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IN THE COMPETITION

Case No. : 1382/7/7/21

APPEAL

TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 30th 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 A N 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)

Transcript of Epiq Europe Limited
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
+44 (0) 207 404 1400
Email: casemanagers@epiqglobal.com
(Official Shorthand Writers to the Court)

2 (10.30 am)

3 Case management conference (continued)

4 MRS JUSTICE BACON: Yes, Mr Williams.

5 MR WILLIAMS: Good morning, Madam, members of the Tribunal.

6 There's a short point I need to raise by way of
7 follow-up to the ruling on yesterday's amendment
8 application, if I may.

9 MRS JUSTICE BACON: Yes.

10 MR WILLIAMS: In the course of argument both parties
11 referred to the fact that some of the findings to which
12 we have referred are contained in decisions of the
13 European Commission. We understand the effect of
14 yesterday's ruling is that we can't rely on such
15 findings on the authority of Evans.

16 But there is a separate route for Commission
17 decisions to come in which we flagged in a footnote in our
18 application, which applies to pre-Brexit decisions of
19 the Commission. I won't take you to the footnote, but
20 it is there. It's footnote 6, on page 10 of the core
21 bundle.

22 We have handed up section 60A of the
23 Competition Act, which I think will be in front of you
24 in hard copy.

25 MRS JUSTICE BACON: Yes. Sorry, which footnote of your

1 skeleton argument, Mr Williams?

2 MR WILLIAMS: It's core bundle, page 10. Sorry, not our
3 skeleton argument. It's a footnote to our application.

4 MRS JUSTICE BACON: All right, let me just get this at core
5 bundle ... ?

6 MR WILLIAMS: Page 10, footnote 6. It wasn't a submission
7 or an argument; it was simply noting that there's
8 a difference in position in relation to the Commission.

9 MRS JUSTICE BACON: Yes. You reserve the right to argue
10 that decisions of the Commission should in any event be
11 given material weight; are you making that argument now?

12 MR WILLIAMS: I'm not making the argument. I just wanted to
13 flag the point because -- and I wanted to draw your
14 attention to section 60A(3) of the Competition Act
15 because that is a separate legal point. I simply wanted
16 to draw attention to that in the context of yesterday's
17 ruling because, as we understand it, the ruling that was
18 made yesterday related to general legal principles of
19 admissibility.

20 MRS JUSTICE BACON: Yes.

21 MR WILLIAMS: We weren't arguing about the effect of this
22 provision and I just wanted to make this point.
23 I didn't want to let yesterday's argument pass and --
24 having not noted that this is a different legal point
25 which may arise -- which we think will arise in due

1 course.

2 MRS JUSTICE BACON: Which will arise in due course

3 independently of yesterday's ruling. What you want

4 the Tribunal to note is that there is a separate route

5 which will apply for decisions of the Commission and you

6 don't want the Tribunal to have excluded that route by

7 yesterday's ruling?

8 MR WILLIAMS: Yes. And I didn't raise it in the context of

9 yesterday's argument because it seems to be a different

10 point. But just having completed the argument without

11 referring to it, I thought it was right to just draw it

12 out now.

13 MRS JUSTICE BACON: Absolutely, thank you very much. Well,

14 just before we move on from that; does Mr Jowell want to

15 say anything about that?

16 MR WILLIAMS: Yes, I think he does.

17 MR JOWELL: Simply this: we don't dispute --

18 MR JUSTIN TURNER: Sorry, could you just give me a second?

19 (Pause)

20 MRS JUSTICE BACON: Yes, Mr Jowell, sorry.

21 MR JOWELL: So that we can -- so that our position is clear,

22 first of all, we don't mind, if you like, this point

23 being held over. But, just so that my learned friend

24 knows our position, we don't dispute that in principle

25 there is a right to have regard -- it's no more than

1 that -- under the section to Commission decisions, but
2 insofar as my learned friend is seeking to rely on
3 Commission decisions that have been annulled, we don't
4 accept that is possible legally and we have referred my
5 learned friend to the Servier judgment in the
6 Supreme Court, which, at paragraph 38, states in terms:

7 "The annulment of the act which has been challenged
8 leads retroactively (ex tunc) to the disappearance of the
9 act in question with regard to all persons."

10 So insofar as my learned friend is seeking to rely
11 upon the successfully appealed exclusivity decision of
12 the Commission, we say he's not -- that is not
13 a Commission decision, in effect it's a nullity and so
14 he can't rely on it.

15 MRS JUSTICE BACON: Yes.

16 MR JOWELL: Insofar as he's seeking to rely on the other
17 Commission decision that's been mentioned, which relates
18 to predatory pricing, we would simply note that it
19 relates to a different product, different chips and in
20 a completely different time period. So whilst in
21 principle one can have regard to it, we don't see how
22 anything of value can actually be drawn from doing so.

23 MRS JUSTICE BACON: Thank you.

24 Mr Williams, how is this point going to be
25 crystallised going forward, in terms of timescale? Are

1 you envisaging that you would be applying to amend in
2 a different way on the basis of this point or that you
3 would simply be citing in your submissions, possibly --
4 I don't know whether you intended to do so in the
5 matters of fact schedule, but at least in your
6 submissions -- Commission decisions and placing some
7 weight on that and then leaving the argument to be had
8 at the time as to how probative they were? What did you
9 have in mind?

10 MR WILLIAMS: We didn't have in mind an amendment.

11 MRS JUSTICE BACON: Right.

12 MR WILLIAMS: At the moment, I think we had simply envisaged
13 that this would be an authority --

14 MRS JUSTICE BACON: Yes.

15 MR WILLIAMS: -- at trial and the parties would argue about
16 the significance of the authority.

17 MRS JUSTICE BACON: Yes.

18 MR WILLIAMS: Mr Jowell has foreshadowed some of the points
19 he will want to make.

20 MRS JUSTICE BACON: Yes.

21 MR WILLIAMS: Because this is a reliance on authority in
22 a more conventional way, if I may say so, we hadn't
23 envisaged that there would be a route for it.

24 Obviously, it's possible that the experts will want
25 to make reference to the extent to which their approach

1 corresponds to an approach taken by the
2 European Commission in these decisions.

3 As I say, we saw this as being in a rather different
4 bracket from the other materials.

5 MRS JUSTICE BACON: No, thank you very much. I think it is
6 right that we have this discussion now, so that there is
7 no doubt about the position if and when you then choose
8 to rely on the Commission -- one or other of the
9 Commission decisions via a different route. No one can
10 say that this was not raised during this hearing. Thank
11 you. Thank you very much.

12 MR WILLIAMS: Thank you, Madam.

13 So then moving on to the schedules, I am pleased to
14 say that we have agreed a date and I will explain what
15 that date is and the basis for it.

16 The date is 8 November, which is the date for
17 witness evidence and hearsay notices. Qualcomm's
18 position was that it would agree to that date on the
19 basis that the content of the schedules was what -- in
20 their words, truly supplemental to any hearsay evidence.
21 If I can just unpack what we think they mean by that,
22 there has been correspondence and we think we're clear.

23 What they're saying, we think, is that we shouldn't
24 refer to findings that capture witness evidence on which
25 we rely and of which we will be giving separate notice

1 in a hearsay notice on 8 November. I assume the logic
2 is then that Qualcomm will reply to any such hearsay
3 evidence in their reply evidence which we have agreed --
4 we will come to this a bit later -- but we have agreed
5 that should come on 14 March in a new step.

6 That's the date for them to respond to our evidence,
7 any hearsay evidence, and so this would then fall into
8 that part of the process.

9 As well as hearsay evidence, Mr Jowell said
10 yesterday that he also wanted us to exclude references
11 to documentary evidence that we have in our possession
12 and although we didn't argue that fully, the Tribunal
13 said that it had some sympathy with what Mr Jowell said.
14 We can see why one would treat documentary evidence and
15 hearsay evidence in the same way and we can do that if
16 that's the Tribunal's preference, to strip these
17 schedules back.

18 MRS JUSTICE BACON: Yes. I understood your concern,
19 Mr Williams, being one of timing, that that's going to
20 take some time to remove.

21 In an ideal world, I think it would be preferable,
22 if you do have documentary evidence anyway, that you
23 don't then need to include it in the schedule; are you
24 content that with the date of 8 November you will have
25 sufficient time to do that?

1 MR WILLIAMS: Yes, yes, we are.

2 MRS JUSTICE BACON: All right.

3 MR WILLIAMS: But I just want to make one point for the
4 avoidance of any doubts. Narrowing the schedules in the
5 way that's been suggested won't, as far as we're
6 concerned, limit our ability to rely on documents which
7 were referred to in the current version of the
8 schedules, but which would be excluded on the narrower
9 approach which we're now discussing.

10 Clearly, we may want to rely directly on the
11 documents as evidence or we may want to use them in
12 cross-examination.

13 MRS JUSTICE BACON: Yes.

14 MR WILLIAMS: Now, that may be a perfectly obvious point to
15 make, again --

16 MRS JUSTICE BACON: That is clear, that if you have
17 a contemporaneous document you will be able to put that
18 to witnesses and you will be able to rely on that
19 contemporaneous document. I think the idea of narrowing
20 the schedules is to have a self-contained set of matters
21 of fact that are recorded in other decisions which are
22 relied on in addition to anything else you might rely
23 on. And the purpose of stripping out documents is
24 simply that there's no duplication.

25 MR WILLIAMS: That's clear, Madam, and that's the only

1 marker I wanted to put down on that.

2 MRS JUSTICE BACON: Yes, all right. Thank you.

3 MR WILLIAMS: So I don't know if Mr Jowell needs to stand up
4 on that topic?

5 MR JOWELL: Simply this: that all seems very sensible to us
6 as well and we're content with that approach.

7 Simply this: there's a slight risk that we get to
8 trial and suddenly a slew of documentary material is
9 suddenly unveiled by the Class Representative and it is said:

ah,

10 well, we haven't addressed that in our witness
11 statements or through our witnesses.

12 Our witnesses will -- we will put in witnesses who
13 are able to cover what we see as the relevant events.
14 We're not going to seek to try to cover necessarily
15 every allegation that's ever been made, you know,
16 ten years prior and I'm sure that the Tribunal wouldn't
17 expect us to.

18 MRS JUSTICE BACON: No, and that's the case in any trial,
19 that your witnesses will cover the events that you
20 consider to be relevant and then there may be further
21 documents in the trial bundle.

22 MR JOWELL: Yes.

23 MRS JUSTICE BACON: Which are then put to the witnesses.

24 MR JOWELL: Indeed, and just as long as it's not said
25 that -- I would say this: if particular reliance is

1 intended to be placed upon some event with regard to
2 some other OEM at some other time, then that should be
3 pleaded. Indeed, certain events have been pleaded.
4 Beyond that, we're not going to start to scour through
5 the prior judgments to find events that are of -- as
6 the Tribunal observed, at best a peripheral element.

7 MRS JUSTICE BACON: All right, thank you.

8 MR WILLIAMS: Privilege, Madam? Shall we move to privilege?

9 MRS JUSTICE BACON: Do we have one other hangover from
10 yesterday, which is the Blumberg documents?

11 MR WILLIAMS: There is a hangover, but I understand that
12 there is a letter. I don't know if it's currently
13 winging its way through cyberspace to us at the moment,
14 but Mr Scott indicated just before you came in that
15 there was that letter and we're going to need to look at
16 that at the short adjournment, I think, so --

17 MRS JUSTICE BACON: All right. So you're --

18 MR WILLIAMS: -- if you don't mind, we will come back to
19 that.

20 MRS JUSTICE BACON: No, that's all right. We will have to
21 just park that for the time being and we will look at
22 privilege. We will come back to the question of the
23 Blumberg documents later.

24 MR WILLIAMS: So, Madam, we discussed timing yesterday.
25 I hope I will be closer to half an hour than 45 minutes,

1 but I won't rush the submissions, if I may, because
2 these are important issues for my client.

3 MRS JUSTICE BACON: Yes. I had an hour down for this point;
4 is that still agreed as a time estimate?

5 MR WILLIAMS: It was originally an hour and a half and
6 I said yesterday maybe we will be closer to an hour.
7 I think we may well be less than an hour and a half.
8 But I'm not going to take it -- I mean, I have certain
9 amount to say. I hope it will fit within the time.

10 MRS JUSTICE BACON: All right.

11 MR WILLIAMS: So the exchanges between the parties on
12 privilege have been continuing since the application was
13 made and again since we received Qualcomm's supportive
14 evidence. So I'm going to outline our concerns, bring
15 the Tribunal up to date on the exchanges between the
16 parties and explain what it is that we're seeking.

17 Again, just to summarise at the outset, we are
18 concerned that the way that privilege has been addressed
19 in the FTC document set, where there's been no review of
20 the documents by Norton Rose Fulbright applying English
21 law, may have led to documents being mistakenly withheld
22 for privilege.

23 The approach that was taken was taken for good
24 pragmatic reasons, but it was highly atypical and we
25 have a concern that it's resulted in errors. We have

1 put some specific examples to Norton Rose and, here,
2 I distinguish between Norton Rose and Qualcomm quite
3 deliberately because Qualcomm has taken a position on
4 privilege in the US and now we're putting the documents
5 to Norton Rose for their view. The examples do suggest
6 to us that there have been errors or at least that there
7 may well have been errors. None of this is to make
8 personal criticism, of course. It's a matter of the
9 approach that's been taken and the results that have
10 been generated.

11 I will develop those points. Given where we have
12 reached we say that it is reasonable and proportionate
13 for there to be some additional quality control at this
14 point in the process. We say it's very important as
15 a matter of fairness to the Class Representative for
16 whom the disclosed documents are obviously a critical
17 strand of the evidence.

18 We have indicated in the past few days to Qualcomm
19 that we're open to discussion about what the process of
20 quality control should look like. We have made a new
21 proposal, which I will take you to. But, if one stands
22 back, the Class Representative's concern to ensure that
23 the unusual approach that has been taken to privilege in
24 this case hasn't given rise to material errors. It's a
25 reasonable concern. The suggestion made by Ms Thomas in

1 her seventh witness statement, that this is all
2 a litigation tactic which is designed to make life
3 difficult for Qualcomm, it's a surprising point to make,
4 but we say it's unfounded and it simply fails to
5 recognise the importance of the issue for my client and
6 for the fair conduct of the litigation.

7 So much is made by Qualcomm of how the original
8 disclosure process happened, so I do need to just deal
9 with that briefly and show you the order that was made
10 a bit more than a year ago.

11 As we were gearing up for CMC 3, at which disclosure
12 was to be dealt with, I make no bones about this, Which?
13 was faced with a dilemma. For the FTC document set,
14 Qualcomm had a set of documents that had been reviewed
15 for privilege under US law in the context of the FTC
16 proceedings and our initial position was that it wasn't
17 appropriate or satisfactory for documents to be
18 disclosed and inspected without a privilege review
19 taking place under English law by English solicitors.

20 Mr Kadri recaps on all this in his evidence. But we
21 were told, no doubt correctly, that to re-review all the
22 documents would take months and months and it would add
23 hugely to the costs. We had no interest in pushing up
24 costs needlessly or for the process to take longer than
25 was necessary.

1 The question we were trying to grapple with was:
2 would it make a real difference? It's hard to know the
3 answer to that, and it's still quite hard to know the
4 answer to that.

5 The legal position, you will have seen from the
6 submissions and from the evidence, is that the doctrines
7 of privilege under English law and US law they
8 materially overlap, but they are not the same.

9 For instance, it's common ground that who is the
10 client under US law is materially wider. I'm not
11 proposing to go into the detail because it's -- the law
12 is essentially common ground. Qualcomm plays down the
13 differences, but there are real differences and the
14 legal position isn't really an issue. The question is:
15 has it made a difference? Is it likely to have made
16 a difference?

17 Just to take that, the example I flagged, if you're
18 dealing with legal advice on commercial negotiations, it
19 is plausible to think that who is the client will affect
20 the outcome of a privilege review. Not everyone who is
21 on an email chain with legal content will necessarily be
22 a client and, of course, taking a different view on the
23 scope of the redactions to a few important documents
24 which reveal internal thinking, that could make
25 a material difference to the substance of a case like

1 this.

2 One doesn't know, but it is very plausible.

3 As Mr Kadri explains in his evidence, Which? took
4 a pragmatic position which was to agree to Qualcomm's
5 proposal, but to reserve its position, to reserve its
6 right to challenge the redactions that have been made.
7 I will just show you the order that has been made. It's
8 supplemental bundle, tab 17, page 854. If you could
9 just have a look at paragraph 6.

10 MRS JUSTICE BACON: Yes. The last sentence says it's
11 without prejudice to your right to query or challenge
12 redactions.

13 MR WILLIAMS: Exactly. So that was the balance that was
14 struck a year ago.

15 So we have since then received disclosure in the
16 latter part of last year and on an ongoing basis, and
17 it's under review. The Tribunal knows that's been
18 a difficult process for technical reasons, but as we
19 have made progress a number of things have emerged.

20 First, there's the point the Tribunal is familiar
21 with, that we found it very difficult to find internal
22 documents going to the basis for the rates charged or
23 conversely the role played by the no licence, no chips
24 policy in the negotiations or the chipset licensing
25 practice on Qualcomm's terminology.

1 Now, you heard about this at the last hearing.
2 I'm not going to go back over that. I think
3 the Tribunal understands our concern about that and its
4 importance in the litigation. Qualcomm says -- has
5 said -- it's unsurprising that we can't find this
6 material because decisions were taken by individual
7 negotiators.

8 We don't accept that the absence of this material is
9 unsurprising. When we come to our further information
10 application in due course, I will explain why we don't
11 accept Qualcomm's explanation of the position in that
12 regard.

13 But what we do see in the disclosure is internal
14 documents relating to commercial negotiations with OEMs,
15 external facing communications in which the OEM
16 complains about the terms that are being offered to
17 them, and then one sees internal discussions of those
18 negotiations which are heavily redacted, and a number of
19 the examples that Mr Kadri has exhibited to his evidence
20 are illustrations of that.

21 Now, of course we accept that material like this may
22 be subject to privilege under English law. There may be
23 legal advice being given to a relevant client. But we
24 would not expect commercial discussions going to the
25 basis for the rate charge to be redacted, so the

1 question arises: where are those internal discussions?
2 Where is that internal consideration?

3 Absent this material in the documents that we have
4 reviewed, we can only say that it is plausible that
5 somewhere in the 450,000 documents that have been
6 disclosed to us, and in particular in the proportion
7 that are the subject to redactions, which I think is
8 just under 30,000, there is evidence that wouldn't be
9 redacted under English law and which goes to the basis
10 for the rate, but which has been redacted in the FTC
11 document set.

12 We're not making allegations or accusations, but in
13 a world where we can't find material which seems very
14 likely to exist we simply say that must be
15 a possibility.

16 There are also three wider points which heighten our
17 concern. The first is this: in the FTC document set,
18 which runs to I think April 2018, 16 per cent of the
19 documents that we have received and which were reviewed
20 under US law contain redactions for privilege. In the
21 post-FTC document set, which was reviewed by
22 Norton Rose, 2 per cent of the documents are redacted
23 for privilege. Those figures are set out in
24 paragraph 15 of Mr Kadri's witness statement.

25 No explanation has been given to us for that very

1 significant difference and it does raise a prima facie
2 concern that material in the FTC set for which privilege
3 has been claimed would or may not have been redacted by
4 Norton Rose because of a difference of approach because
5 it's a very stark difference.

6 The second point relates to one of the points made
7 by Ms Thomas in her evidence. Ms Thomas says that as
8 part of the process in the United States there was
9 a re-review of 110,000 documents. This is paragraph 63
10 of Ms Thomas's seventh witness statement.

11 That is a large number of documents, but it's
12 a fairly small proportion of the documents that have
13 been disclosed to us.

14 Now, what Ms Thomas doesn't say in evidence, but one
15 sees it in the exhibits, is what the upshot of that
16 review was. So can I show you that, please?

17 It's supplemental bundle, tab 41, page 2021, and
18 this is a status report in the proceedings in the US,
19 including the disclosure process. If we go on to 2022,
20 and if the Tribunal could ...

21 You can see that they're describing the status of
22 the re-review. If you just read from the conclusion at
23 line 26.

24 MRS JUSTICE BACON: On page 2022?

25 MR WILLIAMS: Yes, it's at the bottom of page 2022.

1 MRS JUSTICE BACON: Yes, "Qualcomm estimates"?

2 MR WILLIAMS: That's right.

3 (Pause)

4 MRS JUSTICE BACON: Yes.

5 MR WILLIAMS: So, if we have understood this correctly, over
6 30,000 documents have the redactions that were made
7 originally. They were reopened and revised on the
8 re-review. As I said, this re-review only covered
9 110,000 documents rather than the whole document set, so
10 if this is meant to provide us with reassurance, then
11 I'm afraid it's had the opposite effect.

12 What we see is that when the US redactions were
13 scrutinised applying US law a very large proportion were
14 reopened. It just seems to us that the likelihood of
15 further redactions being removed by English solicitors
16 applying English law, it can only be greater.

17 The third point is that there are 70,000 documents
18 we have never seen at all, which is a significant number
19 when considered against the total disclosure set of
20 450,000. Those documents are a complete black box to us
21 and we can't make any submissions about them --

22 MRS JUSTICE BACON: Because the entirety is ...

23 MR WILLIAMS: -- because the entirety of the documents has
24 been redacted and all we know is there's been a claim
25 for privilege.

1 So we have had material concerns about the privilege
2 position for the reasons I have given. The issue has
3 been how to test those concerns and the Tribunal will
4 have seen that we identify ten examples in
5 correspondence and put them to Qualcomm on 21 June. Of
6 course, when one is trying to capture the picture across
7 a very large document set and to engage in a detailed
8 discussion of those, one never knows if you've picked
9 the right examples or the best examples, but that was
10 our attempt to make the issue tractable.

11 We had some initial response -- we had the initial
12 responses in correspondence, but we didn't get
13 Qualcomm's document-by-document commentary until
14 Ms Thomas's reply evidence on 19 July. So this is all
15 crystallised pretty late in the day.

16 Having received Ms Thomas's evidence on the Friday,
17 we wrote back as quickly as we could on the Monday,
18 a week ago, with follow-up questions querying and asking
19 questions about the commentary which is contained in
20 annex 1 to Ms Thomas's statement.

21 Then we had Qualcomm's response to that letter of
22 Monday on Friday morning. So this has all, as I say,
23 come into focus late in the day. So I'll tell
24 the Tribunal where we are.

25 For at least two of the documents there is real

1 doubt -- real reason to doubt the claim to privilege, so
2 I want to deal with those two documents.

3 Can we look at supplemental bundle 1577, please?

4 MR JUSTIN TURNER: Which tab?

5 MR WILLIAMS: It's tab 36. And it's page 1577, sorry, if
6 I didn't say that.

7 MRS JUSTICE BACON: The first supplemental bundle?

8 MR WILLIAMS: Yes, the first supplemental bundle. Are you
9 in electronic bundle, Madam?

10 MRS JUSTICE BACON: 1577. This is the second page of a
11 letter?

12 MR WILLIAMS: I'm sorry, it should be 1578. It's my
13 mistake.

14 MRS JUSTICE BACON: All right, I have that now.

15 MR WILLIAMS: So this is a draft -- could it come up on the
16 screen, please?

17 It is on the screen.

18 MRS JUSTICE BACON: This is an example where the entire lot
19 is redacted.

20 MR WILLIAMS: Yes, you can see it's a draft board minute
21 which has been completely redacted, but it's not
22 a document which has been completely withheld because we
23 can see the heading. But the content is completely
24 redacted.

25 This is one of a number of documents of this type in

1 the disclosure, so this is an illustrative example of
2 what may be a wider problem.

3 We don't accept, based on what we have been told,
4 that the entirety of this document will be privileged.
5 It is inconceivable to us that the draft minute is
6 wholly comprised of a record of legal advice conveyed at
7 a board meeting.

8 We don't accept the fact that a draft was prepared
9 by external lawyers -- which is the explanation which
10 has been given -- would give rise to a claim to
11 privilege. So we haven't seen anything that would
12 justify the claim to privilege that's been made.
13 Indeed, Qualcomm says: well, you've received the
14 eventual minutes and that hasn't many redactions in it
15 at all.

16 But that seems to us to point to the opposite
17 conclusion, that the draft shouldn't be fully privileged
18 either.

19 So that's the first example where we really don't
20 see the basis for the claim to privilege.

21 The second example is at 1598.

22 Now, you can see from the bottom of this that this
23 is a commercial negotiation between Mr Gonell of
24 Qualcomm and Mr BJ Watrous of Apple. Fabian Gonell is a
25 lawyer, but here is acting in a commercial capacity.

1 He's acting directly in a negotiation with Apple. We
2 can see the commercial exchanges and then we see, at the
3 top, a draft of a message that Mr Gonell prepared. This
4 isn't the message that was sent, but this is a draft
5 that was found in his email record. Again, it's been
6 completely redacted. And, again, we don't see how this
7 is said to be privileged; it's a draft of an external
8 facing message in which Mr Gonell is acting in
9 a commercial role. He's not giving or receiving legal
10 advice to himself. He's acting as a commercial
11 negotiator or at least, as far as we can see, that's the
12 dominant purpose of this document.

13 I do want to show you what Norton Rose have said
14 about this document, because it is indicative of the
15 process one gets drawn into where you have one firm
16 reviewing another firm's disclosure review.

17 PROFESSOR MASON: Sorry to interrupt you. I just wanted to
18 check that I understood what you're arguing there. So
19 this email at the top of the page, found in drafts or
20 whatever, there's no recipient specified. So does that
21 mean that the "To" line has been removed or -- and how
22 do we know the intended recipient?

23 MR WILLIAMS: The "To" line, one can see the "To" line,
24 which is to BJ Watrous. That's how we know it's a draft
25 reply.

1 PROFESSOR MASON: Fine.

2 MR WILLIAMS: Rather than some other type of -- that's how
3 we inferred it was -- I think at first we thought it
4 might be a reply, but we have been told it's a draft.

5 PROFESSOR MASON: Okay. All right. Thank you.

6 MR WILLIAMS: Qualcomm has made points about this document
7 in two places. The first is annex 1 to Ms Thomas's
8 statement. If we can go to core 187, one can see --
9 this is example 9 -- you can see the description in the
10 middle column.

11 What I want you to look at, please, is the far right
12 column. That is Qualcomm's explanation in relation to
13 this document.

14 MRS JUSTICE BACON: Are we at item number 8?

15 MR WILLIAMS: Item number 9. I'm sorry, Madam.

16 Could we go over the page, please?

17 (Pause)

18 MRS JUSTICE BACON: So you have the final version of this?

19 MR WILLIAMS: We have the final version, yes. But that did
20 seem to us to be a very carefully worded response which
21 doesn't go so far as to directly claim privilege over
22 this document. So we wrote back and asked whether
23 a claim to privilege was in fact made over the document.
24 We had a response in a letter of 26 July, last Friday,
25 which is the second supplemental bundle, page 67, and

1 it's paragraph 22.

2 (Pause)

3 MRS JUSTICE BACON: Yes. So they are claiming database
4 privilege.

5 MR WILLIAMS: They do say privilege. But we cannot
6 understand, based on this explanation, why it is said
7 that the dominant purpose of this draft reply was to
8 provide legal advice. We just don't understand that,
9 based on what's said here.

10 MR JUSTIN TURNER: So there's no privilege in the final
11 version of the email.

12 MR WILLIAMS: Because that was external facing. That was
13 an external facing document. Quite. That does -- yes,
14 quite.

15 MRS JUSTICE BACON: Well, what's said is that this was
16 a draft that was then most likely circulated among other
17 members of the in-house legal team and Mr Mollenkopf was
18 authorised to seek and receive legal advice on behalf of
19 Qualcomm in relation to this point.

20 MR WILLIAMS: Yes. But in order for privilege to attach,
21 the dominant purpose of the document needs to be to --
22 I mean, if this is coming from lawyer to a non-lawyer,
23 the dominant purpose would need to be to provide legal
24 advice, and we just don't see it at the moment.

25 But we say at the very least there's a real question

1 about this based on the material that's been provided.

2 So if I pause there, if the Tribunal is with us that
3 the claims to privilege that have been made are
4 doubtful, or at least open to serious question, we say
5 for two out of the ten examples that we have raised, if
6 Qualcomm's position hasn't clearly stood up to scrutiny
7 for two of them we say that is significant.

8 We obviously had no expectation of a finding that
9 the claim to privilege collapses for ten out of ten.
10 But if there's still a material question at the end of
11 this process over two, we do say that is significant and
12 it supports the point we make, which is that further
13 quality control is needed.

14 MRS JUSTICE BACON: Isn't there a question about
15 proportionality?

16 MR WILLIAMS: Yes, there is.

17 MRS JUSTICE BACON: Given that you -- do you have, as
18 I understand it, for those two examples you said that
19 you have had the final board minute and you had the
20 final version of the email. So if what you're doing is
21 really just looking for drafts; is this likely to give
22 you much which you do not have already?

23 MR WILLIAMS: Well, I think I make two points, Madam. The
24 first point is that it's, I think, well recognised that
25 drafts may be revealing and they may be revealing of

1 internal thinking in a way that the final product isn't.
2 Parties may say things in draft and then, when it comes
3 to the finished product, they may think better of it and
4 one may get an insight into internal thinking from
5 a draft that one wouldn't get from the final document.
6 So that's the specific point.

7 The more general point is that we're trying to test
8 whether this process has resulted in material being
9 redacted and claims for privilege being made as a result
10 of the process that was followed in the US that wouldn't
11 have been made had the exercise happened here. We don't
12 know what we don't know. We're looking at these
13 documents and trying to work out where there may be
14 an issue. We have identified a number where there may
15 be an issue and these are two of them.

16 So they are illustrative of the wider concern that
17 if one adopts the outcome of a process carried out in
18 a different jurisdiction under a different test, carried
19 out by different lawyers, that you won't get the product
20 that you would have obtained had the exercise been done
21 here.

22 That's why I made the point about the 16 per cent
23 and the 2 per cent, because that is, in my submission,
24 indicative -- broadly indicative of the fact that
25 a different outcome has been received whether material has

1 been carried out -- whether the material has been
2 reviewed by English lawyers under English privilege.
3 One sees a very different outcome.

4 MRS JUSTICE BACON: Yes. You rely on these as examples
5 where there is a privilege concern, but obviously
6 the Tribunal will be mindful of the extent to which,
7 even if there is a concern, what is uncovered is likely
8 to be -- is it likely to advance matters much further?

9 MR WILLIAMS: That's true. But that's the problem with
10 picking a small -- because we can only scrutinise
11 a small sample in this way, we can only put a small
12 number to Qualcomm.

13 I have one more point to make, which I will make in
14 a minute, Madam.

15 We're very mindful of the point you made to me about
16 proportionality, which is reflected in the revised
17 proposal we have made to Qualcomm, which I do want to
18 come to. We say there is a prima facie issue, but we
19 recognise the solution needs to fit the problem, so we
20 have that well in mind.

21 So the second aspect of our concern relates to the
22 clarity of the explanation that we have been given in
23 relation to relevant legal context for some of the
24 apparently commercial communications. As I said a while
25 ago, a number of the examples are internal

1 communications with in-house lawyers who are close to
2 the business. We have just seen Mr Gonell himself
3 conducting negotiations, and these documents relate to
4 negotiations with OEMs, external parties. So there is
5 a question as to what is the nature of the function;
6 what's the nature of the advice being given? To put it
7 in the terms of the legal test per Three Rivers, the
8 question is: what is the relevant legal context for the
9 lawyers' involvement?

10 In the letter that I showed you last Friday,
11 Qualcomm responded -- we asked in relation to a number
12 of these documents: can you please tell us what the
13 relevant legal context is?

14 And Qualcomm said it wasn't going to give us further
15 clarification of that. We say that's something that
16 we're entitled to understand.

17 We have added an authority to the second
18 supplemental bundle, which is the West London Pipeline
19 case. It's second supplemental, page 67.

20 MRS JUSTICE BACON: Are we talking about the authorities
21 bundle?

22 MR WILLIAMS: No, I'm not. I'm sorry, I wonder if it's the
23 second correspondence bundle.

24 MR BAILEY: It's the second correspondence bundle.

25 MR WILLIAMS: Second correspondence bundle, page 67. So

1 this is a decision of Mr Justice Beatson, as he then --

2 MRS JUSTICE BACON: Wait a minute.

3 Yes I have it. Thank you.

4 MR WILLIAMS: Yes, sorry, it's my mistake.

5 MRS JUSTICE BACON: Mr Justice Beatson.

6 MR WILLIAMS: Mr Justice Beatson, as he then was. It may be
7 a trite point, but I just wanted you to read 86(1).

8 MRS JUSTICE BACON: Yes.

9 MR WILLIAMS: So the "affidavits must be as specific as
10 possible without making disclosure of the very matters
11 that the claim for privilege is designed to protect".

12 I'm not going to show you anything else in that case
13 because some of the later principles, they have been
14 disapproved in subsequent authorities. But that's good
15 law; it has been cited since then.

16 We say that explaining the relevant legal context is
17 a necessary component of explaining why this material is
18 subject to legal advice privilege.

19 What we're seeking to do here is to draw the line
20 between in-house lawyers wearing a commercial hat and
21 circumstances in which they're wearing a legal hat.

22 That is central to the claim to privilege and it's a
23 point which it's reasonable for us to seek clarity
24 about. We can't see that explaining the context in more
25 detail than we have at the moment will reveal the

1 substance of the advice. And we don't know why Qualcomm
2 wasn't prepared to engage on this, but the somewhat
3 defensive response we had in correspondence didn't
4 reassure us, is the point.

5 Now, of course, on this specific issue you could
6 direct Qualcomm to tell us what the relevant legal
7 context is in greater detail, but that wouldn't deal
8 with the other points I have been making, the two
9 examples and the wider issue.

10 So our position remains that some form of additional
11 assurance is warranted. The question is: what? To your
12 point, Madam, about proportionality.

13 Now, our original proposal was for a re-review of
14 3,000 documents. I should be clear there was a method
15 to that figure. We were advised by Consilio, the E-
16 disclosure provider, that it would allow conclusions to
17 be drawn with 95 per cent confidence, which is what one
18 is looking for, a product which one can rely on.

19 But since then Ms Thomas has given evidence that
20 that review would take six to seven weeks and it would
21 cost, I think she said, a quarter of a million pounds.
22 So obviously we're mindful of that concern in the same
23 way we're mindful of the Tribunal's concerns about
24 proportionality. We're also mindful of time, of the
25 time factor.

1 So having received that response, we wrote on Friday
2 proposing a review of 500 documents on the rough and
3 ready basis that following Ms Thomas's logic that should
4 be about a week of work; it's one sixth of the volume.

5 Do you want to see that in the correspondence?

6 MRS JUSTICE BACON: Yes, I would like to. Are you going to
7 nominate those 500?

8 MR WILLIAMS: No, they would be chosen at random.

9 Sorry, I should be clearer. They will be chosen at
10 random by Consilio, so we would nominate them in that
11 sense, but we would be nominating them based on a random
12 selection.

13 MRS JUSTICE BACON: All right. Where is that in the
14 correspondence?

15 MR WILLIAMS: It's second correspondence bundle, page 14,
16 tab 5. It's a one-page letter. I will let the Tribunal
17 read it.

18 (Pause)

19 MRS JUSTICE BACON: Yes.

20 MR WILLIAMS: So I hope it's clear that we have
21 proportionality and pragmatism clearly in mind. But, at
22 the same time, from where we are now we cannot see that
23 an exercise on that scale is unwarranted or not
24 justified in the scheme of the proceedings. It would
25 allow much more robust conclusions to be drawn than the

1 very small sample of ten documents that Ms Thomas has
2 currently looked at with her team. So we would be
3 seeking an order for that now as our primary position.

4 MR JUSTIN TURNER: How would it work, then? So, with the
5 ten documents, subject to hearing Mr Jowell, there's
6 an issue around one or two of them where you may not be
7 agreed whether they're properly privileged or not. What
8 happens at the end of the review of 500? Let's assume
9 there's a handful of documents where the claim for
10 privilege is arguably wrong; where do we go from there,
11 looking ahead?

12 MR WILLIAMS: I think one would have to look at the number
13 of documents where the matter had been reopened, the
14 type of document -- I mean, the chair has already made
15 a point to me where some of the examples you've
16 identified have the final documents, one would need to
17 look at what they were. And we would need to take
18 a view as to whether we thought that we were able to
19 then -- well, first of all, whether we're reassured
20 because obviously the point of this is not to make
21 waves.

22 MR JUSTIN TURNER: Sure.

23 MR WILLIAMS: The point of it is to see whether we're
24 satisfied that the outcome is satisfactory. Then,
25 depending on the outcome, it will be a question of

1 degree as to whether we think there is in fact enough to
2 support a wider problem.

3 MR JUSTIN TURNER: Okay, and if there is a wider problem
4 where do we go from there?

5 MR WILLIAMS: Yes. So, at that point, Qualcomm would have
6 reviewed 500 documents. As I said, the next logical
7 stage would be to expand it to 3,000 because that's the
8 point at which you could draw conclusions with
9 statistical confidence. But one has to take it in
10 stages. I mean, in a sense the fact that this could end
11 up being a significant issue, that can't be a reason not
12 to do anything. So what we're trying to identify is
13 a proportionate first step.

14 MRS JUSTICE BACON: The problem is that we don't have time
15 for the subsequent steps, I fear. Because if you ask
16 for that, your hope is actually that it will produce
17 something, as in it will show that -- from your side,
18 your hope is that it will show that there have been
19 redactions which can be unredacted.

20 What then happens in your mind, if your hope
21 manifests itself, and there are out of that 500, let's
22 say, ten or 20 documents or more which you get in less
23 redacted form; what are you going to be asking Qualcomm
24 for and/or the Tribunal for at that stage, when we're
25 then even closer to trial and exchange of evidence?

1 MR WILLIAMS: I think, if I can answer the question in this
2 way, Madam: we fully recognise that in the most nuclear
3 of scenarios where it turns out there is a systemic
4 problem that that has major ramifications for the
5 litigation. We're not pretending otherwise. The point
6 we make is that the timetable to trial isn't the only
7 consideration. There is a matter of due process and
8 fairness here. If there is evidence in due course to
9 support a stronger submission that there appears to have
10 been a systemic problem, then we will have to make that
11 submission to the Tribunal. But we're very mindful of
12 the fact that one needs to get there in stages.

13 We recognise that this first step shouldn't in
14 itself derail matters. That can't be the right way
15 to go about it. So we have tried to take it in stages.
16 We obviously recognise that any Tribunal attaches
17 importance to the trial date and seeking to pursue
18 additional procedural steps that put that in jeopardy,
19 it's a major point. We are obviously very mindful of
20 that, and any submission we make, any application we
21 make in due course, we will take all that on board.

22 But that can't, in my respectful submission, be
23 a reason not to do anything about the problem, if there
24 is a potential problem.

25 MR JUSTIN TURNER: I understand that point. But why are the

1 documents being chosen randomly? How does that bring
2 benefit? This is not a normal distribution or
3 something. I don't know why a statistical approach --
4 if you sample 500 documents; why aren't you sampling 500
5 documents you think are of particular concern to you?

6 MR WILLIAMS: I think the purpose of the exercise is to draw
7 conclusions about the robustness of the exercise
8 overall. That's the reason for it.

9 I don't want to make points against myself. But if
10 we picked our 500 best documents and they all showed --
11 you know, a very high proportion of them showed
12 a problem, that wouldn't tell you the extent of any
13 potential problem over the whole dataset. I think
14 that's the --

15 MRS JUSTICE BACON: Actually, it would be more informative
16 for the Tribunal, don't you think? Because I think our
17 concern is if you just pick random documents and you
18 get some of those which are slightly less redacted, but
19 actually they are documents which don't really go
20 anywhere because, for example, they're drafts of
21 something you already have.

22 That's less likely to incline us to do anything
23 different going forward than if you do have documents
24 which are actually relevant, more likely to be relevant,
25 and that you show, okay, well, actually what's been

1 unearthed is something which is materially different
2 from what we have had, and you have had a chance to try
3 and pick your best case. Then we might be able to look
4 at maybe a more targeted set of further disclosure.

5 But I think we're not going to be able to do that if
6 the initial set is chosen at random.

7 MR WILLIAMS: I understand.

8 MRS JUSTICE BACON: We're trying to be helpful.

9 MR WILLIAMS: No, no, I fully see that. I'm of course not
10 resistant. I was trying to be fair and explain the
11 rationale for the current approach in response to the
12 question, but I fully see the force of the point you're
13 making; that what you don't want to end up with is
14 another debate in the margins about this. You want to
15 know if there is a problem. So I fully see the force of
16 the point you've made to me.

17 I can certainly take instructions about that and
18 about -- sorry, I should make this point: the sample was
19 intended to be 250 documents which are partially
20 redacted and 250 documents which are fully redacted.

21 Now, of course, as far as the fully redacted
22 documents are concerned, that would have to be --

23 MRS JUSTICE BACON: That would have to be random because you
24 don't know what they are.

25 MR WILLIAMS: But as far as the 250 which are partially

1 redacted are concerned --

2 PROFESSOR MASON: I'm not even persuaded on that point
3 there.

4 MR WILLIAMS: Okay.

5 PROFESSOR MASON: That, for example, we saw fully
6 redacted minutes of a meeting which you may feel, even
7 though it's fully redacted, that's very relevant to
8 include in the sample.

9 MR WILLIAMS: That document --

10 PROFESSOR MASON: So to repeat the theme that's emerging --
11 sorry, I will just finish off.

12 The concern with statistical significance feels to
13 me somewhat misplaced or mis-framed, and indeed I don't
14 know what a 95 per cent confidence interval would be in
15 this particular exercise, so it may be worth stepping
16 away from that, as others on the panel have indicated.

17 But, even in the fully redacted documents, there's
information

18 there to indicate the relevance or importance of the
19 document even if the rest is fully redacted.

20 MR WILLIAMS: That document is not fully redacted because we
21 have the heading.

22 PROFESSOR MASON: I see.

23 MR WILLIAMS: When I talk about the fully redacted
24 documents --

25 PROFESSOR MASON: It would be completely blank.

1 MR WILLIAMS: -- I mean the 70,000 documents that have been
2 completely withheld. Sorry, I wasn't clear about that.

3 PROFESSOR MASON: No, that's a helpful clarification.

4 MR JUSTIN TURNER: You say 500 documents is going to be
5 a week's work --

6 MR WILLIAMS: Well, it's based on Ms Thomas's --

7 MR JUSTIN TURNER: -- approximately. And you select the 500
8 you're most interested in for whatever reason, and you
9 say that's proportionate to spend a week looking at that
10 and then see where we are?

11 MR WILLIAMS: Subject to the point I made, which is that if
12 one is looking at a proportion of fully withheld
13 documents, we can't do anything to select those.

14 MR JUSTIN TURNER: It's up to you. You can choose 300 fully
15 redacted or you can choose --

16 MR WILLIAMS: I see.

17 MR JUSTIN TURNER: -- 300 fully redacted, or you can choose
18 100 fully redacted or you can choose these because these
19 look interesting or you can choose this one because you
20 can't imagine how that can be privileged on its face.
21 You can make the selection however you see fit.

22 MR WILLIAMS: Yes. The only point making is that as far as
23 documents we don't know anything about is concerned that
24 would have to be an extent. At the moment, I think that
25 "to an extent" has to be random. I guess we can say we

1 want documents of this nature and then ask, but then the
2 difficulty is that Qualcomm has to identify them, which
3 obviously causes its own difficulty.

4 But I certainly see that there are different ways
5 around this, of calibrating around the point
6 the Tribunal has put to me, and I am very grateful for
7 the contributions.

8 So I hope it's clear. We're looking for practical
9 solutions. In our skeleton we put forward another
10 practical solution, which was inspection of a subset.
11 I won't develop that unless the Tribunal wants me to.
12 That was simply put forward on the basis that we had the
13 ten. Another way of cutting through this would be for
14 those documents or some of them to be directly inspected
15 by a different Tribunal chair. It couldn't be this
16 constitution because the documents are privileged, this
17 Tribunal can't see them. But that would be another way
18 of making progress. But that was very much our
19 secondary position, because it seemed to us one is never
20 going to be able to draw very clear conclusions about
21 a whole document set based on a detailed review of ten
22 documents. We were just putting forward different ways
23 of cutting the problem. So I won't say more about that,
24 unless the Tribunal wants me to.

25 MRS JUSTICE BACON: No, all right.

1 MR WILLIAMS: That's my application, Madam.

2 MRS JUSTICE BACON: Thank you very much, Mr Williams.

3 Mr Bailey.

4 MR BAILEY: May it please the Tribunal. Qualcomm resists
5 the application. It makes four key points.

6 First, the Class Representative is wrong to accept
7 that disclosable material has been withheld from it.
8 I will deal with my learned friend's headline concern
9 about missing rate set and documents, and redacted
10 internal communications.

11 Second, the Class Representative is wrong to object to
12 the need for redactions in what must be its best ten
13 hand-picked documents which were raised some sort of
14 eight months after we provided disclosure from the FTC
15 production set in November last year. I will address
16 the specific examples that my learned friend went to
17 this morning.

18 Third, the Class Representative is wrong to doubt
19 the claims for privilege by pointing to the number of
20 redactions and withheld documents. And privilege isn't
21 a numbers game, so I will show the Tribunal there are
22 good reasons for why the number of documents have been
23 withheld, the number of custodians that are lawyers, and
24 the legal advice and input they provide during
25 negotiations.

1 And, fourth, I will deal with the Class
2 Representative's suggestion, most recent suggestion, of
3 a random review or a handpicked selection of 500 documents,
4 which we say is not satisfactory and hasn't been
5 properly panned out, as Mr Turner had identified and
6 I will seek to address that as well.

7 Before I address those points; can I just simply
8 remind the Tribunal, as I'm sure you have seen in
9 Ms Thomas's seventh witness statement, paragraphs 59 to
10 63, that the privilege review that was done in the
11 United States was a painstaking process. Ms Thomas
12 explains it took 300 attorneys, 100,000 hours, costing
13 \$5 million.

14 Moreover, it was hard fought. The Federal Trade
15 Commission and the US class action plaintiffs
16 challenged, as my learned friends showed you, a number
17 of the claims. That was supervised by the US court, and
18 it's the output of that process that was input to the
19 disclosure given in these proceedings. So there has
20 been some quality control extensively done already.

21 Turning to the first point --

22 MRS JUSTICE BACON: Quality control in the US, under the US
23 test?

24 MR BAILEY: Yes, Madam. Yes, that's right.

25 So the Class Representative's headline concern is

1 that they have not found in Qualcomm's disclosure
2 material, they say, justifying Qualcomm's rates. It
3 brings to mind the U2 song "I still haven't found what
4 I'm looking for".

5 Now, the short answer to that, we say, is just
6 because the Class Representative expects to find
7 a category of documents doesn't mean or imply that the
8 claims for privilege are wrong or even questionable.

9 Second, we have addressed in correspondence, and in
10 our response to the RFI that Madam Chair ordered in the
11 hearing last month, as to how rates are set, who are the
12 individuals that had responsibility for setting royalty
13 rates. For the Tribunal's note, that's at supplementary
14 bundle, page 559.

15 Really, against this you just have a strongly held
16 disbelief that, well, Qualcomm couldn't have left it to
17 individual negotiators.

18 Well, the CR itself points out in its skeleton
19 argument, paragraph 39, it's not an industry actor and
20 therefore it's not in a position, we say, to simply
21 second guess how Qualcomm conducted its licensing
22 negotiation. So that suspicion is not a good reason to
23 unpick or undermine the claims for privilege.

24 Now, my learned friend this morning referred
25 the Tribunal to the fact that in the disclosure some of

1 the email chains consist of external correspondence with
2 an OEM and then internal correspondence, some of which
3 is redacted when it involves a client and in-house
4 attorneys.

5 Can I just show you two things on that point, one on
6 each side of the Atlantic, if I may?

7 The first is just on the US side, just so
8 the Tribunal can see the approach that was adopted.
9 It's just one paragraph, if I may. It's at
10 supplementary bundle, tab 42, at page 2028.

11 Now, this is a declaration that was given by
12 Mr Gerald Ford, not the former US president, but the
13 most senior attorney at Cravath, Swain & Moore in the
14 FTC proceedings. He was the individual responsible for
15 the extensive 18-month review of privilege in the
16 United States.

17 Could I ask, please, the Tribunal to read on
18 page 2029, paragraph 7?

19 (Pause)

20 MRS JUSTICE BACON: Yes.

21 MR BAILEY: I'm grateful.

22 We make two points about this. The Tribunal can see
23 here that the standard that was applied with rigour and
24 in a conscientious way was whether the communication was
25 made for the primary purpose for obtaining -- providing

1 legal advice.

2 I am conscious one of the members is not a lawyer,
3 but so far as English law is concerned, that is the same
4 standard. For the Tribunal's note, the Court of Appeal
5 earlier this year in the Al Sadeq case,
6 authorities, tab 16, page 675, paragraph 228,
7 subparagraph 2. That's exactly the same test. We just
8 use the words "dominant purpose" in England, but there
9 it's for the primary purpose. So the same standard is
10 being applied.

11 The other point which is very important for my
12 learned friend's wearing of different legal and
13 commercial hats, is that in the US, like in this
14 jurisdiction, there is a clear distinction between legal
15 advice provided between a lawyer and his or her client
16 and business advice. The latter is not redacted and not
17 withheld, and that's true both in the States and also in
18 this jurisdiction.

19 If I may, can I just show one further example? The
20 ones hand-picked, I should say, by the Class
21 Representative. Just to sort of show the Tribunal this,
22 it's again in Mr Kadri's exhibit. That's to be found in
23 the supplemental bundle, volume 3, tab 36. I just want
24 to take the first example, if I may, and I promise
25 I will address the examples that my learned friend went

1 to as well.

2 This is just to show the Tribunal essentially how
3 communications were approached. So it's page 1549.
4 I do apologise that it's all overlaid in the bottom
5 right-hand corner. But it's the email from
6 Mr Reifschneider on 28 November 2013. The first email
7 in the exhibit.

8 MR JUSTIN TURNER: Other, which bundle?

9 MR BAILEY: I'm in bundle 3 of the supplemental bundle, at
10 tab 36 --

11 MR JUSTIN TURNER: Sorry, I don't think I have the same --

12 MRS JUSTICE BACON: Page 1549.

13 MR BAILEY: Exactly, Madam. Thank you.

14 I will take this briskly. This is an email chain
15 between Qualcomm and Huawei. You can see from the
16 opening line this is all outer confidentiality ring
17 information. So I will just have to sort of point you
18 to it, so you can see what's being said.

19 You can see that there is a proposal, essentially,
20 for a new licence. It's been partly subject to
21 negotiation.

22 As with all negotiations --

23 PROFESSOR MASON: Just to make sure I'm looking at the right
24 page, and I think this is okay for confidentiality; does
25 it start at the top, "Dear Eric"?

1 MR BAILEY: It does. Actually, the first email, as with
2 chains, it starts with the earliest email and then we're
3 going to go basically backwards, forward in time. Yes,
4 that's correct, sir.

5 So you see that is the proposal for an agreement.
6 There's then a back and forth. There were
7 counter-proposals and comments that are made.

8 Could I ask the Tribunal just to pick up, so you can
9 see -- my learned friend said there's missing relevant
10 legal context. We can see, I hope, if we turn backwards
11 to page 1544, that's the end of page 10, this is the
12 email that precedes the redacted emails. It's from
13 Huawei.

14 I'm just going to ask the Tribunal, if I may, just
15 to pick up a few points in this email, so you can see
16 the context that precedes what we say is privileged
17 information.

18 Under the heading "LTE licence", the second
19 paragraph, you will see there in that paragraph there's
20 a dispute about the royalty rate.

21 But unlike Michael Moseley's "Just one thing", these
22 do not raise just one issue. There are multiple issues
23 raised.

24 Underneath the numbering A to D, that begins:

25 "To be in line with our licensing policy ..."

1 You will see there was a disagreement about the
2 scope of the licence.

3 Underneath that, in the next paragraph, on the other
4 hand, there's an allegation of exposure to Huawei's
5 patents. So we now have an issue relating to alleged
6 patent infringement.

7 Underneath the heading "3G licences" -- could I just
8 ask you to read the opening sentence? That's the
9 accusation being made by Huawei.

10 This just gives you a flavour of what is being said
11 in relation to the LTE licence, alleged potential patent
12 infringement in relation to 3G licence, all that is
13 taken very seriously and, of course, it's that -- if one
14 then turns back a page to 1543 -- which precedes the
15 first redacted email.

16 Briefly in relation to this, if I may, what one
17 has -- so this is the bottom half of the page from
18 Mr Reifschneider, he was the senior vice-president and
19 general manager of Qualcomm Technology Licensing, QTL.

20 Ms Thomas explains he was authorised, as a very senior
21 individual, to seek and receive legal advice. The email
22 is sent to a number of individuals. They are all US
23 qualified attorneys. It's wrong for the Class
24 Representative to suggest they are not lawyers. The
25 Tribunal might wonder: why so many lawyers?

1 The answer to which is that some are litigators,
2 some are patent attorneys, some are corporate lawyers,
3 some are licensing lawyers. There is a wide breadth of
4 expertise that's brought to bear.

5 Then there is a limit to what I can say about the
6 actual subject matter, but Ms Thomas has confirmed that
7 what was being sought here was legal advice from
8 in-house lawyers who are being instructed to assist with
9 the various issues raised by Huawei. In the words of
10 Lord Brown in Three Rivers:

11 "It has the character of legal business. It's the
12 sort of professional service that in-house lawyers are
13 instructed to engage in."

14 Of course, the Tribunal will also note we now have
15 the header "Attorney client privileged". Now, I don't
16 say that's decisive, it's not. But it is a
17 contemporaneous pointer as to what the author of the
18 email thought at the time.

19 I make one other point, if I may, given how strongly
20 the concerns are on the other side of the court.

21 Could I ask the Tribunal to turn to page 1539 and
22 1538? Because I am going, again, backwards and this is
23 going forwards in time.

24 It was suggested: well, all the internal emails are
25 redacted. We can't see anything.

1 Now, that is just not right. Cravath did not take
2 a blanket approach. That's what Mr Ford explains in his
3 declaration. The Tribunal can see here that now we are
4 out of redactions and you can see, if you look at the
5 top of 1539, even though that is between the client and
6 the lawyers, it's not seeking or giving legal advice.
7 We can see they have been working on a revised response
8 to Huawei. Over the page, you can see reference to
9 a meeting with Huawei and reference to an investigation
10 by the Chinese Competition Authority.

11 So we say that actually there is a distinction being
12 drawn between those emails that had the dominant purpose
13 of seeking legal advice and those which did not, where
14 you can see here -- and there are other examples --
15 where redactions are not made.

16 If I move to my second point and address my learned
17 friend's concerns, so he picked two documents, and can
18 we go -- well, I don't think you need to see the
19 board minutes. They are redacted and he referred to
20 that as a black box.

21 So we make three points about the board minutes. It
22 might be easiest to do this by reference to Ms Thomas's
23 annex 1 to her witness statement, which is in core
24 bundle, tab 13, page 185. She explains what is going on
25 in relation to these minutes.

1 MR JUSTIN TURNER: Sorry to interrupt. I have become
2 a little confused with this. Some board minutes -- a
3 final version was disclosed.

4 MR BAILEY: That is right, sir. Actually, it may be
5 helpful, we actually have those in the bundles. We can
6 see --

7 MR JUSTIN TURNER: I wouldn't mind a quick look, yes.

8 MR BAILEY: Those are in the second supplementary bundle and
9 that is page 217. It is even perhaps interesting to see
10 that because a lot of complaints are being made by the
11 Class Representative as to being in the dark and they
12 want to see the decisions made. So this is tab 20 of
13 the second supplementary bundle, page 217.

14 If one casts an eye, this is the fully unredacted --
15 excuse me, this is nearly completely unredacted, apart
16 from one passage to which I will come. You can see all
17 the discussion, all the resolutions. There is one
18 passage, on page 219, where the present chair of
19 Qualcomm is briefed by Mr Rains, he was a partner at
20 DLA Piper, also the company secretary at the time, where
21 he's briefing the board. He's providing legal advice to
22 the board in relation to the delegation of authority
23 resolutions.

24 MR JUSTIN TURNER: Sorry, my question is a very elementary
25 one, or my confusion is potentially an elementary

1 matter. So, for example, where in the final version you
2 have -- let's say start off with a list of attendees --

3 MR BAILEY: Yes.

4 MR JUSTIN TURNER: -- why is that not in the draft? Is
5 there not a lot of -- why is everything in the draft?
6 And this is my confusion, sorry.

7 MR BAILEY: That's a very pertinent point. We accept,
8 having looked at this again, that so far as the draft is
9 concerned, the part of the draft that is privileged under
10 English law is the part that's redacted in the final
11 version. It is redacted under US law and no one is
12 questioning that.

13 We do say as a matter of relevance and necessity
14 it's not clear to us why they need to see the draft.

15 MR JUSTIN TURNER: That's a separate matter.

16 MR BAILEY: That is a separate matter. But so far as
17 privilege is concerned, we confirmed in our letter of
18 26 July that we do say it contains privileged material
19 in relation to the matter upon which Mr Rains briefed
20 the board, but we don't say that the rest of the draft
21 is privileged under English law.

22 MRS JUSTICE BACON: That highlights the concern, doesn't it?

23 MR JUSTIN TURNER: Precisely.

24 MRS JUSTICE BACON: If you have caught a document which is,
25 apart from the heading, blanket redacted and it turns

1 out on review actually the only thing that ought to have
2 been redacted is a small section on one page, that
3 really makes the Class Representative's complaint for
4 them, because it shows that there has been overzealous
5 redaction by comparison with English law. No criticism
6 of the original exercise. But, now, if one looks at it
7 under English law, a lot of that should be unredacted.

8 MR BAILEY: My Lady, in relation to one draft minute that
9 has been queried, we probably looked at it and we do
10 accept that it would be less redacted under English
11 law --

12 MRS JUSTICE BACON: It's not just slightly less; it's almost
13 the entire document, under English law, should not be
14 redacted. So if that's the case for that document,
15 I can really see the concern expressed. It may be that
16 this document doesn't matter very much because they have
17 the final version. But if that's a discrepancy between
18 US law and English law, then there could be a real
19 concern that there's significant text being withheld.

20 MR BAILEY: My Lady, in relation to the draft minutes, one
21 thing that Qualcomm can do is it can review the draft
22 minutes of board meetings in the disclosure given from
23 the FTC production set, because at least insofar as it
24 applies to this type of document that could be done to
25 reassure both the Tribunal and the Class Representative

1 that material under English law is not being withheld.
2 So that is one, we hope, pragmatic solution to this type
3 of document, but I don't think it necessarily follows
4 that the other cherrypicked examples are in any way
5 well-founded. I mean, I have showed you one other where
6 it's patently clear, in my submission, that it involves
7 confidential communications between a lawyer and
8 a client for receiving legal advice.

9 MR JUSTIN TURNER: The reassurance that would be provided by
10 looking at 500 documents -- is there a problem with
11 that?

12 MR BAILEY: In relation to the 500, we say that can't be
13 necessary before the Class Representative has shown that
14 there are material errors in more than just one
15 document.

16 MR JUSTIN TURNER: It's one --

17 MR BAILEY: Out of 450,000 documents --

18 MR JUSTIN TURNER: It's one out of ten, isn't it? It does
19 raise a question.

20 MR BAILEY: The ten wasn't randomly selected and nine out of
21 the ten, we say, are properly privileged under both US
22 and English law.

23 MRS JUSTICE BACON: Yes, now, I think we have concerns with
24 the idea that the 500 are going to be randomly selected.
25 But if one out of the ten contains not just a few

1 redactions, but almost the entire document should have
2 been -- under English law should be unredacted, that
3 gives rise to a material concern and it goes beyond
4 board meetings because it illustrates the extent of the
5 difference between the American and the English
6 approach.

7 MR BAILEY: My Lady, respectfully, we would disagree that
8 one can extrapolate from this draft board minute to in
9 any way unpick or undermine a claim for privilege in
10 other types of document. Each document for privilege
11 needs to be assessed on a document by document basis.
12 So whilst there may be a difference in this instance
13 between US law and English law for draft board minutes,
14 it is, in my submission, worth adding regardless of the
15 position on privilege that when one looks at the final
16 version of this document it's not clear to us how or why
17 any of that is relevant or necessary to any of the
18 issues in dispute. So that is relevant to --

19 MR JUSTIN TURNER: But how did Ms Thomas deal with this?
20 She didn't sort of put her hand up, did she, with
21 regards to this document? Or have I missed --

22 MR WILLIAMS: It's core 185.

23 MR JUSTIN TURNER: She defended the position, as
24 I understand.

25 MR WILLIAMS: Second paragraph of the text.

1 MR BAILEY: I'm grateful to my learned friend.

2 The first point that Ms Thomas makes is that we
3 disclose the final authoritative version, this is page
4 185, and then she says:

5 "The CR has all the material that it might need on this
6 document for substantive purposes."

7 So, in my submission, the point she's making is that
8 there's no need to go behind --

9 MR JUSTIN TURNER: That's not what we're discussing. We're
10 not discussing relevance; we're discussing whether the
11 claim to privilege was appropriate, and she didn't -- as
12 I am understanding this evidence, she doesn't say: look,
13 I accept that this -- this non-privileged material was
14 inappropriately withheld, but it's an isolated example.

15 She doesn't say anything like that.

16 MR BAILEY: She made two points in the two bullets --

17 MRS JUSTICE BACON: Yes, I'm reading the second point:

18 "As such the draft ..."

19 MR BAILEY: Yes, Madam, that point is not being maintained.

20 MRS JUSTICE BACON: The problem is that point was in this
21 response. She didn't -- which she should have done.

22 She just didn't put her hands up and said: actually, nearly all
23 of this is clearly not privileged and we will give it to
24 you. That's what she should have done, but she didn't.

25 MR BAILEY: My Lady, as my learned friend said, the Class

1 Representative followed up to this annex, we then
2 replied to that and we set out the position in our
3 letter of 26 July. So we did seek to take steps
4 rapidly.

5 It should be said this was not raised by the Class
6 Representative until the middle of June, the day
7 before --

8 MRS JUSTICE BACON: Whenever it was raised, this response
9 was not appropriate. The Class Representative shouldn't
10 have had to follow up. The response on the re-review
11 should have been, and should clearly have been: nearly
12 the whole of this document is not privileged and we will
13 give it to you.

14 Rather than trying to defend it and saying, "It's
15 not relevant", or, "You have had it all already. Why
16 are you complaining?"

17 The problem is that doesn't give reassurance as to
18 the approach that's been taken on your side.

19 MR BAILEY: My Lady, Ms Thomas in her annex makes three
20 points about board minutes.

21 The first point is correct, relating to the final
22 version of the minutes.

23 The first bullet is correct in relation to the
24 inclusion of legal advice given by General Counsel and
25 Mr Rains of DLA Piper.

1 The second point is not maintained. But the fact
2 that there is a narrower justification for there being
3 legal advice in this document, and given that
4 Qualcomm -- we have proposed that we would look
5 specifically at the type of document that has given rise
6 to the Tribunal's concerns, we are trying to be
7 cooperative in relation to a document -- we don't see
8 how that can then be extrapolated to other types of
9 documents with a different context and different
10 individuals.

11 MRS JUSTICE BACON: What it shows is that the approach that
12 was taken in this schedule was not correct.

13 MR BAILEY: My Lady, respectfully, we would disagree with
14 that. There are ten examples picked by the Class
15 Representative. We are debating one of them, and in
16 relation to that we're debating one part of what
17 Ms Thomas has said. In my submission, that doesn't
18 impugn or undermine the correctness of everything else
19 that she has explained.

20 I see the time and obviously I need to address the
21 Class Representative's other example, so this was the
22 example given at page 1598.

23 Now, this is a rather untypical example of -- it's a
24 draft unsent email. Professor Mason picked up -- if one
25 looks at the top of page 1598, the email in question has

1 a "To", but it doesn't have a "From", and the reason for
2 that is that it is a draft email that was actually in
3 the deleted items of the in-house lawyer. My learned
4 friend said this was a commercial negotiation,
5 a commercial context. But if one casts an eye actually
6 at the exchange before, Mr Fabian Gonell is an in-house
7 attorney at Qualcomm. Mr BJ Watrous, as you can see
8 from his signature, worked for Apple, legal,
9 intellectual property and licensing.

10 Then if one looks at the question, the question
11 isn't about commercials or financials; it's about the
12 definition of exhaustion. It's about a proposed term
13 relating to the exhaustion of patents.

14 So we don't say -- this is not a commercial
15 negotiation. That is an unfair and incorrect
16 representation.

17 MR JUSTIN TURNER: The difficulty with all these
18 materials is this is -- these negotiations are about
19 licences at their heart, so it's very difficult to --

20 MR BAILEY: They are.

21 MR JUSTIN TURNER: -- draw any comfort from whether these
22 people are lawyers or not.

23 MR BAILEY: But I'm not making a point purely about them
24 being lawyers; I'm making a point about them being
25 lawyers and what they're discussing is the definition,

1 for legal purposes, of exhaustion decision. That isn't
2 something that is being done by the commercial people at
3 either Apple or Qualcomm.

4 The next thing that we would say, of course, is:
5 well, you have the final version. Again --

6 MR JUSTIN TURNER: Isn't this -- it's not how I'm reading
7 this. We don't want to spend too long on this, but an
8 exhaustion decision, isn't that a definition in an
9 agreement rather than legal advice?

10 MR BAILEY: Yes, but definition of a term in an agreement
11 can obviously involve lawyer as he or she --

12 MR JUSTIN TURNER: He -- right. But. You're saying look at
13 it on its face. But, on its face, it seems to me this
14 is a definition that's going into the agreement, which
15 is why "royalty difference" is in speech marks as well.
16 It's not someone plainly giving legal advice as to what
17 exhaustion means, because it says "exhaustion decision".

18 MR BAILEY: Sir, this is not legal advice because this is
19 the email between Apple and Mr Gonell.

20 MR JUSTIN TURNER: Okay.

21 MR BAILEY: What the Class Representative said was: well,
22 how on earth could this be redacted, because this is
23 just between Apple and Qualcomm? The point we make is
24 that -- as Mr Gonell has now explained, we actually went
25 to the author of the email, even though he's no longer

1 employed by Qualcomm, to truly understand the situation,
2 even though it is some nine years ago. The answer is
3 that he was -- as you saw, he was instructed by the
4 chief executive in relation to this negotiation.

5 Can I just actually show you? Because it may help,
6 I hope, that we have the version as sent, so that is in
7 the second supplemental bundle, at page 229. So you can
8 then see what was sent. You can see that the draft
9 unsent deleted item was on Saturday, 7 November.

10 The sent version was sent on Monday, the following
11 Monday, on 9 November. So the Class Representative has
12 the version as sent to Apple.

13 In my submission, there is no need to go to the
14 inner workings of an in-house lawyer relating to
15 an email for which he was working pursuant to
16 instruction from the chief executive.

17 So this is not a further example of something that
18 is not privileged under English law.

19 MRS JUSTICE BACON: So what was privileged -- well, you may
20 not be able to comment on it. But if that is what was
21 sent, if the draft said more or less the same thing;
22 what was privileged about that?

23 MR BAILEY: Madam, I don't think I can -- I can't obviously
24 go into the detail of what was in his draft email.

25 MRS JUSTICE BACON: Yes.

1 MR BAILEY: We have tried to provide as much information to
2 satisfy the requests for information.

3 MRS JUSTICE BACON: Yes.

4 Well, I think we ought to have a five-minute break
5 for the transcribers.

6 I think when we come back what we will want to know
7 from you is what you have to say about the proposal from
8 Mr Williams to look at a reduced subset of the
9 documents, it may be 500, it might be less. Our
10 suggestion is that, if that is done, it shouldn't simply be
11 random selection which might throw up a lot of documents
12 which actually are drafts of things that they have
13 already, but rather should be somewhat more targeted at
14 least for the documents, where they can see something of
15 what the document is. Obviously, for documents where
16 there is simply nothing disclosed at all, even a header,
17 that would have to be random if we were going to order
18 anything. So perhaps you could just take instructions
19 on that and be able to indicate how long that would
20 take.

21 MR BAILEY: Of course, yes Madam.

22 MRS JUSTICE BACON: Thank you.

23 (11.57 am)

24 (A short break)

25 (12.13 am)

1 MR BAILEY: Madam, members of the Tribunal, Qualcomm has
2 reflected in light of the indications from the Tribunal
3 and we would suggest that the way forward should be as
4 follows:

5 We would suggest the Class Representative should
6 select 200 documents -- we say 200 because that's
7 a manageable amount that can be dealt with in
8 a reasonable time -- that they believe on the
9 information available to them to be relevant.

10 We say the second step should be that there should
11 be four weeks for Qualcomm and its lawyers to review
12 those documents.

13 The third step is that we should provide
14 an explanation for each of those documents as to either
15 why we say they are privileged under English law or, if
16 we accept that they should no longer be withheld or be
17 redacted to a lesser extent and set that out.

18 That essentially is providing the explanations that
19 were sought in the draft order.

20 We do say that the outcome of this process, as
21 Mr Turner identified, is very important; what is its
22 purpose? It can't simply be just to sort of go through
23 various documents to see if there are discrepancies
24 between US and English law because we do say that there
25 has to be some sort of minimum or a significant number

1 of documents that have been wrongly withheld or not
2 privileged under English law and also relevant to the
3 proceedings.

4 MRS JUSTICE BACON: Yes, well, we will be able to see on
5 their best case, rather than simply taking a random
6 sample, whether there are a good number of documents
7 which are relevant, not just unredactable, but also
8 relevant.

9 MR BAILEY: My Lady, absolutely. Relevant to the issues
10 that will be adjudicated upon in Trial 1. We say that
11 that would be a pragmatic and constructive way to deal
12 with this process.

13 MRS JUSTICE BACON: I think we need to emphasise that it's
14 not going to be good enough for defensive and
15 obfuscatory explanations to be given on the basis that
16 the Class Representative can come back and take issue
17 with them.

18 I think this has to be done on a much more
19 cooperative basis going forward.

20 MR BAILEY: Madam, we will approach that in exactly that
21 spirit, to try and provide -- as we have been, trying to
22 be constructive, we have, as they have raised queries,
23 sought to provide information on several occasions. We
24 will seek to be -- I don't think we have been defensive
25 or obfuscatory. We will try to provide the explanations

1 which the CR has sought in its draft order.

2 MRS JUSTICE BACON: Yes.

3 MR BAILEY: We do press the point about relevance, because
4 we are concerned that otherwise this goes down a blind
5 alley and we're looking at lots of documents which may
6 or may not be different under English law from US law,
7 but actually come to nothing and actually don't assist,
8 as you put it, Madam Chair, in terms of advancing the
9 litigation towards trial next year.

10 MRS JUSTICE BACON: Yes, all right. Is there anything else
11 you wanted to say, Mr Bailey?

12 MR BAILEY: Obviously, we don't accept some of the points
13 made by the Class Representative about the lack of
14 confidence in the review in the US, but I don't think
15 it's necessary at this point to go over that.

16 Just simply one final point. In relation to any
17 documents that do need to be provided in these
18 proceedings, Qualcomm would need an order of
19 the Tribunal for that purpose because, as I'm sure
20 the Tribunal understands, they are privileged as
21 a matter of US law. No one has said that is in any way
22 other than unimpeachable. We don't want any inadvertent
23 and implied consequence to arise from US law. That's
24 really just a marker for down the track, if that were to
25 arise.

1 MRS JUSTICE BACON: Yes, all right. Of course, you will
2 need to draft the order from this CMC in an appropriate
3 way.

4 MR BAILEY: Yes, my Lady. We will liaise with the Class
5 Representative to make sure that a satisfactory order is
6 placed before you.

7 Decision

8 MRS JUSTICE BACON: All right. What we're going to order is
9 that Which? should select 300 documents that you believe
10 to be relevant. So choose 300 on the basis of what you
11 know, plus there should be an additional 200 that make
12 up your 500 set which are the fully redacted documents.
13 Those will necessarily be random because you don't have
14 any information about those.

15 MR WILLIAMS: Can I just raise a point in relation to that?

16 MRS JUSTICE BACON: Yes.

17 MR WILLIAMS: Because my instructing solicitor did have
18 a thought about that.

19 MRS JUSTICE BACON: Yes.

20 MR WILLIAMS: It's the most recent letter from Norton Rose
21 to Hausfeld. It's the second supplemental bundle,
22 tab 11, and --

23 MRS JUSTICE BACON: Sorry, what page, Mr Williams?

24 MR WILLIAMS: It's page 69. So this is the letter from
25 Norton Rose to Hausfeld which was sent last Friday. One

1 of the issues we raised was that Ms Thomas's evidence
2 referred to privilege logs which had been prepared in
3 the United States. We asked to see copies of those and
4 Norton Rose -- Qualcomm said no, in paragraph 23 to 27.

5 The point that Mr Kadri has drawn to my attention in
6 paragraph 27 is that the privilege logs do contain some
7 description of the documents.

8 If you see in the middle of that paragraph, it says:
9 "Subject line, a high level description."

10 So there is a potential means of us having some
11 visibility of what these documents are.

12 Now, I appreciate that we're talking here about
13 70,000 documents and obviously the Tribunal wants this
14 to move at speed, and I don't want to suggest anything
15 that's not going to work out as a matter of
16 practicality. But the point that's made behind me,
17 which is a good point, which is that to that extent we
18 could gain some visibility of what this material is,
19 but --

20 MRS JUSTICE BACON: How many documents are completely
21 redacted?

22 MR WILLIAMS: Fully withheld.

23 MRS JUSTICE BACON: Fully withheld.

24 MR WILLIAMS: It's 70,000. So we're obviously not going to
25 do -- and I'm not suggesting we would do anything

1 scientific with that, but there are obviously categories
2 and some of those categories would be more relevant than
3 others. Agreements, for example, I mean, if they're
4 draft agreements that's one thing. But we can see here
5 that there are draft agreements, memorandums, and then
6 there is an email chain disclosing our request, and
7 obviously one would be more interested in some of those
8 than others.

9 MRS JUSTICE BACON: So rather than us ordering, as I think
10 you had suggested, a half and half sample of chosen and
11 not chosen; are you suggesting that we park the fully
12 withheld documents and I consider instead just asking
13 Qualcomm to disclose the privilege logs for the whole of
14 the 70,000 that have been fully withheld?

15 MR WILLIAMS: Can I turn my back, Madam, for just a moment?

16 (Pause)

17 So I think our suggestion is that the 300 can
18 proceed. I think we're happy with the 300 and the 200
19 as a process. But the 200 fully redacted documents, it
20 may be possible to specify that they should be selected
21 from within some of these categories rather than other
22 categories, categories as identified within the
23 privilege logs in due course.

24 MRS JUSTICE BACON: So you're not shooting completely in the
25 dark.

1 MR WILLIAMS: So we're not shooting completely in the dark.

2 MRS JUSTICE BACON: So you will ask for the 200 to be
3 selected from certain types of documents?

4 MR WILLIAMS: Yes. We don't want an unwieldy process where
5 we have to review a 70,000 entry spreadsheet in order to
6 get to that point, but we wonder if in the spirit of
7 cooperation that's been advanced whether there might now
8 be some engagement with Qualcomm where we can
9 actually -- they can help us to understand what the
10 categories are and we can then say: can we please have
11 our 200 chosen randomly from within those categories?
12 Because at the moment, as you say, don't want to shoot
13 in the dark, but equally don't want to set in train some
14 satellite process. I think with cooperation they should
15 be able to educate us about this.

16 MRS JUSTICE BACON: Yes, all right.

17 Mr Bailey, are you able to help on that point?

18 MR BAILEY: My Lady, yes, we are maintaining a spirit of
19 cooperation. In fact, the logs were first mentioned
20 in June last year. But, in relation to this request,
21 there are, as explained in paragraph 26 of Norton Rose's
22 letter, 48 different logs that have thousands of entries
23 and each one is an Excel spreadsheet. It should be
24 borne in mind the point made in paragraph 25, a number
25 of those entries are not relevant to these proceedings

1 because they are not caught at all.

2 We are, in a spirit of cooperation, willing to
3 provide logs in relation to, for example, the 200 chosen
4 withheld documents. That will, of course, take some
5 time, but it would give some information to the Class
6 Representative.

7 There is a practical point, however. It's not
8 possible just to pull these off the shelf or even to
9 Google within the spreadsheet. As explained in
10 paragraph 26, actually one has to manually go through
11 and work out where the relevant document is and
12 regrettably the ID numbers in the US are not the same as
13 the ID numbers in these proceedings, so it will take
14 some time. I am told it will take about three weeks.

15 But, if the Class Representative were to tell us
16 what 200 documents there were, we could provide the logs
17 that give the information that is set out in
18 paragraph 27.

19 MRS JUSTICE BACON: I think what's being proposed is
20 something different. I think what's being proposed is
21 that you start off by just giving the Class
22 Representative a list of the document types. So there
23 are some examples given in 27: email chain, draft
24 memorandum and agreement and so on.

25 Are you able -- presumably there is a finite --

1 well, there must be a smallish number of document types
2 which were selected, if they knew that there is a set
3 of, say, 20 different document types, they could say:
4 please could the 200 be selected from ones which have
5 a particular document type.

6 Have I understood correctly?

7 MR WILLIAMS: Exactly, Madam.

8 MR BAILEY: May I just take instructions in relation to the
9 logs?

10 (Pause)

11 So, my Lady, I'm informed that the logs don't
12 categorise documents in the way of agreements,
13 board minutes, emails. It's rather Word, PowerPoint,
14 email. It's done by the format of the document, not the
15 category of document.

16 So you will have, as is set out in paragraph 27,
17 various emails, but I am instructed ...

18 (Pause)

19 So I'm informed it will tell you what each type of
20 document is in terms of memorandum, agreement, email,
21 but it doesn't go into any further level of granularity
22 saying memorandum on 4G licence.

23 MRS JUSTICE BACON: No, I think that's understood. But
24 I think Mr Williams' point was: even if you knew if it
25 was, say, a draft memorandum, agreement or email chain,

1 MR WILLIAMS: Our reaction was we would need a couple of
2 weeks in order to identify documents. That was our
3 immediate reaction.

4 MRS JUSTICE BACON: Yes. So I'm content for you to liaise
5 on timing and then, when you send me the draft order, if
6 you don't have agreed timings you will just have to tell
7 me what you each propose, as you've done on previous
8 orders.

9 MR WILLIAMS: I'm grateful. I think the only other point --
10 Mr Bailey did touch on this -- was that in terms of the
11 outcome of the review, paragraph 12 of our draft order
12 dealt with this. I think Mr Bailey said they're broadly
13 content with the sort of thing we were looking for, but
14 if there is going to be disagreement about that,
15 I thought it's better to flush that out now.

16 It's core bundle, tab 8, page 112, paragraph 12.
17 That was the sort of -- I don't want to sort of engage
18 in drafting by committee, but that was the sort of log
19 that we were looking for.

20 MRS JUSTICE BACON: Well, I don't want to put Qualcomm to
21 excessive work in relation to what is a significant
22 number of documents. Mr Bailey has suggested that
23 Qualcomm should provide an explanation for each of
24 those, either as to whether they maintain privilege
25 under English law or the document should be unredacted.

1 MR WILLIAMS: Yes.

2 MR BAILEY: Or less redacted.

3 MRS JUSTICE BACON: Or less redacted.

4 MR WILLIAMS: And you've made observations about what that
5 explanation ought to look like, Madam. So thank you,
6 Madam, I'm grateful.

7 MRS JUSTICE BACON: All right.

8 All right, are we able, now, to go back to Blumberg?

9 MR JON TURNER: My Lady, I have now received the letter
10 that's come in in the course of this morning from
11 Qualcomm. There is still an issue. It's going to be
12 most efficient, in my submission -- I'm still just
13 digesting this -- if we liaise with Qualcomm over the
14 short adjournment and then the issue may be narrowed or
15 eliminated.

16 MRS JUSTICE BACON: All right.

17 That then brings me to the next question, which is:
18 is there anything that we need to resolve as to the
19 logistics of Mr Blumberg giving evidence? Not just the
20 Blumberg documents.

21 MR JON TURNER: I'm unaware of any issue in that regard,
22 my Lady. If an issue does arise, then we will notify
23 the Tribunal and seek to have it resolved, but I'm
24 unaware that any issue has been raised in that direction
25 on either side.

1 MRS JUSTICE BACON: Who is dealing with this for the
2 Qualcomm side? Is it Mr Scott?

3 MR SCOTT: Yes, that's me, Madam. Do you mean
4 confidentiality?

5 MRS JUSTICE BACON: Yes, for example.

6 NEW SPEAKER: There may be an issue, that's been --

7 MR JON TURNER: That's the issue that's been raised on
8 correspondence.

9 MRS JUSTICE BACON: Are we then at the application regarding
10 custodians?

11 MR WILLIAMS: In whatever order you want to deal with
12 matters, Madam.

13 MRS JUSTICE BACON: So what I have, then, is parked for this
14 afternoon: the Blumberg documents and any
15 confidentiality issue regarding the Blumberg evidence.
16 Let's try to deal before lunchtime with the
17 application regarding the custodians.

18 MR WILLIAMS: There are a few points on timetable.

19 MRS JUSTICE BACON: And timetable.

20 MR WILLIAMS: Timetable and then there are the page
21 limits --

22 MRS JUSTICE BACON: Yes, we will deal with that last thing
23 after lunch.

24 MR WILLIAMS: I'm grateful. I'm grateful, Madam.
25 So further information. This is a short

1 application, which is a follow-up to the application
2 the Tribunal heard on 21 June 2024.

3 The application is at second supplemental bundle,
4 page 29, and the request that we make is on page 32, at
5 paragraph 16. If the Tribunal just wants to refresh its
6 memory.

7 MRS JUSTICE BACON: Yes. Qualcomm has made an offer as to
8 what it proposes that it can provide in a letter which
9 was provided to us yesterday, but which was sent on the
10 27th, so maybe we should take Qualcomm's letter as the
11 starting point.

12 MR WILLIAMS: Yes. Well, what they have said is that they
13 will ask two of the custodians what their role was in
14 the process of setting rates and what sort of advice
15 they provided, I think. Then they say they will give us
16 references to depositions from other custodians in which
17 the custodians describe their role within the business.

18 Essentially, we don't understand that solution
19 because Qualcomm must have the information that we're
20 seeking per paragraph 16 because it formed the basis for
21 its previous information requests, which told us that
22 certain individuals provided advice to others.

23 So they must know on what basis they set that out in
24 their further information.

25 MRS JUSTICE BACON: They presumably don't know because

1 they're saying that they're going to have to go back to
2 them, and that out of the various individuals only two
3 of them are still employed by Qualcomm.

4 MR WILLIAMS: Well, they have pleaded that some of these
5 individuals -- they have specifically pleaded in the
6 information that they have provided that some of these
7 individuals provided advice to decision-makers, so there
8 must have been a basis for that.

9 Indeed, if one looks at paragraph 4 of their letter,
10 they take a position on what the role of some of these
11 individuals was.

12 So we do say that they must have the information we
13 have asked for. We sought to strip the application down
14 to things that they must know and could just tell us,
15 because we wanted to make it as simple as possible.

16 The other point to make at this answer is that -- I
17 mean, they refer to depositions and they say: you
18 haven't read the depositions to work out the answer for
19 yourself.

20 We have read the depositions and we do have
21 a position about this. The reason for seeking clarity
22 is because it seems to us Qualcomm is saying
23 contradictory things and we want a straight answer.
24 That was the point I was really going to develop. But
25 some of these depositions are hundreds and hundreds of

1 pages long and we're very concerned that what we're
2 going to get is a reference to a very long document
3 which says: you know, go and have a look for yourself in
4 this 400, 500-page document.

5 That's not a constructive response to our
6 application, Madam.

7 So I will try to take it quickly because I know
8 the Tribunal is familiar with how this all came about.

9 On 21 June, you made an order requiring Qualcomm to
10 provide us with information about two topics. One was
11 the identity of custodians involved in various aspects
12 of rate setting, and the second was what is meant by
13 fair remuneration for the value of its SEPs, which was a
14 phrase used in its defence and which we have been
15 seeking to understand.

16 The context was the difficulty we have had -- we have
17 talked about this today -- finding documents in relation
18 to the basis for the rates. So we were trying to
19 understand Qualcomm's position and to work out what we
20 needed to interrogate the disclosure and identify
21 supporting material.

22 In the context of all this, there have been
23 exchanges between the parties about how the process of
24 setting the rates works within Qualcomm because that's
25 relevant to what we might expect to find, what sort of

1 documents might exist, and Mr Jowell made submissions
2 about this on 21 June and the position has been captured
3 in correspondence.

4 So can I just show you that? It's correspondence
5 page 268, paragraphs 13 and 14.

6 Perhaps I will just ask the Tribunal to read
7 paragraphs 13 and 14 which span those two pages.

8 MRS JUSTICE BACON: Yes.

9 MR WILLIAMS: So this says decisions are made by
10 negotiators, so we're unlikely to find documents
11 explaining Qualcomm's strategy, its approach, its
12 justification for its rates because the decision is made
13 by the negotiators. So we're trying to piece the
14 picture together, and Qualcomm makes this point and it
15 comes back to it, which is: we're looking for documents
16 which don't exist because this is the way decisions are
17 made.

18 So can we now look at Qualcomm's response to our
19 further information requests pursuant to the order made
20 at the last hearing? This is the supplemental bundle.
21 It starts at 549, but we can pick it up at 561. If
22 the Tribunal can read paragraphs 1, 2 and 3(c). So 1
23 and 2, 561, and then you need to go over to 563.

24 (Pause)

25 MRS JUSTICE BACON: Yes.

1 MR WILLIAMS: So what you see is that part of the process of
2 setting the rate within Qualcomm involves reference to
3 and reliance on other previous licences, which is
4 a point Mr Turner addressed you on yesterday. This did
5 suggest to us that this -- it can't all be left to
6 individual negotiators and there must be some process of
7 coordination within Qualcomm under which the rates to be
8 sought from a particular licensee are considered in the
9 context of other licences. It's hard to see how that
10 kind of process can be carried out by negotiators acting
11 in isolation.

12 If you see at the bottom of 563, then there are the
13 other requests, which is the custodians request. If we
14 just turn over the page to 564, you can see that the
15 paragraph 4 says:

16 "Of the existing custodians ..."

17 MRS JUSTICE BACON: Yes.

18 MR WILLIAMS: "... below individuals will have primary
19 responsibility for making decisions or they were
20 responsible for advising decision-makers on the levels
21 of royalties."

22 That's why we say they must have this for the
23 information we're seeking, because they have described
24 these individuals as decision-makers or providing
25 advice. So they must know who was giving advice because

1 they have identified them as such.

2 MRS JUSTICE BACON: They might not be able to give such
3 a granular answer as the precise type of advice that you
4 were asking for, that's the problem. It's quite easy to
5 say they were either responsible for making the relevant
6 decisions or advised the relevant decision-makers, but
7 you've asked for, I think, much more than that.

8 MR WILLIAMS: Well, I think, just to be clear, we asked
9 principally about the distinction between legal and
10 commercial and the extent to which they provided both,
11 because we have seen already today some of these
12 individuals wore different hats. We have seen
13 deposition material that Qualcomm has referred to which
14 tends to confirm that position. So we're just trying to
15 understand the extent to which there are individuals who
16 provided principally commercial advice because that's
17 the thing we're trying to get to the bottom of. We
18 understand the issues that arise in relation to legal
19 advice.

20 We're not seeking deeply granular information. And
21 so far as it is suggested to us that we ought to read
22 the depositions and work it out for ourselves, what we
23 want is Qualcomm to tell us what their position is
24 because -- I'm going to develop this point -- I have
25 already shown you their response in that letter of

1 4 July which told us that the individual negotiators
2 acted alone, gave that impression, and what we now see
3 is in fact there's an emerging picture in which there is
4 a process of engagement, there is a process of advice.
5 We just want direct, straightforward answers to clarify
6 the position.

7 MRS JUSTICE BACON: Yes.

8 MR WILLIAMS: So that's it in a nutshell.

9 MRS JUSTICE BACON: Thank you.

10 MR WILLIAMS: Some of the people in this list are commercial
11 individuals. So to the extent that they're providing
12 advice, they do seem to be captured. But it wouldn't be
13 surprising to find that senior executives are providing
14 advice to others, but the difficulty we have is that
15 when we then look at what's said in the letter of 4 July
16 none of it really fits together.

17 So that is it in a nutshell. If I can just --
18 I don't know if, Madam, you feel you've heard enough to
19 understand the application.

20 MRS JUSTICE BACON: I think I do. Just help me with this:
21 how is this exactly going to help you in searching the
22 documents? Because the issue has arisen because of the
23 large number of documents that have been disclosed. Are
24 you saying that once you know if it's legal or
25 commercial advice that's going to help you narrow your

1 searches?

2 MR WILLIAMS: It's going to unlock the difficulty,
3 because we understand there's going to be some legal
4 advice, and if there is legal advice it's going to be
5 covered by privilege.

6 If, on the other hand, there's a process whereby in
7 broad terms some of these individuals provided
8 a commercial steer to other individuals it's going to
9 enable us to look in a targeted way for material that
10 goes to evidence which ought not to be redacted.

11 So it's going to draw out the extent to which in
12 fact, contrary to the impression we have been given
13 previously, there are in fact interactions between
14 individuals within the business where we might start to
15 look for material which might shed light on the matters
16 we're interested in.

17 MR JOWELL: Forgive me, I'm going to have to object. I was
18 quite specific in what I said, and it is recorded in the
19 letter on the last occasion. I certainly never said
20 there were not interactions between individuals at
21 Qualcomm. That is complete mischaracterisation of what
22 was said.

23 MRS JUSTICE BACON: Who is dealing with this?

24 MR JOWELL: Mr Saunders. But I have to correct.

25 MRS JUSTICE BACON: Okay.

1 Can I hear Mr Saunders' response?

2 MR SAUNDERS: If Mr Williams has finished his submissions.

3 MRS JUSTICE BACON: Yes, we would like to deal with this
4 before lunchtime.

5 MR SAUNDERS: Yes, succinctly, I'm sure. The background to
6 this application was, the Tribunal said to us, to help
7 us navigate the documents. There are a large number of
8 documents. The remit of this is of course that this is
9 not a prelude to witness evidence or anything else.
10 They have the -- we have identified the custodians who
11 were involved in either taking these decisions or in
12 advising people that were taking the decisions. There
13 is that produced as a subset of the individuals. We
14 have offered that we can ask the two remaining people to
15 talk about their roles. We can also offer to ask them
16 about the roles of the others. The trouble is the roles
17 of the others are no longer -- those people have left
18 the company.

19 MRS JUSTICE BACON: All right, so can you do your best to
20 respond to the questions?

21 MR SAUNDERS: So, my Lady, the question -- we can certainly
22 offer to ask them about the roles of the others.

23 My Lady, can I just take you back to the response
24 very quickly? Then I just need to make one point about
25 the relief that they seek.

1 MRS JUSTICE BACON: I think what is relevant to us to know
2 is what you can do.

3 MR SAUNDERS: We can't do -- so a lot of these people --
4 these people, a lot of them -- the question we were
5 asked was: were they primarily responsible or giving
6 advice? That was what was answered. A lot of these
7 people left quite some time ago --

8 MRS JUSTICE BACON: I don't want to know the difficulties; I
9 want to know what you can do. So there are apparently
10 11 people?

11 MR SAUNDERS: Yes, so people who have left the company,
12 absent reviewing their material, it is not -- I mean by
13 reviewing the disclosure ourselves. We can ask people
14 who are still at the company what they know, and that's
15 what we're offering to do. But to provide the kind of
16 granular answer which they ask for in paragraph (b) of
17 their response requires us to go through everything.

18 MRS JUSTICE BACON: Right. So what you're saying is you can
19 ask the two individuals who are still at Qualcomm, what
20 they did and what they know about what the others did.

21 MR SAUNDERS: Yes, were they taking decisions or giving
22 advice if so, and then we will report back. That will
23 assist them to go through to the extent it will.

24 MRS JUSTICE BACON: All right. In relation to the others,
25 where that doesn't give you an answer in relation to one

1 of the nine, so the nine who are not there, you may get
2 an answer from the two that remain as to what the nine
3 did.

4 In relation to any of the nine for which you don't
5 get a clear enough answer; are you able to identify
6 where in the relevant deposition transcripts the
7 evidence they have given about the nature of their roles
8 might lie?

9 MR SAUNDERS: We can certainly identify and point the Class
10 Representative to the relevant deposition transcripts,
11 and they can flick through those and see what the
12 evidence is that --

13 MRS JUSTICE BACON: I think that Mr Williams' point is that
14 if there is 400 pages of deposition transcripts, then
15 it's not very helpful.

16 MR SAUNDERS: Maybe we can ... but, I mean, ultimately,
17 my Lady, this is their job. They have the disclosure.
18 They should be able to look through the 400 pages and
19 form a view as to the roles that are -- take, for
20 example, Mr Lupin. Mr Lupin left in 2007. He was then
21 a legal consultant employed until 2014.

22 What are we to do? We're to go through depositions
23 and identify if there is a paragraph where he says "my
24 role was" or he was asked a question about a role. The
25 Class Representative can do that in a matter of --

1 MRS JUSTICE BACON: Right, but as a starting point you're
2 saying you can ask the two who are there what they did,
3 you can ask the two who are there what the other nine
4 did --

5 MR SAUNDERS: Yes.

6 MRS JUSTICE BACON: -- and you can give such answers as they
7 provide?

8 MR SAUNDERS: We can point the Class Representative to the
9 Bates numbers in disclosure of the depositions. And
10 they can then get on and have a look at those.

11 MRS JUSTICE BACON: All right, can I just check with
12 Mr Williams?

13 MR WILLIAMS: We don't need them to point us to the
14 depositions; we have read the depositions. The point
15 I was making, Madam, I'm obviously not suggesting
16 Mr Jowell has misled the court. I'm just saying we have
17 gone around these houses quite few times, we have tried
18 to get to the bottom of what the internal process was.
19 At one point it was said it was all left to the
20 negotiators, so don't expect to find any documents --

21 MRS JUSTICE BACON: We are where we are.

22 MR WILLIAMS: Yes.

23 MRS JUSTICE BACON: Mr Saunders has explained what can be
24 done in terms of them making enquiries, so you clearly
25 don't need the deposition numbers. Can we, as

1 a starting point, ask for Qualcomm to do what they have
2 said that they can do?

3 Plainly, the information that you seek is not
4 readily available to them. They will be able to ask the
5 two that are still Qualcomm employees about themselves
6 and about what they know about the other nine and they
7 can tell you that.

8 MR WILLIAMS: I'll just make two points, Madam. The first
9 point is that obviously Qualcomm has a position in the
10 litigation and it's capable of providing us with the
11 best particulars it can as a corporate entity. So we --

12 MRS JUSTICE BACON: This is not about particularisation of
13 its case; it's about it providing you with material that
14 helps you to navigate the disclosure set. This is not
15 an obligation on Qualcomm to particularise what the
16 custodians were doing; this is simply about them being
17 cooperative and the extent to which we can expect
18 Qualcomm to do the work that you could also do in terms
19 of interrogating the depositions.

20 MR WILLIAMS: I understand, Madam.

21 The other point I wanted to make is there's been
22 talk about us seeking granular information. I'd just
23 make the observation we're not seeking granular
24 information; what we're seeking is a broad distinction
25 between legal advice, commercial advice, and obviously

1 recognising that some people may have done both. So
2 we're not trying to, you know, go into the weeds of
3 exactly what that was. We're just trying to understand
4 those roles obviously in the context --

5 MRS JUSTICE BACON: Yes, I understand.

6 Decision

7 MRS JUSTICE BACON: All right, so Qualcomm will be ordered
8 to ask the two individuals to answer the questions for
9 themselves and, insofar as they are able to answer them,
10 for the nine others who are no longer there.

11 MR SAUNDERS: My Lady, I'm grateful.

12 MRS JUSTICE BACON: All right.

13 I think we can't go back to the Blumberg issues.

14 Can we then make a start on the trial timetable?

15 MR WILLIAMS: We might be able to deal with the two

16 timetable issues that arise in ten minutes.

17 MRS JUSTICE BACON: All right.

18 MR WILLIAMS: Obviously, the Tribunal has some other points

19 about expert reports and so on.

20 MRS JUSTICE BACON: We will get to those after lunch.

21 MR WILLIAMS: In terms of directions, there is one point to

22 decide about factual evidence and a few points relating

23 to industry expert evidence.

24 On factual evidence, the current state of play is

25 second correspondence bundle, page 74.

1 To some extent this is me talking you through this
2 and I will identify the point at the end.

3 So this is a table prepared by my solicitors,
4 setting out the position for the Tribunal. You can see
5 the format, proposed step, Qualcomm's position, Class
6 Representative's position. Nearly all this is agreed
7 now as things have developed.

8 So, on the left-hand side, first issue is hearsay
9 notices. These were due on 1 July, but the parties have
10 agreed to vacate that and have the issue determined at
11 the CMC. There is now agreement that hearsay notices
12 should come up on 8 November, which is the same date as
13 factual witness statements, which has a logic to it.

14 It's also agreed that this should include material
15 responsive to the first tranche of third party
16 disclosure, which is due to arrive by the middle
17 of September.

18 So that material should be in play and that will
19 enable the parties to deal with that on the 8 November
20 date.

21 So that's agreed.

22 The second tranche of third party disclosure ought
23 to arrive by the end of the year. This is in the States
24 of course, as the Tribunal knows.

25 So one then sees, at the bottom of that page, there

1 is a new stage, which is reply statements of fact on
2 14 March. I think, if we go over the page, you can see
3 that will also include hearsay notices which are
4 responsive to 8 November and hearsay notices, hearsay
5 evidence responsive to the second tranche of third party
6 disclosure, so all agreed so far.

7 Then the issue arises in relation to the last stage,
8 if it is still in issue, which is the final instalment
9 of responsive evidence and hearsay evidence in response
10 to material on 14 March.

11 Qualcomm proposes 11 July, which is the date that
12 was previously the long stop. But since that long stop
13 was ordered we have a lot more clarity about the third
14 party disclosure process and, as I have indicated, it's
15 going to happen significantly in advance of that.

16 This is now a step which is putting in material
17 responsive to 14 March, so we make two points.

18 First of all, 11 July is unduly close to trial.
19 It's not ideal. It was previously a longstop date when
20 we didn't know when the third party disclosure was
21 coming, but we do know now. It doesn't need to be so
22 late.

23 The second point is that 11 July seems unnecessarily
24 long after 14 March.

25 MRS JUSTICE BACON: Yes.

1 MR WILLIAMS: So we have --

2 MR JOWELL: We can cut this short. We are prepared to agree
3 to 13 June, subject just to this sort of proviso, which
4 is that we currently understand that the amount that
5 will come out of additional material that will come
6 in March will be relatively limited, because we're
7 expecting to get most of the material from the 1782 very
8 soon. So that should come in the first round of hearsay
9 notices.

10 If we get swamped with a large swathe of new
11 material in March --

12 MRS JUSTICE BACON: You may need to ask for an extension.

13 MR JOWELL: -- we may need to ask for an extension.

14 MRS JUSTICE BACON: All right, so that's the first point.

15 MR WILLIAMS: That's the factual evidence dealt with.

16 The other issues relate to industry expert evidence.
17 The first is page limits, where I think Qualcomm has
18 made the running. But the upshot is that they put in
19 evidence asking for 35 pages, and we were content with
20 that proposal. Ms Thomas has given some evidence about
21 this, I think.

22 MRS JUSTICE BACON: So both of you are agreed that the
23 industry experts should have 35 pages each?

24 MR WILLIAMS: Yes.

25 MRS JUSTICE BACON: All right. 35 pages. What about the

1 joint statement from the industry expert?

2 MR WILLIAMS: Ms Thomas has again made the running on this.

3 I think that the issue here is the Tribunal has
4 indicated -- I wasn't at the last hearing, but there was
5 a provisional preference for dispensing with that.

6 I think the parties' preference would be to maintain the
7 current structure, which is reply reports and then the
8 joint statement, but it's a matter for the Tribunal.

9 I don't know who's going to address this on Qualcomm's
10 side.

11 MR JOWELL: I think we also have a slight preference for
12 maintaining -- having the reply reports and then the
13 statement.

14 There is room in the timetable for that. Often what
15 one sees otherwise is that the joint statement becomes
16 a bit unwieldy because it effectively incorporates two
17 reply reports, and there's something to be said for
18 really having the reply reports before and then a joint
19 statement which is a bit more succinct.

20 MRS JUSTICE BACON: The problem is if what you envisage is
21 having a series of reports and then a joint statement
22 which is just basically a cross-referencing,
23 the Tribunal has to keep going back. Whereas I think
24 what was suggested in Ms Thomas's sixth witness
25 statement, and what we wondered about, was effectively

1 a joint statement where we have in one document -- which
2 replaces the expert reports -- a statement of what is
3 agreed and then the points that are not agreed. If that
4 was going to be what we're working towards --

5 MR JOWELL: Yes.

6 MRS JUSTICE BACON: -- then the reply report stage seems
7 unnecessary.

8 MR JOWELL: I see that. But then one is almost
9 incorporating within that document reply reports, which
10 is one way to do it. It does mean, in our submission,
11 that later stage needs to come a bit later because it
12 will take time to draft -- effectively draft that reply
13 report within the statement, so we have suggested
14 a deadline of 20 December.

15 MRS JUSTICE BACON: It's not drafting a reply report within
16 a statement. It's actually giving us a single document.
17 If you have the reports on each side, reply reports, and
18 then a joint statement, which is simply a ready
19 reckoner, we have to look at five documents.

20 MR JOWELL: I do see that. There's no perfect solution
21 because if you -- because what so often happens is you
22 have an initial exchange and then it's only when one
23 then -- after that, that the two experts really engage
24 with the points that the other side is making. So if
25 that engagement can come in a reply report or it can

1 come in a response in an agreed statement of agreement
2 and disagreement -- but then one does have to allow the
3 disagreement to be quite extensive in that document
4 because, I mean, it's often easy for an expert to make
5 a point very succinctly, but sometimes it takes a bit of
6 time to unpack that point, if you're the other expert,
7 to explain why it's wrong or why it's too simplistic.
8 So it's not necessarily possible always, particularly
9 with expert issues, to be as succinct as one might like.

10 So one does inevitably get to a longer document if
11 you do that.

12 MRS JUSTICE BACON: We would prefer a single document.

13 MR JOWELL: A single, longer document. There's nothing
14 wrong with that. It just it takes a bit of time to
15 produce.

16 MRS JUSTICE BACON: And we would rather that that was done
17 by the parties than for us to try and effectively do
18 that for ourselves.

19 MR JOWELL: No --

20 MRS JUSTICE BACON: During the course of or after the trial.
21 It's going to be much more helpful for us to see in one
22 document rather than five what the areas of common
23 ground are and what the areas of disagreement are.

24 MR JOWELL: Disagreement. We have no problem with that.

25 It's just that it's going to take until, we think,

1 20 December.

2 MR WILLIAMS: Can I just deal with that, Madam.

3 MRS JUSTICE BACON: Yes.

4 MR WILLIAMS: Because it did seem to us that one advantage
5 of the Tribunal's preferred approach is that it would
6 allow to us compress the timetable a bit, because at the
7 moment we're due to get -- at the moment we have three
8 stages: we have reports, reply reports and joint
9 statement and the joint statement comes on 20 December.

10 Now, these are all inputs into the economic evidence
11 and our economic evidence is due in January, and one of
12 the disadvantages of the current timetable is that the
13 outcome, the joint statement comes on the 20th and on
14 the Tribunal's preferred approach that will be a very
15 substantive document, because there will have been no
16 reply report. There will be a significant amount of new
17 content and so we do face a difficulty which is that
18 Mr Noble then has to do his best to process this and
19 take account of it in his report which is due
20 in January. And so it seems that one advantage of
21 dropping a stage would be that one could bring that
22 stage back to around 22 November.

23 Now, that ought to be long enough if we have the
24 first round of reports on 6 September. It really ought
25 to be long enough whatever the product is going to be,

1 and it does seem to us it would be really unfortunate if
2 we had the efficiency of dropping a stage and creating
3 a single document but we didn't actually alleviate this
4 timetable pressure that we have at the moment, which is
5 the industry evidence coming very late for the purpose
6 of the economists, so if we do go down the road of
7 a single document, as the Tribunal said, we say that
8 22 November is an appropriate day for that.

9 It's long enough but it also solves the problem we
10 have at the moment of the expert process concluding.

11 MRS JUSTICE BACON: Why is the industry expert going to have
12 a material impact on what the economist is doing?

13 MR WILLIAMS: To the extent that one is considering
14 issues -- they're considering issues of abuse in the
15 context of the matters the industry expert is going to
16 be dealing with about bargaining process, competitive
17 bargaining and all the rest of it. That will be one
18 input into their evidence.

19 I think there is also just generally a process of
20 understanding where both parties are coming from and
21 I think on this approach we're going to be seeing
22 significant new material from -- I think it's Mr Melin
23 on the Qualcomm side and Mr Noble is -- to the extent
24 that contains matters that are relevant to him, Mr Noble
25 would have to process that at significant speed.

1 MRS JUSTICE BACON: Well, how much forward do you suggest
2 bringing this?

3 MR WILLIAMS: 22 November is our proposal. So you have
4 6 September and then previously the date for reply
5 reports was going to be, I think, 1 November. So, you
6 had stages, 6 September, 1 November, 20 December. It
7 just seems to us if you drop that intermediate stage you
8 can comfortably bring the joint report back a month.

9 MRS JUSTICE BACON: Yes, especially if people are not
10 spending a lot of time drafting something, drafting two
11 documents, as in reply reports and then a joint
12 statement.

13 MR WILLIAMS: Exactly, Madam. That's the point exactly.

14 MRS JUSTICE BACON: Yes, Mr Jowell.

15 MR JOWELL: We think we need a little bit more time than
16 that because it is -- you are effectively doing two
17 things and experience teaches one that it takes some
18 time to absorb what the other side are saying and then
19 the process of experts agreeing things is always a very
20 tricky one. So we would suggest somewhere -- we are not
21 necessarily wedded to 20 December, but we think
22 22 November is a bit ambitious.

23 MRS JUSTICE BACON: Well, if you are bringing the reply
24 reports you can presumably bring the WP meetings
25 forward.

1 MR JOWELL: Yes.

2 MRS JUSTICE BACON: I will leave you to work out when
3 exactly in a revised timetable, but I would suggest
4 then -- how about 2 December?

5 MR JOWELL: Very well.

6 MRS JUSTICE BACON: Then the object being that will be
7 a single statement on the industry experts which will
8 set out the points that are agreed. Then we will
9 explain the points that are not agreed and their
10 position on the points that are not agreed.

11 MR JOWELL: Yes.

12 MRS JUSTICE BACON: All right. So 2 December. There will
13 need to be some adjustment of the other dates. But what
14 I envisage is that one of the things we're going to get
15 attached to the order from today will be a revised trial
16 timetable, so simply the order will specify that
17 appendix B in the previous case management order is
18 replaced by the new revised trial timetable.

19 MR WILLIAMS: Madam, I'm not going to ask to argue
20 something. We have some thoughts on the format of the
21 joint expert report we haven't engaged with Qualcomm
22 about. I think we're all agreed on the Tribunal's
23 approach. It's going to need to let the experts set out
24 their positions, effectively the new material they need
25 in order to respond to the other experts. But one

1 question that has arisen on our side is how far, on
2 Qualcomm's approach, it will be possible for the legal
3 teams to get involved in helping crystallise the issues,
4 which is obviously sometimes a very helpful part of the
5 process. But I don't want to argue it now. I wonder if
6 we might just engage with them about that.

7 MRS JUSTICE BACON: Yes.

8 MR WILLIAMS: But we're on the same page in terms of the
9 reports needing to allow the experts to develop their
10 positions --

11 MR JOWELL: Yes.

12 MR WILLIAMS: -- it's just a question of --

13 MR JOWELL: Agreed.

14 MR WILLIAMS: -- on their approach how one would get to a
15 point where the issues are defined.

16 MRS JUSTICE BACON: Why don't you discuss with the other
17 side.

18 MR JOWELL: We need to set down the parameters also of any
19 purdah, if and when the expert are to go into a sort of
20 process whereby they need to be isolated from the
21 solicitors for that process, so agreement or
22 disagreement, which is sometimes done these days.

23 MR WILLIAMS: I don't think you need to make an order about
24 any of that anyway.

25 MR JOWELL: We can agree parameters.

1 MRS JUSTICE BACON: Perhaps the parties can -- I mean, maybe
2 not even encapsulate this in the order that we're going
3 to give from today and yesterday, but rather just inform
4 the Tribunal at some point, and we will put in the order
5 that the parties should by X date inform the Tribunal of
6 their agreement as to the methodology for that process
7 to be carried out.

8 MR JOWELL: Yes. May I mention one further point on the
9 trial timetable? Which is the question of
10 an application for security for costs or for -- in
11 relation to ATE insurance, which the Tribunal mentioned
12 yesterday.

13 MRS JUSTICE BACON: Yes.

14 MR JOWELL: We have waited on that on the basis that there
15 is a certain amount of ATE insurance and so it's
16 obviously not appropriate to jump the gun and seek
17 further cover until one gets to the point where that is
18 either exhausted or close to being exhausted, which is
19 why we have delayed on this. But we absolutely hear
20 what the Tribunal has to say, that these matters can't
21 be left until close to trial.

22 What we would suggest is that we're very much in
23 the Tribunal's hands. We can make an application. We
24 should first, I think, engage --

25 MRS JUSTICE BACON: You must first engage with --

1 MR JOWELL: And then if the Tribunal wishes to lay down
2 a sort of deadline by which we need to make any
3 application, we're content for that to be -- or to give
4 an indication as to when we should make an application.
5 MRS JUSTICE BACON: Yes, do we have a date for the next CMC?
6 MR JOWELL: We don't.
7 MRS JUSTICE BACON: We have a PTR in July 2025, but there
8 will no doubt be other things we need to decide before
9 then.
10 MR JOWELL: Indeed. It would probably be sensible to have
11 one before the end of the year, I imagine, for the
12 purposes at least of any application in relation to --
13 MRS JUSTICE BACON: Yes, well, I think --
14 MR JOWELL: -- security.
15 MRS JUSTICE BACON: -- if you are in agreement, we will need
16 to have a CMC towards the end of the year and the
17 indication should be that any application should be made
18 at that CMC.
19 MR JOWELL: I'm grateful.
20 Perhaps we can seek to agree directions, again, as
21 we did for this CMC, for the dates as to when any
22 applications need to be made?
23 MRS JUSTICE BACON: Mr Williams.
24 MR WILLIAMS: Can we come back at --
25 MRS JUSTICE BACON: Yes, why don't you just take that away

1 and we will discuss it further. But that may be a way
2 of dealing with it. What I didn't want is for you to be
3 bounced into something at short notice before trial when
4 the potential problem has already been flagged now.

5 MR WILLIAMS: Yes. No, no, we're grateful.

6 MRS JUSTICE BACON: We will come back I think at 2.00.

7 (1.09 pm)

8 (The luncheon adjournment)

9 (2.00 pm)

10 MRS JUSTICE BACON: Yes, Mr Turner.

11 MR JON TURNER: My Lady, we return to Blumberg and it was
12 productive to speak to Qualcomm's legal representatives
13 over the short adjournment.

14 There is still a dispute, but a narrow one, that you
15 will need to resolve based upon the up-to-date position.

16 Following your Ladyship's request at lunchtime, it turns
17 out there are 445 what I will call Blumberg documents.
18 They did the search and that's what it yielded. Some of
19 those may overlap, I am told, with documents we have
20 already received, but none of them have been obviously
21 seen by Mr Blumberg yet.

22 The two issues that arose this morning were,
23 firstly, the terms of access to these documents by
24 Mr Blumberg.

25 That connects with the point, my Lady, that you

1 raised before the short adjournment about logistics for
2 trial and the confidentiality, because we are keen to
3 avoid this witness having to give his evidence in
4 essentially a private session. It should be open, if
5 possible.

6 Secondly, you will have seen in our correspondence
7 we sought an assurance that Qualcomm has not been
8 seeking to encourage Lenovo and would not do so to put
9 any difficulties in the way of Mr Blumberg giving full
10 and frank evidence to this Tribunal. I am pleased to
11 say, on that one, I have received an assurance that they
12 will give a written assurance to that effect, so I need
13 say no more about it.

14 I turn, then, only to the issue of the terms of the
15 access that he is to be given and your Ladyship's point
16 about the logistics and how that's affected.

17 I can deal with that quite quickly. I just need to
18 walk you through three of the letters.

19 May I first hand up -- unless it's already been
20 done. You should have in front of you the two latest,
21 which are the email that came from our solicitors
22 following the hearing yesterday and the response that
23 came in this morning, which is one of the main documents
24 I'm going to take you to.

25 But just before doing that I want to show you two of

1 the prior documents.

2 As you know from what I said yesterday, our position
3 is that Mr Blumberg, who will be, as matters stand, our
4 only witness, should have access to documents from the
5 FTC proceedings which Qualcomm hold electronically,
6 being documents that he personally sent or received, or
7 which were otherwise provided to him for the purpose of
8 his deposition. Our position is it would defeat the
9 purpose of this if a substantial number of these
10 documents were going to be withheld from him, either
11 until he's in the witness box and is cross-examined or
12 perhaps entirely.

13 So, on Wednesday -- this is Wednesday last week --
14 we put forward our proposal for how this was to be done,
15 and you find that in the second supplemental bundle. We
16 have that at page 36. That is tab 6 of that bundle.
17 It's dated, therefore, 24 July. You will see the terms
18 of our request for his access in paragraph 4.

19 Essentially, there are three points, (i), (ii) and
20 (iii), and (i) is documents which he was given in
21 preparation for -- during his preparation.

22 MRS JUSTICE BACON: Yes, all right.

23 MR JON TURNER: You have seen that. The others are
24 essentially the documents that he was personally
25 involved in.

1 Then, if you turn over or look at paragraph 6,
2 bottom of the page and the letters over the page, those
3 are the reasons why we were seeking to have him as
4 a witness, which we were asked about. I took you to
5 that yesterday.

6 Then, finally, paragraphs 10 to 14, just showing you
7 here answers to questions that were raised on the other
8 side and in Ms Thomas's seventh witness statement about
9 Mr Blumberg now because of their concerns that there was
10 a problem that he was essentially in a competitive
11 situation. We pointed out the position is --
12 paragraph 10 -- that he currently works for a company
13 called Video Labs. You see from paragraph 11 that the
14 main aspect of their business concerns digital video
15 technology. It doesn't operate in the field of cellular
16 connectivity and it has only one possible standard
17 essential patent. He doesn't have another current line
18 of business. In relation to his obligations to Lenovo,
19 Mr Blumberg, who is himself a qualified lawyer called to
20 two of the US Bars, says that he's satisfied that there
21 isn't a problem in that direction.

22 Qualcomm's solicitors then respond to this letter on
23 Friday, and you find that in tab -- I think it's in the
24 second correspondence bundle, so you have to put that
25 one-to-one side, at page 8, tab 3.

1 You need to see this because of what is said about
2 his position. So in this letter Qualcomm maintained at
3 that point their opposition to Mr Blumberg having access
4 to these historic documents, and they say that he has
5 a clear conflict of interest.

6 If you look at the second page, letters (a), (b) and
7 (c), letter (a) explained their position that they said
8 he has a clear conflict of interest. They refer to
9 Video Labs essentially as a potential competitor of
10 Qualcomm. They say it appears based on public
11 information that Video Labs competes with Qualcomm in
12 several areas other than cellular connectivity. They
13 refer to a certain number of areas of technology,
14 including cloud, power management, video coding and so
15 on, and Wi-Fi.

16 Paragraph 6, they say that some of the documents
17 sought aren't within Qualcomm's control. These are
18 essentially the ones provided to him for his deposition
19 and that we would need to ask Lenovo about those.

20 Then they demand to know by return if we intend to
21 ask for those from Lenovo or if we have done so already.
22 See that in paragraph 6.

23 We responded on the same day. That is at tab 7 of
24 this bundle, which is page 18. We only dealt with the
25 points where they said they needed an answer by return.

1 We said, in paragraph 4, that we haven't corresponded
2 with Lenovo. Paragraph 5, we trust that Qualcomm won't
3 be doing so in relation to his evidence and we expressed
4 our concern, in paragraph 6, that any approach to Lenovo
5 shouldn't be made with a view to impeding him giving
6 full and frank evidence.

7 We dealt, you will see at paragraph 3 of this
8 letter, with their demand they were also making to know
9 if he would be compensated. We explained it was the
10 usual position.

11 Qualcomm's solicitors respond to this on Sunday.
12 Their answer you will find at tab 11, page 31, and it's
13 a short letter. Here they essentially pivot. You will
14 see in the second paragraph, they now say the content of
15 any communications that they have had with Lenovo will
16 be privileged, but, constructively, they would be
17 prepared to agree to joint dealings with Lenovo going
18 forwards.

19 We then had yesterday's hearing. After yesterday's
20 hearing, we wrote to Qualcomm's solicitors again and
21 that's the email that you should have.

22 We asked them to do two things. One, to ask for the
23 searches that your Ladyship mentioned should be carried
24 out for the Blumberg documents and to repeat or request
25 for an assurance.

1 Now, you have the final letter, which is the one
2 that came in this morning. So if you would, please,
3 take that up, you will see the following: on the second
4 page, there's a little table and all hits with families,
5 top right, that's 445 documents.

6 In relation to paragraph 4, they asked us about how
7 many of those hits contain essentially Lenovo
8 information. They say they don't understand that.
9 Their position is that anything that was provided by
10 Lenovo is not necessarily within their control, they
11 can't disclose it and we would need to go to Lenovo for
12 it.

13 Fair enough. We're concerned here therefore with
14 the documents that were sent to or sent from
15 Mr Blumberg, or which he was otherwise involved in.

16 They then talk about the terms of access. Here are
17 where the two conditions come in. At paragraph 7, they
18 refer to the fact that they have contractual obligations
19 to notify Lenovo of the potential disclosure of this
20 information. So their first point, which they explain
21 in paragraph 8, is that what they propose to do is
22 notify Lenovo that they're going to be making this
23 disclosure to Mr Blumberg, and they say previously they
24 didn't refer to this disclosure or the possibility of
25 Mr Blumberg:

1 "... who was formerly Lenovo's employee and now
2 works for a potential competitor and litigation
3 counterparty of Lenovo being provided with access to
4 Lenovo's confidential information..."

5 Now, the first thing that we were worried about and
6 which we had our minds set at rest over the short
7 adjournment was that they weren't going to be saying to
8 Lenovo, when they communicate with them, that this is
9 the position because that would not be right. We have
10 received a clear assurance they will not be doing that,
11 which I understand will be true both orally and in
12 writing.

13 So, on that basis, notifying Lenovo in accordance
14 with their contractual obligations in a neutral way,
15 keeping us involved, that should be fine.

16 So we come to the second point, which is the more
17 important of those, and this is in paragraph 9. If you
18 cast your eye over that, essentially the proposal here
19 is that they don't disclose, or allow to be disclosed to
20 Mr Blumberg, as opposed to our legal representatives,
21 all the documents if they choose to designate some of
22 them as confidential in the way that he shouldn't have
23 access to.

24 They say the purpose of this is to ensure that
25 Mr Blumberg does not obtain access to Qualcomm's highly

1 commercially sensitive information.

2 So the idea is that he will himself only have
3 access -- unless we make an application to the Tribunal
4 in relation to these documents or any of them, he will
5 not have access to the full set.

6 MRS JUSTICE BACON: So you will get the document. You will
7 be able to review them, and if you want to put documents
8 to him, then you will ask for those to be designated as
9 a Blumberg set; is that the idea?

10 MR JON TURNER: That's it, yes. So this is the way that
11 they put it.

12 The issue between us is, therefore, on how this
13 should proceed, because our position is, as a first
14 matter, that we find it highly unlikely that these are
15 going to be documents which are currently commercially
16 confidential to Qualcomm.

17 It's worth noting the vintage of these documents
18 because they date between the years 2013 and 2015,
19 essentially. It's nine to 11 years ago, and I can show
20 you that if needs be in the judgment, but I don't think
21 I need to do so. But very, very old documents indeed.
22 On that ground alone, it's very hard for us to see that
23 there are documents that do remain confidential to
24 Qualcomm and no examples, no particularisation has been
25 given of why that should be the case.

1 Second point: there's no basis, here, for suggesting
2 that Mr Blumberg's employer, Video Labs, competes with
3 Qualcomm because, for instance, prospective licensees
4 would see Qualcomm's patents as an alternative to Video
5 Labs' patents or because in some other way Qualcomm
6 would be under a competitive disadvantage if Mr Blumberg
7 refreshes his memory for these proceedings by looking at
8 the documents in which he was previously personally
9 involved.

10 Finally -- and we can turn to it because it's behind
11 the letter -- the terms of the undertaking, which it is
12 proposed that he should give which reflects that in the
13 ordinary outer confidentiality ring -- and you should
14 have that separately -- is perfectly satisfactory.

15 The issue on this boils down to the following: we,
16 like your Ladyship, are quite concerned to look ahead to
17 trial and to try to avoid as early as possible the
18 prospect of evidence needing to be given in private
19 session, either totally or people going in and out, and
20 all the friction that will involve in a rather intense
21 period leading up to the trial, if you try to sort it
22 out then or beforehand.

23 It seems to us, in accordance with the usual
24 approach in this Tribunal, what should happen is that if
25 they are going to be saying that documents are currently

1 confidential to Qualcomm and would cause Qualcomm
2 legitimate commercial damage if they were to be seen by
3 Mr Blumberg at least some basis for that more than you
4 have here should be provided, and that the right way to
5 approach this is not to place the burden on us to say:
6 he needs to see X, Y and Z.

7 First, for the reason that the whole point of giving
8 him these documents is so that he has a set, so he can
9 see the context in which he's giving evidence --

10 MRS JUSTICE BACON: Just to cut to the chase, you say that
11 Qualcomm should designate the documents that they think
12 are confidential. And then what?

13 MR JON TURNER: They should designate the ones that they say
14 are confidential. They should explain in relation to
15 those why they are confidential and if -- essentially
16 then we have at least an explanation of what they say.

17 MRS JUSTICE BACON: But then what? Do they get put to
18 Blumberg anyway or what?

19 MR JON TURNER: No, if they are saying, "These are
20 confidential and they can't be seen by him", we accept
21 that that will need to be resolved. But, first, the
22 explanation will need to be provided and it should be
23 for them, essentially, if we disagree, to make
24 an application to you in order to establish whether
25 that's the case or not.

1 That will mean we clear this out of the way at
2 an early stage. It will mean that Mr Blumberg gets the
3 maximal set that he can see and it will produce the good
4 order.

5 MRS JUSTICE BACON: Who am I hearing on this?

6 Mr Scott.

7 MR SCOTT: Yes, thank you, Madam. If I can use as a base
8 our letter of this morning, which I hope you have at
9 least in hard copy and possibly electronically -- if
10 anyone needs a hard copy, by the way, I have stack of
11 them over here. I will take that as a no.

12 So if we can start with a general point, which is
13 that we of course recognise that the Class
14 Representative is entitled to call Mr Blumberg as
15 a witness and we don't want to be obstructive of that in
16 any sense, but we do need to strike a balance between
17 that, and Qualcomm's and Lenovo's legitimate interest in
18 and the confidentiality of their information. Of
19 course, it won't be lost on the Tribunal that Lenovo is
20 not here to make representations about that, and that is
21 something that we have taken into account in our
22 proposal.

23 I will skip over paragraph 3 of the letter, which my
24 learned friend has covered and there's no issue there.

25 Paragraphs 4 and 5 read together, really are just

1 a reminder of what has been the settled position in
2 these proceedings to date, which is that documents that
3 are subject to the US third party protective order are
4 not in Qualcomm's possession or control and never have
5 been, so Qualcomm cannot and will not disclose them.

6 My learned friend took you to these paragraphs and
7 said that was fair enough, I think in his words. So
8 I don't think I need to say any more about that.

9 Paragraph 6 confirms what we're proposing to
10 disclose. This is the 445 documents referred to in the
11 table above. Again, I think we're agreed that's what
12 should be disclosed. So, again, no issue about that.

13 Then we come on to paragraph 7, which is where we
14 start to introduce the conditions that we think should
15 apply to this. As we explain in paragraph 7, one of the
16 reasons for this is that these documents are bound to
17 contain information that is confidential to Lenovo as
18 well as to Qualcomm, and as I have mentioned Lenovo is
19 not here to make representations.

20 Now, that takes me on to paragraph 8(a), where we
21 say that Lenovo ought to be given prior notice.

22 MRS JUSTICE BACON: Yes, and I don't understand Mr Turner to
23 object to that.

24 MR SCOTT: No, that's quite right, I do not understand him
25 to object. There are two points I need to make about

1 this.

2 The first is just as to precisely what the terms of
3 that notice should be. My learned friend made some
4 general submissions about that, so I just want to be
5 clear about precisely what it is that we propose to say
6 to Lenovo and what we don't propose to say.

7 I submit that the notice to Lenovo does need to give
8 Lenovo enough information to understand what the issue
9 is and why we're writing to them. So that means, in my
10 submission, that the notice does need to identify what
11 documents we're talking about and it does also need to
12 say that the document are going to be shown to
13 Mr Blumberg, who is their former employee. That's so
14 that they understand why the issue arises in the first
15 place.

16 We don't, however, propose to say that Mr Blumberg,
17 employer of Video Labs, is a competitor or a litigation
18 counter-party of Lenovo, which I think is what was
19 concerning my learned friend. Lenovo obviously is in
20 a position to take its own view about that and do what
21 it wants with what it's told.

22 So that's what we propose to do by way of notice.

23 I think that now brings us on to paragraphs 9 and
24 onwards, which deal with the confidentiality ring, which
25 is really the focus of my learned friend's submissions

1 and where the real debate lies.

2 Could I, at this point, just show you, firstly,
3 paragraph 9 of this letter refers back to an earlier
4 letter of ours which identifies our concerns, which are
5 raised in a letter of 26 July.

6 MRS JUSTICE BACON: Rather than going back to that other
7 document, just explain what your concerns are.

8 MR SCOTT: Certainly. So the first concern is the one
9 that's really the most germane at the moment and that is
10 the concern that Video Labs is a competitor of Qualcomm.
11 I do need to show you some of the evidence about this,
12 which is in Thomas 7, paragraph 90, which is at core
13 bundle, tab 12, paragraph --

14 MRS JUSTICE BACON: Do we actually need to look at that for
15 the purpose of deciding a procedural point?

16 MR SCOTT: Well, I can make the points orally without
17 showing you the evidence, if that's your preference, but
18 I do think I need to make points.

19 MRS JUSTICE BACON: The proposal is that you should
20 designate the documents which you say are
21 confidential --

22 MR SCOTT: Yes.

23 MRS JUSTICE BACON: -- vis a vis Mr Blumberg and then make
24 an application to the Tribunal if the Class
25 Representative disagrees. That's what we need to decide

1 now, we need to decide a mechanism; we're not making
2 a substantive decision about any disagreement about
3 confidentiality. So I think, possibly, you can just cut
4 the discussion about competitive relationships and just
5 address the Tribunal on the mechanism.

6 MR SCOTT: Understood. In that case I will do exactly that.

7 As my learned friend fairly summarised it, our proposal
8 is that we will designate at the time of disclosure
9 which documents can be shown to Mr Blumberg and which
10 cannot. It will then be for the Class Representative to
11 make an application or a request in the first instance
12 to change the designation of any document that it thinks
13 Mr Blumberg should see, but which we haven't designated
14 in that way.

15 That's our proposal.

16 As I understand it, the point of dispute is that my
17 learned friend says we need to make some kind of
18 reasoned application to prevent Mr Blumberg from seeing
19 any particular documents.

20 MRS JUSTICE BACON: No. It's that you will designate in the
21 first place and explain why you say it's confidential,
22 and if they disagree, then you should come back to
23 the Tribunal. So it's an application in the event that
24 your explanations are not accepted by the Class
25 Representative. It just puts the burden on you because

1 it's your claim to confidentiality.

2 MR SCOTT: Yes, I see that. The only point I would make is
3 that's not -- I don't think that's quite how it works at
4 the moment in relation to confidential information under
5 the existing CRO for designation into the outer or inner
6 ring.

7 So what happens under that regime -- which I can
8 show you in a moment -- is the disclosing party in the
9 first instance gets to designate. It just gets to make
10 a designation it considers appropriate, then it's for
11 the other party to make a reasoned challenge, if it
12 needs to. So that would, to some extent, shift the
13 burden on to the Class Representative consistently with
14 the way it's been done with confidential information
15 more generally.

16 If I can perhaps show you that, if that will be
17 helpful.

18 MRS JUSTICE BACON: Is there any particular reason why
19 we need to maintain that for these documents, which were
20 documents which Mr Blumberg originally had, as
21 I understand it, either sent or received?

22 MR SCOTT: I'll just take instructions for a moment, if
23 I may.

24 (Pause)

25 My Lady, I do need to explain. I think the answer,

1 cutting to the chase, is that we probably can do that,
2 but I just do need to make sure it's very clear why we
3 think this concern arises and why it is that we think we
4 are going to potentially need to designate some
5 documents and then documents Mr Blumberg should not see.
6 In the evidence I didn't take you to earlier, the point
7 really is that Video Labs is not only a patent licence
8 holder, but it's a company that has sued Qualcomm. It
9 has alleged patent infringement against Qualcomm, so
10 there is a very legitimate and real concern about them
11 seeing licence agreements and draft licence agreements
12 and that sort of thing. So this is a real issue.

13 One surmise that has Lenovo might have similar
14 concerns and they're not here.

15 So we can happily accept the process, whereby we
16 will give a reason for our designation in the first
17 instance and the Class Representative can come back. I just
18 want to be clear there is a real issue.

19 MRS JUSTICE BACON: Yes.

20 MR SCOTT: The only other thing I need to say is in relation
21 to the assurance about Qualcomm's prior communications
22 and future communications, indeed, with Lenovo.

23 I spoke to Mr Turner about this, my learned friend,
24 and made it clear we were prepared to answer that
25 question on the basis that the Class Representative accepted
that

1 a question of timing, which should perhaps have
2 direction as to when this should be done.

3 MRS JUSTICE BACON: Yes.

4 MR SCOTT: We were going to suggest at the end of August;
5 that is in part to allow for time for the process of
6 notification of Lenovo, which I understand is agreed, to
7 take place and for any issues hopefully to be ironed
8 out.

9 MRS JUSTICE BACON: Yes. Well, that's only a month away; is
10 that agreed?

11 MR JON TURNER: That's agreed.

12 MRS JUSTICE BACON: Thank you very much.

13 Is the only outstanding issue the expert report page
14 limits? Is that the only outstanding issue?

15 MR WILLIAMS: Yes, I think you wanted to talk about listing
16 future hearings as well. But, yes, other than that.

17 MRS JUSTICE BACON: We're just going to rise for a couple
18 of minutes, and when we return Mr Turner won't be here.
19 This Mr Turner (Mr Justin Turner indicated).

20 (2.29 pm)

21 (A short break)

22 (2.30 pm)

23 MRS JUSTICE BACON: All right. So I think we came to the
24 page limits for the industry experts. What we didn't
25 cover this morning was how long the joint statement is

1 going to be.

2 MR SAUNDERS: My Lady, can I just check: so as regards the

3 Williams and Andrews reports --

4 MRS JUSTICE BACON: Yes.

5 MR SAUNDERS: Those have obviously been served now.

6 MRS JUSTICE BACON: Yes.

7 MR SAUNDERS: You've given an indication, which obviously we

8 entirely understand, that you want them to be as

9 uncomplex, if there were such a word, and as short as

10 possible. I didn't understand the Tribunal to have

11 actually made a direction in respect of those reports.

12 If you are making such a direction, I would just invite

13 you to hear me on whether we should be refiling those.

14 MRS JUSTICE BACON: Can we first start off with picking up

15 where we left off regarding the industry experts?

16 MR SAUNDERS: Yes, of course.

17 MRS JUSTICE BACON: So we have set page limits of 35 for the

18 initial reports. That's Melin and Schneider, I think.

19 MR SAUNDERS: Yes, that's right.

20 MRS JUSTICE BACON: What we didn't set was a page limit for

21 the joint report that's going to be produced on the

22 basis of that. Now, it would be somewhat self-defeating

23 if having set a concise page limit for the initial

24 reports we then were to be given many hundreds of pages

25 of the joint report; what do you propose as a page limit

1 for the joint report?

2 MR SAUNDERS: Can I -- if I may, I'll just take instructions
3 as to what our proposal is.

4 MRS JUSTICE BACON: Yes.

5 (Pause)

6 MR SAUNDERS: My Lady, our proposal for that would be 30
7 each, so 60 in total.

8 MRS JUSTICE BACON: So the single joint report we will get
9 at the end of that will be 60 pages?

10 MR SAUNDERS: The idea being, as I think my Lady --
11 the Tribunal has already indicated that's then the
12 document, as opposed to the cross-references to a host
13 some other documents.

14 MRS JUSTICE BACON: Yes.

15 Mr Williams.

16 MR WILLIAMS: I think the format that was envisaged -- and
17 we will end up with some version of this in any event --
18 is that we will have an agreed part, hopefully, and then
19 an unagreed part, if that's a word as well. Not agreed.
20 I suppose, in a way, it's the not agreed part that
21 you're most concerned to put a page limit on, Madam.

22 I was just wondering: with the 30 and 30, there's
23 just a question of how that works when there's going to
24 be an agreed section as well.

25 MRS JUSTICE BACON: I think that we're starting off with 35

1 each. Of that, there will be some overlap because some
2 of that will be agreed, and we will obviously be
3 interested in the agreed parts as well as the not agreed
4 parts. So, at the end of the day, we need something
5 that is actually going to be useable and is going to
6 have not vastly more than the information that we need
7 for the purposes of the trial.

8 MR WILLIAMS: I can well see that the combination of the
9 parts should be 50 to 60 pages, but the only point I'm
10 making is: saying it should be 30 each, I suppose it
11 didn't seem to me to account for the fact that it's
12 a statement of matters agreed and not agreed --

13 MRS JUSTICE BACON: Yes, it's a joint statement. And, all
14 right, I think that I will say 50 to 60 pages in total.
15 I'm not going to specify how that's sliced up.

16 MR WILLIAMS: No, exactly.

17 MRS JUSTICE BACON: If it's more the lower end of that
18 range, then I am sure all will be very happy.

19 All right, that's the industry expert.

20 Now, the expert reports, which have already been
21 served. Andrews and Williams; what are we going to do
22 about those?

23 MR SAUNDERS: Well, my Lady, there are -- my Lady, I'm not
24 sure to what extent the Tribunal has had an opportunity
25 to look at those. But Professor Williams deals with the

1 question of whether patents are practiced on the chips
2 alone or whether by handsets as sold. That is something
3 which -- more generally, Qualcomm's position in this
4 litigation is that it should be possible to proceed on
5 this issue without expert evidence because, ultimately,
6 it is a question of whether the claims of Qualcomm's
7 patents read not only to the baseband chip, but also
8 cover things within the network and the device, so
9 therefore it follows that it's necessary for OEMs to
10 take an end device licence.

11 Now, that's not normally a controversial position.
12 It's not entirely clear in the light of clarifications
13 that have been made to the Class Representative's case
14 how this now fits into their case, but it is something
15 which has been ventilated and they have insisted on
16 there being expert evidence on this topic.

17 The trouble is that topic is in itself quite
18 a technical question because you have to do some claim
19 construction and you have to look at where -- what bits
20 of the device are doing what. So that is the Williams
21 evidence.

22 It's 22 substantive pages in the report as it's
23 filed and -- other than the introduction and the other
24 parts of the report, and it is, we would say, given the
25 complexity of the topic, quite a succinct report.

1 Now, we hope that it is actually possible -- it
2 should be possible to reach some agreement about this,
3 because whether there is a potential infringement by
4 an OEM is something which should be capable of being
5 agreed.

6 One clue to the fact there is a potential
7 infringement by an OEM is that in every UK FRAND action
8 the patentee has gone and sued the importer, the maker
9 of the phone, which is a clue that there's often
10 infringement in the SEP.

11 So, you know, the question is: does Qualcomm have
12 such SEPs?

13 The answer is yes, we have identified some. We
14 should be able to agree this and cut this down a lot.

15 MRS JUSTICE BACON: Could we have a similar process for the
16 technical reports as we have agreed for the industry
17 reports?

18 MR SAUNDERS: My Lady, I think yes. What we're concerned
19 about is if we have to trim -- these are already quite
20 complicated reports, but they should be capable of a lot
21 of agreement. We would hope that it is possible to
22 produce a joint statement that again succinctly
23 summarises what actually matters, and insofar as there
24 is a dispute that need to be adjudicated, then
25 the Tribunal can look at that and, if necessary, give

1 directions as to how to deal with it. But what we are
2 loathe to do is to have refile and chop down these
3 reports in circumstances where a lot of care has been
4 given to producing this evidence quite succinctly in the
5 circumstances anyway.

6 MRS JUSTICE BACON: So, if there were to be a direction that
7 rather than refiling we agree a page limit for
8 Mr Ingers' response and then a page limit for the
9 overall joint statement.

10 MR SAUNDERS: My Lady, I think that would solve the problem.
11 Insofar as there's a problem with that, we can come
12 back.

13 MRS JUSTICE BACON: In that case, because we're not actually
14 ever likely to have to read Andrews and Williams, we
15 don't have to put to you the trouble of refiling them.

16 MR SAUNDERS: My Lady, I would hope that insofar as -- you
17 may have to look at the joint statements that come out
18 of this. It's quite likely that because they deal with
19 this issue of substitutability the consulting economists
20 are going to have to say: well, this is all described in
21 this report.

22 But it is very, I submit, unlikely that you're going
23 to have to really get into the nitty-gritty of claim
24 construction and various other things. If that really
25 is the proposition, then it needs to be explained how

1 that really makes a sensible part of the case.

2 MRS JUSTICE BACON: Well, the aim of the exercise should be
3 that we reduce the technical evidence to a manageable
4 compass and I would not expect, following the joint
5 statement, that we're going to have to go back and look
6 at the original reports.

7 MR SAUNDERS: No, well, that's understood. We will work
8 towards that, of course.

9 MRS JUSTICE BACON: Because that would defeat the purpose of
10 the joint -- of what we envisage the joint statement
11 would be.

12 Who is dealing with this on your part? Is it
13 Mr Williams?

14 MR WILLIAMS: I am, Madam. But, I mean, I was prepared to
15 deal with the sort of slightly more prosaic topic of the
16 page limits.

17 We're a bit unhappy about the idea of this
18 proceeding on the basis that Qualcomm thinks its
19 evidence should be capable of agreement and we therefore
20 embark on a process whereby it's all -- we all proceed
21 on the basis that in due course we will be able to agree
22 with them.

23 I mean, at the moment they have put in a certain
24 amount of volume of evidence and, at the moment, our
25 position is that we need to consider it and respond to

1 it. Where we will come out, I don't have instructions
2 about that at the moment.

3 The concern we have in part about these reports --
4 I made the point about the exhibits yesterday, but the
5 Williams report, it's 34 pages, but it has a 57-page
6 technical annex, you've probably seen, which is
7 a technical analysis of 25 patents, I think. What I can
8 say is that we don't think that is an annex, in the
9 sense of something that simply sits outside the body of
10 the report, it's integral to the substance of the
11 report. So it's not really a 34-page report or
12 a 22-page report. It's a 90 something page report, if
13 I have my arithmetic right.

14 Now, it's a matter for the Tribunal whether it
15 thinks that evidence is excessive, but we aren't happy
16 with the idea that Qualcomm assures the Tribunal that we
17 all ought to be capable of agreement and so we simply
18 work towards agreeing with them. At the moment, we have
19 to respond. We will need pages --

20 MRS JUSTICE BACON: Absolutely. We absolutely understand
21 that you're going to have to respond to it. The
22 question is well, first of all, whether anything is
23 removed before you respond. Having raised the concern
24 about the length, we have not looked in sufficient
25 detail at the report to know exactly what needs to be

1 trimmed, save that on my initial cursory reading of them
2 it looked like there was a lot of technical detail that,
3 as I said yesterday, will never feature in our judgment.

4 Now, you may take the view that when you come to do
5 the joint statement that detail can simply be stripped
6 out. It's not feasible for us to go through the report
7 now and agree what needs to be there or not.

8 Question 1: is it necessary to strip out material
9 now or can that be effectively left to the later stages
10 of doing the joint statement?

11 What's your position on that?

12 MR WILLIAMS: I think prior to the Tribunal's indication
13 yesterday, that you thought the reports needed to be
14 pared back, we were resigned to the ordinary process of
15 seeing what we agreed with, what we didn't agree with,
16 and essentially getting to that latter stage at which we
17 work out what's truly in issue.

18 MRS JUSTICE BACON: Yes, all right.

19 MR WILLIAMS: So we were expecting to do it in that way.

20 MRS JUSTICE BACON: You were expecting to do it anyway, all
21 right.

22 So, secondly, I think that if we can get to a joint
23 statement that is a manageable length, then I don't need
24 to be so strict about the page limits of the initial
25 reports because in a way, as I said, we're not going to

1 really read them. Just to reiterate, the joint
2 statement will replace everything that goes before from
3 the Tribunal's perspective. We are not to be expected
4 to read them. I don't want to see, in skeleton
5 arguments or closing submissions, exhortations to go
6 back and read the original statements, or, in grounds of
7 appeal, the fact that whichever side doesn't succeed
8 considers that we haven't read some footnote in
9 100 pages of technical annex. So I think the
10 expectation will be that the Tribunal will only refer to
11 the joint statement. On that basis, I don't think
12 I need to be quite so strict about the initial pages.

13 How many pages do you think that Mr Ingers needs to
14 respond to what was necessary?

15 MR WILLIAMS: We were going to propose 75 as an outer limit
16 on the grounds that it's the aggregation of the two
17 reports.

18 MR SAUNDERS: Shouldn't the principle be that they should be
19 able to respond in the same number of pages that we
20 have?

21 MR WILLIAMS: That was --

22 MRS JUSTICE BACON: Yes, that was his proposal.

23 MR SAUNDERS: So citing for both reports, that seems --

24 MRS JUSTICE BACON: That was Mr Williams' proposal. It
25 would be 75 to cover both.

1 MR WILLIAMS: Unless you would like 75 pages in response to
2 each one, Madam.

3 MRS JUSTICE BACON: No, say 75 pages overall, then the joint
4 statement. I think I'll leave you to agree timetables
5 for a joint statement, but a joint statement that will
6 then replace what's gone before.

7 MR WILLIAMS: It's hard to say at this point, Madam,
8 obviously. Are you thinking of something of the order
9 of 35 pages being the length of the report that you
10 permitted in relation to the industry experts this
11 morning? I guess I'm to some degree asking for
12 an indication of what your gut instinct is
13 proportionate.

14 MRS JUSTICE BACON: No, the industry expert statements and
15 the 35 pages was the 35 for the initial statements.

16 MR WILLIAMS: I understand, but that was a sort of
17 manageable document.

18 MRS JUSTICE BACON: And I have just agreed that there should
19 be 50 to 60 pages for the joint statement. Depends how
20 controversial this is going to be and what we really
21 need, but it's something of the order of 50 pages max,
22 we would hope would be what we actually need in terms of
23 a joint technical report, because by then you will have
24 agreed what we do need to have and what we don't. I'm
25 hoping that's not going to be accompanied by hundreds of

1 pages of technical annex.

2 MR WILLIAMS: No, understood.

3 MRS JUSTICE BACON: Mr Saunders.

4 MR SAUNDERS: My Lady, that's -- the indication is well
5 received, but I do make the point about
6 Professor Williams and this issue about location. It
7 really is -- there will come a time where I think,
8 I suspect, we may have to raise that more formally
9 before the Tribunal because it is not at all clear to us
10 exactly how this location issue really feeds into the
11 Class Representative's case and exactly how far they're
12 saying that proposition takes them.

13 But I just put that down as marker, without any --
14 MRS JUSTICE BACON: All right. Well, if we say 50 pages for
15 the joint statement, and then if that need to be revised
16 and if there are significant disputes about areas that
17 need to be covered, then you will have to come back to
18 the Tribunal.

19 MR WILLIAMS: Can I just make one other small point, Madam?

20 MRS JUSTICE BACON: Yes.

21 MR WILLIAMS: It is a point we have raised with the other
22 side in correspondence. Professor Andrews' report is
23 about 40 pages. He previously prepared a report in the
24 FTC proceedings and at various points in his report --
25 I won't take you to them -- he says: see my FTC report,

1 such and such.

2 If one adds up the total of the sections to which he
3 makes reference they total 40 pages; they total the
4 same.

5 MRS JUSTICE BACON: Yes.

6 MR WILLIAMS: Now, we wrote to Qualcomm, we said: is this
7 a necessary part of the report?

8 And they have told us that it's not and it's just
9 been provided because it's very helpful of them to
10 provide it. On that basis we're going to treat those
11 references as if they're not there.

12 MRS JUSTICE BACON: Yes. Also, we're not going to want
13 cross-references of that nature in the joint report.
14 The joint report need to contain everything that we need
15 to know.

16 And what about exhibits? However many thousands of
17 pages there are kicking about.

18 MR WILLIAMS: That's a matter for Qualcomm.

19 MR SAUNDERS: My Lady, the reason -- the experts obviously
20 are mindful of their duties to the Tribunal and they
21 don't want to be said at trial to have presented
22 a partial view of their evidence. That is the reason
23 why there are cross-references to the FTC evidence,
24 because the same witness has given evidence on the same
25 matters previously and he doesn't want it to be said

1 that he has given a partial account or an inconsistent
2 account, or anything else.

3 Now, it is not relevant in that sense, as we have
4 explained in correspondence, but he feels it's important
5 to draw that to the Tribunal's attention, so they have
6 the full picture.

7 As far as the joint statements are concerned, if we
8 are going down the route of having comprehensive joint
9 statements there is a little bit of a concern on our
10 side of the room that the norm, or what has become the
11 TCC inspired process of lawyers being involved in the
12 agenda and then leaving the experts to it, may -- we may
13 need to think about that a little bit more, because if
14 that then becomes the totality of the evidence, then it
15 may be necessary for the parties to give a slightly
16 fuller agenda or something else, so that the experts can
17 work on that. But we can think about that.

18 MRS JUSTICE BACON: Yes. I already agreed -- yes, I think
19 that was canvassed before the lunch adjournment and I
20 agreed that you would be able to discuss between you how
21 the mechanics --

22 MR SAUNDERS: To give them a steer.

23 MRS JUSTICE BACON: Yes.

24 I think that the Tribunal's concern is although
25 we need to make sure that the issues necessary for

1 the Tribunal, and of course the other experts, are in
2 the statements, at the end of the day these should be
3 documents produced by the experts and not by the
4 lawyers.

5 MR SAUNDERS: Yes, I think everybody can see the sense in
6 that. But the key thing being that they're given enough
7 guidance so they know what to include.

8 MRS JUSTICE BACON: Absolutely. Yes.

9 MR SAUNDERS: As far as the annexes are concerned, one of
10 the reasons why the annexes are long is because they
11 include the entirety of documents, even if a single
12 paragraph is referred to or a single page. But, again,
13 we would suggest that's of more use to the Class
14 Representative because then they have everything in one
15 place. But if they want that trimmed, it can be. But
16 we would suggest it's not really necessary at this stage
17 because one can immediately see what they have to look
18 at. It's not like that has to be read in a linear
19 fashion, it's just if page 18 of a book is referred to
20 what happens is either the entire chapter or sometimes
21 the entire book is included in the annex.

22 MR WILLIAMS: We were concerned about this. I think,
23 speaking personally, without instructions, I can see
24 that if we're going to move forward to a position where
25 these documents are superseded by the joint statement

1 the fact we had 3,000 pages of exhibits one at one stage
2 might not matter in the end.

3 MRS JUSTICE BACON: Exactly, yes. What's included as
4 attachments or exhibits to the joint statement will be
5 limited to that which is genuinely necessary.

6 MR WILLIAMS: I think that's where this goes, Madam. We
7 won't end up in a position, the conventional position
8 where the trial bundle necessarily includes all the
9 exhibits to the original report. Everyone will take
10 a cold look at this and say: what do we really need?

11 MRS JUSTICE BACON: Yes, that's helpful.

12 MR SAUNDERS: That makes sense.

13 MRS JUSTICE BACON: I think that's very helpful, thank you
14 to both of you.

15 Now, let's look at the competition experts. What is
16 proposed regarding page limits for the competition
17 economists?

18 MR SAUNDERS: The answer is I'm not sure we have raised that
19 because these issues of page limits are so recent we're
20 just not in a position, having raised that with
21 Dr Padilla, to give a proposal. That is something we
22 can take away and raise in correspondence, if necessary.

23 MR WILLIAMS: Madam, we have some ballpark indications from
24 Mr Noble and his team. I don't know if it's helpful to
25 provide those to get the ball rolling or whether you

1 just want us to take it away?

2 MRS JUSTICE BACON: Yes, well, all right, the first question
3 is then: are we going to have the same process of
4 a joint statement?

5 I think in respect of the competition experts, I can
6 see that that's likely to be different and there's
7 likely to be a far greater area of disagreement and
8 controversy between them, so I wasn't expecting to have
9 the same joint statement that would supersede the
10 previous ones.

11 MR WILLIAMS: We have a different process anyway from some
12 of the industry experts because we have Mr Noble first.
13 It's sequential. On Dr Padilla's analysis, he goes
14 first and Mr Noble responds, and on the economics it's
15 in reverse. Then there's three reports. There's
16 a report to Mr Noble, a response from Dr Padilla, and
17 then there's a reply from Mr Noble. Then the joint
18 statement comes at the end of that, so it's
19 a different --

20 MRS JUSTICE BACON: That's a different process. So I think
21 the timetable will remain. The process of production of
22 the reports will remain. The joint statement will take
23 its usual course, setting out what's agreed and what's
24 not agreed, rather than trying to replace what's gone
25 before.

1 Can you indicate your ballpark suggestions?

2 MR WILLIAMS: Our ballpark for the first report was
3 150 pages on the assumption that Dr Padilla would have
4 the same to respond and that the reply report, one would
5 then expect it to hopefully be shorter, possibly up to
6 100 pages.

7 Those are our ballpark figures and they aren't more
8 than that at the moment.

9 MRS JUSTICE BACON: But we start off with Dr Padilla's
10 leveraging analysis?

11 MR WILLIAMS: I beg your pardon, I wasn't focusing. I meant
12 the main reports. Dr Padilla, I guess that's
13 principally a question for Qualcomm in the first
14 instance, but if they don't a ballpark figure then ...

15 MR SAUNDERS: My Lady, I'm afraid the position is we haven't
16 discussed this with Dr Padilla. He's been in trial and
17 we're just not in a position to give you a figure today.

18 MRS JUSTICE BACON: For my part, I think 150 is too long.
19 So I suggest that you go away and discuss that. How
20 quickly are you going to be able to come to a joint
21 landing point? Or even if not agreed, individual
22 landing points?

23 MR SAUNDERS: The answer is I don't even know what
24 Dr Padilla's availability is, but that shouldn't hold us
25 up too much. We must be able to get an answer fairly

1 soon on that.

2 MRS JUSTICE BACON: Mr Williams?

3 MR WILLIAMS: I'm sorry, Madam.

4 MRS JUSTICE BACON: I'm just wondering: is this something

5 that we're going to be able to put in the order or is

6 this going to have to wait?

7 MR WILLIAMS: I don't think so, but I think the fact -- I'm

8 glad I raised the ballpark figure because you've reacted

9 to it. I think if we now take that away -- I don't know

10 if you're able to provide us with any advance on 150 is

11 too long, Madam?

12 MRS JUSTICE BACON: Well, you know the traditional rule that

13 judges fall asleep after 100 pages, you might take that

14 as an indication.

15 MR WILLIAMS: We hear that, Madam.

16 MRS JUSTICE BACON: All right. That won't go in the order.

17 What I would suggest is that the page limits are just

18 inserted -- the page limits so far, as we have agreed

19 them now, get inserted into the trial timetable, the

20 revised trial timetable. We won't therefore have page

21 limits for the competition -- economists. I think that

22 what I will ask is that by -- can I say the end of the

23 first week of August?

24 By 9 August the parties should indicate to

25 the Tribunal their position agreed or not as to the page

1 lengths for the economists. Then the Tribunal will
2 endeavour to let you know if that's agreed the following
3 week.

4 MR SAUNDERS: Yes, 9 August is fine.

5 MRS JUSTICE BACON: All right, thank you.

6 MR WILLIAMS: We do have Dr Padilla's evidence on that --
7 first tranches in September, so if the Tribunal is going
8 to set a limit, I guess Qualcomm need to know sooner
9 rather than later on that, Madam.

10 MRS JUSTICE BACON: Do you want this to be dealt with
11 earlier? Do you want to come back to me by the end of
12 this week, then I can let you know in the week beginning
13 5 August?

14 MR SAUNDERS: Dr Padilla is in trial at the moment, so we
15 may -- I'm not sure to what extent we can get hold of
16 him this week.

17 MR WILLIAMS: I was only.

18 MR SAUNDERS: No, no, I'm grateful.

19 MR WILLIAMS: I was agreeing with your Ladyship.

20 MR SAUNDERS: I'm grateful to my learned friend for his
21 compassion. We can't really take it much further today.
22 That's the problem.

23 MR WILLIAMS: No, it suddenly occurred to me the first stage
24 does need resolution.

25 MRS JUSTICE BACON: It does need resolution, okay.

1 Thank you very much. Is there anything else that
2 we need to decide as to the timetable?

3 MR JOWELL: I think just the date for the next CMC.

4 MRS JUSTICE BACON: Yes.

5 MR WILLIAMS: So we have heard what you said before the
6 short adjournment, Madam. We wondered if we might aim
7 for -- it depends on lots and lots of things, but our
8 starting bid was the week of 9 December.

9 MRS JUSTICE BACON: All right, so I'm afraid I have
10 availability problems in December. Yes, early December.
11 I am in a trial. Actually, I'm in a trial -- I'm in two
12 trials back-to-back from the start of October until the
13 middle of December.

14 I think there could be -- there is a window of time
15 between the 16th and 19th.

16 MR WILLIAMS: Of December?

17 MRS JUSTICE BACON: December.

18 MR WILLIAMS: I should say that at the moment it struck us
19 that this could be a provisional one-day listing. One
20 doesn't know at this stage what will need resolving
21 then, if anything.

22 MRS JUSTICE BACON: Yes, because I also have another hearing
23 to fit into that window of time as well, I think, and
24 I haven't even canvassed availability of the remainder
25 of the Tribunal.

1 Provisionally, I think it will need to be a one day
2 listing. If I can indicate if it's going to be
3 in December it will need to be in that window, and if it
4 can't be in that window, then we will be looking
5 at January. Is January going to be too late?

6 MR WILLIAMS: Well, we did think about January, but our
7 economic evidence is due in the middle of January and
8 then the baton is handed to Qualcomm. To some extent
9 it's a matter for them, but from my point of view that's
10 quite a big deadline quite soon after the holiday and
11 so, just trying to sequence things, that would be a bit
12 difficult.

13 MRS JUSTICE BACON: Yes.

14 MR WILLIAMS: A bit after that would be more doable, but
15 obviously that's partly speaking from our point of view.
16 Something in the first latter part of January or first
17 part of February, subject to Qualcomm's position.

18 I don't want to pick a time that's convenient for us
19 and not for them, but that's our position.

20 The other thing, while I'm on my feet, Madam,
21 obviously it's possible that things will arise before
22 then, obviously. We hear what you say about your
23 availability, but, speaking hypothetically, if anything
24 were to arise, for example, from the privilege exercise,
25 I assume you would want that brought forward sooner

1 rather than later.

2 MRS JUSTICE BACON: Yes, and in which case I just need to
3 make time around the margins of my trial.

4 MR WILLIAMS: Yes. From our point, we just wanted to get
5 clarity. For some issues --

6 MRS JUSTICE BACON: Absolutely.

7 MR WILLIAMS: -- you would see them as needing to come
8 forward sooner than that.

9 MRS JUSTICE BACON: If it's necessary to have an early
10 morning hearing -- I know that's not ideal for everyone,
11 but that may be necessary.

12 MR WILLIAMS: Even if your Ladyship can't deal with it then,
13 at least we could have a sense of direction, I suppose.

14 MRS JUSTICE BACON: Yes, all right.

15 I'm going to have to see what the availability of
16 the rest of the panel is. I hear what you say. If it
17 can be done in December I think that would be ideal.
18 Otherwise we will propose dates that don't interfere too
19 much, if we can do that with everyone else's ongoing
20 work streams.

21 Mr Jowell, do you have a preference?

22 MR JOWELL: We have a preference for December, if possible,
23 also for December. Of course, we will fit in when it's
24 convenient.

25 MRS JUSTICE BACON: Thank you.

1 Is there anything else?

2 MR WILLIAMS: Not on our side.

3 MR JOWELL: Nor on ours.

4 MRS JUSTICE BACON: There's one really technical logistical
5 point. We have a number of documents and passages that
6 are confidential. There is a bit of a problem if the
7 highlighting is in yellow, because that's the colour
8 that we would also use and, unfortunately, if we're
9 doing it online it's indistinguishable to our
10 highlighting online and highlighting for
11 confidentiality; is it possible in the next bundles that
12 are prepared -- this doesn't need to go into the order,
13 but those behind you will have -- if the confidential
14 passages are highlighted in some shade of red, so when
15 we are marking the bundles up as -- at least I do
16 electronically only, I can highlight passages that
17 I want without confusing between what's confidential and
18 what's not. So that's just a technical point.

19 I think that's everything. You will need to be
20 providing a draft of the order. I know there's lots to
21 discuss. Can you suggest when you might be able to send
22 that to the Tribunal? Agreed so far as possible,
23 I should say.

24 MR JOWELL: Well, perhaps we can have a date by which the
25 (audio distortion) if they provide a draft to us by

1 a particular date and then we can have some time to
2 review it.

3 MR WILLIAMS: To some extent, it depends on your
4 constraints, Madam, because I know last year you were
5 quite constrained and you needed it provided to you in
6 short order to deal with it.

7 MRS JUSTICE BACON: Unhappily, I'm sitting for the next few
8 weeks, but it needs not to await the end of that period.

9 MR WILLIAMS: No, but it's less urgent than was this time
10 last year.

11 MRS JUSTICE BACON: It's less urgent than this time last
12 year. Can I suggest that the Class Representative provides a

draft

13 of the order to Qualcomm by close of business on
14 Thursday.

15 MR WILLIAMS: Yes, Madam.

16 MRS JUSTICE BACON: And Qualcomm reply by close of business
17 on Monday, and that a draft, agreed so far as possible,
18 is sent to the Tribunal by close of business on Thursday
19 next week, the 8th.

20 MR JON TURNER: Of course.

21 MRS JUSTICE BACON: With, at the same time, any submissions
22 on what's not agreed; is that doable?

23 MR JOWELL: Eminently doable, yes.

24 MRS JUSTICE BACON: All right. I'm aware that the Tribunal
25 and the panel are not the only ones who are going on

1 vacation, so if that's going to cause anyone a problem
2 please say so now.

3 MR WILLIAMS: I think --

4 MR JOWELL: I'm reminded, having said that it's eminently
5 doable, we may need to adjust it a little because with
6 the time change for California, the time difference with
7 California, close of business on Monday is actually
8 Sunday, so -- for those there, so it doesn't give them
9 any chance for a Monday effectively. So, if we to try
10 to -- if we could have until the Tuesday --

11 MRS JUSTICE BACON: 10 o'clock on Tuesday.

12 MR WILLIAMS: Can I say, we have availability issues moving
13 forward as well. So we might do it tomorrow, if that
14 helps to accelerate the process.

15 MR JOWELL: Still has the weekend issues for us.

16 MR WILLIAMS: You would then have --

17 MR JOWELL: We could have at least until Tuesday morning
18 that would be helpful.

19 MRS JUSTICE BACON: Why do you need that long?

20 MR JOWELL: Otherwise we effectively only have --

21 MRS JUSTICE BACON: If you're given a draft order, this is
22 a draft order and everything is going to be on the
23 transcript, and I'm sure those behind you will have
24 diligent notes of what was decided. If you get a draft
25 order by close of business tomorrow; why don't you then

1 say close of business on Friday for your response, which
2 will not be a weekend, then you can send the Tribunal
3 the order agreed so far as possible by close of business
4 on Wednesday or Thursday morning, or one of those.

5 MR WILLIAMS: I think if we do it that way at least that
6 will mean that those on our side can see Qualcomm's
7 comments before people start to go away, that's all.

8 MRS JUSTICE BACON: Yes.

9 MR JOWELL: We can certainly try. I should say that our
10 in-house lawyers will be instructing -- a lawyer
11 will be travelling on Friday, a 14-hour --

12 MRS JUSTICE BACON: Most of this doesn't need instructions.
13 It's simply what the Tribunal has ordered.

14 MR JOWELL: Of course, and of course --

15 MRS JUSTICE BACON: A bit of negotiation about timing.

16 MR JOWELL: I appreciate that. But one does need to -- at
17 the end of the day, if there is an issue, one may need
18 to take instructions. Can we say we will do that on
19 a best endeavours basis? And if something arises --

20 MRS JUSTICE BACON: Yes, first draft by close of business
21 tomorrow. Qualcomm best endeavours, close of business
22 Friday. Order to be sent -- agreed as far as possible,
23 to be sent to the Tribunal by close of business on
24 Wednesday with comments on any matters not agreed. Then
25 the Tribunal will then decide any disputed points.

1 MR JOWELL: We're grateful.

2 MRS JUSTICE BACON: Hopefully then by the end of the next
3 week.

4 All right.

5 MR WILLIAMS: Just to be constructive, in fact
6 Ms Fitzpatrick is around Thursday and Friday, and if
7 it's possible to avoid storing the problem up until we
8 get the comments --

9 MRS JUSTICE BACON: Can have discussions.

10 MR WILLIAMS: -- speak just to try to iron things out.

11 MRS JUSTICE BACON: I'm sure that would be a cooperative and
12 constructive approach.

13 Is there anything else for us to deal with now?

14 MR JOWELL: Nothing. Just for us to thank the Tribunal for
15 their time.

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

17 (3.06 pm)

18 (The hearing concluded)

19

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