FEDERAL COURT OF AUSTRALIA

Samsung Electronics Co. Limited v Apple Inc. [2013] FCA 1142

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| Citation: | Samsung Electronics Co. Limited v Apple Inc.  [2013] FCA 1142 |
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| Parties: | **SAMSUNG ELECTRONICS CO. LIMITED and SAMSUNG ELECTRONICS AUSTRALIA PTY LIMITED ACN 002 915 648 v APPLE INC. and APPLE PTY LIMITED ACN 002 510 054** |
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| File number(s): | NSD 315 of 2013 |
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| Judge(s): | **BENNETT J** |
|  |  |
| Date of judgment: | 4 November 2013 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application to rely on evidence filed out of time – nature and complexity of evidence – expansion of case – amendment of pleadings – imminent commencement of hearing – case management principles  **EVIDENCE** – application to rely on evidence of negotiations – whether evidence is excluded under s 131(1) – whether evidence is admissible under s 131(2) exceptions  **EVIDENCE** – exclusion of evidence under s 135 – probative value of evidence outweighed by s 135 factors |
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| Legislation: | *Evidence Act 1995* (Cth) ss 131, 135, 192A  *Competition and Consumer Act 2010* (Cth) s 46 |
|  |  |
| Cases cited: | *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 applied  *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357 cited  *Solahart Industries Pty Ltd v Solar Shop Pty Ltd (No 1)* (2010) 88 IPR 337 applied |
|  |  |
| Date of hearing: | 24 and 25 October 2013 |
|  |  |
| Date of last submissions: | 30 October 2013 |
|  |  | |
| Place: | Sydney | |
|  |  | |
| Division: | GENERAL DIVISION | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 158 | |
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| Counsel for the Applicants: | Mr NJ Young QC with Mr IS Wylie and Ms K Williams | |
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| Solicitor for the Applicants: | Ashurst Australia | |
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| Counsel for the Respondents: | Mr SCG Burley SC with Mr CA Moore SC and Mr C Dimitriadis | |
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| Solicitor for the Applicants: | Herbert Smith Freehills | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 315 of 2013 |

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| BETWEEN: | SAMSUNG ELECTRONICS CO. LIMITED  First Applicant  SAMSUNG ELECTRONICS AUSTRALIA PTY LIMITED ACN 002 915 648  Second Applicant |
| AND: | APPLE INC.  First Respondent  APPLE PTY LIMITED ACN 002 510 054  Second Respondent |

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| JUDGE: | BENNETT J |
| DATE OF ORDER: | 4 NOVEMBER 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The Applicants’ application dated 6 September 2013 be dismissed with costs.
2. These reasons not be published and must be kept within the confidentiality regime agreed by the parties, until further order.
3. The parties email submissions regarding publication of these reasons to the Associate to Bennett J by 5.00 pm on 11 November 2013.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| BETWEEN: | SAMSUNG ELECTRONICS CO. LIMITED  First Applicant  SAMSUNG ELECTRONICS AUSTRALIA PTY LIMITED ACN 002 915 648  Second Applicant |
| AND: | APPLE INC.  First Respondent  APPLE PTY LIMITED ACN 002 510 054  Second Respondent |

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| JUDGE: | BENNETT J |
| DATE: | 4 NOVEMBER 2013 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. The background of this case is, of course, well known to the parties and I do not propose to set out all of the details of the litigation between Apple Inc. (**Apple**) and Samsung Electronics Co. Limited (**Samsung**) in Australia. The pleadings and the evidence filed to date, both lay and expert, attest to the complexity of the matters that are before the Court in this proceeding. However, some background is necessary to place in context the present application by Samsung for leave to file two witness statements in the proceeding.
2. Litigation commenced by way of an application by Apple for interlocutory injunctions against Samsung for alleged infringement of Apple’s patents. Samsung cross-claimed asserting infringement of three of its standard essential patents (**SEPs**). Apple cross-claimed asserting various matters including contraventions of Part IV of the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**) and breach by Samsung of its obligations through the European Telecommunication Standards Institute (**ETSI**).
3. Apple did not succeed in obtaining interlocutory relief and it could be said that Samsung’s case has leap-frogged the Apple case in terms of commencement of the hearing. At all times Samsung has pressed for urgent final relief and timetables were set in place, over Apple’s objection, to obtain the earliest possible commencement date for the hearing of Samsung’s claims. As it turned out, the original estimate given by the parties for the hearing of those claims was insufficient and they have been stood over part-heard. Further, in the meantime, the proceedings were split such that the Samsung claims are no longer heard as part of a cross-claim in the Apple proceedings. Accordingly, the present hearing concerns Samsung’s claims for infringement, and Apple’s cross-claim for revocation of those three patents and the other matters raised within Apple’s cross-claim.
4. The timetable that has been put in place to hear the remaining aspects of this proceeding is complex and has been the subject of extensive correspondence between the parties, appearances in Court and negotiations with lay and expert witnesses. The part of the proceeding to which the present application relates is due to commence on 26 November 2013 and conclude on 10 April 2014. It will follow the completion of a further hearing in Samsung’s claim concerning one of Samsung’s SEPs, from 7 November to 15 November 2013. In order to achieve that outcome the Court has made available more time than originally had been expected within that timeframe, at some inconvenience to the Court. This was done in consultation with the parties to achieve the conclusion of the hearing within a very ordered timeframe, which includes the precise statement of dates allocated to expert conclaves, concurrent evidence, evidence-in-chief and cross-examination, as well as submissions. The setting of that timetable preceded the present application.
5. The present application is to file two further lay witness statements; that of Kwang Jun Kim (**the Kim Statement**) and that of Kenneth S Korea (**the Korea Statement**), together the **Proposed Statements**. Those statements were served on 5 August 2013 and 6 August 2013 respectively. Apple opposes this application and says that a ruling on its objections to the admission of this evidence is needed prior to the hearing, as the issues raised by these statements cannot be adequately addressed through cross-examination or rulings at the hearing. Section 192A of the *Evidence Act 1995* (Cth) (**Evidence Act**) provides for advance rulings on admissibility in circumstances of this kind. The issue is not the admissibility of specific parts of those statements but whether Samsung should be permitted to file them out of time. The relevant direction for the filing of Samsung’s evidence on this part of the case was that it be filed by 15 August 2012.
6. The other affidavits relevant to the subject matter of the Proposed Statements and the dates of their filing are as follows:

**CHRONOLOGY OF FILING (AND SERVICE) OF LAY EVIDENCE AS TO NEGOTIATIONS BETWEEN THE PARTIES**

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| --- | --- | --- | --- |
| **Date of filing** | **Date of service** | **On behalf of** | **Document** |
| 28.07.2011 | 28.07.2011 | Apple | First Affidavit of Mr Richard Lutton |
| 23.09.2011 | 23.09.2011 | Apple | Third Affidavit of Mr Richard Lutton |
| 03.11.2011 | 03.11.2011 | Apple | First Affidavit of Boris Teksler |
| 14.11.02011 | 14.11.2011 | Apple | Second Affidavit of Boris Teksler |
| 15.06.2012 | 15.06.2012 | Apple | Third Affidavit of Boris Teksler |
| 17.08.2012 | 14.08.2012 | Samsung | Witness statement of Seungho Ahn |
| 16.08.2012 | 14.08.2012 | Samsung | Witness statement of Yong-Tae Lee |
| 03.10.2012 | 02.10.2012 | Apple | Fourth affidavit of Boris Teksler |

1. It should be noted that the last of these affidavits was filed on **3 October 2012**.

# The pleadings

1. I shall only refer to the aspect of the pleadings of particular relevance to this application. The pleadings have been subject to a number of amendments. I shall refer to the pleadings as relied upon in the interlocutory application, dealing with amendments and the timing of those amendments as relevant.
2. Broadly, the chronology of the pleadings is as follows:

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| **Samsung’s pleadings** | | |
| 1 | Samsung’s Notice of Cross-Claim for Early Final Hearing | 13 February 2012 |
| 2 | Samsung’s Amended Points of Cross-Claim for Early Final Hearing | 13 February 2012 |
| 3 | Samsung’s Defence to Apple’s Amended Statement of Cross-Claim for Early Final Hearing | 5 March 2012 |
| 4 | Samsung’s Reply to Apple’s Amended Defence to Samsung’s Amended Points of Cross-Claim for Early Final Hearing | 5 March 2012 |
| **Apple’s pleadings** | | |
| 5 | Apple’s Further Amended Defence to Samsung’s Amended Points of Cross-Claim for Early Final Hearing | 11 October 2013 |
| 6 | Apples’ Further Amended Notice of Cross-Claim | 11 October 2013 |
| 7 | Apple’s Further Amended Notice of Cross-Claim to Samsung’s Amended Cross-Claim | 20 May 2013  (filed 11 October 2013) |
| 8 | Apple’s Reply to Samsung’s Defence to Apple’s Amended Statement of Cross Claim | 9 March 2012 |

1. Samsung’s Notice of Cross-Claim for an Early Final Hearing (as originally filed in the proceeding commenced by Apple) and Amended Points of Cross-Claim for the Early Final Hearing are dated 13 February 2012 and concerned the alleged infringement of the three Samsung SEPs by various Apple devices.
2. In its Defence to Samsung’s Points of Cross-Claim for Early Final Hearing, Apple relies on licensing and estoppel issues. The licensing issues concern membership of ETSI and its involvement in developing the Universal Mobile Telecommunications System (**UMTS**) standards. Put simply, this aspect of the case concerns, in part, the obligation of a member of ETSI to offer a licence on fair, reasonable and non-discriminatory (**FRAND**) terms for those patents defined as essential to adopt in order to conform to UMTS standards. Put, perhaps in its most basic and simplistic terms, Apple alleges that Samsung has breached its obligations and has not offered to Apple a licence on FRAND terms. Apple relies upon three matters on which it bases its allegation that Samsung has failed to comply with its obligations:

* The offer made by Samsung on 25 July 2011, which proposed a specific royalty for each relevant end product (**the 25 July 2011 Offer**);
* XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX; and
* The commencement of proceedings for an injunction against Apple in respect of Samsung’s three SEPs.

1. Apple asserts that:

*XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, Apple has sought to reach agreement with Samsung Electronics regarding FRAND royalty terms inter alia in respect of any use of that Samsung UMTS declared essential patents* [and that] *at all material times, Apple has remained ready, willing and able to pay FRAND royalties to Samsung Electronics with respect to* [Samsung’s SEPs]*.*

1. Apple also asserts that Samsung has refused and continues to refuse to offer FRAND royalty terms.
2. On 5 March 2012 Samsung filed a defence to Apple’s Amended Statement of Cross-Claim. The defence relevantly refers to another filed document, Samsung’s Reply to Apple’s Amended Defence to Samsung’s Amended Points of Cross-Claim for Early Final Hearing. In the defence Samsung admits ‘*that the parties have not agreed a FRAND royalty rate for licencing of the patents*’. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.
3. In Samsung’s Reply to Apple’s Amended Defence to Samsung’s Amended Points of Cross-Claim for Early Final Hearing dated 5 March 2012, under the heading ‘*The FRAND Declarations do not create binding obligations on Samsung Electronics*’, Samsung asserts in [18]:

*In further response to the allegations in paragraphs 38 – 41 of the defence, Samsung says that:*

*(a) the effect of the ETSI declaration made by Samsung is that Samsung* ***may not refuse to negotiate*** *with any party wishing to have a licence of Samsung’s declared essential patents upon fair, reasonable and non-discriminatory terms;*

*(b) further or alternatively, to the extent Samsung* ***had*** *any binding obligation by reason of having made the ETSI declarations, those obligations* ***have been discharged by Apple’s conduct****.*

[emphasis added]

This aspect of the pleadings was unchanged since its original filing on 15 December 2011.

1. Under the heading ‘*Obligation to agree FRAND terms*’ Samsung says at [38]:

*In answer to paragraphs 75 and 76 of the defence, Samsung:*

*(a) says that its obligations arising in respect of its ETSI declarations were as pleaded in paragraph 18;*

*(b) it says that it* ***acted*** *in accordance with those obligations;*

*(c) says that it* ***made an offer*** *to Apple which was within the range of fair, reasonable and non-discriminatory offers;*

*(d) says that Apple did not negotiate in good faith to secure licence on fair, reasonable and non-discriminatory terms;*

*(e) says that Apple has remained unwilling to so negotiate;*

*(f) otherwise denies the allegations therein.*

[emphasis added]

By way of particulars, Samsung cites correspondence between 29 April 2011 and 17 November 2011.

1. In [41] of that same reply, Samsung, inter alia:

*(c) says that in any event it was prepared to grant a licence to Apple on terms which were fair, reasonable and non-discriminatory and that any representations made in respect of Samsung’s standards essential patents were therefore not falsified by Samsung’s conduct*

…

*(f) admits that it has always acted in accordance with its obligations as pleaded in paragraph 18 above.*

1. In [43] Samsung says, relevantly:

*(b) … any detriment suffered by Apple is attributable to its own conduct in refusing to or refusing to engage in bona fide negotiations with Samsung concerning, Samsung’s offer to licence its standards essential patents to Apple on fair, reasonable and non-discriminatory terms.*

1. By way of particulars, Samsung repeats the particulars in [38], that is the correspondence between 29 April 2011 and 17 November 2011. Samsung further denies in [45] that it has refused to grant Apple a licence which is fair, reasonable and non-discriminatory and again repeats [38] and the relevant portions of [41], as set out above.
2. It should be noted that, despite the amended pleading being dated 5 March 2012, no further amendments were made to the particulars of FRAND offers.
3. On 11 October 2013 Apple filed two further amended pleadings: a Further Amended Defence and a Further Amended Notice of Cross-Claim. The amendments largely concern allegations of patent exhaustion. Samsung relies upon certain paragraphs of the pleading that were not amended and were present in the pleading filed on 7 December 2012. In particular, Samsung points to [57]:

*Further, or in the alternative, Apple has notified Samsung, or alternatively hereby notifies Samsung that it is ready, willing and able to pay a FRAND royalty with respect to any use by Apple of valid Samsung UMTS declared essential patents by reason of its devices containing a chip set that implements the UMTS standard which use is not covered by an agreement between Samsung and the chip set supplier.*

*Particulars*

*Apple relies, inter alia, upon the course of correspondence between the parties between* ***at least*** *late April 2011 to* ***October 2011****.*

[emphasis added]

1. The unamended parts of the pleading include [74], [77] and [78]. In those paragraphs Apple relevantly maintains that:

* XXXXXXXXXXXXXXX Apple has sought to reach agreement with Samsung Electronics regarding FRAND terms;
* ‘*at all material times*’ Apple has remained ready, willing and able to pay FRAND royalties to Samsung Electronics; and
* ‘*further, despite the Samsung licensing acknowledgement, Samsung Electronics has refused* ***and continues to refuse****, to offer FRAND royalty terms to Apple or to provide the information necessary to enable Apple to assess Samsung’s view on what constitutes FRAND royalty terms*’.

1. The particulars of the latter allegation are an offer made by Samsung in its letter of 25 July 2011.
2. An amendment has been added to [79] as follows:

*Samsung Electronics’ refusal to offer Apple FRAND royalty terms, its seeking of injunctive relief against Apple and its purporting to give effect to* [XXXXXXXXXXXXXXX] *referred to in paragraphs 86 and 87A of Apple’s further amended statement of cross-claim to Samsung’s amended cross-claim dated 29 February 2012 is in breach of its:*

*(a) Obligations under the ETSI IPR Policy;*

*(b) Obligations under and in pursuance of the FRAND Declarations; and*

*(c) Obligation to use its best endeavours or alternatively reasonable endeavours, to agree on FRAND royalty terms with Apple.*

The underlined portion of this pleading has been inserted in the October 2013 amendment.

1. Additionally, Samsung refers to [95] to [97] of the pleading, in which Apple alleges that:

* since 21 April 2011, despite numerous requests by Apple, Samsung has refused to offer a licence to Apple which satisfies the requirement of the ETSI IPR Policy;
* Samsung sought injunctive relief against Apple despite Apple’s ‘*stated and continued willingness to pay, and capacity to pay, a FRAND royalty rate*’;
* Samsung sought injunctive relief against Apple despite continuing to correspond with Apple about the terms of a FRAND royalty rate and stating its willingness to receive a FRAND royalty rate for any use of the patents.

1. Samsung has not sought, nor has Apple provided, particulars to [95] to [97] and no dates that postdate 2011 appear in the Apple pleading in relation to this aspect of the defence, although there is repeated reference to ongoing conduct. Similarly, in that part of the pleading concerning alleged breaches by Samsung of the Competition and Consumer Act, Apple alleges breaches by way of specific and detailed past conduct, but the pleading does raise continuing obligations.
2. Samsung contends that Apple’s Defence and Cross-Claim allege refusals to negotiate on an on-going basis. It relies upon the fact that, in the amended pleading as at October 2013, the assertions made in previous iterations of the pleading remain and submits that they should be re-assessed as at the date of the filing of the latest amended pleading.
3. In summary, Samsung submits:
4. Apple alleges in its defence to Samsung’s case that Samsung has refused to negotiate to grant Apple a licence on FRAND terms and continues to do so, whereas Apple claims that it has at all times sought to reach such an agreement with Samsung.
5. Apple also alleges in its competition claim that Samsung has constructively refused to grant Apple a licence, and that the conduct by Samsung pleaded in its defence had the purpose of deterring or preventing Apple from engaging in competitive conduct, in contravention of s 46 of the Competition and Consumer Act.
6. Samsung denies these allegations and in response alleges that Apple has not negotiated in good faith to secure a licence on fair, reasonable and non-discriminatory terms, and has at all times remained unwilling to so negotiate.
7. Samsung’s solicitor states ‘*both parties have assumed that there will be a contest in relation to the negotiations since the early stages of this proceeding*’. He refers to an affidavit from Apple’s solicitor affirmed 16 December 2011 in which she states that Apple intends to file further evidence, at least with respect to ‘*Apple and Samsung’s discussions regarding licensing rates on fair, reasonable and non-discriminatory (FRAND) terms*’. In that affidavit she also refers to the fact that Samsung has put in issue an assertion by Apple that Samsung has been ‘*refusing to date to grant Apple a licence to Samsung’s UMTS declared essential patents on FRAND terms and seeking injunctions in respect of Apple’s mobile devices*’. There was a further reference in that affidavit to an intention to file all and further evidence on ‘*Samsung’s conduct, knowledge and purpose, at different time periods, insofar as it relates to the competition issues*’.
8. Apple subsequently filed evidence as set out below.
9. In essence, Samsung says that the pleadings have always concerned on-going conduct. Samsung points out that an earlier pleading amendment by Apple in May 2013 expanded the market referred to in a competition aspect of the case to a global market and retained the pleading of ongoing conduct. Amendments referring to Qualcomm also extended the dates in Apple’s pleading to 2 February 2012; that is, after the commencement of these proceedings.
10. Further, Samsung says that Apple contends that it is entitled to an injunction and that conduct up to the date of hearing of the parties is relevant to that entitlement, up to the date of hearing.
11. Apple, on the other hand, maintains that the conduct asserted in the pleadings with regard to both the discharge of ETSI obligations and the competition law aspect of these proceedings is:

* Samsung’s 25 July 2011 Offer;
* the seeking by Samsung of injunctive relief through the lodgement of its cross-claim on 17 October 2011; and
* XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

1. Apple maintains that it has been no part of Samsung’s case until the filing of the Proposed Statements in August 2013 that any conduct after the 25 July 2011 Offer was material.
2. Although it is said by Samsung that negotiations have been continuing until recently, Samsung did not give notice to Apple during the course of that conduct that it intended to rely upon it in these proceedings.
3. It is the case that Apple’s pleadings referred to a continued refusal by Samsung and a continued readiness on the part of Apple. Although those matters were in the pleadings as originally filed, subsequent amendments did not limit the continuity of those allegations. Samsung relies upon that fact. Apple contends that it is clear that those matters were alleged as existing up to the date of the filing of the pleading and denies that there was a common understanding that the pleadings raised the possibility of evidence of any continued negotiations between the parties. In particular, Apple relies upon Samsung’s assertion that it had discharged its obligations to Apple and contends that this provides a “stopping point” for the time frame. Apple says further that it has never amended the “continues to refuse” portion of its pleading and did not intend, by filing subsequent versions of the pleadings that incorporated amendments to other paragraphs, to make that allegation referable to any later date. Apple states, categorically, that its case is as set out above.
4. Even before turning to the evidence that has been filed by the parties and the time frame of the filing of that evidence, two other matters are relevant in determining the application to file further evidence. In the pleadings as they stand to date, the particulars of the negotiations given by Samsung concluded in 2011. Apple does not assert any matters that arise after the XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. There is nothing in the pleadings to alert either party that any ongoing discussion between the parties is relevant to the allegations contained in those pleadings.
5. A further matter is relevant in this context. Although no separate application has been filed by Samsung further to amend its pleadings, it notified Apple on 8 October 2013 that it proposed to apply for further amendments and provided a draft amended version to Apple of Samsung’s Reply to Apple’s Further Amended Points of Cross-Claim for Early Final Hearing. Apple’s solicitor states, and this is not contradicted, that no explanation was given by Samsung’s solicitors as to the nature of the majority of Samsung’s proposed amendments contained in that proposed reply. The proposed reply contains a significant number of amendments, several of which on their face concern the proposed additional evidence in the Proposed Statements. In particular, and by way of example, Samsung seeks to insert matters such as the following:

* It says that it has at all times acted and continues to act in accordance with those obligations.
* It says that it has made ~~an offer~~ offers to Apple which ~~was~~ were within the range of fair, reasonable and non-discriminatory offers.
* It says that Apple has remained unwilling to so negotiate the terms and conditions of a licence.

1. By way of particulars, the proposed amendment adds communications referred to in the Proposed Statements.
2. Apple’s pleadings do raise the relevance of continuing conduct. Subsequent amendments to Apple’s original filing did not limit the timing of that conduct, but asserted continuity. Samsung’s pleadings, prior to their notice of 8 October 2013, did not, in the particulars, make continuing conduct an issue in the case it advanced. It can be seen that this proposed amendment changes the pleading.

# Discovery

1. Another aspect of the conduct of these proceedings that casts light on the understanding of the parties as to the relevant issues between them is discovery.
2. The parties were required to give discovery prior to evidence being filed with respect to FRAND and licensing issues. Apple filed its first application for discovery on 27 January 2012. This application was contested. Orders were made for production as on discovery by Samsung on 8 February 2012, 16 March 2012 and 4 April 2012. The categories in relation to FRAND and licensing issues included calculations or deliberations for the 25 July 2011 Offer and also licence negotiations between Samsung and Apple and actual, proposed or contemplated FRAND royalty rates.
3. Samsung produced documents in response to the discovery orders between 9 March 2012 and 14 August 2012. The time periods referred to in the discovered categories extended to 16 December 2004. However, the categories also referred to documents ‘*presented to or considered by senior management on or after 16 December 2004 concerning the use or potential use of Samsung’s SEPs*’. Other categories referred to documents ‘*during the period 1 January 2003 to the present date*’ and documents ‘*created by, presented to or considered by senior management on or after 1 January 2003*’ concerning the XXXXXXX XXXXXXXXXX. Yet another category referred to documents ‘*created on or before 25 July 2011*’ concerning the 25 July 2011 Offer by way of definition in the categories ‘*period*’ referred to in those categories was defined during the period from 1 January 2007 ‘*to the present date*’. The ‘*present date*’ was defined as the date of the order, 16 March 2012.
4. No application has been made to extend the date relevant to ascertaining the documents to be produced on discovery. Samsung has not complied with any continuing obligation to provide discovery in respect of documents after 8 March 2012 in accordance with its presently advanced contention that negotiations subsequent to that date were always intended to be in issue in the proceedings.
5. It follows that an examination of the course of discovery in the proceedings does not assist Samsung in its contention that the parties have at all times understood that the pleaded case referred to negotiations up to and including the days of hearing.

## Future discovery

1. Samsung says that it is content to proceed without further discovery but will make prompt discovery if required. Apple contends that further discovery will be required.
2. If there were to be further discovery in relation to all subsequent negotiations between the parties, Samsung contends that it would be a straight forward matter to provide the discovery and that it could do so within a two week time period. Apple submits that any such discovery would be so extensive as to cause the vacation of the hearing date. Apple also points out that the only date specified in relation to calculating the royalty rate in the discovery categories of the orders of 16 March 2012 is 25 July 2011 – that is, the date of Samsung’s pleaded offer.
3. Taking into account the nature of discovery as to the 25 July 2011 Offer XXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, I would agree with Apple’s submission. Samsung has not advanced categories for further discovery nor provided evidence to assure the Court that any further discovery would be as limited as it contends.
4. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.
5. Apple’s solicitor says that after the proceedings commenced in the United States in April 2011, litigation between the parties also took place in jurisdictions, including further litigation in the United States, France, Germany, Italy, the United Kingdom, South Korea, Japan, and the Netherlands. XXXXXXXXX XXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.
6. I will return to the effect of this aspect of Samsung’s proposed case.

# The evidence filed by the parties

1. Samsung says that both Samsung and Apple have filed evidence concerning licensing negotiations. In particular Samsung refers to affidavits by Mr Lutton, Apple’s former Chief Patent Counsel, who gave evidence in support of Apple’s application for interlocutory injunction. The first affidavit was filed on 28 July 2011 and deals with events prior to that date. The second affidavit is not relevant to this application. His third affidavit was filed on 23 September 2011. Mr Lutton’s evidence concerns licensing discussions between Samsung and Apple between July and November 2010.
2. Apple has also filed four affidavits of Mr Teksler, who was Apple’s Director of Patent Licensing & Strategy until June 2013. Those affidavits were filed on 3 November 2011, 14 November 2011, 15 June 2012 and 3 October 2012. Mr Teksler’s affidavits refers to meetings between Samsung and Apple in 2010 and annex correspondence between the parties from April 2011 to 14 September 2012 concerning licensing discussions. Apple makes the point that although Mr Teksler annexed some correspondence between the parties from July 2011, the body of his affidavit does not contain evidence of negotiations after July 2011.
3. Apple’s solicitor states that both Mr Lutton and Mr Teksler have ceased to be employees of Apple: Mr Lutton on or around 31 December 2011 and Mr Teksler on or around 4 June 2013. The evidence is that Mr Lutton has indicated to Apple that he is not willing to provide any further evidence in the Australian proceedings between Apple and Samsung, and Apple does not seek to rely on evidence from Mr Lutton in this proceeding. Mr Teksler has indicated to Apple that he is not willing or able to provide any further evidence in the Australian proceedings between Apple and Samsung. Apple has stated that, to the extent that Samsung contends that its proposed evidence is in reply to parts of Mr Teksler’s affidavit, it will not read any such parts of the affidavit.
4. With respect to the events that occurred during 2011 and 2012, Samsung has filed a statement from Dr Ahn, dated 10 August 2012. Dr Ahn’s evidence concerns meetings between Apple and Samsung between April 2011 and July 2012. In particular, in Dr Ahn’s statement under the heading “Further Attempts to Negotiate” he refers to a number of meetings. At the end of his statement he says ‘*because those negotiations are ongoing I shall not in this statement say any more about the meetings between Apple and Samsung*’. Nothing further was said from 10 August 2012 in these proceedings until now. Samsung has also filed the statements of Mr Heungmo Lee (dated 13 August 2012) and Mr Yong-Tae Lee (dated 14 August 2012), both concerning licensing.

## The Teksler affidavits

1. Given Mr Teksler’s statement that he is neither willing nor able to provide additional evidence in these proceedings, and Mr Lutton’s lack of willingness to do the same, Apple has said that it will seek leave to have Mr Watrous, Apple’s Vice President and Chief Intellectual Property Counsel, give evidence instead.
2. Samsung points out that Apple confirmed in a letter dated 23 August 2013 that it intended to rely on Mr Teksler’s first, second and fourth affidavits at the hearing and that Mr Teksler is included as a witness who will give evidence in the detailed timetable for hearing. This has not been further explained.
3. As discussed above, Apple has filed four affidavits affirmed by Mr Teksler. Samsung’s solicitor points to Mr Teksler’s first, third and fourth affidavits as being of particular significance to this application.
4. In his first affidavit, which was filed on 3 November 2011, Mr Teksler:

* gives evidence as to the commencement of proceedings in the United States on 15 April 2011;
* annexes non-confidential correspondence between the parties between 29 April 2011 and 18 July 2011 regarding Apple’s request for Samsung’s FRAND rates so that Apple could work out whether those rates were fair, reasonable and non-discriminatory. Mr Teksler says that Samsung repeatedly refused to provide that information to Apple;
* annexes confidential correspondence between the parties dated 25 July 2011 to 31 October 2011 regarding licensing of Samsung’s SEPs.

1. Mr Teksler’s third affidavit was filed on 15 June 2012. In it, Mr Teksler:

* annexes a confidential copy of the 4 November 2010 “Apple/Samsung Licensing Discussion” presentation;
* annexes confidential correspondence between Apple and Samsung that was subject to a non-disclosure agreement (**NDA**);
* discusses the 25 July 2011 Offer by Samsung and XXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXX;
* annexes copies of confidential correspondence between Samsung and Apple dated 17 November 2011 to 31 May 2012 regarding licensing of Samsung’s SEPs.

1. Samsung refers to this affidavit and Mr Teksler’s discussion of the 4 November 2010 meeting. It is that meeting that is the subject of some of the proposed further evidence. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. XXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
2. Mr Teksler’s fourth affidavit was filed on 3 October 2012. In it, Mr Teksler:

* gives evidence about the 5 October 2010 and 4 November 2010 meetings between Apple and Samsung;
* discusses the royalty rate offered by Samsung in the 25 July 2011 Offer;
* annexes a confidential letter from Apple to Samsung dated 5 July 2012;
* annexes a confidential letter from Apple to Samsung dated 7 September 2012 and a letter from Samsung to Apple on 7 September 2012. These letters were sent on the same day but were not responsive to each other; and
* annexes a confidential letter from Samsung to Apple dated 14 September 2012.

1. As at the date of the hearing of this application, the exact content of Mr Watrous’ evidence to be given in place of Mr Teksler’s evidence was not clear. During the hearing, Apple maintained that it would not include the parts of Mr Teksler’s evidence to which Samsung says it proposes to reply. Specifically, Apple has stated that Mr Watrous will not address the paragraphs of Mr Teksler’s affidavit filed 3 October 2012 that concern the 4 November 2010 meeting. XXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX Samsung has indicated that, if Apple does not read this evidence, it will tender Mr Teksler’s evidence itself.
2. Following the hearing of this application, I directed Apple to notify the Court as to the evidence it intended to adduce from Mr Teksler’s affidavits, either through those affidavits or by means of an affidavit from Mr Watrous. Apple has notified the Court that it will not seek to rely separately on the affidavits of Mr Teksler in this proceeding. Apple states that it is currently preparing an affidavit from Mr Watrous which, it says, will relate to the period up to the filing of Apple’s defence in December 2011. Apple says that the affidavit will ‘*in substance address a subset of the topics addressed in Mr Teksler’s affidavit, and on that subset of topics it will in substance address the same matters*’. Further, Apple says that it will be based in part upon information and belief from Mr Teksler concerning matters referred to in Mr Teksler’s affidavits which occurred prior to Mr Watrous joining Apple in June 2011; and it will otherwise contain evidence of matters within Mr Watrous’ own knowledge from the time that he joined Apple.
3. While this does not make clear exactly the content of Mr Watrous’ proposed evidence, Apple says that it will not address matters after December 2011 or matters or topics beyond Mr Teksler’s affidavits.
4. Samsung was given leave to respond to Apple’s notification as to the scope of its intended reliance on Mr Teksler’s affidavits and Mr Watrous’ affidavit. In purported response to that notification, Samsung repeats and raises a number of matters. Samsung submits that Apple ‘*should not be permitted to change its case and evidence in the manner now proposed, unless the evidence of Kim and Korea is received*’. Samsung again contends that the course proposed by Apple is inconsistent with its pleaded ongoing conduct case which, Samsung says, it has been addressing in evidence from the outset and preparing to defend.
5. Samsung further contends that contrary to Apple’s claims about the limitations on its pleadings, it plainly relies on conduct after the date of filing its defence in December 2011 and then says ‘*whatever Apple’s case is now proposed to be, Samsung must be entitled to advance its defence*’. Apparently in support of its entitlement to rely upon the various matters in the Korea Statement, Samsung submits that XXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. It also says that the ongoing conduct of the parties is relevant to Apple’s case under s 46 of the Competition and Consumer Act. Samsung then says that it has served its evidence based upon Apple’s notified intention to rely upon Mr Teksler’s affidavit and annexed correspondence.
6. Various matters raised by Samsung in response go outside the leave given to Samsung to reply to Apple’s notification as to the extent of the proposed evidence of Mr Watrous and its relation to the matters addressed in Mr Teksler’s affidavit. The only reference in Apple’s communication to the pleadings was ‘*Apple expects that Mr Watrous’ evidence will not raise new matters or topics beyond Mr Teksler’s affidavits, and will not address matters after Apple’s filing of its defence in these proceedings in 2011*’.
7. Samsung’s response is in large part not responsive to that matter and plainly goes beyond the terms of the leave given by the Court to Samsung, to ‘*make an observation in relation to that extra material coming in from Apple*’. Apple objects to the further matters being taken into account. In particular Apple refers to *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357 at [111] for the proposition that submissions that travel outside the terms of leave given by the Court should not be taken into account in determination of an application. I accept that proposition in this case. In any event, even if I were to take those further matters into account, they do not add anything in substance to the submissions already advanced by Samsung at the hearing of the application, where Samsung had ample opportunity to address these matters. Samsung was only given leave to respond to Apple’s answer to the question concerning Mr Teksler’s affidavits and the proposed affidavit of Mr Watrous. Further, Samsung’s response says that Apple’s proposed course is inconsistent with its pleaded case. Apple has made its position as to its case clear.
8. Samsung has had adequate opportunity to respond to Apple’s evidence from Mr Lutton and Mr Teksler. It has purported to do so in evidence from Dr Ahn and from experts on patent licensing.
9. It is not an unusual circumstance that a party declines to read evidence that has previously been filed and/or served. Apple is entitled to decline to read Mr Teksler’s affidavits. Similarly, if Apple seeks to confine its case by no longer referring to events after the filing of its defence in December 2011, Apple is entitled to do so. Further, if it was so important to Samsung to respond to Mr Teksler’s evidence, it would have been appropriate to respond to it soon after the fourth affidavit was served on 2 October 2012. Samsung’s failure so to respond has, because of Mr Teksler’s departure from Apple in June 2013 some 8 months after this last affidavit, affected Apple’s ability to file any further evidence from Mr Teksler in answer.

# No Explanation of delay

1. On 8 February 2012, following the commencement of this proceeding in September 2011, the Court made extensive procedural orders, including orders relating to the filing of lay and expert evidence. Samsung was ordered to file the balance of its evidence on FRAND, licensing, contract, estoppel and competition issues (both lay and expert) on or before 27 July 2012. On 15 August 2012, this was extended to 15 August 2012, apart from an expert report that is not of relevance to this application.
2. The Kim Statement was served on Apple on 5 August 2013, and the Korea Statement was served on Apple on 6 August 2013. These statements were served nearly a year after the due date for Samsung’s evidence in answer on these issues in this proceeding.
3. Despite repeated questioning from the Court as to the reasons for the delay, no real explanation of the delay has been proffered by Samsung, by way of evidence or detailed submission. In particular no good explanation has been given as to why Mr Kim did not give evidence at the same time as that given by Dr Ahn in respect of the meetings that took place prior to 25 July 2011. Samsung’s explanation seems to be as follows:

* It was always in the pleadings;
* It is in reply to Mr Teksler’s fourth affidavit of October 2012; and
* There was a common assumption between the parties that correspondence as annexed to Mr Korea’s proposed statement would be tendered by consent.

1. If Samsung is correct in saying that a core part of its case has always been the events after July 2011, then it is hard to understand why none of that evidence has already been filed. Directions were made as to the filing of lay evidence and Samsung did not seek directions for additional, or continuing, evidence.
2. As can be seen, Samsung completed the filing of its lay evidence in August 2012 and yet, without any explanation being advanced, seeks to file further evidence a year later, some of which is in respect to events that took place well before the commencement of proceedings and well before August 2012.
3. This is all, it should be said, in the context of Samsung’s continuing insistence on an early final hearing.

# Economic expert evidence

1. The experts were each supplied with extensive factual assumptions for the purposes of preparing their reports. Apple contends, and it does not seem to be disputed, that none of the assumptions provided to Apple’s experts for the preparation of their first reports referred to correspondence or negotiations between Apple and Samsung after 25 July 2011. The reports of Professor Ordover and Professor King do not refer to any correspondence or negotiations between Apple and Samsung after 25 July 2011 or to any hypothetical subsequent discussions or negotiations.
2. Samsung responded to the first report of Professor Ordover and the first report of Professor King by way of Professor Teece’s report dated 14 August 2012. In his first report, Professor Teece characterised the 25 July 2011 Offer as a “first offer” and was asked to assume that the parties engage in further correspondence and discussions thereafter. Apple contends, and it is not disputed, that Samsung’s solicitors instructed Professor Teece to have regard to XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. However, in providing his response, Professor Teece did not discuss correspondence or negotiations between Apple and Samsung after 25 July 2011.
3. In preparing their second reports, Professor Ordover and Professor King were provided with 205 revised assumptions. Among these were two assumptions that referred to XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. However, neither Professor Ordover or Professor King’s second reports referred to these assumptions or letters.
4. Samsung has served another report from Professor Teece. Orders made on 16 April 2013 required the evidence to be served by 10 May. That report is dated 5 August 2013. In that report, Professor Teece does refer to assumptions that, in turn, refer to XXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. Apple says that Professor Teece relies upon the assumptions provided to him concerning negotiations after the 25 July 2011 Offer to evaluate the 25 July 2011 Offer, to determine whether that offer was consistent with Samsung having substantial market power, and/or consistent with the conduct of a willing licensor prepared to negotiate. Apple’s solicitors contend, and it does not appear to be disputed for the purpose of this application, that at no time prior to serving Professor Teece’s 5 August 2013 report did Samsung notify Apple that it would provide Professor Teece with detailed assumptions regarding later correspondence and negotiations between Apple and Samsung in respect of offers made.
5. Professor Ordover and Professor King have responded to Professor Teece’s 5 August 2013 report. However, it appears that these reports go to the underlying assumptions themselves, rather than the correspondence and negotiations until 20 June 2013. Apple has said that Professor Ordover and King are of the opinion that the further negotiations are ‘*irrelevant to their analysis*’.
6. There is a further potential difficulty with regard to Professor Teece’s report, in that parts of his report that contain material highly confidential to Apple have been released outside the confidentiality regime, including to Samsung’s employees. The precise details of the content and extent of the breaches of confidentiality covering that material, which have occurred separately in the United States and in Australia has not yet been fully ascertained. The evidence is that the release of the confidential information in Australia was inadvertent. Inquiries with respect to the way in which it occurred and the consequences of it are still being investigated by Samsung and its solicitors in the United States, and the evidence only today presented by Samsung in Australia has not yet been considered by the Court or responded to by Apple. There is a question as to whether use was made by Samsung executives of confidential information for the purposes of the negotiations with Apple the subject of the proposed evidence. I will deal later with the submissions made as to the effect of this on this application.
7. Apple also notes that in relation to expert licensing evidence, Mr Donaldson, who gives evidence in relation to FRAND valuations for Apple, does not refer to specific correspondence or negotiations after 25 July 2011 in his analysis. Similarly, whilst Mr Stasik refers to an assumption that the 25 July 2011 Offer amounted to a ‘*first unilateral offer to Apple*’, he does not refer to specific correspondence or negotiations after this date in his affidavit.

# Statements by Apple regarding evidence about the negotiations

1. Samsung relies upon a number of occasions on which counsel for Apple referred to a continued willingness on the part of Apple to negotiate and a continuing refusal by Samsung to do so. Some of those observations were in the course of responding to questions raised in Court concerning any possibility of a negotiated settlement.
2. In any event, these statements do not constitute evidence in the proceedings, nor will such observations made during the course of directions hearings be relevant if outside the pleaded case and the evidence adduced.

# Apple’s approach to the subject matter of the proposed evidence

1. Samsung relies upon what it characterises as a proposal by Apple that the parties agree that, in lieu of direct evidence from Mr Korea, a bundle of correspondence exhibited to that statement, be tendered. That “proposal” is in the context of a letter in which Apple’s solicitors notified Samsung that they removed from the timetable the references to Mr Korea on the basis that Samsung did not at that time have leave to rely on any evidence from him. The letter also noted that Samsung had not provided any information as to the content of the proposed evidence of Mr Korea. Apple states that it does not consider further lay evidence in relation to licence negotiations to be necessary and, in that context, says ‘*instead we propose that it would be more efficient for the parties to agree upon a bundle of correspondence between Apple and Samsung concerning the negotiations which will/would be tendered during the hearing*’. This does not constitute a sufficient basis for Samsung to maintain that Apple agreed to the proposed evidence or to the details of further negotiations between the parties to be examined in this proceeding in order to evaluate the contents of XXXXXXX and the attitudes of the parties in the context of the present proceeding. It could not be said that there was an agreement, taking account of the contents of the whole of the letter, including the fact that Apple did not know what the proposed evidence was.
2. In any event, that letter was only sent by Apple’s solicitors on 2 August 2013. It does not form a basis for Samsung to say that it deferred filing Mr Korea’s evidence for a year based upon some mutual acceptance that the evidence would be admitted by consent.

# Evidence of discussions between Apple and Samsung in overseas proceedings

1. Samsung relies upon Apple’s tendering of ‘*evidence of its licensing discussions with Samsung in overseas proceedings*’. Specifically, this concerns proceedings in the United States District Court, Northern District of California, San Jose Division (**the ND Cal I and ND Cal II proceedings**), in the United States International Trade Commission (**the ITC proceedings**) in Washington DC and, in Italy, in the Court of Milan IP Division (**the Italian proceedings**).
2. Samsung’s solicitor says that in the course of the ND Cal II proceedings, Samsung submitted a declaration of Mr Korea, XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXX. Samsung’s solicitor also says that during the course of the same proceedings, Apple filed a declaration by Mr Watrous, XXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. In the same proceedings, Apple has also apparently filed a copy of a report prepared by Professor Ordover XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX and has deposed Mr Korea XXXXXXXXXXXXXXXXXXXXXXXXXXXX.
3. The ITC proceedings also included evidence XXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. Samsung says that XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
4. Samsung’s solicitor says also that:

* in the ND Cal proceedings, XXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX; and
* XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX was tendered in the Italian proceedings in January 2013.

1. With respect to Mr Donaldson’s evidence, Samsung has not provided any further detail of that evidence, nor the evidence to which it responded, likely because of confidentiality restrictions in the United States. It does not really assist in providing an understanding of the relevance of the evidence in the Australian context, nor of the necessary work to be done by Apple and their Australian legal advisers in understanding the evidence and its potential use directly, or with the inclusion of additional matters, in the Australian context.
2. In August 2013 Apple requested that Mr Watrous and Mr Teksler be granted access to the Proposed Statements, which was agreed to by Samsung. Samsung also relies on the fact that the experts that Apple is calling in the present proceedings have already expressed opinions in these overseas proceedings XXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXX.
3. Samsung says that the FRAND negotiations are a “normal” commercial negotiation and should be seen in that context. That position is supported by Professor Teece’s evidence. Samsung relies on the fact that the ITC has determined, based upon at least some of the evidence now sought to be adduced, that ‘*in the light of XXXXXXXXXX above, Apple has not proved a failure by Samsung to negotiate in good faith*’, and that Apple’s position was subject to some criticism.
4. I have not been provided with the whole of that decision. I have been informed that the whole of the negotiation between the parties was in issue in the ITC proceedings. One issue was whether Samsung negotiated in good faith with Apple concerning a licence to two named SEP patents. I have not been informed if those patents are relevant to the three being litigated in Australia.
5. Samsung’s submission is, basically, that Apple through its US lawyers has already dealt with the subject matter of the Proposed Statements and that, accordingly, there would be no prejudice to Apple in responding to such evidence in Australia.
6. The fact that some of this material has been addressed in evidence overseas does not answer the potential prejudice to Apple and to the conduct of the hearing in Australia. First, it is not clear that the content of the overseas evidence is identical with that in Australia. Secondly, it has not been explained that the issues being addressed overseas are the same as in Australia. While it may be the case that the negotiations between the parties form a single factual matrix and that questions of a FRAND licence are involved, in Australia the competition case also arises and XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.
7. Further, there is no suggestion that Apple’s Australian lawyers are familiar with the content of the evidence. Indeed, in view of the high level of confidentiality that attaches to much of the evidence, it is unlikely to be the case. Samsung has made general submissions that Apple should be ready in Australia to deal with the subject matter of the Proposed Statements because that subject matter has been dealt with by Apple overseas. However, there is no detailed analysis of the similarities and differences and possibilities at a practical level that enable such a submission to be accepted for litigation as complex as this without further analysis. Additionally, Apple’s Australian counsel say that they presently do not have access to all of the documents that have been prepared by Apple’s overseas counsel or experts for use in these overseas proceedings, as they are subject to confidentiality orders in those proceedings.
8. It is difficult to see how the Australian lawyers can prepare for the case in Australia and, concurrently, familiarise themselves with the cases in different overseas jurisdictions, together with the documentation and any further discovery concerning detailed negotiations in a complex context, that do not, apparently, directly relate to, and are limited to, the Australian proceedings.

# The Kim Statement

1. It should be reiterated that the Kim Statement is dated 5 August 2013. Mr Kim proposes to give evidence as to meetings held on 5 October 2010 and 4 November 2010, xx XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
2. Mr Kim states that Dr Ahn and Mr Jun Won Lee were also present representing Samsung at these two meetings. Evidence by Dr Ahn has already been filed and Dr Ahn places in evidence the reports of the meetings made by Mr Lee. Indeed, Mr Kim says that he refreshed his memory of each of the meetings by reading Mr Lee’s reports.
3. Mr Kim was, at the relevant time, the Head of Patent Analysis at Samsung and reported to Dr Ahn. He is presently employed by Samsung Display Company, a subsidiary of Samsung, where he is a Senior Vice President and Chief Intellectual Property Officer.
4. No explanation has been given either in the Kim Statement or otherwise as to why his evidence was not filed in accordance with the timetable and at the same time as the evidence of Dr Ahn, which was filed on 17 August 2012. Further, it is not said that the Kim Statement is relevant to any negotiations that took place between Apple and Samsung after the 25 July 2011 Offer, as the meetings to which he refers were prior to that time.

# The Korea Statement

1. The Korea Statement is also dated 5 August 2013. He annexes correspondence between the parties from March 2011 through to July 2013. Mr Korea is the Vice President and the Head of the US IP Centre of Samsung Information Systems America Inc, which is a wholly owned subsidiary of Samsung. He has held that position since February 2011. He has been involved in the management on behalf of Samsung of its litigation with Apple in the United States. It is apparent (and follows logically) that he has been aware of the litigation between Apple and Samsung, at least in the US context, since the litigation commenced in the United States, in April 2011, which was before litigation commenced in Australia.
2. It is apparent that the evidence that Samsung wishes to adduce through Mr Korea includes the meetings between the parties prior to 25 July 2011 concerning litigation between the parties, such as the April 2011 meeting. Samsung says that although all of the conversations discussed by Mr Korea provide relevant context, it is willing to refrain from reading certain paragraphs of Mr Korea’s statement ([17], [18], 32], [43], [52], [79], [90], [98], [99], [106], [107] and [117]). It says that this would leave only conversations at which Mr Watrous or Mr Sewell were present, and that this is material that, in general terms, Watrous has already addressed in evidence prepared and filed elsewhere.
3. Again, there is no explanation as to the timing of the proposed evidence. There is no explanation as to why the evidence by Mr Korea concerning the 2011 meeting is sought to be filed now.
4. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, there is again no explanation. If Samsung was of the view that ongoing discussions between the parties were central to its case, then why Samsung has chosen not to seek to adduce that evidence before now? If it has always been central to Samsung’s case, an early indication of such additional evidence would have given Apple the opportunity to respond. Again, this does not support Samsung’s assertion as to the importance or centrality of this aspect of the evidence, by reason of its understanding of the pleadings as making relevant the continuing conduct of the parties.

## Particular problems raised by the proposed Korea evidence

1. Apart from evidence concerning correspondence in early 2011 with Apple, Mr Korea sets out conversations that occurred at a meeting of representatives of the parties on 27 April 2011. Dr Ahn was also present, as were Mr Sewell and Mr Teksler. No explanation is given as to why Dr Ahn did not include evidence of the alleged conversations in his affidavit already filed.
2. However, and more importantly, Mr Korea sets out detailed discussions and correspondence XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
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1. It is not at all apparent that the evidence sought to be adduced relates directly to the matters in issue. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. It would likely be the case that, if this evidence were permitted, the question of its relevance to the precise issues in this proceeding, including to competition issues not apparently raised in other jurisdictions, would necessitate further lay and expert evidence.
2. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
3. Each party, in effect, raises an absence of bona fides in the negotiations, including those that are the subject of the existing evidence. XXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.
4. Apple says that to respond to this evidence would impose ‘*crippling obligations*’. This is in a context where, Apple says, there was no pleading by Samsung that any offers subsequently made were FRAND offers and that the pleaded case was and is that Samsung have not refused to negotiate. Apple says that the introduction of a pleading that there has been a subsequent FRAND offer, and the context in which such an offer or offers were said to have been made, cannot be dealt with by Apple within the existing timeframe. In my view, Apple’s position is reasonable.
5. Apple raises a further element that would need to be considered by it in responding to the Korea Statement, and that is the extent to which Samsung’s knowledge of Apple’s confidential agreements with third party licensees was utilised by Samsung in the negotiations between Apple and Samsung and the effect of any such utilisation on:

* XXXXXXXXXXXXXXXXXXX;
* The knowledge that Samsung would have had of Apple’s negotiating position; and
* Samsung’s bona fides in XXXXXXXXX and in the negotiating position that it took.

1. Apple says that investigation into these matters cannot be completed until Samsung provides information not yet available and that this would also affect and make untenable the existing timetable for the hearing.
2. Samsung contends that other aspects of the proceeding can continue unaffected, such as the:

* Expert evidence concerning the nature of the parties’ ETSI obligations;
* Expert evidence given by Mr Stasik, Mr Donaldson and Professor Teece as to licensing practices;
* Evidence on marketing and the importance of the SEPs for marketability of the devices; and
* The construction of the agreements between Apple and Intel, and Apple and Qualcomm, and the assertion of contractual rights, including evidence of New York and Californian contract law.

1. Samsung says that there are ‘*a very large number of matters that are unaffected*’ by Apple’s professed desire to obtain more evidence. It also says that ‘*even the economists*’ can only act on the basis of assumptions about ongoing negotiations.
2. Apple contends that it has prepared the case on the basis that all of the evidence and the issues in dispute are as they presently stand. Apple says that it cannot continue with parts of the case in the absence of being afforded the opportunity to reconsider this case and to form a view as to the evidence necessary to place the negotiations in context.
3. Apple says that the issue of the negotiations cannot be separated out from the other aspects of the case. It says further that ‘*any lay evidence adduced by Apple relating to the negotiations … would take a significant amount of time to prepare* [and] … *might impact upon the present hearing timetable*’. It says that it is not practical for it to continue to conduct the litigation and participate in the hearing while having to prepare to meet the proposed new evidence and respond to it.
4. In any event, Apple says, and I accept, that there is no provision in the existing timetable for the issues and inevitable cross-examination that would be necessary.
5. There is no present application to vacate the hearing dates or to have a separation of the evidence in a new timetable. The prospect of continuing with part only of the case and to separate issues on the basis of those that may be affected and those unaffected by the Proposed Statements would, it presently seems to me, impose an intolerable burden on the Court, in part due to the separation in time in hearing evidence of inter-related issues, and would delay further a conclusion to this litigation.

# The Asserted confidentiality OF the ongoing negotiations between the parties

1. Samsung contends that Apple has agreed to the use of the terms and prospective terms offered for potential patent licences or other agreements for the purpose of the Court determining whether Samsung or Apple offered or rejected a licence on FRAND terms, and the parties’ ongoing attitudes to negotiations.
2. Samsung relies upon an NDA entered into by the parties on 20 July 2011 (**the 2011 NDA**) and a further NDA in September 2012, which was stated to be effective as of 9 April 2012 (**the 2012 NDA**). In particular, Samsung relies upon clauses 2 and 5 of the 2011 NDA and clauses 2 and 5 of the 2012 NDA which relevantly provide as follows:

* The 2011 NDA applies to “Confidential Information” disclosed by Samsung to Apple for the purpose of Apple assessing the desirability or viability of entering into a licensing agreement concerning certain Samsung patents. “Confidential Information” is defined in clause 2 to include:

*… without limitation any terms or prospective terms offered by or on behalf of Samsung to Apple and/or its representatives for a potential license or other agreement with respect to Samsung patents including any patents relating to UMTS/WCDMA technology.*

* The 2011 NDA further provides in clause 5:

*Further, nothing in this agreement shall prevent the use of any Confidential Information in a court or tribunal* ***for purposes of determining whether either party to this agreement offered or rejected a license to patents claimed to be essential to industry standards on FRAND or RAND terms****, provided that any such Confidential Information shall be submitted to the Court or Tribunal in a manner intended, to the extent possible, to prevent disclosure of the Confidential Information to third parties and preserve its confidentiality (for example, where applicable, the highest level of confidentiality permitted under any Protective Order).*

[emphasis added]

* The 2012 NDA applies to “Confidential Information” provided by either party to the other. “Confidential Information” is defined in clause 2 to include:

*… without limitation any terms or prospective terms offered by or on behalf of the Party and/or its representatives for a potential license or other agreement with respect to their respective patents including without any limitation any patents relating to LTE technology.*

* The 2012 NDA further provides in clause 5:

*Further notwithstanding any provision in this Agreement, including without limitation Sections 3 or 8, the Parties shall be permitted to use, retain, or submit any Confidential Information to any court, agency or tribunal in which an issue to be determined* ***is whether either party to this Agreement offered or rejected a license to patents a Party claims are essential to industry standards on FRAND or RAND terms****, provided that such Confidential Information is submitted or used in a manner that, to the extent reasonably possible given available judicial or regulatory procedures protecting confidentiality (which is some jurisdictions, are not available), prevents the public disclosure of the Confidential Information.*

[emphasis added]

1. Samsung says that this constitutes consent by the parties for the tender of materials that update prior negotiations and, in particular, the tender of the Proposed Statements. Samsung submits that the 2011 and 2012 NDAs should be understood as a clarification that the parties are to be taken to agree not to create any prohibition on the uses addressed in clause 5 of each NDA. It also says that the NDAs reflect what it says was the common assumption that the parties intended for offers and counteroffers to be tendered in FRAND proceedings.
2. Apple maintains that both NDAs address confidential settlement correspondence and negotiations between the parties. Apple submits that the versions of clause 5 in both NDAs do not provide any right to disclose under s 131 of the Evidence Act evidence of communications of an attempt to negotiate a settlement of a dispute which would otherwise be prohibited by restrictions such as legislation, privileges or agreements, that exist outside of the terms of the 2011 and 2012 NDAs. Apple says instead, and I agree, that these clauses of the NDAs clarify that neither NDA should be taken to create any prohibition on the uses addressed in clause 5 of each NDA.
3. Apple says that this understanding is consistent with how the parties have conducted themselves, and points to Mr Korea’s statement that he is not permitted to provide copies of XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, even though it is a document to which the NDAs apply.
4. That is, Apple says, the NDAs do not enable disclosure otherwise prohibited by other restrictions external to those NDAs. Apple relies on s 131 of the Evidence Act as such an external restriction.
5. In the circumstances, I do not propose to deal further with the application of the NDAs as Apple does not contend that the NDAs themselves preclude reliance on the Proposed Statements by Samsung.

# Section 131 of the Evidence Act

1. Section 131(1) of the Evidence Act provides that evidence is not to be adduced of communications made between the persons in dispute in connection with an attempt to negotiate a settlement of the dispute. Similarly, evidence is not to be adduced of a document that has been prepared in connection with an attempt to negotiate a settlement of a dispute.
2. Section 131(1) is, however, subject to the exceptions in s 131(2). They include:
3. if the persons in dispute consent to the evidence being adduced, or if any of those persons have tendered the communication or document in evidence in other Australian or overseas proceedings, all of the other persons in those proceedings so consent; or
4. the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or
5. the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute. and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or …
6. the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or …
7. evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or qualify that evidence; or …
8. making the communication, or preparing the document, affects a right of a person.
9. Apple says that much of the evidence contained in the Proposed Statements is inadmissible under s 131, because the settlement correspondence and negotiations discussed relate to “without prejudice” communications. Apple has provided a schedule setting out the paragraphs to which it objects on this ground. However, at the hearing, the parties dealt with this issue on and all or nothing basis, rather than to consider particular parts of the evidence. The parties were content to my reading the Proposed Statements and the Teksler affidavits without waiving privilege. Those affidavits have not yet been read in the proceedings.
10. If the whole course of conduct between the parties from 2010 to the present day were relevant to the issues defined by the pleadings or to the existing evidence, Samsung would not be precluded by s 131(1) from relying upon that evidence.
11. Evidence as to the events of 2010 and 2011 prior to the filing of Apple’s pleadings are the subject of evidence and, accordingly, exceptions in s 131(2) apply, such that they would form a basis for admitting the Kim Statement.
12. Section 131(1) does not of itself preclude the filing of Mr Korea’s proposed evidence. If it were otherwise to be permitted into evidence, it would then be necessary at the hearing to determine the admissibility or otherwise of specific parts of that evidence. I do not accept that it is clear that s 131(2) can have no application.
13. The substance of later negotiations and their content are partially in evidence through Mr Teksler, if that evidence were to be adduced, either through Mr Teksler or Mr Watrous. Mr Korea’s evidence is in part at least directed to the same subject matter and would come at least within sub-sections 131(2)(b), (c), (e) and (g).
14. I do not consider that the fact that a party has given its experts assumptions upon which to base an expert report is sufficient to bring Mr Korea’s and Mr Kim’s evidence within s 131(2).
15. Samsung is not precluded by reason of s 131 from relying on the Kim Statement. As to the Korea Statement, this depends on the evidence to be adduced from Mr Teksler and Mr Watrous.

# Case management principles

### The Aon principles

1. The principles set out by the High Court in *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 (***Aon****)* are directly applicable to the present application by Samsung for leave to file and rely upon the Proposed Statements and to its foreshadowed application to amend its pleadings to particularise settlement correspondence and negotiations beyond those presently particularised.
2. In *Aon*, the plurality (at [111]), when considering the issue of granting leave to amend, said that the Court’s discretion should:

*… not be approached on the basis that a party is entitled to raise an arguable claim, subject to the payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend.*

1. The plurality also emphasised (at [112]) that although parties have a right to bring proceedings and make choices as to how they frame their case, limits will be placed upon their ability to effect changes in their pleadings, particularly when, as in the case here, the proceedings are advanced. The plurality also raised the issue of the effect of the vacation of trial dates on the Court and other litigants seeking a resolution of their cases, which is also an issue here.
2. The Court also stressed the importance of an explanation by the party seeking to support the exercise of the Court’s discretion. The plurality said (at [103]):

*Generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for. The importance attached by r 21 to the factor of delay will require that, in most cases where it is present, a party should explain it. Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives of the Rules.*

1. The need for a satisfactory explanation has been emphasised in cases applying *Aon*. In *Solahart Industries Pty Ltd v Solar Shop Pty Ltd (No 1)* (2010) 88 IPR 337, Perram J refused an amendment application largely on the basis of the lack of any evidence of a satisfactory explanation.

### Consideration

1. All matters relevant to the exercise of the Court’s discretionary power to permit the further proposed evidence and amendment to the pleading should be weighed, including:

* This is not a case, even if it were sufficient, that payment of costs would in any way compensate the parties for the consequences of this application.
* On any view, substantial costs would be wasted and it is more probable than not that the hearing date would need to be vacated, resulting in a substantial delay to a hearing that was originally sought by Samsung on an urgent final basis. Samsung has been given more than sufficient opportunity to agitate its case and to file its evidence prior to this application.
* The litigation is well-advanced in that it commenced on 28 July 2011, with Samsung’s cross claim commenced 19 September 2011. There has been discovery; there have been multiple rounds of evidence, both lay and expert; the hearing dates have been allocated; the timetable for the calling of evidence of local and overseas witnesses have been put in place in circumstances where both parties have said that the process of timetabling for expert witnesses to attend and to meet and to prepare joint expert reports has been complex and not without difficulty.
* Samsung has not given any good reason why the discretion should be exercised in its favour, other than submitting that they are entitled to raise these matters as a defence. In particular, Samsung has provided no good explanation as to the reason for the substantial delay in seeking to file this evidence. That delay is one of nearly 12 months and is still completely unexplained, despite numerous attempts to elicit an explanation during the hearing of this application.
* Apple would need to be given the opportunity fully to consider the proposed evidence and Samsung’s proposed amended pleading. Apple would need to be given the opportunity to adduce further evidence in answer to the matters raised in relation to licensing correspondence and negotiations between Apple and Samsung extending well into 2013.
* Samsung cannot, as it apparently seeks to do, attempt to limit Apple’s response to the Proposed Statements (if admitted) to the evidence of Mr Watrous. XXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXX. Apple is entitled fully to consider what its response would be, and that response is not necessarily limited to Mr Watrous’ evidence.
* Apple has indicated that the likely extent of evidence that it may seek to adduce if the proposed evidence is allowed is not limited to Mr Watrous’s evidence. Apple’s solicitor has explained that XXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX and has stated that any lay evidence adduced by Apple relating to XXXXXXXXX XXXXXXXXXXXXXXX would take a significant amount of time to prepare and that such preparation might impact upon the present hearing timetable.
* Apple has also said that it would need to adduce further evidence from its licensing expert witness and further evidence from its economic expert witnesses. This would necessitate additional joint meetings between the experts, which would in turn necessitate new sets of conclave questions and a consideration of the witnesses’ availability to take part in such meetings and prepare such reports. Present indications are that at least some of Apple’s expert witnesses would have difficulty in making themselves available for additional meetings during the existing timeframe.
* Apple says that it would require further discovery from Samsung in relation to the settlement correspondence and negotiations that are the subject of the Proposed Statements, and in particular would require Samsung to provide discovery in relation to XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXX.
* Apple points to the need to investigate fully the confidentiality breaches and the relevance of those breaches to the matters raised in the Proposed Statements.

1. I accept that the concerns and steps outlined by Apple’s solicitor as necessary to deal with the admission of the Proposed Statements are reasonable. Apple’s solicitor is an experienced litigation solicitor.

# Section 135

1. The Court may refuse to admit evidence under s 135 of the Evidence Act if the probative value of that evidence is substantially outweighed by the danger that the evidence might:

* be unfairly prejudicial to a party;
* be misleading or confusing; or
* cause or result in undue waste of time.

1. Apple relies on each limit of s 135 in this application, and contends that the probative value of the Proposed Statements is such that it is substantially outweighed by those considerations.
2. It says, in summary, that:

* The Proposed Statements have a very low probative value because the evidence is of limited relevance to the case as presently constituted, as Apple’s case is that Samsung’s alleged breaches of its FRAND obligations and contraventions of the Competition and Consumer Act arose out of its 25 July 2011 Offer, application for injunctive relief and XXXXXXXXXXXXXXXXXX.
* XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.
* The form and content of the Korea Statement does not provide a proper understanding of the parties’ negotiations due to the confidentiality restrictions preventing the description of certain negotiations, and Mr Korea’s absence from certain meetings during the period his statement purports to cover. The latter also contributes to the conclusion that this evidence would be unfairly prejudicial to Apple, and/or misleading or confusing.
* Allowing Samsung to rely on this evidence without providing Apple with the opportunity to ‘*test and challenge the evidence by obtaining discovery and preparing and filing responsive evidence*’ would be unfairly prejudicial, but the imminence of the hearing may curtail their ability to do so.
* The need for further lay and expert evidence, expert conclaves, joint reports, and discovery, would contribute to an undue waste of time.

1. Samsung contends that, as at the date of hearing, Apple has had some 11 weeks after to consider and prepare evidence after Samsung first notified Apple of the Proposed Statements. Apple was directed to, but did not, notify Samsung whether it objected to the filing of that evidence until 24 September 2013, after the filing of this application on 6 September 2013. Samsung says that Apple has had ample time to prepare evidence in response and cannot now rely on the short time until the hearing resumes.
2. On the date of service of the Korea Statement on 6 August 2013 (and following service of the Kim Statement on 5 August 2013), Apple sought copies of the annexures to the Proposed Statements and sought information on an urgent basis as to the role of individuals named in the Korea Statement as participants in the negotiations between the parties and whether they were recipients of the licensing information disclosed in breach of confidentiality restrictions. Samsung did not provide that latter information until directed by the Court to do so on 11 October 2013.
3. On 23 August 2013, Apple notified Samsung that, as at that time, it opposed Samsung’s reliance on the Proposed Statements. At the same time, Apple said that it was continuing to consider the evidence and was seeking instructions as to whether Apple would continue its opposition. No change in position was notified with regard to the Proposed Statements.
4. It is the case that Apple has had the opportunity to obtain instructions as to the contents of the Proposed Statements and has had discussions with at least Mr Watrous in August 2013. However, that would have been hampered by the incomplete nature of the Korea Statement as to the complex discussions that had taken place between the parties and the fact that some of the evidence was within the confidentiality regime in the United States and not provided voluntarily by Samsung. A further complication was the impact of the confidentiality breach on the negotiations, which was and remains unascertained.
5. I do not accept that the fact that, for these reasons and in the light of the various steps that Apple’s solicitor said would be necessary to respond to the proposed evidence, Apple has acted unreasonably in awaiting the outcome of this application and the receipt of all of the relevant material from Samsung before preparing the potentially complex evidence it would need to seek to file in response.

# Conclusion

1. Samsung’s application to rely on the evidence of Mr Kim and Mr Korea takes place in the context of a case in which Samsung has always sought an early final hearing. In that context, Samsung has sought, a year after the date set for the filing of its evidence in relation to this part of the case, to rely on new evidence. They have provided no satisfactory explanation of the delay. The inclusion of the Proposed Statements would likely significantly extend and disrupt a carefully set hearing timetable. This would increase the parties’ costs and impact on the utilisation of the resources of the Court. For the reasons set out above, I am satisfied that, at the least, on the basis of the case management principles set out in *Aon*, the Court’s discretion should not be exercised in favour of admission into evidence of the Proposed Statements.
2. Further, for the reasons outlined above and, in particular, because of the limited relevance of, and impact on the proceedings of, the evidence of Mr Korea, it is appropriate in my view to exercise the discretion in s 135 of the Evidence Act to refuse to admit the Proposed Statements. The probative value is substantially outweighed by the danger that the evidence is likely to cause, or result in an undue waste of time. Further, it is appropriate in my view to refuse to admit the proposed evidence on the basis that its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to Apple.
3. It follows that Samsung’s application should be dismissed with costs.
4. Much of the evidence and submissions in this application is subject to a high level of confidentiality. For that reason, I will not publish my reasons until the parties have had an opportunity to consider them. It may be that the reasons can be redacted and subsequently published in redacted form. I will await submissions from the parties before any publication, which should be sent to my chambers within 7 days.

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| I certify that the preceding one hundred and fifty-eight (158) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bennett. |

Associate:

Dated: 4 November 2013

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