaining to the negotiations between Qualcomm and each of Apple and Samsung, so they have the documents from the previous proceedings, they have thousands and thousands of them, and if they want to run this allegation of abuse by reference to alleged deviant conduct in negotiations, then they have to provide comprehensive particulars.

MRS JUSTICE BACON: All right.

MR JOWELL: So that is our first request.

MRS JUSTICE BACON: Yes.

MR JOWELL: Our second request is request 3(a) in our application. The Tribunal will recall that we are really struggling, we have profound difficulty with the manner in which the CR uses this phrase or acronym "NLNC policy" in its pleading, because rather than it referring really to a policy properly so-called, it seems to be being used as an elastic catch-all to encompass a range of conduct. Precisely what it means by the phrase "the NLNC policy" seems to expand and contract from RFI to RFI and from CMC to CMC, sometimes even within the same case management conference. In the same spirit, you may have seen that in their skeleton argument they speak of the NLNC policy as describing the gist of the abuse.

In our submission, it's going to be critical the Tribunal ensures that the Class Representative unpacks precisely what it means by "the NLNC policy" in advance of trial. By that I mean that it should be required to identify with clarity its alleged components or elements, and which of those elements are said to be truly essential and which are inessential.

We need, again, to know that because we need to know what is the evidence at trial on which the abuse allegation is going to turn? Our concern is that the Class Representative is advancing a case that is so malleable, and ultimately so circular, that it will be unprovable, or disprovable, by any actual evidence at trial.

Put another way, we think that the Class Representative wants to be in a position where, whatever the facts turn out to be, even if there were no threats against Apple and Samsung, even if there were no deviations from a negotiating norm as against Apple and Samsung, nevertheless it can still maintain that there was an abusive NLNC policy that somehow had an abusive effect.

If one strips it back and takes it literally, the acronym "NLNC" would appear to be no more than identification of the fact that Qualcomm has a policy

that buyers of its chips must have a licence of its patents, and so it doesn't sell to unlicensed purchasers. In that simple form, "NLNC" is no different from what Qualcomm calls "its chipset supply practice", and that practice is admitted on the face of the pleadings. If that is all that they mean by "NLNC", then we don't really need any more evidence about typical licensing norms or anything else. It's admitted.

MR JUSTIN TURNER: The bit I don't have at the front of my mind, at least, is what Qualcomm's position is with regard to its policy which it accepts. What happens when a FRAND rate is not agreed? Qualcomm requires a licence to be taken --

MR JOWELL: Yes.

MR JUSTIN TURNER: -- and the rate is not agreed. Is your case that Qualcomm supplies in the meantime while that's being negotiated, or while that's being determined by the courts, or --

MR JOWELL: Well, certainly in the case of Apple and Samsung, which is the only one that matters, the only situation that matters here, the answer to that is yes, it certainly was supplying, it never ceased supplying at any stage to those OEMs. In a case of -- you will see from our defence that --

MR JUSTIN TURNER: And you say never threatened.

MR JOWELL: Never threatened, and we also say, in the case of Apple, at one stage it offered a FRAND arbitration. We also say, you will see from our pleaded case, that in the case of both Samsung and Apple, there were security of supply arrangements in place with them.

MR JUSTIN TURNER: I appreciate there's a dispute about the relevance, but you're not saying that's your practice cross industry generally?

MR JOWELL: We do say that across the industry generally we do not have a general policy of threatening to cut people off precipitously, we absolutely do not.

We do require a licence, and we say that the requirement for a licence follows on from the simple fact that first of all, Qualcomm does licence at the end device level. It makes no bones about that, and there's nothing unique about that. That is very common in the industry to licence at the end device level.

Where Qualcomm is in a unique position somewhat is that Qualcomm has both a licensing business, which was its original business, but then also developed a chip supply business. That's why it's said that this NLNC policy is unique, because it's the only company that has a very large licensing business and a large chipset supply business.

If it was to simply supply chips without also requiring a licence, it would be in a situation where either it was threatening the exhaustion of its patents, or it was selling to a patent infringer. And we say that is not something that it should be required to do.

So if we're to have a debate about whether the NLNC policy just in and of itself is abusive, we say that's a very short discussion and the outcome is very clear, it can't possibly be abusive. It's no doubt because they recognise that the Class Representative seeks to add on other elements to what it calls "the NLNC policy". You see that if you go to RFI 3, which is in the supplemental bundle at page 523.

MRS JUSTICE BACON: Yes. Mr Jowell, I think you're going to need to speed up on this point and make your points rather more precisely.

MR JOWELL: Forgive me.

MRS JUSTICE BACON: Because we're down for an hour on this, and we're already at 25 minutes and we haven't got even halfway through your three points.

MR JOWELL: I appreciate that. Let me speed up, but I do need to make these points, forgive me.

If one goes to 523, please, you will see paragraphs 1 to 3 of RFI 3, where we asked about the chipset supply, you will see 1, we asked “whether it's

the Class Representative's case that the Defendant's long-standing practice of selling baseband chipsets only to OEMs that are licensed to practice its patents, and of not selling them on to unlicensed customers, constitutes in and of itself an abuse of dominance."

They say this is:

"narrowly drawn to refer to only that aspect of the practice pleaded by the Class Representative which the Defendant admits. The Class Representative does not accept that this characterisation of the Defendant's practice is complete, nor that it encompasses the essential features which render that practice abusive."

And then they say:

"Through the NLNC policy, the Defendant requires OEMs to enter into a separate patent licence on the terms demanded by the Defendant as a condition or precondition of the supply of baseband chipsets, failing which the supply of chipsets is disrupted. The terms of the --"

MRS JUSTICE BACON: Should we just read to the end of the paragraph? Where do you want us to read to, end of 3?

MR JOWELL: If you read to the end of paragraph 3, I think that's sufficient. (Pause)

MRS JUSTICE BACON: Yes.

MR JOWELL: In a recent response to the other application, if you go to the core bundle at page 273, if you go to paragraph 11(a).

MRS JUSTICE BACON: Yes, do you want us to read that?

MR JOWELL: They effectively reiterate the point. They say --

MRS JUSTICE BACON: Do you want to us read it?

MR JOWELL: -- third line down, 11(a) they say:

"Although Qualcomm admits that it operates a "Chipset Supply Practice", this does not encompass admissions on the essential features which render the NLNC Policy abusive, including its inherent power unfairly to leverage the dependency of major OEMs on its chipsets…"

Then over the page, if you look at (b) and (c), we have at (b) the allegation of -- for instance they say -- this is their deviation from the ordinary negotiations point. And then the reference in (b) also to the threats. They say in (c):

"Qualcomm does not accept that its Chipset Supply Practice involves either type of conduct."

So what one gets from this, when you read these documents, is that the so-called "NLNC policy" is actually a misnomer, it's not really a policy at all. Certainly not just a policy. What it is, is rather a policy, meaning the chipset supply practice, plus

certain additional elements which are said to be essential, by which it is said that Qualcomm unfairly elevates licence royalties.

As far as we understand it, that additional essential conduct consists of these two sets of behaviours; one, this deviation from the licensing norm --

MRS JUSTICE BACON: So not providing things like patent claim charts?

MR JOWELL: Indeed.

MRS JUSTICE BACON: And secondly, threatening with cutting off supply?

MR JOWELL: Exactly.

And that, it seems to be, at least on this version of the case, it's those additional elements that lead to this alleged abusive leveraging.

Now, originally as pleaded the main emphasis was on the threats. I don't need to take you to it, but you will see there, if you read paragraphs 32 to 34 of the claim form, you will see there is a major emphasis on the threats and that they then backed away from the allegation that the threats were essential. You see that, again I won't take you to it, you will see that in the third RFI response at paragraphs 10 and 11, in the supplemental bundle at 525, and there they said "well,

it's not abusive only when the Defendant expressly threatens an OEM with disruption".

So they retreat from the threats and one apprehends that the reason they retreat is they realised there were no threats in the course of negotiations with Apple and Samsung. So then they turn to develop their other aspect which is the deviation from this normal or typical royalty negotiation. You will recall that you were told on the occasion of the last application by the Class Representative that this was a central pillar, they said, critical to establishing the leveraging abuse and on the basis of that they were given permission for their expert evidence.

So what we were keen to do was understand, well, is this going to turn out to be just like the threats, something that they advance and then later retreat from, something they say is essential and then turns out just to be an optional extra.

So if you -- what one sees in the response, if one goes to supplemental bundle at page 571 --

MRS JUSTICE BACON: Well, 571 is a series of if -- do you accept that if X, then the Class Representative's case fails?

MR JOWELL: Exactly.

MRS JUSTICE BACON: Well, I'm not sure that that's the kind

of appropriate question to put in an RFI.

MR JOWELL: Well, we're seeking to elicit whether these are -- what actually is the effect of this allegation of deviation from a licensing norm. Did they accept that if there wasn't a deviation that then there was no abuse, and if that's not the case then are we just throwing back on the chipset licensing practice?

MRS JUSTICE BACON: They have answered that.

MR JOWELL: Well, they answer it, but they do it, as you see in page 573, by defining NLNC in a particular way and what they -- the way they define NLNC, you see in paragraph 2(a):

"Any OEM wishing to purchase chipsets from Qualcomm must also agree to take a separate licence permitting it to use Qualcomm's associated SEPs..."

As I say:

"…on the terms demanded by it…".

And by using that phrase, "…on the terms demanded by it…" they effectively smuggle into the definition of NLNC some element of compulsion as to the outcome of the terms, so in other words NLNC, as defined here, is not just the chipset supply practice, it's not just requiring a licence; the way they're defining NLNC is saying: you impose a licence on whatever terms Qualcomm insists on.

MRS JUSTICE BACON: Well, this is not smuggling in, it's a pleaded point at paragraph 33.

MR JOWELL: Very well, but it is -- nevertheless it allows them to effectively duck the issue.

MRS JUSTICE BACON: We need to get to the nub of what your point is on this, Mr Jowell.

MR JOWELL: What we have asked for is to respond to our queries by reference not to their definition of the NLNC policy, but by reference to simply the chipset supply practice and if you -- now if you go back to the core bundle, forgive me for being so long winded about this, but if you go back to the core bundle at tab 21, and you see at page 304, you see at paragraph 12:

"As to Qualcomm's request that Which? re-produce its response to these two requests as if they had sought information as regards the Qualcomm-defined 'Chipset Supply Practice' rather than Which?'s pleaded NLNC policy: Which? has properly responded to Requests 4 and 5 in the terms in which they were put and on the basis of Which?'s own pleaded case, which relates to the NLNC Policy and not to Qualcomm's defined term. It is unclear to Which? what this variation on the questions ..."

MRS JUSTICE BACON: Yes, they don't understand the question.

MR JOWELL: Yes, well the purpose of the question is simply this: if you go back to the supplemental bundle at 574

and paragraph 3, they say this:

"For the avoidance of doubt, the allegation that Qualcomm sets royalty rates without this being based upon the true underlying value of the patent ..."

MRS JUSTICE BACON: Shall we just read the paragraph?

MR JOWELL: Yes, forgive me, please do.

MRS JUSTICE BACON: Yes.

MR JOWELL: Now, let's suppose that it transpires at trial the Tribunal finds that there was, in the negotiations between Qualcomm and each of Apple and Samsung over licence terms, a genuine process of bargain in which Qualcomm negotiated or was prepared to negotiate the level of the royalty rate with reference to considerations typically taken into account in a competitive negotiation of the royalty rate. Let's suppose that that is how things transpire at trial.

Does the Class Representative still say that there would be an abuse, or an abuse with effects for which it can claim damages? So, in other words, we do not wish to get to trial and find -- and establish that there were no threats, we establish there was a genuine and normal negotiation and then we find that the Class Representative simply turns around and says: oh well, no matter about all that farce, never mind what the facts are, your chipset supply practice is intrinsically per

se abusive. Because if that is their case --

MRS JUSTICE BACON: Well then you could just ask a question based on that without lots of hypothetical: if this is this, then do you accept your claim fails?

MR JOWELL: My Lady, we have tried to do that. We asked them that very question in RFI 3, you see the response we got, we get this response where they say: well, that's not what the essential elements are, and then it talks about these other essential elements.

Now, if -- either they're essential or they're inessential and what we're trying to elicit by these very questions is precisely that.

MRS JUSTICE BACON: Mr Turner has heard what you have to say. I think asking hypothetical questions and asking if their case fails on those bases is not the right way to go about this. If your point is a focused one about: If there is a genuine process of bargaining, do they still say that there's an abuse on what basis, if that question be crystallised, then I don't have a problem with an answer to that being provided and Mr Turner may be able to give that in open court today. But I don't think the way that requests 4 and 5 are currently drafted is the right way of going about this.

You're going to need to conclude your submissions now, please, Mr Jowell, because you have one more point

to deal with which is the leveraging argument.

MR JOWELL: The leveraging argument. Now, there are two other -- the final point -- and forgive me -- is this: they, in paragraph 17(b) of their response to the RFI which you see in supplemental bundle 577, they state this, in 17(b) --

MRS JUSTICE BACON: All right, we have read (b).

MR JOWELL: You've read (b).

MRS JUSTICE BACON: Yes.

MR JOWELL: And we say that this is the first we have seen of any allegation that Qualcomm invokes non-discrimination --

MRS JUSTICE BACON: Yes.

MR JOWELL: -- the non-discrimination limb of FRAND with other OEMs as a basis in its negotiations with Apple and Samsung.

MRS JUSTICE BACON: Yes, all right.

MR JOWELL: And we say this is a new case. If they want to bring it, it requires an amendment to the pleadings and this -- the new case seems to allege that Qualcomm's conduct affected other OEMs, other than Apple and Samsung, but that by some alchemy this resulted in Apple and Samsung paying the alleged super-competitive royalties.

MRS JUSTICE BACON: It's not alchemy. You refer to or

there's a reference to the non-discrimination.

MR JOWELL: Non-discrimination, but if that is the case, then if that is their allegation, then they need to -- it needs to be properly -- first of all, it's a new claim actually because it's a new causal link.

Secondly, it needs to be properly particularised. We need to know which other OEMs it is said were invoked as some sort of benchmark in the negotiations with Apple or Samsung and we need to know is it alleged that Qualcomm invoked the non-discrimination requirement in FRAND as against Apple and Samsung by reference to that benchmark. If so when, in which negotiations, and we also need to understand whether it's alleged that the supposed non-discrimination requirement did require Qualcomm to charge the same to Apple or Samsung because that is certainly not our understanding of the non-discrimination element in FRAND.

So we say that if the CR wants to pursue this new allegation, it has to give proper particulars in all those respects and should do so by seeking permission to amend its claim form.

And if I may add one point before I sit down, which is that there is also this question, this allegation that's thrown around, that somehow it may be that there's an additional aspect of the abuse that is a failure

on the part of Qualcomm to offer, if you like, a conditional licence, a licence at a price at a FRAND rate to be determined. This finds itself into the RFI and into some of the responses.

Again, if they wish to make this allegation, they need to plead it in their claim form and they need to state whether it's alleged that Apple and Samsung ever asked for a licence on that basis from Qualcomm and whether it's alleged that Qualcomm ever refused a licence on that basis.

So, again, that's another additional unpleaded --

MRS JUSTICE BACON: Wait a minute. Where's that in your application?

MR JOWELL: It's -- forgive me.

MRS JUSTICE BACON: Is this paragraph 10 of your skeleton argument?

MR JOWELL: Yes, it is paragraph 10 of our skeleton argument.

MRS JUSTICE BACON: All right.

MR JOWELL: Again, it comes into this question if the plus, if the NLNC policy plus is this sort of conditional licence mention, then that again needs to be spelt out, needs to be put in the claim form and we need to understand: well, are you saying that Apple and Samsung asked for a licence on a conditional basis like that and

we refused it? And, if not, I'm not sure where this allegation frankly goes.

MRS JUSTICE BACON: All right. Thank you.

MR JOWELL: Those are our submissions.

MRS JUSTICE BACON: Thank you very much, Mr Jowell.

MR JON TURNER: My Lady, we oppose the application. We say that the requests are unnecessary and in the first respect oppressive. In view of the debate so far I will deal with this as briefly as I can.

The first area is the application by Qualcomm that we should plead out each and every respect in which Qualcomm's disclosure was revealed on competitive negotiations in their conduct vis a vis Apple and Samsung. We say that's quite wrong. This is not a matter for pleading. The case is clear. It is a matter for the industry expert evidence.

My Lady, you asked about when that's going to be provided. We don't have factual witnesses on this, we have an industry expert and you may recall that that report is due on 6 September.

Rather than us going through all of the disclosure to try to find instances and plead them out before that, the right thing to do, the obviously efficient thing to do, is for us to turn now to the evidence because the case is sufficiently clear from what we say.

So far as the second --

MRS JUSTICE BACON: So your case on that is going to be set out in the industry expert report?

MR JON TURNER: Yes, the industry expert is going to refer to the ways in which there are -- the normal practice in the industry proceeds and we explained at the last hearing that it's done by reference to considerations that normally take -- I'm sorry, my Lady.

MRS JUSTICE BACON: Well, I'm just a bit bemused because we didn't have in mind that your factual case on the non-typical negotiations was going to be led by your industry expert, that's not an expert case. The industry expert can address normal process of negotiations insofar as there is one, but the point that Mr Jowell is making is where do you particularise and actually set out your case on the particular licensing negotiations which you say did not follow the normal path? That's not for the expert to comment on.

MR JON TURNER: Well, my Lady, the expert will refer to what is normal in the industry. What they're asking for now is for us to go through this large disclosure which is still ongoing and we're still due to receive material from Apple and Samsung in relation to the US application which should be coming in the next few weeks as well and to plead out details of every single respect in which

there was uncompetitive behaviour.

MRS JUSTICE BACON: But when are you going to set out that case? If it's not in your evidence and if it can't be in the industry expert report because that's not a matter for the industry expert, when are you going to make that case?

MR JON TURNER: Well, my Lady, what we will do is we will, in the expert evidence, explain what the normal practice is. We don't have factual witnesses and we will therefore need to cross-examine the witnesses for Qualcomm.

MRS JUSTICE BACON: But you can't do that just out of the blue. That's exactly what Mr Jowell is saying when he says he's worried he's going to be ambushed. How can his witnesses address that if you haven't said on which occasions what sort of conduct is alleged to have occurred?

MR JON TURNER: Well, my Lady, what we will need to do is I will need to clarify to you now the relationship between the pleaded abuse and these issues because in my submission the case that's made by Mr Jowell suggests that this is essentially the key aspect of the case which is going to have to be particularised so that it can be dealt with.

I would wish to explain, now, that that's the wrong

way of looking at it --

MRS JUSTICE BACON: But this is your pleaded case that there is non-typical negotiation. When are you going to make that good before we get to trial in terms of the evidence that you're leading or the particularisation of your case? It cannot await trial. It cannot simply come out through cross-examination of their factual witnesses, that's not going to happen because their factual witnesses need to know what the allegation is in advance so that they can actually provide the proper witness evidence.

So when is that going to be provided? It's not going to come in the industry expert report.

MR JON TURNER: Well, my Lady, the right way to do it in that case will be to work backwards from the date when the factual witness evidence from Qualcomm is due to be served, which of course -- November.

You will appreciate that on our side we have received a vast amount of disclosure which we, as I say, are still going through and what we can do is simply refer -- we're not going to refer to individual aspects on a blow-by-blow basis. We're referring in this case to wider points of a broader nature concerning how the approach to negotiation was not what one would expect in standard industry patent licensing discussions.

MRS JUSTICE BACON: So when are you going to set that out, even at a high level, they haven't even got that as a matter of generality at the moment. So they need to have this in time for their fact witnesses to consider that and address it in their evidence.

MR JON TURNER: Well, my Lady, I understand that. We can provide such further details as we are able to, let us say a month before they have to produce their factual witness evidence, but may I say --

MRS JUSTICE BACON: Well, just let me look at that timetable. Witnesses of fact, 8 November. So they're not going to find out until October what you are saying and then only at a high level. How on earth is that going to operate? You can't just then cross-examine on the detailed allegations which you are putting to the witnesses for the first time at trial without those witnesses having had any notice of what you're going to say about particular negotiations.

MR JON TURNER: Well, my Lady, what our case depends on, which I think I shall need to explain, is that the no licence, no chips policy itself creates a pressure which leads to an imbalance in negotiations which means that the result is higher artificially raised royalty rates.

MRS JUSTICE BACON: Yes, but you pleaded non-standard negotiations, so if that's still your case, unless

you're going to withdraw that, you need to explain how that is occurring.

MR JON TURNER: What we say in relation to that is that this is not a constant or essential feature of the negotiations.

MRS JUSTICE BACON: Well, then, do you rely on that then?

MR JON TURNER: To make that clear -- I'm sorry, my Lady?

MRS JUSTICE BACON: Do you rely on if it's not an essential feature of the negotiation?

MR JON TURNER: We rely on it as supporting the proposition that the no licence, no chips policy does have these restrictive effects in unbalancing the commercial negotiations between the parties, but, my Lady, may I just deal -- I'm going to have to address you on this right now, but if I may, in relation to this point, I see your Ladyship's concern. They're saying that they have to produce their witness evidence with knowledge of what we're going to say about specific negotiations, so on a practical point, given the work that we are engaged in doing now, my suggestion will be that we will produce the details that need to be produced on that issue, we say a month before they have to produce them.

MRS JUSTICE BACON: Much too late.

MR JON TURNER: Well, if it's due on 8 November, then, in my submission, the earliest that one can reasonably ask for

this to be done would be mid-September, because we can't produce this in the month of August.

MRS JUSTICE BACON: You have had the request for a long time. You have been saying for a long time from the outset that these negotiations are non-standard, non-typical and what they're wanting to know now is in what way.

I think you may need to be prepared to produce that before mid-September.

(Pause)

All right, 9 September. That's two months before, if I'm getting my month right, it's a Monday.

MR JON TURNER: Go for the Friday, my Lady, I think --

MRS JUSTICE BACON: The 6th?

MR JON TURNER: I was thinking the following Friday, which will be the 13th.

MRS JUSTICE BACON: I'm going to say the 9th.

MR JON TURNER: Right.

MRS JUSTICE BACON: And what are you going to do by the 9th?

MR JON TURNER: So, in relation to Apple and Samsung, we will refer to particular aspects of the negotiations where we say that these depart or have departed from the standard approach in industry practice.

MRS JUSTICE BACON: And are you going to list the particular negotiations which include aspects that have departed

from a standard industry practice?

MR JON TURNER: We will refer to those negotiations, yes, my Lady.

MRS JUSTICE BACON: You're going to then cite, the dates or date ranges of the negotiations?

MR JON TURNER: Yes. We're not looking at individual emails on a blow-by-blow basis --

MRS JUSTICE BACON: No.

MR JON TURNER: -- because you will appreciate that that is simply not feasible. We will refer to aspects where this was not done.

MR JUSTIN TURNER: How many negotiations are we talking about (inaudible)?

MR JON TURNER: With Apple and Samsung there were repeated negotiations over a period of years and the extent of the material that has to be considered is therefore voluminous.

MR JUSTIN TURNER: How many agreements, just very roughly?

MR JON TURNER: I will take instructions on that to see how many there are, but I believe we're talking about, for each of Apple and Samsung, at least two separate rounds of licensing agreements.

MRS JUSTICE BACON: So we need to know which of the rounds -- they need to know which of the rounds of negotiations are impugned, so not just across all of the

negotiations there with the following aspects, but which negotiations are said to have been tainted.

Now, I don't think that that needs to descend to you giving details of each and every email, but they need to know which are the negotiations which are supposedly tainted by the general problems that you will identify.

MR JON TURNER: So, my Lady, with that, if I may, I would like to explain the architecture of our case again because our case is that all of these negotiations are tainted. It is the same case on abuse as has succeeded in Korea, as has been put forward by the FTC in the States and which you have already seen. It does not depend upon particular approaches in the negotiations being an essential additional feature.

If I may, I will just have five minutes to explain this because it's important that we see the way in which this arises.

There are essentially four key points to our case. The first point is this: no licence, no chips. The policy complained of as being the abuse is the same practice as what Qualcomm calls its chipset supply practice. That practice is that Qualcomm will not sell chipsets to OEMs unless and until they have signed a patent licence.

In a nutshell, no licence, no chips. I was

surprised to hear Mr Jowell earlier saying in response to Mr Turner that this is not -- that this has been qualified in the case of Apple and Samsung. That is not what we have seen.

MR JUSTIN TURNER: So these -- you're going to give us four; are they cumulative or independent?

MR JON TURNER: They are cumulative, or the fourth is independent. The first is that the policy that we are --

MR JUSTIN TURNER: Sorry, it is probably my bad question, but are you saying that the CSP is of itself an abuse?

MR JON TURNER: Yes, we are.

MR JUSTIN TURNER: That requires no evidence, common ground, straightforward legal argument. The effect of it may be subject to evidence, but whether it's prima facie abusive will be just for legal argument; is that right?

MR JON TURNER: So the way that the parties diverge is as follows: there's agreement on what the court practice consists of --

MR JUSTIN TURNER: Yes.

MR JON TURNER: -- where the litigants diverge is in relation to the implications and consequences of that practice.

So if you pick up their defence in the supplemental bundle at tab 2, page 93, you see there Qualcomm's chipset supply

practice and Qualcomm acknowledges that no licence, no chips is what it does in 47 and 48. 47 says we use a different term. 48, you will see the last phrase:

"It's Qualcomm's practice not to sell baseband chips to its unlicensed customers ..."

And then they deny there is an obligation.

If you turn over the page, paragraph 49 is dealing with them saying that it's legitimate for reasons or, as it were, in competition jargon an objective justification. If you go to the next page, 95, you see there three reasons for saying that the implications of the practice are not what we say they are.

So 51.1:

"The licensing terms are agreed following arm's length negotiations."

Essentially, it's free and fair.

51.2, that they have never threatened to cut off chipsets to any OEMs including Apple and Samsung.

And 51.3, that they have never withheld samples or software and the like.

The argument is in relation to what the practice actually has involved which takes me to my second of the four points, which is that our case is that this practice, we will not supply you with chipsets until you sign a patent licence, by its nature is distortive of

competition and it is therefore an abuse.

The reason for that is that, on our case, they have a dominant position in the supply of the physical chipsets to OEMs. That is a separate economic market and because of their power on that separate market, their negotiating position, namely we won't sell you the chipsets that you need until you sign up inherently involves a leveraging of chipset power.

MR JUSTIN TURNER: And Mr Jowell's position is that this never happened.

MR JON TURNER: His position, absolutely in line with 51.1 of their pleading, is that it's free and fair. Our position, which is the same position that's been accepted by the foreign court, which I can show you, too, is that this does inherently involve the imbalance in licensing in the negotiations because the customer fears that it won't get this essential product it needs for its business purposes.

MRS JUSTICE BACON: That's your second point, the negotiation position inherently involves a leveraging power because there is an imbalance in the negotiation.

Third point?

MR JON TURNER: The third point is that, as a consequence of this negotiating imbalance, which is imposed on the OEMs through no licence, no chips, Qualcomm has -- and we say

in certain cases, and we plead it consistently in that way -- not even gone to the pretence of conducting negotiations by debating the intrinsic value of the patents in the usual way.

And that's where the expert evidence comes in, because our expert will say that typically, with the major OEMs and SEP holders, the licensing is conducted by considering what's the value of the portfolio.

MRS JUSTICE BACON: Yes, we understand what you want your expert to say. So you say in certain cases they haven't done that and that is what -- and we'll find out --

MR JON TURNER: In certain cases, but not in every case and it is not a necessary feature of the abuse. What it is is a support because it shows that pressure operationalised and manifest in the way that negotiations take place in certain cases.

MRS JUSTICE BACON: All right. So that's part of your case. And point 4?

MR JON TURNER: Point 4 is this: you're aware that Qualcomm hasn't given us information to explain how it justifies its rate demands with OEMs and how it says to them this is the reason why they're fair.

We have gleaned from the disclosure which we, as I say, are still reviewing that Qualcomm sometimes responds to the OEMs who try to engage in the normal

debates over matters relevant to assessing the patent value, that Qualcomm's answer is our royalty rates have been accepted in the industry. Hundreds of licensees pay them. That allows us to bypass these debates that normally happen.

Qualcomm is saying -- and this is the third point that Mr Jowell raises in his request -- that for us to have pointed this out, which is what we have done in our particulars, is a new case on abuse and it requires a pleading amendment. It isn't. It is a support for the existing pleaded case that no licence, no chips is abusive because it is itself an abuse, a tool for leveraging market power in chipsets and it in itself allows Qualcomm effectively to dictate the terms.

MRS JUSTICE BACON: Right, so that's the strands of your case. Let's move on. You've dealt with Mr Jowell's first objection. We're going to have to speed up otherwise we won't finish even tomorrow.

So let's go on to the second of his articulated requests for further information.

MR JON TURNER: In relation to the second request, which is essentially to ask about the essential features of our case, we say it is already clear and it's clear indeed from the propositions that I have just articulated. I can show you that that second proposition in

particular that this is not an essential additional feature of the case that there should be some odd behaviour in the licensing negotiations which is atypical is critical because it is the manifestation of the pressure which is imposed by the policy itself.

That's why it arises. We give examples of it in the same way as in the foreign jurisdictions, these were shown as illustrations, as evidence of the pressure imposed by the policy which creates the problem.

MRS JUSTICE BACON: So your point is even if there is nothing atypical in the licensing negotiation itself, you say that there is still an abuse?

MR JON TURNER: Yes.

MRS JUSTICE BACON: That may give Mr Jowell his answer.

What you do with that is a matter for submissions at trial, but you have had the answer at least.

Is it then possible to move on to the third of the points about the alleged new case?

MR JON TURNER: Yes. So as I mentioned a moment ago, all we are referring to is the fact that Qualcomm, we have seen in two examples that we attached to our response to the information request, bypasses the OEM, which is Apple and Samsung, saying: we wish to debate with you the value of your patent portfolio by saying: well, the overriding point here is that our rates have been

accepted by hundreds of licensees in the industry.

That is what you see as their way of avoiding that taking place.

MRS JUSTICE BACON: Well --

MR JON TURNER: The obvious answer from our side is their rates have been informed by exactly the same practice and exactly the same pressure in relation to other licensees. So that's not an answer to the problem, but that's the way in which they have avoided engaging in this sort of behaviour.

MRS JUSTICE BACON: Well, the problem is that your case on this has evolved. If one looks at your RFI 3 response, what do you say there? And if I look at page 529 of the supplemental bundle, what do you say in your -- in the RFI 3 response at (e)(i) is that there may have been reference to comparators.

Now, Mr Jowell -- if I can just finish my question.

MR JON TURNER: No, no, of course.

MRS JUSTICE BACON: And Mr Jowell hasn't taken issue with that. What we then see is the point about other OEMs being used as comparators then evolving in the RFI 5 response at page 577 to a point about discrimination under the FRAND rules and you say at 17(b) that Qualcomm is able to refer to royalties from other OEMs so that it would be discriminatory to apply a different rate.

My understanding is that Mr Jowell is objecting to this particular point using FRAND to discrimination as a basis for a leveraging and that is not something which I think emerged before this particular response to the request. At least I have not seen it.

MR JON TURNER: Two responses to that, my Lady. The first is that, on that first point, that is a different but related issue. That is saying that one of the things that the OEMs can do in normal negotiations is point to comparators, how much other people have paid, but in circumstances where you don't have those, you can't engage in that process. That's the point. It's looking at an argument that's unavailable to the OEM.

This page 577 is dealing with a slightly -- with a different point which is that Qualcomm on its side approaching the negotiations by saying to the OEM: you need to pay this rate because it's the same rate that hundreds of others have already paid.

May I ask you, I don't believe it's controversial, if you just go ahead to page 582, you see the crystallisation of what we are talking about there and then I can complete the point.

This is a letter from Qualcomm to Apple. It says:

"Entire document outer confidentiality ring information."

So I won't read it out. If you look under the title:

"(a) Qualcomm's offer is FRAND."

Halfway down the page. Just read the first paragraph to yourself, that's essentially the point that's being made and is sought to be reflected in the draft.

The emphasis -- and this may be a drafting infelicity -- it's not meant to be that there is a reference to FRAND considerations as such, but a reference to the fact that our rate is fair because hundreds of other people pay it. So it's not a technical argument at all. All it's doing is referring to a common sense point that they are appealing to the fact that hundreds of licensees already pay this, therefore forget the detailed discussion of the particular value of our portfolio in absolute or in relative terms.

You will have seen here that that OEM asks for the debate to take place and this is the way in which it is fenced or dealt with.

So that's all there is to this and it is not a new point.

What it is is a further example of what we complain of which is that the policy itself enables this form of

pressure to be applied so that they don't have to engage in the sorts of debates that are typical within the industry.

MRS JUSTICE BACON: Yes. Well, would you -- so you're saying that you're not relying on the words so that it would be discriminatory to apply a different rate?

MR JON TURNER: Yes, that's right. It is meant to reflect what you see in this letter and there's a separate one in relation to Samsung, too, along similar lines.

MRS JUSTICE BACON: Yes. Mr Jowell, do you have an objection if it's now clarified that this is not about a FRAND discrimination argument?

MR JOWELL: Well, yes, if we can put a line through so that it would be discriminatory to apply a different rate, then we would be -- then there isn't --

MRS JUSTICE BACON: Your concern falls away?

MR JOWELL: Yes, then the concern falls away.

MRS JUSTICE BACON: Yes, all right.

MR JOWELL: If they are saying that discrimination was invoked or non-discrimination, then that is a new case.

MRS JUSTICE BACON: So, Mr Turner, can you re-serve this with that point deleted?

MR JON TURNER: Yes.

MRS JUSTICE BACON: So that deals with the third --

MR JON TURNER: It does. So, my Lady, the only other thing

I was going to do, but I am conscious, as you are, of the time, is this: Mr Jowell referred in his submissions to a description of our case that in certain respects I would wish to say is inaccurate. I am conscious of the limitations on time. I would otherwise show you in our case exactly how it is constructed in order to make good my point.

If I may, though, I will give you just one reference which was back to the main pleading, but if you don't feel you need to do that, then I shan't trouble you.

MRS JUSTICE BACON: Why don't you give us that.

MR JON TURNER: If you go in the supplemental bundle to the original claim form, tab 1, page 39, you will recall we looked at this at the hearing in June. The heading at the top of the page is "Abuse" and the relevant paragraph is paragraph 68. It sets out the basis for the allegation of abuse.

If you look at subparagraph (c) at the foot of page, just read the first two sentences:

"The parties' licensing negotiations take place in the shadow of the ongoing threat of disruption to the chipset supply. This substantially skews the balance of power between the negotiating parties in favour of Qualcomm and limits the ability which OEMs would otherwise have to bargain their way to FRAND terms

and/or their preparedness to litigate."

Pausing there, "preparedness to litigate" means engaging in litigation to obtain a court's determination of the FRAND licensing terms, and that is the plea that OEMs are deterred from obtaining a court determination of what are fair rates because of their fear that their chipset supply would be disrupted.

So that's the original allegation in the case. It has always been there.

If you now look at the top of the following page, page 40, and you look at the first sentence of (d):

"This skewed negotiating process enables Qualcomm effectively to dictate the terms of the licences for the OEMs."

We're making clear that the gist of the abuse is the distortion produced by the leveraging pressure which enables Qualcomm in consequence effectively to dictate terms. We say I think six lines down:

The consequence is that the OEMs are forced to agree to rates which are "…set without negotiation over the true underlying value of the patent portfolio."

So some of that might be manifest in the form in which Qualcomm engages in the negotiations, for example, to say: well, we don't need to bother by providing patent claim charts in relation to a proud list to

help establish essentiality or anything of that kind.

In other ways, it may simply be, as happened, we say, with Apple -- and I won't take you to the relevant bit of the pleading -- in 2000 -- maybe it's 2017 or 2019, that if there is a fear that new chipsets will not be supplied by Qualcomm, it creates a pressure to just sign up to the terms demanded.

So you don't see a specific deviation from a particular protocol or process, it is merely that that pressure that you won't get the chipsets that you need for your new generation of handsets itself creates the pressure that is required for you to sign up on the dotted line. That's why there is no separate, independent, additional element and there never has been.

What I can do is I can take you through the further RFIs to make this good if you can bear with me for a few minutes, otherwise we --

MRS JUSTICE BACON: Well, I think we have reached a landing point on all three of Mr Jowell's concerns. Unless there is an outstanding point, I think we should be moving on.

MR JON TURNER: Very well.

MRS JUSTICE BACON: So if I can just summarise where I think we've got to. In relation to -- I'm taking the points

in the order in which Mr Jowell has taken them this morning, the first was a request for further particulars of the departure from the norm in negotiations. You were going to provide that by 9 September.

Your response will refer to the general aspects of the negotiations which you say have departed from the standard industry practice and will also refer to the dates or date ranges of the negotiations which you say are tainted by a departure from standard negotiation practice.

So that's the first point.

Mr Jowell's second point was an apparent lack of understanding on their part as to the extent to which you were relying on there being atypical negotiations and you've clarified your position helpfully, if I may say so, this morning and you have explained that that is not an essential feature of your case, but that you say in certain cases the negotiations were not conducted on the basis of the intrinsic value of the patents, but you've just given an explanation by reference to your original pleading as to what you say is the essential part which is that there is this general pressure which you say skews the balance of the negotiations, even if in specific negotiations there isn't a particular identified aspect which departs, you say, from

non-typical negotiation. So that, I think, provides an answer in itself to Mr Jowell's second question.

Then in the third -- in relation to his third concern, you will be re-serving your RFI response deleting the word so that it would be discriminatory to apply a different rate, and with that deletion Mr Jowell has confirmed that he doesn't pursue a further RFI request because that meets his concern.

Is that summary accurate as far as both of you are concerned?

MR JON TURNER: The only slight qualification to what you said, although you addressed this later is you referred to matters tainted by a departure from the standard industry practice, whereas I'm saying that the pressure itself involves the tainting and the arriving at royalty rates which are higher than they would be under contempt --

MRS JUSTICE BACON: Yes, but what you said in your answer to -- when you were going through your four elements, under element 3, you said:

"As a consequence of a negotiating imbalance, Qualcomm has in certain cases not conducted negotiations on the basis of the intrinsic value of the patents."

You've said that's not a necessary feature of the abuse, but if you say that some of the negotiations with

Apple and Samsung did fall into that category, you're going to have to identify which ones.

MR JON TURNER: My Lady, that is right.

MRS JUSTICE BACON: Yes, but on the understanding that you are not saying that that is the case for all of them.

MR JON TURNER: Yes.

MRS JUSTICE BACON: All right. Mr Jowell.

MR JOWELL: We are perfectly content with that with one slight wrinkle and that is that I'm afraid that Mr Turner's very eloquently adumbrated a case but it's not the case that he's pleaded, I'm afraid. Because if you compare what Mr Turner said, he told you that the chipset supply practice, he said, is of itself an abuse. That was his point 1.

We ask that very question in RFI 3 and we said that, as they recount, the request is whether it is the case that the chipset supply practice is in and of itself an abuse of dominance, and the answer we get back --

MR JUSTIN TURNER: Can you give me a page number, sorry, Mr Jowell?

MR JOWELL: Forgive me, yes, this is 523 of the supplemental bundle tab 8. The answer we get back is we don't accept that the characterisation of the Defendant's practice is complete, nor that it encompasses the essential features which render that practice abusive.

So I don't have any objection to him advancing the case that he described. It's just not the case he's pleaded and so they really do need to -- if they need to send a revised RFI 3 now to say the answer to request 1 is yes. That is the answer that they have -- that he's now given orally. We need to understand that.

On the last occasion, their skeleton argument said, in terms, it is a central pillar of our abuse case that there is a deviation from a negotiating norm and Mr Turner now says: no, no, it's not at all a central pillar, it's just an optional extra, he says.

Well, I'm afraid we really need to know because we need to understand and effectively that negotiations evidence was obtained on a false basis, I'm afraid.

MRS JUSTICE BACON: Mr Turner, are you able to encapsulate what you have just said is your case in an amended response or some such document so that they can lay this to rest?

MR JON TURNER: My Lady, so in relation to this, yes, I can lay it to rest also by showing you that it is pleaded in precisely the way that I have outlined in the -- not only in the main pleading, but also in the RFI responses and I can show you that very quickly.

The answer to what Mr Jowell has just said is not that we are saying that there are additional separate

features which are required in order to constitute an abuse. All we were saying was that the mere statement that they don't supply chipsets to unlicensed customers is not the whole show because it doesn't bring out the implications of why that creates the problem.

It's inherent in the chipset supply practice, no licence, no chips, that it produces this effect. Our complaint was that the mere statement "we don't supply chips to unlicensed customers" doesn't bring out the features which we have pleaded. Not that there are separate additional elements.

MRS JUSTICE BACON: Yes, understood.

Mr Turner, can you just set out on a single page the case as you articulated it and give references to where you say it's pleaded in the existing -- in your existing pleadings, including your RFI, and provide that to Mr Jowell by the end of the week.

MR JON TURNER: Yes.

MRS JUSTICE BACON: All right.

We will take five minutes for the transcribers and we will then resume with point 2, which is going to have to go more quickly than the two and a half hours originally put down for this. We would hope that we will be able to make good progress on this by lunchtime.

Thank you.

(12.00 pm)

(A short break)

(12.10 pm)

MR JOWELL: May it please the Tribunal, we apply for an order that certain of the allegations in the pleadings, in particular in the reply and the response -- response to the request for further information, should be struck out. These are the pleadings that contain specific allegations concerning alleged threats to disrupt chipset supply in the course of negotiations between Qualcomm and OEMs other than Apple and Samsung or the Apple contract manufacturers.

Now, the starting point is that this is a claim that is brought on behalf of a class of consumers for damages and it is a claim for damages in respect of the affected products, which are Apple and Samsung mobile phones containing LTE chipsets in the relevant period. The allegation is that the royalties charged by Qualcomm to Apple or to its Apple contract manufacturers or to Samsung have been elevated by reason of this alleged abuse and that those elevated royalties have been passed on in the price of those particular mobile phones.

It's not a claim on behalf of purchasers of other brands of phones, phones from Huawei or Lenovo or Sony Ericsson or anyone else. Nor still is it

an investigation by a regulator into Qualcomm's so-called NLNC policy generally across the industry. It's just a claim for damages arising from those two particular OEMs -- or through those two particular OEMs.

Now, as you see, the chipset supply practice which forms, on Mr Turner's latest case, at least, the absolute foundation and core of his abuse allegation is admitted, so there's no dispute about that.

He says that the other elements, he now says are inessential, whether those be threats or deviations from a licensing norm. These are, on his latest case, merely illustrative or helpful and they are also, by their nature, particular to an individual OEM. So it may be that Qualcomm threatened to disrupt chipset supply to one OEM, but that doesn't mean that it did so to another OEM. It may be that Qualcomm deviated in refusing to provide patent charts to one OEM but, again, it doesn't tell you about its conduct in relation to another OEM.

If it wants to bring into these proceedings a range of allegations about threats or details of negotiations with regard to other OEMs, it must, in our submission, explain how the resolution of whether there were those threats or those negotiation deviations are relevant to the actual negotiations and the royalties agreed between Qualcomm and each of Apple and Samsung.

We say that on the Class Representative's pleaded case no such adequate explanation has been provided, so if one goes to, perhaps if we go to the defence first, we will see that in the supplemental bundle at tab 2, page 74, paragraph 2.9. We say:

"Insofar as the claim form makes allegations regarding the application of the alleged 'NLNC policy' to OEMs other than Apple and Samsung, those allegations are too vague to plead to and, in any event, are irrelevant given the Class Representative's case on causation and loss."

So we stated right upfront that we regarded those allegations as both vague and irrelevant.

In the reply, you will see there's a reference to them in general terms in paragraph 3(b) but the real crux of it is in paragraph 26(b) which you see in the supplemental bundle on page 194, and they respond to our denial of threats to cut off and they say:

"Qualcomm has indeed threatened to cut off, and/or actually cut off the supply of its baseband chipsets to a range of OEMs […]precisely in order to obtain SEP licences on Qualcomm's preferred terms."

Then it gives a series of examples lifted from the US, the vacated US District Court judgment from a number of different -- other OEMs and if one goes forward to

522 in the same bundle, which is --

MRS JUSTICE BACON: But just before we get there, what the Class Representative there is doing is responding to your paragraph 51.2.

MR JOWELL: Yes.

MRS JUSTICE BACON: And your paragraph 51.2 said:

"Qualcomm has never threatened to cut off or actually cut off the supply of its baseband chipsets to any OEMs (including Apple and Samsung)…".

MR JOWELL: Yes.

MRS JUSTICE BACON: So your defence makes the point about other OEMs.

MR JOWELL: Well, that's fair. That's fair. It does, but it also makes the prior point at 1.9 that I showed you that those allegations, any such allegations are irrelevant, but we do deny --

MRS JUSTICE BACON: They might be excused somewhat for responding to the terms in which your defence is put.

MR JOWELL: Well, except that our defence was responding to general allegations of theirs and therefore we wish to make clear that we haven't -- that the point is denied. The first point we make is in 1.9 where we say these allegations are irrelevant, but if they're relevant, insofar as they're relevant and made, we deny them.

Then they respond by saying: well, we don't accept

your denial and here are some examples. And in RFI 3, one sees that they, if you go to page 527, they then give a whole series of further examples, a long list of additional threats relied on, not just LG and Huawei, as in the reply, but also Motorola, Lenovo, ZTE, Pegatron, Sony, Curitel and BenQ.

So they bring in nine additional sets of negotiations and the problem is that it's very easy to throw these allegations around, but if they're going to be grappled with at trial, then this will impose a substantial additional burden, because these are, from Qualcomm's standpoints, serious allegations, it doesn't accept that the allegations fairly characterise its conduct towards these other OEMs and it's reluctant just to leave these at trial unrefuted if they're to be pursued as in some way relevant.

And if we have to address them, then potentially into calling additional witnesses or adducing hearsay evidence.

MRS JUSTICE BACON: And then more disclosure would need to be provided.

MR JOWELL: Indeed, and dealing with these nine sets of negotiations. And this has the potential to become a very large satellite dispute and we only have five weeks at trial. And if you want to fully appreciate

what a Pandora's Box this series of allegations could open up you only need to look at the matters of fact schedule, that we will come to in due course, where they put in nearly 60 rows of detailed findings or evaluative assessments from the vacated judgment in relation to alleged threats relating to other OEMs, including many which took place, in fact I think both -- most, I think, took place before the start of the relevant claim period.

And we say that one can't just plead these kind of serious allegations and then expect to rely on them at trial unless there is some causal link of relevance to the claim.

Now, we have cited the case law in our skeleton argument and I'm sure I know that the Tribunal will be well familiar with it. The first, perhaps we could just have a quick look at the authorities.

MRS JUSTICE BACON: So what paragraph of your skeleton argument?

MR JOWELL: Forgive me.

MRS JUSTICE BACON: Are we talking about 15 and 16?

MR JOWELL: I believe that's correct.

MRS JUSTICE BACON: Sel-Imperial.

MR JOWELL: Sel-Imperial.

MRS JUSTICE BACON: That's a judgment of Mr Justice Roth.

MR JOWELL: Your own judgment in Forrest Fresh Foods v Coca-Cola, and the FX judgment at first instance.

MRS JUSTICE BACON: Yes.

MR JOWELL: Perhaps I can just state from the summary from the FX case at first instance:

"The failure properly to assert a causal link between breach and damage will result in a claim being defective and, if that defect is not cured, liable to be struck out. That is as true of applications for CPOs as it is in other cases."

Now, it's fair to say that the cases we cite and, in particular, the Coca-Cola case and the FX case concerned applications to strike out the whole claim, but we say the same must also go for particular allegations within a claim. In a claim for damages of this nature, if in an allegation of abuse within a claim has no connection to the damages actually sought then in our submission it should be struck out. The Tribunal should not be concerned with adjudicating allegations of abuse that are not alleged to have caused loss to the particular class.

So we do say that there needs to be some causal link between these alleged threats made in other negotiations and the negotiations with Apple and Samsung. It can't just plead allegations of abuse simply to embarrass or

to create prejudice or as part of the atmospherics.

And if it's suggested that because Qualcomm threatened or has alleged to have threatened one OEM therefore it's more likely that it threatened or strong-armed Apple or Samsung, we respectfully submit that that's clearly just a speculative allegation that would certainly not -- and it's not proportionate to justify the time and expense of trying a separate claim in respect of which no damages are sought.

So it's not enough, in our submission, for the Class Representative just to wave their hand and say: well, this is relevant to the nature or the objectives of the NLNC policy or what the NLNC policy really is. The NLNC policy is really the admitted chipset supply practice, as we have now had clarified, and that may be implemented in one way towards one OEM and it may not be implemented in that way to another OEM and it's not informative simply to look at isolated examples that are cherry-picked, of its operation, unless there's some causal relevance.

MRS JUSTICE BACON: But your point in your defence was that you had not made threats to anybody. That's your pleaded position.

MR JOWELL: Yes.

MRS JUSTICE BACON: Now, if the Class Representative comes

along and says: well, actually, we can show that threats were made to various others, that undermines and indeed disproves, if established, one of the key planks of your defence.

MR JOWELL: With respect, no, it doesn't, because our primary position in our defence, as I showed you, is that these allegations against other OEMs are irrelevant because they have no causal link to any case as against Apple and Samsung.

MRS JUSTICE BACON: Yes, you also say expressly: we have not ever made --

MR JOWELL: We do.

MRS JUSTICE BACON: -- any threats to anyone.

MR JOWELL: Yes, but the fact that we deny something, an allegation, doesn't make the initial allegation causally relevant to the proceedings. Otherwise we would have to, if you like, you could plead any -- go along and say: well, I'm bringing a case of, say, a refusal to supply as against -- one customer brings a case of refusal to supply against the dominant undertaking and the customer says: ah well, you also refused to supply this other customer.

Well, we would plead to that and we would say: well, I deny the relevance of my not supplying to that other customer, but as it so happens we also deny it; we did

supply to that other customer.

That doesn't mean that the allegation shouldn't be struck out. The allegation is irrelevant unless there's some causal connection and therefore it should be struck out. Otherwise you could burden your pleading with lots and lots of irrelevant allegations of abuse as against third parties and put a Defendant in an impossible position. They either have to admit them or, if they deny them, then somehow they become relevant.

MRS JUSTICE BACON: In which case why didn't you make an application for strike-out right at the start --

MR JOWELL: Well --

MRS JUSTICE BACON: -- rather than just pleading back to it, setting up a point about other OEMs and then waiting until there was a response to that?

MR JOWELL: To be fair, the allegation was made in very general terms in the first claim form. It's only become apparent just quite how burdensome this is going to be as we see first the reply, which brings in three, then we see the RFI which brings in another nine, then we see the memorandum of facts, where one sees a whole 60 columns. And as we ...

MRS JUSTICE BACON: Yes.

MR JOWELL: There are a number of occasions where we have made clear that we regard these allegations as regards

other OEMs as irrelevant. I give two examples.

One is in supplemental bundle 543 in our response to one of the alleged facts. We say the relevance of this -- and this alleged fact is denied. Qualcomm's licensing arrangements with OEMs other than Apple, Apple CMs and Samsung are not relevant to the pleaded claim."

Another example is 542 where, again, we deny the relevance of the allegation, so we have made very clear that we regard all of these allegations as irrelevant and, as the size and number of these allegations snowballs and snowballs, we get to a point where we think: well, we do have to apply to strike out because it's going to become a massive satellite exercise at the trial, which doesn't go anywhere.

Now, we have sought to clarify what is the relevance of these, what is the causal relevance of these allegations and, if you look in the supplemental bundle at page 530, one of the questions we asked was: are you alleging that Apple and Samsung knew about these specific threats to other OEMs? Because at least then you could see, well, there would be an indirect -- it could be an indirect effect on Apple and Samsung.

And the answer in (f) is:

"Pending disclosure and evidence, it is not the Class Representative's case that Apple and/or Apple's CMs and/or

Samsung were aware of any specific threats made by the Defendant to any other OEMs."

And then they reserve their right to plead differently in the future, but there's no allegation that Apple or Samsung were aware of these specific threats.

And so we say what's the relevance of these specific threats to the claim? And they say -- you see in the same response at (g), they say they are relevant and they do say for two reasons. First, they say because they could have affected the royalty rates paid by Apple or, secondly, because they could have impacted upon Apple and Samsung's position.

Now, the second point I take to be simply saying: well, the reputation, if you like, of the NLNC policy generally could have been known to Apple or Samsung and that -- I can see that, but then they can simply make that good by reference to the general reputation in the industry of this policy, but doesn't make the existence of these specific threats relevant.

At most, what might be relevant might be what Apple and Samsung believed generally about Samsung's conduct.

And then the allegation that they could have affected the Apple or Samsung royalty rates is left unexplained. At a subsequent hearing it was explained

by counsel for the Class Representative that it was alleged that the other OEMs would have sought and obtained FRAND determinations and that these FRAND determinations would then have influenced the Apple and Samsung negotiations.

So we then probe this and you see that in the next tab at page 555 of the supplemental bundle. And perhaps I could just invite you to read paragraph 6.

MR JON TURNER: My Lady, it may help for efficiency if you also read 2 to 5 because they relate to the wider argument.

(Pause).

MRS JUSTICE BACON: So it's being said in terms that it's not their case that any OEM would necessarily have sought and obtained a third party FRAND determination.

MR JOWELL: Indeed, and that's reiterated in 8a, the first sentence, where they say:

"The Class Representative does not say that but for specific “threats”, OEMS other than Apple and Samsung would have obtained FRAND determinations."

So we now have a different -- seem to have a different theory which you will see in the core bundle at page 274 and one sees that they rely on the fact that we say that our royalty rates are set by reference to licences, to hundreds of licences.

MR JUSTIN TURNER: Sorry, whereabouts is that?

MR JOWELL: Forgive me. This is the bottom of page 274.

MR JUSTIN TURNER: (d).

MR JOWELL: (d). And you see the last sentence:

> "Moreover, Qualcomm has expressly pleaded that its royalty rates are set by reference to "any licences previously entered into by the IP holder [i.e. Qualcomm] for the same type of products and/or technology," and that its "…starting point for negotiating royalties are the hundreds of licences previously entered into granting OEMs rights under Qualcomm's cellular SEPs for the same type of products…""

And that's all fair and Mr Turner showed you the letter that he invited you to read earlier, but the notion that one can take from this that therefore it's relevant to look at specific examples of alleged individual threats is untenable.

The reference points used by Qualcomm are, as we say, hundreds of licences previously negotiated and we have provided disclosure of what rates, what royalty rates were achieved under those licences, so they know what the royalty rates are under those licences and they know what royalty rates are achieved with Apple and Samsung.

But how is the Tribunal to consider whether and to

what extent those hundreds of licence rates were influenced by these threats in the course of negotiations if these threats took place, if these threats affected these particular negotiations and then determined how those might or might not have affected these hundreds of licences. It's just an impossible task. One isn't going to determine whether those hundreds of licences were affected by considering a series of alleged threats to nine OEMs. This is a self-selected sample that would be impossible to extrapolate.

Even if you could figure out what impact there was on average rates charged to other OEMs -- which you clearly can't -- it would only represent Qualcomm's starting point in the negotiations with Apple and Samsung. It won't actually tell us whether it actually affected the outcome of the Apple and Samsung negotiations.

So we say this is a speculative and untriable theory.

If one goes on to (g) on page 276, they invoke another point. They say, well, the wider application of the NLNC policy may be relevant to the extent to which it was possible to pass on higher royalty rates.

They say that it would be better case management to

consider this as part of the infringement, rather than as part of quantum and we profoundly disagree with that. As a matter of case management the inclusion of this irrelevant issue in Trial 1 would seriously endanger the manageability of the hearing.

If it's necessary to include it in Trial 2 one should consider that if that should ever arise.

Finally, we see that the Class Representative prays in aid your sympathy. It tells us in paragraph 13 of its response that it doesn't expect to have witnesses from Apple and Samsung to speak to at this trial. It claims that it doesn't have an adequate set of internal documents, it tells us, from Apple and Samsung, showing their perception of their vulnerability. Well, one might say if you haven't spoken to witnesses; how do you know if they perceive themselves to be vulnerable?

But, in any event, the fact is that they have received a vast array of disclosure and they will shortly receive more disclosure via the 1782 process.

If those documents don't make out their case in relation to Apple and Samsung, then that is simply because their case is flawed on the facts because the NLNC policy didn't have the kind of dictation of terms effect as regards Apple and Samsung in those negotiations.

To try to get around that by opening up negotiations with other OEMs to pursue an alternative indirect effect via those other OEMs is neither proportionate nor reasonable and will get one nowhere.

So we say that they can't, as they put it, make up the evidential deficit from evidence in relation to other OEMs. Their case is not improved by relying on cherrypicked selective examples of conduct in relation to other OEMs at other times.

MR JUSTIN TURNER: Mr Jowell, are there two separate, perhaps separate questions? One is whether there was a general awareness. You're looking at it one way, but if you look at it from the other direction, one where there's a general awareness, and one might say that the citation in tab 19, letter of 19 July, might be an example of that. There was a general awareness of an approach Apple was -- sorry, Qualcomm was taking, with regards to other OEMs. So there might be a general awareness of that, but it might be an unjustified general awareness. Then to find out whether it was justified or not one has to look to see if there are any specific examples.

But there could be a consciousness in the industry or a consciousness within Apple and Samsung that this is a -- that Qualcomm are tough and this is a line they're

prepared to cross --

MR JOWELL: Yes.

MR JUSTIN TURNER: -- with or without specific instances; how does that fit into your analysis?

MR JOWELL: Well, it fits into my analysis in this way: I don't say they can't -- if they can demonstrate from the evidence that Apple and Samsung had this general awareness or general belief, then they can pray that in aid. Of course, I can't stop that. But to try, if you like, to determine whether that general awareness was justified or not it seems to us to go nowhere. It doesn't tell you. If it's disproved; what does it tell you? If it's proved; what does it tell you? It doesn't actually improve the position. The problem with all of this --

MR JUSTIN TURNER: But presumably it would matter to your case if this Tribunal were to hold there is an awareness, that Qualcomm have crossed a line, let's say, but that turns out to be a false conclusion being drawn by Apple and Samsung, presumably that's something you would pray in aid.

MR JOWELL: Well, we would say -- when one looks at the circumstances of these negotiations and the facts of the negotiations we are confident that general awareness of belief -- that's all one can say, general belief -- in

a particular mode of operation of Qualcomm or not is not going to have any -- is not going to impact whether there was an abuse or an abuse of any effect in this particular -- in the case of these negotiations.

What we are concerned about is that one will get into effectively trying nine other mini-trials of alleged threats against other OEMs. The wheels of those will spin, but they're not connected to any axle. So they don't advance the mechanism. It doesn't -- things do not go forward as a result. The wheels spin, they create lots of dust and lots of energy, but they don't actually assist the case one way or the other. Therefore we invite the Tribunal respectfully to say these matters should be excluded from trial because they are disproportionate and do not have any clear causal connection to the actual claim for damages as advanced.

MRS JUSTICE BACON: Thank you very much.

Mr Turner.

MR JON TURNER: My Lady, this application is misguided and there's one central reason which I will refer to now.

The premise, listening to Mr Jowell, is that the issue that you're going to be addressing at the trial is essentially the causal link between the abuse, if we prove it, and higher rates paid by Apple and Samsung respectively.

I went to Mr Jowell's skeleton. If you open that again and look at the legal authorities that he was referring to in paragraph 16, taking in particular paragraph 16 and the last sentence which comes from O'Higgins in the Court of Appeal:

In particular "a failure properly to assert a causal link between breach and damage will result in a claim being defective"".

And throughout his submissions he's referring to: how does this material bear on that causal link between breach and damage?

We say that's the wrong frame of reference because at the trial the issues that you will be deciding on liability are not just causation of loss, they include the liability issues of market domination and dominance and, importantly, whether the NLNC policy is or is not abusive, whether it creates this tendency to distort competition, which you're familiar with as part of the definition of abuse in practice.

So the Tribunal will be asked to determine at the trial whether no licence, no chips tends to produce anti-competitive effects and is there abusive or whether, as Qualcomm argues on its side, in its defence, the policy does not distort competitive bargaining and is legitimate.

I took you earlier to the relevant pleas in the defence. We looked at paragraph 49 of the defence and paragraph 51, which was touched on again. Perhaps if you open that up again just to refresh your memory. It was supplemental 1, tab 2, page 95.

On the question of the qualities of no licence no chip, how it affects people in the marketplace, you have those three points in paragraph 51, including at 51.1. The licensing terms are agreed following arm's length negotiation and at 51.2: we have never threatened anybody.

Now, our case is that the evidence of Qualcomm's application of no licence, no chips to a number of the other global OEMs, as well as Apple and Samsung, is relevant to the case in the first place for establishing at the trial what is the true nature and scope of this policy, its implications, how it is used and its objectives.

That is what this is going to be there for. It's not about the causal link only between breach and loss.

If you go to our third RFI response, which is at tab 8 of the supplemental bundle, page 527, you look at paragraph 15 and just read the first two sentences, you will see the way that we expressed it there:

"As to request 5, the Class Representative relies

on examples of the Defendant cutting off the supply of chipsets to OEMs other than Apple and Samsung and the contract manufacturers or threats as relevant non-exhaustive examples of the policy being implemented in order to secure the Defendant's desired licence terms ... The said examples evidence and illustrate the existence and the operation of the policy, including its nature and scope, the means by which it was applied and its objectives."

So this is why it's in relation to establishing whether the practice which they call the chipset supply practice is innocent, as they say, or has these abusive qualities, as we say, that this is primarily relevant.

And as our expert, Mr Noble, has pointed out, it's not adequate to limit the case on abuse, tendency to restrict competition, to a consideration of bilateral negotiations between Qualcomm on the one hand and Apple and Samsung on the other.

For one thing -- and it's not a plea for sympathy; it's an appeal to doing the case justice -- there will not be live evidence from witnesses at the trial on the consumer side to talk to those negotiations.

For another, the documentary exchanges in these cases taken by themselves -- that's Apple and Samsung on the one hand and Qualcomm on the other -- are very

unlikely to give a full picture of the practical impact of the leveraging pressure which is implicit in the no licence, no chips policy and the ways in which Qualcomm can exploit it.

And as Mr Noble also remarks, unless you find express threats to terminate supplies of chipsets which are made in writing and responded to in writing, the real impact of this policy could be hidden from view if you don't have a full picture of how it is generally applied.

Slicing the case down in the way that Qualcomm urges risks very substantial injustice to the Consumers' Association.

MRS JUSTICE BACON: But this is not a case about abuse as against Lenovo or Huawei; it's a case of abuse as against Apple and Samsung and that's the way it's always been pleaded and the case has to be kept within proper bounds.

Now, one concern that we have is that by advancing a case in the way that you have done, referring to other OEMs, that is then going to then generate a request for disclosure that goes way beyond the disclosure that has currently been ordered and that's exactly what we're seeing in the next item on the agenda.

MR JON TURNER: My Lady, no. We're moving, then, from

relevance to proportionality. In terms of relevance, if I may just complete the point, the reason why it's relevant for you to see the way that the policy is operationalised is because it will cast light on the debate that you will have to decide as to the nature of NLNC, no licence, no chips, and whether it distorts competition.

In terms of manageability, there is, in my submission, no problem at all because we are not asking for an enquiry into the circumstances of nine additional OEMs.

What we have referred to in our pleadings is nine cases of threats, I think it adds up to, where the policy was used in a way which distorts competition. The evidence there is in the sense that we have what we have in terms of depositions; material already supplied by Qualcomm from the FTC case.

We're coming on this afternoon to one additional element that our expert --

MRS JUSTICE BACON: What do you mean the evidence is already there? The evidence is not before us. It's not going to be before us. The deposition in the FTC is not going to be before us. All we will have is that there is a recording of testimony being given in the FTC case, but that witness is not going to be before us.

MR JON TURNER: The witness will not be live but we will be relying on that material as evidence in these proceedings.

MRS JUSTICE BACON: How can you? Because we won't have an opportunity to hear the evidence of that witness and Mr Jowell will not be able to cross-examine him, or Mr Saunders or Mr Bailey or whoever else will not be able to cross-examine that witness. How on earth are we going to make findings if you are relying not just by way of supporting evidence but only in this regard on testimony given in other proceedings?

MR JON TURNER: Because, my Lady, the question of the weight to be given -- well, you will obviously be aware that deposition evidence itself has been subject to cross-examination in the US procedure.

MRS JUSTICE BACON: But not before us.

MR JON TURNER: No. However, before this Tribunal the evidence is admissible and the question for your Ladyship and the Tribunal is going to be the weight that you attribute to any evidence which is not live evidence of a witness.

MRS JUSTICE BACON: But you're now saying that's going to be the only evidence there is. It's not going to be supporting evidence. That's the only evidence that you have of threats made to other OEMs.

Sorry --

MR JUSTIN TURNER: Just to clarify, there's depositions of Qualcomm witnesses or depositions of OEM witnesses?

MR JON TURNER: So it's actually both, but in relation to, let's say, the OEMs you have deposition evidence which we will also be referring to. You have it from Samsung, for example, I believe in the case of Mr Injung Lee; that's a deposition.

MR JUSTIN TURNER: Also depositions from Qualcomm?

MR JON TURNER: Yes, there's deposition from Qualcomm witnesses, as well.

MRS JUSTICE BACON: All right.

MR JON TURNER: And the intention is not to essentially say that you can't make out a case without live witnesses. We have documentary material as well as the deposition material because of course the material that was referred to in the FTC US District Court judgment has also been disclosed. So you're going to have primary contemporary documents and the deposition evidence and it will relate to very specific hard-edged points, which are those covered in the pleadings about particular threats and instances which Qualcomm itself has, as your Ladyship says, referred to in their pleaded responses.

MR JUSTIN TURNER: How long is this going to -- if the difference between having these in and having them not,

how much will that increase the length of the hearing --

MR JON TURNER: It's not going to increase the length of the hearing hardly at all, because these essentially are submissions that are going to be made when you haven't got the live witnesses in relation to the documents.

I'm sorry, yes, there will be some additional time taken in relation to cross-examination, potentially, of the Qualcomm witnesses.

MR JUSTIN TURNER: So you want to put these documents to Qualcomm witnesses?

MR JON TURNER: Yes. Well, insofar as some of these matters are denied. In my submission we can go through them, but you will see that some of these matters are very clear-cut, including on the contemporaneous documents and you will also see that the Qualcomm witnesses essentially have already not contradicted them.

So in these circumstances the question that you're addressing is whether there's going to be an additional long layer of cross-examination which is going to derail the trial. In my submission that is not the case and that is fanciful.

MRS JUSTICE BACON: So, Mr Turner, if I can summarise where you are on this, you say that you rely on evidence that does relate to OEMs as going to the nature and scope of the policy in circumstances in which, if one confined

the evidence pool solely to exchanges with Apple and Samsung, that would be unlikely to give a full picture. That's a starting point.

And then you say that you would not be needing to rely on an application for further disclosure on this. What do you want to rely on is a small number of specific examples of, for example, threats made which are already in evidence for which you will be referring to (a) documentary material, (b) to the extent it's given weight, dispositions elsewhere, and (c) cross-examination at trial. So we will have a variety of different sources for to you rely on this and you don't think it will add very materially to the length of the trial and you're not asking for further evidence on this particular point.

Is that your submission?

MR JON TURNER: My Lady, broadly yes. Two qualifications: there will also be, I think, transcripts of evidence from witnesses who gave evidence at the bench trial in the United States as well as deposition evidence.

MRS JUSTICE BACON: Yes.

MR JON TURNER: Secondly, we are, as your Ladyship anticipated, going to ask the Tribunal for certain additional disclosure in relation to two of the OEMs, which is an application yet to be heard. Those are

Huawei and Lenovo and the debate there is, I apprehend, going to turn quite largely on the question of tractability and size and manageability.

MRS JUSTICE BACON: All right. But supposing you don't get those, are you still going to be able to, because I don't want to foreshadow what we're going to say in relation to that third point on the agenda.

MR JON TURNER: Yes.

MRS JUSTICE BACON: Are you still going to be able to make your case on this particular point without that further evidence?

MR JON TURNER: Yes. Yes, we need to be able to refer to this in order properly to be able to put forward our case on why this practice distorts competition in different ways. It's necessary material for you to consider.

MRS JUSTICE BACON: You say it's necessary material but importantly you say the material for this point is already in without further disclosure. Is that your position?

MR JON TURNER: Well, subject to -- as your Ladyship rightly picked me up on, subject to the fact that, as you know, we are going to be asking for disclosure in relation to two of them, which will provide --

MRS JUSTICE BACON: Not subject to. My question is if you

don't get further disclosure and we are confined to what is in already, assuming -- because I don't want to prejudge what we're going to say in relation to the third item on the agenda -- can you make your case on this point so far as it's currently pleaded without further disclosure in relation to either Lenovo or Huawei?

MR JON TURNER: My Lady, yes, we are going to proceed on that basis. This is necessary for us to be able to make the case on the abusive quality of the practice at the trial.

Now, I shall also be making the submission in relation to the disclosure application that that too is important, as I certainly wouldn't want to say that we throw the baby out with bathwater and it's all or nothing, because we do need to be able to refer to these matters for reasons that you will well understand when you see the different positions of the parties.

MRS JUSTICE BACON: Yes, that's very helpful. Thank you.

Well, we will rise for the lunch adjournment and then we will come back and hear Mr Jowell's response on the point and then we will give judgment on that and move on to the application for disclosure in relation to Lenovo and Huawei.

MR JON TURNER: My Lady, I had a couple more points that

I could make, but if it's convenient we can rise now and I can address you after lunch or simply leave it there.

MRS JUSTICE BACON: Yes. Well, the question is not whether you can make them but whether you need to make them.

MR JON TURNER: Well, I will reflect on that over the short adjournment.

MRS JUSTICE BACON: Thank you.

(1.00 pm)

(The luncheon adjournment)

(1.58 pm)

MRS JUSTICE BACON: Yes, Mr Turner.

MR JON TURNER: My Lady, you were right. I don't need to make further points in response.

MRS JUSTICE BACON: Thank you very much.

MR JOWELL: Madam, two brief points, if I may. The first is that Mr Turner said that this would not burden the Tribunal with much time at the hearing and I'm afraid we take issue with that, because if I can just illustrate it briefly, one turns to the memorandum of facts that they have provided, which you will find in the supplemental bundle at tab 6, page 305, and if you turn to page 316, you see it starts:

"NLNC nature of the policy ..."

Then you see entry after entry from pages and pages of the judgment -- of the vacated judgment that is

cited. Let me just give you just three examples.

If you go to page 318, you see at the bottom, we see:

"Findings in relation to Qualcomm's threat to cut off LG Electronics' chip supplies between December 2003 and July 2004."

I will show you another example, page 320. Again, the bottom of the page:

"Findings in relation to the licensing agreements entered into between Qualcomm and Huawei in 2003 to 2004."

Then, if you go forward to page 323, in the middle of the page, under "Curitel" you see:

"Findings in relation to Qualcomm cutting off Curitel's chipset supply from 2001 to 2002."

So you see -- and there are multiple, multiple entries like this.

The three I have shown you, I picked them because they're all over 20 years ago. They're over a decade before the claim period even starts in our case. You have seen that it's not alleged that Apple or Samsung, or any of Apple's contract manufacturers, knew about any of these alleged specific threats.

So we say: are we really meant to spend time at trial in which we are forced to bring forward witnesses,

if we can find them from over 20 years ago, who contest these allegations and the Tribunal to then resolve them? And we say: to what end?

The only end that Mr Turner proposes is that he says, "Well, this is how the NLNC policy is operationalised", as he puts it. But we know what the NLNC policy is; that's now been clarified. It's the chipset supply practice.

What operationalised means, I suppose, is how -- some course of conduct that is alleged to be associated with this practice, this admitted practice, but that's going to be dependent upon the particular OEM. You really are not going to be -- it's not going to be illuminating to consider whether 15 years prior there was an alleged refusal to supply or a threat to other OEMs other than Apple and Samsung. That's simply not going to -- they're not going to move the dial, but it could spend a lot of time -- we all could spend a lot of time at trial resolving these things because, from Qualcomm's perspective, it can't simply allow quite serious allegations to go uncontradicted.

MRS JUSTICE BACON: Yes.

MR JOWELL: So those are our submissions.

MRS JUSTICE BACON: All right.

We don't consider that we should strike out the relevant parts of the pleadings. We accept Mr Turner's point that he wants to rely on this as a matter of principle to show the way in which the NLNC or the chipset supply policy, whatever you call it, worked, and is not just about the quantum and the way in which there was a causal link between that policy and the conduct in relation to Apple and Samsung.

We consider that he is entitled to seek to make that point on the basis of the evidence that is currently in the disclosure set and available from other proceedings.

However, we do have a concern about proportionality and we note Mr Jowell's comments in that regard, and that means two things.

First of all, we have declined to strike out on the basis, among other things, of Mr Turner's confirmation that he considers that he can make this case without further disclosure. So this does not prejudge the question that we are about to come on to and it should not be said that because we have let this in we are necessarily going to order any more disclosure in relation to other OEMs.

Secondly, that also does not prejudge the extent to

which we are going to allow reliance to be placed at trial on matters that are peripheral and long before the relevant period in this case. We will need to consider in due course active case management if there are such allegations relied upon.

So we will endeavour to deal with this going forward with appropriate case management to keep what is referred to at trial within reasonable and proportionate bounds. I don't think that would come as a surprise to any of the parties.

PROFESSOR MASON: Just before we go on. Could we ask IT to do a remote desktop log in because I've lost the transcript?

MR JUSTIN TURNER: Yes, I also have, actually. It's back.

MRS JUSTICE BACON: All right, so while that's going on, the next item on the agenda is then the Class Representative's application for further disclosure.

MR JON TURNER: Yes. My Lady, I hear what you say and understand that the application you've just decided is neutral in relation to this. I am addressing it on its own terms.

MRS JUSTICE BACON: Yes.

MR JON TURNER: The ambit of the request for disclosure by the Consumers' Association has been substantially narrowed over the recent days following exchanges

between the parties, although it is still fully contested.

To be clear what we're asking for, it's for documents relating only to the licensing negotiations with two of the major OEMs. I think you already have that point now. It's Lenovo and Huawei.

Second, it concerns only the repository of documents that is already held electronically by Qualcomm from the FTC case in the USA, so it therefore relates to events prior to April 2018.

Third, the proposal on our side -- and I will address you on the detail in a moment -- is to use keyword searches cooperatively to produce a manageable number of documents which in three respects will be relevant and useful for the issues that the Tribunal will be deciding.

And these are they: first, Mr Noble, in the second of the reports that you will have received for this hearing, Noble 6, he points out that the US District Court findings were specifically that Qualcomm applied explicit pressure in the light of the no licence, no chips policy to both Lenovo and Huawei, in particular important ways by leveraging the market power in the supply of chipsets.

If I may invite you briefly to open the US judgment

so you can see what I am talking about, it's in the authorities bundle and you will find that at tab 24. There are two short passages.

The first is page 1781, where you will see a title at line 17 "For Huawei"; do you see that in bold?

MRS JUSTICE BACON: Yes.

MR JON TURNER: And there's a summary by the judge of what she then goes on to find, so you only need to look at these categories:

"Qualcomm engaged in anti-competitive conduct towards Huawei by [ignore the first of those, the drastically reduced royalty rate for an exclusivity arrangement] ... requiring Huawei to grant Qualcomm a royalty free cross licence to Huawei's patents."

Essentially no payment at all for that, for the cross licence:

"Threatening to cut off Huawei's chip supply on multiple occasions and demanding unreasonably high royalty rates, but refusing to provide a patent claim charts."

That's essentially what is then the subject of the judgment in the following pages.

Then, if you go from that forwards to page 1791, internal page 72, you have the same for Lenovo. You will see the title just at line 7, bold 6, "Lenovo":

"Qualcomm's engaged in anti-competitive conduct to Lenovo by threatening to cut off the chip supply, threatening that even Qualcomm's rival, MediaTek cannot sell chips to Lenovo if Lenovo becomes unlicensed with Qualcomm and demanding unreasonably high royalty rates without providing technical or legal information about the patents."

So elements of behaviour that the Tribunal has already seen trailed.

Now, our expert, Mr Noble, considers that the documents relating to this showing how it occurred will cast light on the no licence, no chips policy and its operationalisation in practice to address the issue whether no licence, no chips restricts competition in competitive bargaining between Qualcomm and the counterparty or not. That justification, of course, chimes with the submissions that I have already made, where our pleaded case relies on certain instances of Qualcomm's exploitation of the chipset muscle in respect of other major OEMs to show that the policy inherently tends to restrict competition.

So that's the first justification for relevance.

Second, is that Mr Noble says that he needs a minimum of information about the negotiating dynamic between Qualcomm and additional OEMs to come to a view

on one of the issues that you will have to decide which is market definition. Is Qualcomm correct in its case before you that you define the relevant market as narrowly as a chipset supply market to Apple and a chipset supply market to Samsung or are the conditions of supply for the relevant chipsets broadly similar across the major OEMs?

If they are broadly similar, then an understanding of the impact on Lenovo and Huawei of the no licence, no chips policy is useful for understanding the impact on the similarly placed Apple and Samsung and whether it tends to restrict their capacity to engage in competitive bargaining, as we say, or is completely neutral, which is Qualcomm's case, as you have seen.

In this regard, Mr Noble points out in what we have called Noble 6, the last of the reports, that Huawei is similar to Samsung in one particular respect. It has a chipset self-supply facility broadly similar to Samsung's, Lenovo does not.

So the market definition issue is the second limb.

And the third reason is Lenovo specific. The Tribunal will now be aware that we have secured a factual witness for the trial and that factual witness is a Mr Ira Blumberg, who was formerly Lenovo's vice-president of intellectual property. He was

an important witness in the FTC trial in the USA and his evidence was relied on repeatedly and significantly by the judge.

The topics on which the court relied on his evidence included the six matters which are listed in our skeleton, if you have that, on page 12, at paragraph 32. I won't read those ad seriatim, but it's the second part of that page and going over to the next.

All those are relevant issues in relation to how this policy works and what it does, which arises in the present case.

We consider that this will be relevant and important in relation to determining the issue of market power and the existence of abuse -- a practice that does inherently restrict competition -- in these proceedings as well for all the reasons I have already gone through this morning.

Now, assuming that Mr Blumberg is going to be cross-examined at the trial by Qualcomm, they will doubtless focus on the documents that Qualcomm holds -- and we do not -- concerning its dealings with Lenovo and in particular where Mr Blumberg himself was involved.

Accordingly, the third justification relates to the principle of equality of arms. It's appropriate for the consumers to be given disclosure at least of the

negotiation documents which were sent to or received by Mr Blumberg.

In that regard -- and we may come to it under any other business I think, rather than in this context -- you will have seen from Ms Caroline Thomas's seventh witness statement for Qualcomm that they seek to suggest that Mr Blumberg was not significantly involved in the patent licence negotiations. We don't need to turn it up, but that's paragraphs 98 and 99 of her statement.

Assuming that to be correct, you would expect there to be only small number of documents responsive to the key word "Blumberg". However, it would be appropriate for the set of documents from Lenovo to match the set from Huawei if you accept my point that these are relevant, in particular on the issue of the abuse, restriction of competition, and the tendency of no licence, no chips to affect competitive bargaining between licensor and licensee. With that comment I move from relevance to proportionality.

Qualcomm denies that further disclosure is proportionate and so all the arguments about how this is not possible or feasible come into play.

If you have their skeleton, at paragraph 67 or 68, they say -- 67 -- that a preliminary electronic search for documents that they have done by reference to basic

terms, which include the company name, Huawei or Lenovo, or acronyms, and contract and licence, that yields 251,000-odd documents for the FTC period. See that four lines up from the bottom of paragraph 67.

Qualcomm then goes on in the next paragraph to say: well, this would take it at least four months and closer to six to seven months to produce the disclosure of that magnitude from the electronically held repository and it would cost at least £1 million.

We recalled that this was very similar to Qualcomm's claim in court to you at the January CMC this year, where they said in relation to a search for 5G documents that this would produce a vast and unmanageable amount of paper and was infeasible.

We therefore wrote to Qualcomm's solicitors late on Thursday evening last week, with a view to exploring the impact of conducting a more focused search using different terms. If you would please pick up what I think is the second supplemental volume, it's called, at tab 9 of that you have the letter. It's on page 54 of that bundle. Can I just check that the Tribunal has it?

It's dated 25 July 2024, top left. I hope that you have it electronically.

MRS JUSTICE BACON: Dated?

MR JON TURNER: 25 July, Thursday. It's on the screen. Excellent, thank you.

MRS JUSTICE BACON: Ah, that's not ...

(Pause)

MR JON TURNER: My Lady, should I continue or just pause for a moment?

MRS JUSTICE BACON: No, just pause for a moment.

(Pause)

Sorry, are you saying there's a second correspondence bundle or the second supplemental bundle?

MR JON TURNER: This is called second supplemental bundle.

MRS JUSTICE BACON: Okay, all right, sorry. I'm there.

All right, thank you.

MR JON TURNER: So if you turn to the second page, 55 --

MRS JUSTICE BACON: Yes.

PROFESSOR MASON: Forgive us, there's a slight discrepancy with the electronic versions. But it's fine, it's on the displaced screen.

MRS JUSTICE BACON: All right, I have it, 55.

MR JON TURNER: Thank you. Two things from this, you see paragraph 6 at the top:

"In arguing that our client's disclosure request relative to Huawei and Lenovo is disproportionate your client suggested the potential volume could amount to 251,000-odd. We're conscious your client took a similar

approach at CMC 4, suggested our client's request for disclosure of 5G would be disproportionate because there were close to 600,000 documents with the word 5G in it. In response to which Professor Mason asked: would a slightly more intelligent search bring the number down?

"Following negotiations between the parties on search terms the disclosure was 2,338 documents."

It says that is 3.89 per cent of the initial 6,000. In fact Qualcomm has helpfully pointed out our maths was wrong. What they disclosed was 0.389 per cent of that amount.

So they have said -- and I needn't go to their part of the response, but Mr Jowell will if he wants to -- that nonetheless it took them considerable work to get it down to that number. But, ultimately, what was produced was an extremely manageable number of documents.

Then, if you look at the table, you will see we proposed -- and this is not meant to be final -- some limiting search terms which seem to us entirely reasonable to bring the -- that should bring the number down.

If you look, for example, at 2a, string 2a, we simply added two further limiters to the company name

and chip and licence, and basically those were FRAND and SEP or essential.

That alone brought the number of documents in itself down, as I'm going to show you, by an absolutely huge amount. There's a further refinement which is labelled string 1a and that brings it down even further. You can see this if you look at the reply that we received. I'm afraid it was only yesterday afternoon. I hope that you have this electronically. It's a Norton Rose letter of 28 July, so yesterday, Sunday afternoon. Do you have that? Otherwise we will try and provide hard copies.

MRS JUSTICE BACON: I think we have that. So this is in a second correspondence bundle?

MR JON TURNER: Yes.

MRS JUSTICE BACON: And it's at page 23?

MR JON TURNER: I am told that should be right. It's a letter that is dated 28 July from Norton Rose Fulbright and under paragraph 3 on the first page, it says:

"Qualcomm's indicative search terms."

PROFESSOR MASON: I have correspondence 2/25.

MRS JUSTICE BACON: It's the page before.

MR JON TURNER: I don't have the same numbering as you, I'm afraid.

That's it, yes.

MRS JUSTICE BACON: Okay. All right, thank you.

MR JON TURNER: I'm sorry, Professor Mason, that is it. If you go in that to internal page 4, they fed back to us what the results were of using additional limiters. You will see for 2a that it comes down from 250,000 to just over 30,000, and in relation to 1a it comes down from 250,000 to just over 25,000.

In other words, one tenth of the number referred to in Qualcomm's skeleton.

Now, on our side, 25 or 30,000 documents in terms of the time to review it would take, we estimate, roughly at this point six weeks. We consider that this exercise helps to show that our ask is proportionate if you're satisfied on the issue of relevance, and that constructive engagement with Qualcomm to finalise this will mean that this is a perfectly tractable task that is consistent with the litigation timetable.

MRS JUSTICE BACON: When is there six weeks in the litigation timetable that nobody is doing anything?

MR JON TURNER: Well, it will be done in parallel with other tasks, but we anticipate that this can commence in September and it would take, as we say, roughly six weeks to complete.

MR JUSTIN TURNER: Is there any explanation why this wasn't asked for? These matters are raised in the initial pleadings which you have just been showing us; why are

we hearing this application today?
MR JON TURNER: I wasn't present at CMC 3 in July 2003; Mr Williams handled that. I understand there was a debate on that occasion generally about OEM disclosure.
MR JUSTIN TURNER: Right.
MR JON TURNER: As a fallback, six OEMs were sought by way of disclosure on that occasion.
MR JUSTIN TURNER: So you had disclosure on six OEMs?
MR JON TURNER: No, no, no, that is what was sought.
MR JUSTIN TURNER: It was refused, yes.
MR JON TURNER: That was refused on that occasion.
MRS JUSTICE BACON: You asked for disclosure on six OEMs. We have had two -- wait a minute. We have had two hearings since then. We have had a hearing in January and we have had a hearing in June, and you're now making an application for further disclosure which you say could be provided by September and which would then take you six weeks to review; how on earth is that going to be possible with a timetable which will have statements of witnesses of fact by 8 November?
MR JON TURNER: Well, my Lady, in terms of witnesses of fact, the one that matters on our side, the only one that matters for us is Mr Blumberg. Were you to say that there's a justification in relation to him, but not

for proportionality reasons more widely than that, then the debate becomes even more narrow because you're only looking at documents which we're asking for which were sent by or received by him and so that's a much smaller fraction even than I have been describing now.

MR JUSTIN TURNER: Sorry, I'm still not quite understanding the context of this. So you start off with the FTC decision and you identify some findings in that and, as I understand, you have depositions relating to that decision.

MR JON TURNER: Yes. The judgment, yes.

MR JUSTIN TURNER: And Mr Blumberg was presumably deposed in those proceedings?

MR JON TURNER: He was.

MR JUSTIN TURNER: So you have all that information and those depositions may refer to specific documents which are important or were relevant to the deposition being heard or put to the witness in the deposition, but you're not pursuing that. You're not saying, "Look, that's why we need this document", you're saying you have to go back and search from scratch. I don't understand why that is necessary.

If there was a specific document that Mr Blumberg had given evidence on and was going to refer to in these proceedings but didn't have, I'd sort of understand what

your point was. But I don't understand why you have to go back and do these searches.

MR JON TURNER: So I'm grateful. So I mentioned three separate justifications. The first of those was the one that I was outlining this morning about the relevance of this in order to shine light on the nature of the policy, and I have shown you that for Huawei and Lenovo, the way they were treated will be something that the economists can consider in terms of working out whether this was an anti-competitive policy or not.

Secondly, I referred more generally to the issue of market definition which is something that equally our expert says. If I'm going to take a view on whether there's a wider market definition, which is one of the issues in the case, then simply an Apple-specific market and a Samsung-specific market, I have to have this.

But I mentioned a third as well which is narrower. This is the one you were just referring to. If we are having a witness at the trial in the form of Mr Blumberg, it's not merely that he is going to be actively referring to documents that were part of his deposition; the point here is that the Defendant, Qualcomm, is likely to cross-examine that witness at the trial and they are going to be able to refer to a host of documents sent to him, or received from him, which we

don't have. If they were to cross-examine on that basis at the trial without us having received that information in advance, that would be an equality of arms. So this is a third and narrower justification applicable only to Lenovo, if you see the point.

The question my Ladyship was addressing, the wider point, which is for the figures that I have shown you here, we're talking about something that even without further limitations on the search terms, even if you were to take what we have already put forward and they have responded on, you're talking about 25 to 30,000 documents. If that were to be actioned with only what's required to be done now, which will not involve a review for -- I will come to this in a moment, but a review for privilege, because they have said, as they said in the earlier round of disclosure, were reviewed for privilege in the USA. The adequacy of that is one issue that Mr Williams is going to be picking up. But, for present purposes, we would swallow that and say: provide these documents now because of your Ladyship's point, that we need to get on with it for these.

Therefore, as an upper limit you're talking about something that ought to be capable of being done reasonably expeditiously and processed on our side, digested and reviewed quite quickly. That is why it is

consistent with the timetable.

So far as Mr Blumberg is concerned, as I say, the point here on the sort of narrower justification is certainly one of inequality of arms because the Tribunal will readily appreciate that if we are putting forward this witness, where they hold these documents on what was sent to him and received from him, that we will need to have that set as well in order for there to be some kind of fairness, otherwise we will be faced, hearing in cross-examination for the first time, "Look at this document which you sent; look at this other one which you've received and I'm going to ask you some questions about it", in circumstances where neither we, nor Mr Blumberg, will have had a chance, in his case to refresh his memory, before he goes into the witness box.

So that is a narrower --

MR JUSTIN TURNER: You're not saying you need it to prepare his witness statement. He's going to put in a witness statement.

MR JON TURNER: He's going to -- yes, he's going to put in a witness statement.

MR JUSTIN TURNER: He has a basis on which to put in that witness statement?

MR JON TURNER: He has. And the basis for that is -- you have seen the six points that we have referred to in the

skeleton argument?

MR JUSTIN TURNER: Yes.

MR JON TURNER: We can base that very largely on the deposition evidence that we have or at least the public version of that, the part of it that we have received. But there are aspects of it that we can't get into because we don't have this material. That's not a reason for holding up his evidence. It's more a point concerning fairness at the trial itself for which that would be required.

So that's why --

MR JUSTIN TURNER: You're saying you need advance notice of what documents are going to be put to him in cross-examination?

MR JON TURNER: Well, he needs to be able to -- well, that's one way in which it can be put. I'm familiar with the way, now, in the Patents Court that particular approach has been advanced.

Yes, in a nutshell, that here we're talking about the corpus of documents which he was involved in at the time and it would be appropriate for him before he essentially goes into the witness box not merely to see isolated documents that are going to be put to him, because then he won't have the context and he won't say, "But there was a document before that which explains

it". He will in fairness need to see the documents that he was sent or which he sent himself, and that, therefore, on this narrower basis, would be the justification in relation to him.

But my point -- I think the Tribunal has it -- is that there are two other reasons which are important to try the issues fairly in the case which we say are relevant. So the key question becomes the one that my Lady had actually raised, which is: please explain to me how this is going to be manageable in the time?

That is, I hope, something that I have now done.

MRS JUSTICE BACON: Thank you very much.

Mr Jowell.

Mr Saunders.

MR SAUNDERS: Change of personnel on this one.

Mr Turner has started in relation to the previous application and made it clear that he could make this case without the necessity of this disclosure, so that is obviously, we would say, the starting point.

Now, the consequence of that is that any disclosure that's to be ordered needs to be very targeted and confined, if any disclosure is actually required.

Now, I was going to address my Lady and the Tribunal on four points: the pleadings, which it's important to look very briefly at the question of market definition.

Secondly, what Mr Noble, in Noble 6, says.

Thirdly, their proposals, which we have just seen on the screen.

Then, fourthly, these issues of proportionality.

If I can just pick up the fourth topics now. My learned friend Mr Turner is now saying it's six weeks' work in September. Qualcomm's evidence is due on 8 November. It isn't in response to my Lady's question about how this can be accommodated. He said: well, we don't need to show Mr Blumberg about this material.

Well, Qualcomm has witnesses, too, and insofar as we're getting into the details of negotiations with Huawei and Lenovo then we need to be able to address that material in our evidence. So we need some time in order to do that. It's just simply, we would say, impossible, even with these smaller numbers.

I will come on a second ago to those strings that were run because, actually, those strings, when you look at them, aren't about market definition; they're about size of portfolio for the purposes of an assessment of FRAND. They're not even on the same point. But if that material were to be ordered, then we have to have sufficient time to be able to deal with it properly with our witnesses.

Now, what about the position of Mr Blumberg, the

narrow basis on which my learned friend puts this application? Well, there are other ways of dealing with that. He is right, in certain circumstances the Patents Court does order a vast disclosure of documents usually to expert witnesses, the reason being that it's not a competition as to who thinks fastest with an expert, they have to have a proper time to look at that. But if that were the price of this -- us preventing that disclosure, then the solution is to provide that material, say, seven days before his cross-examination or something. Insofar as it's -- there are documents that we might want to refer to in cross-examination. That would be a very unusual thing to do.

MRS JUSTICE BACON: What about the documents that are referred to in the depositions? Is there a discrete set that can be corralled from looking at what Mr Blumberg has said --

MR SAUNDERS: I would have thought that is a possibility. Certainly ones that are referred to in the judgment I think have already been provided. We don't have them, because some of them are Lenovo documents that are on the side of the protective order.

MRS JUSTICE BACON: Insofar as you had documents that have been sent to or from Mr Blumberg that are referred to in his testimony; is that something that would have been

provided already or could be provided relatively quickly?

MR SAUNDERS: Hopefully we can ...

We don't know if we have access to that, I'm afraid. Because of the -- so there's a protective order in the US proceedings, which we're on the wrong side of because that was limited to attorneys' eyes only. So I don't know whether this material is at large.

MRS JUSTICE BACON: But does that mean that in relation to what they're asking for -- because in relation to Mr Blumberg what is being sought is documents that have been sent from or to him.

MR SAUNDERS: By Qualcomm.

MRS JUSTICE BACON: Yes.

MR SAUNDERS: So that material, I think, should be -- that is within our possession.

MRS JUSTICE BACON: Right.

MR SAUNDERS: But what we don't have is anything else that was produced from the Lenovo side of the table.

MRS JUSTICE BACON: I see.

MR SAUNDERS: Nor -- I'm not sure of the exact position in relation to some of his deposition material, either.

MRS JUSTICE BACON: So have you done any assessment of how big the document set would be if you were looking at the documents sent to or from Blumberg?

MR SAUNDERS: My Lady, no, because that has just been raised, and very, very shortly before this hearing. But we can do that and come back to it, perhaps, tomorrow, if that's a way through.

MRS JUSTICE BACON: Yes.

MR SAUNDERS: My Lady, can I just address you on the other points which go to the merits of the application more generally?

If I may, I'll just take you to the market definition pleadings because they are not about this. So just turn those up very quickly. So we need the supplemental bundle, tab 1, page 30. So this is the CR's pleaded case on market definition. They start off by saying there is a separate market for each LTE set and they go on to say, later on, that they're not substitutable, so you have a market per patent. That's the set market.

Then they identify four chipset markets in (b), and they set those up on a series of technical criteria, so there are some that are LTE which are backwards compatible with other standards and so on.

So you have a series of technical criteria about whether you can put that -- those -- the supply of those chips into certain buckets, and they identified four.

Now, in their expert methodology statement they

refer to the evidence in Noble 1, and they say: well, the technical expert evidence from Dr Schneider regarding interchangeability of chips, and that's all. A technical question about substitutability and that's the basis on which their pleading goes on to develop this.

If you look at our pleaded case, so that's supplemental bundle, tab 2, page 117.

So what we say at paragraph 82, in the middle of the page, is there's a worldwide market for supply of baseband chipsets for 2G, 3G, 4G and 5G. Alternatively, a worldwide market for chips that could be used in Apple and Samsung devices. We call that the "Apple Chipsets Market" and the "Samsung Chipsets Market".

For SEPs, there's an SEP portfolio licence market or a market for the licensing of Qualcomm's SEPs.

Then, if we can just flip over to the next couple of pages, what we do there is we set out a chain of substitution arguments in relation to the chips. Page 118 and over the page to page 119.

Then, on page 121, we set out our alternative case on Apple and Samsung. So we say chain of substitution, which is a technical question: can you swap one chip for the other?

Then there's an alternative case, in paragraphs 84

and 85, that if the substitutes are OEM specific, then the market is what those OEMs want to buy. It's a market for what Apple wants to buy, a market for what Samsung wants to buy. But that's our alternative case.

Now, there's nothing on the face of those pleadings that says you need to look at what Huawei, Lenovo or any other OEM wants, let alone how they are in terms of market definition. We're looking at questions of technical substitutability. That is consistent with the approach the experts have taken in the expert methodology statements to date.

Now, in it and in the RFI response, as we saw earlier today, subject to their review of the disclosure, they're not even saying the Class Representative, that Apple or Samsung were aware of specific threats that were made to other OEMs. So that brings me to the second point about Mr Noble's sixth statement.

What Dr Padilla said in his evidence was that he doesn't intend to consider whether OEM specific markets exist generally, nor is Qualcomm alleging that there are general specific markets. Nobody is alleging that, other than these specific ones relating to Apple and Samsung, because if Apple says, "Well, we particularly want a blue coloured chip", then they are in the market

for blue coloured chips, but that defines what they're interested in purchasing. So that is the only enquiry.

Dr Padilla is right to say that because that's how the pleadings work. So he says it's not necessary to consider the detail of individual negotiations when you're looking at questions of market definition.

As far as price data is concerned, he and Mr Noble can look at that by looking at the various and very comprehensive set of chipset supply agreements they both have and the data on sales prices from IDC and Strategy Analytics and all the rest of it.

So that brings us to Noble 6 that was served last week. So what he says is he agrees with Dr Padilla that there's a central question of whether Qualcomm is able to exert pressure on Apple and Samsung, and that's the central question, and whether there are artificially inflated royalties.

If we can look at supplemental 2, tab 15, page 152, just at the top, he says you have to look at countervailing buying power. Of course you do, because that's specific to the circumstances of Apple and Samsung. It might be, for example, relevant that Apple is a humongous company and has a lot of buyer power, so therefore can dictate terms to people selling it things. But that's something that needs to be assessed.

Then we look at 2.4 on that page. If, as Which? contends, there is an industry-wide market in which Qualcomm has market power that's relevant to understanding the nature and what he calls cross-effects.

Now, one has to be quite careful because, again, as my learned friend Mr Jowell said, the Class Representative is not a regulator; this is a damages case.

Paragraph 2.6, just down the page, says that he doesn't agree with Dr Padilla that you should just look at Apple and Samsung and then assume the market. That's critically not what Dr Padilla is saying. Nor does Mr Noble reflect, in his reply report, that he doesn't quite have Qualcomm's case right. Rather surprisingly he doesn't acknowledge that.

Then he goes on, in 2.7, to refer to a couple of matters, one of which is blanked out there on the screen, which relate to specifics of the material that he's received from disclosure, so you can look at that.

So 2.8 says it's all about substitution. Again, the technical issues.

2.9 says it's Qualcomm's pleaded position on the Apple and Samsung specific markets that the substitutes differ across OEMs as a key factor. That is not our

defence. We only run this argument in relation to Apple and Samsung specifically. We're not saying it in relation to all OEMs or subsets of OEMs.

Then 2.10, he says he needs disclosure to meet that case. Well, the answer is he doesn't need the disclosure because that is not our case as he has characterised it.

And 2.10 rather strikingly says, this will "cast light":

"I anticipate access to negotiation materials between Qualcomm and other OEMs is likely to cast light on such substitutes, since the OEMs may be expected to refer to their alternative options (if any)."

Well, that again is going to the technical question. Are there other chips available in the market?

Well, the answer is you don't need the disclosure for that. Everyone knows what's available on the market. There is Strategy Analytics and IDC data telling you what and at what price.

So it doesn't cast light in that sense. Have a look what he says on leveraging, page 156, paragraph 3.4. This is where he refers to FTC:

"It may even be that Qualcomm makes similar threats to Apple and Samsung, which is only fragmentary documentary evidence."

Well, he has the documentary -- he has the disclosure in relation to those, have a look at it:

"As such understanding whether or not Qualcomm made any such threats to other OEMs […] and the likely effect that this had on the negotiations has the potential to shed light on the NLNC Policy and its operationalisation."

Again, this is about the potential to shed light.

Now, how is that going to help in relation to Huawei or Lenovo knowing about that? Huawei can get its own chips, its Exynos chips. They will have their own specific set of circumstances. It may be they couldn't get any Exynos chips one year because they couldn't make them for some reason. How is that going to help you with Apple and Samsung? That's completely irrelevant. Those are specific circumstances that relate to Huawei. As far as Lenovo is concerned, really the only interest in Lenovo, as my learned friend has articulated, is those particular points he wants to place reliance on in the FTC judgment.

So it doesn't really shed light. But, on any view, it's an extremely weak assertion. It's essentially a fishing expedition.

But what is very, very striking is that even after Dr Padilla, as it were, threw down the gauntlet in his evidence and supports the basis for this, we don't get

a single reference to an actual document that's been produced -- and they have had them for long enough now -- that says any other OEM had some impact on the position of Apple and Samsung.

That may again not be particularly surprising because Apple and Samsung are two great big beasts in the industry and they will do what they want.

So the basis on which this is put forward evidentially is incredibly weak.

Paragraph 3.5 goes on to say: well, there may have been this benchmark.

But, again, my learned friend has clarified he is not saying there's some sort of non-discrimination applied back to front whereby people have to pay. The other point, of course, is Mr Noble has all the agreements. He can see the rates. I'm not going to go into them now. But he can form his own view as to whether -- and he has the negotiation documents for Apple and Samsung, insofar as it's material he can look at all that.

So those are the points on the Noble evidence. We say it's extremely thin, particularly -- and what is very striking is there's no attempt to try to tie this to Apple and Samsung at all.

Third point I was going to make is have a look at

the letter we just saw, supplemental bundle 2, tab 9, page 54.

Now, on the second page, which my learned friend showed you a second ago, if we could just look at the table in paragraph 7. What are they actually asking for? String 1a is Lenovo and chip and licence and FRAND or fair or unfair, or reasonable and strength or justification, or importance or size.

So this is about portfolio sizes. Strength of patent portfolios, importance, justification and so on. This is nothing to do with market definition, at least as adumbrated in Mr Noble's statement, and it's not about the cross effects. One would expect that we're tracing through into something specific that Apple and Samsung had done. So string 2a is also about FRAND.

1 and 1b are all about strength and justification of the portfolio, and 2b is obviously the unqualified one, which is very broad.

The hit numbers are -- although my learned friend alighted on the 1a, just for your note, is 12,999, with families 25,510. 1b, 38,848, with families 77,214. 2a is 16,675, with families 32,985, and 2b is 53,642, with families 107,933 documents.

So that is not -- for a start the requests don't actually tie to the basis which is put forward for them.

It's not a request for focused disclosure. If anything it sounds like a request that really goes to phase 2 of the trial, which is where we're looking at FRAND and strength of portfolios and all the rest of it, if we get there. There's no real attempt to justify what they're seeking. Calling it a fishing expedition is possibly even slightly generous; it's looking for some other sort of species of aquatic animal all together.

As my Lady has already observed a very similar application came at the CMC a year ago. Back then, they said they wanted all OEMs, their fallback was six. That was rejected because of the causal relevance point.

We admit the existence of a market-wide chipset supply practice and the Tribunal at that stage characterised that application as an extraordinary overreach. All those points still stand now, but they're rather magnified by the fact we're coming up to evidence on 8 November.

So, my Lady, we say that for all those reasons this should be refused. Even calibrating these search terms my learned friend referred to the number -- the change in the number of hits in relation to 5G. That took six weeks of going backwards and forwards with the CR. There is a lot of cost associated with doing that exercise and it did, yes, result in a smaller number of

documents. But one can see how, even with these sorts of search terms, this is hardly a focused request in any way and it's going to lead to another satellite dispute about all this material, when at the end of the day my learned friend says he can run his case without it.

So, as I say, the solution in relation to Mr Blumberg is a specific point. We're not having a trial by surprise. It is not going to be in anyone's interests. We want Mr Blumberg to give his best evidence and there's probably a solution to that, which is to provide whatever it is, or a pack of material, so he can have a look.

MRS JUSTICE BACON: Or to provide the documents you have which refer to him, whether or not you're going to refer to them.

MR SAUNDERS: That's quite a lot of irrelevant material though, whereas actually doing it the other way is rather more focused, perhaps.

MRS JUSTICE BACON: Well, yes, but then you're only producing the documents that are helpful to you.

MR SAUNDERS: I see that, yes.

MRS JUSTICE BACON: I think that it would be helpful to know how many documents you would be handing over, if it was confined to the Blumberg set.

MR SAUNDERS: Yes.

MRS JUSTICE BACON: You may not be able to do that now, I appreciate. We will consider that further. I will hear from Mr Turner in reply now.

Thank you very much, Mr Saunders.

MR SAUNDERS: Thank you.

MR JON TURNER: Yes, my Lady, I will be brief.

First point, your question about why we're looking at this now. Reminded that the Tribunal's order at CMC 3, which was at the end of July 2023, was preceded by your Ladyship saying that this is the order now, but discussions between the experts may result in applications for further disclosure.

Paragraph 19 of the order on that date -- which I regret I don't think is in the bundle, but it's on the website -- was where you ordered that a further CMC, CMC 5, shall be listed for the first available date from 8 May 2024 to consider any further or consequential disclosure applications.

So this was meant to be the occasion -- this is the occasion when that is being considered and it's based on the opinions of our expert economist.

Second point, Blumberg. There's been a debate about what would be appropriate if it was limited solely to documents relating to him. Our admission is the same: you need to have disclosure of that set. It's not

sufficient to provide, as Mr Saunders said, seven days before cross-examination the particular documents on which they propose to cross-examine him, so that he cannot see and does not have access to the documents that preceded it and followed it by way of context, because that is conspicuously unfair.

In relation to the quantity of documents concerned, as I say, I have referred to Caroline Thomas's seventh affidavit which goes to some lengths to say that his involvement according to them was limited, so one would not expect there to be very many documents of this kind anyway. So were it to be limited in this way, it's absolutely feasible for them to provide that set of documents in short order.

Second point on market definition. Mr Saunders says: well, the Apple specific chipset market and the Samsung specific chipset market, those are our alternative case.

It may be their alternative case formally in the documents that have led to this hearing, including Qualcomm's expert methodology. This has assumed rather more importance and in any event it will be a necessary matter for the Tribunal to consider and decide what is the appropriate market definition and if, as we say as part of our case, in relation to OEMs other than Apple

and Samsung they have a similar supply side substitutability, the options available to them are similar, then it is relevant to consider their case in the framework of an abuse of dominance claim to the impact that is produced on Apple and Samsung.

If you restrict this case, which Qualcomm seeks to achieve, to bilateral negotiations between Qualcomm on one hand, Apple and Samsung separately on the other, you will have a tunnel vision where the only issue that you will be able, properly, to take a view on -- and in my submission actually not even properly in relation to that -- is countervailing buyer power, which is two big parties -- can we really see here that one party is able to exert pressure on the other? In order to get a feel for that you do need to have a proper understanding of the relevant market and of the relevance of other OEMs in that context.

Mr Saunders said: well, if it's a question of what chips are available in fact for others to purchase, you have data in the form of industry reports, such as the IDC repository.

You do have that hard data, but that does not tell you what the real options available for those major OEMs are. The fact that there may be a rival chipset supplier producing low quality chips for a particular

area, or even globally, does not tell you that these are a real substitute for Qualcomm's product in relation to the market as a whole. Our evidence will be that Qualcomm's products had a distinct quality and that is why they were important and why they had market-wide dominance, which is one of the issues that necessarily falls to be addressed.

On the question of the leverage point, Mr Saunders essentially repeated Mr Jowell's, in our submission, fallacy of saying: well, where is the causal connection between information relating to these companies and how they were treated and effects on royalties paid by Apple and Samsung?

Now, I have explained that's the wrong frame of reference, because the reason why this is primarily important on the question of leverage is that you will see from the examples here of Lenovo and Huawei -- I showed you the ways in which those companies were treated -- how the policy operates so that you can take a view on whether it tends to restrict competition or not. That point was not addressed.

Finally, in relation to the proposals that we have made, Mr Saunders said: well, why are some of the points in those strings relevant to market definition?

The points in those strings, including size and

FRAND and strength, those are relevant primarily in relation to the question of the negotiations and the sorts of factors that one would expect these companies to raise in patent licensing negotiations where they're trying not to pay an excessive royalty rate. That is why they're relevant to this debate.

The results of the analysis that Norton Rose fed back to us are, in those two cases at the very least, that you have an extremely manageable group of documents returned with no further refinement required.

So, my Lady, unless there's anything further I can assist with, those are our reply submissions.

MRS JUSTICE BACON: When you say "extremely manageable", you're referring to the 53,000 or the 107,000?

MR JON TURNER: I'm referring -- so you look on the right-hand column, which is all hits with families.

MRS JUSTICE BACON: Is it the 107,000 that you would say would take six weeks to crunch through or the 53,000?

MR JON TURNER: No. I'm talking there about a return which will be in the region of 30,000. So I had been focusing in my submissions earlier on 1a and 2a, because if you use those rather than the wider set which results from 2b, which yields 107,000, for those two you get 25 to 30,000 documents. That's why I'm saying that it was -- that's roughly a tenth of what they had been originally

talking about.

MRS JUSTICE BACON: That's what you say would take the six weeks or not?

MR JON TURNER: Yes.

MRS JUSTICE BACON: So you're talking about 1a plus 2a?

MR JON TURNER: No, no. They're alternatives.

MRS JUSTICE BACON: Right. Yes.

MR JON TURNER: So if you were to take 2a, which is roughly 30,000, that would be roughly six weeks. If it's something more narrow than that, then it's less time. You can already see the speed with which this can be produced that subject to the confidentiality check for third party confidentiality, which we accept that they will want to go through, you can dispense with the usual privilege review for the reasons that we know about. These documents can be provided swiftly.

MRS JUSTICE BACON: All right. Yes, thank you very much.

We will rise for five minutes and we will come back with our decision on this and then we will deal with the Hollington v Hewthorn point.

(3.05 pm)

(A short break)

(3.13 pm)

MRS JUSTICE BACON: We refuse the application as it is framed. We do not consider that it is likely to have anything more than peripheral relevance to the issues of market definition raised by Mr Noble.

In relation to the question of shedding light on the operation of the policy, Mr Turner has already confirmed that he can make his case without further disclosure.

That leaves the question of the Blumberg documents. That's not a set of documents that has so far been asked for. It's been raised for the first time today as a possible reduced document set. We think that it would probably be best to let the parties discuss this overnight and, assuming that we are back here tomorrow, address it tomorrow. If we're not back here tomorrow, then we can deal with it on the paper. But we think that it is not right for Blumberg documents to be produced shortly before cross-examination.

It is appropriate if further documents are going to be put to Mr Blumberg in cross-examination for there to be a complete set of documents produced at some point before Mr Blumberg's evidence is given. We suggest given this has been raised for the first time today that the parties try to discuss this and come back to us if an agreement cannot be reached.

But, as for the larger dataset, as I have said, we're not convinced that's likely to be of significant relevance and we have already essentially addressed the problem, the question at CMC 3. There is a considerable concern about the trial timetable if we were now to revisit precisely the issues that were raised before on the basis of a somewhat peripheral argument about market definition.

So that's our decision on that point.

Maybe I'm too optimistic about whether we will get through the rest this afternoon, but let's see how we do.

Hollington v Hewthorn, Mr Turner.

MR JON TURNER: This will be Mr Williams, my Lady.

MRS JUSTICE BACON: Mr Williams.

MR WILLIAMS: My Lady, members of the Tribunal. The Tribunal is familiar with this issue. We are applying to reinstate a plea which was originally included in our reply and which deals with the admissibility of evaluative findings of the decision-makers.

The plea was at one stage struck out and we apply to reinstate it. Do I need to show you the pleading before I get going?

MRS JUSTICE BACON: If you like.

MR WILLIAMS: It's at core bundle, tab 6, page 38,

paragraph 4.

MRS JUSTICE BACON: All right.

MR WILLIAMS: It's the text starting "Reasoned finding ...".

MRS JUSTICE BACON: Yes.

MR WILLIAMS: So, if I may, I will start by summarising our position overall before going to the ruling and the decision in FX.

The key point we make at the outset is that one needs to separate out two distinct issues which arise in connection with this part of the case. The first is the pure question of legal principle as to whether evaluative findings of other decision-makers are permissible in this Tribunal, that is: does the Tribunal adopt a rule or principle equivalent to the rule in Hollington v Hewthorn?

That's the point to which the amendment goes. As you can see from the text that's on the screen, it may be taken into account by the Tribunal.

We previously pleaded that such findings were admissible in principle. That plea was struck out and now we want to reinstate it. The plea is a pure proposition of law.

The Tribunal was invited to form a view on that legal question of admissibility for the purposes of the strike-out application and it concluded that the

findings weren't admissible. We will go to the ruling and we will see the Tribunal didn't make its decision on the basis of an exercise of discretion, either in general terms or as regards specific findings. It concluded that there's a threshold test of admissibility and that we failed that threshold test.

In our respectful submission, the Tribunal's decision on that threshold issue has been overtaken by the views expressed by the Court of Appeal in FX, which held that the findings to which the amendment relates are admissible in principle. The decision of the Court of Appeal is now subject to a further appeal to the Supreme Court. But, as matters stand, we say this Tribunal needs to apply the law as stated by the Court of Appeal.

MRS JUSTICE BACON: Just on the Supreme Court; has permission been given by the Supreme Court?

MR WILLIAMS: Yes.

MRS JUSTICE BACON: Is this particular point being raised there?

MR WILLIAMS: We understand that it is. We understand that it is. When I said there were two aspects of the discussion, that's the first aspect, the threshold question of admissibility. In my submission, that is the only issue which arises on our application. It's

solely about the question of admissibility in principle.

On the basis that findings of this nature are admissible in principle, a further and separate issue would then arise, which is: what approach should be taken in this case? How should the Tribunal exercise its discretion in dealing with these issues? And what weight should be given to particular findings?

That's not what the amendment application is concerned with. It's a separate and subsequent issue. We say that's not a question for today. As we will see in due course, the Court of Appeal gave guidance in FX as to how the Tribunal should approach the exercise of its discretion, and our submission would be that the Tribunal should follow that approach which requires a reasonably granular analysis of particular findings.

I will say now that some of the points identified by the Court of Appeal in that context, that is going to the exercise of the discretion, they overlap with points which the Tribunal considered in the ruling, points like the risk of satellite litigation. But the Tribunal considered those points as part of its consideration of the threshold question of admissibility.

We say that is different from considering the points in the context of an exercise of discretion on the basis that the findings are admissible in principle. A number

of factors would need to be weighed and the risk of satellite litigation isn't a single, overriding factor. I will come back to that when we look at FX.

Before I go to the ruling and FX, I just want to clear away Qualcomm's suggestion that there is some sort of bar to us trying to reinstate the legal plea that they say in their skeleton, this is res judicata. The point is not developed, but they do say that.

We are dealing here with a fairly unusual plea because, as I have said, it is a pure plea of law. Normally, one doesn't plead pure propositions of law. And normally a strike-out application doesn't go to a pure plea in law; it goes to strike out some part of the substance of the case, and that isn't what happened here.

The Tribunal will be familiar with the way this came about. We pleaded our claim originally in which we relied on findings made in foreign decisions and Qualcomm pleaded back to that that such findings were inadmissible. I don't know if you want to see that? It's in the defence.

MRS JUSTICE BACON: No. I think we recall that.

MR WILLIAMS: Then in our reply we then responded to that plea as to the position on admissibility in principle and that was then the subject of a strike-out

application.

So the effect of the strike-out was to remove that assertion as to what the legal position was in our reply. It wasn't to determine any part of our claim. That's why we say there is no question of res judicata or issue estoppel here. No part of our claim has been determined. As I say, no authority has been cited in support of the point, but I want to clear it away.

All that's happened is that the Tribunal has formed a view as to what the law is in dealing with the particular application and we say that view has been overtaken by the views expressed in the appellate courts. So absent any determination of any part of our case, the Tribunal will be required to apply the law as it stands at trial, which, on the current state of the authorities, is that the findings are admissible in principle.

So in way what I am saying is: we have applied to re-amend the reply as a way of crystallising this and making sure that the parties are clear where they stand. But, really, we say the law is the law and the Tribunal has to apply the law, and this isn't really a pleading point in that sense.

So, with that introduction, if we could look at the ruling so I can make good the points I have made about

the nature of that decision. It's at supplemental bundle, tab 14, page 711.

If we start on page 715.

You can see the plea as it then was at paragraph 9.

MRS JUSTICE BACON: Sorry, if you just hold on a minute.

(Pause)

Yes, sorry, Mr Williams.

MR WILLIAMS: No, of course, Madam.

So paragraph 9 was the plea. It's the same plea that we're now applying to reinstate, and paragraph 10 is the counter-argument that the sentence offends against the ruling point in Hewthorn. It says in the final line:

"Account may not be taken of a reasoned decision."

So that is the admissibility issue. One can see that again, if we go on to paragraph 13, so page 716. Again, that is explained in the first sentence in terms of the inadmissibility of the findings.

Then there is a quotation from Rogers v Hoyle. That sets out the view that it is the function of the judge to find the facts, and the judge should exercise that function and not rely on the assessment of others.

MRS JUSTICE BACON: Mr Williams, I think rather than going back to first principles we need to focus on what the Court of Appeal in Evans said.

MR WILLIAMS: Yes, we do. I can cut this short in a way.
MRS JUSTICE BACON: Well, yes, I think that would be a good idea.
MR WILLIAMS: If we go -- can I just show you two things now, please, Madam?

At paragraph 18, I just want to pick up, that's a submission made by Mr Armitage, on page 718. The reason for flagging that is because it's relevant when we come to look at Evans because that paragraph is referred to in Evans.

The conclusion is paragraph 33, and it says:

"… although Hollington v Hewthorn is not binding we consider it is appropriate to adopt the same principle in these proceedings."

So that's the submission they make; that the Tribunal was deciding this point on the basis that there is a single principle, a threshold test of admissibility. We say that is the conclusion that's been overtaken by the decision in Evans.

I won't spend time on the rest of it. Evans is in the authorities bundle. I have a page reference, which is 539. I'm afraid I don't have a tab reference.
MRS JUSTICE BACON: That's all right. The PDF page is good enough.
MR WILLIAMS: Yes.

MR JON TURNER: It's tab 15, if it's needed.
MR JUSTIN TURNER: Where in the judgment?
MR WILLIAMS: It's tab 15 in the authorities bundle.
MR JUSTIN TURNER: I have the judgment, which paragraph or page?
MR WILLIAMS: I was going to start on page 540. No, I wasn't. I was going to start on page 541, I'm sorry. If you can see, the Tribunal will probably be aware that one of the issues in Evans, was the way in which the Tribunal approached the issue of opt in versus opt out. Quite a lot of the issues that were considered in Evans were considered through that prism. One of the concerns that was expressed was that the Tribunal had brought the merits of the claim to bear on the question of whether certification ought to be on an opt in basis or an opt out basis. Within that issue there was debate about the extent to which the Class Representative could rely on the findings of the Commission, so it's a point inside a point inside a point.

So what one can see is paragraph 3 is dealing with, broadly speaking, that topic. You can see towards the end of the finding it says there:

"Hollington v Hewthorn distinguished."

So that's where the point comes in.

If we then move on to the discussion at 578. We can

see how it arises at 94. The applicants argued the CAT in substance applied a strike-out test.

So that's the point I was making about applying too strict a test in the context of the opt in/opt out debate and what Lord Justice Green said is:

"On balance, I think the best way for us to proceed is to accept at face value that the CAT left the merits to be decided in the future and analyse the case on that basis. That means that the merits will have to be reconsidered when the matter returns to the CAT now upon an opt out aggregate damages basis."

And then it says:

"However, since the matter was fully argued before us it raises an important point. It is important to consider the main arguments advanced."

So that's the context; that the matter is going to be remitted, but the Court of Appeal considers it important to deal with the points of principle, given their significance.

You can see from 95.1 that one of the issues that arises relates to the approach to interpretation of Commission decisions.

So the substance of the discussion continues on the next page, page 579. In 97, you can see it says, towards the middle of the paragraph:

"The respondent banks argue the decision is inadmissible, but alternatively of strictly limited, if any probative value. It is contended that the ruling in Hollington v Hewthorn applies [..] rendering it inadmissible. I do not agree."

So that's the punchline, if you like, on the question of admissibility of the Commission decision.

Then the discussion starts at 98. One can see, again, that there is reference to Rogers v Hoyle as there was in the ruling, setting out the rule in Hollington v Hewthorn.

And 99 refers to the growing number of exceptions.

And then, really, the most important discussion is at 100 to 102. 100 says, most importantly, the rule doesn't apply to the CAT, which has its own rules of procedure and evidence.

You can see in that paragraph, paragraph 18 of this Tribunal strike-out ruling, is cited with approval.

As I showed you when we were looking at the strike-out ruling, that was actually Which?'s submission in support of the proposition that the rule in Hollington v Hewthorn wasn't applicable and on the basis that the Tribunal has a broad discretion as to what evidence it ought to admit under its rules. So that is in effect approving the submission made by Which? at the

strike-out hearing.

What we see, in my submission, in these paragraphs is a running together of the two questions which the Tribunal separated out in the ruling, which is: does Hollington v Hewthorn apply and should it apply?

We can see clearly from all these paragraphs taken together, but in particular paragraphs 101 and 102, that the Court of Appeal takes a different view on the question of whether the principle should be applied and it takes an approach which is very different from the strike-out ruling.

So we see that in 101.

Hollington v Hewthorn has been described as "a rule of fairness" above and we see here there's no need for the CAT to be hidebound by --

MRS JUSTICE BACON: Yes, 101 essentially replicates what we have said in paragraph 19. I suspect the reference in paragraph 100 to paragraph 18 should have been to paragraph 18 and 19, because that was a submission that was then accepted by the Tribunal.

MR WILLIAMS: That's true.

MRS JUSTICE BACON: 101 is very similar to paragraph 19 of our judgment.

MR WILLIAMS: Yes. If one then sees in paragraph 102 -- so in my submission where one gets to, reading together

paragraph 98 where -- I'm sorry, paragraph 97, where the court rejects the view that the decision of the Commission is inadmissible. 100, 101 is that the court takes the view that the findings are admissible and that the court does therefore not support the view that the Tribunal ought to adopt a principle equivalent to the rule in Hollington v Hewthorn, which is what this Tribunal did in paragraph 33 of the strike-out ruling.

What they do is contemplate a more granular and context specific exercise of discretion as to the weight that ought to be attached to those findings, having regard to an inexhaustive list of factors, which are set out in paragraph 102.

So there Lord Justice Green says that the Tribunal would examine matters such as whether the decision is follow on, the extent of the overlap between the prior findings and the present case, who the decision-maker was, whether it was a specialist fact finder, what the standard of proof was, what was the nature of the legal analysis and so on and so forth.

So that is, in my respectful submission, a context specific granular assessment of the weight that ought to be attached to the findings and indeed to specific findings having regard to the decision-maker in that particular context, the legal framework in that context

and so on and so forth.

What it isn't is a blanket rule of inadmissibility exercised on the basis of a single principle, which is, as I say, how the Tribunal approached the strike-out ruling.

Qualcomm says no one argued in Evans that the strike-out ruling was wrong. I can't speak to that, but in my submission it is quite clear from what we see here that whatever was argued specifically in relation to the strike-out ruling that the Court of Appeal has taken a different view on the question of principle and on the question of approach, albeit, as I will come to in a moment, that the Court of Appeal approves the Tribunal's reasoning in one or two respects. We looked at paragraph 18 and we will come to satellite litigation now.

MR JUSTIN TURNER: What do you say about the sentence:

"There might be many relevant uses some of which fall short of reliance on earlier conclusions about the ultimate merits". Down to the end of the paragraph.

MR WILLIAMS: So I think what that is saying is that one factor bearing on the exercise of the discretion will be the purpose for which the findings are being relied on. The Tribunal may be -- may apply a lower level of

scrutiny or lower level of stringency when it's simply using the findings for the purposes of deciding, for example, a case management issue, such as the ambit of disclosure. So it may be more ready to use the material for those purposes, but it's not, in my submission, contemplating a blanket rule that findings would be inadmissible for any purpose going to the merits at trial. It's certainly not saying that because a whole range of factors need to be considered, all of which relate to, you know, a particular decision taken by a particular constitution.

MRS JUSTICE BACON: Isn't this saying, particularly with reference to the previous sentence also -- isn't this saying: well, it depends what the purpose is?

For example, you can imagine reference to some of this material for the purpose of certification, when you might adopt a different view in relation to use at trial?

MR WILLIAMS: Yes, it is saying that would be a consideration, but I do maintain the point, Madam, that what it's not saying is that if a party, such as Which?, wants to use the material for the purposes of the merits that would invert the position, that the material would then become inadmissible in principle. One would still need to exercise the Tribunal's

discretion, having regard to all relevant factors and considerations in the way contemplated by paragraph 102.

MR JUSTIN TURNER: But the court didn't say we were wrong in our ruling.

MR WILLIAMS: No.

MR JUSTIN TURNER: Our earlier ruling. So it all has to be read together and in context, including down to the end of that paragraph, where it talks about:

"Conscious of the risk that being invited to perform a detailed inquiry into how prior findings came about.…"

MR WILLIAMS: Yes, so can I --

MR JUSTIN TURNER: So taking it as a whole; is your submission that we were being -- the Court of Appeal was saying we were wrong in the approach we took in the earlier ruling?

MR WILLIAMS: Can I make this point: I showed you in paragraph 94 and 95 that this discussion is probably obiter because the Court of Appeal decided not to -- it decided that there was no error in relation to the Tribunal's approach to the strike-out test, but it went on to consider these important matters of principle. If I may respectfully say so, one likely possibility is that this Tribunal's decision wasn't overruled because it was an obiter discussion.

But, in my submission, one has to read these

paragraphs as a whole, and in my submission it is quite clear that there is no threshold objection to the admissibility of these findings, and that's why I spent some time at the beginning emphasising this point. That is all our application goes to and that is the way in which the Tribunal decided the issue in the strike-out ruling. It is quite clear, in my respectful submission, that blanket rule doesn't hold in the light of the discussion in evidence if one treats this as --

MR JUSTIN TURNER: But you would accept it was open to us to have excluded this evidence as a matter of discretion?

MR WILLIAMS: I'm sorry?

MR JUSTIN TURNER: You accept it was open to us to exclude this evidence as a matter of discretion?

MR WILLIAMS: Well, I accept that under the law as it stands following Evans it would have been open -- the Tribunal would have had that power as part of its case management powers, but that wasn't the issue that was argued before you and that isn't the way the Tribunal, in my respectful submission, decided the point.

What the Tribunal did was hear argument on the point of legal principle. I have showed you the way the issues crystallised in the ruling. The pleading only goes to the proposition of law, and it's the proposition of law that was rejected.

So clearly I accept that following Evans the Tribunal has a case management power to exercise its discretion in relation to these findings.

A question would then arise as to when that power ought to be exercised and on the basis of what factors. But, in my respectful submission, it wasn't open to the Tribunal on the law as stated in Evans to take the view that there was a single principle on the basis of which these findings were inadmissible.

I hope that answers your question.

MRS JUSTICE BACON: I have a question, which is: the Evans judgment was handed down in July 2023. If you were seeking to reopen the issue; why have you waited a year?

MR WILLIAMS: Well, if you remember, Madam, we came before you in January and the issue was raised at that point. There was no application and we took the view at that stage that the law had moved on. We raised the matter at that point and you directed us to bring the matter back before you at this hearing if not before.

One of the reasons for that delay was it wasn't clear at that stage what was going to happen in relation to the Supreme Court and Evans, and you made the point in January and said: we're not going to hang around waiting for the Supreme Court to decide this, so please bring it back in July.

So that is what we have done, Madam.

MRS JUSTICE BACON: Can you just take me to the relevant bit of the transcript?

MR WILLIAMS: Can I ask my colleagues to look for that? I can find it, but it might be more time efficient if they look for it and we come back to it.

MRS JUSTICE BACON: Yes.

MR WILLIAMS: I did want to come back to 102 because there the Tribunal's observations about satellite litigation in the ruling are endorsed. It is clear from Evans that that is a legitimate concern in principle, but we do make two points about this.

First, it's a factor which goes to the exercise of discretion at a more granular level. It's not a point about admissibility. As I said a little while ago, the way in which this Tribunal approached this point in the ruling was that it was a factor in support of a single principle of inadmissibility, so this is a different point.

Secondly, we do say that the concern about satellite litigation is cast in a very different light by the Evans decision because it must follow from Evans in the Court of Appeal that it isn't inevitable that reference to prior findings will give rise to disproportionate satellite litigation. It's not a factor which supports

a blanket exclusion. It must be the case following Evans that it's possible to have regard to evaluative findings of a prior decision-maker without having a disproportionate trial within a trial about how those prior findings were reached.

So Qualcomm makes a submission in terrorem, if I may say so, that as soon as you open this up it's bound to be a hornet's nest of intractable problems and it will all be unmanageable and there will be huge amounts of additional evidence. We say that really can't be right following FX as a blanket proposition, and that given what the Court of Appeal said, the submission really does need to be stress tested, because clearly we see from 102 that Lord Justice Green envisages a granular assessment of the weight that can be attributed to specific findings without disproportionate satellite litigation. Clearly that is what he contemplates.

MR JUSTIN TURNER: Can you just remind me -- in our ruling, can you just remind me again why you say it was done as a matter of principle rather than as a matter of discretion?

MR WILLIAMS: 33 was the -- sorry, if you look at 22 and read it together with 33, I think --

MRS JUSTICE BACON: Because 22 says we're not bound by the rules, so we're not deciding this as a matter of

principle. Rather, it's a question about what we do in this case.

MR JUSTIN TURNER: 33 uses the word "principle", but if one reads that approach rather than rule of law, one reads "principle" in that sense.

MR WILLIAMS: In my respectful submission, you can't do that -- in my submission you can't do that, sir, because -- and this is really what I was going to take you through, and we can cut it short in the interests of time. But what happens at 21 is the Tribunal -- sorry, the paragraphs up to 21, the Tribunal concludes that it's not bound by Hollington v Hewthorn. It's not bound by it. But then it goes on to consider in effect whether we ought to adopt the same rule, the same rule, principle, the same approach.

MR JUSTIN TURNER: In the context of this case.

MR WILLIAMS: Well, it says in 22:

"Should we adopt the same principle?"

And then it says in 33:

"We should adopt the same principle in these proceedings."

But in my respectful submission, a principle is a principle and the Tribunal adopts a single legal principle that all findings of this nature are going to be inadmissible, then it is proceeding on the basis of

a blanket rule which is equivalent to what the Court of Appeal described in Evans as a strict rule in Hollington v Hewthorn. It's a single, one-size-fits-all rule in contrast to the more granular assessment envisaged by paragraph 102. So in my submission -- and of course if one reads through paragraphs 22 through to 33, it is a single decision. It's a homogenous single decision exercised on the basis of a single principle. So one doesn't see any distinction between, for example, the FTC or the KFTC. One doesn't see any distinction, for example, between a Competition Authority or a court, and so on and so forth. One doesn't see any distinction between findings that go to closely overlapping issues, factual issues, legal issues and so on. It is a single principle exercised on the basis -- it's a single decision reached on the basis of a single principle. So that is, in my submission, what the ruling says, but is also the only way to read it, given the way that it's reasoned, in my respectful submission.

Ms Fitzpatrick has helpfully pointed me to the discussion at CMC 4. It's supplemental bundle 978, line 21, 22.

MR JUSTIN TURNER: Hold on, just so I know, say that again.

MR WILLIAMS: Supplemental bundle, page 978 is the conclusion of -- I think it's the practical conclusion

of the discussion, because Mrs Justice Bacon says:

"Yes. So how about if ... "

Sorry, are you bringing it up?

MR JUSTIN TURNER: Thank you very much, sorry.

MR WILLIAMS: In fact, if you go back a bit to the top of the page, and I haven't refreshed my memory about all this, but you can see on line 5, at 978, Mr Jowell says:

"Can I highlight one other point about timings. If they are going to pursue this, it's going to have evidential implications ..."

And so on. That's the response to you saying we need to come back at the CMC.

MRS JUSTICE BACON: Yes, thank you, that's helpful.

MR WILLIAMS: So I was making the submission that the concerns about satellite litigation were considered by the Tribunal in the context of what I have said is a single principle. So Qualcomm says: well, there will be (inaudible) satellite litigation. We do say in the light of Evans that has to be stress tested.

The question is: what evidence is said to be needed and why?

They have given general evidence about why there has to be evidence of this nature. But, in my respectful submission, one does need a bit of a reality check about this. Qualcomm says: we will end up with days and

possibly weeks litigating these contextual issues.

The whole FTC trial was, I think, ten days, so one has to, I think, get a sense of proportion about this.

The idea that one needs to litigate the nature and conduct of the FTC proceedings and the Korean proceedings in exhaustive detail before you can even have regards to what they concluded is, in my respectful submission, scaremongering. The fact we're in the territory of scaremongering --

MR JUSTIN TURNER: The context is the document that you produced at tab 6, isn't it, the schedules?

MR WILLIAMS: I'm going to --

MR JUSTIN TURNER: Which comes to nearly 200 pages.

MR WILLIAMS: Yes. Obviously, there's a discussion to be had about that. But what that is is, those are -- that document in two sections. There are various matters dealing with matters of fact, which are evidential matters, and then some of the findings are evaluative findings. So the discussion we're having there only goes to the evaluative findings, but the factual matters -- there's a debate about what the factual matters are, but the factual matters are in principle admissible irrespective of the discussion we're now having about Hollington v Hewthorn.

The point I was making about scaremongering is that

there's a suggestion in Ms Thomas's latest witness statement that if the Tribunal lets these matters in it's going to be faced with evidence about the nature of the proceedings before the Commission. If there's one thing this Tribunal doesn't need it's evidence about the nature of proceedings before the European Commission enforcing Article 102. So we do say this is Qualcomm seeking to work up satellite litigation itself in a self-serving way, because obviously it has an interest in excluding these findings.

We have been working with these decisions for some time. The decisions largely speak for themselves in terms of the points that we want to draw from them, which are, in broad terms, evaluation of evidence reaching, findings which are a reflection of the evidence that this Tribunal will be able to see, and discussion, broadly speaking, of economic theories of harm underlying findings of competition law infringements. You can get that from the decision.

We can see that, if we get to a hearing, this Tribunal a might want a certain amount of explanatory material. But, in my respectful submission, the idea that we're going to have a trial about what proceedings before the KFTC involve or the FTC is, in my submission, satellite litigation. It is scaremongering.

If we get to a trial and the Tribunal decides it doesn't know enough about the foreign proceedings to be able to attach weight to findings we want to draw to the Tribunal's attention, if the Tribunal says it can't attach weight to those without having a trial within a trial, then that might cause us some difficulty. But this is not an overriding threshold obstacle in the light of Evans. It really shouldn't be, in my respectful submission.

So that's the legal point. That's where satellite litigation fits in to the legal point, in my submission.

MR JUSTIN TURNER: Can I just ask you one other question? One has to go through a few points before we get here. But if you were right that we decided this on the wrong basis and it was done as a point of principle rather than an exercise of discretion; is there any reason why we can't exercise that discretion today on the same basis?

MR WILLIAMS: Yes, yes. There is a reason, which is paragraph 102 of Evans, which is that the Court of Appeal has there given guidance as to how the discretion ought to be exercised and there are a range of factors which we need to be considered.

MR JUSTIN TURNER: Why can't we exercise that discretion today?

MR WILLIAMS: We haven't come to argue that point, sir. I have come for my legal plea to be admitted, and my legal plea goes to the point of admissibility. We have a two-day hearing with an agenda. I have applied to amend my pleading. I was going to come on now to deal with some practicalities. But, if you look at the points that are set out in paragraph 102, they are detailed -- they are variable considerations which will vary from decision to decision, from issue to issue. It's not terrain we can simply cover off in closing remarks.

MR JUSTIN TURNER: So what is it that we're not aware of in this list?

MR WILLIAMS: It's not that you're not aware of it, in broad terms, sir; it's just we haven't argued application. I have come to argue the amendments application which goes to the proposition of admissibility.

I mean, if you wanted me to make submissions about the factors I would make them now in broad terms. That's where I was going to in the time we have with the satellite litigation point.

As far as the factors in paragraph -- I do say we haven't argued this.

MR JUSTIN TURNER: Sorry, I don't want to take you off your course. It was just a question.

MR WILLIAMS: Not so much my course. I obviously want to

help the Tribunal --

MRS JUSTICE BACON: No, and your course needs to reach its destination very soon.

MR WILLIAMS: Yes. I'm in the last --

MRS JUSTICE BACON: Couple of minutes.

MR WILLIAMS: Yes, I'm in the last section of my submissions.

So all I was going to say is -- I was going to make four points about where we are in the light of Evans.

The first is that we recognise -- and I want to be very clear that this Tribunal is going to start with and primarily rely on the evidence that is directly before it at trial. That will, as you've considered with Mr Turner today, include documentary evidence, hearsay evidence, witness evidence and so on.

There will be a lot of primary material that formed the basis for these prior decisions. We will be putting that before you and asking you to form views. We're not proposing to run this case on the basis that this Tribunal is going to outsource its functions to anyone else. We will be looking to identify respects in which the evaluative findings of the prior decision-makers add something, whether it's by way of corroboration, or whether it's by way of contextual differences.

I won't close the case now, but just to give you

a flavour: what we say is at the most general level the way in which decision-makers around the world have approached these issues and evaluated the relevant evidence, it is informative and it is probative. It's clearly not dispositive. We're not suggesting that for a second. But it's informative and probative to know that in Korea, South Korea, the system has decided that three tiers, that an essentially equivalent theory of harm is economically valid and made out on the evidence.

It's informative and probative to know that a judge who heard a range of evidence in the United States reached conclusions of fact that are broadly consistent with the case we advance.

It's informative and probative to know that a decision-maker with expertise like the European Commission has made findings about market definition of dominance which are supportive of our position and so on.

There may be areas where the court had access to evidence that this Tribunal wouldn't have access to, for example, a live witness. It may be relevant to see what a judge made of hearing a live witness who is not before this Tribunal.

Now, this Tribunal will need to take a view about the weight to be attributed to any and all of these

matters, we say, at trial, but they are valid points that bring to bear and they're points which we're entitled to bring to bear in the light of Evans.

Third point very briefly, there's nothing radical or mysterious or surprising about our reliance on any of this. Qualcomm knows that our case is heavily based on what we saw in these prior decisions. That was the genesis of the claim, so it's not surprising that we say that these findings corroborate our case and it knows how we seek to use them. None of this is expanding or changing the direction of the litigation.

So that will leave this Tribunal with a question of case management, about how to take this forward. I'm not going to deal with that now.

My submission would ultimately be that the Tribunal is only in a position to take a view about the weight that can be attributed to these matters at trial. That's both because that's what we will know where those findings add to the evidence before the Tribunal and where they actually enhance our case, rather than constituting a distraction, and it's only at that point the Tribunal will be able to evaluate whether and to what extent they add value to the other evidence before the Tribunal. As I say, that's not a matter for today. Those are all issues which arise, are consequential on

the question of admissibility.

So unless I can assist you further.

MRS JUSTICE BACON: Thank you very much, Mr Williams.

Mr Jowell.

MR JOWELL: The suggestion is that the judgment of the Court of Appeal in Evans has somehow overruled the judgment of this Tribunal, and the short answer is it clearly hasn't and indeed it would be very surprising if it had, not least because nobody argued in the Evans case in the Court of Appeal that Qualcomm was wrongly decided.

What instead we see is in paragraph 100 of the Evans judgment that you have seen on page 580 of the authorities bundle, is an express approval of the Qualcomm decision to the effect that the CAT has a wide discretion as to the evidence to be admitted. Although it cites paragraph 18, it's very clear that that should be a reference, as the Tribunal observed, to paragraphs 18 and 19. Indeed, what the Tribunal says in paragraph 19 of its judgment is this:

"We reject Qualcomm's submission that the rule in Hollington if it applies is binding on this Tribunal. No cogent basis has been made out as to why a High Court rule of evidence should necessarily bind this Tribunal and we accept Which?'s submission that the discretion

[note discretion] given to this Tribunal as to the evidence to be admitted is broad."

That is, I think, first gives the light of a suggestion that somehow there's no element of discretion in the Tribunal's judgment. It clearly regards itself as having a discretion.

In paragraph 102 of Evans, again we see an express approval of the approach in the Qualcomm judgment of considering what weight to put on prior decisions and of taking into account the risk that giving weight to those findings might draw it into a detailed enquiry into how prior findings came about which might result in disproportionate satellite litigation.

Then it's also clear that the Court of Appeal in Evans has no difficulty with the Tribunal deciding in advance of the trial whether evidence should have weight placed on it or not. It doesn't have to wait until trial and then decide the issue at that point, which would be potentially enormously inconvenient, particularly if there is a risk of satellite litigation.

We see that in the Evans case itself, because what it then considers in detail, at paragraphs 103 and so on, is why in the case of this particular Commission decision in the Sterling Lads case that might be taken into consideration by the CAT and it puts considerable

emphasis as to how close those decisions were to the decisions that were the subject of the follow-on proceedings in the Evans case.

So there's absolutely nothing in the judgment to suggest that Qualcomm was wrongly decided. Indeed, it affirms the approach in Qualcomm of considering the issue on the particular facts of the case and affirms the wide discretion of the CAT to give weight or not to give weight.

So we see, for example, in 101, the Court of Appeal says in terms, in the second sentence:

"Whilst the CAT does not apply the strict rule in Hollington it does of course endeavour to secure fairness, but it is a sophisticated tribunal well able to form its own view on the value, if any, of prior findings."

So clearly it is open to the Tribunal to say that in the circumstances of the case that the findings of the foreign court should have -- the evaluative findings should have no value.

If one looks at -- if one turns back to the judgment in Hollington, the reasoning is clearly on a dual basis, not solely on the basis that my learned friend says of, if you like, applying a Hollington-like rule. It's also on the basis of applying a discretion on the facts.

One sees that where one sees in -- as I have said, I have shown you already the reference to discretion in paragraph 19. But, again, if one looks to paragraph 29 and the reasoning there, where we see:

"Mr Armitage also contended that the correct approach of this Tribunal should be that the finding of another court or regulator should not be excluded ab initio, but should be given appropriate weight in all the circumstances at trial which could at that stage include considerations of fairness to both parties. We see, however, that this could present considerable difficulty. How would this Tribunal at trial go about assessing how much weight should be given to a particular decision of another court or regulator. That would almost inevitably involve a detailed consideration of the evidence that was before the other decision-maker and the nature of the decision-making process. It might also require an assessment of the way in which the arguments were put to that decision-making body on both sides. There would be in consequence what was described in Crypto […] as a "satellite litigation about the circumstances in which the earlier decision was come to and how far it could properly be helpful in the later proceedings."”

That's precisely what the Court of Appeal endorses

in paragraph 102. The Court of Appeal in Evans notes there are different forensic uses of earlier findings that might be deployed. So it's one thing to say "we rely on it for disclosure", it says, but another if it goes to the ultimate merits. Here, of course, it's being proposed it should go to the ultimate merits. Then it notes terms that the CAT will be conscious of the risk that being invited to perform a detailed enquiry into how prior findings came about draws it into disproportionate satellite litigation.

Again, it's echoing precisely paragraph 30 and citing paragraph 30 of Qualcomm, so how can it possibly be said that the Court of Appeal considered that that reasoning was wrong?

So we say this is just a wholly illegitimate attempt to have a second bite at the cherry in relation to an exercise of the discretion in a judgment that has been affirmed and not overturned.

I should add that the factors that pointed against giving weight to the reasoned findings of the other courts and authorities in the context of the present proceedings very much still exist, so it remains the case that if the Tribunal does open the door to giving weight to these findings at trial, then we will need to put in expert and factual evidence relating to these

foreign judgments and decisions.

So just to give you a flavour of that, in relation to the US District Court judgment, that judgment in our respectful submission is a complete nullity in US law. It's not just that it's been overturned on some legal ground; it is a total nullity. It has no standing in US courts. We will wish to put in evidence to substantiate that and therefore there's no -- because it contradicts the repeated refrain of the Class Representative that those factual findings were somehow not overturned on appeal.

We will wish to put in expert evidence to show that the entire judgment was overturned, including the factual findings which have no status in English law. It would be very odd indeed if an English Tribunal were to give some weight to evaluative findings in a judgment that had no weight in its own local jurisdiction at all.

That's the US proceedings.

In relation to the FTC's decision in Korea, we would intend to put in evidence that the decision arose from an unfair procedure. That would require us to explain both general factors of unfairness, such as the absence of disclosure to Qualcomm of exculpatory documents, but it would also extend to specific factors, such as the fact that the chairman of the FTC was subsequently

charged in summary with corruption connected to FTC officials obtaining jobs at Samsung. Indeed, we understand that he subsequently went to prison on those charges.

So the suggestion that this Tribunal should somehow give weight to the evaluative findings in these judgments without also permitting us to adduce this sort of evidence concerning these matters would lead to manifest unfairness and indeed to satellite litigation. So we say that even if -- if you really exercise your discretion you inevitably would, and should, come to the same conclusion.

Indeed, it's telling, in our submission, that the Class Representative doesn't have a decision that is closer to home. It doesn't, for example, have a Commission decision, as in Evans. There's no Commission decision finding that this no licence, no chips is an abuse of dominance. There's no CMA finding to that effect.

If the CR wishes to rely on these decisions from further afield, then it does require the Tribunal to get into proper consideration of the standing of those decisions and the procedures leading up to them. That would be burdensome and unnecessary and it shows that the Tribunal was plainly right to reach the original

judgment that it did.

MRS JUSTICE BACON: Thank you very much, Mr Jowell.

Mr Williams, do you want to say anything in reply?

MR WILLIAMS: Just a few points.

Madam, can I start with a point which I will admit is not a reply point. It's a point I didn't make because I didn't go through the ruling in the way I intended to.

It's paragraph 23 of the ruling, which is where the Tribunal says:

"In a trial of these collective proceedings it would not be appropriate to attach any weight to the findings reached by the courts."

Of course, that does say "in the trial of these collective proceedings". But the point the Tribunal goes on to make is a point about the function of the Tribunal and the fact that the function of the Tribunal is the same as the function of the Court. In the context of Hollington v Hewthorn, that is to say it is the function of the court to assess the evidence and make primary findings of fact. That's one of the points I was going to make when I had gone through the ruling in support of the submission, that this is really a decision made on the basis of a single principle, on the basis of what the function and role of the Tribunal

is and the way that it ought to exercise its function as a general matter.

So that's a point I didn't make. I'm sorry I didn't make it before, but I didn't go through the ruling in the way I had intended to.

Just a few short reply points.

Mr Jowell said that my submission was that the Tribunal didn't recognise that it had discretion or there was no element of discretion involved.

Clearly, the Tribunal did recognise in the first part of this discussion that it had a discretion in relation to how to deal with evidence, in the sense that it wasn't bound by the rule in Hollington v Hewthorn as a common law authority. But I'd made my submissions that it went on in the context of the exercise of that discretion to adopt a single principle. Paragraph 23 is one point which goes to that.

Mr Jowell noted the way in which the Court of Appeal dealt with Sterling Lads, which was a very closely related decision to the decisions that form the basis of the action in that case. It was a similar subject matter and overlapping allegations.

Of course, that was a factor which in that context militated in favour of the Tribunal being entitled to give weight to that decision, but it doesn't follow at

all that -- that doesn't say anything about what weight ought to be attributed to the decisions on which we rely in these proceedings, recognising that there isn't the same overlap as there was between Sterling Lads and Three Way Banana Split and so on and so forth.

The submissions that Mr Jowell started to make at the end of his submissions, where he invited the Tribunal to re-exercise its discretion, I really can only reiterate the point I made in my submissions that that isn't the basis of the application. The application is to reinstate the legal plea which goes to the point of principle. We haven't argued the question of the exercising of discretion properly. Clearly the Tribunal can't make a decision based on a number of points that were tacked on to the end of Mr Jowell's submissions about alleged corruption in the FTC and so on.

The final point is about Mr Jowell said, "We have nothing closer to home". Well, of course, some of the decisions that we rely on are Commission decisions in the context of market definition and dominance, so that point is not right as a matter of a blanket application.

I don't have anything further, Madam.

MR JOWELL: May I just make one brief comment on paragraph 23 since my learned friend took you to it only

in reply?

The first sentence is very important:

"We are of the view at the trial of these collective proceedings it would not be appropriate to attach any weight."

It is specific to these collective proceedings. It is not a blanket rule that is being applied.

Decision

MRS JUSTICE BACON: We reject the application to reintroduce this point. This issue was decided in February last year. It was decided as a matter of the Tribunal's decision exercising its discretion in relation to the use at trial in these proceedings of material of foreign regulators and courts. The decision was taken in relation to these proceedings only and expressly not giving a view as a matter of principle for all proceedings before the Tribunal on the basis of an application of a binding law.

As in Hollington v Hewthorn, indeed the Tribunal found that as a matter of general principle the Tribunal was not bound by the rule in Hollington v Hewthorn and that was upheld by the Court of Appeal.

The decision to apply the same approach in these proceedings was not pursued before the Court of Appeal. The Class Representative attempts to resurrect the point

now on the basis of an obiter discussion in the Evans case in the Court of Appeal.

In our judgment that is hopeless. The court in Evans had every opportunity in that case to say that the approach taken in this case was wrong, but it did not. On the contrary, it expressly endorsed the approach of this Tribunal twice, including referring to a key passage of our judgment at paragraph 30. We note that no argument appears even to have been made by the parties there that our previous decision in this case was wrong.

We do not consider that the Evans judgment in those circumstances forms a basis for us to reopen the decision that we took in February 2023.

MR JOWELL: We're grateful. Does the Tribunal wish to continue or do you wish to break? We won't get through -- we will get through tomorrow, I say with some confidence.

MRS JUSTICE BACON: Yes. I think we may then be able to deal quite quickly with the next point.

MR JOWELL: The matters of fact schedule?

MRS JUSTICE BACON: Yes. What I want to say is this: in light of the fact that we are not reopening the question of the reliance on foreign decisions to the extent of the evaluative assessments reached, it seems that

a large part of this schedule must fall away and it is actually surprising to us that the schedule was prepared in the way it was before the matter had come back before us, because it expressly refers to evaluative assessments, which we have already rejected for these proceedings at trial.

MR WILLIAMS: Can I explain that, Madam? We canvassed this in January specifically and we said we were going to be directed to carry out the task of carrying out the review for the purposes of identifying matters of fact, which is what we were directed to do. We said if we're going to do it -- we're going to bring Hollington v Hewthorn back and while we're doing it, while we're going through it in a systemic way we want to identify the evaluative findings as well because we don't want to have to do the exercise twice.

MRS JUSTICE BACON: I see.

MR WILLIAMS: And you said as long as they were clearly identified so that they could be addressed --

MRS JUSTICE BACON: Thank you.

MR WILLIAMS: -- you would have no objection.

MRS JUSTICE BACON: So I understand the reason why that was done.

But, in any event, having reached the view that we did on Hollington, that we have just done on

Hollington v Hewthorn, that means that part of the schedule falls away and we're left with the matters that have been identified as findings of fact.

Now, we have concerns about whether the matters identified as findings of fact are indeed factual matters of the kind that we accept can go in, such as recording of the testimony of a particular person or whether they are actually evaluative findings made having considered the evidence.

We certainly don't think that it's going to be appropriate for there to be a general reference to findings of fact in relation to X, which then refers to several pages of a decision.

What is necessary -- and maybe we need to go back to the pleaded point and I don't have it. Can someone take me back to the pleading on this point which sets out the way in which these can come in? I think it's a kind of record of the decision or something, record of fact.

MR WILLIAMS: It's the reply, I think. Paragraph 4 of the reply, which is the supplemental bundle, tab 3.

MRS JUSTICE BACON: Okay. Page?

MR WILLIAMS: Page 178.

MRS JUSTICE BACON: 178, all right.

So:

"Insofar as they record matters of fact and not

insofar as they make evaluative assessment."

So I don't think that actually findings is going to be possible. That's not recording a matter of fact; that's a finding of the relevant court.

So it seems to me that this is going to need to be confined to a record of a fact, such as -- which could include that a particular witness said a particular thing when giving a deposition or whatever, or a specific point of fact that is actually just a factual statement rather than an evaluative finding.

So we are not at the moment convinced that the schedule as it currently stands is going to be a useful or appropriate document at trial. That may dispose of this issue. You will need to go away and redo that schedule. But we do have considerable concerns about its length and the extent to which there seems to me to be a great deal of reliance on matters which are not properly consistent with the basis on which we have allowed this to go in the pleading as it currently stands.

MR JOWELL: My Lady, we're very grateful for that indication, with which we of course wholeheartedly respectfully agree.

The other element of this is that it seems to be completely indiscriminate, in that what we had intended

was really for us -- for them to provide us with notice of those -- as you say, records of fact from the judgment that they actually plan to rely on at trial, not every record of fact that might vaguely be relevant possibly on a -- if -- you know, that they might want to refer to if they were writing a novel about this. In particular, there appears to be no attempt to, for example, strip out records where they have the underlying document or the underlying transcript. So, clearly, if they have the underlying document or the underlying transcript that is quoted they don't then need the judgment to tell them to record that. They have the better evidence.

So one would hope that if you actually take out all the things that they have from the underlying -- what one is left with is a very small, potentially very small list of records of fact from these judgments that is actually supplementary to that, to those things.

MRS JUSTICE BACON: Yes, well, I think I have some sympathy with that. Also, there is a question about temporal relevance. Really, when we get to trial, are we going to be asked to look at even records of a factual matter, leaving aside whether it is a finding or not that goes back many years before the relevant time period.

So rather than having lengthy submissions on what in any event is going to need to be redone in the light of

judgment that we have just reached, and given the lack of specificity in the schedule, I think that if this is going to be a useful document at trial it's going to have to be redone on a different basis.

MR WILLIAMS: Obviously, Madam, we hear what you say and we will obviously reflect on that and take account of it.

The point that immediately arises is one of timing, though, because the point you've made, Madam, is you're concerned that the document is not going to be useful at trial and trial is a little more than a year away. We have made clear in responding to the application that we were asked to prepare the document 18 months out from trial. We hear what you say about the approaches taken, but in terms of the inclusivity, obviously the earlier you ask a party to identify what it is going to rely on the more inclusive you're going to be as time goes on will be able to be more refined… .

MRS JUSTICE BACON: I suppose at trial -- I should say at trial and in the process leading up to trial, because of course it's going to be used by Qualcomm in deciding what to put in its witness evidence. So that's a good reason why the document needed to be produced now. We have a trial timetable, which has witness evidence being produced in November. When would you propose to prepare a revised version of this schedule?

MR WILLIAMS: Qualcomm's application was for us to do it by 27 August. That's not going to be practicable not just because of vacation periods -- well, partly because of that, but because we're running at full pelt carrying out the disclosure review at the moment.

So we can redo -- the Tribunal is concerned that it should be done in time to give Qualcomm fair notice in advance of its witness evidence. We can do it in the course of September. At the moment, what we will be doing, I envisage -- and we will consider this overnight -- is refining the document in the context to some degree of the points that have been made today about the scope of the other OEMs' case and the pleaded allegations about that.

MRS JUSTICE BACON: Yes.

MR WILLIAMS: But obviously one does need to take a view in relation to what Qualcomm have called the compendious findings. We weren't trying to be difficult, if one has three or four pages of the judgment all dealing with a particular topic, negotiations with a particular OEM in a particular time period, and in that passage you have a whole series of factual findings and references to evidence, those are all matters that we will or may wish to rely on as part of our case.

Now, at trial, of course, insofar as we have the

underlying documents, the likelihood is that we will be drawing the Tribunal's attention to the underlying documents. But obviously it's a very, very big task to go through all that material line by line and work out which documents we have and all the rest of it. Closer to trial, of course, we will be on top of that material in a trial-ready way, but doing it well over a year in advance of trial in parallel with other work is extremely difficult.

So, at the moment, we say Qualcomm knows what the pleaded issues are and it knows that's the focus of our case. I think what we would like ...

MRS JUSTICE BACON: Would you mind if I just had a quick discussion?

MR WILLIAMS: I don't want to speak over you, of course.

(Pause)

MRS JUSTICE BACON: Yes, sorry, Mr Williams. Please continue.

MR WILLIAMS: I was going to say: look, I've raised some of the practical considerations that are bearing on this. I think what we would like to do is take it away overnight and think about time and take instructions. I don't want to make submissions on the hoof.

MRS JUSTICE BACON: No, all right.

MR WILLIAMS: I just wanted to make the point now that the

date that Qualcomm have asked for causes all sorts of difficulties and from our point of view, given that they know what our pleaded case is and they know what our pleaded allegations in relation to the other OEMs are, they're not punching in the dark here, we see the Tribunal said that it wants a more refined document, but this is not defining the scope of the evidence. These are evidential matters that will be brought to bear in the context of the pleaded issues.

MRS JUSTICE BACON: Well, look, I think perhaps the best thing is for you to return to this tomorrow. I was starting to hope that we might be able to avoid coming back tomorrow. We probably still have too much to do to finish tonight.

I would suggest that you take instructions and have a discussion with Qualcomm and between you, if you were able to agree a revised timetable is to go in; if you're not able to agree we will have to look at that tomorrow.

MR WILLIAMS: I'm just conscious that the first order that you made this morning was for us to provide particulars on another part of the case by 9 September on top of current workstreams. So we will come back in the morning and deal with that if we need to.

MRS JUSTICE BACON: Yes, although you were suggesting that you wanted a load of disclosure which would take

six weeks to review, so plainly there's capacity when it's needed.

All right. Let's come back to this tomorrow.

I think we're going to need to rise shortly. That leaves, tomorrow, the following issues, which I would suggest we deal with in this order: the re-review of the documents of privilege. Now, is that really going to take an hour and a half?

MR WILLIAMS: I don't think so, Madam. It might take an hour. I don't think it will take an hour and a half.

MRS JUSTICE BACON: Let's put that down.

MR BAILEY: Madam, the application is strongly opposed by Qualcomm. It slightly depends how it's put by my learned friend. I would also hope it could be dealt within an hour.

MRS JUSTICE BACON: Are you dealing with this, Mr Bailey?

MR BAILEY: I am, my Lady.

MRS JUSTICE BACON: Let us aim, if we can, to finish tomorrow lunchtime, so let's say an hour for this.

Now, the next question I have on my list is the question about Mr Blumberg's evidence; is there any dispute about that? Because it doesn't seem to feature heavily in the skeleton arguments. Is Mr Blumberg going in? Does the Tribunal need to make any order about that? Are we going to need to have any

submissions on that or is that now agreed?

MR JON TURNER: Sorry for the musical chairs.

MRS JUSTICE BACON: Yes.

MR JON TURNER: I don't believe there is any controversy that we're entitled to call him as a witness.

MRS JUSTICE BACON: No.

MR JON TURNER: What you have seen from Ms Thomas's witness statement and there have been further new points in correspondence, are various potential objections and limitations and qualifications; is his contract with Lenovo going to permit him to give evidence and so forth? So they're raising all these sorts of hurdles to be addressed.

The latest is that we asked them to confirm whether -- that they wouldn't speak to Lenovo with a view to trying to prevent him from acting as a witness, which would obviously be proper. They have come back and said: our communications are privileged, and there's an ongoing line of communication, just to bottom that out.

But the question of whether he can give evidence at trial in principle we do not understand to be controversial.

MRS JUSTICE BACON: All right. So are we going to need to make any orders about his evidence tomorrow?

MR JON TURNER: I'm not aware of any that need to be made.
MR SCOTT: My Lady, I am, I think, because the Class Representative's most recent draft order included a, not previously included in any earlier draft order, provision for Mr Blumberg to be admitted to the outer confidentiality thing and we have not consented to that. So that requires, first, an application that hasn't been made, but if it is to be decided the Tribunal needs to make an order.
MR JON TURNER: I'm grateful. It's not actually, in its current form, an application that he just becomes a member of the outer confidentiality ring. We have made clear that we want him to have access to the sorts of documents that I was debating earlier in relation to him, documents that he was involved in.
MRS JUSTICE BACON: All right. Well, I anticipate from Mr Scott that some of this may be opposed. So obviously we're going to have to make sure there's some time for this tomorrow.

So we will deal with that next.

Obviously, I haven't forgotten there are two issues that remain hanging from today. The first is the one we have just talked about regarding the schedule, and the other is the Blumberg documents that may be disclosed. So those are the two, unfinished business.

Then we have privilege. Then we will have to deal with Mr Blumberg's evidence and any confidentiality restrictions and the extent to which he can see further documents.

Then we will deal with the application regarding further custodians or further information regarding the existing custodians.

We will need to deal with the trial timetable.

Can I just raise a few other issues of AOB that we're going to need to discuss just to give you a heads up?

First of all, expert report page limits. I'm afraid to say I was a little horrified to see the extent of the reports filed by Mr Andrews and Mr Williams. I think they're -- I'm afraid I am going to say they're going to have to be refiled and they're going to have to be shorter.

We, of course, at the last CMC, perhaps misguidedly only addressed the technical experts -- sorry, the industry experts. We didn't cover all the experts. But we had in mind that our comments would apply across the board. I absolutely had not expected to get over 80 pages -- no, almost 80 pages of a statement just on one side.

So I think I'm going to need you to consider how

quickly Andrews and Williams can be refiled on a rather more concise basis. I am afraid to say I had in mind something of the region of 40 pages between them. And consideration must be given to exactly how much of the technical detail is really needed, because this is not a patent case and there are diagrams in the expert reports which I do not think are likely to form part of our judgment.

So it seems to me that those expert reports go into far greater detail than they need to and are too long and, therefore, any order that we make about expert reports is going to also cover those expert reports and I will need to have some submissions from you as to timetable on that. Not now, but tomorrow.

MR WILLIAMS: No, in the context of what you're saying, Madam, I just wanted to raise one other point which we would otherwise have raised tomorrow which is about the exhibit to those reports, which is a different point, but it's related. The exhibits to Andrews and Williams are currently 3,000 and 2,000 pages.

Now, I'm not here to make submissions about the detail of that, but just in terms of the sheer bulk that point arises, too. I just wanted to give the Tribunal visibility of it, that's all.

MRS JUSTICE BACON: Yes, it's also an issue. We absolutely do not want to be swamped with completely irrelevant

material and I'm afraid -- I have had a quick look at both of those reports and they go into far greater technical detail than I think will ever be required at trial and the parties need to bear that in mind. We are not going to be producing a thousand-page judgment with myriads of technical diagrams. It's not going to happen. Bearing in mind this is one trial of two.

So that's going to need to be considered overnight.

Provisionally, we think that the suggestion of a joint statement from the industry expert and the basis on which that's provided in paragraph 94 of Thomas 6 seems sensible and we will want to discuss that tomorrow, as well.

We note that there have been comments. Thomas 6, paragraphs 96 to 99, about the level of cost protection.

Now, if that is a concern is there going to be an application for an increase in the ATE insurance of the Class Representative or security for costs? I don't want this to be just raised now and then left unresolved with an application being made shortly before trial, as has been made in another set of proceedings in which I am involved at the moment. It's very unsatisfactory for applications to be made like that quite shortly before trial in general. They ought to come on, if possible, earlier.

So if you are going to be making anything of this, please make something of it now or in the very near future rather than waiting.

MR JOWELL: We hear what you say.

MRS JUSTICE BACON: Yes, all right.

If we were going to try to finish by tomorrow lunchtime, if that's possible, could we get through all these issues with a 10.30 start? Or do you think we're actually going to need most of the day tomorrow?

MR WILLIAMS: So there's the privilege issue, which we said was an hour. There's timetable, which is largely agreed, and you've given some helpful indications there, Madam, in relation to one of the issues. So there's not very much to talk about on the timetable.

There's then our additional request for further information, which you decided at the beginning of last week would be heard. That's not a very long issue, but it's probably somewhere between three-quarters -- sorry, somewhere between half an hour and three-quarters of an hour.

MRS JUSTICE BACON: Oh, I had it 20 minutes on a revised agenda.

MR SAUNDERS: I'm not sure. I wasn't planning to speak on it for more than five. It's a very narrow point.

MR WILLIAMS: Half an hour, then.

MRS JUSTICE BACON: Yes, all right.

MR WILLIAMS: Yes, I hear. It sounds like we should be able to finish with a 10.30 start. Yes.

MRS JUSTICE BACON: It's all right. If we end up going over lunch, we have the whole day, but it would be, I think, good if we could deal with this as quickly as possible. I am mindful that the vacation is approaching and we're going to have to get an order out and that's going to take some agreement between the parties.

MR SAUNDERS: Is there a possibility to start at 10.00 am? I don't know if that's convenient.

MRS JUSTICE BACON: Let's start at 10.30. With a fair wind we might get through this by lunchtime. If not, we will have to come back in the afternoon.

All right, thank you very much. So 10.30 tomorrow.

(4.40 pm)

(The hearing adjourned until 10.30 am on Tuesday, 30 July 2024)