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**IN THE COMPETITION**  
**APPEAL**  
**TRIBUNAL**

Case No. : 1382/7/7/21

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Thursday 19<sup>th</sup> December 2024

Before:

Justin Turner KC  
(Chair)  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Consumers' Association

Class Representative

v

Qualcomm Incorporated

Defendant

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**APPEARANCES**

Rob Williams KC and Jamie Carpenter KC (instructed by Hausfeld & Co. LLP on behalf of Consumers' Association)

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

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(10.30 am)

THE CHAIRMAN: Some of you are joining us via live-stream. 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 contempt of court.

Sorry, just give me a minute. (Pause).

You will have gathered Mrs Justice Bacon has picked up a bug yesterday and obviously is not here. Under rule 110, we don't need a full tribunal for this, as we understand it, unless you disagree, and I was proposing, as chair, that I would sit today. If anyone has any objection to that, obviously, let me know. No, good, all right. Thank you. Very good.

MR WILLIAMS: Sir, I appear for Which? together with Mr Carpenter today and Mr Saunders appears with Mr Scott for Qualcomm. There are three applications on the agenda and two pieces of housekeeping. Unless the Tribunal has any preference, I was going to press on with the first application which is the privilege issue.

THE CHAIRMAN: Sure.

1 Application by MR WILLIAMS

2 MR WILLIAMS: Sir, we have applied for a further re-review  
3 of the claims Qualcomm has made to privilege in relation  
4 to the FTC production set. We received an indication  
5 yesterday that the Tribunal may not have had a chance to  
6 read very widely, I don't know what you have had  
7 a chance to read, sir.

8 THE CHAIRMAN: Yes, I have read most of the material in  
9 the core bundle, I looked at the skeletons and I have  
10 looked at the witness statements. If anything came in  
11 late, I have not looked at that.

12 MR WILLIAMS: There is some correspondence but nothing by  
13 way of evidence, so, no. The application follows on  
14 from the application the Tribunal heard in July, so the  
15 background is familiar to the Tribunal. The essential  
16 question is, in light of what we now know, can Which?  
17 and the Tribunal rely on the privilege review that was  
18 carried out under US law as part of the FTC proceedings  
19 as adequate to deal with the application of privilege  
20 under English law in these proceedings? The short  
21 answer to that question is no, and even Qualcomm accepts  
22 that now, to some degree.

23 We had to make this application before Qualcomm  
24 accepted any shortcoming in its process, but it has now  
25 accepted that a further substantive re-review is needed.

1           The question is how far that needs to go. Our  
2           position is that the issues go much further than  
3           Qualcomm has acknowledged and that a broader re-review  
4           is needed than they have conceded. We applied  
5           originally for a complete re-review, for reasons that  
6           are explained in our skeleton, technical difficulties  
7           with the document set, and so on, but I hope it is clear  
8           from our skeleton that we are not dogmatic about that  
9           and what we want to do is to solve the problem.

10           Our skeleton touches on the ways that the review  
11           could be narrowed, and I will come back to that towards  
12           the end of my submissions, but we are happy to work with  
13           Qualcomm to identify the best way to solve any problems  
14           that the Tribunal may be satisfied exists once you have  
15           heard the application.

16           So I am going to run through the main points on the  
17           application and the points are the argument made by  
18           Qualcomm that Which? is now reneging on a previous  
19           agreement to proceed on the basis of the US review, I am  
20           going to deal with the main flaws in Qualcomm's claims  
21           to privilege which are under three headings: the high  
22           overturn rate in the review of fully withheld documents,  
23           that is the first issue; the second issue is the belated  
24           emergence of a divergence between English and US law,  
25           which Qualcomm now accepts requires a re-review process;

1 and, thirdly, the key issue in relation to partially  
2 redacted documents, which is the over-redaction of  
3 material where lawyers have been involved in the  
4 process. As I work through those issues, I will deal  
5 with Qualcomm's main counter arguments, which are,  
6 essentially, the relevance of the material and the  
7 prospect that a re-review will show up new material.

8 Then, as I said, towards the end of the submissions,  
9 I will come on to the question of, if there is  
10 a material problem, what is the solution? That has two  
11 aspects: one, trying to identify a solution that is  
12 targeted at the main problems and that is proportionate  
13 and considering the impact of any review on the trial  
14 timetable. If I may, I want to start with that issue,  
15 because I don't want it to be the elephant in the room  
16 as I make the rest of my submissions, I want to tackle  
17 it head on.

18 We haven't come to the Tribunal today applying to  
19 vacate the trial date. We have come to the Tribunal  
20 because, in our submission, there is a serious problem  
21 in relation to privilege and it needs to be resolved.  
22 The trial date is obviously a key consideration in  
23 deciding what an appropriate and proportionate solution  
24 might be, but the fact that we have a trial date cannot  
25 define what is needed by way of a solution if the

1 Tribunal is satisfied that there is a problem. We  
2 recognise, in making our application, as we did in July,  
3 that this Tribunal and, indeed, any court or tribunal  
4 that has fixed a trial date doesn't move the trial  
5 lightly, and, of course, we recognise that all of the  
6 members of the Tribunal have busy diaries and  
7 commitments which would need to be considered and it is  
8 not a small matter to rearrange them. We recognise all  
9 of that. We recognised it in July, which is why we made  
10 an application which takes the matter in stages, but we  
11 are ultimately dealing with a matter of basic fairness  
12 and due process.

13 It is the duty of any party to give disclosure on  
14 a proper basis and only to claim privilege where it is  
15 entitled to do so and, as a Class Representative, Which?  
16 depends heavily on documentary evidence. We don't have  
17 the same access to witnesses that Qualcomm does, we are  
18 not an industry party. Disclosure is obviously critical  
19 for us, and disclosure of material which exposes  
20 Qualcomm's strategy and internal thinking is especially  
21 critical.

22 Of course, normally, disclosure involves a review by  
23 English solicitors responsible for the litigation.  
24 I say "normally", but it is a fundamental part of the  
25 process and this is the only case I have ever

1 encountered in which the case has proceeded without that  
2 review, but, in the summer of 2023, Qualcomm persuaded  
3 us that, contrary to our reservations at that time,  
4 reliance could, and should, be placed on the review for  
5 privilege that had been conducted in the US under  
6 US law. It was a very unorthodox way to proceed, but we  
7 did agree to it, whilst reserving our rights, because we  
8 were told that a privilege review would add seven to  
9 eight months to the timetable and it would cost another  
10 £4 million. The extent of that issue was exacerbated  
11 because of another --

12 THE CHAIRMAN: Sorry, could you just go back a step further?  
13 How did this arise as to how disclosure -- so, you have  
14 obtained disclosure from the FTC set of documents, using  
15 search terms, as I understand it.

16 MR WILLIAMS: Yes.

17 THE CHAIRMAN: Was that pursuant to argument in front of  
18 this Tribunal or was that by agreement?

19 MR WILLIAMS: So, Qualcomm made the proposal, and there were,  
20 again, discussions about how long a relevant review  
21 would take and what it would cost, and so on, and we  
22 agreed to disclosure on that basis, in the expectation  
23 that we would then be able to interrogate the document  
24 set using electronic searches, and so on, in the usual  
25 way.

1 THE CHAIRMAN: And the FTC documents -- there were how many  
2 FTC documents?

3 MR WILLIAMS: That were disclosed or the total documents?

4 THE CHAIRMAN: The total documents prior to searching or  
5 maybe you don't have the figure to hand?

6 MR WILLIAMS: I think it was several million.

7 THE CHAIRMAN: We can come back to that. Then 450,000  
8 produced; is that right?

9 MR WILLIAMS: That's right, yes.

10 MR SAUNDERS: Sir, the total FTC document set is  
11 4.4 million.

12 THE CHAIRMAN: Yes, I think I saw that somewhere. So  
13 450,000 were disclosed and it is out of that 450,000  
14 that 72,000 were withheld, either wholly or partially?

15 MR WILLIAMS: Just on the numbers, if it helps, there were  
16 72,000 documents that were fully withheld.

17 THE CHAIRMAN: Yes, and then 34 on top of that?

18 MR WILLIAMS: So, the parties, I think, used different  
19 numbers for this and I just wanted to be clear about  
20 that.

21 THE CHAIRMAN: Okay.

22 MR WILLIAMS: Qualcomm's number is, I think, slightly in  
23 excess of 50,000. We have been working on the basis of  
24 a number that we have arrived at, which we think involve  
25 a degree of --



1 THE CHAIRMAN: I have now got confused. Start again, the  
2 72,000?

3 MR WILLIAMS: So, the numbers we have raised are 72 and 34.

4 THE CHAIRMAN: Yes.

5 MR WILLIAMS: Qualcomm gives the total number of 122, which  
6 is obviously more than 72 plus 34 and we think the  
7 discrepancy arises because Qualcomm has a larger number  
8 for partially redacted documents, and we think the  
9 difference between their number and our number is that  
10 we have done a process of deduplication and  
11 reclassification, and we think that the number is more  
12 like 34 once -- the real number is more like 34.

13 THE CHAIRMAN: Fine. That is not the entirety of the  
14 disclosure, as I understand it.

15 MR WILLIAMS: That is the privileged material.

16 THE CHAIRMAN: The 450,000 that were provided -- let's not  
17 get into privilege for the moment, I am just trying to  
18 understand the landscape. So, 450,000, and then there  
19 were other categories of disclosure as well, is that  
20 right?

21 MR WILLIAMS: Yes, this is the FTC set which only goes up to  
22 a certain point in time in 2018, and then there is  
23 a different body of material. That was approached  
24 differently. Because that was new disclosure, that was  
25 subject to a relevance review and an individual

1 privilege review.

2 THE CHAIRMAN: How many documents did you get?

3 MR WILLIAMS: So 17,000 were disclosed. And the privilege  
4 rate in those documents was 2 per cent, rather than the  
5 16 per cent that we saw in the FTC set, which is a point  
6 we made in July.

7 THE CHAIRMAN: Right. Thank you. Sorry, just trying to ...

8 MR WILLIAMS: So, in fact, the point I was going to make is  
9 tied up with the points you are making to me, sir, which  
10 is that the costs of all of this, as presented to us in  
11 2023, they were raised because Qualcomm wasn't going to  
12 carry out a relevance review, it was going to disclose  
13 on the basis of search terms. So, there wasn't going to  
14 be that process of going through the documents. So the  
15 cost of doing a privileged review was heightened,  
16 because, first of all, the documents were broadly scoped  
17 and, secondly, they were not going to be looked at, in  
18 any event. So, what you didn't have was a kind of  
19 winnowing down for relevance and then a privilege review  
20 for a subset of those documents.

21 THE CHAIRMAN: Was there an identification of issues to  
22 which the disclosure went? I appreciate you negotiated  
23 search terms.

24 MR WILLIAMS: No.

25 THE CHAIRMAN: So, we don't -- okay, obviously, that is

1 something you are going to have to address me on, is why  
2 you need disclosure -- leaving aside whether it is  
3 privileged or not, why you need these documents.

4 MR WILLIAMS: I think the short answer to that is we have  
5 accepted that now, that if -- Qualcomm has made clear  
6 that if there is going to be a re-review, it makes  
7 a huge difference to the time and cost if there is  
8 a relevance review because that then would filter the  
9 documents.

10 THE CHAIRMAN: Right, but irrespective of that, you will  
11 need to address the Tribunal quite clearly on why you  
12 say this disclosure is important -- Qualcomm say it is  
13 of marginal relevance, and that is, I think, one of the  
14 areas you need to focus on.

15 MR WILLIAMS: Of course, yes.

16 The broad submission on that is that it is true that  
17 the entire universe of documents includes more  
18 irrelevant material because of the approach that has  
19 been taken, but, of course, that doesn't mean that, when  
20 one gets into it, one will not find relevant material  
21 and I will be dealing with the relevance issue in  
22 relation to what we have got now. So, contrary to the  
23 insinuation in Qualcomm's case today, we don't want the  
24 trial delayed and we don't want the costs to go up.  
25 That is not in anyone's interests.

1 THE CHAIRMAN: I have that point, yes.

2 MR WILLIAMS: But the point is we were between a rock and  
3 a hard place in 2023, and we agreed to the proposal on  
4 privilege on the basis of a reservation of rights -- we  
5 went through this in July, I don't want to take up time  
6 on it -- but we had that power under the order to come  
7 back on the issue and that is what we have done.

8 The Tribunal knows what happened next, we made our  
9 application in July, we exposed doubts about whether the  
10 US review was, in fact, an adequate basis on which to  
11 deal with the matter, and there was a sample of 500  
12 documents. So, what we are saying, basically, is that  
13 this was Qualcomm's proposal and, if there is a problem  
14 now, it is a problem which is of Qualcomm's making.  
15 The problem has been stored up because they proposed to  
16 take this approach to privilege and, if that problem has  
17 been stored up, it has to be solved. Ms Fairhead talks  
18 in her evidence about a margin of error in relation to  
19 disclosure, and of course we accept that people can make  
20 mistakes. We don't agree that a margin of error of more  
21 than one in every ten documents is a reasonable margin  
22 of error and --

23 THE CHAIRMAN: I didn't find this area of the evidence, from  
24 either side, particularly helpful. Putting  
25 a qualitative interpretation on figures is -- I mean the

1 figures are what they are.

2 MR WILLIAMS: Well, the important point we make is that,  
3 when one looks at some of the documents, they are not  
4 reasonable disagreements and I will take you to some  
5 examples. There are documents for which privilege  
6 should never have been claimed, and so, that is our main  
7 answer on margin of error, but there is a more  
8 fundamental point here, which is that the solicitors  
9 responsible for this litigation on Qualcomm's side have  
10 never done a privilege review. This is not just about  
11 margins of error, a necessary part of the process was  
12 bypassed for reasons of time and costs, but when we have  
13 dug into it, the fix to that problem, it turns out, in  
14 our submission, didn't work in the first place.

15 So, in terms of the issue of timetable and trial  
16 date, the -- we have to take the issue in stages. The  
17 key questions for the Tribunal are, are we right that  
18 there is now evidence of a real problem in relation to  
19 privilege and, if so, what is needed to solve that  
20 problem? And if we persuade the Tribunal that there are  
21 serious problems and that the solution means that the  
22 trial date cannot be maintained, then that is,  
23 unfortunately, where we are. It is very far from  
24 an ideal position for us. We don't want justice to be  
25 delayed, we don't want costs to go up. But we say it is

1           preferable and necessary if the alternative is  
2           proceeding on the basis of a compromised disclosure  
3           process.

4           So that is the framing from our side, sir. Now, in  
5           dealing with those introductory points, I have dealt  
6           with the first point I wanted to cover, which is the  
7           idea that we are reneging on the agreement to rely on  
8           the US review. I was not going to take up time on this.

9   THE CHAIRMAN: I don't think you need to address me on that.

10   MR WILLIAMS: If it was a good point, it was a good point  
11           in July, and it wasn't a good point in July. So that  
12           leads me to the flaws that have been uncovered through  
13           the process of review. The headline number is that, out  
14           of the sample of 500 documents, 60 were redesignated and  
15           those are split quite evenly in proportion between the  
16           fully redacted, fully withheld and partially redacted  
17           documents. It is 35 partially redacted out of 300 and  
18           25 out of 200 fully withheld.

19           I want to start with the fully withheld documents,  
20           because as we have said in our skeleton, these documents  
21           were not the focus in July, because we couldn't see what  
22           we couldn't see, and the examples that we put before the  
23           Tribunal were necessarily partial redactions from  
24           documents we had seen and about which we had concerns.  
25           It is really through this re-review, which Qualcomm did

1 resist tooth and nail, that the position in relation to  
2 fully withheld documents has come to the surface.

3 You have seen that one in eight of the fully  
4 withheld documents that were selected at random for  
5 review has been revealed to be either not privileged in  
6 full or not privileged at all. We say that is, on any  
7 view, a high error rate for a random sample. And  
8 Qualcomm have seen that that is a damaging number for  
9 them, given the fact that these documents were picked  
10 without any visibility of the content of the documents  
11 and so they have done their best to say, well, the  
12 sample is not random, because we selected file types and  
13 document types. But the point is, we did that blind --  
14 or the documents were picked blind to the content of the  
15 documents, so within the generic document types which  
16 I will show you in a minute, the documents were then  
17 selected at random. So, could you look at the privilege  
18 bundle, page 110, please. This is the letter of  
19 23 August by which Hausfeld wrote to Norton Rose,  
20 setting out what the targets of re-review should be. If  
21 you go on to page 121 of the privilege bundle, you can see how  
the fully  
22 withheld documents were defined or identified.

23 THE CHAIRMAN: Annex B?

24 MR WILLIAMS: Annex B, that's right.

25 THE CHAIRMAN: Yes.

1 MR WILLIAMS: What we have is a total sample size of 200,  
2 and Hausfeld identified 100 documents to be randomly  
3 selected by the document type and 100 documents to be  
4 randomly selected by the file type. And you can see  
5 that to try and get a cross-section of different types  
6 of document, which is part of the purpose of the  
7 exercise, the numbers are actually stretched quite  
8 thin when you look at it. So, you can see the number of  
9 emails is 520 in 2023, depending on different types of  
10 emails and the number of Outlook documents is 35, for  
11 example. So, we are talking about fairly small numbers  
12 within each category to try and get a cross-section, but  
13 the point is these documents were then -- the documents  
14 falling into these categories were not then chosen  
15 because there was any reason to think they were not  
16 privileged, and it was, therefore, a random sample --

17 THE CHAIRMAN: Sorry, so I understand, you say, if not  
18 random, then close to random?

19 MR WILLIAMS: Yes.

20 THE CHAIRMAN: I have that point.

21 MR WILLIAMS: So, what Qualcomm says is, well actually, many  
22 of these documents have then shown up elsewhere in the  
23 disclosure in unredacted or in less redacted form, and  
24 we say that is not an answer. There were 72,000 fully  
25 withheld documents and Ms Fairhead says that about



1 22,500 of them have shown up elsewhere in the  
2 disclosure, in some form or another, which means that  
3 almost 50,000 or 70 per cent don't show up anywhere else  
4 in the disclosure. So, if there is a high error rate --  
5 THE CHAIRMAN: I've got that, yes.

6 MR WILLIAMS: So, it is likely, at a minimum, very plausible  
7 that an error -- a high error rate in the fully withheld  
8 documents is going to turn up material numbers of  
9 documents. It may not be one in eight for the sorts of  
10 reasons that Qualcomm gives, but, if it helps the  
11 Tribunal, even if it was one in 50, we would still be  
12 looking at nearly 1,500 documents or something like  
13 that. So, it is going to be a lot of the documents if  
14 the error rate is at all material. Then we come to  
15 relevance. Qualcomm says some of the documents that  
16 were hit through this random sample were not very  
17 relevant to the claim, for the reasons we have already  
18 touched on, sir, which is that the pool was defined in  
19 the way that it was. We say, first of all, that is not  
20 surprising, given what the pool of documents were. The  
21 pool of documents was wide and then the documents were  
22 chosen blind. So, this process cannot be a test of how  
23 likely it is that documents that haven't been reviewed  
24 by anyone will be of direct relevance to the claim.  
25 What this is, is a test of the robustness of the

1 privilege review and we say that there are very clear  
2 reasons to be concerned about the quality of the review.

3 THE CHAIRMAN: You were going to address me on relevance,  
4 you said? You said you were going to address me on the  
5 relevance.

6 MR WILLIAMS: Yes, so the point I am making now is Qualcomm  
7 said --

8 THE CHAIRMAN: This Tribunal has never -- as I understand  
9 it, never formed a view as to whether any of these  
10 documents are relevant, because you have -- for good  
11 reason, I am not saying it is a bad reason, but, for  
12 whatever reason, you have taken a different approach to  
13 disclosure, which isn't starting with what the issues in  
14 dispute are, and which categories of documents should be  
15 disclosed in the light of those issues. So that is  
16 still a relevant factor in determining what the Tribunal  
17 does today. So, we are going to need some assistance,  
18 I am going to need some assistance.

19 MR WILLIAMS: I understand that, but, to break it down,  
20 there are two separate issues: one is, what does the  
21 relevance or irrelevance of the documents picked by the  
22 sample tell you about --

23 THE CHAIRMAN: I understand that.

24 MR WILLIAMS: That is the first point.

25 THE CHAIRMAN: Yes, I understand that.

1 MR WILLIAMS: Yes, so the difficulty we have, in terms of  
2 saying whether the rest of the fully withheld documents  
3 are highly likely/probably/possibly relevant is that we  
4 don't know what the documents are, sir.

5 THE CHAIRMAN: Right, but that is the same on any disclosure  
6 application, isn't it? If you were coming here saying,  
7 "I need disclosure", you would have to start off by  
8 saying why you need it. You cannot say, "I don't know  
9 if I need it because I don't know what is there", that  
10 would be what is classically referred to as "fishing",  
11 so you need to start off by saying why you need these  
12 documents. Assume in your favour too many have been  
13 withheld, but you need to explain why you need these  
14 documents, because that is not a matter you have  
15 addressed the Tribunal on before.

16 MR WILLIAMS: No. No. But, in my submission, one has to  
17 put the point the right way around, sir, and it is this.  
18 Normally, in any disclosure process, one would do the  
19 filter for relevance, identify whether the material that  
20 has been narrowed down in some way or other is relevant,  
21 and then, on that basis, decide if the relevant material  
22 is privileged.

23 THE CHAIRMAN: You start with what the issues in dispute  
24 are.

25 MR WILLIAMS: That's right, exactly, that is normally the

1 way it would happen, and that is not what happened here.  
2 We, instead, started with a broad body of material,  
3 identified in the way that it was identified, and then,  
4 within that body of material, if the material had been  
5 subject to privilege in the US proceedings --

6 THE CHAIRMAN: Sure, I understand, but you have had 450,000  
7 documents, subject to those that were withheld. And  
8 that is a lot of documents.

9 MR WILLIAMS: Yes.

10 THE CHAIRMAN: And the way that disclosure, you have gone  
11 about disclosure, means it has not been done in --  
12 I don't mean this in the wrong sense -- but in  
13 an intelligent way, it has been -- it suited the parties  
14 to take this rather broadbrush approach, which has no  
15 doubt meant there are a lot of documents that might  
16 otherwise not have been disclosed. Now you are saying  
17 that, because you haven't got all of the 450,000 you  
18 deserve to have, you need more, and a question precedent  
19 to that is, why do you need any of the 450,000  
20 documents? I appreciate that is where we are but that  
21 is what I am urging you to address me on.

22 MR WILLIAMS: Yes, no, so, sorry, I understand the question  
23 of course.

24 So, to slightly fast forward to a later part of the  
25 submission, the material that we are most interested in

1 is internal Qualcomm thinking, internal Qualcomm  
2 commentary on negotiations with OEMs, internal material  
3 that sheds light on its strategy in dealing with OEMs  
4 and, obviously, ultimately in connection with the  
5 policies and the issues that are the subject of the  
6 claim. That is --

7 THE CHAIRMAN: Can we just take that a little bit more  
8 slowly?

9 MR WILLIAMS: Yes.

10 THE CHAIRMAN: So, internal commentary on negotiations with  
11 OEMs. So, you want to know Qualcomm's approach to  
12 negotiating, is really what you are saying?

13 MR WILLIAMS: We want to understand what Qualcomm's internal  
14 thinking was, its approach to -- what its internal  
15 thinking was when it was dealing with OEMs. And so,  
16 when we come later on to the --

17 THE CHAIRMAN: What aspect of its -- appreciate the Tribunal  
18 has not been through this loop at all, so don't assume  
19 on it, but the policy is not in dispute.

20 MR WILLIAMS: No.

21 THE CHAIRMAN: So, why do you need to know about Qualcomm's  
22 internal thinking, just --

23 MR WILLIAMS: So, it is essentially to understand the manner  
24 in which Qualcomm's overall modus operandi and its  
25 application of the policy and its use of the policy in

1 negotiations with OEMs, the extent to which that was  
2 used as, or did, in fact, have the effect of influencing  
3 royalty rates. That is the central issue in the claim.

4 THE CHAIRMAN: So, you want the way it goes about  
5 negotiating royalty rates?

6 MR WILLIAMS: Yes, that's right.

7 THE CHAIRMAN: Yes.

8 MR WILLIAMS: Yes, and I should say, sir, we did have a CMC  
9 in July 2023 where there was dispute about disclosure  
10 categories, so it wasn't -- the Tribunal didn't direct  
11 disclosure on a completely generalised basis. Before we  
12 got to the search terms, we had a CMC and we debated  
13 a number of disclosure categories, I made the  
14 application, Mr Jowell responded to the application and  
15 the Tribunal ruled on those different categories and  
16 there were a whole range of categories under  
17 that July 2023 order.

18 THE CHAIRMAN: Right.

19 MR WILLIAMS: Obviously, one of those categories was  
20 centrally focused on Qualcomm's negotiations.

21 THE CHAIRMAN: Do we have that order in the bundle?

22 MR WILLIAMS: Sorry, I was perhaps taking too much as read.

23 THE CHAIRMAN: Yes, it was a little while ago. Is it in the  
24 bundles?

25 MR SAUNDERS: It might be under the privilege bundle, page 1240.

1

2 MR WILLIAMS: I am grateful to Mr Saunders. (Pause). The  
3 point I was making to you, sir, a moment ago, is, if you  
4 look to the bottom of page 1243 of the privilege bundle --

5 THE CHAIRMAN: Hold on, give me a second.

6 Right. Okay.

7 MR WILLIAMS: Then there is an expansion of that category in  
8 (j) underneath that, "internal communications within  
9 Qualcomm".

10 THE CHAIRMAN: You have "... Relevant OEMs ..."

11 MR WILLIAMS: Apple and Samsung and their contract  
12 manufacturers.

13 THE CHAIRMAN: "Chipset suppliers in relation to requests  
14 for LTE SEP licences ..."

15 Okay, right.

16 MR WILLIAMS: Now, obviously, as you will remember, sir, it  
17 has been a bit of a hot potato, the relevant OEMs point,  
18 and, at that CMC, we argued for broader disclosure of  
19 negotiation materials with other OEMs and, in fact, that  
20 issue came back before the Tribunal in July.

21 THE CHAIRMAN: I do recall that, yes.

22 MR WILLIAMS: But, at the same time, Qualcomm applied  
23 in July to strike-out our case as it relates to other  
24 OEMs, and that application was refused. So there has  
25 been traffic in both directions on this point.

1           Whilst we accept that Qualcomm shouldn't be  
2           broadening the net to capture material that the Tribunal  
3           has previously said shouldn't be captured, if, in the  
4           course of conducting this review, it identifies material  
5           which relates to negotiations with OEMs who are the  
6           subject of repeated allegations, we say there is  
7           absolutely no reason why it shouldn't be disclosed and  
8           we have examples of that in the material that has  
9           already been disclosed to us. We say that that material  
10          is now to be treated in the same way as the examples  
11          that have been the subject of the re-review. So, one  
12          shouldn't be --

13       THE CHAIRMAN: On relevance -- sorry, we seem to be drifting  
14          off relevance again.

15       MR WILLIAMS: No, what I am saying is that this order  
16          reflects --

17       THE CHAIRMAN: I understand these are two categories. So  
18          the challenge -- just to be frank, the challenge you  
19          have, I think, is, on the one hand, I understand you  
20          need to appreciate the way that Qualcomm was going about  
21          negotiating as a general matter -- its modus operandi,  
22          as you put it. That seems to be, I would imagine, from  
23          the 440,000 documents, minus the ones you haven't got,  
24          you will have got an impression of its modus operandi.  
25          The question is, do you need to see every document?



1 MR WILLIAMS: Well, yes, that is --

2 THE CHAIRMAN: Because you are not looking for something  
3 specific to make your case good.

4 MR WILLIAMS: No, that is true. But, in fact, we put the  
5 point a bit more specifically than that. What we say is  
6 that we have a concern, which we raised in July and  
7 which we have raised today, which is that the material  
8 which is really revelatory of internal thinking, it  
9 seems may well be the subject of privileged redactions  
10 because lawyers have been involved in these exchanges  
11 and a broad view has been taken of how privilege should  
12 be applied to those communications. So, we are not  
13 fishing in that sense, sir, we know that there is a body  
14 of material which Qualcomm has a sensitivity about, and  
15 we know that in many of the documents we see, that  
16 material has been redacted, and I am going to come to  
17 that in due course.

18 THE CHAIRMAN: Right, can we get to it sooner rather than  
19 later?

20 MR WILLIAMS: I think one sees it most acutely in the  
21 examples of partially redacted documents. So, shall we  
22 go straight there and then I will come back?

23 THE CHAIRMAN: Right, yes.

24 MR WILLIAMS: I was going to show you five examples.

25 THE CHAIRMAN: Yes, that would be helpful.

1 MR WILLIAMS: So, privilege bundle, page 207. Now, there  
2 are limits to what I can say about these documents  
3 because some of them are within a ring, even though,  
4 after the long lapse of time, they are probably not very  
5 confidential in real terms. The point I am going to  
6 make about all of them is, when one looks at the text  
7 that has --

8 THE CHAIRMAN: This an email of 25 September 2001?

9 MR WILLIAMS: That's right. And the red box is what was  
10 redacted for privilege.

11 THE CHAIRMAN: Okay.

12 MR SAUNDERS: I am sorry, sir, I am not sure if the online  
13 bundles -- if, sir, you are relying on those, we are  
14 seeing blank pages here.

15 THE CHAIRMAN: I can see them, actually.

16 MR SAUNDERS: I am grateful.

17 MR WILLIAMS: This is a document in which you can see from  
18 the email below, that was disclosed, that there were  
19 communications with one particular OEM, where -- I am  
20 trying not to -- in fact --

21 THE CHAIRMAN: Do you want me to read the first paragraph?

22 MR WILLIAMS: The first paragraph is the key point and what  
23 we say is this material is clearly not privileged --

24 THE CHAIRMAN: Just let me read it, sorry. (Pause). That  
25 has been removed?

1 MR WILLIAMS: That was redacted as privileged.

2 THE CHAIRMAN: What is the bit in red then?

3 MR WILLIAMS: The bit in red is what was removed for  
4 privilege. In relation to all these documents, sir --

5 THE CHAIRMAN: Why is that any -- you then point to the --  
6 sorry, maybe we are talking about different -- the  
7 paragraph I am looking at is: "At our last ..." it starts  
8 "At our last ...".

9 MR WILLIAMS: Yes, that was disclosed to us. That was not  
10 redacted.

11 THE CHAIRMAN: Right. And the one that starts "I intend..."?

12 MR WILLIAMS: Privilege was claimed over that material, yes.

13 THE CHAIRMAN: Why does that -- given that the topic is  
14 relevance --

15 MR WILLIAMS: What we say about this is that it indicates  
16 that, when Qualcomm negotiates with OEMs -- we have got  
17 a case, as you know, that negotiations with OEMs ought  
18 to happen with reference to particular criteria,  
19 information about the value of the rights being  
20 conferred and all the rest of it. Instead, what we say  
21 is that Qualcomm establishes a rate, and then, when it  
22 comes to deal with other OEMs, it justifies that rate on  
23 the basis it is what everyone else is paying.

24 THE CHAIRMAN: Right. And you form that view from, what?

25 MR WILLIAMS: We form that view --

1 THE CHAIRMAN: Yes, you have established in our own mind  
2 that ...

3 MR WILLIAMS: We see other documents in which Qualcomm says,  
4 "We are not going to negotiate with you about the rate"  
5 or "We are not going to accede to your request for  
6 a reduction in the rate. The rate that we charge is the  
7 market rate, it is what everyone pays", so we have  
8 documents that show that.

9 THE CHAIRMAN: You have documents that support that. So why  
10 do you need this one, taking this as an example?

11 MR WILLIAMS: It is not so much that we need it. We say it  
12 is very useful corroboration and evidence of the  
13 practice, but the point I am making today, sir, is that  
14 this material is relevant in the sense that I have just  
15 described and it was redacted for privilege. And it  
16 should never have been redacted for privilege. It is  
17 clearly not privileged. It is simply saying, "I am now  
18 going to email the other manufacturer". So, this is  
19 demonstrating the proposition that the approach that has  
20 been taken to privilege has the potential to trample on  
21 the material that we are interested in.

22 THE CHAIRMAN: This is one of the ones in your skeleton at  
23 paragraph --

24 MR WILLIAMS: That's right, yes. So, this is an example of  
25 both error in privilege and relevance. Some of the

1 examples I am about to show you are of the more general  
2 nature, which are showing this tendency to redact  
3 internal thinking, internal consideration of  
4 negotiations in a manner that has the potential to  
5 deprive us of relevant material.

6 The next one is at privilege bundle, page 211 --

7 THE CHAIRMAN: Give me a second. I haven't got there yet.

8 I am not very quick on this. This is referred to in  
9 your skeleton or ...?

10 MR WILLIAMS: This is referred to in our skeleton as one of  
11 the examples of obvious errors in the application of  
12 privilege.

13 THE CHAIRMAN: I can't find it.

14 MR SAUNDERS: Paragraph 20.

15 MR WILLIAMS: Paragraph 20, yes.

16 THE CHAIRMAN: Okay. (Pause). Okay.

17 MR WILLIAMS: You can see at the bottom that this is  
18 a document which is a communication from a particular  
19 OEM to Qualcomm, and then you see some internal  
20 commentary on that email and it is clearly not  
21 privileged at all. Now, that material, we don't say  
22 sheds any particular light on the issues in the case,  
23 but it is evidence of this tendency, we say, to redact  
24 internal discussions, internal commentary, internal  
25 thinking because one of the parties is said to have been

1 a lawyer at some stage and, frankly, there is no basis  
2 at all for a claim to privilege.

3 THE CHAIRMAN: Okay.

4 MR WILLIAMS: The next one is at privilege bundle, page 616. It is  
another --

5 this is a bit different because this is a note of  
6 a meeting between Qualcomm and -- I am going to put it  
7 generally -- a regulatory authority. If you look  
8 through the redactions in that note --

9 THE CHAIRMAN: Sorry, I am on the privilege bundle, page 616 yes?

10 MR WILLIAMS: Exactly, so if you scroll down to the bottom  
11 of 616, you can see that there is an email from  
12 an individual relating to -- it is effectively a note of  
13 a meeting with a regulatory authority. That is what you  
14 can see from the subject "...meeting notes".

15 THE CHAIRMAN: Meeting notes with that person, "(Privileged  
16 and Confidential)".

17 MR WILLIAMS: Then, if you look through that, you can see  
18 some red boxes --

19 THE CHAIRMAN: I am going back up, yes?

20 MR WILLIAMS: Down, sorry.

21 THE CHAIRMAN: Depends which down is. We are still on  
22 the privilege bundle, page 616, are we?

23 MR WILLIAMS: The red boxes start on page 618.

24 THE CHAIRMAN: I see, sorry.

25 MR WILLIAMS: Then there are some more on page 619. You

1 can get the gist. (Pause).

2 THE CHAIRMAN: So:

3 "Delivering ... message. So far so good ...", is  
4 the --

5 MR WILLIAMS: That is privileged apparently.

6 THE CHAIRMAN: Right.

7 MR WILLIAMS: These documents show this extreme sensitivity  
8 of at least some reviewers when they have gone through  
9 this material, and when they see something that  
10 provides --

11 THE CHAIRMAN: I understand that. It has not been done in  
12 this jurisdiction and (a) mistakes may have been made  
13 and (b) a different approach may have been taken. But  
14 we are on relevance at the moment. So, this is not  
15 assisting your case on relevance.

16 MR WILLIAMS: As I say, there are two parts to the argument,  
17 sir. One is the general point about the extreme  
18 sensitivity about internal thinking where lawyers are  
19 involved, and the second part --

20 THE CHAIRMAN: Yes.

21 MR WILLIAMS: The next one is one which is more -- will  
22 address the point on relevance. If you turn on to  
23 privilege bundle, page 622. The red text is, again, what is  
redacted.

24 This is a negotiation -- or internal discussions --

25 THE CHAIRMAN: This is internal.

1 MR WILLIAMS: Internal communications relating to  
2 a discussion with an OEM and you can see who it is from  
3 the bottom of the page 622 of the privilege bundle.

4 THE CHAIRMAN: You say I can tell who it is?

5 MR WILLIAMS: If you look at the box on the bottom of  
6 page 622 of the privilege bundle, you can see it refers to  
particular  
7 products. In fact, if you look at the top of  
8 page 624 of the privilege bundle, you can see an email -- you  
can see, at the  
9 bottom of page 623 of the privilege bundle, top of page 624, you  
can see  
10 email addresses which tell you who it is.

11 THE CHAIRMAN: Right, let me just have a look at this bit.

12 (Pause). Why do you need this document -- these  
13 documents, these emails?

14 MR WILLIAMS: Well, you can see from the top email, sir,  
15 that it is an example of --

16 THE CHAIRMAN: The top email being page ...?

17 MR WILLIAMS: At the top of page 622 of the privilege bundle --

18 THE CHAIRMAN: Yes.

19 MR WILLIAMS: -- there are discussions about, first of all,  
20 Qualcomm's approach to resolving issues about the level  
21 of the royalty rate, and --

22 THE CHAIRMAN: So, the first paragraph, you are saying?

23 MR WILLIAMS: The first paragraph raises that. And the  
24 second paragraph deals with how the issues, at that  
25 time, might feed into the prospect of a new licence



1           being put in place.

2   THE CHAIRMAN:  Sorry, I am struggling with this a bit.

3           (Pause).  Right.

4   MR WILLIAMS:  I am quite limited in what I can say in open  
5           Tribunal.

6   THE CHAIRMAN:  Yes, I can read it.  So, you say this is part  
7           of the picture.  Just explain to me -- I just want your  
8           submission on why a document like this is important.

9   MR WILLIAMS:  One of the issues in the case is, how do the  
10           parties go about resolving disputes between them in  
11           relation to --

12   THE CHAIRMAN:  It is not really an issue, is it?  That is  
13           an open question, isn't it?

14   MR WILLIAMS:  I shouldn't say an "issue".  One of the issues  
15           relates to the parties' attitudes in these negotiations  
16           to different ways in which royalty disputes about  
17           royalty rates may be resolved and the availability of  
18           dispute resolution mechanisms is one issue, for example.

19           So that is part of that picture.  The other strand  
20           of it is that it is a -- there is a particular issue in  
21           relation to Qualcomm --

22   THE CHAIRMAN:  Sorry, I just -- please bear in mind this  
23           case has been -- only come back recently.

24           So I should see it -- "One of issues relates to  
25           parties' attitudes in these negotiations to different

1           ways in which royalty disputes about royalty rates may be  
2           resolved ..."

3           Just be a bit more specific with me. What is the  
4           issue in these --

5 MR WILLIAMS: This paragraph talks about the scope --

6 THE CHAIRMAN: That I understand. But just explain to me,  
7           why is that an issue in these proceedings and what the  
8           scope of the dispute is?

9 MR WILLIAMS: We say that the policies that were applied,  
10          circumscribe the ability of an OEM to engage in dispute  
11          resolution mechanisms and in relation to particular  
12          negotiations -- so I think, at previous hearings, we  
13          have dealt with this issue, sir.

14 THE CHAIRMAN: Yes, but don't assume I remember --

15 MR WILLIAMS: I was going to say, the way you put it to me  
16          was that the policy affected the safety valve of the  
17          ability to go off and get a FRAND determination, for  
18          example.

19 THE CHAIRMAN: Yes.

20 MR WILLIAMS: What one sees in the disclosure generally is  
21          that Qualcomm was prepared, in certain situations, to  
22          propose dispute resolution mechanisms, but on terms  
23          which were unacceptable to the party or which the party  
24          said didn't give them a proper opportunity to litigate  
25          the issue. So, this sort of communication is part of

1           that picture.

2   THE CHAIRMAN: Right, but is this throwing light on whether  
3           there is -- a FRAND determination is possible or not?

4   MR WILLIAMS: In isolation, this document is not, but it is  
5           part of the overall picture, which arises particularly  
6           between Qualcomm and this OEM about how that safety  
7           valve, as you put it to me, might or might not work.

8   THE CHAIRMAN: Right. But you are just saying it is part of  
9           the overall picture of these negotiations, rather than  
10          there is a specific issue which is relevant to the  
11          pleaded case?

12   MR WILLIAMS: Well, yes, I mean, in relation to all of these  
13          documents -- I mean, the first document I showed you in  
14          relation to what I called the modus operandi with the  
15          other OEM, that goes quite specifically to part of our  
16          case.

17                 Some of this other material is part of the overall  
18          picture of negotiations between Qualcomm and these other  
19          OEMs. On our side, understanding Qualcomm's internal  
20          thinking about that --

21   THE CHAIRMAN: Why does the internal thinking matter?

22   MR WILLIAMS: Well, in any commercial scenario, sir, one  
23          tries to understand the difference between the position  
24          that a party presents to the counterparty and what they  
25          say internally about their thinking.

1           That is, classically, a part of any competition --  
2           and indeed other commercial disputes. So that is what  
3           we are trying to get at. Qualcomm obviously presents  
4           its position to the parties in one way, and then these  
5           communications shed light on what it was really  
6           thinking, what was really driving its thinking. You can  
7           see from the second paragraph that what Qualcomm is  
8           seeking to do is to use the situation to affect the  
9           terms of dealing with this other OEM more generally.

10   THE CHAIRMAN: Do you have any other documents relating to  
11           this negotiation? This specific negotiation which  
12           no one is mentioning as if it is a secret?

13   MR WILLIAMS: I am sure we have documents relating to these  
14           negotiations over time. And the point is going to be  
15           made against me, so I will deal with it now, Qualcomm  
16           say this document crops up elsewhere in the disclosure  
17           in unredacted form. This particular document.

18   THE CHAIRMAN: Okay.

19   MR WILLIAMS: And I am going to deal with that point in due  
20           course.

21   THE CHAIRMAN: Leaving aside that, again, it comes back to  
22           the point I put to you earlier, how important is it that  
23           you have -- so this was a series -- a negotiation which  
24           took place over a period of time. You have some  
25           documents relating to that negotiation, so you can

1 understand the approach that was being taken by  
2 Qualcomm, why do you need every document associated with  
3 that negotiation, in order to make your broader point  
4 that we are concerned with, you are trying to pin  
5 Qualcomm down on their modus operandi, as you put it.

6 MR WILLIAMS: We don't say that we need every document, sir.  
7 What we say is that Qualcomm is an extremely  
8 sophisticated commercial counterparty.

9 THE CHAIRMAN: Of course.

10 MR WILLIAMS: And it has engaged in a longstanding strategy  
11 and practice in these areas, and our case is that it has  
12 used those strategies and tactics to extract inflated  
13 royalty rates and that what we are looking for in the  
14 internal communications is unguarded observations that  
15 corroborate and confirm that that is indeed the way in  
16 which it was operating, and so, we are not searching for  
17 every document, but we are not fishing either, because  
18 we know that other tribunals, other regulators have  
19 looked at this. We know there is substance to our  
20 concerns and what we are concerned about is that the  
21 application of privilege to these documents may well  
22 have covered up material which goes to corroborate the  
23 case that we want to make. That is the overall  
24 submission. There is then a fallback point which is  
25 that one can see from some of the material that has been

1 redacted for no good reason, that it is material which  
2 does form part of the overall picture and which informs  
3 our understanding of these negotiations, so that is  
4 perhaps what I would call contextual relevance or  
5 explanatory relevance. We are not saying that any of  
6 the documents that have been identified through this  
7 re-review are smoking guns and that they demonstrate  
8 that there are other smoking guns, somewhere else in the  
9 disclosure. That, in my submission, is to put the  
10 standard much too high, sir. What we say is that if  
11 there is material of this nature, which supports our  
12 case, and which has been withheld from us on the basis  
13 of an unjustified claim to privilege, then it is  
14 material to which we are entitled, and that,  
15 fundamentally, comes down to the reliability of the  
16 privilege review. I can't make submissions to you about  
17 the likelihood or the exact probability that, if one  
18 looks behind these redactions, you will find unvarnished  
19 material that will corroborate our case. Of course,  
20 I can't do that. But that is back to front, in my  
21 submission, sir, because the material --

22 THE CHAIRMAN: I understand that. But let's just stick with  
23 relevance at the moment. Are there any other documents  
24 you want to show me?

25 MR WILLIAMS: So, there is one other document I wanted to

1 show you which was fully withheld. Again, it is  
2 a document which then cropped up elsewhere in the  
3 disclosure. It is a document at page 459 of the privilege  
bundle. In fact,

4 there are two more documents I should show you.

5 THE CHAIRMAN: Okay. So, this was wholly withheld?

6 MR WILLIAMS: This was wholly withheld and we are told it  
7 does crop up somewhere else, but you can see the  
8 relevance of this. This is a communication of an OEM  
9 containing patent information, which, as you know, goes  
10 to one of our --

11 THE CHAIRMAN: Slow down. I am just trying to work out --  
12 okay, I can see -- right.

13 Okay, yes.

14 MR WILLIAMS: Then privilege bundle, page 236 was the last example.  
You can  
15 see from the email heading what this relates to,  
16 I think.

17 THE CHAIRMAN: Sorry, page 236 of the privilege bundle, so this is -

18 MR WILLIAMS: This is an email, which says at the top  
19 "Attorney-Client Privileged Communication", so it is  
20 a document which goes to our overall point that that  
21 label is being used in a broad sense --

22 THE CHAIRMAN: But this is not Samsung or Apple.

23 MR WILLIAMS: No, it is not, no.

24 THE CHAIRMAN: So, why is this relevant?

25 MR WILLIAMS: So, what this document shows, and I will put it

1 in general terms, if I may --

2 THE CHAIRMAN: But given that it is not Samsung or Apple.

3 MR WILLIAMS: No, but what we say this document shows is  
4 a point which we -- well, what the document shows is  
5 that Qualcomm engaged with this particular OEM in a way  
6 which was designed to ensure that the royalty rate  
7 stayed up, and that any concession they made to the OEM  
8 was made other than in the context of the royalty rate,  
9 because we say that that was, again, part of its modus  
10 operandi and that is not just the point about  
11 negotiations with Apple and Samsung because it is  
12 a point about the overall strategy and about the  
13 importance to Qualcomm --

14 THE CHAIRMAN: But have we had a discussion about whether  
15 negotiations with other OEMs are disclosable? Is  
16 that -- I thought we had said they weren't or  
17 something -- it may be a false memory.

18 MR WILLIAMS: No, that is right. So, Qualcomm haven't had to  
19 go off and scope within their overall searches material  
20 specifically targeting negotiations with other OEMs, or  
21 this particular OEM.

22 THE CHAIRMAN: I see. So, this would not be disclosable.  
23 This is one of the -- it wasn't a bonus document because  
24 it was redacted, but there will be documents like that  
25 which you have got, which you wouldn't have got doing



1 the -- if you had come to the Tribunal and asked for  
2 disclosure in the conventional way?

3 MR WILLIAMS: We wouldn't have got it if we had said, "Can  
4 we have this because it is a negotiation with that  
5 OEM?", but the point I am making to you is not actually  
6 a point about -- one of the reasons we have said that  
7 material with other OEMs is relevant generally is  
8 because these are singular policies practised across the  
9 market, and I understand we have had that debate.

10 THE CHAIRMAN: Yes.

11 MR WILLIAMS: I am not reopening it, but there is another  
12 sense in which this material is relevant, which is that  
13 it goes to support the point I was just making that when  
14 Qualcomm deals with OEMs, it does so in a way which  
15 keeps the royalty up, and that royalty is then paid --

16 THE CHAIRMAN: But that is the submission you would no doubt  
17 have made on the last time you tried to get broader  
18 disclosure.

19 MR WILLIAMS: Well, we didn't make that particular  
20 submission but, in any event, the material has been  
21 scoped in the way that it has, we agreed the search  
22 terms, this document has arisen, and the point I am  
23 making to you is it is relevant. It is relevant  
24 material in the sense I have described --

25 THE CHAIRMAN: Understood.

1 MR WILLIAMS: -- and it is a document where we really cannot  
2 see any basis on it having been withheld for privilege,  
3 but, in any event, it is now accepted that it is not  
4 privileged. So that, I hope, explains to you -- I mean,  
5 I hope I have tackled your point on relevance head on.

6 THE CHAIRMAN: You have, yes, thank you.

7 MR WILLIAMS: But I do stress the point, in any disclosure  
8 exercise, one is looking for the most probative material  
9 and it is hard to find. I mean, you know, one goes  
10 through many documents, thousands, tens of thousands,  
11 sometimes even hundreds of thousands of documents to  
12 find it, and the submission I am making is that, in this  
13 particular case, there is good reason to think that that  
14 material may well be hidden behind redactions for  
15 privilege. I have given you some examples. So, I was on  
16 fully withheld documents and I have made the submission  
17 to you that, within the population of fully withheld  
18 documents, if there is a high error rate, then there is  
19 good reason to think, first of all, there will be lots  
20 of disclosable documents and, secondly, that, within  
21 that population, some will be relevant and we have just  
22 had the discussion.

23 Of course what one -- one doesn't know how many and  
24 one doesn't know what it is, but the point of the  
25 process of disclosure is to identify that material. It

1 is not to apply a blanket redaction to it in the first  
2 place and then say, because that has happened, it would  
3 now be disproportionate to even go and look at the  
4 material. That, in my submission, is completely back to  
5 front.

6 So, if there is a problem with the fully withheld  
7 documents, I think it is common ground that it is  
8 a bigger problem than can be solved on the current  
9 timetable we have, because it is such a large population  
10 of material and, even if one winnows out the documents  
11 which appear elsewhere in the disclosure, there are  
12 still 50,000 documents or so. So, the --

13 THE CHAIRMAN: Mr Saunders, please.

14 MR WILLIAMS: I think --

15 THE CHAIRMAN: Keep going.

16 MR WILLIAMS: Mr Saunders asked if I want to adjourn,  
17 I think I addressed that. The second point, hopefully,  
18 I can take a bit more clearly -- sorry, a bit more  
19 quickly, which is the Sporck issue, and I don't know how  
20 much of this you have picked up.

21 THE CHAIRMAN: Yes, I understand that. You have offered --  
22 Qualcomm have offered to look at 30 families or  
23 something again, 30 families --

24 MR WILLIAMS: Families of 30.

25 THE CHAIRMAN: You are quite right, families of 30, which

1           would be another 200,000 documents.

2   MR WILLIAMS:  I will take this as quickly as I can, given  
3           the time.

4   THE CHAIRMAN:  Yes.

5   MR WILLIAMS:  So, I think you will have our points in our  
6           skeleton that the Sporck issue came as a bit of a shock  
7           to us, because we have proceeded on the basis that the  
8           doctrines of privilege are relevantly the same for these  
9           purposes, and yet, here, we find a category of material  
10          which would never have been privileged under English  
11          law --

12  THE CHAIRMAN:  You are not disputing that this is a relevant  
13          principle of US disclosure law?  You are not disputing  
14          that?

15  MR WILLIAMS:  What we cannot dispute is that a body of  
16          material -- we accept there is a doctrine.

17  THE CHAIRMAN:  There is a doctrine, yes.

18  MR WILLIAMS:  But that doesn't necessarily matter all that  
19          much, because, what is clear, is that a large body of  
20          material was withheld on this basis and it wouldn't have  
21          been withheld under English law.

22  THE CHAIRMAN:  But you have been familiar with -- I am  
23          (inaudible) with knowledge of US law for these purposes,  
24          you could have spoken to US people and you could have  
25          raised this at any stage with Qualcomm and said, "Look,

1           what are you doing about this issue and is it relevant  
2           to the disclosure you are giving?". I mean, you could  
3           have raised that at any stage. You didn't need to  
4           wait for Qualcomm to tell you that it was a relevant  
5           doctrine of US law.

6   MR WILLIAMS: That is true, but a large part of their  
7           justification for the approach they took is that the two  
8           doctrines were relevantly the same and it is  
9           obviously -- one question is whether there is  
10          a difference and another question is whether a different  
11          part of US law had been relied on in relation to  
12          a population of documents within this set and withheld  
13          on that basis. We couldn't know that. We didn't know  
14          that. So, we were relying on them to say the principles  
15          are relevantly the same.

16                 It does go a bit further than that -- if you saw our  
17          application, there was correspondence about the approach  
18          that would be taken to families, and they told us, well,  
19          we are only withholding families if the whole family is  
20          privileged or if the individual document is privileged  
21          and we took that at face value and it now turns out that  
22          one had to read into that Sporck doctrine, under which  
23          whole families might be treated as privileged under US  
24          law, even if the document wasn't privileged under  
25          English law. What we say is that was not

1 a straightforward reading of the correspondence, the way  
2 it was presented to us. I understand it was --

3 THE CHAIRMAN: Could you just show me that, sorry?

4 MR WILLIAMS: We have extracted it in our application, which  
5 is in the core bundle, page 64, paragraph 27 -- sorry, 28. 27,

28.

6 THE CHAIRMAN: Yes, all right. Yes.

7 MR WILLIAMS: So, as I say, they now say, if you read Sporck  
8 into that, it is accurate, but of course we didn't read  
9 Sporck into it. Indeed, the reality is that, as  
10 Ms Fairhead has fairly explained, Norton Rose were not  
11 aware of Sporck when they wrote that. They were not  
12 aware of the implications of the Sporck doctrine when  
13 they wrote that correspondence. We say, well, we  
14 understand that but, of course, behind this process sat  
15 Qualcomm and its US team, and they knew, they knew there  
16 was material within the overall population which had  
17 been withheld on this basis and which put this in  
18 a completely different light. So, Qualcomm are really  
19 left with no choice but to say this is a minor  
20 discrepancy and one shouldn't go overboard in trying to  
21 deal with it, but the question is not really whether it  
22 is a major difference from a doctrinal perspective, the  
23 question is, how many documents does it affect? Again,  
24 we don't know. Qualcomm hasn't really explained that to  
25 us. But what we do know is that when we were sampling

1 the random documents, the issue arose, or the issue of  
2 unprivileged documents in privileged families arose for  
3 20 per cent of the sample.

4 So it appears to be material and it -- and the point  
5 has been relied on as an explanation for the reasons why  
6 some of the documents we have now got were withheld from  
7 us in the first place, so it -- the point does seem to  
8 be material.

9 So it is not surprising that Qualcomm has belatedly,  
10 only in response to our application, accepted that they  
11 need to correct for the point, but the proposal is not  
12 satisfactory because it is made on this very approximate  
13 basis that Sporck is more likely to be engaged in  
14 relation to families of 30 than for smaller families,  
15 and that would bring 8,000 documents within the pool for  
16 re-review. But Qualcomm don't know what the reach of  
17 the doctrine is. They have chosen this narrowing  
18 criterion which we say is bound to be self-serving and  
19 which only catches a fairly small number of documents  
20 out of the 72,000. If you could look at the second  
21 supplemental bundle, page 884, please.

22 THE CHAIRMAN: Sorry, I was looking at something else.

23 Which page?

24 MR WILLIAMS: Page 884, the second supplemental bundle.

25 THE CHAIRMAN: Yes.

1 MR WILLIAMS: We wrote to Qualcomm and said, "Well, how many  
2 documents would it be if you changed the family number  
3 threshold?", and you can see the results at the top of  
4 page 884, second supplemental bundle.

5 THE CHAIRMAN: I see.

6 MR WILLIAMS: As you would expect, as you reduce the  
7 threshold --

8 THE CHAIRMAN: How does Qualcomm know this, know the number  
9 of documents in these size families?

10 MR WILLIAMS: It is the number of families, I think, rather  
11 than the number of --

12 THE CHAIRMAN: Mr Saunders, before I forget --

13 MR WILLIAMS: Sorry, I beg your pardon -- perhaps  
14 Mr Saunders --

15 THE CHAIRMAN: Mr Saunders, could you explain how you get  
16 these figures?

17 MR SAUNDERS: The documents are tagged by the system as  
18 being part of a family --

19 THE CHAIRMAN: That is the answer, yes.

20 MR SAUNDERS: So, you can wind that back.

21 THE CHAIRMAN: You can wind that back, yes.

22 MR WILLIAMS: We make two points about this.

23 First of all, this is not, in our submission, the  
24 correct solution to the issue, because I have made my  
25 submission that there is a wider issue with fully



1 withheld documents and, if Qualcomm does a proper job to  
2 deal with the position on the fully withheld documents  
3 more generally, that would also deal this issue because  
4 the populations overlap, and that should be the focus,  
5 not just the family documents. But, even if one were  
6 designing a proposal to deal specifically with Sporck,  
7 we say that the proposal to put the threshold at 30 is  
8 not satisfactory. First of all, it is very arbitrary,  
9 it is very rough and ready and, really, there is no  
10 confidence at all that that is the right place to draw  
11 the line, and it is highly unsatisfactory for Qualcomm  
12 to make this error and then to try to minimise what they  
13 need to do to correct it.

14 In our submission, if a family of five documents has  
15 been caught by Sporck, then the position should be  
16 corrected. So, this is a problem, really, of Qualcomm's  
17 making and we say there is no reason for the Tribunal to  
18 show leniency in resolving the issue. None of us know  
19 what the reach of the doctrine is and which families  
20 Sporck has been applied to and which families it has not  
21 been applied to and, in my submission, that really does  
22 point to dealing with the issue as part of the wider  
23 issue on fully withheld documents and it will be swept  
24 up in that way.

25 So that is that issue, sir.

1           The last topic by way of flaws in the disclosure, we  
2           have already covered to a large degree, which is the  
3           partially redacted documents. And, to a large extent, my  
4           learned friend, his submission is aimed at a straw man  
5           in that regard. What he says is you are extrapolating  
6           from your best documents to the whole document  
7           population, and we are not making that submission at  
8           all. Of course we accept that we have picked documents  
9           which we thought were more likely to contain errors in  
10          relation to privilege. The submission I make is the  
11          submission I have already made to you, about why, if one  
12          digs into these communications in which lawyers were  
13          copied or which involved lawyers, there is a tendency to  
14          over-redact the material and why it is that if one gets  
15          behind that material, there are very realistic prospects  
16          that it will reveal material which is probative of our  
17          case. I do need to make one further point on this  
18          theme. You may have seen from our skeleton that we say  
19          the problem is continuing, because, when we got the  
20          results of the re-review, we queried the status of one  
21          document and, when they looked into it, Norton Rose  
22          Fulbright found that that document had been disclosed to  
23          us elsewhere with fewer redactions, so we can see what  
24          Norton Rose Fulbright redacted in that document. It is  
25          a presentation at page 1225 of the privilege bundle.

1 THE CHAIRMAN: Yes.

2 MR WILLIAMS: If you then go on -- what this relates to is  
3 Project Berlin, which is an internal project considered  
4 by Qualcomm in which it decided whether to spin off the  
5 chip business from the licensing business, so it goes to  
6 a central issue in the case, which is the links between  
7 the two businesses and disclosure was ordered  
8 specifically in relation to Project Berlin in the July  
9 CMC.

10 If you then look at pages 1229 and  
11 1230 of the privilege bundle, the green box shows you what  
Norton Rose

12 Fulbright redacted, and there is another green box on  
13 page 1230 of the privilege bundle. (Pause).

14 THE CHAIRMAN: So sorry, it is my fault. I have just lost  
15 track. This Norton Rose, this is a document that was  
16 not within the FTC set; is that right?

17 MR WILLIAMS: It was within the FTC set.

18 THE CHAIRMAN: It was within the FTC set. I beg your  
19 pardon.

20 MR WILLIAMS: So, when we got a further unredacted version  
21 of this as part of the -- the result of our application,  
22 so the re-review, Norton Rose said, "Here is another  
23 version of this document", and we raised some queries  
24 and they went off and looked into the queries and they  
25 found that we had already been given the same documents

1           beforehand with fewer redactions than they had applied.

2   THE CHAIRMAN: Right.

3   MR WILLIAMS: So --

4   THE CHAIRMAN: So, Norton Rose did the redactions on --

5   MR WILLIAMS: Norton Rose applied the redactions in green.

6   THE CHAIRMAN: Right.

7   MR WILLIAMS: And because they have now found that we had

8           another version of it, they have now said, well, in

9           fact -- so we can now see what Norton Rose redacted.

10   THE CHAIRMAN: So, there is still a little bit of redaction

11           in here?

12   MR WILLIAMS: Within this slide deck, there are still

13           redactions.

14   THE CHAIRMAN: Why is that relevant to this application?

15           If -- I mean, the -- you are saying Norton Rose didn't

16           do a very good job, but you would like Norton Rose to

17           look at a whole new bunch of documents and, presumably,

18           you would say they might not do a very good job of those

19           either, and I am not in a position to resolve that.

20   MR WILLIAMS: It is part of the submission I have made which

21           is that there is a tendency to over-redact at the

22           margins. I have made my point about that in relation to

23           documents I have already shown you, and what we say is

24           that, really, it is very hard to see why this material

25           should be redacted.

1 THE CHAIRMAN: Is this dealt with in evidence, this  
2 particular document?

3 MR WILLIAMS: It is dealt with by Ms Fairhead.

4 THE CHAIRMAN: Okay.

5 MR WILLIAMS: But, I mean, I am not making an allegation of  
6 impropriety, I am simply saying there is this tendency  
7 to over-redact commercial material where there is  
8 a sensitivity about it, and that appears to have  
9 continued even into the latest stage of this process,  
10 which has been conducted under the scrutiny of the  
11 Tribunal.

12 THE CHAIRMAN: Yes.

13 MR WILLIAMS: I think you will have picked up the point from  
14 our skeleton, one of the points that is made against us  
15 is to say some of these documents, in fact, have turned  
16 up elsewhere in the disclosure in a less redacted form,  
17 or a fully unredacted form, and we say, well, if that is  
18 intended to give us comfort, it doesn't.

19 THE CHAIRMAN: I understand that.

20 MR WILLIAMS: What it shows is the completely erratic nature  
21 of the review, the inconsistency in the review.

22 Cutting to the end of the submission about the  
23 partially withheld material, we were directed to pick  
24 our best examples, and my learned friend says, "If these  
25 are your best examples, we can judge you on them". You

1           have seen the numbers of documents at issue. I have  
2           shown you what we say is the trend demonstrated by the  
3           documents. There are obviously many other documents we  
4           could have picked. We picked the documents because they  
5           appeared to raise issues about privilege and because  
6           they appeared contextually relevant. We didn't know  
7           what was underneath, we didn't know whether it was going  
8           to be probative of the case or not.

9   THE CHAIRMAN: You have made that point, yes.

10  MR WILLIAMS: Exactly.

11           So that brings me to what is the solution and as  
12           I said, we started off with the broad application, but  
13           having seen Ms Fairhead's evidence, we were able to, and  
14           did, propose a more targeted exercise, which is set out  
15           in our skeleton from paragraph 56 and it might be useful  
16           for you to just have that, sir.

17           I have already made the point that, in principle,  
18           one can cut down the 72,000 by removing duplicates and  
19           that could reduce it down by -- take out 30 per cent of  
20           it, and take it down to 50,000-odd. The second point  
21           I think goes to a number of the points that you have put  
22           to me about relevance, sir, which is that --

23  THE CHAIRMAN: I have this point. You do relevance review  
24           first.

25  MR WILLIAMS: You can see it completely changes the scale

1 and cost of the exercise, it is a transformative point  
2 and it is helpful that Qualcomm have brought that to the  
3 surface. I mean, obviously, what one would need to do  
4 is to establish the criteria for a relevance review.  
5 I was not going to make detailed submissions about that  
6 now. But, for example, one of the points that is made  
7 against us is documents that predate the claim period  
8 are irrelevant. We say they are not irrelevant because  
9 they go to the -- what I have called the modus operandi  
10 point. The disclosure set that we have got has never  
11 been scoped by date range, it goes back at least to 2006  
12 and, in many instances, before that. In my submission,  
13 there is no reason to start drawing lines based on date  
14 ranges now.

15 As far as the other main battle line is concerned,  
16 which is to say other OEMs, as I say, it is one thing to  
17 not go out and do searches for material, scoping in the  
18 material, but if -- now that the material has been  
19 brought within the cohort, based on those searches, we  
20 say it would be inappropriate to now strip it out again  
21 on the basis -- where it relates to OEMs that are the  
22 subject of previous allegations. I hope I have shown  
23 you, sir, that some of that material is relevant to the  
24 broader themes in our case. We understand the  
25 Tribunal's point that one wouldn't go out and expand the

1 searches significantly to bring in that material, but  
2 the material has now been scoped in and, if, in the  
3 course of a relevance -- we say it is not inappropriate  
4 to capture within that reference to OEMs who are within  
5 the scope of our case.

6 Qualcomm applied to strike it out in July, that  
7 application failed and the material is now there, and we  
8 have some of it, and there is no reason why it should be  
9 withheld from us. Obviously, we recognise that  
10 £2.3 million, or whatever it is, is a significant sum of  
11 money, but in the context of Qualcomm's overall costs,  
12 which you will hear about further later today, we say it  
13 is not an extortionate sum and it is a proportionate sum  
14 to deal with a matter that goes to a point of basic  
15 fairness, we say.

16 Then the last point in paragraph 58 is that we are  
17 open to filtering. This point has been made in relation  
18 to the partially redacted documents, but the point could  
19 be made more generally to target the material that we  
20 have the greatest interest in, which is the internal  
21 email traffic, for the reasons I have been developing  
22 and we have identified that, in relation to Qualcomm's  
23 population -- what Qualcomm says is 50,000 partially  
24 redacted documents, if you filter that for emails and  
25 for key custodians, who are the people who are likely to



1 be copied into these emails, which are communications  
2 with legal personnel, that would chop that number of  
3 50,000 at least in half.

4 So I hope it is clear that this is not  
5 a one-size-fits-all application. We made the  
6 application in the way that we did because of the  
7 technical difficulties, but we have now got more  
8 information from Norton Rose, we have had a process of  
9 engagement with Qualcomm about how it might be more  
10 focused and, in the end, it still appears to us that if  
11 the problems are solved, that is going to affect the  
12 current timetable, but I have made my submissions about  
13 that. The last point I would make is this, it is not  
14 just the matter of making sure there is time for  
15 Qualcomm to do the process. If there is going to be  
16 more disclosure, we need time to consider it, analyse it  
17 and think about how we are going to use it in the case,  
18 and I think that is part of the reason why there are  
19 difficulties with the current trial date if there is  
20 going to be a comprehensive process.

21 It is not just a matter of Qualcomm doing the work,  
22 it is a matter of us then having a fair opportunity to  
23 use it.

24 So I will just turn my back, if I may, for a moment,  
25 sir. Thank you, sir.

1 THE CHAIRMAN: Shall we just have five minutes for the  
2 shorthand writer?

3 MR SAUNDERS: Thank you, sir.

4 (11.51 am)

5 (A short break)

6 (11.59 am)

7 THE CHAIRMAN: Mr Saunders?

8 MR SAUNDERS: Sir, I think there is one other point.

9 MR WILLIAMS: There is a reference and, if I may, I will  
10 make sure it is right and then deal with it at the end,  
11 if that is all right.

12 THE CHAIRMAN: Mr Saunders, sorry, I just wanted to -- the  
13 order we were looking at -- sorry, I probably should  
14 have asked Mr Williams this, but I don't think it  
15 matters who I ask. The order I was looking at with the  
16 disclosure categories, I think it was page 1243 in the  
17 privilege bundle.

18 MR SAUNDERS: Yes.

19 THE CHAIRMAN: That is not the -- these documents are  
20 outside -- these categories are outside of the FTC, are  
21 they?

22 MR SAUNDERS: No, sir. So, those are the categories and  
23 there was also, I think -- it may be in the same order  
24 or elsewhere that the disclosure was to be done by going  
25 through -- by not reviewing for relevance other than

1 using these search terms that were calibrated to try and  
2 catch some of the stuff.

3 MR WILLIAMS: I think it is partly my fault, sir, because  
4 you said we didn't decide how to define the documents  
5 with reference to the issues in the case, and I said  
6 "Yes, that is right" --

7 THE CHAIRMAN: Let's not go back through history, I just  
8 want to know what the position is.

9 MR WILLIAMS: Sir, we had an argument in July about what  
10 types of documents go to these issues, if I can -- ought  
11 to be disclosed. And the Tribunal heard arguments about  
12 that and some of them were contested and some were  
13 not --

14 THE CHAIRMAN: So, you take, for example, (i), those  
15 categories, and then use that to come up with the search  
16 terms?

17 MR WILLIAMS: To come up with the calibrated search terms.

18 THE CHAIRMAN: Then you use those on the FTC?

19 MR SAUNDERS: Yes. So, paragraph 2 on page 1246 of the privilege  
bundle,

20 I think.

21 THE CHAIRMAN: Yes, I see.

22 MR SAUNDERS: So, the idea -- there are two chunks of  
23 disclosure. There is the FTC material, but the FTC  
24 material stops in 2018, and then there is the later  
25 chunk of material as well.

Qualcomm

1 THE CHAIRMAN: And then just one -- there was just one other  
2 question, which you may come to, but in terms of --

3 MR SAUNDERS: Just to complete the picture on this, the  
4 other paragraph you need is paragraph 6, on  
5 page 1248 of the privilege bundle and that just explains what  
6 was ordered to do.

7 THE CHAIRMAN: Thank you. Just explain to me, from your  
8 perspective, Mr Saunders, what is the dispute on the  
9 modus operandi that Qualcomm employs in its  
10 negotiations, the dispute between the parties.

11 Submissions by MR SAUNDERS

12 MR SAUNDERS: We are totally baffled by that, in the sense  
13 that the -- it seems, from the way that the Class  
14 Representative wants to develop the case, there is some  
15 sort of platonic way in which one should do licensing  
16 negotiations. For example, you should do a top-down --  
17 I'm sure, sir, you are familiar with these sorts of  
18 terms, but you should do (inaudible) accounting. Now,  
19 we get hints of that in some of the evidence.  
20 That isn't the real world at all and that will be  
21 something the witnesses will be asked about in due  
22 course.

23 THE CHAIRMAN: Right.

24 MR SAUNDERS: We say it is essentially for the birds, this  
25 idea that Apple and Samsung, two of the world's largest

1 companies, are really going to, you know, get pushed  
2 around in that way, and you have got the -- you will  
3 have got 450,000 documents, which, no doubt, the Class  
4 Representative will pluck things out of, but the idea  
5 that the internal machinations within Qualcomm that  
6 don't cross the line, let alone in relation to third  
7 party OEMs, are of some relevance to what this Tribunal  
8 has to decide --

9 THE CHAIRMAN: That is a slightly different point, but you  
10 will not be saying you don't use comparative licence  
11 rates in part of your negotiation strategy?

12 MR SAUNDERS: No, so a standard way of doing it. But the  
13 idea that you can bully -- it is all from the  
14 competition perspective --

15 THE CHAIRMAN: That is a separate question, yes.

16 MR SAUNDERS: They have the documents in relation -- the  
17 debate at that CMC, and also at the subsequent CMC  
18 because the application was renewed, was, to what extent  
19 should there be disclosure of documents relating to  
20 negotiations with other OEMs. Now, obviously, Qualcomm  
21 negotiates with a lot of OEMs.

22 THE CHAIRMAN: I am not interested so much in the other  
23 OEMs, I am more interested in Apple and Samsung.

24 MR SAUNDERS: But they have the material in relation to  
25 Apple and Samsung.

1 THE CHAIRMAN: They say they haven't and we looked at one  
2 email.

3 MR SAUNDERS: There is one email in relation to one of those  
4 parties and I can address you on that in a moment.

5 THE CHAIRMAN: In terms of -- let's assume in their favour  
6 that there are other documents as part of the internal  
7 communications or perhaps, with Apple and Samsung, other  
8 documents that show the position you were taking in  
9 negotiations, what is the issue that those documents go  
10 to? And I don't want to know your position on it other  
11 than what the issue is going to be.

12 MR SAUNDERS: It is very difficult to see how that -- so the  
13 case that is being run against us, as we understand it,  
14 and we have struggled to understand the case, but the  
15 case that is run against us is that the -- what is  
16 alleged to be the "no licence, no chips" policy, leads  
17 to higher royalties. They say that is buttressed by  
18 what they call the "refusal to licence" policy, which is  
19 (inaudible) licensed chip makers.

20 THE CHAIRMAN: And don't make available the FRAND  
21 determination, that is the other.

22 MR SAUNDERS: That is an odd one because I can say to the  
23 court --

24 THE CHAIRMAN: Again, I am trying to identify the issues.

25 MR SAUNDERS: But if you take Apple, and this is not

1 confidential, Apple -- Qualcomm offered a FRAND  
2 arbitration to Apple.

3 THE CHAIRMAN: We can get into that --

4 MR SAUNDERS: That is for down the track. There are  
5 documents that relate to that within disclosure.

6 THE CHAIRMAN: So why -- what is going to be the dispute on  
7 the way you negotiate, and if you say there is no  
8 dispute, then when Mr Williams pops up at the trial and  
9 says this is how you negotiate, you are going to say --

10 MR SAUNDERS: At the moment, we don't understand how "how you  
11 negotiate" feeds into -- because the problem we have been  
12 suffering --

13 THE CHAIRMAN: That is a separate thing. In terms of how  
14 you negotiate, is there a dispute on the pleadings or  
15 a dispute on the evidence?

16 MR SAUNDERS: None of this is pleaded out by the CR or by  
17 Qualcomm. It will really only be when we see Mr Noble's  
18 evidence that we'll see the theory of harm for the first  
19 time, which is one of things I was going to say about  
20 the context of this application, because there does seem  
21 to be a suggestion that all of that should be put off.

22 THE CHAIRMAN: Your position today is you don't understand  
23 why your modus operandi is controversial or central to  
24 this dispute?

25 MR SAUNDERS: No. No.

1           I mean, if my learned friend wants to give  
2           particulars of why and how, then that is a matter for  
3           him, but he can volunteer that if he wants to, in some  
4           way, bring it into issue. But it may well be that,  
5           actually, we are no different to a lot of other people  
6           and we can all agree that, but that is not a ventilated  
7           issue on the pleadings at the moment.

8           And there is a risk that this is all running away  
9           with itself, because it is just simply not -- we are  
10          talking about disclosure in respect of issues which are  
11          just not -- and a theory of harm which doesn't even seem  
12          to us to be coherent.

13          I know that is a slightly negative submission, but  
14          the trouble is it is not for want of trying on this  
15          side. We are trying very hard to understand how this  
16          case works.

17        THE CHAIRMAN: What do you want to address me on? I have  
18          read your skeleton.

19        MR SAUNDERS: Can I just pick up the numbers, first of all,  
20          because you asked my learned friend about that. The  
21          total FTC docs provided are 450,000.

22        THE CHAIRMAN: Got that.

23        MR SAUNDERS: Within that 450,000, 52,000 are partially  
24          redacted. There are an additional 72,000 which are --  
25          were fully withheld, so they are not in the 450,000.



1 THE CHAIRMAN: Okay, 72,000.

2 MR SAUNDERS: That is in addition to the 450 that they have  
3 got. And the non-FTC documents they have been provided  
4 with are 17,000.

5 THE CHAIRMAN: Okay.

6 MR SAUNDERS: At the outset, I should say that Qualcomm does  
7 not want to lose the existing trial date, and nor do we  
8 say that anything this application has thrown up  
9 justifies losing that trial date. My learned friend has  
10 shied away from making an application to adjourn, which  
11 is essentially what we had understood his application to  
12 be and the consequence of it.

13 But he now seems to have fallen back in his  
14 submissions to suggesting that the sort of proposal that  
15 he develops in the skeleton argument should be done, so  
16 there should be a relevance review first, and  
17 Ms Fairhead, in her evidence at paragraph 48, talks  
18 about what that -- the consequences of that would be.

19 THE CHAIRMAN: Six to seven months.

20 MR SAUNDERS: Six to seven months and cost £2.3 million to  
21 £2.8 million. So how is this to work, we get the  
22 disclosure, say, in July, and we have a trial in October?  
23 My learned friend doesn't explain -- there are various  
24 places in his skeleton argument where they say they  
25 cannot even do the Sporck -- Qualcomm's proposed way of

1 dealing with Sporck, because that is -- they are so up  
2 against it in the trial timetable.

3 As I say, what we are very concerned about on this  
4 side of the court is Mr Noble's evidence being delayed  
5 and, insofar as any additional documents that come  
6 along, what really should be happening is that Mr Noble  
7 updates his report or provides a supplement when he gets  
8 to see those. There is no reason to withhold it. Part  
9 of the reason for our concern there is the reason that,  
10 sir, you touched on a second ago, which is that, on this  
11 side of the court, we are really struggling to  
12 understand how this case works.

13 So Mr Noble will elucidate that because he will have  
14 to go into print when he files his report. That is  
15 going to be the first time that we will see how this  
16 matters, if it matters.

17 So it is very important, as a matter of case  
18 management, that we don't lose that report. It is due  
19 in January. There is no application to push back the  
20 time for it.

21 So those are Qualcomm's case management concerns.

22 Now, again, we are very concerned about the idea  
23 that a big wedge of documents comes into the case  
24 in July and then there is going to be what is quite  
25 likely to be, assuming that some material comes out of

1 that, a lot of frantic review on every side, all sorts  
2 of last-minute reports and so on. It is going to lead  
3 to a very disorderly trial. So, it seems to us that the  
4 option that my learned friend went for on his feet today  
5 is not a particularly fair one to Qualcomm, and  
6 I detected a hint in his submissions that he still  
7 doesn't quite shy away from adjournment, but, actually,  
8 the consequence of it is probably pretty much as good as  
9 an adjournment because this trial has to take place in  
10 a way that is fair to both sides. They have to be able  
11 to know what material is there.

12 So, sir, that is the case management background. We  
13 say that, in the circumstances where we are presently,  
14 in December, with a trial less than a year away, we need  
15 to come up -- if we are to do anything, it needs to be  
16 calibrated and fair to both sides and it cannot be  
17 sensible to embark on some enormous exercise in respect  
18 of this pool of documents.

19 Now, it is quite important if I can just take, sir,  
20 you to a couple of aspects of how we got here, because  
21 actually that is quite important in relation to the way  
22 the application is now put.

23 If we can just look at Ms Fairhead's second  
24 statement, so core bundle, page 80, and then, bottom of  
25 the page, paragraph 8.

1           So, the parties agreed that Qualcomm would reproduce  
2           FTC disclosure without further manual review. The  
3           reason for that, as Ms Fairhead explains, is that it was  
4           agreed that it would be unreasonably burdensome for  
5           Qualcomm to have to repeat review of privilege that has  
6           already been done, given how similar US and English law  
7           of privilege is.

8           Just to pause there, this notion that it is for  
9           Qualcomm to educate Hausfeld, the largest claimant law  
10          firm in the world, on US law is also somewhat  
11          surprising --

12       THE CHAIRMAN: I have that.

13       MR SAUNDERS: -- frankly. Rather disappointingly, the  
14          Sporck case is not about spoons and forks, as you might  
15          wish, it is a securities action, but I'm glad that it is  
16          a well-known principle of US privilege.

17          Now, Which? agreed that Qualcomm did not need to  
18          undertake a review of privilege in order to ensure that  
19          the costs remained proportionate, as Ms Fairhead records  
20          there, and that the proceedings can progress  
21          sufficiently. It stated that it may raise questions "on  
22          privilege designations and redactions to specific  
23          documents (or categories thereof ...) ..."

24          So that was the proviso that Which? provided. It  
25          was not a nuclear -- they didn't say they would launch

1 a nuclear attack on the previous approach. It was  
2 a targeted approach that they were envisaging. We have  
3 seen the order, a second ago, which the chair made in  
4 relation to the disclosure at CMC 3. And the effect of  
5 the order was that the Class Representative got the  
6 documents from the FTC production set by running search  
7 terms against them. In fact, they got a lot more than  
8 they would have done if there had been a relevance  
9 review and the CR as part of that, the Class  
10 Representative, asked for yet broader search terms to  
11 capture even more extensive categories of documents and  
12 Qualcomm agreed that on the basis of what had previously  
13 been agreed, i.e. this agreement about specific classes of  
14 documents.

15 So the pool of documents that we have got in the  
16 case now, the FTC set, is rather more -- not only is it  
17 not filtered for relevance, but it is actually a rather  
18 more flabby set of documents than a laser-focused set on  
19 the issues in the case.

20 Now -- and it includes lots of stuff of, at best,  
21 peripheral relevance to the case as it has been pleaded.  
22 Running right back to 2006. And even earlier than that,  
23 in fact.

24 So they got the documents. Seven months later, we  
25 then had the application, sir, that you heard back at

1 the last CMC and, if I may, I will just take you to  
2 a couple of bits of the transcript where the chair  
3 indicated what the Tribunal was -- why we went down that  
4 route.

5 THE CHAIRMAN: I am not sure that is necessary. Tell me  
6 what it says.

7 MR SAUNDERS: So, the point being, it is not only that it was  
8 relevant to the case, but also materially different to  
9 what they had before. So that was the approach that --  
10 so that is the supplemental bundle, page 569,  
11 supplemental bundle, page 597, and the question was:

12 "On [*the Class Representative's*] best case, rather  
13 than simply taking a random sample, whether there are  
14 a good number of documents which are relevant, not just  
15 unredactable but also relevant."

16 So the short answer to this application is there are  
17 not. And they are not materially different to what they  
18 have. Because, actually, a lot of them are duplicates  
19 they have already got elsewhere and that is just the  
20 nature of the exercise.

21 THE CHAIRMAN: Mr Williams makes a fair point when he says  
22 the fact there are duplicates in this example doesn't  
23 actually address the problem of whether the redactions  
24 are inappropriate or not, and in other cases there may  
25 not be duplicates.

1 MR SAUNDERS: That is -- I mean, that is definitely  
2 a possibility, but you have to remember how the exercise  
3 was carried out. The Class Representative selected  
4 documents from within the partially redacted set it  
5 wanted to have investigated and, as far as the fully  
6 redacted set were concerned, as, sir, you have seen  
7 already today, they are particularly focused on emails  
8 which are much more likely to have privilege issues.

9 So that was never a representative sample. To  
10 suggest there was some kind of normal distribution  
11 across the whole set is irrelevant anyway.

12 THE CHAIRMAN: I am not sure that really takes us very far.  
13 The fact is, we are where we are, and the point has been  
14 made there are inappropriate redactions for privilege  
15 and we need to focus on what we do from here, rather  
16 than too much of a --

17 MR SAUNDERS: The point being, sir, doing this review, any  
18 privilege review exercise -- you may have been saved the  
19 joys of having done these in the past, there is a degree  
20 of human interpretation in them and there are errors.  
21 An error that you pluck out of individual documents,  
22 isolated individual documents, is not the same thing as  
23 a systematic problem, and it is a systematic problem  
24 that we are looking for. The fact that there are  
25 multiples of some of these documents suggest error,

1           rather than there having been -- it is noise,  
2           essentially, rather than being an actual signal,  
3           a systematic signal, that there has been a fundamental  
4           difference of approach.

5   THE CHAIRMAN:  As I understand it, your central point is  
6           really one of proportionality.  It is looking, on the  
7           one hand, at the relevance of these documents, given the  
8           pleaded case and the number of documents that have  
9           already been disclosed and, of course, the significant  
10          burden in having to redo this exercise.

11  MR SAUNDERS:  Yes, but those are --

12  THE CHAIRMAN:  I mean, if it was a relatively small number  
13          of documents, you would not object to doing them.  In  
14          fact, you are offering to look at another 8,000 or so.

15  MR SAUNDERS:  Yes.  Sir, I mean, we don't say that is  
16          necessary, but that is our proposal to deal with this  
17          very discrete issue --

18  THE CHAIRMAN:  Yes.

19  MR SAUNDERS:  -- that has come up, but we say that the idea  
20          that it is proportionate to review across this very  
21          artificially large set and engage huge amounts of  
22          expense and lawyer time is -- it would be wholly  
23          unprincipled if that is the approach that is to be  
24          taken.

25  THE CHAIRMAN:  I've got that point.



1 MR SAUNDERS: Sir, can I just address you briefly on the  
2 relevant -- on the particular documents?

3 THE CHAIRMAN: Yes, I think -- yes, I don't know whether we  
4 need to look at all of them, but I think 618 and 622  
5 were focused on, but --

6 MR SAUNDERS: Sir, just to set the scene for this, you have  
7 already seen that the disclosure of OEMs -- negotiations  
8 with OEMs other than Apple and Samsung was refused at  
9 CMC 3.

10 THE CHAIRMAN: I have that point.

11 MR SAUNDERS: It was also refused at CMC 4 and the order  
12 there is at supplemental bundle page 689, because the  
13 application was renewed.

14 So the starting point that anything that goes into  
15 this is not -- we have had argument about this twice,  
16 and even where things have been caught, as it were, by  
17 accident or bonus documents because they have obviously  
18 triggered some other search term, to suggest that that  
19 is something which then justifies opening up this  
20 enormous exercise is entirely contrary to the two  
21 previous orders of the Tribunal.

22 Now, in its application, the Class Representative  
23 only tries to argue that -- only seeks to argue that six  
24 of the documents out of 500 confirm that material that  
25 is relevant to the issues in dispute were incorrectly

1 held or redacted.

2 That is the starting point. That is paragraph 48 of  
3 its application. Only six are maintained as being  
4 relevant.

5 THE CHAIRMAN: Sorry, which paragraph?

6 MR SAUNDERS: It is paragraph 48 of the application,  
7 tab 4, page, pages 70 to 71 -- core bundle, sorry.

8 THE CHAIRMAN: Which paragraph?

9 MR SAUNDERS: Core bundle, paragraph 48.

10 It identifies six documents, and then those are  
11 responded to by Ms Fairhead in her table 2, which is  
12 also in the core bundle at pages 98 to 101.

13 Now, for three of the six, the Class Representative  
14 has had unredacted duplicate copies since November 2023,  
15 so it is slightly surprising that they could have  
16 verified that they had unredacted versions of those  
17 documents before the application, but obviously didn't  
18 do that.

19 There are three others, which are, we would say, the  
20 high-water mark of my learned friend's application.  
21 Page -- if we could go to the privilege bundle, so the  
22 first of those is at page 207. Just give me a second.

23 THE CHAIRMAN: What do you want?

24 MR SAUNDERS: Sorry, I am just having a slight IT issue.

25 There we are. You have already seen this one. All that

1           was redacted was one sentence.

2   THE CHAIRMAN:  Yes, I think you can move on.

3   MR SAUNDERS:  A 23-year old email chain, predates the claim  
4           period by 14 years.

5   THE CHAIRMAN:  I have that point.

6   MR SAUNDERS:  More striking than that, it is a comment from  
7           the lawyer, 14 years before the period, recording his  
8           intention to a proposal for a third party OEM.

9   THE CHAIRMAN:  Okay.  Which is the next one?

10  MR SAUNDERS:  That is that one.

11           The next one is -- my learned friend referred to  
12           this one, which is privilege bundle, page 211.

13  THE CHAIRMAN:  Yes.

14  MR SAUNDERS:  So, this is a point where they say there are --  
15           not all communications involving lawyers are privileged.  
16           Again, another 21-year old email chain.  There is  
17           already a duplicate of that disclosed and that is entry  
18           number 2 in the table at core bundle, page 99.

19           So, again, quite how any of that material assists  
20           anything, is --

21  THE CHAIRMAN:  Next one.

22  MR SAUNDERS:  That is that one.

23           The next one my learned friend referred to is  
24           privilege bundle -- page 616.

25           So, I am having a slight --

1 THE CHAIRMAN: Pages 616 to 618?

2 MR SAUNDERS: That is it. So, again, those have been --

3 those redactions were removed. They are very minor and

4 the substantive content of the email is all below, as

5 you can see, and it was always available. It is very

6 difficult to see how any of that material is going to be

7 relevant to the issues in this case. They don't add

8 materially to the disclosure that has already been

9 provided. They seem to relate to the author's various

10 impressions of a meeting.

11 THE CHAIRMAN: Let's have a look at 622.

12 MR SAUNDERS: 622, that one -- so 622, let me just get to

13 that.

14 THE CHAIRMAN: It has been disclosed elsewhere, I think.

15 MR SAUNDERS: Yes, there is already an unredacted duplicate

16 copy of this document --

17 THE CHAIRMAN: Leaving that aside, let's just say that is

18 a happy accident, it is an example of a relevant

19 document --

20 MR SAUNDERS: But it is a relevant document they have

21 already got.

22 THE CHAIRMAN: Yes, but, as I say, leaving that on one side,

23 have you got any other submissions on this?

24 MR SAUNDERS: What we see here is to and fro. My learned

25 friend sought to justify this by saying it is all about

1 the availability of alternate dispute resolution  
2 mechanisms. That is, again, not a pleaded issue in the  
3 case, but in any event, as I said a moment ago, there  
4 were offers to arbitrate anyway and that is something  
5 which we are going to hear about insofar as this really  
6 is an issue, but this is just internal back and forth.  
7 It is not of any -- I mean, these are all documents  
8 which, frankly, we are never going to hear anything  
9 about, realistically, we are never going to see at any  
10 point in this case again.

11 THE CHAIRMAN: But this would be-- you would accept, on the  
12 case as currently pleaded, this would be, if one had the  
13 benefit of hindsight, if one had this document in front  
14 of one, this would be a disclosable document --

15 MR SAUNDERS: On the case that is currently pleaded --

16 THE CHAIRMAN: -- in that it goes to a relevant issue?

17 MR SAUNDERS: The answer is it has been caught already by  
18 the search terms --

19 THE CHAIRMAN: I understand that.

20 MR SAUNDERS: I can't say it wouldn't have been caught,  
21 because it has been.

22 As far as relevance is concerned, we still do not  
23 understand how this is put in terms of the availability  
24 of alternate dispute resolution. You are dealing with  
25 two of the largest companies in the world here. This is

1 not -- if they want to sort things out, they know how to  
2 do it.

3 THE CHAIRMAN: Then 459 is the other one I think we need to  
4 look at.

5 MR SAUNDERS: The next one is 459. This is a 2009 document.

6 Now, sir, 459 is said to be something in relation to  
7 provision of patent information, and that you can see.  
8 But, if you look at what it is talking about, it is not  
9 coming from my client, it is coming from the OEM. So, it  
10 is not as if Qualcomm is sending a list of its patents,  
11 something else is going on here. There is no  
12 explanation offered by my learned friend as to why the  
13 counterparty to that negotiation offering lists of  
14 patents could be of any relevance to its case, to the  
15 Class Representative's case in this action, it appears  
16 to be about people picking patents from lists.

17 THE CHAIRMAN: Okay.

18 MR SAUNDERS: But, I mean, at the end of the day, this is  
19 not, at this stage of the proceedings, a FRAND dispute.

20 THE CHAIRMAN: No.

21 MR SAUNDERS: Even if it were a FRAND dispute, it would be  
22 highly questionable whether this material would be  
23 relevant, but we are not doing that.

24 THE CHAIRMAN: Where do we need to go next? We don't need  
25 to look at 236, I don't think.

1 MR SAUNDERS: 236, you have seen already.

2 I think the last one my learned friend referred to  
3 was 1225. This is the Berlin discussion.

4 THE CHAIRMAN: Yes, yes.

5 MR SAUNDERS: Now, the -- there are a number of aspects to  
6 this document, we say, which show that sometimes in  
7 privilege reviews there are close calls that have to be  
8 made. Norton Rose, my solicitors, took one view and,  
9 obviously, the people in the -- when it was produced in  
10 the FTC took a slightly different one.

11 But that does not -- that is not probative of any  
12 problem with the pool as a whole. And, again, the only  
13 redaction that is maintained in this is a single  
14 sentence.

15 THE CHAIRMAN: This doesn't seem to be relevant to the  
16 current dispute. This seems to be a complaint at  
17 Norton Rose, leaving aside whether --

18 MR SAUNDERS: Yes, it's essentially a gripe about the  
19 re-review of the 500.

20 THE CHAIRMAN: Yes, which we are not concerned with.

21 MR SAUNDERS: Other than this, it seems they are actually  
22 quite happy and have been through it with a fine-toothed  
23 comb.

24 In any event, there is a duplicate copy in the  
25 disclosure which was given to the other side on

1           9 November 2023.

2   THE CHAIRMAN: Right, okay.

3   MR SAUNDERS: Now, what is very striking, if that is the  
4           high point of my learned friend's case, this exercise  
5           has really shown nothing of any particular significance,  
6           to any of the pleaded issues. He has not identified any  
7           part of the pleading that this goes to. The reason for  
8           that is it is not pleaded, a lot of the points he was  
9           making on his feet. He has, very strikingly, not  
10          referred to any of the 450,000 other documents in order  
11          to say, "Here we are, this now explains a piece of the  
12          picture that we were struggling with".

13   THE CHAIRMAN: I have that in mind.

14   MR SAUNDERS: So, none of that has been done either.

15           So, in order to justify this review, we would submit  
16          that they are nowhere near the sort of threshold that  
17          the Tribunal had in mind when the 500 was ordered.

18           Now, as, sir, you have already seen, we have made  
19          a proposal to deal with Sporck, which is a particular  
20          issue that has arisen out of this, and we say, by doing  
21          that, our proposal is to try to address something which  
22          has come out and so that there's no -- we can deal with  
23          that issue. The figure, you have seen the calibration  
24          documents, so the reason that we picked that, it has  
25          been said against us this is a rather unprincipled



1 and -- a sort of exercise of having a bit of guesswork,  
2 but, actually, quite a lot of thought has gone into  
3 where you put that boundary to try and come up with  
4 an exercise where the -- where it is actually  
5 a practical exercise to do without derailing things too  
6 significantly.

7 Now, we proposed that we would get on with that and  
8 that should be happening in parallel to everything else,  
9 Mr Noble should be serving his evidence and, if  
10 something comes out of that exercise, which Mr Noble  
11 wants to refer to, we are not going to suggest for  
12 a moment that he shouldn't be able to do that or update  
13 his opinion, because he has seen some additional  
14 document, but the key thing is this case has to keep  
15 moving forward. What must not happen is to delay that  
16 evidence in order to put it all at the back end of this  
17 exercise and we do have our fear, as I was suggesting  
18 a moment ago, we are struggling, on this side of the  
19 court, to understand the theory of harm, and it may well  
20 be that that is not something that is unique to us.

21 Now, so the final -- my learned friend's claim fell  
22 down on the proposal for six or seven months to complete  
23 and £2.3 million to £2.8 million worth of work. Sir,  
24 that is just an impractical proposal and it would be  
25 grossly disproportionate, but also actually

1           fundamentally unfair, if all of -- if material comes  
2           into the case at that late stage. It is just going to  
3           lead to a very disorderly trial.

4           Sir, now, there are also -- the Class Representative  
5           seeks its costs --

6 THE CHAIRMAN: We haven't got to costs yet.

7 MR SAUNDERS: You may take it we don't accept any of that.

8 THE CHAIRMAN: Yes. Thank you.

9           Mr Williams?

10                         Submissions in reply by MR WILLIAMS

11 MR WILLIAMS: Sir, I will show you the pleaded issues to  
12           which we say this goes.

13 THE CHAIRMAN: Yes.

14 MR WILLIAMS: Can you look at supplemental bundle 39.

15 THE CHAIRMAN: Page 39?

16 MR WILLIAMS: Page 39, please.

17           You can see this is under the heading of abuse. And  
18           68 is in respect of the NLNC policy --

19 THE CHAIRMAN: Let me read 67 first. Right.

20 MR WILLIAMS: The first couple of paragraphs explain that,  
21           because of the NLNC policy, OEMs are required to, and  
22           do, take out a licence before they purchase chips. Then  
23           if you could read 68(c) and (d), please.

24 THE CHAIRMAN: Right. (Pause).

25           Right.

1 MR WILLIAMS: So, there is a pleaded issue about the manner  
2 in which the NLNC policy skews the bargaining process  
3 and, obviously, there are going to be two sides of the  
4 documents that shed light on that bargaining process.  
5 There will be the documents that cross the line between  
6 Qualcomm and the OEM in question, and there will be --

7 THE CHAIRMAN: Sorry, apart from the NLNC policy, what is it  
8 that you are saying -- and the ability to have -- to be  
9 able to have FRAND -- sorry, no.

10 Just explain what it is in these paragraphs that --  
11 apart from the policy, what it is in these paragraphs  
12 that you are referring to?

13 MR WILLIAMS: So, the -- I think you understand the policy.  
14 The policy, sir, is that, before an OEM can receive the  
15 supply of chips, they have signed the licence --

16 THE CHAIRMAN: What else?

17 MR WILLIAMS: -- and what these paragraphs say is, well,  
18 what impact does that policy have on the bargaining  
19 process, the negotiation process?

20 THE CHAIRMAN: Right.

21 MR WILLIAMS: What (c) and (d) say is, effectively, they  
22 skew the negotiation process.

23 THE CHAIRMAN: I understand that. That is obviously  
24 an important point central to this case.

25 MR WILLIAMS: So, the point I was --

1 THE CHAIRMAN: That policy is accepted. Why do you need  
2 disclosure to understand it?

3 MR WILLIAMS: So, one is then looking at the evidence of  
4 what actually happened in the negotiations and, as you  
5 have seen, there was an order for the disclosure of both  
6 negotiating material and internal Qualcomm material  
7 going to those negotiations. That is for an obvious  
8 reason, sir, which is that, if you want to understand  
9 the balance of power in the negotiations, you want to  
10 look at two things: you want to look at what  
11 communications crossed the line between the parties, how  
12 did they conduct themselves vis-a-vis one another, and  
13 that is one strand of the disclosure, the deal that was  
14 made; and the other strand is internal material, which  
15 sheds light on --

16 THE CHAIRMAN: But none of the documents we have looked at  
17 say, "Look, because of our NLNC policy, we can play hard  
18 ball".

19 MR WILLIAMS: No. I accept that point. And -- but I am  
20 explaining what it is that is central to the  
21 disclosure -- why the material, which we have said ought  
22 to be the central focus of any targeted proposal now,  
23 ought to be the Qualcomm internal material, because the  
24 submission I made earlier on was internal Qualcomm  
25 material, internal communications, are -- unguarded

1 internal communications are the most likely source of  
2 evidence about how Qualcomm perceived its own bargaining  
3 position.

4 It is true that the documents that were selected for  
5 the partial review don't go directly to that issue, but  
6 the question you put to me is, what are you looking for,  
7 what is the relevance of the material? The relevance of  
8 material is material which goes to that internal  
9 perception, and the broad submission we make is one can  
10 see in multiple documents, an approach which tends to  
11 redact internal communications where lawyers are copied,  
12 and the fundamental concern is that that has been  
13 applied in a way which has deprived us of that central  
14 material. There may not be very much of it, it may be  
15 that the documents which shed light on that relate to  
16 an earlier point in time, but that kind of unguarded  
17 internal observation really, really could shed light on  
18 what Qualcomm understood the nature and effect of this  
19 policy to be and, based on everything we have seen, we  
20 say there is a very strong possibility that it is hidden  
21 under redactions. That is the point I have been making  
22 to you.

23 So there is a clear target in terms of relevance,  
24 and can I make the submission to you that there is  
25 an overwhelming probability that we will find hundreds

1 or thousands of new documents which go to that point?  
2 Well, I can't make that submission because we obviously  
3 don't know what we haven't seen, but the suggestion that  
4 this is all a sort of invention on our side and that we  
5 are fishing around for something, some sort of  
6 theoretical category of documents, is not the case at  
7 all, sir.

8 Just to respond to a few of my learned friend's  
9 specific points, he said only six out of 500 documents  
10 were relevant. Of course, we only got 60 documents, so  
11 we were focusing on 6 out of 60, so it is 10 per cent  
12 rather than 6 out of 500.

13 The position, as far as OEMs is concerned, can  
14 I just show you page 434 in the supplemental bundle,  
15 which is an observation that was made by  
16 Mrs Justice Bacon at the last CMC.

17 This was in dealing with the strike-out application  
18 in relation to -- the Qualcomm strike-out application to  
19 strike out the pleading insofar as it relates to other  
20 OEMs.

21 THE CHAIRMAN: Hmm.

22 MR WILLIAMS: What Mrs Justice Bacon said in the Tribunal's  
23 ruling from line 11 is:

24 "... he is entitled to seek to make that point  
25 [about the other OEMs] on the basis of the evidence that

1 is currently in the disclosure set and available from  
2 other proceedings."

3 And, a bit further down:

4 "... Mr Turner's confirmation that he ... can make  
5 this case without further disclosure."

6 What the Tribunal ruled on that occasion was that  
7 one wasn't going to -- one was going to expand the  
8 universe of material, but the material, having been  
9 brought within scope through the current disclosure  
10 process, we say, if it goes to the issue, then we are  
11 entitled to disclosure of it, and, if the material is  
12 going to be re-reviewed as part of this process, there  
13 is absolutely no reason why it should be carved out  
14 because it does fall within that principle, sir.

15 I think Mr Saunders makes a bit of a jury point when  
16 he says that we didn't ascertain that we already had  
17 copies of some of these documents in a less redacted  
18 form --

19 THE CHAIRMAN: You don't need to address me on that.

20 MR WILLIAMS: Then, just in relation to the specific  
21 documents, I think, in the end, Mr Saunders accepted  
22 that the Apple document would be relevant and  
23 disclosable on any basis.

24 THE CHAIRMAN: I don't think he did.

25 MR SAUNDERS: I did not accept that.

1 THE CHAIRMAN: I put that to him, but he didn't agree.

2 MR SAUNDERS: No.

3 MR WILLIAMS: Sorry, I should reframe. I don't think  
4 Mr Saunders gave any good reasons why it wouldn't be  
5 disclosable on any basis. I should be more accurate.

6 As far as the Samsung document is concerned, I mean,  
7 you understand that it is our case, sir, that normal  
8 negotiations in this context involve the provision of  
9 patent information and an appraisal of that patent  
10 information and factoring that into it. Clearly,  
11 a document which shows that one of the main OEMs in the  
12 proceedings saw fit to negotiate in that way, clearly  
13 that sort of document is relevant to that part of the  
14 case.

15 So dealing then, last of all, with the particular  
16 proposal on Sporck, which only arises if you are against  
17 me on the wider application, I mean, Mr Saunders said  
18 candidly that they have come up with a proposal which  
19 encompasses 30 families and which will not derail  
20 matters too much. That is the wrong approach, sir, in  
21 my submission. One has to look at a solution that will  
22 deal with the problem.

23 THE CHAIRMAN: Yes.

24 MR WILLIAMS: And it is -- as I say, it is accepted that  
25 this now was an error, that this material shouldn't have



1           been carved out because there is not an appropriate  
2           proxy, the position that was taken in the US is not  
3           an appropriate proxy for the position under English law,  
4           so what one needs to come up with is a proposal which  
5           will actually deal with that problem properly, rather  
6           than seek to squeeze it into the current timetable.

7           Now, I don't submit that it is impossible to deal  
8           with the Sporck issue, on the basis of the current  
9           timetable, it depends on what the scope of the exercise  
10          that is ordered by the Tribunal is.

11          But we do say that one needs to start with the  
12          question of, what is the problem, what is needed to  
13          reverse out of that problem, and then understand what  
14          the timing implications of that are. If the exercise is  
15          going to go to, in my submission, 28,000 documents, say  
16          on the basis of families of five or more rather than  
17          8,000 documents on the basis of families of 30 or more,  
18          one would need to understand the timing implications of  
19          that, and that is a matter which I don't think really  
20          has been canvassed.

21          Sir, unless I can assist you, those are my  
22          submissions.

23       MR SAUNDERS: Can I just come back on that reference to the  
24          pleadings very, very briefly?

25       THE CHAIRMAN: Yes.

1 Further submissions by MR SAUNDERS

2 MR SAUNDERS: That is -- sir, I think you picked up the  
3 point --

4 THE CHAIRMAN: Page number again?

5 MR SAUNDERS: Supplemental bundle, page 39.

6 THE CHAIRMAN: Yes.

7 MR SAUNDERS: Sir, this is the -- this abuse is about  
8 chopping off the supply of chips in order to get better  
9 FRAND. That is the allegation. We haven't seen any  
10 hint of that at all in any of this material.

11 THE CHAIRMAN: Yes.

12 MR SAUNDERS: That is their pleaded case. Sure, it is  
13 an issue in the case and there is evidence that goes to  
14 that and they have had reams and reams of material. As  
15 I said before, they have had very broad disclosure,  
16 actually far broader than they would have had if  
17 relevance had been a factor.

18 Now, what is very striking is that, despite that,  
19 one might have thought, out of the 52,000 redacted  
20 documents, we might be getting an application for  
21 specific disclosure in respect of a handful of --

22 THE CHAIRMAN: I think we are going off -- you were just  
23 coming back on the pleading, I think.

24 MR SAUNDERS: No, I know, but what they have done is they  
25 have picked 300, and that, actually, is now a different

1 justification to the one that was made in the  
2 application, and it doesn't help my learned friend  
3 because it doesn't go to any of documents we have seen.  
4 So that is the submission in relation to that.

5 In relation to that aspect of the transcript you  
6 saw, supplemental bundle, 434, we would just invite you  
7 to read on to the top -- so the bottom of 434 and the  
8 top of 435, because what the Tribunal goes on to say, or  
9 Mrs Justice Bacon goes on to say, is:

10 "... declined to strike-out on the basis ... of  
11 Mr Turner's confirmation that he [doesn't need the]  
12 disclosure."

13 Which is rather a critical point, but:

14 "... this does not prejudge the question ... and it  
15 should not be said that because we have let this in we  
16 are necessarily going to order any more disclosure in  
17 relation to other OEMs."

18 That is the separate point:

19 "... also does not prejudge the extent to which we  
20 are going to allow reliance to be placed at trial on  
21 matters that are peripheral and long before the relevant  
22 period in this case. We will need to consider in due  
23 course active case management if there are such  
24 allegations relied upon."

25 That is what we are seeing.

1 THE CHAIRMAN: Okay.

2 (12.49 pm)

3 (Ruling extracted for approval)

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(12.49 pm)

**Ruling**

**THE CHAIRMAN:** The background to this application is that disclosure has proceeded on the basis that Qualcomm was required to disclose documents from the FTC disclosure set, by reference to agreed search terms. That set had been obtained after 300 attorneys had spent 100,000 hours reviewing documents, a set which comprised more than 4 million documents.

Qualcomm submit this disclosure has resulted in more extensive disclosure than would otherwise have been provided had a UK approach to relevance been taken. Further, it submits that this was a pragmatic approach which resulted in the saving of costs. During the process, there was no separate review of documents for relevance or privilege and, in total, 450,000 documents were disclosed. From within those documents, 52,000 were partially redacted. In addition to the 450,000, there were 72,000 which were withheld as being privileged documents.

At the last CMC, it was ordered that there should be a re-review of 500 documents that had been withheld or redacted for privilege. These documents were selected by the class representative and this led to 60 documents being identified as wrongly classified as privileged.

In the circumstances, the class representative now requests that all documents be reviewed, it having been shown that there was a material defect in the way the documents were classified. It submits that the defect in part arises from a difference in the UK and US approaches to privilege. In particular, they point to the Sporck doctrine by which families of documents intentionally selected and collated by lawyers for legal purposes may be classified as privileged under US law.

In addition, various errors may have been made.

1 The order that Which? seeks is set out in a draft order:

2 "The Defendant shall review all documents disclosed in these proceedings from the  
3 FTC Production Set pursuant to paragraph 4(a) of the CMC 3 Disclosure Order, but  
4 which were withheld (in full or in part) from inspection in accordance with paragraph 6  
5 of the CMC 3 Disclosure Order, on the basis that they were protected by a legal  
6 professional privilege under US law, and determine whether the material in the  
7 documents had been withheld from inspection and subject to legal privilege under  
8 English law"

9 It also submits that the defendant, Qualcomm, should bear its own costs of this  
10 process."

11 Which? point out that the fully withheld documents were chosen at random with no  
12 visibility of their content and they were selected from a pool of documents which had  
13 been identified on the basis of the search. Moreover, the sample reviewed from that  
14 broad pool was tiny, just 200 documents out of 72,000, or 0.72 per cent. It contends  
15 that the central issue is not whether Which?'s random selection has immediately  
16 alighted on the needle in a haystack, it is whether the review has revealed deficiencies  
17 in the approach taken to privilege. Which? says, that even with this tiny random sample  
18 of fully withheld documents, the documents which have now been produced include  
19 directly relevant material.

20 I am going to decline to make the order sought by the class representative. The  
21 reasons are as follows.

22 First, and most importantly, the relevance of these specific disclosure documents as  
23 a general matter is unclear. The principal issue between the parties is whether the  
24 "no licence, no chip" policy, which is admitted, is abusive. Paragraphs 67 and 68 of  
25 the Re-Re-Re Amended Collective Proceedings Claim Form State:

26 "67. In implementing the NLNC and RTL Policies, and Qualcomm's additional

1 | measures to buttress and sustain those policies (described at paragraph 39A above),  
2 | Qualcomm has abused its dominant position on both the LTE Chipset Markets and the  
3 | LTE SEP Markets and to the extent relevant the 5G Chipset Market and the 3G CDMA  
4 | Market.”

5 | “68. In respect of the NLNC Policy:

6 | a. Qualcomm exploits its dominance on the LTE Chipset Markets to insist that OEMs  
7 | enter into separate licences in respect of Qualcomm’s LTE SEPs, on pain of  
8 | Qualcomm threatening to cut off, or actually cutting off, the supply of LTE Chipsets to  
9 | the OEM concerned (the NLNC Policy). Qualcomm also uses other methods to coerce  
10 | OEMs into taking separate licences to its LTE SEPs, including threatening to or  
11 | actually withholding sample chipsets, revoking technical support for chipsets and/or  
12 | delaying the implementation of chipset-related software.

13 | b. Because OEMs are dependent on Qualcomm for at least a material part of their  
14 | LTE Chipset requirements, a threatened or actual disruption to their supply of LTE  
15 | Chipsets (or associated technological support) is effective at forcing OEMs to take  
16 | separate licences under Qualcomm’s LTE SEPs.

17 | c. The parties’ licensing negotiations take place in the shadow of an ongoing threat of  
18 | disruption to OEMs’ LTE Chipset supply. This substantially skews the balance of  
19 | power between the negotiating parties in favour of Qualcomm, and limits the ability  
20 | which OEMs would otherwise have to bargain their way to FRAND licence terms,  
21 | and/or their preparedness to litigate. The FTC Judgment refers to multiple of  
22 | Qualcomm’s internal documents which recognise that Qualcomm’s licensing practices  
23 | would be significantly more vulnerable to challenge absent its ability to  
24 | leverage the threat of chipset disruption (see, for example, p.157, l.23-p.161,  
25 | l.21 and p.177, l.26-p.182, l.8).

26 | d. This skewed negotiation process enables Qualcomm effectively to dictate the terms

1 of its LTE SEP Licences with OEMs, and has forced OEMs to accept licensing terms  
2 which they would not otherwise have accepted. In particular, OEMs have been  
3 compelled to: (i) accept a charge described as a “royalty rate” for the use of  
4 Qualcomm’s LTE SEPs, which is calculated by reference to a percentage of the price  
5 of the mobile handset and is set without negotiation over the true underlying value of  
6 the patent portfolio; and, in combination with this, (ii) pay this charge to Qualcomm  
7 even in respect of smartphones which incorporate a rival manufacturer’s LTE Chipset;  
8 (iii) cross-licence their own SEPs to Qualcomm, often on a royaltyfree basis; and (iv)  
9 accept and pay for licences in respect of certain of Qualcomm’s patents (including  
10 non-SEPs) which they neither want nor need; and (v) agree not to bring, or participate  
11 voluntarily in, proceedings against Qualcomm which challenge the lawfulness of, inter  
12 alia, the NLNC and RTL Policies and/or which seek a determination of whether  
13 Qualcomm’s patent licensing rates are FRAND.”

14 When asked about the relevance of the documents that have been identified in the  
15 review, Mr Williams KC, for Which?, fairly stated that he is not suggesting that any of  
16 the documents produced, or to be produced, would be smoking guns, but he said what  
17 is relevant is the *modus operandi* of Qualcomm in the way it is approaching its  
18 negotiations with Apple and Samsung, and that the documents additionally produced  
19 will be part of over all the picture, which, he submits, is important in establishing  
20 whether or not there is abuse.

21 Mr Saunders KC for Qualcomm said he was perplexed as to the relevance of these  
22 documents. He submitted that there was no dispute on the pleadings as to whether  
23 a particular *modus operandi* was relevant or not, other than the reference to the "no  
24 licence, no chip" policy. He also made the submission that Qualcomm, at trial, will be  
25 accepting that they used comparator license rates, in order to arrive at appropriate  
26 rates with Apple and Samsung and are not contending they just use a bottom-up



1 approach by reference to patent stacks.

2 I was shown certain documents and I am just going to give the references: they were  
3 documents in the privilege bundle, pages 207, 211, 616 to 618, 622, 459 and 236.

4 Having considered these documents, and the redactions that have been made to  
5 those documents which are partially redacted, my view is that these are of marginal  
6 relevance to the unpleaded reference to the *modus operandi* being adopted by  
7 Qualcomm in its negotiations.

8 There has been a production of a very large number of documents and it is not  
9 suggested by Mr Williams that the *modus operandi* of Qualcomm, as a general matter,  
10 will not be evidenced in the documents already provided. His submission is that it is  
11 better to have an overall picture of the negotiations, understanding the internal  
12 thinking, and that more documents will give a fuller picture and are better for him to  
13 make his case. He also made reference to the fact that these documents would be  
14 a useful corroboration of material which Which? already have.

15 So the first reason for refusing this application, as I said, is that the documents so far  
16 identified appear to be of marginal relevance in relation to the pleaded issues in the  
17 case.

18 Second, it is common ground that disclosure must be pragmatic and proportionate,  
19 (which is why this approach of starting with FTC documents was taken in the first  
20 place). The approach was never expected to produce every document of marginal  
21 relevance. The questions of proportionality are important when it comes to assessing  
22 the appropriateness of this review. Qualcomm says it is going to take eight lawyers,  
23 reviewing 400 documents a day, six to seven months to complete the task, even if  
24 there was an initial review for relevance of the documents identified. This would cost  
25 in between 2.3 million and 2.8 million. I think that may be dollars.

26 Given that it is difficult to see how individual documents will be central to this dispute,

1 that any of them will be smoking guns, this is, in the Tribunal's view, disproportionate.  
2 An alternative approach, or a slightly watered-down approach, has been suggested in  
3 Which?'s skeleton, at paragraph 56. They have three points.  
4 First of all, they say it maybe possible to materially reduce the number of fully withheld  
5 documents by eliminating documents that are duplicates, and this could reduce the  
6 pool by up to 30 per cent to around 50,000.  
7 Second, it is suggested that by conducting a relevance review -- this is Ms Fairhead's  
8 evidence on behalf of Qualcomm -- first, before a privilege review, this would reduce  
9 the burden. That is the approach which gets to the figures of six or seven months at a  
10 cost of 2.3 million to 2.8 million, to which I have already made reference.  
11 Third, was a speculation by Which? that partial redactions relate most particularly to  
12 internal documents and, most specifically, emails sent by, to or copying in legal  
13 personnel. It is said it is open to a suggestion as to how documents might be targeted  
14 using the names of relevant legal personnel and focusing on certain document types,  
15 if that is technically possible.  
16 That is not a matter which has been explored further.  
17 The third factor in the Tribunal's mind, refusing this application, is that, insofar as  
18 documents have been incorrectly withheld, that has arisen either because of  
19 a difference between US and UK approaches to privilege, or because of errors. There  
20 is no suggestion that there is any bias to these errors or differences, which means that  
21 more relevant documents have been withheld or redacted.  
22 In summary, looking at the pleaded issues, there is no indication that Which? will not  
23 be in a position to identify from documents already disclosed the *modus operandi* of  
24 Qualcomm in approaching its negotiations as a general matter.  
25 Finally, Qualcomm have offered to look at certain classes of documents. I think  
26 families of more than 30 documents, with a view to trying to reduce some of the issues

1 | which may have occurred by applying the Sporck doctrine. Qualcomm will be required  
2 | to do implement that proposal.  
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4 (1.02 pm)

5 THE CHAIRMAN: Where do we go now?

6 MR WILLIAMS: There is a question about the costs of that  
7 re-review. Our submission is that the re-review that  
8 you have directed should be done at Qualcomm's own costs  
9 because it is Qualcomm correcting for an error in its  
10 own approach.

11 THE CHAIRMAN: No, I am not with you on that, I am afraid,  
12 Mr Williams.

13 MR WILLIAMS: All right.

14 THE CHAIRMAN: There will just be costs in the -- I don't  
15 think there is a need to reserve them. I think they  
16 will just be costs in the action.

17 MR SAUNDERS: I think just costs in the case, yes.

18 THE CHAIRMAN: Costs in the case, yes.

19 MR SAUNDERS: Sir, the only other matter was the costs of  
20 the application, as to which I am not sure whether my  
21 learned friend persists in seeking indemnity costs.

22 THE CHAIRMAN: Let's see where we are at the end of the day,  
23 shall we?

24 MR SAUNDERS: We will see where we go.

25 THE CHAIRMAN: I was -- yes, we will deal with security

1 next. You have quite a generous time estimate for  
2 dealing with security, up to two hours, when your  
3 submissions on them are rather short.

4 MR SAUNDERS: Yes.

5 THE CHAIRMAN: Particularly yours, Mr Saunders, so I am not  
6 expecting that to take anything like two hours.

7 MR SAUNDERS: No. Indication received. There is also the  
8 MOF schedule points, which just by way of a division of  
9 labour on our side, my learned junior is going to  
10 address you on those briefly as well, but we don't  
11 anticipate they will take very long.

12 MR WILLIAMS: The housekeeping at the end is minutes,  
13 I think.

14 MR SAUNDERS: Subject to the Tribunal, I think we are agreed  
15 on both points, so we can discuss, but yes.

16 THE CHAIRMAN: We can make sure you are after lunch.

17 (1.03 pm)

18 (The lunch break)

19 (2.00 pm)

20 THE CHAIRMAN: Thank you, yes, costs.

21 Discussion re costs

22 MR SAUNDERS: Sir, as you have seen, we seek an order for  
23 security for costs in the event that the Class  
24 Representative fails to obtain adequate ATE insurance  
25 cover.

1           What we propose is that the ATE cover, or the  
2           security, should cover a sum of £27.5 million and what we  
3           would seek is the difference between £27.5 million and the  
4           current cover that is in place, which is £13.25 million.

5           Can I just start by identifying some common ground  
6           on, I think, where we are apart.

7           There is no dispute between the parties that the  
8           Tribunal has a power to order security for costs under  
9           rules 59(b) and (f) of the CAT Rules. And the conditions  
10          for that is, in particular, that there is reason to  
11          believe the claimant would be unable to pay the  
12          defendant's costs if ordered to do so.

13          Nor is there a dispute that the current level of ATE  
14          insurance cover is inadequate. The Class Representative  
15          has a proposal to increase that by a small amount, but  
16          what it says in footnote 5 to its skeleton argument on  
17          page 15 is that: "Which? does not say it would not be able  
18          to obtain whatever additional insurance is required."

19          We say that is quite important because this is not  
20          a case where there is a suggestion that Which? cannot  
21          get, or the funder cannot fund, additional insurance.  
22          It is not being said the funders are going to pull the  
23          plug, it is a case where what we are arguing about is  
24          what is the appropriate level of ATE on a security that  
25          should be provided, not the principle of whether it

1 would stifle the claim or one of those sorts of  
2 principles.

3 The point of principle which my learned friend  
4 develops in his skeleton argument is to the effect that  
5 orders for security in relation to class representatives  
6 should be more conservative than equivalent orders for  
7 security in private litigation. So that is the first --  
8 that is, as it were, the point of principle that is  
9 between us. Then, sir, as you have seen, there are  
10 a number of points about the quantum of Qualcomm's costs  
11 and various different points that are made in relation  
12 to that.

13 If I can address you first about this point of  
14 principle, and it may be convenient if you could take my  
15 learned friend's skeleton -- it is page 13, paragraph 66  
16 onwards.

17 Now, obviously, I will hear my learned friend  
18 develop his submissions on this in due course, but if  
19 I can just address you about whether this is  
20 an appropriate way forward or not, the first point that  
21 the skeleton makes is that -- is the citation to the CAT  
22 Guide, whether the application is made in order to  
23 stifle a claim and, as I have just said, that is not  
24 being said here, nor is it being said that it would have  
25 that effect.

1           The other issue is, obviously, the stage of  
2           proceedings at which the application is made and I will  
3           come on to address that, because one of complaints that  
4           is made against Qualcomm is this has all been left too  
5           late.

6           Now, paragraph 67 goes on to cite the decision in  
7           *BCL, BCL Old Co.* *BCL* was a case about a vitamins cartel  
8           and, if I could briefly take you to that, it is in the  
9           authorities bundle at page 8.

10          You will see what the case was about there at  
11          paragraphs 2 and 3, so it was a cartel relating to the  
12          supply of vitamins -- folic acid and various other  
13          things -- and predating the case before the Tribunal,  
14          there was a decision of the European Commission which  
15          fined the various undertakings -- I think, if you just  
16          turn the page, it was the best part of \$1 billion, the  
17          fine. 855 million -- sorry, €855 million. So, in that  
18          case -- just over the page, you will see there was no  
19          appeal against that liability, the finding that was made  
20          by the Commission.

21          So it was a follow-on action in the United Kingdom,  
22          liability had been established and the key questions  
23          were causation and quantum. Then, paragraph 33 on  
24          page 21, if we could look at that, now what that  
25          identifies is that: "an important factor is the likely



1 outcome of the proceedings and the relative strengths of  
2 the parties' case," and so, the defendants' liability is  
3 prima facie established as a result of the Commission's  
4 decision, for which there has been no appeal, and then  
5 there was an issue about passing on defences. The idea  
6 being that a defence is run where the claimants don't  
7 suffer loss because it is in the hands of --

8 THE CHAIRMAN: Yes.

9 MR SAUNDERS: That goes on to say an important factor is the  
10 relative strength of the parties' case. That is  
11 a difficult thing for the Tribunal to form a view on for  
12 the purposes of this application, but what we do submit  
13 is this is not a case in which liability has been  
14 established in a way that binds the Tribunal. You have  
15 already heard this morning my submissions about some of  
16 the theories of harm that have to be considered in this  
17 case. So there is, at the very least, a very real  
18 prospect, we would say, that Qualcomm can successfully  
19 defend this action.

20 So it is not like the *BCL Old Co.* case where  
21 liability was a done deal.

22 Now, what we say -- then paragraph 39 on page 23.  
23 You will see: "one question relevant... is which of the  
24 parties should take the financial risk on these various  
25 issues...we do not consider that the financial risk should be

1 taken by the Claimants, as far as security for costs is  
2 concerned." That was in there because, as I submitted  
3 a second ago, that was a particularly one-sided case.

4 So what we say is you have to be careful about  
5 approaching issues of principle through the somewhat  
6 myopic lens of *BCL*. That is a different beast to this  
7 dispute. At the very least, we say we have a very real  
8 likelihood of successfully defending this claim.

9 Going back to the skeleton argument, paragraphs 68  
10 to 70 are about costs to the funder. Now, that is the  
11 price of bringing a claim for £500 million-odd, and  
12 seeking, themselves, the funders, and their investors to  
13 profit very handsomely from any damages that are  
14 awarded.

15 It is not just a point about class members, it is  
16 a point -- primarily, we would say, one of the issues  
17 that is engaged is about fairness to Qualcomm, and there  
18 is a risk, contrary to the points that are developed  
19 here, we would submit, that -- of a perverse incentive  
20 in these cases because, if there are defendants in cases  
21 which are not follow-on actions, if they are not  
22 potentially properly protected in costs, then that  
23 creates a perverse incentive to settlement dynamics just  
24 as much as anything else because that means there is  
25 a delta between the protection that the defendant can

1 reasonably expect, a nuisance value, and the security  
2 becomes in itself a tool in settlement disputes. In  
3 settlement negotiations.

4 That is -- I mean, the reality of these cases is  
5 that there is a lot of big business behind them.  
6 Obviously, there are consumer claimants that are  
7 represented, but the financial interests of funders, it  
8 may come as no enormous surprise, sir, that they tend to  
9 look after number 1, and that is an issue which, it  
10 would appear, is live before the Tribunal in *Merricks*,  
11 amongst other things.

12 The Tribunal should be alert to a defendant ringing  
13 up exorbitant costs, but that is not a point of  
14 principle which should result in a lower reward than  
15 normal, compared with a private party. The Tribunal has  
16 to form a view on the amount of security, and we don't  
17 shy away from that, but it is not a point of principle  
18 that colours the analysis which has to be carried out,  
19 and the point which is now developed is contrary, we  
20 would say, to the rule 78(2), which is the rule which  
21 actually permits collective actions to be brought in the  
22 first place. You can see that rule on -- in the  
23 supplemental bundle at tab 71, page 1433. If we could  
24 turn that up, 1433.

25 So 78(2), just at the top half of the page:

1            "In determining whether it is just and reasonable  
2            ..."

3            So here we are talking about authorisation of the  
4            representative in the first place. One of the factors  
5            is, you will see in (d), whether the applicant -- the  
6            Tribunal has to consider whether the applicant is able:  
7            "to pay the defendants' recoverable costs if it's ordered  
8            to do so."

9            So it is inherent in the scheme of these actions  
10           that defendants have to be protected insofar as there  
11           are recoverable costs, and that is the touchstone.

12           The whole point of certification and continuation of  
13           the action is that the ATE insurance, which the funders  
14           pay for and is obtained, has to be able to pay the  
15           defendants' recoverable costs, we would submit. That is  
16           important because defendants need to be protected from  
17           claims that don't succeed.

18           It is also, we would submit, interesting to note  
19           that in the *Merricks* litigation itself, a similar  
20           argument was run before Mr Justice Roth. If we just  
21           look at that very briefly. We need the authorities  
22           bundle at page 399. Then, just to orientate yourself,  
23           this is the costs hearing in -- so just over the page at  
24           page 400, paragraph 4, you will see what this is about.  
25           This is dealing with costs relating to trials on

1 causation and the value of the claim judgment and  
2 a further limitation judgment. So, this is post-trial  
3 costs. There were issues at that stage about interim  
4 payments on account, in the usual way, and if we can  
5 just look at how that was dealt with by Mr Justice Roth,  
6 if we can look at paragraph 43 on page 411 -- sorry,  
7 page 411 of the bundle, thank you, just at the bottom  
8 there.

9 What the class representative, Mr Merricks, argued  
10 there is "that the tribunal should modify its approach to  
11 the costs because these are collective proceedings." And  
12 that was in order to try and resist an interim payment  
13 on costs and the court recorded it is entirely correct  
14 that it is designed to facilitate access to justice.  
15 This is why it "permits proceedings to be brought on  
16 an opt-out basis for a vast class", and so on.

17 Then:

18 "But, at the same time, collective proceedings  
19 involve huge claims -- here some £10 billion ..."

20 This one is 500 million. It is a huge claim by any  
21 measure, not as big as that one, but very, very big:

22 "... and impose a very significant burden on  
23 defendants. They are usually brought with commercial  
24 funding and ATE insurance, as is the case here. Many  
25 claimants, including sizeable commercial entities,

1 bringing individual proceedings are no better able to  
2 fund their claim than the commercial litigation funders  
3 who support collective proceedings."

4 Whilst that is in a different context, those similar  
5 principles, we would say, are germane to this point of  
6 principle which my learned friend develops.

7 Now, the final point which the Class Representative  
8 makes in its skeleton argument is to say -- they say  
9 this is broadly a similar exercise to determining the  
10 amount of a payment on account. We don't agree with  
11 that as a matter of principle, because this is  
12 a fundamentally different question. A payment on  
13 account, an interim payment, a *Mars v Teknowledge* type  
14 payment, is about when you get your money. Is there  
15 a short circuit to an aspect of the costs for the  
16 purposes of detailed assessment?

17 This is about whether we get our money, because, if  
18 it turns out that this claim was not -- was unfounded,  
19 why should Qualcomm be expected to have inadequate  
20 protection for its recoverable costs?

21 So we say that it is a fundamentally different  
22 exercise in that sense, insofar as my learned friend is  
23 seeking to argue that an interim payment is a similar  
24 sort of beast, this, we would say, engages a different  
25 set of considerations.

1           Now, we cited in our skeleton argument at  
2           paragraph 50, a passage from the decision in *Pisante*,  
3           and we submit that that is quite a helpful way of  
4           looking at how the Tribunal should go about doing this  
5           assessment. The first point that that makes is that the  
6           amount of quantum is a matter for the court's  
7           discretion. The overall question being, what is just --  
8           paragraph 50 of our skeleton -- in all the circumstances  
9           of the case? It is not a detailed assessment exercise,  
10          but it looks at the evidence as to the amount of costs,  
11          and will approach that on a robust basis in applying  
12          a broadbrush. In some cases, there may be an overall  
13          percentage discount, having regard to uncertainties of  
14          litigation, and the costs may include some detailed  
15          items which you wouldn't again get on detailed  
16          assessment, but there is no hard and fast rule on that.

17          When you decide the amount of security to award, one  
18          of the factors that is relevant to take into account is  
19          the balance of prejudice, between the harm that Qualcomm  
20          would suffer, if too little security is given, and the  
21          harm that the funders or the claimant would suffer if  
22          the amount secured is too high.

23          That balance usually, it goes on to say, favours the  
24          applicant, and an under-secured applicant would be unable  
25          to recover the balance of costs. It is not suggested by

1 Which? that they have a secret money tree that could pay  
2 it if the insurance cover is not there.

3 So they have confirmed they cannot pay these costs  
4 themselves, so it is either security or enhanced ATE  
5 cover that is needed to protect Qualcomm in the -- so  
6 that it can get its recoverable costs if it wins.

7 Now, the amount of security and the various  
8 criticisms. Now, the question, as I have just  
9 identified, and we saw in *BCL* as well, is, what is just  
10 with regard to all the circumstances? It is not  
11 a detailed assessment. If too little security is  
12 offered, then there is significant prejudice to my  
13 client in being unable to recover the balance of its  
14 costs. This security is it to all intents and  
15 effects.

16 Having regard to the complexity and value of the  
17 proceedings and the proportionality of costs generally,  
18 this a claim for £482 million. So, it is a very  
19 substantial claim and a very substantial issue for my  
20 client, but, as you can also imagine, this is a class  
21 action and there are a number of other class actions  
22 around the world, and so it is important that they are  
23 robustly defended from my client's perspective, and they  
24 should be entitled to do that.

25 We say that some of the costs have been exacerbated



1 by the Class Representative's approach to the litigation  
2 and we have put the references in the skeleton argument.  
3 Ultimately, we are seeking security for 65 per cent of  
4 our projected costs and we say that that figure  
5 addresses a number of the concerns.

6 Now, should Qualcomm recover its costs at a rate of  
7 65 per cent, there is a shortfall in the region of  
8 £14.25 million. But even on the Class Representative's  
9 position, if you take the position in Ms Boyle's 13th  
10 witness statement at paragraph 10, she identifies a series of  
11 complaints about the costs and then she says:

12 Well, Qualcomm would recover "not more than  
13 50 per cent" of the costs.

14 THE CHAIRMAN: Can we have a look at your evidence -- before  
15 we get to the rebuttal, can we look at your evidence --

16 MR SAUNDERS: On the figure?

17 THE CHAIRMAN: Yes, how you get to that.

18 MR SAUNDERS: That is in Thomas 8 at C, tab 9, page 142.

19 THE CHAIRMAN: Show me where the explanation is for the --

20 MR SAUNDERS: Oh, the breakdown?

21 THE CHAIRMAN: Yes.

22 MR SAUNDERS: The evidence deals with the headline rate and  
23 then there is a series of questions that have been asked  
24 about it and a kind of ream of correspondence that sits  
25 between the parties. The way that this has developed is

1           that, as you have seen in my learned friend's skeleton  
2           argument, the Class Representative makes a series of  
3           complaints on the basis of explanations it has or has  
4           not received. I will come on to address those specific  
5           points. But --

6   THE CHAIRMAN: But you have spent -- to date, I have no idea  
7           why this is in dollars, but it gets converted to pounds  
8           just at the end, I think. So, I am looking at an annex  
9           to the eighth witness statement of Ms Thomas. And  
10          £24 million is an extraordinarily large sum that requires  
11          some sort of explanation. I mean, this is just to get  
12          to deal with what you say is a wholly formulated case.

13   MR SAUNDERS: Sir, in terms of the explanation, I can go  
14          through the individual complaints that are made against  
15          it --

16   THE CHAIRMAN: Your positive case.

17   MR SAUNDERS: You mean in terms of the overall figure --

18   THE CHAIRMAN: No, why you say these costs are appropriate  
19          and will be justified in future.

20   MR SAUNDERS: Well, sir, the costs are what they are, but  
21          part of the reason why they are high is because of  
22          the -- because there has been a very wide disclosure  
23          given, as you have already heard this morning, sir, we  
24          have had --

25   THE CHAIRMAN: The disclosure was done to reduce costs.

1 MR SAUNDERS: The approach that was taken, but we have now  
2 ended up with a lot of documents in the case. There is  
3 quite a lot of expert evidence, including technical  
4 expert evidence, in addition to a lot of financial  
5 evidence. We have experts dealing with licensing  
6 issues. So, this is a heavy piece of litigation in any  
7 view. Sir, I mean you will obviously have your own  
8 views about the overall quantum, but --

9 THE CHAIRMAN: It is more the complexity. I am not sure  
10 I am on all fours with the complexity of this case at  
11 the moment.

12 MR SAUNDERS: Sir, in part, the difficulty with the  
13 complexity is that the more defined a case, the easier  
14 it is to deal with as a defendant.

15 THE CHAIRMAN: Right.

16 MR SAUNDERS: And what you cannot do, as a defendant, is sit  
17 back and just let things develop without trying to  
18 proactively work --

19 THE CHAIRMAN: What are the issues? What are the heavy  
20 issues in the case?

21 MR SAUNDERS: Just generally?

22 THE CHAIRMAN: Yes.

23 MR SAUNDERS: Sir, the theory of harm, abuse, market  
24 definitions, substitutability of products. We have  
25 expert evidence that --

1 THE CHAIRMAN: So, to get a feel, how many of your costs are  
2 associated with market definition?

3 MR SAUNDERS: That, I am not sure. Hopefully, someone can  
4 help me with how they are broken down. We have expert  
5 costs there.

6 THE CHAIRMAN: These are extraordinarily -- do you dispute  
7 these are out of the ordinary for the sort of figures  
8 that this Tribunal sees, at this stage of litigation?

9 MR SAUNDERS: Sir, I don't -- sir, I think it is difficult  
10 because we don't have a yardstick of what parties are  
11 spending in an equivalent position, but this is a very  
12 substantial claim that is very important to my client.  
13 It engages lots of international issues, so we have had  
14 heavily fought 1782 applications, we have been dealing  
15 with FTC issues, there are multiple law firms involved  
16 because of some of the issues, we have had to give  
17 disclosure in relation to Korean regulatory proceedings,  
18 all sorts of other things have been flying around --

19 THE CHAIRMAN: Just help me with a couple of these. First  
20 of all, one thing I have had sight of, at least some,  
21 are these case management conferences and this is at  
22 a cost of \$3.2 million: that is the cost of a two-week  
23 trial in the High Court, typically. Having sat through  
24 these hearings, I have perhaps a little more feel for  
25 them and I don't quite understand why the costs are so

1 high.

2 MR SAUNDERS: Although the perspective of the Tribunal --

3 this is now the sixth CMC.

4 THE CHAIRMAN: Yes.

5 MR SAUNDERS: In terms of court days, we may not be on --

6 entirely up to a two-week trial.

7 THE CHAIRMAN: We are up to five now. The sixth doesn't

8 count.

9 MR SAUNDERS: Yes. We have had five CMCs at that point.

10 Yes. Often, when the Tribunal is faced with issues,

11 they have been sufficiently whittled and honed that the

12 fight is actually much narrower than it was.

13 THE CHAIRMAN: That is true for any case.

14 MR SAUNDERS: It is, sir, but the submission I am trying to

15 make is that the -- putting that together and dealing

16 with it on the ground is often a far more involved

17 process than by the time that the points become acute

18 and are argued out.

19 THE CHAIRMAN: At the moment, I have no explanation. There

20 is no narrative on that, is there? No explanation as to

21 where, as one might think, five CMCs would come in at

22 less than a million, they are £3.2 million in this case because

23 of A, B, C, D. I haven't got any of that, have I?

24 MR SAUNDERS: No, but some of the issues that have been

25 raised by the CMCs have required a lot of investigation.

1           If you take, for example, the most recent things we have  
2           been dealing with over the last couple of CMCs, there  
3           are issues of disclosure there and --

4   THE CHAIRMAN:  But your disclosure is coming in at  
5           \$11 million in a different column.

6   MR SAUNDERS:  Sir, well, that is the subject of a specific  
7           complaint by --

8   THE CHAIRMAN:  Let's have a look at -- what about general  
9           case assessment, development and administration?

10   MR SAUNDERS:  Yes.

11   THE CHAIRMAN:  Just explain to me what that is, it is not  
12           pleading, it is not CMCs, it is not expert evidence, but  
13           it is coming in at a whopping \$6.5 million.  Talk me  
14           through that.

15   MR SAUNDERS:  No, so the way -- so this is the way that time  
16           is recorded, as I understand it, it is not split -- this  
17           is work on the case, this is not someone doing some  
18           paralegal photocopying job, this is -- this includes  
19           work on strategy, which, actually, if anything, is one  
20           of the most important aspects of the litigation  
21           generally, and advice to Qualcomm that relates to that  
22           and, obviously, there is an aspect of just dealing with  
23           filing as part of that.

24   THE CHAIRMAN:  By "strategy", you mean the lawyers sitting  
25           down and saying, "How are we going to defend this

1 case?".

2 MR SAUNDERS: Yes, it is the chess moves.

3 THE CHAIRMAN: Right.

4 It is still quite high for --

5 MR SAUNDERS: But this is a very, very big, very high value

6 case. I appreciate -- the difficulty is, if you take

7 the example of disputes in the patents courts, the --

8 THE CHAIRMAN: I am not talking about disputes in the --

9 MR SAUNDERS: No, but the yardstick is -- this is much

10 closer to the sorts of sums that get expended in the

11 Commercial Court in big fraud cases and big commercial

12 dispute cases in the Commercial Court, and the reality

13 is that running these kind of big cases with large teams

14 that are necessary to scale, and where there are

15 multi-national issues and coordinations required across

16 multi-national teams, is an expensive job. So, this is --

17 this figure does include that work. It is a substantive

18 figure.

19 THE CHAIRMAN: I see.

20 MR SAUNDERS: It is just a quirk of the way that time is

21 recorded.

22 The point we make in relation to that is this is not

23 an exercise in detailed assessment. The detail, the

24 starting point should be, how do we get protection for

25 Qualcomm's recoverable costs?

is

1           What we say is that 65 per cent is an appropriate  
2           discount from the overall figure and, sir, you may have  
3           your own views about that, but we -- even the Class  
4           Representative is saying that, by the time it has  
5           identified all of its factors where it has gone through  
6           this forensically and picked holes, they are not  
7           saying -- they, themselves, are saying a figure of 50 per cent  
8           the sort of figure.

9           So that is still some way off where we are in their  
10          proposed ATE coverage. That is another 11 million-odd  
11          of ATE cover.

12          The question is where in that band, we would submit,  
13          do you set the threshold? Part of what I would  
14          submit -- although, I can see obviously, sir, you are  
15          struck by the overall figures, but part of what we have  
16          to assess are, having looked at the complaints that have  
17          been made against it by the Class Representative, how  
18          much force is there in those? I mean, there is  
19          obviously the point about the overall sum, which I have  
20          addressed you on, but we say quite a lot of these  
21          individual complaints don't amount to anything very much  
22          and they have had -- you know, this is not for want  
23          of interrogatories in correspondence to ask about this.  
24          What I was proposing to do now is just go through some  
25          of the complaints that have been made and what we have



1 to say about them.

2 The first of those is delay.

3 Now, it is said that Qualcomm unreasonably delayed  
4 in making the application in the first place. We don't  
5 accept that. It was raised -- we flagged it, spend,  
6 ahead of the fifth CMC and we said it wasn't appropriate  
7 to jump the gun at that CMC. One gets to a point where  
8 the ATE cover is either exhausted or close to being  
9 exhausted, and the Tribunal asked at the fifth CMC for  
10 any applications on security to be made by this CMC and  
11 this is where we are.

12 So we don't say there is an unreasonable delay in  
13 making that application, but, in any event, even if  
14 there is delay to this CMC, why does it -- what does  
15 that go to? This is not a principle where this is so  
16 late in the litigation that there is no -- that in some  
17 way the claimant is being prejudiced by the timing of  
18 the application.

19 The second point that was made is increasing costs  
20 from the last CMC. It is said that Qualcomm's increased  
21 costs between that CMC and this CMC have been  
22 substantial. We say that is a slightly surprising  
23 submission, in the sense that it is absolutely obvious  
24 what everybody has been doing since that CMC and this  
25 CMC, which is producing -- working very hard on fact and

1 expert evidence, which has been filed and those  
2 documents have been produced.

3 So that is -- there was various -- a complaint about  
4 that, but what, again, is striking is we have no  
5 figures -- we haven't even got -- we asked for the  
6 hourly rates on the other side and they wouldn't tell us  
7 those. So, it is striking that there is a certain amount  
8 of coyness on the other side about this. It's obviously  
9 easier to make a complaint about our costs, and I accept  
10 that is a matter for -- it is me who is seeking security  
11 but there is no yardstick, an easy -- no yardstick  
12 against which that can be easily measured.

13 That is the second one.

14 The third one, lack of detail of costs. As  
15 I submitted earlier, this is a security application, not  
16 a detailed assessment. But what we have done is, when  
17 these points have been raised, and they have been raised  
18 through various complaints in correspondence, we have  
19 been cooperative and provided breakdowns where the Class  
20 Representative has requested them. So, the breakdown of  
21 future costs by phases, as requested by the Class  
22 Representative, breakdowns of hourly rates, which we  
23 have not had. When we have asked for comparisons, we  
24 haven't had those.

25 The fourth point made against us is that Qualcomm is

1 familiar with the case against it. That is my learned  
2 friend's skeleton, paragraph 87. Well, there are  
3 English solicitors and counsel who were not involved in  
4 the FTC action, but, in any event, this case advanced by  
5 the Class Representative is materially different to that  
6 in the FTC and the Korean Fair Trade Commission, not  
7 least because it makes allegations that the "no licence,  
8 no chips" policy is buttressed by the RTL and the  
9 silencing allegations which don't exist there, but, in  
10 any event, it is important -- the costs relate in part  
11 to the English solicitor and counsel costs that relate  
12 to this litigation. It does not mean -- just because  
13 the client is familiar with the subject matter, that  
14 doesn't mean they are not required to incur significant  
15 costs defending themselves. They had to deal with  
16 witness evidence under English rules, not US rules.  
17 Those witnesses had to be properly proofed and prepared.  
18 They have had to deal with experts. There are new  
19 experts in this case, or different experts, that are not  
20 in the FTC case: Dr Padilla, the main financial  
21 expert -- sorry, the consulting economist; Mr Melin,  
22 the industry licensing expert, and so on.

23 Also, there has been extensive disclosure, as you  
24 have heard, including review of 140,000-odd documents  
25 that have not ever been reviewed previously.

1           The next point that was made is that the disclosure  
2           costs are too high and, sir, that was a point which you  
3           raised a second ago in relation to the figures in the  
4           schedule. Now, one of the points that my learned friend  
5           makes is, well, they characterise the disclosure to date  
6           as lift and drop. That is -- that is not a fair  
7           characterisation of the entirety of the exercise. There  
8           has been, as I mentioned a moment ago, relevance and  
9           privilege reviews of about 140,000 documents, so that is  
10          the post FTC population, the 5G market power disclosure  
11          order and recent production from another custodian,  
12          Mr Katouzian.

13           Even when it comes to the FTC material, there was  
14          significant time and costs on the search term  
15          "calibration", a lot of liaising with the other side  
16          about that, and, as you have heard already, half  
17          a million-odd documents have been produced.

18           Now, part of the reason where you have got such  
19          a large set, it is not -- my client and its advisers  
20          need to look at that material too, so you cannot just  
21          sort of cast these things out and hope that everything  
22          will be all right at trial. This is a big case in terms  
23          of documents, a very document-heavy case, and that is  
24          largely as a result of the approach that the Class  
25          Representative wanted to take by getting the material

1 early, and we have heard about that.

2 Disclosure costs also include costs of dealing with  
3 the Class Representative's third-party disclosure  
4 applications. So, there are the 1782 applications in the  
5 US. There is Qualcomm's own responsive 1782  
6 application. Third-party notifications have been a big  
7 issue, particularly where other OEMs and Apple and  
8 Samsung are concerned. There have been a huge amount of  
9 issues about that and Apple, in particular, is very, very  
10 keen to ensure that those matters are taken very  
11 carefully into account. All of that -- that process  
12 alone has been very expensive, because it is just a huge  
13 job for the -- all of that.

14 THE CHAIRMAN: Liaising with third parties.

15 MR SAUNDERS: Even liaising with the third parties.

16 THE CHAIRMAN: I have not got a figure for that.

17 MR SAUNDERS: Sir, I understand, on instructions, the cost  
18 of dealing with the 1782s and the third-party  
19 notifications is over a million.

20 THE CHAIRMAN: But I am not happy with you just giving me  
21 evidence on your feet.

22 MR SAUNDERS: Maybe there is a reference that we --

23 THE CHAIRMAN: We have evidence that has been filed in  
24 support of --

25 MR SAUNDERS: I appreciate that.

1           There is a point made about the costs of the sample  
2 review, so that was the review of the 500 documents for  
3 the purposes of the application.

4           That -- there is no suggestion -- we are not  
5 suggesting at all that any main disclosure would have  
6 been carried out in the same way. What we had to do for  
7 that was give reasons and explanations for each  
8 privilege designation maintained, and that made it  
9 a very expensive process.

10           There are points about Norton Rose liaising with  
11 Quinn Emanuel Brussels. Now, Norton Rose are obviously  
12 responsible for disclosure, they have their own  
13 professional duties in respect of that to make sure that  
14 is done properly. But Quinn Emanuel Brussels couldn't  
15 be left alone to deal with those issues without proper  
16 supervision, and the -- they have had to locate,  
17 collate, process and advise on various documents from  
18 the Commission files and all of the other proceedings  
19 that have been disclosed.

20           There is a point about -- a slightly bizarre point,  
21 about the costs post certification relating to  
22 Quinn Emanuel. They have obviously had to deal with the  
23 defence, so no one can seriously suggest that it is being  
24 suggested we were not entitled to put in a defence, but  
25 there is a complaint about the allowability of those

1 costs, which is slightly surprising.

2 Then, finally, guideline rates, that was developed  
3 by my learned friend at paragraphs 93 to 95 of his  
4 skeleton argument.

5 Mr Justice Roth in *Merricks* identified that  
6 an increase of over 30 per cent of the guideline rates was  
7 potentially reasonable having regard to the complexity  
8 of proceedings. There is a table in Ms Boyle's  
9 evidence, but the uplift of rates, most, virtually all,  
10 of Norton Rose's rates are close to or below the  
11 guideline plus the 30 per cent uplift.

12 So we say that these various criticisms that have  
13 been made, when one drills into the detail, they  
14 don't hold water, but, in any event, this is a very, very  
15 substantial case, it is a very, very important case to  
16 a company like Qualcomm. It is a multi-national case;  
17 there are an awful lot of documents; it is a defuse case  
18 which requires a lot of work to second-guess and deal  
19 with it. The allegations cover decades with multiple  
20 defined markets over time -- we have had to deal with  
21 CDMA, chip substitutability, and so on.

22 So, to get through all of that material, this is  
23 a very complex, big set of proceedings. The fact it may  
24 distil into a series of relatively short issues at CMC  
25 does not, in my submission, give you a fair feeling for

1 all of the work that has to go on behind the scenes.

2 So, obviously, this is not a detailed assessment but  
3 it is in terms of proportionality, generally, half  
4 a billion pounds that is sought. Sir, if you are not  
5 with me on 65 per cent, we would invite you to assess  
6 a percentage that you say is -- that you consider fair  
7 in --

8 THE CHAIRMAN: Horse-trade down, Mr Saunders, is that the  
9 idea?

10 MR SAUNDERS: Sir, that is not -- in my submission, that is  
11 not right as a matter of principle. It is not  
12 a question of horse-trading but you have to form a view  
13 on the material before you, but when you are doing that,  
14 one of the things we say is it is very important to take  
15 account of the specific criticisms that have been made  
16 and the answers that I have just developed to them and,  
17 actually, a lot of them are not that good at the end of  
18 the day. Obviously, sir, you have identified that you  
19 have concerns about the overall figure but, in my  
20 submission, actually, when you start to understand  
21 how complex and how multi-national and important these  
22 proceedings are, and how many documents there are, you  
23 start to get a feeling for why this is a case that has  
24 incurred and will incur those costs.

25 If you are not with me on the 65 per cent, we seek such sum



1 as the Tribunal considers appropriate, but I should add  
2 that, insofar, sir, as you are minded to reduce that  
3 figure, the Class Representative's own evidence says, in  
4 the light of the various factors it has identified, you  
5 will not get more than 50 per cent. That, if anything,  
6 is a bottom bound on where we should be. We would say  
7 it should be higher than that at the very least and, as  
8 I say, my primary application is for 65 per cent or such other  
9 sum as you see fit.

10 In terms of timing, we don't object to the Class  
11 Representative's proposal that they should have until  
12 28 February to do whatever it is they want to do.

13 Sir, unless there is anything else, those are our  
14 submissions.

15 THE CHAIRMAN: Mr Carpenter, I only need to hear from you on  
16 the 50 per cent point; is that your position?

17 Submissions by MR CARPENTER

18 MR CARPENTER: I am grateful, sir. Well, it may be that you  
19 need to hear from me in fact on a little more than that  
20 but I will take it in stages.

21 Although Ms Boyle says in her witness statement that  
22 it should not exceed 50 per cent, you see the only  
23 concrete proposal we actually make is that in our  
24 skeleton argument, which works out at 40 per cent, if  
25 you are in the business of using percentages --

1 THE CHAIRMAN: I understand.

2 MR CARPENTER: -- although we say a more forensic approach  
3 than that is called for.

4 The reason why I say you may --

5 THE CHAIRMAN: I don't need to hear from you further, thank  
6 you very much.

7 MR CARPENTER: I am grateful.

8 (2.44 pm)

9 (Ruling extracted for approval)

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(2.44 pm)

**Ruling**

**THE CHAIRMAN:** This Tribunal has the power to order security for costs under rule 59

"The Tribunal may make an order for security for costs under this rule, if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and one or more of the conditions in paragraph 5, or as the case may be paragraph 6, applies.

Then in subparagraph (5), there is a reference to subparagraphs (b) and (f), which I won't set out now but which I think both parties agree are satisfied.

Additionally regard may be had to the matters set out in the Guide to Proceedings in paragraph 5.158.

Qualcomm request that security be ordered in this case by way of the class representative being required to increase its ATE insurance within eight weeks to 27.5 million from its current level of 13.25 million. The class representative has agreed to provide a further 3.5 million, taking the total to 16.75. Qualcomm arrives at this figure by estimating its total costs of this action to be 42.31 million and applying a recovery rate of 65 per cent.

It relies on, in terms of the correct approach, to the case of *Pisante v Logothetis* [2020] EWHC 332, paragraph 88:

"The relevant principles governing the quantification of an order for security for costs are summarised in note 25.12.7 in the White Book as including the following points:

"(i) The appropriate quantum is a matter for the court's discretion, the overall question being what is just in all the circumstances of the case. In approaching the exercise, the court will not attempt to conduct an exercise similar to a detailed assessment, but

1 will instead approach the evidence as to the amount of costs which will be incurred on  
2 a robust basis and applying a broad brush (see also *Excalibur Ventures v. Texas*  
3 *Keystone* [2012] EWHC 975 (QB) § 15).

4 "(ii) In some cases, the court may apply an overall percentage discount to a schedule  
5 of costs having regard to (a) the uncertainties of litigation, including the possibility of  
6 early settlement and (b) the fact that the costs estimate prepared for the application  
7 may well include some detailed items which the claimant could later successfully  
8 challenge on a detailed assessment between litigants. There is no hard and fast rule  
9 as to the percentage discount to apply. Each case has to be decided upon its own  
10 circumstances and it is not always appropriate to make any discount.

11 "(iii) In deciding the amount of security to award, the court may take into account the  
12 'balance of prejudice' as it is sometimes called: a comparison between the harm the  
13 applicant would suffer if too little security is given and the harm the claimant would  
14 suffer if the amount secured is too high. The balance usually favours the applicant: an  
15 under-secured applicant will be unable to recover the balance of the costs which is  
16 unsecured whereas, if the applicant is not subsequently awarded costs, or if too much  
17 security is given, the claimant may suffer only the cost of having to put up security, or  
18 the excess amount of security, as the case may be (see also *Excalibur* § 18).

19 "(iv) In the Commercial Court, an order for security for costs may in appropriate cases  
20 be made on terms that the applicant gives an undertaking to comply with any order  
21 that the court may make if the court later finds that the order for security for costs has  
22 caused loss to the claimant and that the claimant should be compensated for such  
23 loss. Such undertakings are intended to compensate claimants in cases where no  
24 order for costs is ultimately made in favour of the applicant (Commercial Court Guide,  
25 Appendix 10, § 5).

26 "(v) In determining the amount of security, the court must take into account the amount

1 that the respondent is likely to be able to raise. The court should not normally make  
2 continuation of their claim dependent upon a condition which it is impossible for them  
3 to fulfil."

4 It relies in support of its application on the eighth witness statement of  
5 Caroline Thomas. She has provided a schedule which is short on detail. I accept the  
6 submission that it is not appropriate at this stage to engage in detailed assessment  
7 but, when such large sums are identified relating to the costs of the action, I believe it  
8 is appropriate to have far more explanation than has been provided by Ms Thomas.

9 Costs expended up until 30 September 2024 include, \$3.2 million on the five CMCs  
10 that have taken place; \$6.5 million on general case assessment, development and  
11 administration; \$11.5 million on disclosure; costs relating to expert evidence of  
12 \$3.8 million; pleadings and submissions, \$2.7 million. These figures are  
13 extraordinarily high and the Tribunal does not currently understand why they are so  
14 high or why the costs of this action up to trial 42.3 million. We have very little evidence  
15 from which we can understand those figures. In the circumstances, we are not  
16 persuaded that they are proportionate to the complexity of the issues we have to deal  
17 with at trial and decline to make the order sought.

18 The class representative suggests that special factors in this case arise because this  
19 is a class action and the way that class actions are funded are relevant to how we  
20 approach this application. We do not need to decide today whether such special  
21 factors apply given we are not satisfied that a justification has been provided for the  
22 figures sought.

23 So the order we will make, which I understand is agreed, is that Which? will increase  
24 its ATE insurance by £3.5 million.

10 (2.49 pm)

11 THE CHAIRMAN: I assume that is pounds. That is my  
12 understanding? £3.5 million, isn't it?

13 MR CARPENTER: That's right, yes.

14 THE CHAIRMAN: When will that be done? Is there any dispute  
15 as to the date?

16 MR CARPENTER: 28 February is agreed and that date will be  
17 met.

18 THE CHAIRMAN: I am grateful.

19 Where do we go next?

20 MR SAUNDERS: Other than costs, which I think we are parking  
21 to the end, is the MOF schedule, and I will give way to  
22 my learned junior.

23 THE CHAIRMAN: Yes.

24 I think I know where I've got it. I have it here,  
25 yes.

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Submissions by MR SCOTT

MR SCOTT: Sir, the genesis of this issue, you may recall, is your strike-out ruling. Given that time is relatively short for this application, I was not proposing to take you back to that ruling, unless you would find that helpful.

THE CHAIRMAN: No, that is fine.

Can I just start by asking you a question. I've got the revised schedule, which somebody printed off for me. It has some yellow highlighting. I assume the yellow highlighting is just what is confidential?

MR SCOTT: That is right. I am going to take you to an annotated version of that document, which has the parties' comments and identifies the objections in a moment, but that will have the same yellow highlighting and that will mean the same thing, confidential ring information, that is what that is.

I was just going to summarise in three sentences, if I may, the strike-out ruling. You will recall that you decided that the Tribunal should adopt the principle from *Hollington v Hewthorn* in these proceedings; although you are not bound by it, you decided you would adopt it.

THE CHAIRMAN: Yes.

MR SCOTT: That means the factual findings of foreign

1 decision-makers are inadmissible. However, matters of  
2 primary fact recorded in the following decisions, which  
3 in this context means records of the evidence that was  
4 before the decision-maker, are admissible. So that is  
5 the distinction that we need to have in mind.

6 Against that backdrop, the Class Representative was  
7 ordered to produce a schedule of matters of fact, the  
8 MOF schedule for short. The purpose of the schedule is  
9 to give Qualcomm and the Tribunal clear notice of each  
10 specific matter of primary fact -- in the sense I have  
11 just described, so record of evidence -- that is derived  
12 from foreign decisions that the Class Representative  
13 intends to rely on at trial.

14 So save a bit of time, can I take you to our  
15 skeleton, paragraphs 57 and 58, core bundle, page 50.  
16 This is just to remind you of where matters stood at the  
17 last CMC.

18 THE CHAIRMAN: I have read this, I have this in mind.

19 MR SCOTT: You have this in mind.

20 THE CHAIRMAN: We now have this new schedule and you are  
21 still having a moan about that?

22 MR SCOTT: Quite right, and just particularly to remind you  
23 of the order that you made, which I have quoted at  
24 paragraph 58, but if you have that in mind, I won't  
25 dwell.



1 THE CHAIRMAN: Thank you.

2 MR SCOTT: Pursuant to that Order, we received the revised  
3 schedule -- and I know you have seen that -- and it is  
4 undoubtedly an improvement; 27 pages and not 190  
5 anymore.

6 THE CHAIRMAN: It is going in the right direction.

7 MR SCOTT: That is very welcome but we say it still does not  
8 comply with paragraph 6(a) and 6(b) of your Order. So  
9 it still contains matters that are not supplemental to  
10 documentary and hearsay evidence and it still contains  
11 evaluative assessments, i.e. factual findings.

12 THE CHAIRMAN: Have you identified which statements you are  
13 objecting to?

14 MR SCOTT: We have, and I am going to show you those in  
15 just --

16 THE CHAIRMAN: Show me that.

17 MR SCOTT: So, can we go to the second supplemental bundle,  
18 tab 26, page 798?

19 THE CHAIRMAN: Sorry, give me the page number again?  
20 I apologise.

21 MR SCOTT: 798 of the second supplemental bundle. If we can  
22 possibly -- yes, wonderful.

23 I mentioned a moment ago an annotated version of the  
24 revised schedule and so what we have here is some --  
25 well, I will just run you through how it works.

1           So you can see the column headings across the top.  
2           We have some numbering --  
3   THE CHAIRMAN:  Row 3 you have crossed something out.  
4   MR SCOTT:  Not quite.  So, row 3, the way it works is  
5           Qualcomm applied highlighting in various colours other  
6           than yellow to bits of text it objected to -- so here  
7           blue highlighting means Qualcomm objected.  I will come  
8           on to explain what the different highlighting means as  
9           I go through but any highlighting that is not yellow  
10          means we objected.  
11   THE CHAIRMAN:  Yes.  
12   MR SCOTT:  In this instance the crossing through means that  
13          the Class Representative agreed with us and has agreed  
14          to strike that out.  
15   THE CHAIRMAN:  So that has gone.  Excellent.  
16   MR SCOTT:  So, 3 is not in issue but we will see quite a few  
17          that are in issue.  
18   THE CHAIRMAN:  6?  
19   MR SCOTT:  What I was actually proposing to do, rather than  
20          going through each and every one -- because there are 35  
21          of them and that will take too long -- is organise them  
22          into four categories which have some of similarities  
23          between them.  
24   THE CHAIRMAN:  Right.  
25   MR SCOTT:  And then show you some examples of each one, just

1 mindful of the time that we have available for this  
2 application.

3 The first category of the four that I want to show  
4 you is entries that are evaluative assessments in their  
5 entirety. I am starting with those, although they are  
6 not at the beginning of the schedule, because in our  
7 submission, these entries show that the Class  
8 Representative has fundamentally misunderstood where the  
9 line is to be drawn between admissible matters of  
10 primary fact --

11 THE CHAIRMAN: But these are just -- sorry, I am trying to  
12 understand why anyone cares about any of this.

13 So if Mr Williams puts in something and you go  
14 "Well, that is not fact, that is a comment on a fact",  
15 why do we have to determine that today?

16 MR SCOTT: Sir, we say it matters for two reasons.

17 THE CHAIRMAN: Right.

18 MR SCOTT: There is a practical reason, which is that the  
19 purpose of this document is to give everybody -- that is  
20 the Tribunal and the parties -- notice of which matters  
21 of primary fact the Class Representative is relying on.

22 THE CHAIRMAN: Right.

23 MR SCOTT: What we don't think we want is to have satellite  
24 disputes at trial about which of these is admissible,  
25 which is not; and what we particularly acutely don't

1           want, in my submission -- and you will have a view on  
2           this -- is for when the Tribunal comes to write its  
3           judgment after trial, to have to parse this document to  
4           work out which bits of it are admissible.

5   THE CHAIRMAN: I have a strong suspicion I will never look  
6           at this document again.

7   MR SCOTT: That may well be something that we would welcome;  
8           but if we cannot be sure of that, sir, we do think, if  
9           we are going to have a document like this --

10   THE CHAIRMAN: So, there are a lot of statements in here that  
11           you accept -- I don't know if you accept they are  
12           admissible -- my screen has gone blank.

13           It is back.

14           Anyway, there are things that the Claimant wishes to  
15           rely upon.

16   MR SCOTT: Yes.

17   THE CHAIRMAN: Which ones do you agree are facts -- if we  
18           want to narrow issues, why don't you tell us which facts  
19           you are disputing?

20   MR SCOTT: I don't think at the moment we are in a position  
21           to do that on a line by line basis. That is an issue  
22           for trial. That is really the whole point. The point  
23           is to understand --

24   THE CHAIRMAN: No, I mean not today, not at the moment, but  
25           why couldn't you produce a responsive document saying we

1 don't agree -- you say in 2018, and I can read this out  
2 I assume, as it is not in colour?

3 "Qualcomm forecasts that it would maintain  
4 a 79% share of CDMA modem chips sold to handset  
5 OEMs."

6 You could say "We never said any such thing", "We  
7 don't dispute that", or you could say "Yes, we agree".

8 MR SCOTT: Well, if I may say so that strikes me as being  
9 likely to be a far more extensive exercise than the  
10 exercise we are actually trying to embark on now, which  
11 is to get this document in line.

12 THE CHAIRMAN: I know, I am taking you off your course.

13 I am not going to apologise for it but, I think in terms  
14 of narrowing issues for trial, that would be useful.

15 I think that is something that should be done. There is  
16 no point --

17 MR SCOTT: That may be something that, apart from anything  
18 else -- I mean it would depend on a number of things.

19 It would depend on witness evidence. It might be that  
20 we would need to canvass witnesses who we have not got  
21 evidence from at the moment. I just don't know who --

22 THE CHAIRMAN: As I say, I don't understand why any of this  
23 really matters, but let's assume points at row 7  
24 mattered.

25 MR SCOTT: Yes.

1 THE CHAIRMAN: If it doesn't matter, or you don't care, you can  
2 ignore it; if you think it might matter or it does  
3 matter, you are going to have to deal with it in some  
4 way, aren't you?

5 MR SCOTT: Yes. 7 is not in dispute as it happens.

6 THE CHAIRMAN: That is not the point.

7 MR SCOTT: I understand, quite.

8 Well, one of the things that we want therefore to do  
9 is to narrow this down to the ones that are actually  
10 admissible so we only have to deal with the ones that  
11 are admissible.

12 THE CHAIRMAN: Right, but if it is a comment, you can just  
13 ignore it and say it is a comment.

14 MR SCOTT: We perhaps could but the concern, as I say, is if  
15 we have a situation where we are at trial and we are  
16 having to deal with the question of whether these are  
17 admissible or not, the Tribunal has to deal with that  
18 question when writing a judgment and, also, sir, just  
19 stepping back, an awful lot of work has gone into this  
20 process. It is something that the Class Representative  
21 originally volunteered to do. They have had two goes at  
22 it. They have done it, in our submission, very wrongly  
23 the first time and they have still done it somewhat  
24 wrongly the second time. Stepping back --

25 THE CHAIRMAN: I am not really in a position to go through

1           these row by row and say ...

2           And today. You say it is going to be difficult to  
3           do this at trial. It is going to be far easier to do it  
4           at trial when I have read these documents and I have  
5           a feel for them. Today to make a ruling as to whether  
6           or not that is a fact that, that is -- if you cannot  
7           agree on it, I am going to have to resolve it.

8   MR SCOTT: Sir, one of the difficulties is that quite a lot  
9           of this stuff is not actually referring to documents, or  
10          is not referring to documents that are available. So the  
11          problem is we are not going to be able to go to the  
12          underlying evidence unless we test it.

13   THE CHAIRMAN: Right.

14   MR SCOTT: So, can I give you an example, if I may?

15   THE CHAIRMAN: Well, I picked that up from the skeleton but  
16          give me the example anyway, yes.

17   MR SCOTT: The example would be entry number 28, which is on  
18          page 807. You can see the bit that we have objected to  
19          is in pink.

20   THE CHAIRMAN: 28, yes.

21   MR SCOTT: I will let you read the finding.

22   THE CHAIRMAN: Okay.

23   MR SCOTT: You will see the part in pink we have objected  
24          to.

25                The problem with this is that this relates to

1 deposition testimony that is under seal. So, we haven't  
2 got it and the Class Representative hasn't got it --  
3 THE CHAIRMAN: This is all nicely set out. You say "The  
4 pink highlight merely describes evidence given which is  
5 not otherwise available to us ..."  
6 MR SCOTT: That is actually what the Class Representative says.  
7 THE CHAIRMAN: And the next column, the pink highlighted  
8 text ought to be removed?  
9 MR SCOTT: Quite right.  
10 THE CHAIRMAN: So we know what the boundary -- why do I have  
11 to make a ruling on this today?  
12 It is very helpful, you have set out what the scope  
13 of the dispute is. I don't know, is that even going to  
14 be mentioned at trial, whether oral threats to cut off  
15 Huawei's chip supply were ever made?  
16 MR SCOTT: That is very much a matter for my learned friend.  
17 It is their case.  
18 The point is simply, if we are going to have this  
19 document working the way it is supposed to, we need to  
20 get out the stuff that is going to be admissible and we  
21 should do that now. That is simply the point.  
22 THE CHAIRMAN: Yes, but it is difficult just to -- as you  
23 say, if there were two of these, we could do it today  
24 but to go through all these documents ...  
25 MR SCOTT: So, the issue with this one, because the



1 deposition testimony is under seal, we cannot look at  
2 the deposition testimony now, or ever, and we cannot  
3 interrogate whether that characterisation in pink is  
4 correct.

5 If you look at what is quoted, it is not clear to us  
6 at all how that arises. That is the judge's evaluation  
7 of that testimony -- it may be right, it may be wrong,  
8 noting of course this judgment has been reversed and  
9 vacated on appeal. There is simply no way forward with  
10 this issue. If this is left in, we have simply this  
11 untestable evaluative assessment which is inadmissible.

12 THE CHAIRMAN: There is no document to support it. I feel  
13 this has developed into a beast.

14 MR SCOTT: Yes, that may well be fair, sir.

15 THE CHAIRMAN: And I'm not really sure -- so these are odd  
16 statements in documents. If it is not in the document,  
17 then what is the problem?

18 MR SCOTT: So, the point, just to be clear, all of this,  
19 everything that is quoted here, is in the FTC judgment  
20 of Judge Koh, so this is a quotation from the FTC  
21 judgment. Our objection is that this --

22 THE CHAIRMAN: Everything is a quotation from the FTC  
23 judgment?

24 MR SCOTT: Everything in the first schedule is from the FTC  
25 judgment. The second one I think is -- so there are

1 different -- there is the KFTC and then the Seoul  
2 High Court, but everything is a quotation from a foreign  
3 decision maker's decision, and our point is some of those  
4 quotations are evaluative assessments which are  
5 inadmissible under the *Hollington* principle. That is  
6 the point.

7 THE CHAIRMAN: Yes, but we have given you a judgment on  
8 that.

9 MR SCOTT: Yes, quite so.

10 THE CHAIRMAN: So why do we need to get --

11 MR SCOTT: This is really just a way of --

12 THE CHAIRMAN: We have just created a document that leads to  
13 more satellite disputes. If we had never produced this  
14 document, we wouldn't be having this discussion.

15 MR SCOTT: Well, it is the Class Representative that produced this  
16 document.

17 I can see that, but the purpose of the document was  
18 to give us -- because we have these very, very extensive  
19 foreign decisions which are pleaded in various ways and  
20 we wanted to have notice of which admissible matters of  
21 fact from those documents --

22 THE CHAIRMAN: Right, but you are asking me today to make  
23 rulings on admissibility --

24 MR SCOTT: Yes.

25 THE CHAIRMAN: -- on numerous documents, on numerous parts

it in

1 of documents, that I have not read in advance of this  
2 hearing 3 -- I don't think I was asked to read  
4 advance of this hearing. How do we do that without  
5 spending a day on it?

6 MR SCOTT: Well, I certainly don't propose to spend a day on  
7 it.

8 THE CHAIRMAN: I don't think we can really take this further  
9 forward but I think this is a very helpful document, it  
10 has not been wasted. You have put your markers down and  
11 there may be a lot of sense in the points you have made,  
12 so we all know where we are.

13 I think the one thing that is missing is-- I think it  
14 would be useful if you treated it as a sort of notice to  
15 admit and those statements where you are not disputing  
16 whether it is in the judgment, you say whether you admit  
17 it or not, or you are challenging it or not.

18 MR SCOTT: Sir, that presents a difficulty. There is no  
19 application obviously to do that. I have no  
20 instructions about --

21 THE CHAIRMAN: It is coming from the Tribunal. We are  
22 allowed to do things.

23 MR SCOTT: Of course, sir. Quite so.

24 I think, in a sense, to the extent that you are  
25 minded to do that, that makes our application rather

1 more important because, in my submission, as a matter of  
2 principle -- well, two things. Firstly, we shouldn't  
3 have to do that in relation to things that are not  
4 admissible in the first place. There is just no reason  
5 for us to go to that effort. Secondly, in relation to  
6 this example, 28 -- and there are others like it --  
7 Qualcomm cannot see this document. The deposition is  
8 under seal. We have no way of testing this evaluation.

9 THE CHAIRMAN: If it is one you don't agree with it, then  
10 don't admit it.

11 MR SCOTT: Yes, well, I am sure we wouldn't admit that. The  
12 difficulty is, as I say, as a point of principle, we  
13 don't have access to the document and we cannot really  
14 interrogate it.

15 THE CHAIRMAN: Any of these facts you are accepting, and we  
16 have identified one -- I think it was row 6 -- just say,  
17 you admit it. If it is one that you don't admit, say  
18 you don't admit it. You might get asked why; you may  
19 think it is appropriate to explain why -- but that will  
20 materially narrow the issues for trial.

21 MR SCOTT: Sir, I had not appreciated this might come up.

22 THE CHAIRMAN: I am not going to deal with this today,  
23 sorry. Notwithstanding your eloquent submissions, I am  
24 not going to deal with this today, as I do not think it  
25 is a productive use of this Tribunal's time to go

1 through and rule on these things.

2 You have put your marker down and said this is just  
3 not appropriate in the light of our ruling on *Hollington*  
4 *v Hewthorn*. That may well be right, but I do think we  
5 cannot really take anything further forward at this  
6 stage.

7 If it is necessary, particularly important, to  
8 resolve any of these specifically as the trial develops,  
9 then obviously we can look at them again, but I think  
10 the appropriate course is, at a time of your choosing,  
11 you should respond to these as to whether or not you  
12 admit them or don't admit them.

13 MR SCOTT: Understood, sir.

14 Thank you.

15 THE CHAIRMAN: How long do you want to do that? Maybe after  
16 the fact evidence or --

17 MR SCOTT: It would be helpful just to take a moment and  
18 take instructions on that.

19 THE CHAIRMAN: I am not rushing you on that. There is no  
20 point, because you just won't make any admissions, but  
21 maybe at the time you do reply fact statements --

22 MR SCOTT: That may be appropriate.

23 THE CHAIRMAN: 14 March.

24 MR SCOTT: If I could either turn my back or we could rise  
25 for five minutes.

1           I think there is some housekeeping to do as well so  
2           we could perhaps come back and deal with those points.  
3   THE CHAIRMAN: Why don't you take instruction as to the date  
4           now. (Pause).  
5   MR SCOTT: I think we can do it at the same time as reply  
6           statements. I think that is where we have landed.  
7   THE CHAIRMAN: Thank you very much.  
8           Sorry, Mr Williams, you do get to say something.  
9           I apologise.  
10   MR WILLIAMS: I was only going to say, sir, it is 3.00pm and  
11           there are a couple of bits housekeeping left. If  
12           Mr Scott needed a few minutes, then we could take five  
13           minutes.  
14   THE CHAIRMAN: I think we have a date.  
15           Are you content with this as an approach, that the  
16           parties' rival positions have been set out in this  
17           document. I think it would be helpful to know if there  
18           is a dispute in relation to some of these facts, because  
19           I imagine a number there will not be, and that you are  
20           told that by 14 March. Then, if we need to grapple  
21           further with this area of the case in due course, once  
22           the fact evidence has been served and we know where we  
23           are, we can revisit it then.  
24   MR WILLIAMS: We are happy with it and we actually wrote to  
25           Qualcomm a couple of days ago and said something similar

1           and they said no, we are going to press on.

2   THE CHAIRMAN:   Okay.   Good.

3   MR SAUNDERS:   Sir, I think the only other matters are

4           housekeeping.

5           So there is an order from this morning, a couple of

6           housekeeping points, which, sir, we need to address you

7           on.

8   THE CHAIRMAN:   I did see it but remind me --

9   MR SAUNDERS:   Sir, there is the draft order.   I don't know

10          whether my learned friend has had an opportunity to --

11  MR WILLIAMS:   We think the draft order is fine and we will

12          just take a --

13  MR SAUNDERS:   Maybe I can just pass one up.

14  THE CHAIRMAN:   Do you need five minutes?

15  MR WILLIAMS:   No, we looked at it over lunch.

16  MR SAUNDERS:   This is just to reflect the "Sporck order", as

17          it were.

18          Thank you.   (Handed).

19  THE CHAIRMAN:   Right, I see.

20  MR SAUNDERS:   So, what we have provided is that we review

21          everything, all families of 30 or more documents which

22          were withheld in full or in part, and then you will see

23          the proposal there in paragraph 2 and paragraph 3.

24  THE CHAIRMAN:   To be clear, this is going on in parallel?

25          It shouldn't be holding up any other --

1 MR SAUNDERS: In terms of case management, as I mentioned  
2 earlier on, on this side of the court, we don't think  
3 that this should be holding up any of the expert  
4 evidence at all. If the experts need to come back and  
5 address something out of this, then so be it.

6 THE CHAIRMAN: Sure.

7 MR WILLIAMS: We understood that was the effect of your  
8 ruling, sir.

9 MR SAUNDERS: Just again to be absolutely clear, while we  
10 have the benefit of the Tribunal's time, I understand,  
11 sir, the Noble expert report is due in I think the  
12 middle of January, roughly, but there is no application  
13 now and I assume no suggestion from my learned friend  
14 that that date cannot be complied with; is that right?

15 MR WILLIAMS: I am not making that application today. As  
16 one gets closer to a deadline, one always has to take  
17 stock but we are not making an application today.

18 If we make an application, it will be because we  
19 need one as the deadline arrives.

20 MR SAUNDERS: Well, so that is --

21 THE CHAIRMAN: Mr Saunders, we know where we are. You are  
22 doing your best to make sure there is no possibility of  
23 an extension of time.

24 MR SAUNDERS: No, no, if there is some major problem which  
25 needs to be addressed, then fine but we will consider



1           that as and when it comes in, but what I want to just be  
2           clear about is there is nothing on the radar that has  
3           not been mentioned because, if there has been, we need to  
4           know where we are. That is helpful.

5           Sir, the other two points are in relation to expert  
6           evidence. This is my learned friend's proposal, they  
7           want -- you will recall that the Tribunal set page  
8           limits for the various reports and there was a separate  
9           limit for the annexes. I think my learned friend's  
10          proposal is he wants to roll all of that together.

11       MR WILLIAMS: I am happy for Mr Saunders to make my  
12          application for me.

13       MR SAUNDERS: I don't think there is any --

14       MR WILLIAMS: No, it is a matter for the Tribunal. The  
15          parties are content. The Tribunal previously ruled that  
16          the economic expert reports ought to be 100 pages with  
17          50 pages of annexes. We are now a long way into that  
18          process and Mr Noble's position is that he can meet the  
19          overall envelope of 150 pages but that the way the  
20          material has panned out, it will be probably of greater  
21          assistance to the Tribunal if that is not carved into  
22          100 pages and 50 pages, because --

23       THE CHAIRMAN: I have a feeling the annex is getting smaller  
24          and the main report is getting longer, yes.

25       MR WILLIAMS: That's right. That's right.

1 THE CHAIRMAN: We are not going to accede to that request.

2 MR WILLIAMS: You are not going to accede to it?

3 THE CHAIRMAN: No. You will just have to be more concise.

4 Most expert reports seem to say everything three  
5 times, so maybe you will just need to say it once on  
6 this occasion.

7 MR WILLIAMS: Without waiving privilege, I can tell you that  
8 the current draft is not saying everything three times  
9 and the other possibility that we considered, sir, was  
10 to apply for the balance to be more like 120 pages and  
11 30 pages. So, we are not seeking to put in a report of  
12 150 pages, just to be clear.

13 THE CHAIRMAN: But I have no explanation as to why it needs  
14 to be so long today; so this is addressing what topics?

15 MR WILLIAMS: This is addressing market definition,  
16 dominance and abuse, and of course it is addressing  
17 market definition and dominance in relation to multiple  
18 markets, because we have got the 3G CDMA market, we have  
19 the LTE market and we have the 5G markets, and of course  
20 it is addressing the separate markets in relation to SEP  
21 licensing and chipset manufacture.

22 So, just dealing with market definitions --

23 THE CHAIRMAN: So how much is on abuse?

24 MR WILLIAMS: How much?

25 THE CHAIRMAN: How much is written on abuse?

1 MR WILLIAMS: I think, at the moment, one would expect the  
2 report to be about a third or a third-plus in relation  
3 to abuse.

4 THE CHAIRMAN: So, can I suggest we have -- what reasons have  
5 you given so far in the correspondence?

6 MR WILLIAMS: We didn't give extensive --

7 THE CHAIRMAN: Can I suggest you write to the Tribunal.

8 I am conscious Mrs Justice Bacon is not here today.  
9 This was an order that she made and so, if you produce  
10 a letter a little bit more detail than you are giving me  
11 now, explaining why the market definition is taking up  
12 so much, then we can deal with that in correspondence  
13 I think.

14 MR WILLIAMS: The other point I will make, so it is on your  
15 radar, is that one way to comply with the order would be  
16 to re-organise the material and to say "This is my view  
17 and some of the supporting analysis and evidence is in  
18 annex ..." whatever it is, and then the Tribunal would  
19 have the same material in a form that --

20 THE CHAIRMAN: I appreciate that but, obviously, the annex  
21 is something one hopes one only has need to dip into and  
22 not to study.

23 So would you mind, sorry, given the circumstances of  
24 where we are today, would you mind putting that in  
25 writing and then we can --

1 MR WILLIAMS: I understand, sir.

2           The other matter is Mr Saunders' application, which  
3           I will not make, sir.

4 MR SAUNDERS: I was just going say, just in relation to  
5           that, we are not proposing to respond to that. My  
6           client is neutral on this. It is really a matter  
7           between my learned friend and the Tribunal. So just  
8           don't expect something from us.

9 THE CHAIRMAN: No.

10           If you could put that perhaps -- when you write the  
11           letter, perhaps you could put that at the end, that  
12           Qualcomm's position is neutral; otherwise we may forget  
13           and ask for Qualcomm's response.

14 MR WILLIAMS: I don't know if you can help me with this,  
15           sir, but obviously the work is ongoing and the reason  
16           for raising it today was to facilitate ongoing work.

17 THE CHAIRMAN: Yes.

18 MR WILLIAMS: Do you have any sense of whether it is going  
19           to be possible to determine that this side of Christmas?

20 THE CHAIRMAN: I am sure within the next couple of days,  
21           yes -- I say "sure" but I would be optimistic.

22 MR WILLIAMS: I understand, but in the circumstances  
23           I wanted to ask. Thank you.

24 MR SAUNDERS: Sir, the other housekeeping matter is in  
25           relation to the experts' joint statements.

1           So as between Messrs Williams and Ingers, both  
2           experts have agreed that they would like to ask for  
3           an extension of time for their joint statement to  
4           10 January.

5   THE CHAIRMAN: That is fine.

6   MR SAUNDERS: So that is the other matter on that.

7           I think -- sorry, there is one other housekeeping  
8           point, which, sir, one point that we have raised, and  
9           I am not asking, sir, for a ruling on this but it is  
10          important that it is on the Tribunal's radar, because it  
11          may come up at the next CMC.

12          You will be aware that there are confidentiality  
13          clubs in these proceedings. The top tier of that club  
14          is an external eyes only club. Ordinarily following  
15          *Mitsubishi v OnePlus*, and the various authorities in the  
16          Court of Appeal. You don't get to trial with documents  
17          that can't be seen by at least somebody at the defendant  
18          to be able to give instructions.

19   THE CHAIRMAN: Certainly.

20   MR SAUNDERS: That is something that we have on our radar.

21          Now, it is slightly more problematic here because  
22          also some documents have been produced from the 1782  
23          applications in the US and they have their own  
24          protective order. So, it is not a trivial issue sorting  
25          all of that out, because it may require variations to

1 the protective orders and so on. But it is something  
2 very much on our radar and I just wanted to mention --

3 THE CHAIRMAN: Who is it who cannot see the documents at the  
4 moment?

5 MR SAUNDERS: At the moment, Qualcomm -- I can't show my  
6 client some of the documents. So, I think we would want  
7 to --

8 THE CHAIRMAN: Some of the documents from where?

9 MR SAUNDERS: So, I think some of the 1782 documents are  
10 subject to protection.

11 THE CHAIRMAN: Right.

12 MR SAUNDERS: So, there are issues with the foreign court.  
13 I am not suggesting that is something that the  
14 Tribunal can necessarily resolve but it is something  
15 that, by the time we get to trial, as matter of  
16 fairness, there needs to be somebody in the club that  
17 can give us instructions potentially.

18 THE CHAIRMAN: Yes, so you will be pursuing that in the --

19 MR SAUNDERS: We may have to pursue it but what I am  
20 hopefully exhorting the Class Representative to do is to  
21 come up with some proposals. We have written about this  
22 some time ago and it is a live issue which does need to  
23 be sorted out.

24 THE CHAIRMAN: The Class Representative can see these  
25 documents?

1 MR SAUNDERS: Yes, because -- well, the lawyers can see the  
2 documents. I am not sure whether anybody from Which?  
3 can see them.

4 THE CHAIRMAN: That may matter less.

5 MR SAUNDERS: Yes. But the problem is we can't. So, in  
6 particular, where there are documents which reflect  
7 things that are relevant to things that are said to have  
8 happened in a negotiation with Qualcomm, it is important  
9 we can deal with those; not least because, if you get to  
10 trial and there is some zinger in those documents, at  
11 the moment they cannot put them to the witness, which is  
12 going to be a bit of a problem.

13 So all of this does need to be sorted out at some  
14 point.

15 THE CHAIRMAN: Yes.

16 MR WILLIAMS: I understand the importance of the issue, sir,  
17 but I am not really sure why Mr Saunders says the ball  
18 is in our court.

19 THE CHAIRMAN: I am not sure he put it that strongly. Maybe  
20 he did.

21 MR WILLIAMS: He said they were exhorting us to come up with  
22 some proposals, I thought he said.

23 THE CHAIRMAN: It may be, for the reasons he has just given,  
24 it may be a problem for you also if you need to put  
25 documents to witnesses.

1 MR WILLIAMS: From that point of view --

2 THE CHAIRMAN: Anyway --

3 MR SAUNDERS: Yes.

4 MR WILLIAMS: I am sure --

5 THE CHAIRMAN: It is not a straightforward issue we can take  
6 forward today.

7 MR SAUNDERS: No, and I am not suggesting for a moment -- we  
8 cannot invite, sir, to make a ruling in respect of it but  
9 it is just a case management issue that is on the radar  
10 and we do need to cooperate to try and sort it out. So  
11 hopefully we can do that.

12 THE CHAIRMAN: There we are.

13 MR SAUNDERS: Sir, the only other -- I think there are costs  
14 live now.

15 THE CHAIRMAN: Yes.

16 MR SAUNDERS: Sir, obviously you have seen that we seek our  
17 costs in respect of various things. We are content with  
18 costs in the case.

19 THE CHAIRMAN: Yes, I think costs in the case is the  
20 appropriate order for today, unless anybody wants to  
21 argue otherwise?

22 MR WILLIAMS: That would have been our proposal, sir.

23 (3.16 pm)

24 (The hearing concluded).

25