IN THE COMPETITION APPEAL TRIBUNAL

Case No:1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 22nd November 2022

Before:

Justin Turner KC

Jane Burgess

Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

JUSTIN GUTMANN
Applicant / Proposed Class Representative

v

(1) APPLE INC.;
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED; AND
(3) APPLE RETAIL UK LIMITED
Respondents / Proposed Defendants

A P P E A R AN C E S

Anneli Howard KC, Stefan Kuppen, Will Perry (on behalf of Justin Gutmann)

Brian Kennelly KC, Daniel Piccinin, Gayatri Sarathy (on behalf of Apple Inc.; Apple Distribution International Limited and Apple Retail UK Limited)

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Tuesday, 22 November 2022

(10.30 am)

Housekeeping

THE CHAIR: Some of you are joining us livestream on our website so I must start by giving the customary warning.

An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Ms Howard.

MS HOWARD: My Lord, I appear on behalf of the proposed class representative, Mr Justin Gutmann, along with Mr Kuppen and Mr Perry. My learned friend Mr Kennelly KC appears with Mr Piccinin and Ms Sarathy on behalf of the proposed defendants, Apple Inc and two Apple UK subsidiaries.

Just as a matter of housekeeping, my Lord, there have been some updates to the bundles. I am not sure whether you are aware of those, because I think you all had your bundles separately, but they have been updated. There are some extra correspondence clips at the end and there is a new bundle 2 which is just the confidential bundle.

THE CHAIR: Yes, I think I have that.

MS HOWARD: There are some new authorities that have come into the authorities bundle --

THE CHAIR: I am not sure we have those.

MS HOWARD: These were filed yesterday. They are in relation to the Hollington line of arguments and some subsequent case law about the admissibility of the French DGCCRF decision.

THE CHAIR: Right. I may not have those. Do you have --

MS HOWARD: I think they have just been handed up to your referendaire so they should be in the authorities bundle.

THE CHAIR: In this one here.

MS HOWARD: If I need to, I can walk your Lordship through those, if it would assist.

THE CHAIR: Okay, yes. I have them, yes.

MS HOWARD: Thank you. Aside from that, I think your Lordship has the agenda at tab 1 of the bundle.

THE CHAIR: Yes, thank you.

MS HOWARD: I didn't know whether we wanted to run through that in order or if there is anything --

THE CHAIR: Whatever is most convenient.

MS HOWARD: That's fine. Would it help if I give an overview of the case or do you want to move straight to the agenda?

THE CHAIR: I think we can probably move straight to the agenda.

MS HOWARD: Thank you.

Submissions by MS HOWARD

MS HOWARD: I think it's agreed between the parties the forum should be England and Wales, that's not contested.

We have filed composite draft directions which is at tab 4 of the bundle.

THE CHAIR: Yes, which I have been working off so far. Thank you very much.

MS HOWARD: It's useful to use that --

THE CHAIR: It will. That's been very helpful, thank you.

MS HOWARD: Then moving through that order, the next item on the agenda is confidentiality and perhaps if I just give the members of the Tribunal an update as to

where we are.

THE CHAIR: Yes.

MS HOWARD: The parties have agreed an interim -- or we call it interim confidentiality arrangements, which are limited to the finance and ATE documents. A copy of that is in the bundle, that's been agreed.

The proposed class representative has sought to agree a final confidentiality ring order for the purpose of the main proceedings and we proposed that in correspondence in October, but the proposed defendants I understand have some material amendments they wish to make to that draft. We did send a further draft on Friday last week and the parties are trying to liaise to agree that. We don't quite understand what the objections are at this stage, or the amendments that need to be made, but we would have thought that's something that could be agreed quite quickly.

THE CHAIR: Yes.

MS HOWARD: Because these things are very common in these types of proceedings.

THE CHAIR: Yes.

MS HOWARD: We have proposed what we call a plain vanilla ring, just a single tier ring, at the moment that will allow documents, any disclosure or any arrangements -- particularly in light of the replies that are due to be filed hopefully at the start of next year, we want to get the ring up in place quickly so any necessary disclosure or those submissions can be made into the ring.

THE CHAIR: Yes.

MS HOWARD: So we have sought a direction that the parties should liaise.

THE CHAIR: Yes.

MS HOWARD: At the moment I think there's a deadline of 16 December for the parties to either agree terms of the confidentiality ring order or submit a composite draft for the Tribunal to resolve. But we are sort of minded of Christmas approaching

and particularly if there is an order for disclosure -- I will be turning to my application later. We are keen to get that disclosure before Christmas so that these proceedings can proceed in an expeditious manner.

THE CHAIR: Yes, so you have your application which we are going to come on to in a minute.

MS HOWARD: That's right.

THE CHAIR: You are also envisaging further documents coming in when a further response is --

MS HOWARD: At the moment --

THE CHAIR: -- provided.

MS HOWARD: -- we haven't agreed the timelines. You'll see in the order at paragraphs 7 and 8 --

THE CHAIR: Yes.

MS HOWARD: -- we have different coloured coding.

THE CHAIR: But you are envisaging other documents will need to be disclosed under conditions of confidence.

MS HOWARD: We have in correspondence been pursuing wider disclosure requests and those requests have been extant now for nearly a year -- for over a year.

THE CHAIR: Yes.

MS HOWARD: For the purpose of this hearing we've focused on one specific document --

THE CHAIR: Right.

MS HOWARD: -- that we think is really necessary and critical for certification purposes.

THE CHAIR: Yes.

MS HOWARD: The other request we're trying to pursue in correspondence and we're

hoping to liaise with the proposed defendants to see -- because obviously we are at an information asymmetry, we don't know what they have. We are trying to highlight things that we think might be relevant and might be in their possession.

THE CHAIR: Okay.

MS HOWARD: We hope we can take the other requests away, liaise with the parties to see what they have and whether the disclosure can be phased and disclosed in to the ring.

THE CHAIR: Right, okay.

MS HOWARD: We are hoping not to trouble the Tribunal with that and to pursue those other requests in correspondence, but obviously the sooner we get the ring instituted the quicker that process can be facilitated.

THE CHAIR: Right, but there are two distinct things: what the terms of confidentiality are going to be and what the scope of disclosure is going to be.

MS HOWARD: Exactly, yes.

THE CHAIR: Neither is agreed --

MS HOWARD: Neither is agreed.

THE CHAIR: -- at the moment.

MS HOWARD: No. I don't know whether --

THE CHAIR: Yes, why don't we deal with it.

MR KENNELLY: (Inaudible) asking the Tribunal to make any orders about the timing for the confidentiality ring. We've agreed that as a longstop we have until 16 December to agree between us. But this is familiar territory and it should really be possible for the parties to agree the final confidentiality order by 16 December. We shouldn't need to trouble you after that.

THE CHAIR: You are both agreed it can be dealt with on paper if it has not been -- you will provide the Tribunal by 16 December on paper any disputes so that it can be

resolved promptly.

MR KENNELLY: Absolutely, and Apple has approached this, if I may say so, in a spirit of co-operation and we shall continue to do so; and hopefully the Tribunal won't be troubled at all by 16 December, except to receive an agreed draft.

THE CHAIR: Very good.

MS HOWARD: Thank you. I wanted to put a marker down really that, although that's a full month to agree the ring, if the parties can agree it quicker than that we should proceed as expeditiously as we can to agree it.

THE CHAIR: So we're agreed on wording of paragraph 2 then as I understand it.

MS HOWARD: Yes. Now I don't think any other issues arise in relation to confidentiality. We have applied for confidential treatment for some of the extracts contained in the finance documents and the ATE documents. I don't think they are contested by my learned friend. So we would apply for the protection of those requirements as set out in our skeleton. There is a schedule, that's been updated, annexed to our skeleton for those redactions.

THE CHAIR: Yes.

MS HOWARD: But we don't understand any objection is made to those.

MR KENNELLY: We have not reviewed those documents, I understand, yet, so we reserve our position.

THE CHAIR: There's liberty to apply as I understand it.

MR KENNELLY: Indeed.

THE CHAIR: That will be the basis on which --

MR KENNELLY: We received them yesterday, which is why we are reserving our rights in relation to whether the redactions are appropriate or not.

THE CHAIR: But you are content to proceed on that basis with liberty to apply if you need?

MR KENNELLY: Yes.

MS HOWARD: I think there was a hold up with confidentiality undertakings, so we couldn't disclose them until we got the undertakings, but we will take that forward without troubling you and the Tribunal.

I think the next issue is our application for specific disclosure. We've limited the request to disclosure of one document and we've framed that as a DGCCRF decision and we made our application on 14 November, pursuant to rule 74 and rule 53(1)(l).

Our position is that that decision, whatever form it's in -- and there is a bit of a debate as to exactly what the document entails -- we say that it is plainly relevant and admissible and it should be provided as soon as possible in good time for Apple's response, and we are happy for it to be circulated within the ring to the extent that there is confidential information in that decision.

Now from what I understand from my learned friend's skeleton, they resist, disclosure on the basis it's not relevant and it's not admissible under the rule in Hollington v Hewthorn.

I think my learned friend said he might not be pursuing that second point. I had prepared some detailed argument for you and I was going to structure it into five sections, but I don't know whether you want to hear me on all of those sections. Shall I give you an outline of the points I was going to make?

MR KENNELLY: The point about admissibility isn't withdrawn, but prematurity is my main point. So I tried to help my learned friend by saying that we don't say that admissibility should be resolved by the Tribunal in this application, it's a matter for another day, but it went no further than that.

MS HOWARD: If I perhaps lay out the five areas I was going to cover and then you can tell me if you don't want to hear me. Firstly, I was going to set out a little bit of historical background to the application and the correspondence between the parties.

I was then going to just give a quick overview of the Tribunal's powers for disclosure and how that interrelates with the common law rules and the CPR and the rule in Hollington, and whether that's applicable.

I was then going to deal with admissibility, relevance and necessity; and by necessity I mean should it be disclosed at this stage in the proceedings.

THE CHAIR: Okay, I think we can take the first point fairly smartly.

MS HOWARD: That's fine. So the background to this application is that on 2 July 2020 the French directorate general for competition, consumer affairs and fraud prevention, which is a bit of a mouthful but the DGCCRF, announced it had completed its investigation into Apple's failure to inform iPhone owners that particular updates, the 10.2.1 and 11.2 iOS updates, were likely to lead to the slower operation of their iPhones, particularly the iPhone 6, the 6SE and the iPhone 7 of those models of iPhone.

Now Apple entered into a transaction as it's called in French, a settlement, with the DGCCRF and agreed to pay a fine of 25 million euros. It might be useful at this point just to take your Lordship to the press release that was issued by the DGCCRF. That was annexed to our skeleton and so it's at the back of -- I think it's tab 5 of bundle 1 and it's at 13.7 and 13.8.

At the moment this is the only information we have in the public domain that we've managed to find about this decision, but there are some key points that come out of this press release. The press release stated the DGCCRF transmitted its conclusions to the French authorities and considered that the failure to provide consumer information was a misleading commercial practice by omission.

I am going to come later to tease out the points that we say are relevant from this press release to these proceedings, but that investigation is now concluded. It is final. Apple has settled the case and paid the fine and has not appealed it.

Now the proposed class representative, Mr Gutmann, has repeatedly requested copies of this decision from Apple in a series of letters dating from 22 December 2021. We referred to it in the very first letter before action and we made it clear that although regulatory findings and settlement materials are not binding on the court, their factual contents and related acknowledgements and admissions by Apple are plainly relevant evidence and the PCR intends to rely on them in support of the collective proceedings. That's paragraph 2.15 of the letter before action. For your Lordship's pen it's at tab 29, page 540. Then we've repeated those requests in May of this year, twice in May, 19 and 31 May, also in June and July and November.

Apple has come back quite shortly just saying the documents are either not admissible or not relevant. I will leave my learned friend to make those arguments on it. They are relying on the rule in Hollington v Hewthorn which is a common law rule of evidence.

My first point, in moving to the Tribunal's powers, is of course that the Tribunal is a statutory body. It is created under section 15 of the Enterprise Act. So, strictly speaking, it's not bound by common law rules of evidence but its own rules of procedure which have been adopted by statutory instrument. I am not going to take the panel to it, but obviously, rule 53, the overriding principle is that the Tribunal has broad powers to give such directions as it sees fit to secure the proceedings are dealt with justly and at proportionate cost.

Now we are very mindful of the Tribunal's guide, paragraph 6.28, where the Tribunal does not encourage pre-certification disclosure in collective proceedings and it's made observations about that in previous case law. But it will allow it, it has a discretion to allow it where it's specific and limited or where it's necessary to determine whether the proceedings are suitable. We say the "or" is a disjunctive criteria not a cumulative one.

But those provisions have to be read in the light of rule 4 of the Tribunal's rules and we say there are numerous elements within rule 4 that are relevant and pertinent here. Firstly, importantly ensuring the parties are on an equal footing and here we have the proposed class representative as an individual bringing these proceedings on behalf of UK consumers but at considerable information asymmetry to the power and resources of Apple.

Apple is notoriously secretive about its intellectual property, its devices, its technology, but also all the relevant facts here about Apple's conduct, the battery issues we set out in the claim form, the automatic download of the software updates, it is all within Apple's knowledge and the proposed class representative has no direct knowledge. As we've made clear in the claim form, he doesn't own an iPhone, he hasn't any kind of conflict of interest with these proceedings, but is at a disadvantage because he doesn't have obviously any direct evidence and doesn't have any direct contact with the 26 million consumers in the UK that have suffered this harm.

So it is important, we say, to bear that consideration in mind when assessing the exercise of the Tribunal's discretion, also ensuring that cases are dealt with proportionately and we don't have to relitigate factual issues where Apple has already conceded or made acknowledgements or admissions to those facts; and that will also save costs and ensure the proceedings are dealt with expeditiously.

Now I just wanted to flag that, being a creature of statute, the Tribunal has already held in the Agents Mutual case at paragraph 8 to 9 -- that's at tab 13, page 241 of the bundle. It might be useful to bring that up.

THE CHAIR: Give me a second. Right, yes.

MS HOWARD: This was a ruling in relation to the admissibility of certain recordings or transcripts of meetings that had been held in relation to a property portal and there was an application for disclosure. The Tribunal made clear, at paragraphs 8 and 9,

that's at page 241 of the bundle, that:

"[*The*] *strict rules of evidence do not apply before the Tribunal. The Tribunal will be guided by circumstances of overall fairness rather than technical rules of evidence*."

Then it continues at paragraph 9:

"*The consequence is, certainly as far as disclosed documents are concerned…that there is rarely argument before the Tribunal as to whether a document is admissible as evidence. The argument, by reason of the Tribunal's general approach, focuses instead on the weight to be attached to the document*."

Then just on the next page, at paragraph 11 there is a reference to rule 4 of the Tribunal's rules and the overriding objective in CPR, Part 1, the obligation to deal with a case justly and at proportionate cost.

THE CHAIR: Just so I understand, we are not concerned with admissibility. This is a disclosure application.

MS HOWARD: This is a disclosure application but I am raising these arguments mainly because of --

THE CHAIR: No, I understand, but you are not saying you want this decision to put in evidence?

MS HOWARD: That's right. My key two points are that this document is relevant, and I am going to come to explain exactly why we say it's relevant to the case we are pleading, but also that it's necessary now. So the points I wanted to take --

THE CHAIR: I don't think at the moment you need to persuade us whether the fact it's admissible or not is determinative of this application.

MS HOWARD: Okay, thank you. The point I was only going to draw from this is the Tribunal said the issue of relevance, in paragraph 11, is a relatively low standard and generally speaking documents should be admitted and any concerns relating to them go to weight, not admissibility. That was the point I wanted to take from that ruling.

Thank you.

In that case, I was going to take your Lordships to the subsequent case of Rogers v Hoyle, which addresses these issues of relevance and deals with the rule in Hollington. It may be I don't need to take your Lordship to it.

THE CHAIR: Perhaps you can come back in reply if necessary.

MS HOWARD: Okay. The key point that I want to draw from that line of case law is we are not seeking to rely here on findings of opinion or findings of the DGCCRF in terms of the French consumer code. What we are trying to get disclosure of is the statements within that decision of primary fact.

THE CHAIR: I understand.

MS HOWARD: We say it's those facts that we can rely on in support of our arguments. That approach of separating the issues of fact and opinion is clearly set out by the Court of Appeal in Rogers v Hoyle and both Mr Justice Leggatt, as he then was, and Christopher Clarke very clearly said that it's actually up to the judge to decide. It is better that the judge sees the whole report and then the judge can make use of it as the judge sees fits and can carry out an editing exercise, and that's at paragraphs 49 to 57 of Rogers v Hoyle.

So if I move on now, I am going to try and explain to the panel why we say this decision is relevant. It's probably best to go back to that press release because there we can pull the relevant points that we say have a parallel with the proceedings in this case.

The press release again was annexed to our application and the key points that we draw out of it are that the two updates, the 10.2.1 and the 11.2, were issued in 2017 and they included a power management device -- we have called that, in our claim form, a power management feature or a throttle -- that slowed down the iPhones' processors.

The press release also refers to the fact that:

"*It included the dynamic power management device [that's in the second paragraph] which under certain conditions, and in particular when the batteries were old, slowed down the operation of the iPhone 6, the SE and the 7.*"

But then it goes on to explain that:

"*Many consumers were unable to revert their phones to the previous version of the operating system and therefore they were forced to change their battery or even buy a new phone*."

We say that is consistent with the case that we have pleaded and the three heads of loss that we have specifically pleaded in our claim form.

The conclusion that the DGCCRF reaches is that there was a lack of information about the likelihood of the updates to slow the phone down and on that basis, they found that that was misleading commercial practice by omission.

Now, in the claim form, we have pleaded the existence of this decision and the findings of fact that we want to rely on in numerous places. That's alongside other regulatory proceedings that have taken place in Italy, Belgium, Spain, the US and Canada. I can give you a list of those points, but they relate not just to our case on infringement and why we say there was a relevant market, there was dominance, they are also relevant to the case of abuse and why we say that there was an exploitative abuse in this case by Apple failing to inform consumers and give them a meaningful choice about these automatic downloads; and that once the download had been installed on the phone it was impossible for the consumer, the user, to then remove that download and return their phone to its previous state without the update.

We also rely on the admissions that Apple seems to have made in settling this case and its decision not to appeal, and we also rely on it in relation to the lack of objective justification.

So we think that there is information in this decision about the precise models of the

iPhone that have been affected, the history of the battery issues and these unexpected power offs that happened before the updates, the timing and the details of the relevant updates, the lack of information about the effects of the update, the inability of consumers to make an informed choice, information about how this power management device operated; and there may be relevant factual information about how the phones were slowed down and what the effects were on its central processing unit, what its effects were in terms of performance.

We also suspect that there may be relevant evidence about Apple's motivations for these practices, there may be reference to internal documents or strategy papers or relevant admissions as to its conduct; and there may also be relevant information about the balance of power between Apple and consumers, the relevant product markets, how Apple competes with other handsets or with other operating systems and the degree of brand loyalty that mean that Apple users may not switch. All those factors go towards the existence of Apple's market power and dominance.

THE CHAIR: You obviously have sufficient information to plead the case at this stage and at least formed a provisional view [there is] sufficient there for certification. You make reference to the decision of the Italian competition authority, which I understand you have. I mean it might be said really you can't at the moment articulate anything in the French decision you require for your case at this stage.

MS HOWARD: We have not seen it.

THE CHAIR: You have not seen it, exactly. So you really want to fish --

MS HOWARD: It's not fishing, its because this decision is later than the Italian one. The Italian decision was issued in 2018, this was issued in 2020. Obviously our claim period extends throughout that period, so it will give us more relevant, more up-to-date, evidence and facts and Apple's knowledge and admissions as in 2020. We do say -- obviously they appealed the Italian decision. I understand the appeal against

the Lazio ruling is still ongoing in Italy.

THE CHAIR: Yes.

MS HOWARD: Whereas this decision is final, it's been settled and there's no appeal. So in terms of weight and status --

THE CHAIR: What's the relevance?

MS HOWARD: The findings will -- I am not going to say they are res judicata because it's not a litigation court hearing, but they will have a certain weight because they are final and Apple has accepted them.

THE CHAIR: You seem to be moving in to now -- I understand your case, you want disclosure, you need information in order to best present your case. I understand that.

MS HOWARD: Yes.

THE CHAIR: But you are not going to be relying on findings of fact, we are back into is this evidence or is this disclosure.

MS HOWARD: It's important to try and bifurcate what we need this document for.

THE CHAIR: Yes.

MS HOWARD: We have been very clear throughout the claim form, we think we have a plausible case on infringement that meets the certification threshold. Obviously it's a low threshold, it's not a merits test, and we think that we've got enough material that we've drawn on from the US proceedings and the Italian decision.

But we are acutely conscious that in the New Year we will be receiving, as Apple has intimated, a strike-out application in a situation where it's very unequal because obviously they have all the facts and the knowledge and we have no direct knowledge. We will have to respond to that application for strike out and summary judgment. We don't know on what basis it is going to be brought yet, but we will need to respond to it in relatively short turnaround at the same time as preparing the response to the CPO application.

We presume that as part of the CPO application there will be extensive expert evidence, as is often common in these cases even though we would say that would be irrelevant for certification. But we will have a lot of work to turn around and to get the French decision at that point, when the time is ticking, we would say would be unfair because we have to respond to two things at once. We'd also need to get a proper translation of the Apple judgment. We would need to sort the confidentiality issues out.

If we can have it before Christmas, we can have a look at it, we could even intimate if there are any bits we want to rely on specifically in relation -- for certification. Then that gives Apple the chance to respond and reply to that in its response, rather than having to go through a whole rigmarole of amendments and associated costs of amendments at a later stage.

So we say there is advantage, given that this document is clearly relevant, it clearly exists. Apple accepts that, even if it's just provisional and it's within the French system, this document exists. It's in their possession and control. We say it's clearly admissible. It's up to the Tribunal to decide what weight they put on it. But at the moment we are under a disadvantage because we have not seen the document so I can't really tell you why it's relevant without seeing it.

But it's not a fishing expedition and we feel that ensuring equality of arms -- particularly for the strike-out application, it would be very helpful for us to see it now rather than having to make a separate application, at cost, in the New Year when the time is ticking against us.

THE CHAIR: Okay. Is there anything else?

MS HOWARD: No. I mean the only point I was going to -- was to show the example of how the Italian decision has helped to add relevant facts to support our claim, but I am not sure you need to see that.

THE CHAIR: Okay.

MS HOWARD: I think obviously there is going to be a lot more in a decision than in a press release and we do think there will be material relevant facts there.

Just to sum up, this is a very limited and specific request. It's clearly admissible. The Tribunal obviously can come to their own independent assessment of the weight to be placed upon its contents. But we do consider it's necessary now to have this document in order to ensure fairness and the expeditious conduct of these proceedings. Thank you.

Submissions by MR KENNELLY

MR KENNELLY: Thank you, members of the Tribunal. The key point is that the PCR has not shown the disclosure of this document is necessary at this stage, and necessity is the test.

It's not necessary to assess suitability for certification, which is the first reason that the PCR gives; and if and when Apple makes a strike-out application, if and when, disclosure of the document might be necessary but that will depend on the precise nature of any strike-out application. Even then, as I'll explain to the Tribunal, it's unlikely that the document will be needed. But in any event the key point is the application is premature.

This is an important point of principle which is why we have taken this point before you. Can we go, please, to the guide to proceedings just to take up that point of construction which my learned friend addressed you first. It's in the authorities bundle behind tab 10, paragraph 6.28, page 177.

You see there at the beginning of 6.28:

"*The Tribunal does not encourage requests for disclosure as part of the application for a CPO. However, where it appears that specific and limited disclosure or the supply*

of information ... is necessary in order to determine whether the claims are suitable [suitable, I will come back to what that means] to be brought as collective proceedings ... the Tribunal may direct that disclosure or information be supplied ..."

A distinction is made there between disclosure of documents or the supply of information, they are different things. But in both of those cases the test is necessity -- not relevance, necessity -- and necessity in order to determine whether the claims are suitable. So we'll come to look at what the test is for suitability in the Tribunal.

It's not a question of whether the documents would be useful or whether the documents would be useful and convenient to save the PCR time, which is essentially the submission made to you by my learned friend. That is not the test. What's described by my learned friend is the essence of a fishing expedition.

We ask then what is this document? Does it satisfy the requirement of necessity for the purpose of suitability and any strike-out application? It's common ground that it concerns a French national consumer protection law. It does not even address competition law. The sole basis, as you saw in the press release, for the report is that it concerns a lack of consumer information. It was produced during the course of investigation by the French consumer protection watchdog, but, as my learned friend accepts, Apple settled the case without any criminal charges being brought against it, that was the context, and it paid a fine by way of settlement with no admission of liability. No court or tribunal made any findings or decision. The report is not binding even in France on Apple.

But even when decisions are relevant and binding in this Tribunal, the Tribunal applies the necessity requirement strictly under the guide to proceedings which I took you to. To see that, could I ask you to take the UK Trucks CMC transcript up which is in the authorities bundle behind tab 3.

Now in this Trucks case, pre-certification, so on a similar context to ours, the PCR sought the confidential version of the Commission decision. The PCR had the non-confidential, public version but it was very short and sparse. It was the confidential version of the Commission decision but had the cross-references to documents to help them understand the basis for the Commission's findings. Remember that decision was binding on the Tribunal.

You see why the PCR sought it, if you go to page 95 of the transcript.

THE CHAIR: 95 of the bundle?

MR KENNELLY: Forgive me, 95 of the bundle, lines 7 to 12. Counsel for the applicant for the disclosure was asked why they were seeking these documents. If you look at line 7: broadly they come under the category of equality of arms. The point is made that the respondents were intending to make substantial submissions, evidence and expert evidence and they were making a great deal -- skipping down to line 11 -- of their expertise about this market and how they were going to put forward evidence about how it operates "*presumably to try and cast doubt on the merits of our claim*".

That's the asymmetry information point that was made to you by my learned friend.

But if you see how the then Chair, Mr Justice Roth, addressed it, you see at line 34 he said at the very, very last line:

"It's really a question of what is relevant and necessary for this --

THE CHAIR: Sorry, I beg your pardon, where are you?

MR KENNELLY: Line 34 on that same page 95.

THE CHAIR: I beg your pardon, yes.

MR KENNELLY: Having heard the rationale, the equality of arms rationale, the concern that because of the asymmetry information the respondent companies would try and cast doubt on the merits of the claim, the Chair says: well, it's really a question of what's relevant and necessary for this stage of the proceedings.

That's why the Chair was struggling to see how the document could assist them, because he said:

"*If any respondent says, 'Ah but the statement in paragraph 58 is not supported by the underlying information', then you can quite legitimately say, 'Well you cannot say that if you will not show us the underlying information'*."

We make the same point. If we put in issue those points in the press release from the DGCCRF -- I will come back to that, plainly there is a powerful argument there for disclosure of the document. It depends on what is necessary at this stage of the proceedings, suitability or strike out.

THE CHAIR: You have reserved your position with regards to strike out and you've indicated you will be resisting certification. You haven't explained what issues will arise at the certification hearing and you've not told us what is in the decision.

So how can I assess your submission that the necessity test is not satisfied?

MR KENNELLY: I can show you now that for the purpose of suitability, which is a requirement of certification, this document is not going to be necessary. I will take you to how they put suitability. But on strike out, I accept that if and when we make a strike-out application in theory it may be possible then to see the necessity of providing the document. But as I will explain, it's highly unlikely we would make a strike-out application and put in issue the facts -- it wouldn't be a very strong strike-out application if we came before you and said the points that are made in that DGCCRF decision are wrong. I will take you to the press release and show you the facts upon which my learned friend relies, which she draws from that.

THE CHAIR: You will be informing the Tribunal whether your case is consistent with the decision in due course?

MR KENNELLY: Absolutely in due course. There are two stages. First of all the strike out -- if we make a strike-out application, if we make one, then the question of

disclosure has to be revisited because if we put in issue those facts in that press release, or however we put it, it will be open then to the PCR to examine how we put the strike out and say: now it does appear that these documents are necessary for us to resist this strike-out application.

It's not good enough for them to say there may be a strike-out application, we may need this document to deal with it. That's a million miles from demonstrating necessity.

Separately, if they are certified, well plainly there will be issues about relevance and we can have the Hollington v Hewthorn debate then but my application -- my opposition to the application does not rest on an argument that they will never be entitled to this document if they are certified. My focus is on the prematurity of the application.

THE CHAIR: Sorry, I just want to make sure I have your submission right. You say if there's a strike-out application --

MR KENNELLY: Yes.

THE CHAIR: I understand you are reserving your position today on that.

MR KENNELLY: Yes.

THE CHAIR: The question of disclosure should be revisited at that stage.

MR KENNELLY: Yes.

THE CHAIR: Okay. So then let's move on to certification.

MR KENNELLY: Yes.

THE CHAIR: Suitability.

MR KENNELLY: Suitability. If we just take up their -- just to conclude on this document, before I put it away on the CMC.

THE CHAIR: I beg your pardon, yes.

MR KENNELLY: You have in front of you. If you go to page 96, you see again an

echo of the point we have just been discussing, chairman, Mr Thompson said at line 29 -- the point he is making is if they put in evidence:

"*If what they put in evidence is at least questionably inconsistent with whatever is in these undivulged footnotes we are in no position to judge*."

We are in the dark as to whether what they put in is inconsistent or consistent with the document they haven't got.

The Chair says:

"*We would not be judging the matter. We are not deciding it, we are just looking at whether ...(Reading to the words)... on the facts set out by the commission, can you bring a collective case with common issues relating to damages*."

So if you turn to page 98, line 24, the Chair says:

"*We are going to leave it so that you can come back after you have seen the responses and make a specific application then. It will be much more focused*."

THE CHAIR: Right. What are you getting out of this that you are not getting out of paragraph 6.28?

MR KENNELLY: Simply a demonstration of how restrictive 6.28 is, not least because of the construction point taken by my friend but also to show that even when a decision is binding, as it was in that case, the court said it's premature -- the Tribunal said it's premature.

THE CHAIR: I mean, as I understand it, the court had a redacted judgment or some sort of judgment and the question is should it have fuller version. Have I misunderstood that? Something about footnotes and, I mean, I don't really see how that can assist me in this case.

MR KENNELLY: I will move on. I will move on then, if I may. The question of suitability is the one I have been invited to address now.

THE CHAIR: Yes.

MR KENNELLY: The question of suitability, and this should be common ground, is not about the merits of the case. The question is whether the claims are suitable to be brought in collective proceedings rather than individual proceedings and whether it's suitable for an award of aggregated damages as opposed to individual damages. That's the suitability question and we see how that's put -- and that reflects the rules on suitability and it's put that way in the claim form, quite properly, behind tab 6.

Could you turn please to the claim form, the collective proceedings claim form.

THE CHAIR: Yes.

MR KENNELLY: Tab 6 in volume 1.

THE CHAIR: Yes, I have tab 6. What page do you want?

MR KENNELLY: It's page 99 where the PCR addresses the question of suitability. So page 99, paragraph 223. This is the beginning of the analysis of whether the claims are suitable to be brought in collective proceedings, which is the question upon which 6.28 focuses. 223, I shall skip over this relatively quickly, the PCR says that, second sentence:

"*Overall, bringing the claims by way of collective proceedings is evidently preferable to leaving them to be pursued by way of separate individual claims*."

Then that is particularised in the paragraphs that follow.

THE CHAIR: Yes.

MR KENNELLY: Then you see at 225 a focus on the costs of doing it collectively are outweighed by the benefits.

THE CHAIR: Yes.

MR KENNELLY: 226, tracking the criteria in rule 79.2.

THE CHAIR: Yes.

MR KENNELLY: There are no separate proceedings making the same or similar nature -- claims.

227, over the page:

"*The size and nature of the class are such as to make the claim suitable*."

That's again the question in rule 79(2)(d).

"*Will it be possible [228] to determine whether someone is in the class or not*?"

Then 229, here we have a hint at a merits issue:

"*The claims are suitable for an aggregate award of damages, rule 79(2)(f) because Mr Gutmann proposes, he says, a plausible and credible methodology for estimating the loss that the proposed class members have suffered in the aggregate*."

Plausible and credible methodology is the threshold required for certification, but that's about loss, not about whether the phones were inadequate or not, the question of fact which is raised by the DGCCRF report.

Now the PCR has not told you anything about why they need the DGCCRF report to address any of these questions. This is an exhaustive list of matters of suitability.

THE CHAIR: Sorry, on certification.

MR KENNELLY: Yes.

THE CHAIR: You will be present making submissions opposing it. Are you only going to be addressing, when you oppose certification, the matters in paragraphs 223 through to 231?

MR KENNELLY: On suitability, yes.

THE CHAIR: On the application, I don't know if -- you will be opposing certification as I understand.

MR KENNELLY: Yes.

THE CHAIR: I don't want to subdivide, would your submissions at that hearing be limited to addressing the matters in these paragraphs under the heading suitability -- that's paragraph 223 to 231. Are you saying they are the only things this Tribunal will be concerned with on certification?

MR KENNELLY: On certification -- I will just quickly check because there may be other issues on certification. But the Tribunal will recall that 6.28 focuses on suitability alone. [takes instructions]

It's too early to say and that's partly why the Tribunal doesn't order disclosure at this stage.

THE CHAIR: Right.

MR KENNELLY: Because when the Tribunal sees our response and sees how we oppose certification that's a separate opportunity to say that documents should be disclosed.

THE CHAIR: So putting words in your mouth, and feel free to say am wrong obviously, as I understand it you are saying there may be a strike-out application.

MR KENNELLY: Yes.

THE CHAIR: In which case disclosure will need to be revisited.

MR KENNELLY: Yes.

THE CHAIR: Also you may be developing your certification case at which, disclosure needs to be revisited or may need to be revisited on that also.

MR KENNELLY: Yes.

THE CHAIR: Have I got that right?

MR KENNELLY: Absolutely, sir, yes. That's why the Tribunal's practice is to make disclosure orders post strike-out application or post response when -- if at all, in advance of the CPO hearing, which is why when we come to timetable appropriate time is allowed for these disclosure issues to be addressed. If the strike-out application is made and post-response -- and both parties have built into their timetables approximately -- there is a difference between us, but there is approximately ten weeks between our response to the claim form and their reply. So if we make a strike-out application there's ten weeks permitted for the PCR to raise concerns

about disclosure, for us to address them and, if necessary, to have them resolved by the Tribunal, which should be ample considering the material before you.

THE CHAIR: This decision, the French decision, is it possible to get it through other means? Do you know? Why is it confidential? Can you get a Freedom of Information request in France to get this sort of thing or not?

MR KENNELLY: It's certainly confidential. I don't understand that it's possible to obtain it by other means. I will be told otherwise. I don't know what the Freedom of Information regime is in France. If the PCR has more information they can tell you.

I am happy for the Tribunal to assume that there is no way for the PCR to get this document unless and until we provide it.

THE CHAIR: That wasn't really the purpose of my question. I was just curious.

Are there any reasons you want to give for not giving disclosure at this stage? You've explained to me the legal test of necessity. But other than that, is there anything relevant to this document as to why you shouldn't produce it? You can produce it readily I assume. What is the downside of producing it?

MR KENNELLY: The Tribunal probably is familiar with the French secrecy regime in other contexts. There's no rule that prevents us from providing it as far as I am aware.

I am not pointing to any particular prejudice. But it's an important point of principle because this a pure fishing expedition. As the Tribunal can see from the claim form, from the detailed material the PCR has put forward, it's inconceivable that this document is necessary for the purposes of certification. Even if they can prove that, it's a matter for another day after they see our response.

There are 30 volumes of documents exhibited to the claim form, 30 lever arch files worth of documents. They have a vast array of factual material in support of their case. The idea that this document is necessary for the CPO hearing at this stage is just inconceivable.

So that's why Apple is taking this stand, as it were, on the proper application of paragraph 6.28 of the guide because this is a pure fishing expedition. They haven't come close to showing necessity in relation to it.

The second reason why it really is appropriate for the Tribunal to resist temptation to say, well, if there's no real prejudice what's the problem, is because of the strike-out application. The point they make that if a strike-out application is made this might be useful is both unlikely and premature. It's unlikely because if we just go back to the press release itself, just back to the reality of what they are saying, and see it in -- I think it's at the back of their application, tab 6. Sorry, tab 5. It's 13/8. I shan't take time to reread the whole thing. But there are three main factual points which my learned friend took from this, three findings which she says the DGCCRF makes in this press release.

The first is that the throttle was included. That's the first factual point, that it included a throttle. The second is that consumers were unable to revert to the previous version of the operating system. The third was there was an alleged lack of consumer information. Those are the three factual points.

Now if in our strike-out application we put any of those three things in issue, well plainly my learned friend has a stronger argument for saying the underlying decision is relevant. But in the real world it wouldn't be a very strong strike-out application if I came before you and said you should strike out their case because the French consumer watchdog got these factual things wrong. It's highly unlikely that any strike-out application would be based on that kind of factual argument.

So we may well bring a strike-out application but if we do it will be targeted and is unlikely to focus on factual allegations like this, which is why, again, it's unlikely and premature to say this document is necessary now.

Now that's not to say that at a later stage, especially post-certification, the document

may be relevant to the extent it has evidence -- it refers to evidence, references a document, that evidence may well be admissible. We don't say the Tribunal should be applying strict rules of evidence. On the points of principle which my learned friend put to you on the questions of admissibility, we take no issue. But that is not a matter the Tribunal needs to resolve today.

Having said all that, just to make sure that my remarks aren't misunderstood, when the merits of the claim come to be assessed the Tribunal will see that Apple has never and would never intentionally shorten the life of any Apple product or degrade the user experience to get customers to upgrade. We've said that publicly and we'll say it again to the Tribunal at the appropriate time; and all the allegations in the PCR's CMC skeleton are rejected.

THE CHAIR: No, I understand.

MR KENNELLY: But I think those are our submissions on the disclosure application.

Submissions in reply by MS HOWARD

MS HOWARD: Thank you. I have just a number of points. It's probably five or six points I need to take the panel to quickly.

Firstly, Apple has had this claim form for over five months and so to stand here and say they still have no clue what their strike out is going to entail or what their response is going to entail we think beggars belief. They made it very clear, in their initial response of 31 May, that this claim in their view was wholly without merit and they intended to strike it out on all bases.

So I think for them to isolate a couple of factual allegations that we've managed to gather or glean from the press release is disingenuous. It is quite clear from our claim that we are relying on this decision for a number of the common issues.

It might be helpful just to take you to our pleading where we set out those common

issues. I will just give the reference for your pen. It is at paragraphs 218 to 222 at pages 97 to 98.

So the common issues that we rely on for the purposes of rule 79 are market definition, dominance, abuse, the theory of harm, the quantum issue which we say is the heads of loss -- the three heads of loss that we've raised; one being sub-standard performance of the iPhones; the second one being the costs of battery replacement that users have incurred; and the third being the costs of premature upgrades.

There is an interrelationship between the three because, as the experts, BRG, have explained, they will have to calibrate the amount of loss for the first head of sub-standard performance to reflect the other two heads.

Then lastly there's interest. Then we set out in detail how those issues are common. But those common issues then feed into the suitability test and, if you turn over the page to the section that my learned friend took you to, the first limb of suitability for determining whether this is an appropriate means for the fair and efficient resolution is to look at the common issues.

So you can't determine suitability without first looking at the common issues that we've raised. We say of course it's sensible that they are going to argue and try and strike out facts about there being a power management device. They've accepted that. They've accepted that with the DGCCRF. They've accepted it in their press releases. What we are looking for is statements of primary fact in this decision that we can then use to support our case on market definition, to support our case on dominance and to support our case on abuse in particular. It also goes to issues of quantum and the interrelationship between these heads because the DGCCRF has explicitly found that users not only suffered sub-standard performance but, because they couldn't unlock this download, they then either bought a new phone or they spent money replacing the battery. So we say there is a substantial link of why this document is relevant to

our pleaded case.

In terms of the guide, I have two points to make. Firstly, the test is disjunctive. It's either specific and limited disclosure or it's suitable for determination in collective proceedings. My learned friend tries to run the two together.

THE CHAIR: Sorry, just go back to that again. I apologise. Just take me through that a bit more slowly.

MS HOWARD: Is this the point on the guide?

THE CHAIR: Yes, on the guide.

MS HOWARD: Yes, shall we pull the wording up of the guide? Would that help, my Lord?

THE CHAIR: Yes, 6.28.

MS HOWARD: 176, I think it is, and 177. Obviously, yes, the Tribunal doesn't encourage requests:

"However, where it appears that (1) specific and limited disclosure or the supply of information is necessary in order to determine whether the claim is suitable, the Tribunal may direct that disclosure be supplied."

THE CHAIR: So you are saying "necessary" only governs the supply of information, is that what you are saying, submitting?

MS HOWARD: I thought that meant the supply obviously because supply of information is a broader category than just an isolated specific request for a document that is known to exist and is relevant. So for disclosure the ordinary test of relevance would apply and the necessity for suitability would apply to the information because --

THE CHAIR: The sentence, if you cross out "or the supply of information is necessary", I mean where do you -- I mean how does the grammar work?

"*However, where it appears that specific and limited disclosure* ..."

What's the next word on your ... I am not sure that works, does it?

MS HOWARD: It may not. The grammar might not work. Okay.

But then my second point is that this guide was drafted obviously before the Supreme Court ruling in Merricks and at that time it was presumed that you would have certification first and you would have a separate strike-out application because the tests were thought to be different. The certification at the time was thought -- it was a merits test. Now the Supreme Court ruling has aligned the test for strike out with suitability and the two have come together, to go part and part.

So, although the wording here is framed in terms of suitability of the collective -- of determining for certification, we say that does bring in the strike-out point because that's the other half of the coin in determining whether you have a plausible case. So we say it is permissible for the Tribunal to take account of the strike-out application as a reason for ordering disclosure now.

My learned friend then made two points. One, he referred to the decision being under French consumer law and said that the lack of consumer information has no relevance to a competition law claim.

MR KENNELLY: No, sorry, I never made that point. I said it may be relevant.

THE CHAIR: I didn't understand that point to being said. We can move on I think.

MS HOWARD: Obviously that's clearly not correct, in light of the Court of Appeal's ruling in Gutmann where the Court of Appeal has said -- and we've got copies if we need to give it to you -- a lack of transparency is relevant for exploitative abuse.

So, although this decision was adopted in the context of the French consumer code, we are not trying to rely on the DGCCRF's conclusions as to the application of the French consumer code. What we are trying to do is take and isolate the findings of fact which we then say are relevant to establishing exploitative abuse under the competition law framework.

The last point was the Trucks ruling which my learned friend took you to. Now

obviously in that case it's quite clear, from Mr Justice Roth's comments at page 95, they did have a copy of the decision. They had a non-confidential version, as your Lordship identified.

THE CHAIR: Yes.

MS HOWARD: He was able to tell from that decision the extent of the redactions and he held there were no redactions relevant to the conduct in that version. Here, we know this decision exists but we don't have a copy of it and we can't even argue properly where it is relevant because we haven't even got a non-confidential version. We have tried to get a copy of this from the DGCCRF itself. We wrote to them on 19 May and we've repeated that request to them, but have had no response from the DGCCRF. So, short of the Tribunal making an application, which we submit would be disproportionate, we think it's far easier for Apple to hand over the document it has in its possession which we say is clearly relevant and the Tribunal can then decide how much weight to put upon its findings.

So, unless I can assist you further, those are my submissions.

THE CHAIR: I am grateful.

MS HOWARD: Thank you.

THE CHAIR: Let's say 10 minutes, so if we come back at quarter to 12.

(11.34 am)

(A short break)

(11.45 am)

(Ruling given but reserved for approval)

THE CHAIR: I understand that there may be an issue with regard to the terms of confidentiality. Mr Kennelly, are you agreed on the terms on which it will be produced?

MR KENNELLY: Forgive me, sir, it will depend. If we go to the order, as I think my

learned friend said, it will follow the making of the confidentiality order.

THE CHAIR: We already have one confidentiality order in the case. Can that just be applied to this document or ...

MR KENNELLY: No, it can't, it's specific to the particular -- we'd need a new order. That order is specific to the matters it covers. I will have to take instructions on --

THE CHAIR: Obviously we don't want to draft it in detail today, but are you in a position to sort of indicate to whom it is going to be disclosed? I think it would be quite nice to establish --

MR KENNELLY: I will check that, sir.

THE CHAIR: -- that if there is a dispute. Could we do that now?

MR KENNELLY: Sir, just to be clear, the current order does not work because it's one way, the provision of documents from them to us.

THE CHAIR: I see.

MR KENNELLY: In fairness to my learned friend she was content to receive the DGCCRF decision after 16 December when we agreed to -- which is a longstop date for the permanent confidentiality ring. So, consistent with the order which we understood to be agreed, subject to the question of whether it be disclosed at all, we are content with that. Certainly there's nothing to suggest it was more urgent than that, but I will hear from my friend.

THE CHAIR: Yes, I was not thinking so much as timing as to whether we are going to have any substantive dispute as to who gets to see it, but it may be the parties are not in a position to argue that today.

MR KENNELLY: There's very unlikely to be a dispute about that. The ring is going to be made in the ordinary way. It will contain the persons which are normally within the ring and I am sure that can be addressed between us. If there's any dispute at all, that's something we can discuss between us.

MS HOWARD: The circumstances I set out at the beginning of hearing, at the moment there's a month's delay until the terms of the ring are going to be determined. If there is any dispute about the terms of the ring, the parties are then going to submit competing drafts on the papers which then have to be resolved before the Tribunal, which means this decision is not going to be disclosed before Christmas.

THE CHAIR: Yes.

MS HOWARD: Already the solicitors, Covington, have indicated the ring we proposed in simple terms is going to need substantial amendments. So we are concerned we are not going to get it -- there may be a knock-on effect on timetable. Suppose we wanted to make amendments to make our reliance very, very clear in the claim form so that could be reflected in their response, that's then going to spread over Christmas and into the New Year. So why not disclose it to lawyers only at the moment?

THE CHAIR: You have agreed the date of 16 December and I understand from -- it may be the parties are optimistic that it can be agreed by 16 December, the confidentiality ring; yes?

MR KENNELLY: Optimistic in the sense we are sure it can be done by then. This discussion, this concern that it might not be done by then is new to me. We understood this to be a longstop date. We are co-operating, this should be done sooner than that if it can be. We don't anticipate there to be a dispute after the 16th. The problem with the order may be it provides disclosure of DGCCRF decision on the same day that this is supposed to be done, 16 December. There may be some room to put a day or two between those two dates.

THE CHAIR: Let's say three working days after that had been agreed.

MR KENNELLY: We are content.

THE CHAIR: Ms Howard, is that all right?

MS HOWARD: Yes, thank you.

MR KENNELLY: Sorry, it will have to be three days after undertakings are given but we'll make that adjustment in the ...

THE CHAIR: Yes, after the ...

MR KENNELLY: But the point that they won't get the document before Christmas, there is nothing to suggest they will have to wait that long.

MS HOWARD: I am sorry.[takes instructions]

THE CHAIR: Just so there's no confusion -- the confusion may be on my part, but there will be a confidentiality ring which is agreed and then the parties have to enter undertakings separately. So there are two different events, is that right?

MR KENNELLY: Yes.

THE CHAIR: You are saying it will be provided within three days of the undertakings.

MR KENNELLY: Yes.

THE CHAIR: And everyone is accepting of that.

Ms Howard, hopefully we can canter through the rest of this reasonably expeditiously. We need to deal with dates.

Discussion regarding procedural dates

MS HOWARD: It's really dates and I think we are to be guided by the panel really as to their availability.

THE CHAIR: Yes. So can I --

MS HOWARD: I don't know whether we want to take it in a linear fashion with the pleadings or whether you have a window that you are minded to think about for the CPO strike-out hearing.

THE CHAIR: We have some dates that we have pencilled in which I can give you as our provisional view and obviously I will hear submissions on it.

The date for the response, so paragraph 7, would be 3 February. As I say, this is just

provisional, just to get the ball rolling. The response, paragraph 8, would be 3 April. Then the hearing would start on 2 May. Then a PTR would be on 18 April.

Just so you are clear, the reason for 2 May is in part due to the availability of this Tribunal. Please take your time taking instructions on that. If you need me to read out the dates again, I am very happy to do so. **(Pause)**

MS HOWARD: I think, from our perspective, those dates are workable. The only crunch point is that the skeleton for the final hearing would be due the same week as the PTR hearing, on our calculations of the --

THE CHAIR: Sorry, I should have added, that was going to be seven days before.

MS HOWARD: Okay, so that would bring --

THE CHAIR: Not ten days before.

MS HOWARD: So the skeletons would be due on the 25th.

We were wondering, for efficiency sake, if we use the same bundles for the PTR as for the main hearing, I know it's bringing the bundle deadline forward but --

THE CHAIR: Yes, yes. No, absolutely.

MS HOWARD: -- rather than killing trees --

THE CHAIR: Absolutely.

MS HOWARD: -- if we could have a bundle deadline that works for both.

THE CHAIR: Yes.

MS HOWARD: It may be that the PTR is vacated anyway if there's nothing in dispute at that stage.

THE CHAIR: For the PTR, I would like a list of issues. It may be very short. I think it's unlikely to be vacated.

MS HOWARD: Yes, okay.

THE CHAIR: But I would like to understand whether it's an agreed list of issues or two lists of issues. I appreciate you won't have exchanged skeletons so it will be the

principal issues as you see them at the time and you won't be held to them.

MS HOWARD: So we can try and narrow -- is it worth trying to do that composite version of the list of issues --

THE CHAIR: Yes, of course, it's better if it can be composite.

MS HOWARD: -- with different colours, that makes life a lot easier I think.

THE CHAIR: Yes.

MS HOWARD: So if we did a -- would the list of issues be at the same time as skeletons for the PTR?

THE CHAIR: I just want them, yes, for the PTR. There is no need to have necessarily detailed skeletons for the PTR, unless there are particular issues the parties --

MS HOWARD: Yes, I am just conscious of Easter kind of intervening --

THE CHAIR: Yes.

MS HOWARD: -- with when the deadline for skeletons would normally be. I think it's Easter Monday.

THE CHAIR: Easter Monday is?

MS HOWARD: I think Easter Monday is the 10th.

THE CHAIR: What's your proposal?

MS HOWARD: Perhaps if we did a composite version of the list of issues and skeletons, if advised, on the 14th, would that be -- that's still quite tight before the hearing, but it should be mainly ...

MR KENNELLY: Forgive me, just on this point, on Monday the 17th, skeletons. So the list of issues and the skeletons could then be a week before, as the Tribunal proposed.

THE CHAIR: So Monday, the 17th skeletons?

MR KENNELLY: No, Monday, the 17th list of issues and then the skeletons a week before the hearing.

THE CHAIR: Give me a date for the --

MR KENNELLY: 25 April would be the skeletons exchange.

THE CHAIR: 25 April for the skeletons.

MS HOWARD: But that's for the main CPO hearing. I am talking about if there needs to be a skeleton for the PTR.

MR KENNELLY: Although we can --

MS HOWARD: That's why I was thinking the 14th for the list of issues and the skeletons for the PTR together, than that gives you a weekend to prepare.

THE CHAIR: I don't particularly want to -- obviously I need them at least 24 hours in advance for the PTR but I mean I don't think skeletons on skeletons on skeletons. I don't want the parties to spend a lot of time, unless it's necessary, doing skeletons for the PTR, so they could be the day before.

MR KENNELLY: Yes.

THE CHAIR: And you may want to talk about things at length but I am not expecting them. I am expecting them to be really fairly concise, just describing what the issues will be.

MR KENNELLY: For the PTR, indeed.

THE CHAIR: For the subsequent hearing so just ...

MR KENNELLY: That's well understood, and the Tribunal has guidance about skeleton lengths and we understand that very clearly.

MS HOWARD: And the list of issues. I am sure we can liaise in the --

MR KENNELLY: May I address you on the proposed dates?

THE CHAIR: Yes, of course.

MR KENNELLY: We appreciate that 2 May is our backstop and I am assuming that's not negotiable. That obviously constrains us. It means we are running a much tighter timetable than the one that we have proposed to you.

Having said that, we would urge the Tribunal to at least give us an extra week for the response, and that would have a knock-on effect of giving my learned friend a week. I appreciate that extra week falls on Easter Monday, so that would be the 11th for the reply.

Just to explain why we need that extra week, even with the week we are in some difficulty because this claim that we are facing, the response that we have to put in, is very technical. Although my learned friend says, well, you've obviously dealt with regulatory investigations in other jurisdictions and you've faced claims, their claim covers phones and software that have never been the subject of any regulatory investigation or claim anywhere and they are quite different from the ones that were previously subject and even then subject only to consumer law investigations.

So we are, over the Christmas period, going to have to engage on these very complex technical issues with the experts in the United States and work out whether these claims are good or bad on these technical points, as is our right, because we are not just preparing our response, we are also preparing a potential strike-out application, both of which need to be done by the deadline that the court is setting, which is why --

THE CHAIR: (Inaudible due to overspeaking) the flavour I had from your submissions earlier, when you were describing how straightforward certification would be. But you are saying there may be some complex technical issues on the strike-out or the certification.

MR KENNELLY: Yes, but the problem is this. True it is that we can only bring a strike-out application on a proper strike-out basis. We can't come before you and say: investigate the facts in great detail. But in order to understand whether their points are hopeless or not, we do need to understand the technical engineering allegations that underpin their claim and these are very complex, you've seen the reports that are annexed to their claim form, and that does require technical and

engineering input from the experts in the United States. That's why --

THE CHAIR: You have had the claim since August. You are presumably not starting tomorrow.

MR KENNELLY: No, indeed not. But even with that, the timetable we put before the Tribunal was done understanding our responsibility to you to put forward realistic dates, and that was put before you having taken instructions from the relevant technical experts in the United States as to when we could get the instructions, information, meetings that we need.

All those dates we've set provisionally have now to be changed. We have to bring everything forward and work over the Christmas period. Holidays have to be cancelled now. We make no complaint about that, that's the job we have, but we still need that extra week, I am told, in order to get the information we need for the response and for the strike-out application.

THE CHAIR: Right. The object of this is not to make people cancel their holidays of course. But just explain a little bit more. The reason you need an extra week is because you need to engage with technical experts, is that right, principally?

MR KENNELLY: Yes, if you look at the claim form, behind tab 6, if you go to the annex, you see the devices and software that are in the so-called Affected iPhones. It is behind tab 6, page 106.

THE CHAIR: Yes.

MR KENNELLY: And the models are described in the left-hand column. To varying extents, the models 6, 6 Plus, 6S, 6S Plus, SE, 7, 7 Plus have already been the subject of consumers complaints or litigation in the United States.

But the 8, 8 Plus and 10 -- it's X but we say 10 -- models are quite different and operate under the iOS 12.1 that was introduced on 30 October 2018. That's very different from the preceding software and the performance management function, feature, again

operates in a very different way. Although this may seem like just another edition of the iPhone, another software update, these are brand new allegations which have never been addressed by Apple before, and this is what we are working on, in addition to the previous problems.

THE CHAIR: Are you saying you will be contesting they had defective batteries?

MR KENNELLY: For certification, yes, on those models certainly, yes.

THE CHAIR: Okay, and you will be -- and then it follows from that you will be disputing the throttling?

MR KENNELLY: For those models, again yes. I cannot tell you now, sir, precisely what our strike-out application will say, but for the purposes of our defence ultimately, we will be contesting everything. But for certification, for strike-out, I can't give you detail now as to what we will be saying. What I can tell you is that, in order to work out what we can say, in order to work out how strong we can be, we need instructions and we need to understand -- we need to test all of the claimant's allegations, which are extremely detailed and supported by expert reports, by reference to these models. These questions have never been put to our experts before on these models and this software and that is a very complex exercise.

But we have not been slow. We've not sat around doing nothing.

THE CHAIR: If they've not got defective batteries, it is not complicated, is it? If that's going to be your position. You've had this claim since August. I appreciate you don't want to disclose the details of your strike-out application today, and I am not asking you to do so, but just in terms of the areas it does not follow from what you are saying that if your case is that these don't have defective batteries and consequently there's no need to be throttling performance, it doesn't follow from that suggestion that this is technically complex. That sounds technically simple.

MR KENNELLY: The conclusion may be technically simple, but in order to explain

the differences between the different models and the different iOS applications, the problems that they were addressing and how the technical solutions were addressed, that is complex and so that is the matter upon which we require further information.

THE CHAIR: And you are envisaging we are going to have to look at this phone model by model at the certification stage?

MR KENNELLY: We may well have to do that, yes. Yes, indeed, because there are very important differences between them. This 8, 8 Plus and X/10 model is quite different. As is our right, we may well ultimately be making strike-out points on quite complex technical issues but which ultimately demonstrate that their case is hopeless in respect of that model, and that is our right, and of course it is possible to bring a strike-out application even on a technical issue if one has sufficiently compelling evidence.

THE CHAIR: Yes, of course --

MR KENNELLY: And that's what we are trying to test --

THE CHAIR: -- I understand that.

MR KENNELLY: -- to see if we have that or not.

THE CHAIR: Ms Howard, I am minded to give Apple until 10 February.

MS HOWARD: I would strongly resist that, my Lord, for a number of reasons. Firstly -- probably three reasons. Firstly, we set out our claim in very extensive detail in the letter before action which was sent in December 2021. So they've had the actual bones of our case in quite some detail for nearly a year.

We notified them in June that we were going to expand the scope to include the iPhone 8 and the iPhone X and they knew that.

THE CHAIR: In June.

MS HOWARD: In June, or before. We sent them some letters along with the -- before we issued, and again at the point of issue we told them the changes we were making

to the case. So they've known that since June.

They'd already had this claim for three months. By the time their reply is due, assuming it is 3 February, it will be six months, or I calculate it as 24 weeks.

Now the standard time for a response and strike-out in other cases has between 15 and 18 weeks. By comparison, we will have nine weeks for our response, assuming that's due on 3 April. If that's moved back by a week, not only do we lose a week, so we have eight weeks to reply to the CPO and the strike-out, which will be new information that's not within our knowledge, it's certainly within their knowledge and they have the technical expertise internally and they should have the history and the knowledge of these events to produce all this technical information, we will be facing it cold for the very first time for the proposed class representative, who is not a technical expert, will have to engage with both our economists and our technical industry expert to take instructions and respond.

That period, if they are moved to 10 February, will cut across not just the February half-term but also the Easter period and we will be putting our submission in after Easter Monday, along with the list of issues, our skeleton for the PTR --

THE CHAIR: Sorry, you will be putting your submission in?

MS HOWARD: Our detailed response to the CPO application and our response to the strike-out application will be due again on 10 April, which is Easter Monday.

THE CHAIR: Well, I hadn't said I'd give you until 10 April. I am envisaging us putting that back to 7 April, which was your original suggestion, so give the --

MS HOWARD: But then we've lost a week effectively.

THE CHAIR: It seems unattractive to turn this into a mini trial on the technical workings of iPhones. That's not what this application should be about. Of course if Apple want to say, want to advance that there's no arguable case on technical issues they can do so, but you don't have to prove you are right in respect of those technical

issues, you need to show there is a triable case.

I have no doubt you are absolutely right, it's going to take a longer period to get to the bottom of all these issues, but we are not at the stage of needing to get to the bottom of them, when dealing with the threshold of whether they are arguable or not.

So ... **(Pause)**

MS HOWARD: Can I just take instructions as to the date of ... **(Pause)**

I am concerned that in that period of April we will be preparing our response to these two quite substantial documents coming in from Apple, at the same time as trying to agree the list of issues, preparing the skeleton for the PTR, the responsibility for preparing the bundles will fall obviously on us as the claimant, and our main skeleton for the CPO and the strike-out hearing, which will be due on 25 April, at a point when everything will be crunching together in the same period of three weeks, which I think is an unfair burden to impose on the claimant all at one stage within a period of three to four weeks.

THE CHAIR: So what if the factual evidence comes a week earlier on 3 February and then the expert evidence and response to the CPO application on 10 February? Then you can use that week and your experts can start looking at the factual evidence, insofar as that is going to be necessary.

MS HOWARD: I am told that might be acceptable if we had the factual evidence, yes.

(Pause)

The only other alternative, I think your Lordship was referring to one deadline being on the 7th. It may have been -- of course, yes.

MR KENNELLY: The difficulty of course, as the Tribunal anticipates, is that the factual evidence is very closely linked to the expert evidence. To the extent that we have factual evidence on these technical issues, it may well come from Apple employees who will be informing the independent expert and they have to be done together.

THE CHAIR: No, that's certainly not my experience, I have to say. Normally the factual evidence is served -- if you've got a technical dispute, factual evidence is served first so that the experts then know what to address their expertise to. So if it's this particular type of battery that was inserted in the phone, they have to know that in order then to give their opinion on it. So I don't accept that submission that fact and experts should go together. That's certainly not been my experience in the patents courts. So -- yes.

MR KENNELLY: Forgive me, sir, while I was taking instructions I missed the dates you were discussing with my learned friend.

THE CHAIR: What I am suggesting is that factual evidence will be served on 3 February and that you will have an extra week, that's to 10 February, for your expert evidence and your response to the CPO application, and that paragraph 8 the date will be 7 April.

MR KENNELLY: I am grateful.

MS HOWARD: 7 April is Good Friday.

THE CHAIR: I can put 6 April if you prefer but it's up to you when you provide it. I don't want to -- it will resist the temptation of ruining your Easter weekend so let's make it the 6th.

MR KENNELLY: Would you permit me one more moment just to take instructions?

THE CHAIR: Yes.

MR KENNELLY: We are content with that suggested timetable. Thank you, sir.

THE CHAIR: I am grateful. Now the length of -- first of all, length of hearing, four days at the moment. That's quite a long time. I assume you will keep the Tribunal up-to-date with any revised estimates.

MR KENNELLY: Certainly, yes.

THE CHAIR: At the moment that's -- again I am nervous that there should be a mini

trial, or nervous that there should not be a mini trial, and a four-day hearing suggests there might be but ...

MR KENNELLY: We are experienced in these matters. It's in no one's interests to try and seek a mini trial.

THE CHAIR: No.

MR KENNELLY: We will certainly keep the Tribunal updated with anything that suggests that the hearing will be a shorter length. I think, just looking at the particular order, going back to the ... yes, sir, just to say that, yes, we hear what the Tribunal says and we will update you if anything suggests that that hearing could be shorter.

THE CHAIR: Okay, and if you could keep that under review I would be grateful.

MR KENNELLY: Of course.

THE CHAIR: Length of skeletons, I think if it's more than 20 pages you have to -- are you envisaging the skeleton being longer?

MR KENNELLY: Again I simply cannot say, but we have well in mind the Tribunal's preference for short skeletons, even if there may be justification for longer ones. It's in our interests to put forward something succinct before you in resisting certification and in any strike-out that we seek to make. I don't think we need a direction in relation to skeleton length: we know exactly what the Tribunal wants and what you find persuasive and we'll bear that in mind when we do our drafting.

THE CHAIR: Okay. We will need a direction at some stage. I think on this occasion if you have not agreed that, if you could -- if you agree it between yourselves, if you could communicate with the Tribunal for its agreement. If there is a disagreement, we'll have to discuss it at the PTR. But the PTR will probably be too late to discuss it so you may need to liaise with us beforehand.

MR KENNELLY: Indeed.

THE CHAIR: Yes.

MS HOWARD: Yes.

THE CHAIR: Then your strike-out application, when will we know if that is emerging? That should be on the -- it should be filed on 10 February, yes, any strike-out application?

MR KENNELLY: Yes, indeed. As far as we are concerned, I think that's everything on the draft order, except for costs.

THE CHAIR: Will you draw up a draft order for my approval?

Costs, I understand that there is -- I have seen the scope of the dispute. I am going to reserve costs of today over to the next -- the certification hearing and we will decide -- we can then argue about all the costs at that stage. I assume there's no objection to that.

MS HOWARD: Yes, we did want to seek our costs of the application for disclosure.

THE CHAIR: No, I am not going to make a separate order for that now.

MS HOWARD: Okay.

MR KENNELLY: We are content with the Tribunal's indication.

MS HOWARD: Thank you.

THE CHAIR: I think that's all.

(12.30 pm)

(The hearing concluded)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?