IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1382/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 21st June 2024

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

BETWEEN:

Consumers' Association

Class Representative

v

Qualcomm Incorporated

Defendant

A P P E A R AN C E S

Jon Turner KC and Antonia Fitzpatrick (instructed on behalf of Consumers' Association)

Daniel Jowell KC and Jonathan Scott (instructed on behalf of Qualcomm Incorporated)

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email:
ukclient@epiqglobal.co.uk

Friday, 21st June 2024

(10.30 am)

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

Yes, Mr Turner. Is there an agreed running order?

MR TURNER: It is my application. I was proposing to open it as quickly as possible and in the usual way to respond to the submissions of Mr Jowell.

MRS JUSTICE BACON: And you propose to deal with all parts of the application together?

MR TURNER: Right. There are two parts of the application. My Lady, this is our application. You have seen that we seek an order on two points. Our case is that these arise from developments in the litigation since January, a practical need to meet the litigation timetable which has been set down and above all a need to ensure that the Class Representative can properly prepare its case for trial and is put on an equal footing with the industry Defendant, Qualcomm.

With your permission I will make quickly some introductory comments and then turn to the submissions in the manner I have said.

Our draft order is at tab 4. I don't know if you are working electronically. The page is 61 and essentially has two paragraphs, two points. The first point stems from an impasse about whether certain matters that Which?'s industry expert intends to give an opinion on are relevant to the scheduled liability trial which we are all calling Trial 1.

It came to a head from Qualcomm's solicitors in early May and you will have seen from

the solicitors that it has turned into a much deeper and more fundamental argument about the very nature of Which?'s case on abuse of dominance. You will also have seen from our written submissions we consider Qualcomm's arguments on this to be without merit. We have since received Qualcomm's skeleton yesterday, and I will deal with that, but the question for you, for the Tribunal, is are the points that Dr Matthias Schneider wishes to address in his report due on 6th September currently matters for Trial 1.

Underlying this Qualcomm's litigation tactic of purporting to not understand the case is causing real friction behind the scenes on a continuing basis.

MRS JUSTICE BACON: I don't think it is helpful to talk about it as a litigation tactic. Qualcomm has said categorically --

MR TURNER: Qualcomm's complaint. My Lady, I accept that. Qualcomm's complaint, saying that it does not understand the case is causing real friction on a continuing basis in the preparation of the case for the trial, and that is why, with your permission, it is necessary for me to deal with it.

If you go to page 23 of the bundle, which is Mr Jowell's submissions and look at paragraph 7 near the foot of the page, you will see it is even said that our case appears to be --

MRS JUSTICE BACON: Are we talking about his skeleton argument, because I have a lot of this in hard copy?

MR TURNER: No, this is not the skeleton argument. This is the written submissions that preceded --

MRS JUSTICE BACON: Yes.

MR TURNER: This is 5th June document.

MRS JUSTICE BACON: Yes.

MR TURNER: If you are looking at that in hard copy it is towards the bottom of that

page. He says that our case appears to be that Qualcomm's, what they call chipset supply practice, what we call, as you see from the second line, the no licence, no chips policy -- it is the same thing -- is not abusive in and of itself. That's how they understand the case, and if he has misunderstood this then he will make an application for a strike-out.

He has misunderstood this and it needs to be made clear so that the parties can actually get on with the preparations for trial and deal with the point that's immediately before the Tribunal today in relation to Dr Schneider.

The second issue for today is that we are seeking answers to three requests for information. The purpose of these is to seek information on the Defendant's strategy underlying its royalty payments which it demands for the patent portfolio, and the justifications given to counterparties which support the patent licensing negotiations.

Now we say this is a central issue that will fall to be determined at the trial. There are two practical reasons why this information should be ordered to be given now. The first is that Which? has over the last six months or so expended tremendous efforts and cost in reviewing the Defendant's disclosure. So in particular we have aimed to find documents in which Qualcomm discusses its strategy or puts forward to counterparties in the patent licensing negotiations its justification for the royalty rates that it seeks for its portfolio based on the value of the portfolio.

Now we had hoped and expected to find material casting light on those matters. We have to date found very little. In part, this deficit may be explained by the heavy redactions that have been applied to Qualcomm's internal documents in the disclosure, and that is a matter that we are raising with Qualcomm separately and which may form an agenda item at the next CMC, currently scheduled for late July.

Now these problems have also been exacerbated, as you will have seen from the evidence filed, by the manner in which the disclosure has been given, and I make it

clear we attribute no blame here to Qualcomm's solicitors. We are dealing with a practical issue for the litigation. We are where we are. 450,000 or so documents provided last November, so the vast majority of the disclosure, has been presented in a format that makes an ordinary efficient disclosure review by solicitors impossible.

The headline information from Ms Boyle's witness statements, which you will have received, is essentially this.

Point one. The vast majority of this, which is almost 90%, consisted of scanned document images, sometimes repeatedly scanned, from other cases.

Second, the quality of the underlying text files, which is what you use for electronic searching when you are doing a disclosure review, is too poor to be reliable in a significant number of cases.

Point three. If you abandon the electronic searching and you resort, as the disclosure team, to a fully manual review, about two-thirds of all the scanned material is difficult to read and in some cases almost impossible to read. I can give you some examples. It is essentially either heavily pixilated, it's scrambled or too small to actually discern the text.

So against the very real pressure of the litigation timetable which frames all of this that has brought into sharp focus the need now for answers to three key information requests. Those are the ones set out in paragraph 43 of our application letter, which you have on page 15 of the bundle in tab 1.

MRS JUSTICE BACON: Are you talking about little (b) (i) to (iii)?

MR TURNER: Yes, I am. They are cross referred to in the draft order.

MRS JUSTICE BACON: There are four subparagraphs to (b).

MR TURNER: There are. That is because (i) and (ii) you will see are alternatives. The first essentially is asking the Defendant to provide information on the principal justifications which it gives for the rates it charges to the industry for its portfolio. One

asks what that is, and this is because it is believed that the Defendant puts forward consistent justifications to all counterparties to justify the consistent rates it charges, but if that were not the case then we ask for certain specific examples, including Samsung and Apple. So (ii) is the alternative to (i) on the issue of justification.

MRS JUSTICE BACON: It is not the alternative. It is if you get a particular answer to (i), then you are asking for more information.

MR TURNER: I am sorry, my Lady. I missed that.

MRS JUSTICE BACON: It is not an alternative. You are saying that if there are different grounds for different licensees, then you want more information.

MR TURNER: To clarify, it is meant to be an alternative. (i) is framed on the basis that we understand they offer consistent justifications for their charges which they demand across the board. (ii) is saying if that's not the case, or it should be saying, if materially different grounds are put forward, which is not understood to be the case, then we focus on specific examples and ask what were the justifications.

MRS JUSTICE BACON: All right.

MR TURNER: That's how it is meant to work, and I apologise for the confusion.

The second request, which then is (iii), is asking for information on the Defendant's internal justification for the rates it charges, and this request is critical to determining the Defendant's strategy and whether Qualcomm consciously and deliberately exploits the no licence, no chips policy to apply leverage.

The final request, which is (iv), is asking for information on the Defendant's internal organisational processes for setting the royalty rates, the main committees and individuals responsible, and you may have picked up the purpose of this reflects the approach which was taken by Mr Justice Roth in the Google shopping litigation, when he ordered information about Google's internal decision-making structure with the precise purpose of helping the claimant in the disclosure review process.

Now, standing back, the responses to these three information request will, when you view the litigation as a whole, serve to do justice, because it will enable Which? to get this case to Trial 1 and to ensure that the issues which we raised are properly and justly adjudicated, but in the immediate term these substantive answers to the information requests also feed in to the industry experts' reports due on 6th September, which will comment, we propose, on whether Qualcomm's practices in patent licensing negotiations are in line with industry practice.

So that's all I wish to say by way of the landscape. I will then deal with my specific submissions on the points that you need to decide. I will structure the argument very simply as follows.

First, I will deal with the question of the matters for the industry expert reports. As I say, essentially are the points Dr Schneider wishes to address relevant for the forthcoming trial on liability? I will begin with what the pleaded issues in the trial on liability actually entail and show that what Dr Schneider intends to do supports those pleaded issues. I will also wrap up in that Qualcomm's objections.

Second, I will deal more briefly with the requests for information and Qualcomm's objections to those.

MRS JUSTICE BACON: Yes. We only have this morning for this hearing.

MR TURNER: I understand. This will be at a pace.

MRS JUSTICE BACON: Yes, and in that we will have to helpfully give judgment. We were not proposing to go away and do a reserve judgment. We would propose to decide the issue today and deal with any consequential issues. So there needs to be time built in for that as well. I don't propose that your reply submissions will finish at 12.59.

MR TURNER: Yes. Understood. So in view of the submissions that you have seen as to the relevance to our case of what is asked for, the necessary starting point is

what is our case on these points. We say this has been perfectly clear and straightforward from the outset and I will show you immediately this is a leveraging abuse. The central allegation has always been that this no licence, no chips policy in and of itself, to return to Mr Jowell's phrase, creates pressure on OEMs to sign up to artificially high royalty demands and it inhibits the customers from challenging those demands through FRAND determinations, from using the process, the mechanisms in the industry.

This then enables the Defendant to take an approach in the negotiations which is abnormal and which is not in line with the normal industry practice of debating the true value of the patent portfolio being licensed. It is essentially the same theory of harm that was the subject of the FTC's case in the District Court, which we went through in considerable detail at certification, and which was reversed on points of US law that do not concern this point.

Now if we go to the claim form in the first hearing bundle at tab 15 -- electronically it is page 626 -- I will show you the points that underlie Dr Schneider's intentions.

First go to paragraph 6(b) on page 626. Introductory paragraph, encapsulates what is our case. You will see from the final sentence essentially this is a leveraging abuse from the chipset market power, the physical product, into the licensing of the patents and the prices demanded for those in the separate licensing market.

You then go straight to 657, internal page 34. The heading above paragraph 67 is "Abuse". The section deals with the behaviour that's objectionable and it explains that it restricts competition in the bargaining process between licensor and licensee over the portfolio and so raises price.

The effects of the behaviour on what is paid by Apple and Samsung is not dealt with here. It is dealt with subsequently in this pleading at paras 77(b) and (c) if you go forward to page 666. That is in the "Loss and damage" section.

But if you stay on 657 and look at paragraph 68, the structure is this. (a) and (b) refer to the threshold issue that no licence, no chips is effective in forcing the customers abnormally to enter into separate patent licences for intellectual property incorporated in the products they buy. This then acts as the precursor to imposing artificially high royalty rates on the customers, which is the subject matter of sub-paragraph (c) and following.

If you look at (c), it points out that the licensing negotiations take place in the shadow, first sentence, of the ongoing threat of disruption. It is very simple. "You can't have the chips you need unless you first sign our patent licence". This substantially skews the balance of power between the negotiating parties and you will see that it is pleaded that it limits the ability of the OEMs to bargain their way to FRAND's licence terms, fourth line, and their preparedness to litigate by seeking a third party determination under the ETSI FRAND system.

So if I pause there, it has always been absolutely clear that the key allegation is that the policy itself is the source of the pressure. It is this that distorts the competitive bargaining process between licensor and licensee.

Now look at the language of Qualcomm's response to our application on page 24 of the bundle. Keep a finger in there and go to tab 2, page 24. You will see this is their submissions. Right at the top of the page they say:

Despite this “Until recently, it was thought that the crux of this allegation was that Qualcomm had been making explicit or implicit threats to withhold or disrupt the supply of its chipsets in order to “pressure the OEMs […]””. The CR now disclaims that Qualcomm has to actually make or carry out threats".

And essentially is saying it is inherent in the policies. They are saying "Until recently we thought it was something else" but now they are saying this. This is the basis of the confusion that he says is going to result in his reverse summary judgment or

strike-out application.

MRS JUSTICE BACON: I mean, it is not surprising, given the language of 68(c), that parties' licensing negotiations take place in the shadow of an ongoing threat to disruption.

MR TURNER: Well, my Lady, the threat arises from the policy. It is not a separate threat that's made. What it is saying is that the policy itself constitutes the threat.

Now if you return to 658 and look at sub-paragraph (d), the allegation is that the skewed negotiating process just described enables Qualcomm effectively to dictate terms and force the customers to accept licensing terms they would not otherwise have accepted. This practice, setting terms without negotiating the true underlying value of the portfolio, that is the gist of the problem flowing from no licence, no chips.

Sub-paragraph (d) therefore goes on to spell out, (i), that customers are compelled --

MRS JUSTICE BACON: Yes. We can read that paragraph if you want us to.

MR TURNER: Yes. You will see essentially that the essential point is that negotiation over the true underlying value is what normal competitive bargaining involves.

MRS JUSTICE BACON: Yes, but there isn't any plea here as to a typical bargaining process or --

MR TURNER: Let me then continue to show you this. This point is followed through in the subsequent subparagraphs. If you turn over the page to 659, and you look at (f) (ii) on that page, which is at the foot of the page, reading from the second line:

"[…] In some negotiations, Qualcomm does not adopt even the pretence of negotiating over the patent portfolio's value […]."

Implicit in that is that is what happens in the normal course of things. Over the --

MRS JUSTICE BACON: That's just simply saying what Qualcomm does and doesn't do. There's no pleading here as to what happens in the normal case if that's your case.

MR TURNER: Let me continue, my Lady, if I may, and wrap this all up at the end, because you have to read all of this together.

The point is that negotiation over the true underlying value is what we are saying is normal competitive bargaining over the portfolio.

If you then go over to paragraph 68(g) over the page at 660:

Without the practice “There would instead be intensified competitive bargaining […] centring on the intrinsic value of Qualcomm’s SEPs that were the subject matter of the licensing."

So without the abuse there would be competitive bargaining centring on the intrinsic value of the SEPs, specifically said there.

Finally if you go forward to 665 and look at paragraph 73, this says specifically that the matters set out in the preceding paragraphs 67 to 72, constitute the departure from the competition on the merits. In other words, this is the conduct which is abusive and it entails failure to negotiate with customers over the value of the patents.

Go back to 659. What is given in (f)(ii) at the foot of the page are examples of how that manifests and it continues at the top of 660, and that includes by way of examples the abnormal approach, the failure in some negotiations even to provide pattern claim charts and with a large portfolio you are talking about a proud list sample, of course.

Keeping the royalty rates, and this is a point we will come back to because it is part of the application, so you need to mark that, keeping the royalty rates demanded at the same constant level between different generations such as 3G and 4G, even though the number of essential patents has declined, and failing to adjust the royalty rates demanded to reflect the value of cross-licences, the patents to Qualcomm by the customer, by the OEM.

Now that's abuse. Before turning to the specific issues that they object to Dr Schneider giving his opinion on, there is another facet of the pleaded cases which is important to

the present argument and it is the peculiar conflation you have seen from their case of two things: no licence no chips as a policy and the concept of licensing at the end device level. The two are not the same thing, as we pointed out specifically in one of our RFI responses. You can see it on page 876 of the bundle, which is hearing bundle 2, tab 20.

MRS JUSTICE BACON: I have one hearing bundle.

MR TURNER: Ah, right. 876, tab 20. This was an RFI response that we gave in which we said at the foot of that page, bundle reference 876, paragraph 4:

"The NLNC Policy prevents the OEMs from obtaining the supply of chipsets straight away on the basis that they don't agree to the Defendant's terms demanded for the separate patent license because those terms are not regarded as FRAND, but they would commit to a FRAND licence, […] the terms of which would be set by an independent third party determination […]."

No licence, no chips, on the other hand, is saying "You are not getting supply until you sign". So that's a peculiar confusion.

So, to summarise, if I stand back, the behaviour of Qualcomm which Which? alleges departs from normal competition, which forms the abuse, includes the abnormal approaches that Qualcomm is alleged to take in the patent licensing negotiations that are enabled by its no licence, no chips policy.

Now Qualcomm has suggested in its submissions that anything involving the use of the word "FRAND" is destined, earmarked for Trial 2, but the split between Trial 1 and Trial 2 which you decided at the last hearing is essentially liability and quantum. That is what your order says in clear terms. It is page 1069 of the bundle in tab 26. If you go in that to page 1084 you have under the heading "Issues for second trial" paragraphs 14 and 15. 14 is asking what was the actual effect of the contested practices on the level of royalties paid by Apple and Samsung. It is a quantification

question.

15 asks if the Tribunal has determined at the first trial that Qualcomm can argue as a matter of principle its royalties were FRAND, and that's a defence to the allegations of abuse, again a quantification question, were the relevant royalties at the FRAND level? Were they FRAND? All of this is a quantification point.

Now an issue which is squarely raised on the liability side, abuse, is that in this industry all parties negotiate within the FRAND framework set by the ETSI rules. In normal circumstances licensees can and do draw attention to FRAND's considerations to bargain their way to FRAND licence terms. You saw that phrase in the pleading that I took you to. The allegation is specifically that the NLNC policy inhibits people from bargaining their way to FRAND licensing terms.

In short, it is self-evidently appropriate to have industry expert evidence which supports the pleaded case and provides the basis for you, the Tribunal, to determine it.

MRS JUSTICE BACON: But the emphasis then must be on what is being done to inhibit. We are not being asked to make a determination, a microscopic determination on what is typical in FRAND bargaining. That's not pleaded.

MR TURNER: When you say a microscopic determination --

MRS JUSTICE BACON: The issues of the kind that are on page 2 of the list here. There isn't any pleading as to the detailed factors that are taken into account in a typical negotiation, if there even could be a typical negotiation.

MR TURNER: So, my Lady, the first point is that the pleading says that a typical negotiation focuses on exploring the true value of the patent portfolio. The pleading then gives certain examples of what Qualcomm does that is at odds with that. The expert evidence is going to establish the claim that Qualcomm's practice is different from what the typical negotiating practices involve.

MRS JUSTICE BACON: Why is that a matter for expert evidence?

MR TURNER: Because one wishes to know what typically constitutes the practice of negotiation over the value of the patent portfolio and how it is done.

MRS JUSTICE BACON: All right.

MR TURNER: You are then able to see Qualcomm's practices depart from that.

MRS JUSTICE BACON: The second of those questions, isn't it for you surely and a matter then for the Tribunal to determine on the facts? I don't see how the second of those points, the extent to which Qualcomm's practice departs from that, is a matter for the industry experts, who as we understood it, were going to give evidence which framed the debate by talking about what normally takes place within the industry.

MR TURNER: Yes. Certainly the industry expert will frame the debate by giving evidence on what normally takes place within the industry and their report is intended to expand on that and say what normally happens. You then have for the purpose of your adjudication the question of whether what Qualcomm does conforms to that or not.

MR JUSTIN TURNER: The no licence, no chip policy, and I appreciate that is a paraphrase, if that is not typical, and I don't understand there to be an issue whether it is typical, but maybe we need to come back to that, if that is not typical, then doesn't that just answer the request why do you need to look at all the other aspects of it?

MR TURNER: Sir, you are absolutely right. I will be corrected if I am wrong, but I believe there is no dispute that it is abnormal, that they say it is unique. It is. That policy then enables practices and negotiations which themselves are complained of, because those reflect the failure to negotiate --

MR JUSTIN TURNER: Qualcomm is perhaps -- and I am not trying to put words in anyone's mouth -- but Qualcomm is perhaps the only company in a position to have a no licence, no chip policy perhaps. So it is not a typical negotiation. Whether it is

abusive is a distinct question as to whether it is typical. Why do we need to get into all those other fine distinctions of what is typical and not typical when it comes to number of patents?

MR TURNER: It won't be fine distinctions. The logic runs as follows. They have a policy which in itself imposes pressure on the customer to agree to the terms which are demanded. The way that this plays out is that, unlike what happens in ordinary negotiations within the FRAND framework where parties say "Here is a proud list. Here is our position on patent count. Here is our position on validity. Here is our position on capital contribution" these things don't happen here and the industry expertise is relevant to the contention that in normal industry practice this is what one expects to see as the basis for parties negotiating over the true value of the patent portfolio.

MR JUSTIN TURNER: Isn't that slightly different? You are now saying that it is not the pressure caused by the no licence, no chip negotiating position. You are saying it is the failure to engage in other reference points.

MR TURNER: What we are saying is that that failure to engage in those other reference points is itself the consequence of the pressure of the no licence no chips policy and it leads to a practice in the negotiations which is not competitive and which the industry expert will explain to you at the trial is not competitive, because they will say "This is how things are generally done", not in a sense of there being by the way, to respond to my Ladyship, a specific mandatory single process for looking at the value of the practice, because parties do approach this in different ways, but there are certain considerations which, when you are negotiating over the value of the patent portfolio, the industry always normally takes into account.

So the expertise of the industry expert is that they will say "This is what you expect to see normally and this is what is absent in the case of Qualcomm", because of the

shadow of the NLNC policy.

MR JUSTIN TURNER: That is perhaps the bit that I had not picked up in the pleading, that Qualcomm don't identify patents or identify the quality of those patents. I don't see that that is pleaded at the moment, is it?

MR TURNER: Well, what is pleaded is the broad point that they don't negotiate centring on the intrinsic value of the patents and within that certain examples are given which are (inaudible). There has been no request for particulars of it, but that's the case, that in a normal competitive negotiation this is what would happen.

The industry expert will then give the evidence to explain it, which you will need for the trial. That's the way it is put.

MRS JUSTICE BACON: But even the questions you have got, even the disputed questions don't deal with the question of whether Qualcomm is doing something different. I really struggle to see how that's a question for the industry experts who, if anything, they are here to provide context -- for us to understand what you say normally happens in a broad sense, but the question of what Qualcomm does to diverge from that seems to be a matter for submissions based on the evidential material before you.

MR TURNER: My Lady, a couple of points on that. I am going to come to it. Point one, in the list I have issues they actually do say at the top of page 1 that they intend to comment on (inaudible) in this context.

MRS JUSTICE BACON: Yes, but that's a long way from saying -- we will come back to whether that is appropriate anyway, but even if that is the case, that's a long way from saying that they are effectively going to be making the case about Qualcomm doing something that's different.

MR TURNER: Point one, as you see from what's said, that the proposal there, not objected to by Qualcomm's lawyers. They comment on the evidence (inaudible).

MRS JUSTICE BACON: If your proposal was that the industry experts were effectively going to be making the case about Qualcomm doing something that diverges from these, I would have expected to see far more questions in the list of questions about how far, to what extent and why Qualcomm's practice diverges instead of which I think we have one question in the agreed list on page 1, which is a very broad question. The answer to that may not be very controversial about whether the practice of selling chips to any OEMs licenced to practise reflects the normal commercial practice in the telecoms industry. That's the only point on which the industry experts are supposedly going to be commenting directly on the divergence between what Qualcomm does and what is normal industry practice.

MR TURNER: Well, my Lady, this document, which is a short summary of their discussions, says at the very top that in the context -- I will read it:

"The following key topics were agreed to be potentially covered by the reports for Trial 1. They will address these to the extent the topics are within their individual area of expertise / based on their experience, and will comment on evidence they receive about Qualcomm's practices."

So it is shortly expressed, but the first point, and I will just make another one in a moment, is that it has always been clear that they were going to look at what is done normally in the industry and compare what Qualcomm does against that.

MRS JUSTICE BACON: How could they do that, because the factual evidence will not be before them? I mean, the data sources are not said to be the disclosure set.

MR TURNER: Let me come to that. There is subject to -- well two things. The first is they do have quite a lot of material, but it is not the Qualcomm witness evidence, which I was going to address in a moment, on this point. They have in particular or they will have all of the evidence on this very point that was adduced in the US FTC case. We have depositions, the transcripts of evidence which we are asking to be admitted as

hearsay. So they will have that and they are able to comment on that.

MRS JUSTICE BACON: So they are just going to be commenting on hearsay evidence about what Qualcomm does but without any of the factual evidence that's actually in this case.

MR TURNER: That will be evidence in this case of course.

MRS JUSTICE BACON: Well, it is hearsay evidence.

MR TURNER: Yes. It will be evidence. If your Ladyship says "Will there be live witness evidence?" So far as Qualcomm is concerned, we know that they say they are going to be putting forward witnesses. We have no idea or control over what they will actually say in their witness evidence.

MRS JUSTICE BACON: The problem is this is going to be an extremely partial basis on which these experts are commenting and then you will presumably be placing great reliance on what they say. It is very unsatisfactory.

MR TURNER: My Lady, I hear that. If I may address that in just a moment, because if that is your provisional view there is a very simple work-around to it which I can address, which means essentially in very short order you could simply say "These expert reports can come three weeks after the witness evidence".

MRS JUSTICE BACON: Or we can say the experts don't deal with that issue and you deal with it in your submissions.

MR TURNER: You could say.

MRS JUSTICE BACON: That's more work for you and less work for them but at the moment I find it very difficult to see how properly the experts can be commenting on this.

MR TURNER: Well, the reason is this, my Lady. The industry experts are able to say "This is what normally happens and I see what Qualcomm does and with my expertise I can give you, the Tribunal, useful information on the divergences".

This is not usurping your function, because you will be hearing rival expert evidence on this point.

MRS JUSTICE BACON: I am not concerned about them usurping my function. I am concerned about them usurping your function.

MR TURNER: Yes. Well, it is not usurping submissions because what you will see is the industry experts giving evidence that is peculiarly within their expertise. They know how this works. They will see what Qualcomm does and in my submission in a fairly orthodox way they are then able to comment on what they see and give you information on how far and in what ways that matches normal industry practice. That then is an input into your decision. So it will not be usurping my submissions. It will be giving you evidence that I cannot give as counsel on this point.

That is why in my submission if your Ladyship is -- I understand the point -- concerned about sequence, there is another way of dealing with it.

May I get to that in just a moment because I am going to --

MR JUSTIN TURNER: While you are talking about that, just explain. You have a number of different terms. You have used "normal" in your submissions. Here we have "standard" and also "typical".

MR TURNER: Yes.

MR JUSTIN TURNER: I don't know if they are all the same thing or different things. They are the same thing. Just as a practical matter how is your expert going to say what is typical? Is he going to be pointing to a survey? Is he going to be saying what he has personally experienced? Is he going to be pointing to third party documents?

MR TURNER: Yes. This is somebody who has worked in the industry on our side who has done patent negotiations for portfolios on both sides I believe of the fence I believe, and has knowledge of how these things typically are done. I will develop that in a moment.

MR JUSTIN TURNER: Right. But, I mean, if something is typical does it have to be done 50% of the time, 90% of the time. Is his sample size proportionate? Has he been working for particular people in the industry? What does typical even mean and how are we going to resolve -- Mr Jowell says this is relatively unusual and only happens in 5% of cases. You say "No, we reckon it happens in 60% of the cases". What are we going to --

MR TURNER: Sir, that may be a substantive issue that you will resolve at the trial, because we will be saying or we understand our expert will be saying that when this is the standard practice, this is the common practice -- it may be the universal practice, everyone always argues "You are trying to get me to sign up to a licence for this portfolio. Let's talk about its value. Here is the tool kit. Here are the things that in a standard way people discuss".

MR JUSTIN TURNER: That sounds like fact almost rather than expert opinion.

MR TURNER: It is --

MRS JUSTICE BACON: What happens in practice.

MR TURNER: It is, and certainly in circumstances such as we face here it is an industry expert who says "With my experience I can survey how things are done in the industry and I say that this practice, this tool kit is used as a standard matter".

MR JUSTIN TURNER: Right. So we are not going to see any documents that support that. He is just going to be saying "This is how I would expect it to be done".

MR TURNER: In the data sources bit of the summary discussions.

MR JUSTIN TURNER: I saw that.

MR TURNER: He is not referring, for example, to specific negotiations that he will have been involved in. One would expect those to be confidential, of course.

MR JUSTIN TURNER: Yes. Quite.

MR TURNER: But he will say in his experience that this is the way that the industry

always, or on a standard basis, approaches negotiations by digging into the question of how you get to the true value of the patent portfolio.

MRS JUSTICE BACON: Well, if he can't comment on specific cases, then how is anyone going to test what he is saying if there turns out to be a dispute between the experts as to what is typical.

MR TURNER: On that, that may be a question again for trial management at the time. It may be that he can give that evidence but it will need to be in a confidentiality ring so that the information can be given in the way that is protected. So I don't see that as an objection, but again these are issues for the trial itself.

MR JUSTIN TURNER: What is the sample size? Is it like hundreds, thousands?

MR TURNER: The sample size?

MR JUSTIN TURNER: Negotiations that have taken place. Is it hundreds of negotiations that ...

MR TURNER: It is very unlikely to be hundreds of negotiations that a single individual would --

MR JUSTIN TURNER: In the industry. If we have to decide what's typical in the industry and there have been say 500 negotiations and your expert has been involved in six, how does --

MR TURNER: Because it is not merely the ones the expert is involved in. If you are in that industry, you are within a network and you know the way that industry negotiations over these matters takes place. There may even be conferences to discuss it. There may be fora in which these things are discussed.

Again, if I may say so, you raise a fair point, but it is not a point which is a threshold point. It is a point which goes to the question of the value of the evidence that you will receive from those individuals at the time, but the point here is that --

MRS JUSTICE BACON: It does become a threshold question, because if we are not

going to get something useful, we are not going to order that everyone goes away and spends a lot of time and money producing it. Our concern is that we are going to get expert reports which are of a vast length and which spend a lot of time and effort in going into issues that may ultimately turn out to be entirely irrelevant for us or very peripheral, or only relevant at a very high level, which then doesn't really justify going into, as I said, microscopic disputes about some of the issues that you set out on page 2 of this list.

MR TURNER: Yes. So to respond to that, it is not peripheral. On the contrary, as I have sought to show you from the pleading, this is essentially the major issue in the case that we are talking about. This is the heart of the abuse allegation, that in the negotiations that take place between Qualcomm and counterparties in the shadow of this policy that they apply you do not have competitive bargaining. As an aid to you determining that, industry evidence on what is normal industry practice is needed for essentially the charity, the consumer representative, to put forward. We are not an industry party ourselves. So it is central.

Secondly, it will not be -- I can reassure you on this -- microscopic or involving extremely lengthy reports.

MRS JUSTICE BACON: How long do you have in mind? How many pages do you have in mind, because we have in mind that wherever we come out, we are going to be setting some page limits either today or at the CMC?

MR TURNER: My Lady, understood. That is something that on my feet I think it is hard for me to pluck a number from the air, because I would need to have more mature consideration of that. All I can say at the moment is that we are not envisaging, as your Ladyship warned a few moments ago, the production of vast industry expert reports going into microscopic detail.

To be clear, what I have in mind is a report which says competitive bargaining in the

context of this particular industry involves a tool kit in which the parties look at typically, standard basis, always, certain things. You will have evidence that in this particular case you do not see these things in the same way. So I expect the industry expert report to be concise in that way and not to involve microscopic detail.

MRS JUSTICE BACON: 20 pages?

MR TURNER: Well --

MRS JUSTICE BACON: I think those behind you all (inaudible) to start thinking about this because we may well come out with a page limit at the end of today.

MR TURNER: I understand, my Lady. I do think it is something which without speaking to the expert is quite difficult. I can undertake now that you have raised it to get that underway. I understand that it would be a discipline that you would seek to apply across the board to both sides?

MRS JUSTICE BACON: Yes.

MR TURNER: My Lady, may I then --

MR JUSTIN TURNER: Just so I understand your submission that knowing what the shape of negotiations typically are and the sorts of things like that, number of patents and quality of patents and so forth, but insofar as there are differences -- let's assume Qualcomm says "Yes, we agree the number of patents". Quality, it is more difficult to say that's a standard thing. Maybe the number and the fact they are standard and essentially we don't actually look at -- I will giving a for instance. I am not suggesting --

MR TURNER: Yes.

MR JUSTIN TURNER: Do we need to resolve that? Are you going to be asking this Tribunal to -- I understand your broad point that these are the broad areas that one would normally consider in the negotiations, but some of these seem to be a bit finely sliced. Are you going to be asking the Tribunal to resolve those things as to whether or not ...

MR TURNER: What we apprehend is that you will receive evidence, both sides, about what a competitive bargaining situation typically comprises in this context in this industry. As you say, sir, rightly, that will involve things such as the number of patents or perhaps more particularly stack share for a particular standard. You know, you have 10% of the (inaudible) stack. Technical contribution, quality, validity. These are obvious in a way, perhaps is your point, but the industry expert will merely say how these fairly obvious considerations translate into what the parties generally do when they are negotiating in good faith over the true value of the portfolio and then you are able to compare that with what goes on here, which we are alleging does not do things that are needed in order for there to be this competitive process. That's how it will work.

I am acutely aware of my Ladyship's point that we need to keep this under control in terms of length and avoiding microscopic detail. At the moment I am able to give you an assurance as far as I can that that is in no way what is intended in terms of the industry expert report. It will be a report speaking to the issues that I have just outlined and doing so as concisely as is possible. What I cannot do now is say it will be 20 pages. That's my concern. I feel -- we are happy to reflect and even give the Tribunal a view on this after consulting with Dr Schneider.

MRS JUSTICE BACON: Yes.

MR TURNER: Overnight.

If I may -- I am conscious of the time. I just want to get through this so we get this done.

MRS JUSTICE BACON: Right.

MR TURNER: Trial 1, there is this other dimension, because it is not just about abuse. Qualcomm itself is raising for your determination at this trial these FRAND considerations in the context of what will be discussed and what you will decide and

they do that in relation to the allegation of market power or dominance, because they plead specifically that the FRAND tool kit is used by Qualcomm's counterparties in the licensing negotiations with it, that it is an effective competitive constraint and it prevents Qualcomm from holding and exercising substantial market power in relation to its portfolio.

You see that on page 758 in tab 16, if you just go there. It is an important point not to lose sight of so you know what you will be facing in this first trial.

On page 758 you are in Qualcomm's defence. Above paragraph 103 the title is "No dominance in any SEP Portfolio Markets".

At paragraph 103.1 you will see their positive case:

"The FRAND commitment has been an effective competitive constraint on Qualcomm at all material times. Consequently, Qualcomm does not possess a substantial degree of market power in relation to its SEPs."

So in this context they are saying this will have to be gone into in Trial 1. It is an issue for you, because their case is other parties in the negotiations raised these considerations that Mr Turner and I have been talking about and they use it to constrain our market power.

Now in this context both the rival expert methodology statements which you have asked for refer to the economists considering at Trial 1 evidence about how licencing negotiations work in this industry, including specifically the role that the FRAND commitments play.

I will show you those references. The first is page 104. Is it 104? I have tab 23 in my note. Let's get this right. Tab 23. 1034. That's right. Thank you. If you go to page 1038, you will see the heading "Assessment of market power", which is what their expert, Dr Padilla, wants to cover.

If you go over the page to 3.7, which is page 1040 -- that's it -- it is the 0 at the

end -- 1040, paragraph 3.7 at the top, they say the dominance:

"In relation to the SEP licensing market, the relevant expert economist will, if necessary, have regard to industry expert evidence to inform them in relation to the meaning and effect of FRAND commitments and the commercial/business reality of how SEP licences are negotiated."

So they contemplate industry expert evidence concerning the commercial reality of how SEP licences are negotiated, just the same subject matter.

If you go to our statement, and I hope I have the reference right, over the next tab, 24, page 1052, this is Mr Noble and you will see on page 1052 the heading "Assessment of market power". At 3.3 towards the bottom of that page:

"For SEP, markets the assessments will consider factors including ..."

You can read it for yourself. It ends:

"[…] the role that the FRAND and other commitments given to standard development organisations play."

So likewise both the economists envisage that these FRAND considerations and how they work will be a factor that you will need to decide and it is contemplated that industry expert evidence will inform them and ultimately you in your determination.

That is why we say in view of Qualcomm's own pleaded case in its own methodology statement it is surprising they are seeking to block the industry experts at Trial 1 from giving evidence on qualitative considerations of the extent to which, and I quote "[…] implementers in practice rely on FRAND considerations in licensing negotiations […] to beat down royalty demands […]". That's one of the things that they specifically object to.

On that note I have dealt with the pleaded case. May I just then turn directly to look at this dispute regarding the expert issues? If you open up page 64, which is their list of issues, here you have the summary of the discussions between Melin and

Schneider signed in late April. We have looked at the introductory wording at the top of 64. We have read that.

If you move to the table immediately below, that's the topics on which the two experts agree and which Qualcomm's lawyers are not trying to block.

The first table, this is what they agree to and which they are not trying to block. If you look at the third box down, look at what they agree to:

"How are licensing terms typically offered and sought to be justified for a SEP portfolio."

They agreed to this. It directly raises what one might call the FRAND, fair, reasonable and non-discriminatory considerations. Then two particular issues are specified without objection --

MRS JUSTICE BACON: Yes. We have read those.

MR TURNER: Comparator information.

MRS JUSTICE BACON: We have read those.

MR TURNER: Yes. My point is that most of them are pre-emptively part of the tool kit and for the second one, which is about cross licensing, if you turn to page 65, so you look at what's objected to and you go to the bottom of that page -- we made this point in our submissions -- and look at letter (f), it is almost identical. There is a reference to the relevance of cross-licences again as something which might lead to a discount in the royalty rate which you pay. So there is a pure and unambiguous inconsistency in their approach.

Now if you just focus generally on that second box on page 65, this is what we have all been calling row 2, which they are seeking to block. It opens with exactly the same phrase as in the first table.

MRS JUSTICE BACON: Yes. We have seen that and we have read all of the subparagraphs.

MR TURNER: Right. So you will have seen from that that those points are all purely qualitative points about how parties typically negotiate and what considerations they normally take into account. So it follows from the case which is advanced by Which? that you have seen, these are matters that are clearly relevant to the abuse issues in the liability trial.

The only point that I have not perhaps completely covered is the industry experts commenting on evidence of Qualcomm's practices which we have now canvassed in argument. I don't know if I need to say anything further on that in view of the debate we have already had.

MRS JUSTICE BACON: No.

MR TURNER: One point is that we don't know what their industry evidence is going to cover or not. To pick up on what I foreshadowed a moment ago, if you do consider, and I understand the point, that you think it is indispensable or correct for the industry expert reports to take account of such evidence as their factual witnesses choose to give, there is a simple solution, as I say.

MRS JUSTICE BACON: We will come to that if we consider that it is necessary for the industry experts to comment on that.

MR TURNER: Yes. Let me just say what it is, which would be to move the industry expert reports to the end of November.

MRS JUSTICE BACON: You say (inaudible).

MR TURNER: So that deals with the points on what we call row 2. If you go back to the summary of discussions document and just look at the first row at the top of the page:

"[…] whether ETSI incorporated the patents in its standard knowing […]".

MRS JUSTICE BACON: I understand that's now agreed (Overtalking).

MR TURNER: So I turn lastly to the third row at the bottom of the page.

MRS JUSTICE BACON: Yes.

MR TURNER: "From an industry licensing perspective, what has been the relative significance of […] the portfolio across time and generations of standards?"

So this represents the evidence which you need to determine at Trial 1 an issue on the pleadings which I have now shown you. Go back to it. That was page 660 at the top, if you recall. If we go back to that one more time, tab 15, 660. This is the allegation which remains there, which they have not tried to strike out, that Qualcomm's royalty rates have remained constant notwithstanding the decline in the number of SEPs which has contributed to the successive standards. So that is pleaded as an (inaudible) of the abuse. It has to be tried. It is not struck out. You can't have a strike out by the back door by stopping us adducing the industry evidence we need to try the pleaded point.

It is also not something that was complained of originally by Qualcomm's solicitors when they wrote their letter of 2nd May. You have seen it has become a contested issue since we made the application and I will show you quickly that the objections raised in their skeleton served yesterday are based on a simple misconception. The misconception is, to return to the word "microscopic", that Dr Schneider intends to carry out a precise quantitative assessment of patent value, because that is not what he intends to do at all, and in my discussion with him about their skeleton, he introduced me to a new German word, which is "Nebelkerze", which apparently is the German for "red herring", and I will explain why that is the case.

He is referring to information that's commonly used in the industry when parties sit around the table to negotiate these patent licences. It is used by them as an input to their decisions in an imprecise way. It provides a broad brush picture for the purpose of negotiations over the true value of the portfolio.

So, to make it real, you sit down. You say "You had 13% of the 3G stack. You now

have 9% according to this of the 4G stack. Your pre-existing rates should come down". That's the sort of argument. That's the sort of thing he says you expect to see. He has explained what he intends to do here in his second statement, which you have at page 263. Go there. Go to page 264. The key paragraphs are 6 to 9.

At paragraph 7 in the middle of the page he says he intends to refer to the fact as a normal feature of SEP licensing negotiations that the parties look at available metrics, including the number of SEPs contributed to the standard.

At paragraph 9 he makes two points, and you need to be aware there are two. The first is he proposes to give evidence about what was well-known in the industry.

It was well-known in the industry Qualcomm had particular important inventions for the 3G technology, but he says the same may not be true when you move from the 3G to the 4G licensing negotiations, and this is the matter of general industry knowledge.

Second point and distinct is that he says he will look at the databases commonly used in the industry in the negotiations to see if the accepted contribution counts did decline between, say, 3G and the 4G negotiations. It is an input to form a qualitative view, as it would be in party to party negotiations. What it does is it enables him to make the observation that you would expect this factor to have an influence in the negotiations with customers over royalty rates for the later 4G portfolio.

My Lady, members of the Tribunal, I am conscious of the time. Subject to any questions, I will turn smartly to deal with the RFI requests unless there is more you would like to ask me about in relation to this.

MRS JUSTICE BACON: Please go on.

MR TURNER: RFI requests. If you turn those up, page 15 in tab 1. We looked at those at the outset. What's listed in paragraph 43(b), so I will take these briskly and do so in reverse order.

The request for information at the bottom on Qualcomm's internal processes matches

the beneficial approach that Mr Justice Roth took in another abuse of dominance case. It is one of the Google shopping damages actions. This was Foundem v Google, not the POECU case that I believe Mr Turner was presiding in.

MRS JUSTICE BACON: Do we need the first sentence, could you just do with the second sentence? Isn't that at the heart of what you want?

MR TURNER: You mean from "In particular".

MRS JUSTICE BACON: Yes.

MR TURNER: Oh, I see.

MRS JUSTICE BACON: The problem with the first sentence is it is generally vague. The second sentence is actually what you want.

MR TURNER: My Lady, that's a fair point.

MRS JUSTICE BACON: All right. So that deals with 3. Moving on to 2.

MR TURNER: All right. So turn to the internal justification, 2, the internal justification for demanding the royalty rates that Qualcomm does. So this is strategy and rationale. My starting point is the well-known proposition from the Court of Justice case in Tomra, which we cite at paragraph 29 of the application letter. If you have that open in front of you, it is on page 12, to save us going to it.

Basically when you are assessing a dominant position, the Competition Authority or court is necessarily required to assess the business strategy pursued by the undertaking and it is clearly legitimate to refer to subjective factors, namely the motives underlying the strategy in question.

So that's why this arises. The question of the business strategy they are pursuing is an important issue in the case. Was Qualcomm deliberately using the chipset market power to leverage its position in the licensing negotiations to get higher rates?

There is essentially, to come back to what I said at the outset --

MRS JUSTICE BACON: The Tomra point doesn't mean that you can effectively serve

an interrogatory asking Qualcomm to make your case for you. It means that where that evidence is before the court, that's something the court or Competition Authority can take into account.

MR TURNER: So, my Lady, a couple of points in response to that. We are not, I can assure you, seeking to get them to make our case for us in the sense of saying "Yes, we deliberately used the leverage". What we are doing is asking them as a procedural matter to get the case ready for trial at which a relevant issue can be determined on the merits seeking to get information that is needed and Tomra tells us that information on an undertakings business strategy is relevant, indeed they say necessary, in this sort of case as a factor you will take into account.

So I draw a distinction between the procedural pre-trial steps and the substantial steps you will decide at trial. We made the point in our reply and the authority makes quite clear certainly under the CPR, that there is a big difference between those things. Parties are there to cooperate to ensure that the issues needed to try the substance of the case are presented to the court.

If I may, I will come to that, because this was essentially dealt with, and your Ladyship may remember this, in the Gas Insulated Switchgear case that Mr Justice Roth again tried, where the judge decided that interrogatories essentially, requests for information by the claimant in a cartel case, which were very wide-ranging, should be answered. Your Ladyship may recall on the other side counsel argued "No, because you cannot force a defendant to make your case for you", the judge said "No, that is wrong in principle. Under the modern rules on the contrary I can order this" and ultimately he did order this in 2014, and it is not open to a defendant to say "We don't have to do this", because then the case is prepared for trial and it can be determined on the merits.

Would your Ladyship care for me to just go to that and show it to you, because it will

take ten minutes maximum? It is in authorities tab 5.

MRS JUSTICE BACON: Well, perhaps five minutes, because we need to crack on.

MR TURNER: I do understand that but, as your Ladyship raised the question of the difference between the procedure and the substance, this actually does address it.

So if you go to that and go in it to page 44, tab 5, what you saw there -- some of this may be a distant memory for your Ladyship, but on page 44 at the top, there were the list from (b) to (e) set out by the judge. The questions that the claimant cartel victim was asking about how the cartel operated was very wide-ranging. On the other page, 45, the facing page, you see of the rival submissions.

At 69 Mr Hoskins and Ms Demetriou said it would be inappropriate and premature. The pleader is entitled to set out their evidence and the partaking procedure should not be used to force a defendant in adversarial litigation to provide what amounts to fragmentary witness evidence at the behest of the claimant at an early stage in the proceedings.

You may recall that this is exactly the wording that Mr Jowell has used in this case. That was the submissions of Mr Hoskins at that point.

The opposing submissions, again counsel familiar to this court, are recorded immediately below. The patent nature of the material. Your Ladyship will see that at 20 below that the judge says that in 2012 he refused to make the order sought by the claimant except against one defendant. He accepted at that time it was a premature and disproportionate burden to provide the requested information, which you can see was far more voluminous than we are now asking for, but the matter did not end there. This is the 2014 case, because in 2014, once they had put in their witness evidence, the claimant renewed the same request for an order. It is now opposed again in particular by Mr Morris, as he then was, and on page 51 if you look at paragraph 39, start from five lines down, you have the judge in blistering terms explaining what

modern litigation requires:

"Information sought must relate to “any matter in dispute”. But if it does, the rule precisely covers a situation where there is potentially relevant information relating to that matter solely within the knowledge of one side. In modern litigation you can't hold this back and leave the opponent to take a chance to see if it chooses to put forward a witness from whom the information might be elicited by way of cross-examination during trial."

Then at paragraph 41 at the foot of the page the judge records:

"It may", not necessarily will, "be oppressive to require a party to answer a question well in advance of witness statements".

At page 52 you will see that the judge signalled even at the time in 2012, even if it was disproportionate to order it at the time, if the witness evidence turns out to be insufficient, then the request for information would be reconsidered.

So, to finish in my five minutes, the takeaway is two-fold. An order for information can be made in a situation where you have relevant information relating to a matter in dispute, here strategy, in the knowledge of one side alone and, secondly, whether it is appropriate to make it in advance of witness evidence depends on the circumstances.

Now in Switchgear the requests were voluminous. In our case our request 2, as I frame it, is concise. It is capable of being answered rapidly and shortly, because this is Qualcomm's central business practice, which has been the subject of anti-trust litigation across the globe.

Time is tight. If you look at the litigation timetable, it is efficient and not burdensome for them to answer the strategy question now rather than force us to take our chances, as Mr Justice Roth put it, with their witness evidence.

MRS JUSTICE BACON: All right. Thank you. Does that conclude your submissions?

MR TURNER: Well. So very briskly then the last one is the first point, and there is

very little to add. This is what are the justifications you advance in the negotiations. Essentially the same point applies here that this is material which is needed in the litigation timetable at the moment as an input to the expert report.

So, my Lady, I am conscious of the time. I am grateful for your indulgence. Those, subject to any questions, are our main submissions.

MRS JUSTICE BACON: Yes. Thank you. All right. We will take five minutes.

(Short break)

MRS JUSTICE BACON: Mr Jowell, we wondered if it would be helpful for you to understand where we are provisionally so that you know where to direct your submissions.

MR JOWELL: Yes. I am sure it would be. Yes.

MRS JUSTICE BACON: Right. So our provisional thinking is that in relation to the question of the expert issues if this is all directed at points at a very high level, we think what one could do is simply provide that expert evidence should be filed by the industry experts directed to the factors ordinarily or typically taken into account when negotiating the terms of a FRAND licence, effectively using that to paraphrase most of the topics on pages 1 and 2 rather than descending into the granular detail of what are within and without the scope of that, which we see is very difficult for us to take a view on at this point, but with a very strict page limit so that this doesn't spiral out of control and which, if the point is really a very high level one that just frames the debate as to what's normally done in the industry and isn't going to effectively require us to get into a detailed dispute about in what percentage of cases X or Y is done, it seems to us would be an appropriate compass for the expert industry evidence, although we don't include within that the last question on row 3 of page 2, which we think seems to be very broad and we doubt that this is properly within the expert evidence. Certainly in the way it is framed it seems to be far too opaque and could open a whole host of

difficult issues, which are probably not for this trial.

That's where we provisionally came out on the expert issues and we would have in mind a fairly constrained page limit, maybe 20 or 25 pages first out, which means that the experts necessarily would have to be pretty concise and general about what they are saying.

As regards the request for information, if what is now the third question is framed as it is simply a request for individuals or committees or groups, in other words identifying custodians -- it is (iv), but I think Mr Turner has now called that question 3 -- (iv) on page 15. If it is simply the second half of that, that's simply pointing the way to key words that might be used in searches. We are not sure that that's very objectionable.

Equally in terms of (iii), the second half of that, seems to be clarification of an expression used in the defence. Again we are somewhat sympathetic to that, but in relation to the other questions our provisional view is that it is premature and that this is a matter for evidence in so far as it is relevant and that as in Gas Insulated Switchgear, one may potentially return after the evidence if that evidence doesn't cover the issues which you think need to be covered or which Which? thinks needs to be covered.

That's our provisional thinking, but obviously that's set in order that if you don't agree with that, you can seek to persuade us otherwise.

MR JOWELL: Well, I am very grateful for that. It might be helpful if I could take instructions for five minutes just on those points before I -- I would like to make some submissions, because there are some other, if you like, caveats that we would clearly like to lay down, but if I may take -- if I could take five minutes?

MRS JUSTICE BACON: Yes. All right. You might both think about what I have said about the fairly strict constraints on any page limit that we would permit, and we will need -- and I would say, having had this debate, this flags up to me that we are going

to need to set some page limits for the other expert reports at the CMC.

MR JOWELL: Yes. So I can get -- because we don't have an immediate transcript. If I could just make sure that I have fully understood, your inclination is not to exclude the issue which could be called the patent counting issue --

MRS JUSTICE BACON: Yes.

MR JOWELL: -- which is from an industry licensing perspective --

MRS JUSTICE BACON: Yes, the patent counting one. yes.

MR JOWELL: The very last one --

MRS JUSTICE BACON: And in relation to the issues in row 2 of page 2 and row 3 of page 1, simply to wrap -- rather than saying we think that all of these questions are relevant, which we don't take a view on now, just to replace those with an order referring to expert evidence directed to the factors typically taken into account when negotiating the terms of a FRAND licence.

MR JOWELL: So the scope of that would not extend to commenting on Qualcomm itself.

MRS JUSTICE BACON: The scope of that would not extend to commenting on Qualcomm, absolutely, as you may have gathered was our provisional view from my exchanges with Mr Turner.

MR JOWELL: And in terms of the specific questions you have in mind that we would answer question (b). Let me make sure I get it right, the second question of (b) (iii). Is that right?

MRS JUSTICE BACON: What does Qualcomm --

MR JOWELL: The second sentence of (b) (iii).

MRS JUSTICE BACON: And the second sentence of (b), (iv).

MR JOWELL: I will take instructions on that basis, if I may. Thank you.

(Short break)

MR JOWELL: Thank you. We are grateful for the Tribunal's indication and we are not going to substantially push against that outcome subject to a few points that I would like to make and qualifications.

So the first point I should say is that Mr Turner started his submissions by observing that it was his case he said that the chipset supply policy was in and of itself an abuse, but then half an hour later we heard him say words to the effect that the negotiations were a key part -- what happened in the negotiations were a key part of the abuse. Indeed, I think he went so far as to say at one point that what happened in the negotiations were the heart of the abuse.

MRS JUSTICE BACON: Yes, he did.

MR JOWELL: So I am afraid we remain deeply confused as to what the case is that is, in fact, advanced, because if the case is that it is the chipset supply policy is inherently anti-competitive, then what happens in the negotiations is neither here nor there. On the other hand, if the negotiations are a central part, a central pillar, as I think they put it in their written submissions, of the abuse, then clearly it is not the case that it is the chipset supply policy in and of itself. So I am afraid we do have -- our confusion remains and it is certainly not tactical or forensic.

Now how this plays out in relation to this particular evidence is this, that we say, first of all, we do need to understand what is then the role of the negotiations or the deviation from a negotiating norm to their case. Do they accept, for example, that if the Tribunal hears this evidence and finds that there is no normal negotiation of the type that they posit, or if it finds that there is a normal -- there are certain negotiating norms, but that in the case of Apple and Samsung the negotiation fell within those norms, do they then accept that their case on abuse will fail?

It seems that they would accept that, but then when Mr Turner says "But the chipset supply policy is in and of itself abusive", one thinks maybe they will simply say at the

appropriate moment "Oh, never mind all that. This was always just the fifth wheel on the coach", but if that's the case, then this evidence shouldn't be in to begin with. So we say it is essential that they do clarify their case.

MRS JUSTICE BACON: So then why don't you serve a request for information which deals with that?

MR JOWELL: Very well. We will do so.

MRS JUSTICE BACON: Because I think it would be very undesirable for this to get to trial with the parties' submissions being ships passing in the night and then to have some kind of pleading dispute at trial. This really needs to be ironed out well before trial.

MR JOWELL: No, indeed.

MRS JUSTICE BACON: Insofar as there is a pleading issue, everyone needs to know where they stand and what Which?'s case is now and indeed by the time of the next CMC.

MR JOWELL: Indeed. If I may just take you to two parts that Mr Turner didn't take you to.

MRS JUSTICE BACON: Are you just carrying on in a similar vein, because I think the answer is the one that I have just given you and you don't need to persuade us that there is an outstanding -- there is obviously an outstanding dispute as to what the case is. That needs to be clarified. If you accept that the way to do that is an RFI, then get on and serve that RFI.

MR JOWELL: Very well. I was simply going to observe that when you look at -- just for the Tribunal's note, if you look at paragraphs 32 and 33 of the pleading, you do see that the threats are very explicitly wrapped up in the very definition of no licence, no chips, and if you look at -- that's in pages 636 to 637 of the bundle.

MR JUSTIN TURNER: Say it again.

MR JOWELL: It is at pages 636 to 637 of the bundle. You see that the very definition of no licence, no chips encompasses a reference to threats.

If one goes also to the response to our request for further information --

MRS JUSTICE BACON: I think it is possibly peripheral. If you want to serve a further RFI and you don't get a satisfactory answer, then that can be raised at the next CMC.

MR JOWELL: We will do so. We hear what you say and time is short. We accept that.

The second issue is this, relating to this question of deviation from the norm and that is that, as the Tribunal itself observed, there isn't actually a proper pleading of what goes on in what they say now is a typical negotiation other than by reference to two things. First of all, there is a very general statement about a reference to negotiating by reference to the intrinsic value of the patents or the patent portfolio, and, secondly, there is a reference to an exchange of patent claim charts.

Other than that there is no particularisation in the pleading of what they say a normal negotiation contains, and before our expert has to go into print we should really be given in a short and summary form what their case is of what they say are these essential components of a supposed normal negotiation. That's really the only two points we have on that.

MRS JUSTICE BACON: Mr Turner, are you willing to provide that clarification?

MR TURNER: My Lady, we would say it is not necessary. We have pleaded this. There has never been a request for (inaudible).

MRS JUSTICE BACON: Well, there is a request.

MR TURNER: But this is something that is going to be developed in the expert evidence. There will be evidence explaining exactly what a normal negotiation involves.

MRS JUSTICE BACON: That puts the cart before the horse, doesn't it, because if

there isn't any pleaded basis for this then it's questionable why the expert is spending time addressing the issue? Can you not explain it at least at a very high level in your pleadings, especially given that the expert reports are simultaneous.

MR TURNER: My Lady. Yes.

MRS JUSTICE BACON: On this point.

MR TURNER: Yes. If that's your request, I will not argue that.

MRS JUSTICE BACON: All right. So, Mr Jowell, serve an RFI and it will be responded to. We have the next CMC in July. If you are not happy with the response there is time to deal with that then. That still gives some months before the first round of the expert reports.

MR JOWELL: I am very grateful for that indication. I think I don't need to address the Tribunal on the patent counting evidence, because that has been rejected, rightly, of course, in our submission.

That leaves the RFI. I should just make two comments about that. One is that in (b)(iv) the individuals within the Defendant who had primary responsible for making relevant decisions on set royalties. We are content to do that in relation to Apple and Samsung for the relevant period, but we don't see the basis for doing so in relation to other OEMs at present. I mean, this is a claim for damages in relation to phones that were sold only by Apple and Samsung. It is not a -- this is not a regulatory enquiry.

MRS JUSTICE BACON: So you would -- yes. You would frame that by reference to, rather than OEMs generally, Apple and Samsung?

MR JOWELL: Apple and Samsung.

MRS JUSTICE BACON: Yes.

MR JOWELL: The second point we should make clear --

MRS JUSTICE BACON: Yes. I should say we are sympathetic to that point.

MR JOWELL: I am grateful. The second point we should just make clear, just so that

the Class Representative don't get their hopes up, is that there are unlikely -- we cannot say definitively -- there are unlikely to be these committees and groups that they posit the existence of, because these decisions are made by the negotiators, but we can give the identities of the negotiators, but there is not some sort of, as I understand it, some sort of committee where the intrinsic value is sought to be derived from a patent count or anything similar to that. The information is in the public domain relating to these patents and Apple and Samsung are, to put it mildly, highly sophisticated and well-resourced counterparties. So they may be disappointed, but we are perfectly content to provide the information, and, of course, we are prepared to provide the explanation of fair remuneration, but again they should not expect an elucidation of some sort of elaborate patent counting process. It will be a general explanation in general terms, and that was the meaning of the pleading.

So, subject to that, I am not sure I have anything that I need to add.

MRS JUSTICE BACON: Yes. All right. Thank you.

Mr Turner, is there anything else you want to say? I don't think you need to. Well, I don't think it is appropriate for you to respond on the points that we have rejected essentially because Mr Jowell hasn't said anything about those. We have reached a view on those. So the question will be whether there is anything that you want to say in response to Mr Jowell's comments just now.

Reply by MR TURNER

MR TURNER: My Lady, I understand that. With one small qualification. I have not been able to address your provisional view on one point. I think it would be helpful if I was able to do that so you understand our perspective in case it influences you before you reach a final view.

MRS JUSTICE BACON: And what was that point?

MR TURNER: Well, row 3, essentially the general industry knowledge point in the expert list. This is what was called the patent count.

So here you have an intention to look at the implication of the decline in the number of the patents. Now you have seen that that is a directly pleaded issue. We do need to address this by way of evidence. Following your provisional indication, we thought about how we were going to do that if our industry expert can't himself adduce this database information. We do understand and accept your point that he can look at normal industry practice. So he will be able to say that if there is a decline in standards, that this is a point that is taken into account in the industry. We accept that.

MRS JUSTICE BACON: Yes.

MR TURNER: One thing, though. I mentioned in my address that there were two aspects to what he intended to do. The first, which was not about patent count at all, was to refer to the fact that it is well-known in the industry that for 3G this company did make important patented contributions and had important inventions. The same may not necessarily have been the case for 4G.

So what went through our minds is that's a point that we do need to bring before the Tribunal and it is not specifically the patent counting point, but it is something that we are going to need to put in evidence.

MRS JUSTICE BACON: Why does it need to be the industry expert? Is there a factual witness who can speak to that?

MR TURNER: Well, it is what is well-known in the industry and that is why it seemed suitable for the industry expert to say that this is the case. We can look to see if we can find a factual person who can deal with it, but to an extent what is well-known in the industry is pre-eminently the province of an industry expert.

MRS JUSTICE BACON: That's a very different point to the point as currently framed in row 3. Can you articulate now exactly so that we can just make a note of it what

you propose that Mr Schneider is going to address?

MR TURNER: I prefer not to do it on the hoof because it is actually quite close to what is here, because he says in row 3:

"From an industry licensing perspective what has been the relative significance of Qualcomm's […] portfolio across time and different generations of standards."

So that's not referring to the patent counting at all. If anything, it is referring to the industry perspective on the relative significance --

MR JUSTIN TURNER: So this is a value judgment on Qualcomm's relative contribution to 4G as against 3G?

MRS JUSTICE BACON: Or 3G as opposed to 4G.

MR JUSTIN TURNER: 3G as opposed to 4G.

MR TURNER: Yes.

MR JUSTIN TURNER: I mean, how could we begin to resolve that? That sounds like an enormous question that could take a year to try on its own and if it is not common ground, how could we possibly -- how can an expert just stand up and say that? I assume Qualcomm may dispute it or may dispute the degree to which he is saying it and that just seems like an extraordinarily weighty topic.

MRS JUSTICE BACON: And it is not one that's pleaded anywhere as far as I can remember from the pleadings, this particular point about 3G and Qualcomm's contribution to that. We don't even know what your position is going to be on that.

MR TURNER: Well, my Lady, I will leave it there.

MRS JUSTICE BACON: Yes.

MR TURNER: All I would say -- I am not going to draft this on my feet.

MRS JUSTICE BACON: No.

MR TURNER: What I would say is it is not intended to be an enormous exercise, merely that it was well known in the industry that for 3G they did have certain important

contributions which Dr Schneider in relation to the radio access network, which are mentioned in Dr Schneider's second statement, that this is something which was not the case when it came to the later generations.

MRS JUSTICE BACON: Well, I think, as you fairly said, you can't draft on your feet. If there's something -- if there is an additional point that you think it is necessary for Dr Schneider to address because you don't have any other witness, you can address it and it relates specifically to a pleaded point or a point that you say might not be pleaded but is going to inevitably be put in dispute by the pleaded points, then you will be able to raise that in correspondence and then bring back to us at the July CMC fortunately.

All right.

MR TURNER: Yes. So there is really only one other point arising from what Mr Jowell said, which is something that we would push back on and one comment if you are willing to hear me on it, which is very brief.

The point we are pushing back on is in relation to the narrowing of your Ladyship's articulation of the RFI relating to individuals and committees to say only in relation to Apple and Samsung, because they are the only parties overcharges on whose products are in question. Two points arise here, one of which is a practical point. One is a point of principle. The practical point is that that form of narrowing rings big alarm bells, because it is likely to miss or may well miss the justification that's given by Qualcomm internally when they are generally considering the strategy that they adopt for justifying the level of royalties that they charge, because it is completely conceivable that they have internal processes, committees and individuals, who decide this is the basis on which we are setting these rates. They may be referring to the leveraging quality. They may not. They may not be specifically referring in those discussions, which are key to the case on strategy, in relation to the specific

negotiations with Apple and Samsung.

So there is a big alarm bell that you will miss that if you restrict that in the way Mr Jowell has suggested. That's why it can't be accepted in my view.

The other is the point of principle relating to this, which is the point that we have rehearsed on previous occasions. If you go to page 886 of the bundle, 880, you will recall that for the purpose of the trial of the issue of abuse we are dealing with a market-wide practice and that Qualcomm's behaviour in relation to other entities is part of the infringement. So you will see in paragraph 15 on page 880 at the bottom, about seven lines down:

"Furthermore, the fact the NLNC policy was applied on an industry wide basis is relevant both to the question of infringement and the quantification of the effects of that infringement as explained below."

Now the practical bite of this for the purpose of what I have just said is as follows. First, simply for the Tribunal to recognise that that is the way the case is put. We are dealing with a market-wide abuse. In this pleading we explain why their behaviour in relation to others affects what is done in relation to Apple and Samsung. Most obviously they are comparators. If they turn up at Apple's door and say "The reason why you should sign this licence is because it is accepted in the industry, because everybody else has signed up to it", and they don't give anything beyond that, of course, those others may have been affected by the NLNC policy.

It is quite an intuitive point, but the practical issue is that the limitation that Mr Jowell suggested is going to miss something that may be important to your determination. So I would urge you not to accept that.

That's the point of practice. The comment I was going to make, but I need not if your Ladyship wishes me not to, is on the essential pleading point and the conceptual point that was raised by Mr Jowell at the outset on abuse, because I can say that in

one minute.

MRS JUSTICE BACON: Well, I don't think I need further comment. I cut off Mr Jowell's attempts to make further comment on this, because it seems to me you have both explained your positions. Mr Jowell says he doesn't know what your case is. You say it is clear. From the Tribunal's perspective what is important is that we know by the next CMC everyone is clear what your case is and that there is no further argument about there potentially being an issue that is not pleaded. So Mr Jowell will serve his RFI now, and if there isn't a satisfactory reply, and by the way, that will encompass not only the general pleading point as to what's your theory of harm, but also what are the essential components of a supposed normal negotiation, and then that can be raised at the next CMC. I think it is not useful for us to go into this further now.

All right. Let me just speak to my -- the other panel members regarding the point relating to OEMs.

(Pause.)

MRS JUSTICE BACON: All right. We can see your point on limiting sub-paragraph 4 -- rather not limiting sub-paragraph 4 to Apple and Samsung. We understand your point that you are relying on an industry-wide policy and that by so limiting a search to Apple and Samsung, if I can say in very broad terms, custodians, negotiators, points might be missed.

Can I just ask Mr Jowell before we reach a final view on this do you have any information on the extent to which that's likely to be burdensome for you to give information which extends to OEMs generally as opposed to just Apple and Samsung?

MR JOWELL: The difficulty is, as I indicated previously, that this is a much more decentralised process on instructions than I think the Class Representative believes.

MRS JUSTICE BACON: Yes.

MR JOWELL: So if we were asked to do what the literal wording of the RFI, then one would end up with a list of probably, and I can't say for sure, because the exercise hasn't been done comprehensively, but my understanding is one would have to go and identify literally every negotiator with every OEM over this very, very long period.

MRS JUSTICE BACON: Well, no. The question is primarily responsible.

MR JOWELL: Well, whoever was primarily responsible for these individual negotiations.

MRS JUSTICE BACON: We are talking about a disclosure exercise which you say has cost you £4 million dollars, 4 million something, a large amount of money in any event, and we are talking about a way of enabling Which? to interrogate that very expensively provided disclosure. If it is a question of giving a list of names that's 20 long or 100 long, in relative terms that doesn't seem to be a huge burden.

MR JOWELL: Well, it may be because we may need to find out how we negotiated with every specific -- potentially every OEM over that very long period and then identify the lead negotiator in every single case.

MRS JUSTICE BACON: Yes. You might need to do that.

MR JOWELL: The other point is this. We have not given disclosure of negotiations with other OEMs. So it is also a somewhat futile exercise as well.

MRS JUSTICE BACON: It may be that that does not then produce something within the data set, but you will have done what they want you to do in terms of identifying search terms which they can use. Is there any reason why in terms of the time involved that is going to be an order of magnitude different?

MR JOWELL: May I take instructions?

MRS JUSTICE BACON: Right.

MR JOWELL: I am told it isn't practical, because there will be literally thousands of negotiations with different OEMs, but it would be practical if we could limit it to those

who are within the -- who are existing custodians of the disclosure that we have already given.

MRS JUSTICE BACON: So you will respond to the point on Apple and Samsung generally. In relation to other OEMs you propose that it would be limited to existing custodians who have been searched already?

MR JOWELL: Yes.

MRS JUSTICE BACON: All right.

Mr Turner, I think that's an appropriate compromise, and then if you don't get what you need immediately then you can come back at the next CMC.

MR TURNER: My Lady, one point of clarification. You said to Apple and Samsung generally. I understand it is Apple and Samsung and generally, because if they have a committee that discusses how we are going to go out to the industry and justify these rates and it is not referrable to any individual counterpart.

MRS JUSTICE BACON: Yes. Mr Jowell -- yes. Obviously if there is some kind of committee that would address the general situation he will need to respond to that, but if there is no committee then you will not get any details of that.

MR TURNER: Yes. The second point is there is a way of cutting through it, which would probably deal with it too. On the page that I took you to a moment ago, where we refer to these other OEMs by way example that are important to the abuse and the infringement, if you go to 881 of the bundle you will see there's six companies named there -- seven over the page, BenQ as well. With one substitution, which would be to change BlackBerry, which was a major party, for Curitel, you could say these make it very manageable, because you are not now talking about thousands of negotiations. Here you are talking about the big beasts in the industry, LG, Huawei, Lenovo, Sony, BlackBerry. That makes it tractable. You are not now, to quote Mr Jowell, looking at thousands of negotiations. So that would be in my submission a fair and just way of

limiting it proportionately.

MRS JUSTICE BACON: All right. Mr Jowell is taking instructions on that.

Mr Jowell.

MR JOWELL: There was a decision made at a previous CMC which was that they would not be receiving disclosure of negotiations with other OEMs, and it was a decision that was obviously correct and essential to maintaining this trial within a reasonable ambit. This is not a regulatory enquiry into the application of NLNC across the industry. It is about whether -- ultimately it is about whether it had this effect as regards Apple and Samsung.

So I just really struggle to see the relevance of this and it just does seem like an attempt by them to reopen the whole issue of --

MRS JUSTICE BACON: Well, I think Mr Turner's point is that you have given a disclosure set. He is not asking for the disclosure set to be broadened. He is already saying that it is difficult enough to search. So I would be surprised if he wants to come along and have yet more millions of documents.

I think the question is what can be done to enable anything relevant within that disclosure set to be ascertained.

MR JOWELL: Yes.

MRS JUSTICE BACON: Which do you think is more manageable, to use your approach of searching existing custodians other than Apple and Samsung --

MR JOWELL: Yes.

MRS JUSTICE BACON: -- or his approach of just restricting this to a number of named OEMs?

MR JOWELL: Let me take instructions again.

We think from a utility standpoint limiting it to the custodians who are within the existing pool makes a lot more sense, because otherwise you are likely to have individual

negotiators identified for, say, Lenovo or BlackBerry or whatever it may be, and then we will inevitably say "Let's see all the documents relating to Lenovo and BlackBerry" and that's just a pointless exercise because we are not concerned with Lenovo or BlackBerry phones or how those negotiations were conducted. So we think this makes more sense to do it with the custodians.

MRS JUSTICE BACON: Well, we have heard both of you on this point. We do understand Mr Turner's concern that by only giving names of individuals relating to Apple and Samsung negotiations that might cause documents to be missed from the existing disclosure set that are relevant to the pleaded issues. We will, therefore, order identification of names of the primary negotiators of other OEMs insofar as those have been identified as custodians for the existing data set. If that proves to be insufficient for Mr Turner's purposes, then that can be raised again at the next CMC.

Other than that in relation to Apple and Samsung the details required in the second sentence of (iv) should be provided as well as any -- in general terms any committees or groups, if there are any, who have been primarily responsible for making decisions on SEP royalty rates to be paid by OEMs in general. I am not restricting that to Apple and Samsung. If there are any committees and groups, those should be identified. Obviously if there aren't and it is individual negotiators, then that's the answer that will be given.

I think -- let me just go through -- yes. I think that deals with all of the issues.

So just to recap so there should be no doubt about this, in relation to the expert issues I have suggested a potential reframing of what is currently at row 2 on page 2 and row 3 on page 1, which would be something along the lines of "Expert evidence directed to the factors typically taken into account when negotiating the terms of a FRAND licence", without specifying in a granular way the points that that would need to include.

The other points on page 1 will stand, because those have been agreed.

Row 3 on page 2 -- sorry. Row 1 on page 2 has been agreed subject to the clarifications as to the scope of the evidence to be given by each of the two experts based on their different experience.

Row 3 we are not going to order. We consider that, as I have said, to be at the moment drafted in too broad and general terms.

Mr Turner has suggested that he may return to this with a somewhat different request at the next CMC and we don't exclude that.

In relation to the RFI, using the numbering in the application, we are not going to order the requests at (b)(i) and (ii) and the first sentence of (iii) on the basis that we consider those to be premature at this stage.

We will order a response to be provided to the second sentence of (iii), albeit that we note Mr Jowell's comments that the response may be given in rather general terms. We will have to see what response is given and whether there is any objection to the clarity of that taken, but that will unravel in due course.

In relation to (iv) we are going to order a response to be given to the second sentence on the terms that I have just explained.

Are there any issues about the timing of these responses?

MR TURNER: Can we ask for the full set to be given three weeks from the date of the order, which would be today? I don't know whether in view of the shortening of the matters that have been ordered Mr Jowell is in a position to improve on that, to do it in two weeks.

MRS JUSTICE BACON: Yes. Mr Jowell, are you in a position to improve on that because I would like as much progress to be made as possible ahead of the next CMC. Would you be in a position to provide that by 4.00 pm on 5th July?

MR JOWELL: This is the answer to the RFI?

MRS JUSTICE BACON: Yes. Exactly. The answer.

MR JOWELL: I very much doubt that, but let me take instructions.

To summarise, if I may, I think there is some lack of clarity as to what it is we will need to do to achieve this task. I think the purpose of the task is to try to assist the other side in identifying for the purposes of their disclosure what searches to run. So can I suggest that we use our best endeavours to respond within two weeks, but on the basis that it may be that the list will need to be provisional or on a particularly limited basis?

MRS JUSTICE BACON: Yes. All right.

MR JOWELL: As a practical --

MRS JUSTICE BACON: In relation to the question at (iii) simply a clarification of your case, what you mean by the term --

MR JOWELL: That we can provide.

MRS JUSTICE BACON: That can be done by two weeks?

MR JOWELL: Yes.

MRS JUSTICE BACON: In relation to the rest provide what you can by that date and then explain what you have not been able to provide and when I hope promptly you will be able to provide that information.

MR JOWELL: One possibility is, if you like, we initially provide from within the custodian base those major OEMs that have been identified.

MRS JUSTICE BACON: Yes.

MR JOWELL: And that should be a more sort of manageable task I believe.

MRS JUSTICE BACON: Provide what you can.

MR JOWELL: Yes, and then --

MRS JUSTICE BACON: By 5th July. Identify what's outstanding and what you have not been able to do by then and then maybe have a long stop of a week later for the

rest.

MR JOWELL: There are a number of OEMs and it is a long period, so it is not necessarily easy to identify them.

MRS JUSTICE BACON: If it is absolutely impossible, then you will have to come back to the Tribunal, but I don't want this to be left in abeyance because we do need to know in broad terms where we stand before the next CMC and Which? is going to start using that to interrogate the documents to make sure they have what that they need.

In terms of the RFI you are going to serve, again I think it is important that well before the next CMC the battle lines, if you like, are clarified so that you know whether you need to ask for any further directions at the CMC. Are you able within the next week to send to Which? your RFI?

MR JOWELL: Could we say ten days?

MRS JUSTICE BACON: Okay. That gives us to 3rd July. Is that right? I am sorry. I am miscounting. No. It is 1st July would be ten days.

MR JOWELL: Yes. By close of business on 1st July.

MRS JUSTICE BACON: All right. Then Which? to respond, which it should be relatively easy to do if Which? says its case is clear. I think Which? should respond to that and I am going to suggest 10th July. Mr Turner, is that doable?

MR TURNER: Clarifying our case to the extent it needs, that's going to be feasible. In relation to the factors that are taken into account in the competitive negotiation I imagine we will speak to our expert and that will form the basis for the headings.

MRS JUSTICE BACON: Yes, but you know now the questions effectively that are going to be asked. So the question is -- the RFI will be sent to you formally by 1st July, but you can start working on it now. So is there any reason why by 10th July you shouldn't be able to respond?

MR TURNER: Not that I am aware of, my Lady. If it turns out that for some reason we can't liaise with our expert on that, we will need to make that clear. It is a question of best endeavours, but we fully expect to meet that deadline.

MRS JUSTICE BACON: All right. So 10th July.

MR JOWELL: If I may just on that, the deadline for the applications for the next CMC is also 10th July. So for that specific application we may need your indulgence of a couple of days to serve any application relating to that RFI.

MRS JUSTICE BACON: I can see that. A couple of days later.

MR JOWELL: I am grateful.

MRS JUSTICE BACON: All right. Then in terms of provisional page limits, please put on the agenda for the next CMC page limits for expert reports, but I think I can say now that we envisage that the industry experts' reports should be no longer than 25 pages each, and what we are also wondering is whether the timetable should be somewhat modified -- and I am not going to put this in the order, but perhaps you can think about this -- so that instead of producing simultaneous reports, and then having a reply report, and then having an agree/do not agree schedule whether we might consider something else, which is to get the initial reports in and then for the experts to use that as the basis of a single consolidated document, which sets out the point -- in general terms the background which is agreed, and identifies within that the points that are not agreed, so that we are not working off multiple documents, which we then have to cross-refer with an agree/do not agree schedule, but rather a single document, which will form the basis of the relevant section of our judgment.

MR TURNER: That sounds like potentially a very good idea, my Lady. Does it mean essentially moving straight from the main reports to something that is a joint statement?

MRS JUSTICE BACON: A joint statement, exactly. That then will not simply be

a cross-reference to the earlier reports, but will take the place of the main reports, and so you then skip out -- so you completely skip the section of reply reports, and what we get at the end of it is a statement which sets out so much of the background as is agreed, and then with appropriate colour coding or whatever the bits that aren't agreed.

That is the proposal and perhaps you can just take that away and consider for the next CMC.

MR TURNER: We will consider the logistics with our experts.

MRS JUSTICE BACON: All right. This isn't by any means intended to be a sort of replacement for the ambulatory draft, but rather something which is commonly done in patent cases, and which seems to be useful for us, at least for that part of the evidence, a lot of which may not be that controversial.

MR JOWELL: No.

MRS JUSTICE BACON: Right. Is there anything else?

MR JOWELL: Well, we do say that this application was made on a very unfortunate basis. It was not -- clearly the need for this -- the central part of it, the evidence, was not set up properly either in the pleadings, or in the correspondence, or in the application itself, and we do say that it has been largely unsuccessful. So we do suggest we should at least have a significant proportion of our costs.

MRS JUSTICE BACON: I am sorry. We are going to order costs in the case, as requested by Mr Turner. I don't think it is appropriate for us to start carving up which part was successful or not. We have come down somewhere in the middle of the parties' positions I think on all of the issues.

MR JOWELL: I am grateful.

MRS JUSTICE BACON: All right. Provision of the order. You are going to take a little bit of time. Could I ask you to send that through to the Tribunal by, say, noon on

Monday in the usual way, agreed as far as possible? Insofar as there isn't agreement, either put the points on which you disagree or your position on those in the comment boxes on the order, or accompany the order with very brief submissions in a cover e-mail as to the points that are not agreed, and then just include appropriate colour coding in the order reflecting your rival contentions as to what should be ordered.

(1.04 pm)

(Hearing concluded)