Neutral Citation Number: [2018] EWHC 1188 (Pat)

Case No: HP-2017-000015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 22/05/2018

Before:

MR JUSTICE MORGAN

- -

Between:

(1) APPLE RETAIL UK LIMITED **(2) APPLE DISTRIBUTION INTERNATIONAL** **(3) APPLE OPERATIONS EUROPE** **(4) APPLE GMBH** **(5) APPLE RETAIL GERMANY B.V. & CO. KG** **(6) APPLE INC**	**Respondents/ Claimants**
- and –	
(1) QUALCOMM (UK) LIMITED **(2) QUALCOMM INCORPORATED**	**Applicants/ Defendants**

- -
- -

Marie Demetriou QC, Colin West, Brian Nicholson & Chris Hall (instructed by **Boies Schiller Flexner (UK) LLP**) for the **Claimants**
Mark Howard QC, James Flynn QC, Nicholas Saunders QC & Gerard Rothschild (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Defendants**

Hearing dates: 27 & 28 March 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MORGAN

The Hon Mr Justice Morgan:

The parties to these proceedings

1. There are six Claimants. All of the Claimants are companies in the Apple group of companies. The First Claimant is incorporated in England and Wales. The Second and Third Claimants are incorporated in the Republic of Ireland. The Fourth and Fifth Claimants are incorporated in Germany. The Sixth Claimant is Apple Inc which is incorporated in California, USA, and is the ultimate parent company of the other Claimants and of the Apple group as a whole.

2. As is well known, the Apple group of companies is involved in the design, manufacture and marketing of various mobile communication and media devices, personal computers and portable music devices. Apple's products include the iPhone and iPad devices.

3. There were originally four Defendants but the Claimants now wish to proceed against only two of them. The remaining two Defendants are now known as the First and Second Defendants. The First Defendant is incorporated in England and Wales and is a wholly owned indirect subsidiary of the Second Defendant. The Second Defendant is Qualcomm Incorporated, which is incorporated in Delaware, USA. It is the ultimate parent company of the companies in the Qualcomm group.

4. The Second Defendant has described itself as a leading contributor to the development of technologies used in smartphones. It has accumulated over 130,000 relevant patents and patent applications worldwide. Of these, approximately 13,300 are European patents. Its UK patent portfolio consists of 5,168 UK and EP(UK) patents. It has declared approximately 26,700 patents as potentially essential to the European Telecommunications Standards Institute ("ETSI") mobile telephone standards.

The procedural history

5. The Claimants issued (but did not then serve) the original Claim Form in these proceedings on 23 January 2017. The Claimants amended the Claim Form on 19 May 2017. The Claimants then served the Amended Claim Form and Particulars of Claim on the First Defendant, the UK company, within the jurisdiction. The Claimants also served the Amended Claim Form and Particulars of Claim, in so far as they put forward certain claims relating to patents, on the Second Defendant, the US company, within the jurisdiction, in reliance on CPR 63.14.

6. On 30 June 2017, the Claimants applied without notice for permission to serve the Amended Claim Form on the Second Defendant out of the jurisdiction (presumably in so far as the Claimants had not already served it on the Second Defendant within the jurisdiction in reliance on CPR 63.14). On 12 July 2017, Arnold J granted the permission which had been sought.

7. On 11 August 2017, the Second Defendant served a Defence to the patent claims made against it, save for one of those claims (the patent exhaustion claim). As to the patent exhaustion claim, the Second Defendant contends that that claim is not within CPR 63.14 and was not validly served on it within the jurisdiction.

The applications

8. On 29 September 2017, the First Defendant (along with two other Defendants who are no longer relevant) applied for an order striking out the claims as against them, alternatively for reverse summary judgment in relation to the claims against them. By the same application notice, the Second Defendant applied for a declaration that the court has no jurisdiction (or ought to decline to exercise any such jurisdiction) in relation to the claims made against the Second Defendant in some (but not all) of the paragraphs in the Prayer for Relief in the Amended Claim Form and for consequential orders such as an order setting aside the permission to serve those claims on the Second Defendant out of the jurisdiction.

9. On 21 March 2018, the Claimants applied for permission to amend their Particulars of Claim.

10. On 23 March 2018, the Defendants applied to adjourn the hearing of their applications of 29 September 2017. In support of the application for an adjournment, the Defendants submitted that they needed time to investigate the proposed amended claim as set out in the draft Amended Particulars of Claim. I heard the application for an adjournment on 26 March 2018 and ruled that the hearing of the Defendants' applications of 29 September 2017 and the Claimants' application of 21 March 2018 should proceed on 27 and 28 March 2018 with a view to the court dealing with all of the outstanding applications or, at least, dealing with so much of them as could properly be dealt with without unfairness to the Defendants resulting from the time at which the Claimants provided the draft Amended Particulars of Claim to the Defendants. The various applications were then heard on 27 and 28 March 2018.

The claim against the First Defendant

11. Although the Amended Claim Form and the Particulars of Claim suggested otherwise, it was made clear at the hearing of the applications that there is only one claim made against the First Defendant. The single claim against the First Defendant is that it is in breach of a contract on which, it is said, all of the Claimants are entitled to sue. The contract relied upon is said to have been made by the First Defendant, as a member of ETSI, and is a contract which requires it to comply with ETSI Directives, including ETSI's Rules of Procedure and Intellectual Property Rights Policy ("IPR Policy"). In this regard, the Claimants rely on certain declarations made in respect of the licensing of standard essential patents ("SEPs") and in respect of negotiating the grant of such licences on fair reasonable and non-discriminatory ("FRAND") terms.

12. As explained above, the First Defendant has applied for an order striking out this claim and/or for reverse summary judgment and an order dismissing this claim.

The claims against the Second Defendant

13. There are various claims against the Second Defendant. I will start by referring to the claims against the Second Defendant where the Second Defendant has been served within the jurisdiction and where the Second Defendant accepts that those claims can be tried in this jurisdiction. These claims refer to five patents, namely, EP(UK) 1,264,506, EP(UK) 1,192,749, EP(UK) 1,791,286, EP(UK) 1,774,822 and EP(UK) 2,217,031. The Claimants contend that these five patents are invalid on the ground

that, in the case of each patent, none of the claims involved an inventive step (I ignore the inappropriate double negative in the Grounds of Invalidity). The Claimants then contend that each of these five patents should be revoked. Next the Claimants seek a declaration that each of these five patents is not essential, i.e. is not a SEP, for the purposes of the ETSI standards.

14. In relation to the claims described in the last paragraph, it is agreed that the five patents are "registered rights" within CPR 63.14, that the above claims relate to the registered rights and that the Amended Claim Form was served on the Second Defendant within the jurisdiction at addresses for service provided for that purpose.

15. The next claim made against the Second Defendant is a claim for a declaration that the Second Defendant's rights in respect of all EP(UK)s declared by the Second Defendant to be SEPs for the ETSI standards are exhausted in respect of any device which incorporates a chipset supplied directly or indirectly to an Apple company with the consent of a company in the Qualcomm group. In respect of this claim, the Claimants say that the claim "relates to" the registered rights within CPR 63.14. The Second Defendant does not accept this contention.

16. Then the Claimants claim a declaration that the Second Defendant has, contrary to Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), Article 54 of the Agreement on the European Economic Area ("EEA") and section 18 of the Competition Act 1998, abused its dominant position in the relevant market or markets. The Claimants further claim damages said to have been suffered by them by reason of the alleged abuses of dominant position. The alleged abuses of a dominant position are pleaded in considerable detail in the Particulars of Claim and in the draft Amended Particulars of Claim. In relation to these claims, the Claimants accept that they need permission to serve these claims on the Second Defendant out of the jurisdiction. For that purpose, the Claimants rely on "Gateways" 3, 4A and 9(a) as set out in sub-paragraphs (3), (4A) and (9)(a) of paragraph 3.1 of Practice Direction 6B – Service out of the Jurisdiction.

17. The next claim against the Second Defendant is for a declaration that the Second Defendant is in breach of the ETSI IPR Policy and certain declarations which it made under that Policy. As I understand it, the Claimants do not contend that they are able to rely on CPR 63.14 in relation to that claim and therefore it would seem that they must accept that they need permission to serve that claim out of the jurisdiction. I will proceed on the basis that the Claimants also wish to claim damages for the alleged breach of contract although the only claim to damages in the Prayer for Relief refers to damages suffered "by reason of the said abuses" which might have been restricted to the alleged abuses of a dominant position. Further, the Claimants claim a declaration that the Second Defendant is obliged to offer a patent licence to the Claimants in respect of Apple devices for sale in the EU/EEA in relation to any SEPs for two specified telecommunications standards on FRAND terms.

18. The claims referred to in the last paragraph were not separately considered in the course of submissions as to whether the court should grant permission to serve out. I can see that the Claimants' arguments as to Gateways 3 and 4A can be put forward in relation to these claims as to obligations arising in relation to ETSI standards but Gateway 9 could not be relied upon for that purpose as that Gateway deals with

claims in tort. The Claimants did not assert that they could rely on the Gateways which apply to some contracts (Gateways 6 to 8) in relation to these claims.

19. The Prayer for Relief in the Particulars of Claim (which is not amended in the draft Amended Particulars of Claim) then claims damages, costs, interest and further other relief. The position as to service out in relation to these matters will, of course, turn upon the position in relation to the claims considered above.

Strike out and/or summary judgment for the First Defendant

20. The First Defendant submits that the single claim against it, based on the ETSI Directives and the IPR Policy and various declarations which have been made, is not based on reasonable grounds and should be struck out pursuant to CPR 3.4(2)(a). Alternatively, the First Defendant submits that that claim does not have a real prospect of success and there is no other compelling reason why that claim should go to trial rather than been summarily dismissed; the First Defendant relies upon CPR 24.2.

21. The rules as to striking out a claim and as to summary judgment were not in dispute and need not be further elaborated here. However, the First Defendant specifically relies on the statement of Moore-Bick LJ in ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725 at [12], as follows:

> "It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

22. Basing itself on the remarks in the ICI case, the First Defendant submits that the differences between the Claimants and the First Defendant turn on a short point of law and those differences should be determined on a summary basis at this stage.

23. Whether the Claimants have a real prospect of success in relation to their claims against the First Defendant is highly relevant to the question of whether the court has jurisdiction in relation to the claims against the Second Defendant. Later in this judgment, I will deal in greater detail with the legal principles which apply in this case in relation to the jurisdiction issues but I note at this stage that one of the Gateways relied upon by the Claimants to give the court jurisdiction in respect of the claims against the Second Defendant is Gateway 3. That Gateway requires the Claimants to show that there is a real issue between the Claimants and the First Defendant which it is reasonable for the court to try. It was pointed out by Lord Collins of Mapesbury giving the judgment of the Privy Council in Altimo Holdings v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 at [82] that the court applies the summary judgment test when assessing this question in relation to the claim against the "anchor defendant" who is

sued within the jurisdiction (in this case, the First Defendant). In the same case, Lord Collins considered the approach of the court when the dispute between a claimant and an anchor defendant turns on a matter of law. He explained that where the question of law goes to jurisdiction, the court will normally decide it rather than asking itself whether there is a good arguable case: see at [81]. He also stated that it was not normally appropriate in a summary procedure to decide a controversial question of law in a developing area: see at [84]. He concluded at [86] by referring to the approach of the House of Lords in The Brabo [1949] AC 326 and he then said:

> "That was not a case where the point of law was a difficult one. Lord Porter said, at p 341, that "when the various Acts and provisions are collated the answer is clear". Consequently the observations of the members of the Appellate Committee are obiter, but although they do not all put it in the same way, the overall effect of the decision is that if the question is whether the claim against D1 is bound to fail on a question of law it should be decided on the application for permission to serve D2 (or on the application to discharge the order granting permission), but not where there is an exceptionally difficult and doubtful point of law: Lord Porter, at p 341, and cf, at p 338 per Lord Porter; Lord du Parcq, at p 351. Contrast Lord Simonds, at p 348: "the court should not easily be deterred by any apparent difficulty or complexity of subject matter from considering and, if it can do so at that stage, forming an opinion on the question whether the action is bound to fail against the defendants within the jurisdiction." "

24. Accordingly, on the application by the First Defendant for a summary disposal of the case against it, I will apply the usual summary judgment test and I will adopt the approach identified above as to the appropriateness of deciding any relevant issue of law. If I find that the Claimants have no sustainable claim against the First Defendant the sooner that is determined the better. Such a determination would have the additional advantage of ensuring that the court would not, inappropriately, assert jurisdiction against the Second Defendant pursuant to Gateway 3.

ETSI

25. A useful introduction to ETSI is given by Birss J in Unwired Planet International Ltd v Huawei Technologies Co Ltd [2017] RPC 19 at [83]-[85], as follows:

> "83 … Standards exist so that different manufacturers can produce equipment which is interoperable with the result that the manufacturers compete with one another. So the phone makers compete in the market for phones and the public can select a phone from any supplier and be sure (for example) that if it is a 4G phone, it will work with any 4G network. As a society we want the best, most up to date technology to be incorporated into the latest standards and that will involve incorporating patented inventions. While the inventor must be entitled to a fair return for the use of their invention, in order for the standard to permit interoperability the inventor must not

> be able to prevent others from using the patented invention incorporated in the standard as long as implementers take an appropriate licence and pay a fair royalty. In this way a balance is struck, in the public interest, between the inventor and the implementers. The appropriate licence is one which is fair, reasonable and non-discriminatory. That way a standard can safely incorporate the invention claimed in a patent without giving the inventor or his successors in title unwarranted power over those who implement the standard. Thus the public interest is served because telecommunication standards can be set using the best and most up-to-date technical expedients available and the inventor's private interest is served because the FRAND undertaking ensures they or their successors will obtain a fair reward for their invention.
>
> 84 Telecommunications standards worldwide are formulated and set by SSOs (Standards Setting Organisations). In Europe the relevant SSO is ETSI. SSOs require the holders of patents which are essential to the standards to give an undertaking to license on FRAND terms if they wish to participate in standard setting.
>
> 85 In ETSI this process is based on its Directives which include Rules of Procedure and a Guide to IPRs. Within the Directives, as an annex to the Guide to IPRs, is an IPR Policy. The policy and the rules have been adjusted over time but none of the issues before me turn on any differences. Article 4.1 of the ETSI IPR Policy requires members of ETSI to inform ETSI of "ESSENTIAL IPRs" in a timely fashion. ESSENTIAL and IPR are defined terms (art. 15). A patent which would inevitably be infringed by operating in accordance with a standard is an example of an ESSENTIAL IPR. By definition a SEP is an ESSENTIAL IPR. Once an ESSENTIAL IPR has been declared by its owner to ETSI, the owner will be requested by ETSI (art. 6.1 of the ETSI IPR Policy) to give an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on FRAND terms."

26. In the present case, the Claimants rely on the IPR Policy which is Annex 6 to an ETSI Directive; I was not shown the Directive itself. I will set out more of this Policy than is pleaded by the Claimants in their draft Amended Particulars of Claim. The paragraphs of the IPR Policy appear to be called clauses rather than Articles.

27. Clause 15 contains a number of defined terms, as follows:

> **"AFFILIATE"** of a first legal entity means any other legal entity:
>
> - directly or indirectly owning or controlling the first legal entity, or

- under the same direct or indirect ownership or control as the first legal entity, or

- directly or indirectly owned or controlled by the first legal entity,

for so long as ownership or control lasts.

Ownership or control shall exist through the direct or indirect:

- ownership of more than 50% of the nominal value of the issued equity share capital or of more than 50% of the shares entitling the holders to vote for the election of directors or persons performing similar functions, or

- right by any other means to elect or appoint directors, or persons who collectively can exercise such control. A state, a division of a state or other public entity operating under public law, or any legal entity, linked to the first legal entity solely through a state or any division of a state or other public entity operating under public law, shall be deemed to fall outside the definition of an AFFILIATE.

"ESSENTIAL" as applied to IPR means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR. For the avoidance of doubt in exceptional cases where a STANDARD can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered ESSENTIAL.

"IPR" shall mean any intellectual property right conferred by statute law including applications therefor other than trademarks. For the avoidance of doubt rights relating to get-up, confidential information, trade secrets or the like are excluded from the definition of IPR.

"MEMBER" shall mean a member or Associate member of ETSI. References to a MEMBER shall wherever the context permits be interpreted as references to that MEMBER and its AFFILIATES.

"PATENT FAMILY" shall mean all the documents having at least one priority in common, including the priority document(s) themselves. For the avoidance of doubt, "documents" refers to patents, utility models, and applications therefor.

28. Clause 3 sets out the relevant Policy Objectives, as follows:

> "**3 Policy Objectives**
>
> 3.1 It is ETSI's objective to create STANDARDS and TECHNICAL SPECIFICATIONS that are based on solutions which best meet the technical objectives of the European telecommunications sector, as defined by the General Assembly. In order to further this objective the ETSI IPR POLICY seeks to reduce the risk to ETSI, MEMBERS, and others applying ETSI STANDARDS and TECHNICAL SPECIFICATIONS, that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD or TECHNICAL SPECIFICATION being unavailable. In achieving this objective, the ETSI IPR POLICY seeks a balance between the needs of standardization for public use in the field of telecommunications and the rights of owners of IPRs.
>
> 3.2 IPR holders whether members of ETSI and their AFFILIATES or third parties, should be adequately and fairly rewarded for the use of their IPRs in the implementation of STANDARDS and TECHNICAL SPECIFICATIONS.
>
> 3.3 ETSI shall take reasonable measures to ensure, as far as possible, that its activities which relate to the preparation, adoption and application of STANDARDS and TECHNICAL SPECIFICATIONS, enable STANDARDS and TECHNICAL SPECIFICATIONS to be available to potential users in accordance with the general principles of standardization."

29. Clause 4 deals with Disclosure of IPRs in these terms:

> "**4 Disclosure of IPRs**
>
> 4.1 Subject to Clause 4.2 below, each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted.
>
> 4.2 The obligations pursuant to Clause 4.1 above do however not imply any obligation on MEMBERS to conduct IPR searches.

4.3 The obligations pursuant to Clause 4.1 above are deemed to be fulfilled in respect of all existing and future members of a PATENT FAMILY if ETSI has been informed of a member of this PATENT FAMILY in a timely fashion. Information on other members of this PATENT FAMILY, if any, may be voluntarily provided."

30. Clause 6 deals with Availability of Licences in these terms:

"**6 Availability of Licences**

6.1 When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory ("FRAND") terms and conditions under such IPR to at least the following extent:

- MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
- sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
- repair, use, or operate EQUIPMENT; and
- use METHODS.

The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate.

6.1bis Transfer of ownership of ESSENTIAL IPR

FRAND licensing undertakings made pursuant to Clause 6 shall be interpreted as encumbrances that bind all successors-in-interest. Recognizing that this interpretation may not apply in all legal jurisdictions, any Declarant who has submitted a FRAND undertaking according to the POLICY who transfers ownership of ESSENTIAL IPR that is subject to such undertaking shall include appropriate provisions in the relevant transfer documents to ensure that the undertaking is binding on the transferee and that the transferee will similarly include appropriate provisions in the event of future transfers with the goal of binding all successors-in-interest. The undertaking shall be interpreted as binding on successors-in-interest regardless of whether such provisions are included in the relevant transfer documents.

6.2 An undertaking pursuant to Clause 6.1 with regard to a specified member of a PATENT FAMILY shall apply to all existing and future ESSENTIAL IPRs of that PATENT FAMILY unless there is an explicit written exclusion of specified IPRs at the time the undertaking is made. The extent of any such exclusion shall be limited to those explicitly specified IPRs.

6.3 As long as the requested undertaking of the IPR owner is not granted, the COMMITTEE Chairmen should, if appropriate, in consultation with the ETSI Secretariat use their judgment as to whether or not the COMMITTEE should suspend work on the relevant parts of the STANDARD or TECHNICAL SPECIFICATION until the matter has been resolved and/or submit for approval any relevant STANDARD or TECHNICAL SPECIFICATION.

6.4 At the request of the European Commission and/or EFTA, initially for a specific STANDARD or TECHNICAL SPECIFICATION or a class of STANDARDS/TECHNICAL SPECIFICATIONS, ETSI shall arrange to have carried out in a competent and timely manner an investigation including an IPR search, with the objective of ascertaining whether IPRs exist or are likely to exist which may be or may become ESSENTIAL to a proposed STANDARD or TECHNICAL SPECIFICATIONS and the possible terms and conditions of licences for such IPRs. This shall be subject to the European Commission and/or EFTA meeting all reasonable expenses of such an investigation, in accordance with detailed arrangements to be worked out with the European Commission and/or EFTA prior to the investigation being undertaken."

31. Clause 6bis provides:

"**6bis Use of the IPR Licensing Declaration Forms**

MEMBERS shall use one of the ETSI IPR Licensing Declaration forms at the Appendix to this ETSI IPR Policy to make their IPR licensing declarations."

32. Clause 8 deals with Non-availability of Licences in these terms:

"**8 Non-availability of Licences**

8.1 Non-availability of licences prior to the publication of a STANDARD or a TECHNICAL SPECIFICATION

8.1.1 Existence of a viable alternative technology

Where prior to the publication of STANDARD or a TECHNICAL SPECIFICATION and IPR owner informs ETSI

that it is not prepared to license an IPR in respect of a STANDARD or TECHNICAL SPECIFICATION in accordance with Clause 6.1 above, the General Assembly shall review the requirement for that STANDARD or TECHNICAL SPECIFICATION and satisfy itself that a viable alternative technology is available for the STANDARD or TECHNICAL SPECIFICATION which:

- is not blocked by that IPR; and
- satisfies ETSI's requirements.

8.1.2 Non-existence of a viable alternative technology

Where, in the opinion of the General Assembly, no such viable alternative technology exists, work on the STANDARD or TECHNICAL SPECIFICATION shall cease, and the Director-General of ETSI shall observe the following procedure:

a) If the IPR owner is a MEMBER,

i) the Director-General of ETSI shall request that MEMBER to reconsider its position.

ii) If that MEMBER however decides not to withdraw its refusal to license the IPR, it shall then inform the Director-General of ETSI of its decision and provide a written explanation of its reasoning for refusing to license that IPR, within three months of its receipt of the Director-General's request.

iii) The Director-General of ETSI shall then send the MEMBER's explanation together with relevant extracts from the minutes of the General Assembly to the ETSI Counsellors for their consideration.

b) If the IPR owner is a third party,

i) the Director-General of ETSI shall, wherever appropriate, request full supporting details from any MEMBER who has complained that licenses are not available in accordance with Clause 6.1 above and/or request appropriate MEMBERS to use their good offices to find a solution to the problem.

ii) Where this does not lead to a solution the Director-General of ETSI shall write to the IPR owner concerned for an explanation and request ultimately that licences be granted according to Clause 6.1 above.

iii) Where the IPR owner refuses the Director-General's request and decides not to withdraw its refusal to license the IPR or does not answer the letter within three months after receipt of the Director-General's request, the Director-General shall then

send the IPR owner's explanation, if any, together with relevant extracts from the minutes of the General Assembly to the ETSI Counsellors for their consideration.

8.1.3 Prior to any decision by the General Assembly, the COMMITTEE should in consultation with the ETSI Secretariat use their judgment as to whether or not the COMMITTEE should pursue development of the concerned parts of the STANDARD or TECHNICAL SPECIFICATION based on the non-available technology and should look for alternative solutions.

8.2 Non-availability of licences after the publication of a STANDARD or a TECHNICAL SPECIFICATION

Where, in respect of a published STANDARD or TECHNICAL SPECIFICATION, ETSI becomes aware that licences are not available from an IPR owner in accordance with Clause 6.1 above, that STANDARD or TECHNICAL SPECIFICATION shall be referred to the Director-General of ETSI for further consideration in accordance with the following procedure:

i) The Director-General shall request full supporting details from any MEMBER or third party who has complained that licences are not available in accordance with Clause 6.1 above.

ii) The Director-General shall write to the IPR owner concerned for an explanation and request that licences be granted according to Clause 6.1 above. Where the concerned IPR owner is a MEMBER, it shall inform the Director-General of ETSI of its decision and provide a written explanation of its reasons in case of continuing refusal to license that IPR.

iii) Where the IPR owner refuses the Director-General's request or does not answer the letter within three months, the Director-General shall inform the General Assembly and, if available, provide the General Assembly with the IPR owner's explanation for consideration. A vote shall be taken in the General Assembly on an individual weighted basis to immediately refer the STANDARD or TECHNICAL SPECIFICATION to the relevant COMMITTEE to modify it so that the IPR is no longer ESSENTIAL.

iv) Where the vote in the General Assembly does not succeed, then the General Assembly shall, where appropriate, consult the ETSI Counsellors with a view to finding a solution to the problem. In parallel, the

> General Assembly may request appropriate MEMBERS to use their good offices to find a solution to the problem.
>
> v) Where (iv) does not lead to a solution, then the General Assembly shall request the European Commission to see what further action may be appropriate, including non-recognition of the STANDARD or TECHNICAL SPECIFICATION in question.
>
> In carrying out the foregoing procedure due account shall be taken of the interest of the enterprises that have invested in the implementation of the STANDARD or TECHNICAL SPECIFICATION in question."

33. Clause 12 provides that the Policy is governed by French law.

34. The parties began their submissions to me as to the effect of declarations made pursuant to Clause 6.1 of the IPR Policy but without putting into evidence the relevant declarations which had been made in this case. I pointed out that the declaration forms which were attached to the copy of the IPR Policy which had been put in evidence were in different terms. In one place the declaration was made by "the Declarant" and in another place the declaration was made by "the Declarant and/or its Affiliates". I considered that if I was to be asked to construe the declarations, I needed to see the actual declarations which had been made. I was then provided with what I understand to be the relevant declarations. The declarations provided are not all in identical terms but it was not submitted that there was any relevant difference for present purposes between the different versions.

35. The first declaration which I was asked to consider was date-stamped 12 December 2014. The heading said that it was "version 8". The "Declarant" was identified as QUALCOMM Incorporated, i.e. the Second Defendant. The document began by making an information statement pursuant to Clause 4.1 of the IPR Policy. The statement was to the effect that the Declarant and/or its Affiliates informed ETSI that it was the Declarant and/or the Affiliate's belief that the IPR disclosed in an Annex may be or may become Essential. The Declarant and/or its Affiliates then stated they were the proprietor of the disclosed IPRs. In this document, the declaration made pursuant to Clause 6.1 of the IPR Policy was in these terms:

> "In accordance with Clause 6.1 of the ETSI IPR Policy the Declarant and/or its AFFILIATES hereby irrevocably declares the following:
>
> To the extent that the IPR(s) disclosed in the attached *IPR Information Statement Annex* are or become, and remain, ESSENTIAL in respect of the ETSI Work Item, STANDARD and/or TECHNICAL SPECIFICATION identified in the attached *IPR Information Statement Annex*, the Declarant and/or its AFFILIATES are (1) prepared to grant irrevocable licences under this/these IPR(s) on terms and conditions which

> are in accordance with Clause 6.1 of the ETSI IPR Policy; and (2) will comply with Clause 6.1bis of the ETSI IPR Policy.
>
> This irrevocable undertaking is made subject to the condition that those who seek licences agree to reciprocate.
>
> By signing this IPR Information Statement and Licensing Declaration Form, you represent that you have the authority to bind the Declarant and/or its AFFILIATES to the representations and commitments provided in this form."

36. The above declaration was stated to be governed by French law. The declaration also stated that the definitions in Clause 15 of the IPR Policy applied to the declaration. The IPR Information Statement Annex identified a number of patents registered in various countries. The Annex contained a column with the heading "Proprietor" and in the case of each patent, the proprietor was Qualcomm Incorporated.

37. Some of the other declarations were said to be versions 5, 6 or 11. As it was not submitted that the different versions had different effects, I will not set out the precise wording of all of the different versions. However, just by way of contrast, I will quote the relevant part of another declaration which was said to be version 6. There the wording was as follows:

> "In accordance with Clause 6.1 of the ETSI IPR Policy the Declarant and/or its AFFILIATES hereby irrevocably declares the following:
>
> To the extent that the IPR(s) disclosed in the attached *IPR Information Statement Annex* are or become, and remain, ESSENTIAL in respect of the ETSI Work Item, STANDARD and/or TECHNICAL SPECIFICATION identified in the attached *IPR Information Statement Annex*, the Declarant and/or its AFFILIATES are prepared to grant irrevocable licences under this/these IPR(s) on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy.
>
> This irrevocable undertaking is made subject to the condition that those who seek licences agree to reciprocate."

The pleaded case against the First Claimant

38. The Claimants plead that the Fourth Claimant and the First Defendant are members of ETSI. The Claimants then refer in their pleading to Articles 4.1, 6.1 6bis, 12 and 15.1, 15.4, 15.6 and 15.9 of the IPR Policy. It is then pleaded that an ETSI member is obliged to license or procure a licence for Essential IPR on FRAND terms and that this obligation is actionable under the governing law of ETSI (French Law) by other ETSI members and by third parties seeking such a licence. It is further pleaded that any ETSI declarations made by or on behalf of members or "patent-holding affiliates of members" are likewise enforceable under French law. It is next pleaded that "Qualcomm" meaning, apparently, both Defendants, has agreed to license Essential IPR on FRAND terms. Later in their pleading, the Claimants plead breaches of

obligation by both Defendants. It is pleaded that the First Defendant breached Article 6.1 of the IPR Policy and such breach was actionable by all of the Claimants. It is next pleaded that the declaration made by the Second Defendant was made on behalf of itself and its Affiliates, including the First Defendant, and that the Second Defendant and its Affiliates (including therefore the First Defendant) have breached the undertaking contained in the declaration. There is an unexplained disparity between one part of the pleading which alleges that the declaration made by the Second Defendant is made on behalf of itself and "patent-holding affiliates" and the other part of the pleading which alleges that the declaration is made on behalf of the Second Defendant and "its Affiliates". The First Defendant is not a "patent-holding affiliate" of the Second Defendant but it is "an Affiliate" as defined in the IPR Policy.

The expert evidence on French law

39. As the IPR Policy is governed by French Law, both the Claimants and the Defendants submitted expert evidence on French law. The Defendants served a report by Professor Fauvarque-Cosson who is a professor of law at the University Panthéon-Assas (Paris II). The Claimants replied with a report by Professor Molfessis who is also a professor of law at the same university. The Defendants then served a report in reply from Professor Fauvarque-Cosson.

40. Expert evidence on French law is, of course, admissible as to the principles of French law to be applied to a question as to the meaning of a contractual document. In the present case, there was broad agreement between the experts as to what those principles were. Professor Fauvarque-Cosson set out some relevant principles in her report. Professor Molfessis then set out his version of the relevant principles in his report and in her reply Professor Fauvarque-Cosson stated that she was largely in agreement with parts of his statement of the principles. She then gave her opinion that the relevant provisions of the IPR Policy were clear and unambiguous. She did however have "minor quibbles" as to Professor Molfessis' statement of the principles which applied where the terms of the contract were not clear. She then commented on what Professor Molfessis had said about Articles 1188, 1199 and 1203 to 1209 of the Civil Code. I do not need to set out all of the points made by Professor Fauvarque-Cosson. She then addressed what Professor Molfessis had said about the notion of *porte-fort* and said that she disagreed with part of what he had said.

41. For the purposes of deciding the issues between the parties as to the meaning of the IPR Policy and the declarations, it is sufficient for me to set out the relevant parts of what Professor Molfessis stated and what Professor Fauvarque-Cosson said in response where she disagreed with him.

42. Professor Molfessis stated:

> "21 I consider that the following provisions of the French Civil Code are those that are relevant to the matters considered in this Expert Report:

a. As a matter of French law, Article 1192 states that *"Clear and unambiguous terms are not subject to interpretation as doing so risks their distortion".*

i. This provision of the French Civil Code means that, when the terms of a contract are clear and unambiguous, under French law, plain language will govern: i.e. *"what is clear must not be interpreted"*. The French Cour de Cassation overrules decisions that do not comply with this requirement i.e. decisions that "construe" contract terms which are already clear in meaning.

ii. In the event that it is necessary to resolve any ambiguity or question, however, produced by a literal reading of a provision in a contract, Article 1182(2) of the Civil Code sets out the manner in which this ambiguity must be resolved. Article 1188(2) of the French Civil Code provides:

"Article 1188: A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms.

Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give it."

iii. The main objective of the interpretation of a contract under French law is to find out the genuine "common intent" (commune intention) of the parties. This is where the relevant terms of the contract are not clear i.e. that the common intent of the parties is not clearly expressed. This may be the result of a contradiction or an ambiguity within the contract itself (e.g. resulting from the comparison of two clauses) or an external contradiction or ambiguity (e.g. the contract itself is clear in meaning but when examined in relation to another pre-existing or background document, becomes ambiguous: Cass. civ. 1, October, 13 1965, JCP 65.II.14426, n. J.A).

iv. If the intention cannot be discerned, from a mere reading of the relevant provisions, in isolation from other terms of the contract and other relevant factors, this provision of the French Civil Code requires an ambiguous contractual provision to be read in the manner which a reasonable person would adopt.

v. Other rules guide the interpretation of an ambiguous contractual provision such as the fact that *"where a contract term is capable of bearing two meanings, the one which gives it some effect is to be preferred to the one which makes it produce no effect"* (Article 1191 of the French Civil Code).

b. Article 1199 of the French Civil Code provides that a contract creates rights and obligations only between the parties to the contract.

c. However, this principle does not exclude the possibility that a contractual obligation may confer rights for the benefit of third parties in certain circumstances governed by the French Civil Code:

i. Articles 1205-1209 of the French Civil Code make it clear that where a contract provides for rights for the benefit of third parties, also, those rights are enforceable by any third party beneficiary of those rights. This preserves the principle under French law of enforcement by such third party beneficiary on the basis of *stipulation pour autrui*.

ii. This mechanism permits a party to enter into a binding obligation for the benefit of third parties. It can be described as the following: an obligation in favour of a third party that is formed by an exchange of agreement between two parties. In a *stipulation pour autrui*, the promisor commits to the stipulator to grant a right to one or more third party beneficiaries. By sole commitment of the promisor, the third party beneficiaries are vested with an immediate and direct right against the promisor.

iii. Article 1204 of the French Civil Code expressly contemplates that *"a person may stand surety ("se porter fort") by promising that a third party will do something"* and that in such a case if the third party does not perform the action which was promised, the promisor "may be ordered to pay damages". This is a classical mechanism under French law known as *"porte-forte"*. It is an important exception to the fact that a person may only give undertakings in its own name as regards itself. Here, a person undertakes that a third party will do something. In this sense it is possible to make obligatory on the part of one person the entering into of a contract or the performance of a positive act by another. "

43. Professor Fauvarque-Cosson responded:

"14. In sub-paragraph 21(c)(iii), Professor Molfessis refers to Article 1204 of the Code, introducing the French law notion of *porte-fort*. The wording of Article 1204 that he cites, providing that *"a person may stand surety by promising that a third party will do something"*, is taken from the official translation of the New Code which I co-authored and which is exhibited to my First Report. As noted in the footnotes to that translation, there is no exact common law equivalent of *"porte-fort"* that I am aware of. It is very important to understand from the outset that the promise made by the 'surety' in no way commits the third party to a particular course of action – the

third party may act as it pleases without incurring liability, and the extent of any liability of the promisor depends on the language of the contract.

15. Traditionally, the notion of *porte-fort* developed from personal and family law to deal with situations where a family member was incapacitated or temporarily absent. The representative of someone who was incapacitated could enter into a contract and promise performance by the incapacitated person when the incapacity ended. More recently, *porte-fort* has been used in a commercial context as a special form of guarantee. However, crucially, it differs from many typical guarantees in that it is an autonomous undertaking by the promisor and not incidental to any particular contract between the promisee and the third party.

16. In the final two sentences of paragraph 21(c)(iii), Professor Molfessis describes the effect of Article 1204 as follows: *"Here, a person undertakes that a third party will do something. In this sense it is possible to make obligatory on the part of one person the entering into of a contract or the performance of a positive act by another"* (emphasis added). I disagree entirely with this description. There is no obligation on the promisor to perform the specified act of the third party itself, nor any possibility to obtain specific performance of the act by the third party on the basis of the assumption of the *porte-fort* obligation. In the event that the third party does not perform the specified act, the legal consequence for the promisor is limited to its potential liability in damages as Article 1204 states; there is no legal consequence for the third party.

17. The amount of any damages awarded against the contracting party under Article 1204 depends on the nature of the third party act in respect of which the promise was given. Damages are not assessed on a basis which would put the promisee in the position he would have been in if the third party act had been performed. The amount of damages is not designed to cover the full profit that would have been expected had the obligation been performed. This is summarised by Bénabent in his textbook as follows:

"If the third party refused to ratify the contract, it is deprived of any effect (...). Whoever stood as surety has consequently failed in his engagement and will be liable in damages, which however will not cover the profit of the expected contract, but only the immobilization of the good or the loss of other opportunities (by analogy with Articles 1112 paragraph 2 and 1116 paragraph 3)"

> 18. Contracts which contain a *porte-fort* obligation are exceptional and clear language is normally required before the French Courts will impose this obligation. The third party is usually expressly identified and the nature of the acts it is required to undertake specified in detail.
>
> 19. More generally, it is also important to bear in mind that the normal rule under French law when a company enters into a contract is that it does so on its own behalf and not on that of any other members of the corporate group to which it belongs. This is in part a consequence of Article 1199 discussed above, but also of more general provisions of French law including those relating to French companies. The position is succinctly summarised by Merle as follows:
>
> *"The principle remains that the mere fact that a company has control over another is not sufficient for it to be condemned to carry out the commitments made by that company."*
>
> 20. Consequently, for the contract to relate not only to acts of the contracting party but also acts of members of the corporate group of the contracting party, there must be clear wording to suggest that an obligation of *porte-fort* has been assumed by the contracting party."

44. Both professors then stated their own opinions as to what the relevant provisions of the IPR policy meant and explained their reasoning. Mr Howard QC, on behalf of the Defendants, submitted that these parts of their reports were not admissible and I should attach no weight to them but I should form my own view as to the meaning of the relevant documents, applying the principles of French law for that purpose. He cited paragraph 9-019 of Dicey, Morris & Collins, The Conflict of Laws, 15th ed. The Fourth Cumulative Supplement of that work cites the case of Alhamrani v Alhamrani [2014] UKPC 37 at [19] in relation to paragraph 9-019 of the main work. That is a reference to part of the judgment of the Privy Council, given by Lord Clarke, which is in these terms:

> "19 The position is, as ever, put with clarity in Dicey, Morris & Collins on The Conflict of Laws, 15th ed, (2012) at para 9-019:
>
> "The function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with his function in relation to the construction of foreign documents. In the former case, the expert tells the court what the statute means, explaining his opinion, if necessary, by reference to foreign rules of construction. In the latter case, the expert merely proves the foreign rules of construction, and the court itself, in the light of these rules, determines the meaning of the documents."
>
> See also paras 32-143 to 145. The point was again put with clarity by Lord Greene MR in one of the cases cited in Dicey,

> Rouyer Guillet & Cie v Rouyer Guillet & Co Ltd [1949] 1 All ER 244 (CA):
>
> "I must make it clear that the evidence of French law is subject to a certain differentiation as between the evidence of the meaning of the law of 1925 and the evidence of the meaning of the articles. As I understand the law of England, evidence as to the meaning of the statute is to be obtained from the evidence of expert French witnesses and the decisions of the French courts. On a matter of French law the decision of a French court would be most persuasive. On the other hand, evidence on the construction of a private document, such as articles of association, is admissible so far as it deals with French rules of construction or French rules of law or the explanation of French technical terms, but evidence as to its meaning after those aids have been taken into account is not admissible. It is for the court to construe the document, having fortified itself with the permissible evidence."
>
> See also, to the same effect, two more recent first instance decisions: Svenska Petroleum Exploration AB v Government of the Republic of Lithuania [2005] EWHC 2437 (Comm), per Gloster J at para 29, and Toomey v Banco Vitalicio de Espana SA de Seguros y Reaseguros [2003] EWHC 1102 (Comm), per Andrew Smith J at para 37."

45. Accordingly, although both sides to the present dispute tendered inadmissible evidence as to the meaning of the IPR Policy and the declarations, I will apply the law as stated in Alhamrani. I consider that I can take account of what is said by the two professors as, in effect, their submissions as to the meaning of the documents in the same way as I will pay attention to the submissions made by counsel but the opinions of the professors in these respects are not evidence of fact on an issue of fact. Approaching the matter in that way, I consider that the meaning of the IPR Policy and the declarations is clear.

The claim against the First Defendant: discussion and conclusions

46. Under Clause 4.1 of the IPR Policy a Member of ETSI is obliged to use its reasonable endeavours in certain respects. The First Defendant is a Member of ETSI and so, in principle, is obliged to comply with Clause 4.1. The Claimants' pleading does not allege that the First Defendant is in breach of its obligations under Clause 4.1.

47. Under Clause 6.1 of the IPR Policy, the Director General of ETSI is entitled in certain circumstances to request "the owner" to give an irrevocable undertaking that it is prepared to grant irrevocable licences on FRAND terms to a specified minimum extent. The words "the owner" are not defined in the IPR Policy or in any other document which was shown to me. I consider that it is clear that "the owner" means the owner of the relevant Essential IPR. The owner of that IPR is able to undertake to grant the kind of licence referred to in Clause 6.1. A non-owner is not able to undertake to grant such a licence. It is not said that the First Defendant was ever the owner of any of the relevant patents in this case nor that it was ever requested by the

Director General of ETSI to give an undertaking or that it ever refused to comply with any such request. Accordingly, it cannot be said that the First Defendant is in breach of any obligation under Clause 6.1. It is pointed out that Clause 6bis refers to "Members" using one of the declaration forms appended to the IPR Policy to make "their" licensing declarations. Of course, if the Member is not the owner of the relevant IPR, the Member is not required to make any such declaration. I do not read the wording of Clause 6bis as imposing an obligation on a non-owner to make a declaration to grant a licence of it which, being a non-owner, it is unable to do. Clause 6bis makes sense in the light of the definition of Member as including an Affiliate of a Member. Qualcomm Incorporated is an Affiliate of the First Defendant who is the Member. Accordingly, Clause 6bis provides that Qualcomm Incorporated should use the relevant form for its declaration. In any event, it is clear from reading the IPR Policy as a whole that an owner who is requested to give a declaration containing an undertaking to licence is not under an obligation to give the undertaking; this can be seen from the elaborate provisions of Clause 8 which proceed on the basis that the owner may choose not to give the undertaking which had been requested.

48. Accordingly, on the clear wording of the IPR Policy, the Claimants have no real prospect of showing that the First Defendant is in breach of any of the terms of that Policy.

49. I will now consider the terms of the declarations made by Qualcomm Incorporated and/or its Affiliates. The relevant wording of the declaration is that Qualcomm Incorporated and/or its Affiliates declare that Qualcomm Incorporated and/or its Affiliates are prepared to grant licences of the relevant IPRs on FRAND terms. In the declaration, "Affiliate" has the meaning provided in clause 15 of the IPR Policy. "Affiliate" is very widely defined. It includes the First Defendant. However, it also includes many other companies who are Affiliates of Qualcomm Incorporated. I was not told the exact number but the submissions proceeded on the basis that there were at least hundreds of companies which came within the definition of Affiliate. I was also told that many of those companies would have nothing whatever to do with the IPRs which were the subject of the declarations. Qualcomm Incorporated is a senior company in the Qualcomm group and most if not all of its Affiliates are in no position to control it or to direct its conduct. In the context of declarations made for the purpose of ETSI, it is likely that the position of Qualcomm Incorporated is not unique amongst the various companies who are "declarants".

50. Against this background, it is now necessary to interpret the words of the declaration. Does the phrase "the Declarant and/or its Affiliates" where it twice appears in the declaration have a meaning which extends to "Qualcomm Incorporated and the First Defendant and many hundreds of other companies" or does it mean "Qualcomm Incorporated and any Affiliate which is the owner of an IPR which is the subject of the declaration". As I have said, the phrase "the Declarant and/or its Affiliates" appears twice in the declaration. In the second place where it appears, "the Declarant and/or its Affiliates" state that they are prepared to grant licences of the IPRs. In this case, there can be no question of the First Defendant granting a licence of an IPR. It is not the owner of any relevant IPR. That powerfully suggests that in the phrase "the Declarant and/or its Affiliates" the reference to "Affiliates" is only to an Affiliate which owns an IPR which is the subject of the declaration. This interpretation is reinforced by the consideration that the declarations in this case were made pursuant

to Clause 6.1 of the IPR Policy and that clause only refers to "the owner" giving an undertaking to licence an IPR. Accordingly, I conclude that in the second place where the phrase "the Declarant and its Affiliates" appears in the declaration, it does not require the First Defendant to grant a licence of an IPR which it does not own.

51. The next question is whether the phrase "the Declarant and/or its Affiliates" has the same meaning in the first place where it appears in the declaration. Is it possible to read the declaration so that it means: "Qualcomm Incorporated and/or the First Defendant and many hundreds of other Qualcomm companies declare that Qualcomm Incorporated and/or any Affiliate which owns an IPR in the attached Annex are prepared to grant irrevocable licences of these IPRs"? This would be a strange reading of the declaration. It would involve interpreting the same phrase in two different ways. It would involve many hundreds of Qualcomm companies with no connection with the IPRs and no control over Qualcomm Incorporated making a declaration as to what Qualcomm Incorporated was prepared to do. Further, the declaration is made pursuant to clause 6.1 of the IPR Policy which refers to the owner of the IPR stating that it is prepared to grant licences. I consider that it is clear that the phrase "the Declarant and/or its Affiliates" is intended to have the same meaning in both places where it appears in the declaration.

52. In fairness to the Claimants, Ms Demetriou QC did not in the end feel able to submit that the word "Affiliates" in the declaration had a different meaning from that which I have identified. I refer to her submission as recorded in the Transcript for Day 2 at pages 106 to 108. I have only laboured this question as to the correct interpretation of the declaration because it is pleaded that the word "Affiliates" in the declaration did include the First Defendant.

53. Thus far, the Claimants have not established any arguable case that the First Defendant as a Member of ETSI had taken on any relevant obligation under Clause 6.1 of the IPR Policy or under the declarations. Ms Demetriou then submitted that although the First Defendant, as a non-owner of an IPR, was not a declarant or a relevant affiliate under the declaration, nonetheless in order to make the scheme work it was necessary to read the Policy and the declarations as imposing on the First Defendant as a Member of ETSI an obligation to see to it that the Declarant and the relevant Affiliates who had made the declarations performed their declarations. Ms Demetriou was not able to point to any words which imposed that obligation on the First Defendant as a Member of ETSI. I cannot see anything in the wording or in the nature of the scheme which imposes that obligation. I consider that the wording of each provision is clear and that the scheme is workable. I do not see any need to impose an unexpressed obligation of the kind suggested on the First Defendant as a Member and I do not see how that could be done as a matter of construction of the relevant documents.

54. I know that Professor Molfessis reaches a different conclusion from mine. I have read and re-read Professor Molfessis' report as, in effect, his submission as to the meaning and effect of the IPR Policy and the declarations. I find his reasoning completely unpersuasive. In a number of places in his report he simply misdescribes the wording of the relevant provisions. A glaring example of that is in paragraph 29 of his report where he says:

> "The obligations that an ETSI Member has agreed to assume by becoming an ETSI Member include the obligation set out at Clause 6.1 of the IPR Policy to irrevocably undertake to be prepared to grant irrevocable licences to any patents declared to be SEPs (upon request by ETSI)."

However, the clear wording of Clause 6.1 does not impose an obligation to undertake to grant licences. Whatever Professor Molfessis is doing it does not involve a process of applying the undisputed principles of French law to the construction of the actual wording of Clause 6.1.

55. I was taken in detail to the reasoning in Unwired Planet International Ltd v Huawei Technologies Co Ltd [2017] RPC 19, in particular, at [98]-[146]. I do not consider that any of my conclusions are in any way inconsistent with that reasoning.

56. On my interpretation of the IPR Policy and the declarations this is not a case of the First Defendant agreeing to *se porter fort* in relation to the undertaking given by Qualcomm Incorporated. As the First Defendant has not agreed to do that, it is not necessary to consider the French rule as to a *stipulation pour autrui* allowing an agreement to be enforced by third parties.

57. I conclude that the claim against the First Defendant has no real prospect of success and there is no compelling, or any, reason why it should proceed to a trial. The position is clear. The position does not turn on a disputed issue of fact as to the principles of French law. It is desirable that the sooner the fate of the claim is decided the better. The court should not assume jurisdiction against the Second Defendant pursuant to Gateway 3 on the basis that there is a real issue between the Claimants and the First Defendant. I will grant the First Defendant summary judgment in relation to the claims against it.

CPR 63.14

58. I now turn to consider the case against the Second Defendant. As I have explained earlier in this judgment, the Second Defendant was served within the jurisdiction in relation to some of the claims made against it. It is agreed that the Claimants can rely for that purpose on CPR 63.14. However, there is a dispute which I must resolve as to which claims come within that rule.

59. CPR 63.14 provides that "a claim form relating to a registered right" may be served on a party at certain addresses including an address for service given for that right in the appropriate register at the UK Patent Office.

60. I have described the claims made by the Claimants for declarations of invalidity of and for revocation of certain patents. It is agreed that those patents are registered rights within CPR 63.14 and that the Second Defendant was properly served with those claims at addresses within the jurisdiction.

61. The third claim made by the Claimants in relation to the same patents is a claim that they are not essential to the ETSI standards in relation to which each such patent has been declared to be essential. The Second Defendant accepts that this claim "relates

to" the relevant patents for the purposes of CPR 63.14 and has been correctly served on it within the jurisdiction.

62. The fourth claim made by the Claimants is for a declaration that the Second Defendant's rights in relation to all EP(UK)s declared by the Second Defendant to be essential to the ETSI standards are exhausted in respect of any device which incorporates a chipset supplied directly or indirectly to the Claimants with the consent of the Second Defendant.

63. The claim as to exhaustion of rights is explained in the Claimants' pleading. It is said that the Second Defendant supplied chipsets to the Claimants' manufacturers when the Second Defendant knew of the contractual arrangements between the Claimants and those manufacturers. It is said that thereby the Second Defendant impliedly granted to the Claimants a licence for the relevant patents which related to the chipsets. The Claimants then submitted that any contractual terms between the Second Defendant and the manufacturers which might contradict the alleged implied grant of a licence were invalid.

64. Although the Claimants' claims for declarations of invalidity and for revocation related only to five patents, the claim for a declaration as to exhaustion of rights is said to relate to all the Second Defendant's EP(UK)s. The claim is put on the basis that the Second Defendant has not (yet) said that the position as to exhaustion of rights is different in relation to the five specified patents from the other EP(UK)s and so that this claim has been served within the jurisdiction only at the addresses which had been given for the five specified patents.

65. The Claimants say that the claim for a declaration as to exhaustion of rights is a claim "relating to" the relevant patents within CPR 63.14. Their case is that the patents have not been infringed by reason of the implied licence which the Second Defendant is to be taken to have granted. The Claimants accept that a licence cannot be implied where the suggested implication would be contrary to an express term which has been notified to subsequent purchasers of the relevant articles: see HTC Corporation v Nokia Corporation [2014] RPC 19 at [156]. The Claimants expect that the Second Defendant will make the case that there are such express terms in this case. The Claimants expect that they will then contend that those express terms are invalid because they were imposed by the Second Defendant as part of its conduct which amounted to an abuse of its dominant position.

66. The Second Defendant submits that the claim as to exhaustion of rights does not relate to the five specified patents. It is said that the claim would require an investigation into a supply chain involving entities who are not parties to these proceedings and involving acts outside the jurisdiction. Assuming that to be so, I fail to see how that produces the result that the claim does not relate to the five specified patents. Although I do not think that this was argued, I would not accept that the fact that the Claimants will say that certain express terms are invalid by reason of the alleged abuse of dominant position means that the claim does not relate to the five specified patents. I hold that the Second Defendant has been validly served within the jurisdiction, pursuant to CPR 63.14 in relation to the exhaustion claim in respect of the five specified patents.

67. At this stage, the Claimants have not attempted to serve the exhaustion claim in relation to any patents other than the five specified ones. They wish to wait and see what Defence is raised to that claim and whether it is said that the five specified patents are not representative of all of EP(UK)s referred to in the Prayer for Relief.

68. If I had decided that the exhaustion claim did not come within CPR 63.14 then it might have been necessary to consider whether that claim came within Gateway 11 dealing with property within the jurisdiction, which would include the relevant patents. If I had then given the Claimants permission to serve the exhaustion claim out of the jurisdiction pursuant to Gateway 11, then that would have had a bearing on the arguments as to the operation of Gateway 4A to which I refer below. However, as all of the patent claims have been served within the jurisdiction pursuant to CPR 63.14 and the Claimants have not applied for permission to serve out pursuant to Gateway 11, I will not consider Gateway 11 any further.

Service on the Second Defendant out of the jurisdiction

69. There was no dispute as to the general principles as to service out which apply in this case. A convenient statement of the principles is contained in the judgment of the Court of Appeal in VTB Capital v Nutritek International [2012] 2 Lloyd's Rep 313 at [99]-[101], based on the judgment of the Privy Council given by Lord Collins in Altimo Holdings v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804. The Court of Appeal's summary of the principles is not affected by anything said in the Supreme Court in the same case: see [2013] 2 AC 337, see in particular at [164]. The summary is in these terms:

> "99 There was no dispute between the parties on the general principles to be applied when deciding whether permission should be granted to serve proceedings on a defendant who is out of the jurisdiction, under the terms of paragraph 3.1 of Practice Direction 6B of the CPR. The three basic principles were recently restated by Lord Collins of Mapesbury in giving the advice of the *Privy Council in AK Investment CJSC v Kyrgyz Mobile Tel Ltd[2011] UKPC 7; [2011] 1 CLC 205* at paragraphs 71, 81 and 88. They can be summarised as follows: first, the claimant must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim. Secondly, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. These are now set out in paragraph 3.1 of Practice Direction 6B. 'Good arguable case' in this context means that the claimant has a much better argument than the foreign defendant. Further, where a question of law arises in connection with a dispute about service out of the jurisdiction and that question of law goes to the existence of the jurisdiction (e.g. whether a claim falls within one of the classes set out in

> paragraph 3.1 of Practice Direction 6B), then the court will normally decide the question of law, as opposed to seeing whether there is a good arguable case on that issue of law.
>
> 100 Thirdly, the claimant must satisfy the court that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. This requirement is reflected in Rule 6.37(3) of the CPR, which provides that 'The court will not give permission [to serve a claim form out of the jurisdiction on any of the grounds set out in paragraph 3.1 of Practice Direction 6B] unless satisfied that England and Wales is the proper place in which to bring the claim'.
>
> 101 On the last of the three basic principles, two further points should be made. They arise from the now classic speech of Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex Ltd[1987] AC 460* , at 475–484. They are: first, where a claimant seeks leave to serve proceedings on a foreign defendant out of the jurisdiction, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. Secondly, in such a case the burden is on the claimant to persuade the court that England is clearly or distinctly the appropriate forum."

70. This summary states the requirement that there is a good arguable case that the claim comes within one of the Gateways. It also states, as has been stated many times before, that the claimant must have "a much better argument" than the foreign defendant on that point. However, that last statement must be taken together with the more recent comments of Lord Sumption (with whom Lord Hughes agreed) in Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192 at [7] (see also at [33]):

> "In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice*. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a

> superior standard of conviction that is both uncertain and unwarranted in this context."

71. The Claimants rely on Gateways, 3, 4A and 9.

Gateway 3

72. The Claimants relied on Gateway 3 on the basis that they had made a claim against the First Defendant within the jurisdiction, that there was a real issue between the Claimants and the First Defendant which it was reasonable for the court to try and that the Second Defendant was a necessary and proper party to that claim. In view of my earlier decision to dismiss the claim against the First Defendant, it is obvious that the Claimants can no longer rely as against the Second Defendant on Gateway 3 and I will not discuss the other issues that might have arisen if Gateway 3 was still being relied upon.

Gateway 4A

73. Gateway 4A is in these terms:

> "A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts."

74. It is accepted that claims have been made against the Second Defendant in relation to the five specified patents. The claim is for various declarations as to invalidity (and revocation) and as to the patents not being essential for ETSI standards and as to exhaustion of rights. Those claims were properly served on the Second Defendant within the jurisdiction in reliance on CPR 63.14.

75. The Second Defendant makes two points in relation to Gateway 4A. It says that the patent claims made against the Second Defendant were not made "in reliance on" any one of the Gateways mentioned in Gateway 4A. Secondly, and in the alternative, it says that the claims which the Claimants wish to add to the patent claims do not "arise out of the same or closely connected facts".

76. It is not in dispute that the patent claims were not in fact made "in reliance on" any of the other Gateways referred to in Gateway 4A. However, the Claimants submit that the words "in reliance on" can and should be interpreted so as to extend to a case where the Claimants did not actually rely on one of the other Gateways referred to in Gateway 4A but where they could have done so. If that were the right reading of the words "in reliance on", the Claimants submit that they could have relied on Gateway 11 in relation to the patent claims which they have brought against the Second Defendant. They say that it would be paradoxical if the fact that it was possible for the Claimants to serve the patent claims on the Second Defendant within the jurisdiction under CPR 63.14, and the fact that the Claimants relied on that possibility, now means that they have lost the ability to rely on Gateway 4A which ability they would have had if they had taken the less obvious route of applying for permission under Gateway 11 to serve the patent claims out of the jurisdiction.

77. In support of their argument that the Second Defendant's interpretation of "in reliance on" produces a paradoxical result, the Claimants rely on the example of a claim made under a contract governed by English law within Gateway 6. If a claimant obtained permission, in reliance on Gateway 6, to serve such a claim out of the jurisdiction, it could then rely on Gateway 4A in relation to further claims which arose out of the same or closely connected facts. However, if the contract provided for service of claims under the contract at a specified address within the jurisdiction and the claimant relied upon that provision and did not rely on Gateway 6 and if the argument of the Second Defendant were to be correct, then such a claimant could not rely on Gateway 4A to add a further claim which arose out of the same or closely connected facts. It may be possible to think of other examples where a similar paradox might be suggested.

78. Mr Howard accepts that his point as to the meaning of "in reliance on" is a technical point but he says that it is an entirely correct technical point. He submits that Gateway 4A is to be construed narrowly and it is certainly not to be construed in the impermissibly wide way contended for by the Claimants. He submits that there is a good policy reason behind the use of the words "in reliance on". He says that if Gateway 4A is construed in accordance with its clear terms, a claimant can only rely on Gateway 4A if he can also rely on one of the other specified Gateways, i.e. 2, 6 to 16, 19 or 21. If he does successfully rely on one of the other Gateways he will have shown to the satisfaction of the court with the necessary supporting evidence that there is a serious issue to be tried on the merits of the other claim and that this jurisdiction is clearly or distinctly the appropriate forum for the trial of that other claim. He submits that where a claimant has served the other claim within the jurisdiction he has not been required to demonstrate those matters and therefore he ought not to be able to rely on Gateway 4A.

79. Ms Demetriou replies to Mr Howard's point about the policy behind the words "in reliance on" by saying that if a claimant serves the first claim within the jurisdiction and there is not a serious issue to be tried on the merits then it can be struck out and Gateway 4A could no longer be relied upon. As to forum conveniens, she points out that the claimant will have to satisfy the forum requirement in relation to the reliance on Gateway 4A for the second claim. Further, in relation to the first claim which has been served within the jurisdiction, there will not normally be a forum issue; she gives the example of this case where the first claim is served within the jurisdiction because CPR 63.14 recognises that this is the appropriate forum. As to her example of the contract where the claim is served within the jurisdiction by agreement, that would be a case where the parties had agreed that this was the appropriate forum. I agree with Ms Demetriou that her submissions go a long way to answer the suggested policy arguments as to the literal meaning of "in reliance on".

80. On the facts of the present case, it has not been shown that the construction of Gateway 4A for which the Claimants contend would produce an undesirable result. However, I am not persuaded that I am able to interpret the express requirement that the first claim was made "in reliance on" one of the other specified Gateways as being satisfied where that requirement is not met. I cannot interpret the words so broadly that they could extend to a case where I am to investigate and determine whether the first claim "could have been served in reliance on" one of the other specified Gateways.

81. It may be that my decision in this case will reveal that the drafting of Gateway 4A has produced an unintended result and the Rules Committee will wish to review its terms. However, I consider that I must apply the current wording of Gateway 4A and, giving that wording its ordinary meaning, I hold that the Claimants have failed to show that the patent claims were made in reliance on one of the other Gateways referred to in Gateway 4A.

82. I heard submissions on the second point raised in relation to Gateway 4A which was whether the further claims which the Claimants wish to put forward in reliance on Gateway 4A arise out of the same or closely connected facts as are involved in the patent claims. In view of my decision as to the meaning of "in reliance on", it is not strictly necessary to deal with this point in order to dispose of the applications before me. Nonetheless, I will deal with the point as it was fully argued and a decision on it may be of assistance if, for example, the Claimants were to apply to serve the patent claims out of the jurisdiction in reliance on Gateway 11. I make no finding as to whether that would be an available course of action for the Claimants.

83. Gateway 4A came into effect on 1 October 2015. I was referred to three cases which have considered this gateway. The cases are Huda v Wells [2018] EMLR 7 (where the point did not really arise), Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd [2018] Bus LR 470 and Eli Lilly and Co v Genentech Inc [2018] 1 WLR 1755. In the last of these cases, the judge (Birss J) disagreed with some comments in the earlier case of Eurasia Sports v Tsai [2016] EWHC 2207 but I was not asked to consider that earlier case.

84. Gateway 4A applies where the further claim "arises out of the same or closely connected facts". Those words require the court to identify the facts from which the first claim arises and then the facts from which the further claim arises. Then the court has to ask whether the two sets of facts are the same or closely connected. The words make it clear that the facts need not be the same provided that they are closely connected.

85. The meaning of "closely connected" was discussed in Orexim but the parties relied in particular on how the matter was described in the Genentech case at [32]-[33]:

> "32 Gateway (4A) is certainly not as wide as the ambit of the court's power to try distinct domestic cases together, where no jurisdictional question arises, but it seems to me that essentially the same practical considerations indicate what the provision is aimed at. Given that the defendant is already properly subject to the court's jurisdiction, pragmatic factors are appropriate matters to take into account in deciding whether the connection between the facts is sufficiently close to justify service out having regard to the overall justice of the circumstances. The purpose of gateway (4A) is to allow the joinder of a further claim against the same defendant based on the same or closely connected facts so as to further the interests of justice, including taking into account practical considerations such as procedural economy and an avoidance of inconsistent results.

> 33 If facts unique to the second claim include disputed matters of primary fact and would require extensive cross-examination and disclosure [to] resolve, then that would support a conclusion that the connection between the facts is not sufficiently close to justify service out. But if the key factual issues in the second claim are facts it has in common with the anchor claim and the difference in the relevant facts is only on matters which are undisputed or which can readily be dealt with without substantial disclosure and little or no cross-examination, then the factual connection may be sufficiently close to justify service out."

86. The parties accepted that I should apply the approach identified in these passages from Genentech.

87. I begin by considering the facts from which the patent claims arise. At this stage of the litigation I can really only assess this question by reference to the most up to date version of the Claimants' case which is contained in their draft Amended Particulars of Claim. That is a lengthy document extending to some 45 or 46 pages supplemented by Particulars of the Invalidity of the patents. The facts relied upon as to invalidity rely upon three pieces of prior art. The claim for revocation of the patents appears to turn on the same alleged facts. The claim that the patents are not essential for the ETSI standards is very briefly pleaded so that I do not know what facts might be relevant to that claim but it seems probable that the claim will turn on technical matters. As to the claim as to patent exhaustion, I have already referred to that claim when considering the application of CPR 63.14. It is possible that the relevant facts will relate to the contracts between the Claimants and their manufacturers and the Second Defendant's awareness of those contracts. I explained earlier that the Claimants say that any express term which might override the implication of a patent licence is invalid because it was part of the Second Defendant's conduct amounting to an abuse of its dominant position. The Claimants' pleading sets out the case of abuse of dominant position at considerable length but the way in which the imposition of express terms is said to be abusive involves a relatively narrow factual allegation.

88. I next need to consider what are said to be the facts which give rise to the further claims. I need only give a brief summary of the 45 or 46 pages in which these allegations are made. The pleading identifies the Claimants and the Defendants, refers in detail to the ETSI IPR Policy and the declarations, sets out in great detail the Claimants' supply arrangements and their chronological development, refers to the relevant patents, describes the relevant markets and explains the Second Defendant's dominance in those markets. The pleading then sets out the case as to abuse of a dominant position. The allegations of abuse extend to 17 paragraphs and only one of those paragraphs involves the alleged abuse in relation to the imposition of express terms to prevent patent exhaustion. The next section of the pleading sets out the alleged effects on trade of the foregoing allegations. The last section of the pleading alleges breach by the Second Defendant of its ETSI declarations.

89. I consider that it is clear that the further claims which the Claimants would wish to add to the patent claims pursuant to Gateway 4A are far too wide and extensive, raising many additional matters of fact and law, to be capable of being seriously argued to be the same facts, or closely connected to the facts, giving rise to the patent

claims. If I apply [33] of Genentech I consider that the additional facts needed for the determination of the further claims would involve very extensive cross-examination and disclosure. The addition of the further claims would transform what would be involved in the litigation of the patent claims alone. It is true that there are some facts which are common to the patent claims and the further claims but the facts which are common are a small part only of the facts which would be relevant at a trial of the patent claims and the further claims together. The fact that the patent exhaustion claim involves an allegation of abuse of dominant position in one respect is simply nowhere near enough to allow me to say that the full width of the further claims arises out of facts which are closely connected to the patent claims.

90. Accordingly, if I had not already held that Gateway 4A was not available to the Claimants, I would have held that the Claimants cannot bring the further claims within Gateway 4A.

Gateway 9

91. Lastly, the Claimants rely on Gateway 9 which is in these terms:

> "A claim is made in tort where –
>
> a) damage was sustained, or will be sustained, within the jurisdiction; or
>
> b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction."

92. The claim in contract for breach by the Second Defendant of its ETSI declarations is not within Gateway 9. The claim for abuse of dominant position is a claim in tort. In relation to the claim in tort, the Claimants rely only on Gateway 9(a). They say that the abuse of dominant position has caused the Claimants or some of them to sustain damage within the jurisdiction.

93. In accordance with the general principles which I set out earlier, the burden is on the Claimants to show that they have a good arguable case that they sustained damage within the jurisdiction. Ms Demetriou submitted that it was sufficient for the Claimants to provide a pleading which identified the allegation which the Claimants would make as to the way in which they had suffered loss within the jurisdiction. She said that it sufficed if the pleading disclosed the mechanism by which loss was allegedly suffered. Put that way, her submission was that if the Claimants delivered a pleading which complied with the rules as to the adequacy of pleadings and that pleading identified a legally recoverable head of loss, that would enable the Claimants to establish that they had shown a good arguable case of loss within the jurisdiction. I do not agree. Whether the Claimants suffered loss within the jurisdiction is a fact which goes to jurisdiction. Her submission is contrary to the established practice, referred to by Lord Sumption in Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192 at [5] where he refers to the defendant's ability to challenge "the evidence led by the claimant on the point". I have already set out what Lord Sumption said in the same case at [7] as to what was needed to establish an arguable case that the jurisdictional facts of the relevant Gateway exist. In that passage, Lord Sumption refers to "a plausible evidential basis". The court will take a view on the material available to it if it can reliably do so. However, if some material is provided to the

court and the court finds that it cannot make a reliable assessment of that material at the interlocutory stage, the court can hold that there is a good arguable case that the requirements of the Gateway are satisfied where "there is a plausible (albeit contested) evidential basis for it".

94. I fear that the way in which the Claimants, or some of them, intend to allege that they have suffered damage by reason of the Second Defendant's abuse of its dominant position is most confusing. Before attempting to understand the case which the Claimants intend to make, it may help to identify some fairly basic points which might be relevant. No doubt, these basic points can be subject to subtleties and refinements in some cases but my statement of them will suffice for present purposes.

95. This is a case of an alleged overcharge being made by the Second Defendant. The first person who might suffer a loss as the result of there being an overcharge is the person who pays the overcharge on buying the relevant goods. That person's loss would seem to be the amount of the overcharge, absent any other considerations. If the first person to pay the overcharge sells the goods on and passes on the overcharge to his buyer then absent any other considerations, the first person does not suffer a loss by paying the overcharge but might conceivably suffer a loss if selling the goods at a price, which includes the overcharge, results in lost sales. The buyer from the first person who pays the overcharge (to the first person) would thereby suffer a loss and would have a claim against the Second Defendant for such a loss which would seemingly be the amount of the overcharge.

96. Although there are six Claimants, as I understand the case which was being put at the hearing before me, the only loss claimed within the jurisdiction is loss suffered by the First and possibly the Second Claimants. Accordingly, whatever else is decided, it would seem to follow that the Third to Sixth Claimants should not have permission to serve out pursuant to Gateway 9.

97. The First Claimant is incorporated in England and Wales. The Second Claimant is incorporated in the Republic of Ireland. If the First Claimant claims as a buyer who has paid an overcharge which it has not passed on, then the First Claimant can say that it has suffered a loss in this jurisdiction. If the First Claimant claims as a seller who has passed on an overcharge but has lost sales in this jurisdiction, then it can say that it has suffered a loss in this jurisdiction. The position of the Second Claimant is to be analysed in the same way but the difference will be that the Second Claimant as a buyer pays an overcharge in the Republic of Ireland but it may wish to say that it passes on the overcharge and loses sales in the market in this jurisdiction.

98. There is one further basic point. If a claimant puts forward the case that it has suffered a loss by buying in this jurisdiction and paying an overcharge, then it will be open to a defendant to say that that claimant did not suffer that loss because it passed on the overcharge. The burden of showing that the overcharge has been passed on is on the defendant and that will have to be reflected when the court considers whether there is a plausible, albeit contested, basis for the allegation that the claimant has suffered loss within the jurisdiction.

99. As to where any such losses might be made, if the loss is paying an overcharge when buying the goods, the loss would seem to be made where the goods are bought. If the

loss comes from reduced sales then the loss would seem to be in the market where the seller suffers the loss of sales.

100. Following from this analysis, it is important to understand whether the First and Second Claimants are claiming losses as buyers bearing an overcharge or as sellers passing on an overcharge and losing sales.

101. The original pleading of loss was as follows:

> "127. By reason of the abuses pleaded above, the Claimants have suffered loss and damage. The Claimants' primary case is that such loss and damage was suffered by Apple Operations (the Third Claimant). However, to the extent that such loss was reflected in the prices charged by Apple Operations to the other Claimants (or, so far as the royalties are concerned, to the extent that it may be held that some part of such loss was retained within the Sixth Claimant rather than being passed on to Apple Operations), such loss was suffered by such other Claimant, as the case may be.
>
> 128. The Claimants are not currently in a position to quantify such loss. The Claimants will particularise their case as to loss and damage in due course by way of expert accountancy evidence."

102. The original pleading put forward the primary case that the loss was suffered by the Third Claimant, a company incorporated in the Republic of Ireland. That primary case did not involve loss being suffered in England and Wales. The original pleading identified a possible alternative case with the words "to the extent that". However, the pleading did not say that the alternative possibility had actually happened. If the alternative case had actually happened, then the allegation seemed to involve the First Claimant suffering loss (by bearing the overcharge) in England and Wales and the Second Claimant suffering loss (by bearing the overcharge) in Ireland. There was no suggestion at this stage of a claimant incurring a loss of sales where the overcharge was passed on.

103. The ex parte application to Arnold J for permission to serve out of the jurisdiction was supported by the first witness statement of Ms Harrison, the Claimants' solicitor. In paragraph 45 of her witness statement, Ms Harrison only made the suggestion that the First and Second Claimants might have suffered losses within the jurisdiction. She referred to the possibility that they had suffered losses on sales by them within the jurisdiction even though that was not the pleaded case. In the alternative to this suggestion, she referred to the loss being incurred on buying the goods and paying the overcharge, in which case it was only the First Claimant who suffered loss within the jurisdiction.

104. After the Second Defendant applied for an order setting aside the ex parte permission to serve it out of the jurisdiction, Ms Harrison put in a second witness statement in which she said that she maintained her position which she said was that the First Claimant and possibly the Second Claimant had suffered loss within the jurisdiction.

105. Shortly before the hearing before me, the Claimants served a draft Amended Particulars of Claim. The claim for loss was pleaded differently, as follows:

> "129. By reason of the abuses pleaded above, the Claimants have suffered loss and damage. So far as concerns which Claimant entity bore the overcharge in relation to devices sold through the First to Fifth Claimant entity, the Claimants' case is that such loss and damage was suffered by Apple Operations (the Third Claimant) and to the extent that such loss was reflected in the prices charged by Apple Operations to the other Claimants (or, so far as the royalties are concerned, to the extent that it may be held that some part of such loss was retained within the Sixth Claimant rather than being passed on to Apple Operations), such loss was suffered by such other Claimant, as the case may be. So far as concerns the Claimants' retail operations, the retail price of Apple devices is centrally set by the Sixth Claimant for sales in all countries or territories internationally. Such price reflects the prices and charges paid by Apple in relation to such devices and all components thereof, including the element reflecting the royalties charged by Qualcomm. By reason of the charging of excessive (supra-FRAND) royalties by Qualcomm, as well as its overpricing of chipsets, the price of such devices over the period to which these proceedings relate was higher than it otherwise would have been. Although Apple's retail operations, such as those carried on by the First and Fourth Claimants, are generally carried on, in accordance with applicable taxation principles, so as to generate a specific percentage margin per sale, because the price of the devices was higher than it would otherwise have been, such Claimants will have lost sales they would otherwise have made and suffered losses thereby accordingly.
>
> 130. The Claimants are not currently in a position to quantify such loss. The Claimants will particularise their case as to loss and damage in due course by way of expert accountancy evidence. For the avoidance of doubt, the Claimants in these proceedings sue only in relation to Apple devices sold in the EEA through the First to Fifth Claimants."

106. The draft amended pleading gives rise to a number of questions. It is no longer said that the case that the loss was suffered by the Third Claimant is the primary case. When the pleading uses the phrase "to the extent that", is it being alleged that the overcharge was actually passed on by the Third Claimant to the other Claimants? In relation to the Claimants' retail operations it appears to be said that the overcharge is passed on to the Claimants' customers because the prices charged are higher by the amount of the overcharge and the Claimants' margin on top of the overcharge. That suggests that the overcharge must have been passed on by the Third Claimant to the other Claimants. However, it might be possible to read the pleading as not necessarily saying that all of the overcharge, but only some of it, is passed on. The pleading does

allege that the Claimants have lost sales by adding the overcharge (or possibly only part of it), together with a margin, to the price of the goods.

107. On 15 March 2018, Ms Harrison served her third witness statement. She said that the Claimants' case on Gateway 9 would be set out more fully in submissions. However, she made some comments of her own as to how damage was suffered within the jurisdiction. Although her comments are not wholly clear, she seems to be saying that the overcharge is passed on to each claimant who is a retailer. She then said:

> "14(c) The basis for and details of how this would have led to loss suffered by the First and Second Claimants will be set out by Apple in due course in the event that these Proceedings continue to full trial. However, at this stage I note:
>
> i. The First and Second Claimants acquire devices for onward sale to end-users through various internal supply chain and distribution agreements. The costs of the devices as paid for by the First and Second Claimants, are set, as required by international tax principles on transfer pricing, at levels that ensure that those entities are able to achieve a fixed operating margin, i.e, percentage of revenues, commensurate with a retail business.
>
> ii. In the event that the First and Second Claimants had been able to sell a higher volume of devices in the jurisdiction, their revenue levels and overall profit in 'real pound' terms would have been higher."

108. In her third witness statement, Ms Harrison therefore states that the Claimants' as to loss will be the subject of submissions and if the proceedings continue the case will then be set out. She then refers to the First and Second Claimants paying for the goods in a way which suggests that the overcharge is passed on to the First and Second Claimants. She then refers to the question of the volume of sales. She does not say in terms that the First and Second Claimants have lost sales as a result of passing on the overcharge with their margin on top but instead uses the conditional language: "in the event that the First and Second Claimants had been able to sell a higher volume of devices in the jurisdiction". However, Ms Harrison does not say that the First and Second Claimants had lost sales in the jurisdiction.

109. Ms Demetriou's skeleton argument addressed the question of loss within the jurisdiction. I understood her skeleton argument as submitting that the overcharge was passed on to the First and Second Claimants and was then passed on by them to their customers in the jurisdiction. She then submitted:

> "Although those companies' per-unit margins are set, the total amount of their profits depends on the volume of devices which they sell. The lost volumes resulting from the increased retail prices of the devices resulting from the overcharges imposed by Qualcomm about which Apple complains in these proceedings

> therefore result in loss to such retail companies, including the First Claimant."

110. In her oral submissions, Ms Demetriou told me that the only way she put her case on loss within the jurisdiction was on the basis of lost sales on the part of the First Claimant. She also gave the example of Apple paying a royalty to Qualcomm of £8 (when the FRAND rate should have been £2) and passing on the full amount of the royalty when selling the goods for £500; in this example the overcharge is £6. She then asked: what could Apple have done if it did not have the overcharge of £6? One course would have been to sell the goods for £500 and make an increased profit of £6. Another course would have been to sell for £494 and boost sales and achieve more profit through more sales. The first course does not involve an allegation of loss of sales as a result of the overcharge but the second case does.

111. The approach which the Claimants have adopted in advancing a case of loss within the jurisdiction for the purposes of Gateway 9 is distinctly unimpressive. The various formulations of their case have shown considerable confusion of thought and there has been a clear reluctance to commit to any particular formulation of their case. The basis advanced on the ex parte application for permission was not advanced at the hearing before me.

112. I recognise that the assessment of loss in this case involves identifying a counterfactual as to what would have happened if the relevant claimant company had not borne the overcharge. As the counterfactual did not occur, the Claimants cannot advance evidence as to a matter of historic fact. However, in relation to the counterfactual, evidence from the Claimants as to what they would have done if there had been no overcharge is admissible although the court is not bound to accept it. In a case like the present, I would have expected the Claimants to have adduced evidence as to what they would have done and to have indicated in broad terms what they will say would have been the effect of that. Of course, it would be entirely inappropriate and certainly not necessary at this stage for the Claimants' evidence to address the detailed quantification of the alleged losses.

113. As I have explained, the day before this hearing began the Second Defendant applied for an adjournment to enable it to adduce evidence which they said would show that the Claimants' case on loss within the jurisdiction was not plausible. I declined to grant an adjournment as I considered that the hearing could be used to deal with the other points arising and I have now dealt with those other points in this judgment. When refusing an adjournment, I indicated that if the point came when it would be unfair to the Second Defendant to decide the case against it when it was denied any real opportunity to adduce the evidence it wished to rely upon then I would ensure that there would be no unfairness.

114. In the light of what was said when the adjournment was refused, I consider that there are only two courses open to me. The first is to dismiss the Claimants' case as to Gateway 9; that would result in me setting aside the permission to serve the Second Defendant out of the jurisdiction. The second course is to make an order which gives effect to the other parts of this judgment, to give directions as to further evidence and to stand the issue as to Gateway 9 over for further argument. I can rule out the possibility that I could decide the Gateway 9 issue in favour of the Claimants without giving the Second Defendant an opportunity to adduce the evidence on which it

wishes to rely. I cannot say in advance that any such evidence would be of no assistance (as the Claimants submitted to me) and in view of the lateness of the Claimants' significant change in position as to how they put their case on Gateway 9 it would be unfair to shut out the Second Defendants' intended evidence and to decide that issue in the Claimants' favour.

115. Whilst reflecting on the two courses open to me, I have come very close to forming the opinion that whilst the Claimants' new case as to loss is in principle pleadable, the Claimants have done nothing to convert what is merely an unclear pleaded allegation into a case with a plausible evidential basis. However, I have finally decided that I should not give effect to that opinion at this stage. The course which I was invited to take by the Second Defendant was to enable them to adduce evidence in response to the new case and then to reach a final view of the question of loss within the jurisdiction. That is the course which I will take. In that way, the issue as to loss for the purposes of Gateway 9 will be decided on all of the evidence which the Second Defendant wishes to adduce rather than only part of the evidence. Any appeal from my decision will again have regard to all of the evidence. I consider that time and cost will be saved in the long run by admitting and considering evidence from the Second Defendant in response to the new way in which the Claimants put their case.

116. When this judgment is handed down, I will give directions as to the service of evidence in relation to the issue of loss within the jurisdiction. The parties must appreciate that the question which I will ultimately have to address is whether there is a plausible, albeit challenged, evidential basis for the allegation of loss within the jurisdiction. I would expect the Second Defendant's evidence to be prepared with a sense of proportion and realism as to what the court can decide at this interlocutory stage. Although I will hear argument on this, my provisional view is that I should allow the Claimants to respond to the Second Defendant's evidence. My present view is that the Claimants should not be given a yet further chance to formulate their case or to change their case on loss but it is only fair that they can answer the specific points raised by the Second Defendant in its evidence.

Forum conveniens

117. If, following further argument on Gateway 9, I hold that the Claimants have not established what is required for that Gateway, then I will set aside the permission to serve out on that ground. In that event, the question of forum conveniens would not arise. However, as I have not finally decided the issue as to Gateway 9 and as I heard detailed argument on forum I consider that I should address that issue in this judgment. I will do so on the basis that the Claimants are able to establish that the First Claimant, a company incorporated in England and Wales, has established that it has suffered loss in this jurisdiction as a result of the Second Defendant's abuse of dominant position contrary to Article 102 of TFEU.

118. The submissions on forum were made by reference to all of the claims by all of the Claimants in accordance with their draft Amended Particulars of Claim. I am now considering the question of forum on a narrower basis in relation only to a claim by the First Claimant for damages for an abuse of dominant position contrary to Article 102.

119. There are a number of matters which point to this jurisdiction being the proper forum. These are:

(1) The claim is by a company incorporated in this jurisdiction;

(2) The claim is for loss suffered in this jurisdiction;

(3) The applicable law of the claim is European law (Article 102 of TFEU) which is part of this jurisdiction's domestic law;

(4) On 24 January 2018, the European Commission issued a Press Release disclosing that it had fined Qualcomm €997 million for abusing its dominant position in LTE baseband chipsets contrary to Article 102; the Claimants have asked Qualcomm for a copy of the Commission Decision but this has not been provided; the First Claimant's claim for breach of Article 102 is or includes a follow-on claim; in this jurisdiction, the First Claimant will have the benefit of Article 16 of Council Regulation (EC) No 1/2003 and can rely on the Commission Decision;

(5) The patent claims are proceeding in this jurisdiction in any event.

120. As against these points, the Second Defendant points to the current proceedings in the United States. I was provided with many hundreds of pages of pleadings in relation to the US proceedings. The parties helpfully provided me with an agreed summary of those proceedings and I set out that summary in an Appendix to this judgment.

121. There is a clear overlap between the patent claims made in the US and the patent claims made in this jurisdiction. The parties before me proceeded on the basis that the patents claims in the present proceedings would be litigated in this jurisdiction although I do not know what their proposals might be as to case management of those claims in view of the claims in the US proceedings.

122. There is also a clear overlap between the competition law claims made in the US and the allegation of a breach of Article 102 in the present proceedings. The Second Defendant says that this overlap means that it is inappropriate for the First Claimant to have permission to serve its Article 102 claim on the Second Defendant out of the jurisdiction. The First Claimant says that, as with the overlapping patent proceedings, there will need to be appropriate case management of the competition law claims in this jurisdiction.

123. The First Claimant says that it is not a party to the US proceedings and should not be required to join those proceedings in order to advance its claims (if that were possible). The First Claimant also submits that the Californian court would not be able to give it a remedy for breach of Article 102. I do not need to decide whether that is so or whether the position is simply unclear. The First Claimant points to the fact that the Californian court refused to grant the Second Defendant an anti-suit injunction restraining Apple Inc from bringing in foreign jurisdictions proceedings of certain kinds which overlap with the US proceedings.

124. The First Claimant says that it will not have the benefit of Article 16 of Council Regulation (EC) No 1/2003 if it were to bring its Article 102 claim in the US. Mr Howard on behalf of the Second Defendant has stated that the Second Defendant will

undertake that it will accept in the Californian court the findings of the European Commission.

125. It is also the case that many of the facts which will need to be referred to and possibly investigated in detail in the course of the claim took place outside the United Kingdom.

126. I have now referred to the principal considerations which were identified in the course of argument. I consider that these considerations in combination demonstrate that this jurisdiction is clearly and distinctly the proper forum for the First Claimant's claim for breach of Article 102. The fact that there are similar proceedings in the US does not change my assessment. Multiplicity of proceedings in different jurisdictions is to be expected where there are allegations that certain conduct has given risen to breaches of the law in multiple jurisdictions: see Iiyama (UK) Ltd v Samsung Electronics Ltd [2018] EWCA Civ 220 at [99].

The next steps

127. At the hand down of this judgment I will hear brief submissions as to the directions to be given as to further evidence in relation to Gateway 9 and as to the form of an order to give effect to the matters I have decided in this judgment.

APPENDIX

SUMMARY OF APPLE INC. v. QUALCOMM INCORPORATED
(Case No. 3:17-cv-00108-GPC-MDD)

1. On 20 January 2017, Apple filed a complaint against Qualcomm in federal court in San Diego, California seeking declarations with respect to several of Qualcomm's patents and alleging that Qualcomm breached certain agreements and violated federal antitrust and California state unfair competition laws.
2. In its initial complaint:
   (1) Apple sought declaratory judgments of non-infringement by Apple of nine of Qualcomm's US patents (including equivalents to the patents-in-suit in the English proceedings)[1]. Apple also challenged the validity of these patents and, if valid, the degree to which those patents are essential.[2]
   (2) Apple further sought a declaration that Qualcomm's sale of baseband chipsets exhausts Qualcomm's patent rights for patents embodied in those chipsets.[3]
   (3) Apple further sought in the alternative, if a patent is not invalid, infringed or exhausted, a declaration of FRAND royalties for that patent.[4]
   (4) Apple alleged that Qualcomm had attempted to evade the patent exhaustion doctrine by reorganising its corporate structure.[5]
   (5) Apple sought to disgorge Qualcomm of excessive non-FRAND royalties from Apple and to disgorge royalties paid by Apple including through its contract manufacturers.[6]
   (6) Apple claimed that Qualcomm's refusal to make certain payments to Apple under a Business Cooperation and Patent Agreement ("**BCPA**") constitutes a breach of contract in violation of California law and sought damages in the amount of the unpaid payments, alleged to be approximately $1 billion.[7]
   (7) Apple claimed that Qualcomm has refused to deal with competitors in contravention of Qualcomm's agreements with applicable standard setting organisations (naming ETSI in particular)[8], has used its market position to impose contractual obligations on Apple that prevented Apple from challenging Qualcomm's licensing practices, has tied the purchase of Qualcomm's CDMA-enabled and "premium" LTE-enabled chipsets to licensing certain of Qualcomm's patents and has required Apple to purchase baseband chipsets exclusively from Qualcomm as a condition of Qualcomm's payment to Apple of certain rebates, in violation of Section 2 of the Sherman Act (unlawful monopolisation)[9] and the California Unfair Competition Law[10]. Apple alleges that the relevant product markets for the purposes of its monopolisation claim are

[1] In the Amended Complaint at **[C2/Vol. 1/ File 3 of 5/601-770]**, see Counts V, VIII, XI, XIV, XVII, XX, XXIII, XXVI and XXIX.
[2] In the Amended Complaint, see for example paragraph 283.
[3] In the Amended Complaint, see Count LIX.
[4] In the Amended Complaint, see Counts VII, X, XIII, XVI, XIX, XXII, XXV, XXVIII and XXXXI.
[5] In the Amended Complaint, see paragraph 583.
[6] In the Amended Complaint, see paragraph M in the prayer.
[7] In the Amended Complaint, see Counts I to IV.
[8] See paragraph 386 of the Original Complaint (not reproduced in the bundles).
[9] In the Amended Complaint, see Count LXII.
[10] In the Amended Complaint, see Count LXIII.

the markets for "premium LTE" baseband processor chipsets[11] and CDMA baseband processor chipsets.[12] The relevant geographic market was said to be worldwide.[13]

(8) Apple sought injunctive relief with respect to these claims and a judgment awarding its expenses, costs and attorneys' fees.

3. On 10 April 2017, Qualcomm filed its Answer and Counterclaims (amended on 24 May 2017) in response to Apple's complaint denying Apple's claims and asserting claims against Apple.[14] The counterclaims against Apple include:
   (1) Tortious interference with Qualcomm's Subscriber Unit License Agreements ("**SULAs**") with third-party contract manufacturers of Apple devices, allegedly causing those contract manufacturers to withhold certain royalty payments owed to Qualcomm and violate their audit obligations.[15]
   (2) Claims for declarations that Qualcomm's licence agreements with the contract manufacturers do not violate Qualcomm's FRAND commitments to ETSI, and that Qualcomm has satisfied its FRAND commitments to ETSI with respect to Apple.[16]
   (3) Claims for declarations that Qualcomm's SULAs with the contract manufacturers do not violate either Section 2 of the Sherman Act or California Unfair Competition Law.[17]
   (4) Breach of contract based on Apple's failure to pay amounts allegedly owed to Qualcomm under a Statement of Work relating to a high-speed feature of Qualcomm's chipsets.[18]
   (5) Breach of contract and the implied covenant of good faith and fair dealing relating to the BCPA.[19]
   (6) Unjust enrichment and declaratory relief relating to the BCPA.[20]
   (7) Violation of California Unfair Competition Law based on Apple's threatening Qualcomm to prevent it from promoting the superior performance of Qualcomm's own chipsets.[21]
   (8) Breach of the parties' Master Software Agreement.[22]
4. On 19 June 2017, Apple filed a Partial Motion to Dismiss Qualcomm's counterclaim for violation of the California Unfair Competition Law. The court granted that motion on 8 November 2017. On 20 June 2017, Apple filed an Answer and Affirmative Defenses to the rest of Qualcomm's counterclaims.
5. On 20 June 2017, Apple also filed an Amended Complaint, reiterating all of the original claims and adding:
   (1) Claims for declaratory judgments of invalidity of the nine patents that are subject to declaratory judgment claims in the original complaint.[23]

---

[11] In the Amended Complaint, see paragraph 619.
[12] In the Amended Complaint, see paragraph 620.
[13] In the Amended Complaint, see paragraph 621.
[14] **[C2/Vol. 1/ File 1 of 5/10-158]**.
[15] Count I.
[16] Counts II and IV.
[17] Count III.
[18] Count V.
[19] Counts VI and VII.
[20] Count VIII.
[21] Count X.
[22] Count XI.
[23] Counts VI, IX, XII, XV, XVIII, XXI, XXIV, XXVII and XXX.

(2) New declaratory judgment claims for non-infringement, invalidity and a declaration of royalties for nine more patents.[24]

(3) Claims for declaratory judgments that certain of Qualcomm's agreements are unenforceable.[25]

6. On 18 July 2017, Apple filed a motion to consolidate this action with *Qualcomm Incorporated v. Compal Electronics, Inc., et al.*,[26] (the "**CM Proceedings**") and on 13 September 2017, the court granted that motion.

7. On 21 July 2017, Qualcomm filed an Answer to Apple's Amended Complaint as well as a motion to dismiss the new declaratory judgment claims for non-infringement, invalidity and a declaration of royalties for the nine additional patents.[27] The court granted Qualcomm's motion on 8 November 2017.

8. On 7 September 2017, the court rejected Qualcomm's motion for an anti-suit injunction.

9. On 11 February 2018, the court issued an amended scheduling order setting out various deadlines relating to discovery, expert disclosures, expert depositions and pre-trial motions. Fact discovery is coordinated with fact discovery in proceedings brought against Qualcomm by the US Federal Trade Commission and a putative consumer class in the Northern District of California, as well as the CM Proceedings.

10. Pursuant to the terms of that order, fact discovery is set to close on 11 May 2018. As part of fact discovery, Apple and Qualcomm have each produced millions of documents, and the parties have taken more than 70 depositions (and are likely to take dozens more before the end of fact discovery). Expert disclosures are due on 1 June 2018, and rebuttal expert disclosures are due on 29 June 2018. Expert discovery closes on 10 August 2018. Partial or fully dispositive motions are due by 6 July 2018. A final pre-trial conference is scheduled for 28 September 2018.

11. No trial date has been set.

QUALCOMM INCORPORATED V. COMPAL ELECTRONICS, INC. ET AL
(Case No. 3:17-cv-1010-GPC-MDD)

12. On 17 May 2017, Qualcomm filed a complaint in the United States District Court for the Southern District of California against Compal Electronics, Inc. ("**Compal**"), FIH Mobile, Ltd., Hon Hai Precision Industry Co., Ltd. (together with FIH Mobile, Ltd., "**Foxconn**"), Pegatron Corporation ("**Pegatron**") and Wistron Corporation ("**Wistron**") asserting claims for injunctive relief, specific performance, declaratory relief and damages stemming from the defendants' breach of contracts by ceasing the payment of royalties for iPhones and other devices which they manufacture for Apple globally.[28]

13. On 24 May 2017, Qualcomm applied for a payment injunction against the defendants. This was rejected by the court on 7 September 2017.

14. On 17 July 2017, Compal, Foxconn, Pegatron and Wistron each filed third-party complaints for contractual indemnity against Apple seeking to join Apple as a party to the action.[29] On 18 July 2017, Apple filed an answer to these third party complaints

[24] Counts XXXII to LVIII.
[25] Counts LX and LXI.
[26] These proceedings were commenced by Qualcomm asserting various claims against contract manufacturers. Apple consented to be joined as a party on 18 July 2017. See further below.
[27] **[C2/Vol. 1/File 3 of 5/771-865]**.
[28] **[C2/Vol. 1/Files 3-4 of 5/873-927]**.
[29] An example is at **[C2/Vol. 1/Files 4-5 of 5/1196-1205]**.

acknowledging its indemnity agreements and consenting to be joined. Also on this date, Apple filed a motion to consolidate this action with the *Apple Inc. v. Qualcomm Incorporated* case. On 13 September 2017, the court granted Apple's consolidation motion.

15. On 18 July 2017, the defendants filed an Answer and Counterclaims to the complaint[30], asserting defences and counterclaims similar to allegations made by Apple in the *Apple Inc. v. Qualcomm Incorporated* case in the Southern District of California. In addition, the defendants asserted certain new claims against Qualcomm, including claims under Section 1 of the Sherman Act (anticompetitive agreement) and California's Cartwright Act (state antitrust law). The defendants seek damages, declaratory relief, injunctive relief, restitution of excessive licence fees paid under the SULAs and other relief.

16. Fact discovery is coordinated with fact discovery in *Apple Inc. v. Qualcomm Incorporated* . A final pre-trial conference is scheduled for 28 September 2018.

17. No trial date has been set.

[30] **[C2/Vol. 1/File 4 of 5/928-1195]**.