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4 record.

5 **IN THE COMPETITION**

Case No: 1468/7/7/22

6 **APPEAL**

7 **TRIBUNAL**

8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Tuesday 2nd May 2023

13  
14 Before:

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16  
17 Justin Turner KC  
18 Jane Burgess  
19 Derek Ridyard

20  
21 (Sitting as a Tribunal in England and Wales)

22  
23  
24 **BETWEEN:**

25  
26  
27 **Mr Justin Gutmann**

28 Applicant/Proposed Class Representative

29  
30 V

31  
32  
33 **Apple Inc., Apple Distribution International Limited,  
34 and Apple Retail UK Limited**

35 Respondent/Proposed Defendants

36  
37  
38 **A P P E A R A N C E S**

39 Philip Moser KC, Anneli Howard KC, Stefan Kuppen & Will Perry (Instructed by  
40 Charles Lyndon Limited) On Behalf of Justin Gutmann

41 Lord Wolfson KC, Daniel Piccinin KC, Gayatri Sarathy & Lucinda Cunningham  
42 (Instructed by Covington & Burling LLP) On behalf of Apple

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Tuesday, 2 May 2023

(10.45 am)

**THE CHAIR:** Some of you are joining us livestream on our website so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Mr Moser.

### Submissions by MR MOSER

**MR MOSER:** Thank you, sir. I am leading Ms Howard KC, Mr Kuppen and Mr Perry. My learned friends for Apple are Lord Wolfson KC, leading Mr Piccinin KC, Ms Sarathy and Ms Cunningham.

May I say briefly but at the outset I am extremely grateful for the indulgence on the timetable. The responsibility is entirely mine and certainly not that of my client. I am grateful.

There are bundles in hard copy for those who want them and in electronic form in any event. Some are confidential and marked as such and where that happens I will say that before I turn to them. In other cases there are some parts of the documents, as you will have seen, that are marked in yellow highlight and they are confidential and again I won't read those out in open court and we'll see how we go.

This is an application for certification of collective proceedings against the proposed defendants Apple. There is a draft amended CPO claim form for which we will seek permission and that is at core bundle tab 2, starting at page 97.

Before I come to look at that in any detail, just a comment about the issues. The issues have narrowed somewhat for the purposes of this hearing. The Apple defendants

1 would like to see that as being because we no longer pursue the various heads of  
2 abuse that they have listed in their response. We of course say that we never pursued  
3 most of these, individual heads at least, and to that extent the parties are arguing past  
4 each other. So there will be a certain amount of, I suppose, argument about exactly  
5 what we are saying and I hope to make that clear from the outset. We've made certain,  
6 we say, proportionate and sensible changes or clarifications in our reply and in our  
7 draft amended claim form, largely because this was the first time that Apple had  
8 presented its position to us. They had declined to engage in that way in pre-action  
9 correspondence and that included restating to make clearer that we are claiming on  
10 the basis of a single and continuous abuse. I stress that's not a new approach but it  
11 was quite evidently not emphasised enough the first time around because Apple did  
12 not respond to that.

13 Sir, the list of principal issues as identified in dispute between the parties is at tab 10  
14 of that core bundle.

15 I just go through them very briefly. I know the tribunal has seen them, I know the  
16 tribunal know what is on the menu. There is one issue around the eligibility condition  
17 and that's to do with the methodology that is put forward which Apple say doesn't meet  
18 the Pro-Sys test because they say, well, actually, it doesn't go to the transparency  
19 abuse as they define. I am going to make the first part of my substantial submissions  
20 about that. We say in summary that that is not in fact aimed at the methodology at all.  
21 They are really arguing with our counterfactual and I will explain why we say  
22 Mr Harman has put in place a methodology for that.

23 There is then an unusual and unprecedented challenge under the authorisation  
24 condition and, two, it's asked is it just and reasonable for Mr Gutmann to act as the  
25 class representative in these proceedings? I propose to take that at the end of my  
26 submissions and relatively briefly, I want to see to what extent that is really persisted

1 with by my learned friend before I develop it too far.

2 Then over the page we have a strike-out summary judgment type application. It's in  
3 my submission more summary judgment than strike-out, which is an issue proposed  
4 by the respondents and not initially agreed by us, which is that if we allege the failure  
5 to provide prompt and effective redress is itself abusive conduct should that allegation  
6 be struck out. I should explain something more about this.

7 We did not consider this an issue partly because we perceived that Apple's idea of our  
8 abuse issues was to siloise them and then say, well, that's not an issue on its own and  
9 seek to strike it out. We wanted to avoid a situation where we again have a sort of  
10 sterile debate as to whether this can be an abuse on its own because we say we don't  
11 need it on its own.

12 Now, our position is it might be in the right case an abuse on its own for a super  
13 dominant company not to offer redress. I don't need to go that far. We rely on it as  
14 being abusive in the specific factual context of this case as part of the single and  
15 continuous infringement or single and continuous abuse, along with transparency  
16 acting as an indicator of abuse, as I will explain.

17 Whether or not that's something my learned friend wants to strike out I leave to him.  
18 I don't shrink from saying that the failure to offer redress is part and parcel of the single  
19 and continuous abuse. Indeed we say, our primary case is, that's what it was aimed  
20 at. I also say I don't necessarily need it because even if, even if, contrary to all that,  
21 it's only, as they put it, a factual consequence in the counterfactual, that is still all  
22 I need for my purposes, and I come back to that.

23 Then finally there is the question of in the event the claim is certified, for the scope to  
24 be limited to the period up until the apology, that's called Message To Our Customers,  
25 on 28 December 2017. That is partly about the adequacy of the apology, we say it's  
26 inadequate, and it's partly about whether this is the right time for the tribunal to be

1 asking itself this question because we say that something that's really going to turn on  
2 the evidence and we say, well, we'll see where the evidence takes us as to when the  
3 abuse really petered out.

4 So those are the issues --

5 **THE CHAIR:** Mr Moser, we appreciate Apple have not applied to strike out the  
6 application on the merits or say certification should be refused on that basis but we  
7 need to understand, because we obviously have a gatekeeper function, a little better  
8 the factual and evidential basis of your case of abuse.

9 That's also going to inform the downstream issues of methodology and the application  
10 for summary judgment, reverse summary judgment and I thought we probably should  
11 start with just two questions or areas that are of interest perhaps to the tribunal.

12 Now, we understand that -- so if we look, for example, at paragraph 12 of your  
13 skeleton -- sorry, I am just looking at the skeleton for shorthand, obviously the pleading  
14 is more important, but you make the point that Apple -- sorry, when you have that.  
15 You talk about battery issues, I am just sort of picking this paragraph up rather  
16 randomly.

17 **MR MOSER:** Yes.

18 **THE CHAIR:** And that Apple should have remedied the problem by offering  
19 compensation or a free battery replacement. So we get the impression that part of  
20 your case is that batteries are defective and we understand Apple do not accept that  
21 the batteries installed in the phones were defective.

22 So our first question really is what is your positive case that the batteries were  
23 defective and what is the evidential support for that? Then the second question really  
24 arises from -- and we can perhaps just again for convenience to identify the broad  
25 point look at paragraph 24 of your skeleton where you deal with theory of harm and  
26 you say:

1 "The single and continuous abuse resulted in customer detriment since the Proposed  
2 Class Members were left with Affected iPhones that performed significantly below the  
3 level expected."

4 Then you go on to say

5 they were "sub-standard and inferior to advertised expectations."

6 So again we need to understand what your positive case is that there was a material  
7 reduction in performance such that they performed below expectations or were inferior  
8 to advertised expectation.

9 I don't want to take you out of your course, Mr Moser, but I think really starting there  
10 is going to be of assistance to the tribunal because I think a number of matters flow  
11 from that.

12 **MR MOSER:** Indeed, sir. I will give a short answer now and then, if I may, I will bear  
13 that point in mind as I go along and make that good or even better in the course of my  
14 submissions.

15 So it is quite obviously a complaint of Apple's that we ought not to be bringing  
16 a product defect type claim and we have sought to allay that by saying we are not  
17 bringing a defective product claim. We are complaining about the battery issues as  
18 defined. If I can ask you, please, to turn to tab 2, page 100 of the core bundle in our  
19 claim form. That is where we define the battery issues at 7(a). Sir, we say:

20 "Apple was aware, from 2015 onwards, that certain models of iPhones (the "Affected  
21 iPhones") contained lithium-ion batteries that were defective in that they were unable  
22 to deliver the necessary peak power required by the iPhone central processing unit  
23 ("CPU") the graphics processing unit ("GPU") and operating system and which caused  
24 the smartphones to stall or shut down without warning."

25 We've called that the battery issues.

26 So what we are complaining about is not a defective product as such. They were

1 defective in the sense there defined. We've called that the battery issues.

2 **THE CHAIR:** Sorry, I just need to understand this more clearly. When you say they  
3 are defective, you are not suggesting they were manufactured incorrectly.

4 **MR MOSER:** No.

5 **THE CHAIR:** You are saying they were not -- I don't know, what are you saying?

6 **MR MOSER:** They were not functioning in the way as advertised.

7 **THE CHAIR:** So when you say they should be replaced, what are they going to be  
8 replaced with? If they are not defective --

9 **MR MOSER:** New batteries. One of the matters that seems not to be in dispute is  
10 that if a new battery had been inserted then the phones would have functioned again  
11 as advertised.

12 **THE CHAIR:** I think that is in dispute. I mean, Mr Crumlin talks about that in his  
13 evidence and says: look, it wasn't really a battery issue, and they considered replacing  
14 batteries but that wasn't an answer to the problem.

15 **MR MOSER:** He says that and that's going to be a matter for trial because we  
16 obviously very much say that the way that the interplay between the batteries and the  
17 functionality of the sixes and sevens worked was that it led to unexpected shutdowns  
18 and then after the iOS updates led to slowdown. That's what we are talking about.  
19 That's the difference between the iPhone as it should have been and as it was  
20 portrayed to the consumers and the iPhone as it in fact was.

21 **THE CHAIR:** So I need to understand, we understand there was a problem with these  
22 shutdowns. I think that's common ground. Apple does not dispute that. But you are  
23 saying that's as a result of a defective lithium-ion battery. I just need to understand  
24 what your positive case is that these batteries were defective. As I understand, you  
25 are not saying there was a manufacturing fault but so in what way -- what's your  
26 positive case as to why they were defective?

1 **MR MOSER:** The way that we are describing this is absolutely not as a manufacturing  
2 defect. What you get is you have a mismatch between what these batteries were  
3 supposed to be doing and what they were able to do in the affected iPhones. That's  
4 the sense in which we speak of defective. If it's caused confusion I apologise. It's not  
5 a defective product claim.

6 **THE CHAIR:** You don't have to apologise. So you are saying they are not  
7 appropriately spec'd for the device.

8 **MR RIDYARD:** A couple of times you've said "as advertised", so there's a promise  
9 which has been broken here, so which promise is this and how has it been broken?

10 **MR MOSER:** If we look, and we'll come to it in due course, at how these phones were  
11 advertised, but I can go to it now if you would like me to, they were advertised as  
12 essentially lightning fast and similar. They were not. The example that our expert  
13 gives is of a car that is advertised as going at 200 miles per hour and then it turns out  
14 that for some reason when you go over 150 miles per hour it breaks down. Therefore,  
15 what you end up with, even if you throttle the speed of the car and say, well, it's only  
16 going to go 150, is you end up with a product that doesn't do what it said it was going  
17 to do and therefore is worth less.

18 **MR RIDYARD:** Where does Apple say a car would have gone 200 miles an hour?

19 **MR MOSER:** I am happy to take you there now. Let me just find the place where --

20 **THE CHAIR:** Mr Moser, don't rush it. It's an important question so it's not a ...

21 **MR MOSER:** No indeed, it should not take me long to find. I will see if somebody can  
22 give me the reference. It's in paragraph 61 of the draft amended claim form. I am  
23 grateful to Mr Perry. Where we talk about the battery issues and there you see when  
24 Apple launched the iPhone 6/6 Plus it was marketed as "blazing fast performance and  
25 power efficiency ... offers faster performance and is more energy efficient". When  
26 Apple launched the 6S Plus, "the most advanced chip ever in a smartphone, delivering



1 faster performance and great battery life". When Apple launched the iPhone SE,  
2 "exceptional performance with the same 64-bit A9 chip ... for blazing fast speeds,  
3 longer battery life". Introduced iPhone 6S and so on, "two times faster ... three times  
4 faster". 7/7 Plus, over the page, "more power and performance with the best battery  
5 life ever in an iPhone."

6 We can see how there is a certain amount of dramatic irony in that --

7 **THE CHAIR:** Leaving aside whether these are relative representations to the  
8 consumer, which they might be, let's assume they are for the time being, so your  
9 example of the car is a good one inasmuch as you say you promised 200 miles an  
10 hour and you don't get 200 miles an hour. What we are trying to understand is let's  
11 assume you are promising blazing fast performance, where do you fall short? Where's  
12 the evidence that these phones are falling short of blazing fast performance? We  
13 know they were shutting down and we know that the software was introduced, the  
14 term you use which I think Apple don't like, to slow down the performance, to throttle,  
15 as you put it, the performance.

16 **MR MOSER:** They don't like the word throttle.

17 **THE CHAIR:** No, but what's your evidence that the performance is now unacceptable  
18 in the sense as not living up to the advertised expectation, as you put in your skeleton?

19 **MR MOSER:** Happily we are not doing this in an evidential vacuum at all.

20 **THE CHAIR:** No.

21 **MR MOSER:** This is not follow-on claim.

22 **THE CHAIR:** No.

23 **MR MOSER:** But the evidence as we have it at the moment before disclosure is  
24 replete with regulatory reports and other international collective and other actions --

25 **THE CHAIR:** Yes.

26 **MR MOSER:** -- in relation to Apple and I do say that there has been findings, some

1 not appealed further or settled by Apple, or other complaints that we have seen the  
2 world over that we are going to --

3 **THE CHAIR:** Can you point to passages in those -- and, again, Mr Moser, I don't  
4 expect you to be able to do this in an instant if it's not in your note but are you able to  
5 point to passages in those decisions which make good that proposition?

6 **MR MOSER:** Yes, absolutely. If I can ask you to turn first, because it locates us  
7 appropriately, then I need not go back to the regulatory decisions, to the CMA and  
8 that's in bundle B, this is electronic only I'm afraid.

9 **THE CHAIR:** Right.

10 **MR MOSER:** In bundle B, tab 7, page 1005. So what we have here is an  
11 announcement, essentially, from May 2019, Competition and Markets Authority, of  
12 Apple pledging clearer information on iPhone performance. The statement there is  
13 a commitment from Apple:

14 "We use ... cookies ... The Competition and Markets Authority ("CMA") raised  
15 consumer law concerns with the tech firm last year after finding people were not being  
16 warned clearly that their phone's performance could slow down following a 2017  
17 software update design to manage demands on the battery. The CMA became  
18 concerned that people might have tried to repair their phone or replace it because  
19 they weren't aware ... In addition, people were not able to easily find information about  
20 health of their phone's battery, which can degrade over time."

21 Then over the page:

22 "Since the CMA raised its concerns, Apple had already started to be more upfront with  
23 its iPhone users, but today's announcement locks the firm into formal commitments  
24 always to notify people when issuing a planned software update if it is expected to  
25 materially change the impact of performance management on their phones."

26 Then there are further promises to provide easily accessible information and so on.

1 **THE CHAIR:** I understand that but that does not address performance and whether  
2 it's falling short of the advertised -- or the representations being made by Apple.

3 **MR MOSER:** Well, Apple isn't saying that, no, this never happened. If we turn over  
4 to tab 8 and page 1007, we see a summary of the undertaking --

5 **THE CHAIR:** Sorry.

6 **MR MOSER:** 1007.

7 **THE CHAIR:** Of bundle?

8 **MR MOSER:** Of bundle B.

9 **THE CHAIR:** Yes, I beg your pardon. Yes.

10 **MR MOSER:** A summary of the undertaking itself. There's a definition section  
11 including about Performance Management, meaning dynamically managing  
12 performance peaks. Then one:  
13 "Apple will maintain prominent information about the ..."  
14 I should read the heading:  
15 "Transparency about battery health, unexpected shutdowns and Performance  
16 Management.  
17 "Apple will maintain prominent information about the existence of, and links to, easily  
18 accessible webpages that provide clear and comprehensible information to  
19 consumers about lithium-ion batteries, unexpected shutdowns and performance  
20 management. The web pages will provide guidance ..."  
21 So nobody is saying: oh, there wasn't an unexpected shutdown, there wasn't  
22 a concern about the battery health.  
23 Two:  
24 "If a future iOS update materially changes the impact of Performance Management  
25 when downloaded and installed on an iPhone, Apple will notify consumers."  
26 Nobody is saying it didn't materially the change impact.

1 Three:

2 "Apple will provide information to consumers ... about the battery, such as the battery's  
3 maximum capacity and peak performance capability."

4 Four and importantly:

5 "Apple will use its best endeavours to ensure its consumer-facing staff and its third  
6 party partners are sufficiently familiar with the information ... communicate such  
7 information ... and refer consumers to such webpages ... where appropriate."

8 So that's about transparency. So there was no statement here saying this never  
9 happened.

10 **THE CHAIR:** No, Mr Moser, as I understand, Apple accept that these PMFs will  
11 reduce processor speed at a technical level in certain circumstances and that's not in  
12 dispute and there's not a dispute that there was a problem with shutdowns and so  
13 forth. The question we are on is a narrower one as to whether that reduction in  
14 performance was such that the phones were not operating in accordance with the  
15 manner in which they had been advertised or whether they are not performing as  
16 a premium phone should. It's slowing down a little bit in certain circumstances. It's  
17 then a leap to say that they are slowing down so much that you are no longer  
18 complying with your promises.

19 It's trying to find out what your positive case -- I'm not really interested in what Apple's  
20 case is at the moment, I am interested in your positive case as to what the  
21 performance impact was and why you say it's inferior to advertised expectations.

22 **MR MOSER:** It's of course not only the CMA undertakings. I did promise other  
23 findings.

24 **THE CHAIR:** Okay.

25 **MR MOSER:** So if we turn then further to tab 9 and page 1009, that is the public  
26 announcement of the findings of the Directorate General for Competition Policy,

1 Consumer Affairs and Fraud Prevention in France and we are told there, July 2020:

2 "Following an investigation by the Directorate General for Competition, Consumer  
3 Affairs and Fraud Prevention ("DGCCRF") and after approval by the Paris Public  
4 Prosecutor, the Apple group agreed to pay a fine of 25 million euros in the context of  
5 a criminal transaction" [as it's put there].

6 Over the page at 1010:

7 "Seized on January 5, 2018 by the Paris public prosecutor's office to investigate the  
8 complaint of an association against Apple, the DGCCRF indeed showed that iPhone  
9 owners had not been informed that the updates of the iOS operating system 10.2.1  
10 and 11.2 they were installing were likely to lead to slower operation of their device.  
11 These updates, released during the year 2017, included a dynamic power  
12 management device which could, under certain conditions and in particular when the  
13 batteries were old, slow down the operation of the iPhone 6, SE models and 7. Unable  
14 to revert to the previous version of the OS, many consumers would have been forced  
15 to change their battery or even buy a new phone."

16 These conclusions were then sent to the Paris public prosecutor's office:

17 "Considering that the lack of consumer information constituted a misleading  
18 commercial practice by omission, with the agreement of the public prosecutor,  
19 a transaction was offered to the Apple group – which accepted it – including the  
20 payment of a sum of 25 million euros and the publication, for one month, of a press  
21 release on its website."

22 So slowdown to the extent that people were forced to change the battery or buy a new  
23 phone, it's exactly what we say, sir.

24 **THE CHAIR:** Right, but, I mean, you see, this is a summary. Again, going back to  
25 your example of failing to meet 200 miles an hour in your car, what is your case on the  
26 performance of these phones with the power management function installed? Why do

1 | you say they are -- beyond hand waving, what is your specific case on saying they are  
2 | a bit ...

3 | **MR MOSER:** What happened to the iPhones is that the PMF, we say, was designed  
4 | to throttle the processor and other components. I know Apple say this a benefit  
5 | because it evened out the troughs and peaks. But in so doing and in ensuring that  
6 | less battery power would be consumed, a side effect, and that's essentially what we've  
7 | called the defect, and that may have led to the argument about is this a defective  
8 | product, but the side effect was that they couldn't carry out certain tasks, they froze,  
9 | they showed as a spinning wheel or time-out and they couldn't perform all the added  
10 | functionality and apps that I read to you as having been promised in the advertising  
11 | and marketing material.

12 | **MR RIDYARD:** Which promises in particular have been broken by the PMF? That's  
13 | what we are asking?

14 | **MR MOSER:** Far from blazing fast speeds, instead they either stopped working  
15 | altogether or worked extremely slowly to the extent that people were forced either to  
16 | get a new phone or to have a new battery.

17 | **THE CHAIR:** The evidence for that is where?

18 | **MR MOSER:** Well, if I can take you to the detail of the French DG and then I will take  
19 | you to the U.S. material in public domain.

20 | **THE CHAIR:** That would be helpful, thank you.

21 | **MR MOSER:** There is a confidential document elaborating all of this at bundle A,  
22 | tab 12, page 411 of that bundle. I am not going to read it out because it contains  
23 | confidential information but that is the Directorate General for Competition Policy,  
24 | Consumer Affairs and Fraud Control's official report.

25 | If I can address your attention first please to page 416 and the complaint -- you will  
26 | see the heading, I think I can read that out:

1 "On the practices in question."  
2 And then the second paragraph down in particular starting with the words  
3 "the complaint" and the nature of the complaint is further elaborated, for instance, on  
4 page 417 in the middle of the page in hard copy between the two hole punches, again  
5 it's the first of the 2 paragraphs starting "the complaint".  
6 **MR RIDYARD:** Okay, this is the complaint.  
7 **MR MOSER:** Yes, I am grateful.  
8 **THE CHAIR:** Just so I understand, there is a reference to a search engine in that  
9 paragraph.  
10 **MR MOSER:** Yes.  
11 **THE CHAIR:** You see that? That's the support, as I understand, for that statement in  
12 that paragraph.  
13 **MR MOSER:** The reference to the search engine in which paragraph, sorry?  
14 **THE CHAIR:** The first paragraph you took me to on page 416, second paragraph.  
15 **MR MOSER:** Yes.  
16 **THE CHAIR:** And then it seems to be reiterated on page 417.  
17 **MR MOSER:** Yes. It's of course instructive to read between those paragraphs as  
18 well. There are various studies cited. For instance, the one immediately below the  
19 first paragraph I took you to on page 416, it elaborates with evidence the summary in  
20 the paragraph above.  
21 **THE CHAIR:** I mean, it's on a blog, yes?  
22 **MR MOSER:** I beg your pardon?  
23 **THE CHAIR:** It's on a blog, it says.  
24 **MR MOSER:** Yes.  
25 **THE CHAIR:** Do we know anything about this organisation, looking at the -- I don't  
26 know why all this is confidential because it seems to be on the web but there we go.

1 You've got on practice questions it then refers to an association which publishes  
2 a blog, a confidential blog and ...

3 **MR MOSER:** They were the initial complaints.

4 **THE CHAIR:** Do we know anything about these people?

5 **MR MOSER:** They were consumer association. I can't tell you very much about them  
6 but they were the original complainant in the French complaint.

7 **THE CHAIR:** Right.

8 **MR MOSER:** They were the ones who sent the complaint to the public prosecutor.

9 **THE CHAIR:** Okay.

10 **MR MOSER:** We see that on page 416.  
11 The gist of the conclusion is at page 441.

12 **THE CHAIR:** Yes.

13 **MR MOSER:** And under the heading "Conclusion on information delivered", if I can  
14 ask you to cast your eye down that section.

15 **THE CHAIR:** Starting "It follows"?

16 **MR MOSER:** Yes, down to where it says page 31.

17 **THE CHAIR:** Okay, again, Mr Moser, it does not seem to address the point of the  
18 extent to which performance was impacted, does it?

19 **MR MOSER:** If I can ask you to turn on -- I will come back to that. To page 442.

20 **THE CHAIR:** Yes.

21 **MR MOSER:** The section prior to December. Also, at 445 and importantly the second  
22 paragraph on that page that starts again "it follows".

23 **THE CHAIR:** Sorry, I beg your pardon?

24 **MR MOSER:** 445, second paragraph that starts "it follows".

25 **THE CHAIR:** Yes.

26 **MR MOSER:** If you look at what it is that this follows from at page 444, immediately



1 before, there is the reference to a press release and that is by the paragraph that's  
2 headed "Secondly".

3 **THE CHAIR:** So this is a press release from who? It's an Apple press release?

4 **MR MOSER:** It's an Apple press release. It's not confidential even. It's dangerous to  
5 read from this document but if we look at tab 2 of the core bundle and our claim form,  
6 at paragraph 87, on page 130, we have pleaded this. We have said,

7 "Under impact of the power management function, where the power management  
8 function resulted in the throttling of the affected iPhones, this caused significant  
9 reductions in the technical functionality of the affected iPhones by slowing down their  
10 processor speed and performance and rendering certain basic functions unavailable."

11 I say in parenthesis, don't take my word for it, take Apple's, because the support article  
12 first published in December 2017, subsequently updated, states that:

13 "The level of perceived change ..."

14 And we've put in brackets "in daily device performance":

15 "... depends on how much performance management is required for a particular  
16 device."

17 We say:

18 "But that in cases that require more extreme forms of this performance management,  
19 the user may notice effects such as longer app launch times, lower frame rates while  
20 scrolling, backlight dimming, lower speaker volumes, gradual frame rate reductions.

21 During the most extreme cases the camera flash will be disabled as visible in the  
22 camera UI, apps refreshing in background may require reloading upon launch."

23 We say of course that it's not just the most extreme cases but that this was widely  
24 experienced and we say that that's going to be made good insofar -- we say it's made  
25 good in the French complaint but insofar as it isn't, it's going to do to be made good  
26 also if we look that US material. Can I just finish with the French complaint so that

1 I don't have to go back it to later because it's important on transparency.

2 If one looks at page 452.1, this is back in bundle A where we had the complaint, there  
3 is a conclusion on transparency there in the paragraph that starts "the companies in  
4 the Apple group".

5 **THE CHAIR:** Yes.

6 **MR MOSER:** Now, there is a footnote I should say in our skeleton which refers to this.  
7 It's an old translation. There was a previous translation of this complaint that made it  
8 into the draft bundle. This is the more official translation. Some of the wording and  
9 page numbers have changed but that is what we refer to in our footnote.

10 So leaving that complaint there, this is --

11 **THE CHAIR:** It's still not quite on the point that we are on. So I'll put it to you slightly  
12 differently, Mr Moser. If the iPhone 6 had been sold with the power management  
13 function in it, would it have been falling short of the required specifications? It's not  
14 a change, this is just if it had always had that, designed with it. Let's assume Apple  
15 anticipated the problems it subsequently encountered, so it had been sold like that.  
16 Was there an obligation on Apple to inform consumers that it had a PMF in it, because  
17 I imagine they have all sorts of fancy software it that consumers never know about?  
18 So in those circumstances do you say there was an obligation on Apple to inform  
19 consumers --

20 **MR MOSER:** There is a competition law duty on dominant, and especially we say  
21 super dominant but it really adds nothing, companies to be transparent about their  
22 products and that includes consumers because competition law, when you are dealing  
23 with exploitative abuses, is consumer facing.

24 In those circumstances, absolutely, yes. What you say is: here is a new generation of  
25 iPhone, this in a sense not unrelated to our counterfactual, here is a new generation  
26 of iPhone, it is going to be slower particularly as batteries age --

1 **THE CHAIR:** Slower than what?

2 **MR MOSER:** It is going to be slower than the previous generation particularly as  
3 batteries age because of the demands that are being placed upon the device by new  
4 apps and the new functionality that you can find, and for good measure we say of  
5 course they would have been offering it not at the same premium price as they offered  
6 it when they said that this is blazing fast and 70 per cent faster than the previous  
7 generation.

8 **THE CHAIR:** I understand that, if they are advertising iPhone 6 as faster than  
9 iPhone 5 and it is in fact slower than iPhone 5, I can see there is an issue there.

10 **MR MOSER:** Yes.

11 **THE CHAIR:** But let's assume that they advertise iPhone 6 as faster than iPhone 5  
12 or as the same speed as iPhone 5 or whatever, and it is the same speed or it is faster  
13 than iPhone 5, let's assume they advertise that. In those circumstances, is there an  
14 obligation to tell the consumer that it has a PMF, that it has various software in it to  
15 limit and control excessive voltages being downloaded off the battery and so forth?  
16 Presumably not in those circumstances.

17 **MR MOSER:** I don't need to commit myself to that because it's absolutely not our  
18 case but presumably not because, as Apple rightly says, there will be all sorts of things  
19 inside a phone that the consumer never knows about and does not need to know  
20 about.

21 **THE CHAIR:** So then let's assume that they installed an update and that update  
22 addresses a bug and as a result of that that iPhone 6 is still faster than the iPhone 5  
23 and they are complying with all their advertising representations, again is there any  
24 obligation on your case to inform the consumer in those circumstances?

25 **MR MOSER:** One aspect of this is -- we are using speed as a useful proxy and indeed  
26 we say that the processing speed is a useful proxy for value. It's of course not only

1 about speed but I take your example. Whilst it is not just about speed, there are certain  
2 priorities that consumers set. That's an important one. If it remains unaffected and  
3 the iPhone works as advertised, we wouldn't be having this problem.

4 **THE CHAIR:** Right.

5 **MR MOSER:** That's of course absolutely not what happened in the actual they worked  
6 very much not as advertised.

7 **THE CHAIR:** Mr Moser, that's helpful. You say that it's the fact that it's falling short  
8 of consumers' expectations as a result of the way that Apple --

9 **MR MOSER:** Yes.

10 **THE CHAIR:** How you define that, there may be some argument to be had. But again  
11 I think our question is where is the evidence that it is falling short of those legitimate  
12 consumer expectations? We understand references to slower. We will no doubt look  
13 at some more. But is it so much slower that it's inconsistent with the legitimate  
14 expectations of the consumer?

15 **MR MOSER:** Yes, absolutely.

16 **THE CHAIR:** It's the evidential basis for that.

17 **MR MOSER:** Yes, I was about to take you to the US class action --

18 **THE CHAIR:** Yes.

19 **MR MOSER:** -- as yet another regulator or court that has dealt with it. We've pleaded  
20 that at the draft amended claim form at page 140. This is the class action, sir, starting  
21 at paragraph 114. This is the class action that was settled in April 2020 for a minimum  
22 of \$310 million to a maximum of \$500 million.

23 Now, of course, and I should say, it is a fact that Apple say this all without prejudice to  
24 what is complained of and so on. But we will see that the exact same factual  
25 allegations that we make were made in that set of proceedings.

26 **THE CHAIR:** Mm-hmm.

1 **MR MOSER:** They were settled with redress in the many hundreds of millions. We  
2 see at 115 an extract from pleadings filed in the US class action. None of this is  
3 confidential. The first consolidated complaint states:

4 "After years of customer frustration and attrition ... Apple admitted to one of largest  
5 consumer frauds in history, affecting hundreds of millions of mobile devices across the  
6 globe. Prompting the admission were reports of unexplained shutdowns of certain  
7 devices surfacing more than two years earlier, with consumers complaining their  
8 devices were suddenly shutting down even though the batteries were more than  
9 30 per cent charged. Complaints accelerated in ... 2016 and were accompanied by  
10 reports of unexplained heating."

11 There is a reference:

12 "Even the inventor of Apple's iPod - Tony Fadell - publicly reported" shutdown of his  
13 iPhone.

14 There's various things that made it worse. There is a reference to the chorus of  
15 complaints and at seven, over the page, between the hole punches:

16 "2017 arrived, and as expected Apple installed software updates on the devices to  
17 gather additional diagnostic data in early January 2017. Based in part on that  
18 diagnostic data Apple raised a software update, known as iOS 10.2.1. Apple told  
19 consumers it was to fix bugs or improve security on the devices and a month later  
20 Apple told a reporter at TechCrunch the software update had largely addressed the  
21 shutdown problem. Missing from these statements to consumers or to the tech press  
22 was the true purpose of the software update, to conceal a much larger defect than the  
23 public knew, namely there was a mismatch between the devices' hardware, including  
24 their processing chips and rechargeable lithium-ion batteries and the ever-increasing  
25 demands placed on the devices by Apple's constantly updating the iOS software  
26 platform. This mismatch is referred to as the defects. The software update did not fix

1 or cure the defect. It instead concealed it by secretly throttling the device's  
2 performance to reduce the number of unexpected shutdowns to a more manageable  
3 volume. Apple partially cured one defect by making another defect more aggressive.  
4 For 11 months the secret remained uncovered as Apple continued to hide the whole  
5 truth ..."

6 And so on. So here we have the evidence in --

7 **THE CHAIR:** This is an allegation.

8 **MR MOSER:** We have the allegation but the evidence of complaints in that class  
9 action, we have made essentially --

10 **THE CHAIR:** Are you suggesting we should attach weight to this complaint as  
11 evidence in these proceedings?

12 **MR MOSER:** Of course it's worth reminding the court that even if this were the finding  
13 of a California court you wouldn't be bound by the outcome but it's instructive to see  
14 what the complaint was in the French proceedings, in the American proceedings.  
15 They are the exact same complaints that we make in these proceedings. Insofar as  
16 we speak of defects, we have taken the definition from the US class action, although  
17 we have wrapped it up in our definition of battery issues, as I showed you at the outset.  
18 I absolutely do say that it is instructive to take into account what was being said over  
19 there. I have conceded that Apple say this is all without prejudice but it led to them  
20 paying out up to half a billion US dollars on the basis of the very same complaint that  
21 we are advancing before you.

22 **THE CHAIR:** Yes, I understand that. That's a pure advocacy point and not really an  
23 answer to the question we are seeking to answer at the moment. Apple settled that  
24 litigation in the US and we are not in a position to know what forces caused Apple to  
25 settle that litigation and what we are trying to identify is an evidential basis in this court  
26 for the claims your client is making and I am not sure how much assistance one can

1 get from an accusation in another jurisdiction which is unsupported, at least in this  
2 passage, by data and documents and measurements and expert reports and ...  
3 Mr Moser, sorry, what is the documentary position here? There were documents filed  
4 in support of this complaint, were there? There are documents that might emerge on  
5 disclosure? Or what's your position on that?

6 **MR MOSER:** In California?

7 **THE CHAIR:** As a result of these Californian proceedings.

8 **MR MOSER:** The actual Californian complaint is at bundle B, tab 16, page 1952 and  
9 following.

10 **THE CHAIR:** Sorry, bundle B?

11 **MR MOSER:** Bundle B, tab 16. I am sorry, that is the Californian complaint. The  
12 settlement agreement that I was referring to is at tab 14, page 1727 and following.

13 **THE CHAIR:** I apologise, tab 14?

14 **MR MOSER:** Tab 14, page 1727 and following.

15 **THE CHAIR:** Yes, I have that, yes.

16 **MR MOSER:** I show you that really for completeness.

17 **THE CHAIR:** Yes.

18 **MR MOSER:** I think what is most useful to see is that we know two things. The first  
19 is we know what we have in our own evidence here. We have of course the report of  
20 Mr Sinclair.

21 **THE CHAIR:** Yes, shall we have a look at that?

22 **MR MOSER:** Yes, which you will have seen and which I should take you to.

23 **THE CHAIR:** Yes.

24 **MR MOSER:** Mr Sinclair's report is bundle A, tab 4.

25 **THE CHAIR:** Yes.

26 **MR MOSER:** Again we are limited at this stage --

1 **MR RIDYARD:** Page number please?

2 **MR MOSER:** It starts at page 187. I would like to start at page 233.

3 **THE CHAIR:** Yes.

4 **MR MOSER:** I just want to make a general remark about the inequality or the  
5 imbalance of information between us and Apple in this situation. We are of course  
6 bringing the complaint at this stage. This is an early stage of the complaint to see  
7 whether it may be certified. We have not yet had disclosure from Apple, despite the  
8 fact that we have been requesting disclosure since December of 2021.

9 It is worth noting that Apple says it has run its own diagnostics on iOS 10.2 and their  
10 witness statement refers to extensive testing that they've concluded. We sought  
11 disclosure of that on 19 January of this year. But Apple have refused. So we are in  
12 a situation of serious imbalance of information. That's why we rely on the best  
13 evidence available to us, which is that this is not something that Mr Gutmann has  
14 somehow made up on his own but this exactly the complaint that's been brought in  
15 other jurisdictions where it has led either to a settlement or to an unappealed finding  
16 of a regulator in France.

17 We say that is not at all a bad start in collective proceedings of this kind where very  
18 often you don't have that level of information in a stand-alone claim from other  
19 regulators and courts and complaints. What our expert has looked at again is the best  
20 evidence that's been available and you will have seen in the papers the reference to  
21 the Primate Laboratories Geekbench tests and at page 233 --

22 **THE CHAIR:** Sorry, just so I understand, I understand the point on inequality  
23 information, you only have access to so much information.

24 **MR MOSER:** Yes.

25 **THE CHAIR:** Just before we move on to Geekbench, in respect of the other  
26 complaints that you've pleaded, as yet you don't have any documents underlying those



1 | complaints, complaints and decisions that you pleaded in your --

2 | **MR MOSER:** That's correct.

3 | **THE CHAIR:** -- amended -- there are no publicly available witness statements, expert  
4 | reports as far as you are aware, you haven't been able to get hold of any of the  
5 | documents underlying those complaints?

6 | **MR MOSER:** I'm afraid we do not have access to the disclosure in the US  
7 | proceedings. What we happen to know is that 7 million pages were disclosed in the  
8 | US proceedings. It may therefore be safely assumed that there's a certain amount of  
9 | evidence available.

10 | **THE CHAIR:** Yes.

11 | **MR MOSER:** Sadly not yet to us.

12 | So the Geekbench tests are referred to at page 233 of Mr Sinclair's report at tab 4. He  
13 | explains that users of iPhone devices shared their experiences of device performance  
14 | issues on social media. Naturally this has been criticised by Apple but it is evidence  
15 | that is available to us and we have to draw the best inferences we can from it and so  
16 | must, in my respectful submission, the tribunal and do what it can.

17 | It's explained at 126 what Geekbench is: a software application maintained by  
18 | Primate Laboratories, a measures and benchmark system for performance against  
19 | the scores for different devices and so forth. And the results of the phone operations  
20 | on workload are shown in figure 20 which on page 234. There's an explanation of  
21 | Primate Laboratories testing and whilst Mr Sinclair is able to postulate or able to say  
22 | with considerable confidence what Apple will have in its own possession, he explains  
23 | at 131 on page 235 he is not able to state definitively whether Apple has conducted  
24 | testing to determine prevalence of UPOs, impact of power management, however is  
25 | highly likely that Apple hold such data because a diagnostic tool was introduced in iOS  
26 | 10.2 and Apple would have needed the status and know-how to design the power

1 management feature and there's a reference to an Italian decision indicating that  
2 Apple monitored the effectiveness of the power management feature:

3 "Apple claimed to have made improvements to the power management feature when  
4 the battery health feature was released. If Apple holds such data, it could be analysed  
5 and used to assess the extent of shutdowns and the impact of the power management  
6 feature [...]."

7 We know now of course that Apple has conducted testing, they've just not told us the  
8 outcome or given us the data.

9 When considering your decision as the tribunal, of course you are obliged to think not  
10 only about the data that we already hold as the class representative but the data that  
11 is going to be available for us if this case is certified and at trial. It's, in my submission,  
12 undeniable that Apple will hold such data. We will be able to analyse it and we will be  
13 able to make good the experiences of the consumers that are related in the existing  
14 complaints which have led to, as I say, the settlements.

15 So I do rely on that as evidence in its own right of others having made exactly the  
16 same complaint the world over and that is something that you are, in my submission,  
17 to have regard to.

18 **THE CHAIR:** I understand that and of course there's some force in those submissions  
19 but the trouble with at least the documents we've looked at so far is they don't allude  
20 to data, they don't say: we had a report which showed that phones weren't performing  
21 satisfactorily and you say I would like to get hold of the report, but it's very high level,  
22 it's sort of almost working on the assumption these are material differences in  
23 performance and it's very difficult to understand from those decisions the prima facie  
24 case that performance was below that expected by consumers.

25 **MR MOSER:** Well, one point and then I will try with another piece of evidence, but in  
26 my submission, and, sir, I am conscious you may say again that this is pure advocacy,

1 but in my submission it goes way beyond a prima facie case in this instance where  
2 you have in the public domain exactly the consumer experience of which we complain.  
3 As I say, we haven't based this on theory; on the contrary, we've based this on the  
4 evidence that is already out there in other similar complaints that have led to success  
5 for the complainants.

6 Now I will come to, if I may, another piece of evidence because we didn't rest there.  
7 Mr Gutmann, the proposed class representative, commissioned a survey. He  
8 commissioned a survey from an outfit called Yonder and that is at bundle B, tab 19.

9 **THE CHAIR:** Page number?

10 **MR MOSER:** It starts at page 2061. The approach is outlined at page 2065. We see  
11 there what has happened. Yonder conducted a 10 minute online survey with 427  
12 British respondents, all participants recruited from Yonder's proprietary online panel  
13 Yonder Live. Respondents were screened in a particular way and we see what the  
14 nature of the sample was at the bottom of that page.

15 At page 2067 you see the majority of those who currently own an iPhone also owned  
16 an iPhone in the past. Apple is more trusted than other brands. Across all brands  
17 when choosing a smartphone to purchase, reliability and battery life are the two most  
18 important factors. Nearly all current iPhone users are likely to get another iPhone next  
19 time they purchase another smartphone.

20 Then 2068, over the page, summary of key findings:

21 "Smartphone issues: [...] phone battery draining within 12 hours of a charge would be  
22 at least a slight problem for most users ... with at least half of iPhone 5, 6, 7 users  
23 claiming to have experienced their battery running down quickly on their handset, apps  
24 crashing or unexpectedly shutting down on at least a weekly basis would also be at  
25 least a slight problem for most users, around a quarter claiming to have experienced  
26 a slowdown in performance.

1 "iPhone scenarios, most automatically accept software update ..."

2 And so forth. Because it's important, in the third bullet point:

3 "Only a fifth claim to remember the Apple offer of compensation for faulty batteries in  
4 2017/18 20 per cent, and upon prompting most do not feel it was sufficient. A full  
5 refund or a replacement are seen as more appropriate."

6 Again, the last bullet point, for instance:

7 "Only a very small number of respondents, 4 per cent, took up Apple's offer of  
8 compensation."

9 If one looks at the useful graphs behind all of this at page 2082, this is the graph for  
10 those who recall owning an iPhone and the battery draining within 12 hours or indeed  
11 having an unexpected shutdown.

12 Over the page:

13 "One in six recall their iPhone 5, 6 or 7 working slower than expected on a daily basis.  
14 The second most recalled issue. Phone calls dropped, cameras not working, phone  
15 or apps working slower than expected. At least once a month, 27 per cent."

16 **THE CHAIR:** I beg your pardon, give me the reference again.

17 **MR MOSER:** 2083:

18 "Phone or apps working slower than expected daily, weekly at least once a month, 16,  
19 21 and 27 per cent respectively."

20 Over the page at 2084:

21 "The majority experienced problems with their iPhone 5, 6 or 7, battery life issues are  
22 the most frequently recalled."

23 **THE CHAIR:** Why have we picked up iPhone 5 in this, they are not affected by this?

24 **MR MOSER:** This was right at the outset of this and we had originally framed it as 5,  
25 6 or 7, it was during pre-action correspondence that we dropped, but as I understand  
26 it, it's alleged that or, well, it's maintained that we've accepted that this wasn't

1 a problem with iPhone 5.

2 **THE CHAIR:** Yes, but it's difficult to know what the data would look like if it was just  
3 iPhone 6 and 7. Can we tell that or --

4 **MR MOSER:** It's not made clear. If one looks at the little pictures on page --

5 **THE CHAIR:** Okay, sorry, so 2084, we can see 7 on the right, 6 is in the middle, is  
6 that right?

7 **MR MOSER:** That's right.

8 **THE CHAIR:** Then 5 is on the left, it's not labelled.

9 **MR MOSER:** Yes.

10 **THE CHAIR:** I understand, thank you.

11 **MR MOSER:** There we are. Of course this was carried out --

12 **THE CHAIR:** But it does not show a deterioration between 5 and 6 insofar as any of  
13 this is meaningful and material, "Battery ran down quickly", it's actually slightly better  
14 with the iPhone 6. In fact the shutdown unexpectedly does not seem to have got  
15 caught by this dataset.

16 **MR MOSER:** Well, there are limitations to any survey. It certainly doesn't show the  
17 dramatic increase in performance that was advertised between 5 and 6 or 7  
18 respectively.

19 **MR RIDYARD:** It doesn't need to test that, does it?

20 **MR MOSER:** No, but you can infer that.

21 **MR RIDYARD:** How?

22 **MR MOSER:** Because 6 and 7 don't perform significantly better.  
23 What you have, if you go down the left-hand side, is a breakdown into the different  
24 types of complaint: the battery ran down quickly, the iPhone slowed down after  
25 updating the software, the iPhone would shut down unexpectedly, the iPhone would  
26 drop calls, the iPhone was unable to save data, photos, text messages, et cetera.

1 So it is broken down not only in relation to the type of phone but also the type of issue.  
2 These are the issues that we have characterised as battery issues.

3 **THE CHAIR:** Yes.

4 **MR MOSER:** As I say, we say it is undoubtedly the case that once we get the  
5 disclosure from Apple, who have all the data in relation to this and in relation to what  
6 happened after each iOS update, it will be available to us, it will be available to the  
7 tribunal. It will show, we say, the real issues that are indicated by the complaints, by  
8 the survey, however imperfectly at this stage, because we have that inequality of  
9 information, but we should not be shut out because of that inequality at this stage. On  
10 the contrary, all of the available information indicates that there is an issue in my  
11 submission --

12 **THE CHAIR:** Yes, we have to consider whether there's a basis today to certify this  
13 case.

14 **MR MOSER:** Yes.

15 **THE CHAIR:** I understand why you say you need to get hold of documents,  
16 I understand that. But is there an evidential basis for supporting the case as currently  
17 pleaded? It's one of the questions we need to address as a tribunal and obviously ...  
18 now in terms of documents, and this is just a general question not to be answered  
19 now, are there documents of narrow compass which would assist you to plead, without  
20 going to a full disclosure exercise, assist you to flesh out some of the matters that  
21 you've been discussing? In particular I have in mind Mr Crumlin's witness statement  
22 from Apple where he alludes to certain matters and obviously we've got the prior  
23 decisions and it would be helpful I think at some stage maybe over the adjournment  
24 for you to address your mind to what documents that are readily accessible that you  
25 would like to see.

26 **MR MOSER:** Indeed. We won't have to address our minds to that for the first time or

1 | come up with anything new for that purpose because we have on about a dozen  
2 | occasions in the correspondence bundle asked for certain documents and so those  
3 | are the documents that we know must exist and that would assist us greatly in  
4 | supporting the nature of our complaint.

5 | **THE CHAIR:** Indeed.

6 | **MR MOSER:** We have not had them.

7 | **THE CHAIR:** No, but obviously the case has moved on a little bit and pleadings have  
8 | been amended and so forth. It may be that that list is to be refined or to be expanded  
9 | even, I don't know.

10 | **MR MOSER:** It may well be. But we have an existing shopping list of documents that  
11 | we are after and we are happy to share that.

12 | **THE CHAIR:** Mr Moser, we need a break for the shorthand writer.

13 | **MR MOSER:** Yes.

14 | **THE CHAIR:** 5 minutes. Is now a convenient moment?

15 | **MR MOSER:** That's a convenient moment, yes.

16 | **(11.55 am)**

17 | **(A short break)**

18 | **(12.03 pm)**

19 | **THE CHAIR:** Mr Moser, I am sorry for peppering so many questions at you and taking  
20 | you out of your note and so forth. We do need to bring a little bit of structure back I  
21 | think. It's our fault, not yours. So we are obviously, as you will have picked up,  
22 | concerned about whether there is a sufficient evidential basis for this to go ahead at  
23 | all at the moment notwithstanding Apple's narrower points. On that I had just one  
24 | more question before I come back to where we are and where we go to next. The  
25 | question is, we have been discussing the reduction in performance as a matter of the  
26 | PMF and we've looked at your suggestion that it's not consistent with the

1 representation, consistent with the advertising and you've made the submissions that  
2 you only have so much information at this stage.

3 Is that essential to your case? So if there had been the update and it impacted  
4 processor speed but that wasn't materially noticeable to the consumer, would there  
5 nevertheless be an abuse? Or is that an important aspect of your case? Does that  
6 make sense, that question?

7 **MR MOSER:** It does make sense. Two points. The first is I still owe you the last bit  
8 of evidence that was going to sum up --

9 **THE CHAIR:** We'll come back to that.

10 **MR MOSER:** But it is important what the consumer expected and what the consumer  
11 got because that's what we say the nature of the misleading part of this is driving at.  
12 It is however not only the consumer, it does matter whether the car could go  
13 200 kilometres per hour or miles per hour or not, as it were. So if the device was  
14 intrinsically less valuable than advertised or than was it purported to be, then that is in  
15 a sense enough for me. I don't need everybody to have known that.

16 **THE CHAIR:** If it's less than advertised.

17 **MR MOSER:** If it's less than advertised, so if the car can only go 150 and not 200 --

18 **THE CHAIR:** The fact that you always drive at 60 doesn't matter.

19 **MR MOSER:** It doesn't matter. It doesn't matter because you've got a less valuable  
20 car. So our methodology is very much driven by what the true value of the phones  
21 was in actuality.

22 There is of course, and this is not a completely straightforward point ever, but there is  
23 of course an interplay between consumer awareness and value of the phones, so  
24 once it gets out transparently that there is a problem, then people will not want to pay  
25 300 plus pounds for a premium iPhone if they are told, well, actually it's going to shut  
26 down unexpectedly and it's going to run slow when you are trying to use the apps,



1 because they will not perceive it as being worth that.

2 So the value is both intrinsic but it is also driven by consumer perception and that's  
3 why the proxy that's been used by Mr Harman is all about CPU speed because that's  
4 something that the evidence shows, even the available evidence shows, consumers  
5 particularly value.

6 **THE CHAIR:** You say available evidence. I mean, this is the sort of anonymous  
7 survey on the internet?

8 **MR MOSER:** It's also what Apple themselves clearly value because that's how they  
9 advertise the product, it was going to be lightning fast.

10 **THE CHAIR:** Yes, I understand.

11 **MR MOSER:** So clearly that matters. I would have thought that at least was almost  
12 common ground between us. I have not in all the excitement gone to the CMA market  
13 study, which is on something slightly different, which is that study which is about  
14 ecosystems in mobile technology, but that's something the CMA have found in their  
15 2020 study. We could go there if you wanted me to.

16 So it's proper evidence, it's not something that I am just saying.

17 **THE CHAIR:** Yes.

18 **MR MOSER:** The French decision as well.

19 **THE CHAIR:** Yes, Mr Moser, again I apologise, we've taken you out of your course  
20 considerably but we are on a topic which you weren't preparing to address us on  
21 because Apple had not taken the point, I understand that, which is in answer to the  
22 two questions we've put forward and in particular what your basis for saying there's an  
23 abuse at all is in this case. So we need to deal with that properly and obviously one  
24 of the options to consider is first of all whether we say we are not prepared to certify  
25 today at all, that's one option, another option is to order disclosure today and send you  
26 away with an opportunity to re-plead once you've seen that disclosure.

1 **MR MOSER:** Yes.

2 **THE CHAIR:** Then the third is just for you to press ahead and we agree with you and  
3 we certify. Those seem to be the three things. We need to deal with those first, I think,  
4 before we go on to anything else.

5 **MR MOSER:** Certification is an iterative and dynamic process and I think you've heard  
6 no complaint from me at all about what you've asked me. It makes sense. It is  
7 noticeable, important that it's coming from the tribunal and not from Apple and what  
8 you read into that, I of course would suggest it seems even Apple didn't want to go so  
9 far as to say that the battery issues --

10 **THE CHAIR:** It may have been a very fiendish tactic on Apple's part of course. We  
11 don't know.

12 **MR MOSER:** Indeed, it may be a subtlety that has alluded me.

13 **THE CHAIR:** Yes.

14 **MR MOSER:** But I completely see where we go with that, sir. If, sir, you want to go  
15 further down the disclosure line, I suppose it's also a question, and I am sorry now  
16 I have segued into discuss mode, but it's also a question of time management, so if  
17 disclosure might be the route, then query how far I am going to get with the arguments  
18 on strike-out and so forth. But there I am entirely in your hands.

19 **THE CHAIR:** Yes.

20 **MR MOSER:** I of course say that we would like this certified. There's plenty of  
21 evidence, prima facie evidence --

22 **THE CHAIR:** Yes.

23 **MR MOSER:** -- of where we say we are going with this and we absolutely know that  
24 Apple has evidence on this which disclosure will have to produce.

25 **THE CHAIR:** Yes.

26 **MR MOSER:** So we urge upon you to have no concerns on that front. Of course

1 I understand you have reasonable concerns and that's not for me to gainsay.

2 **THE CHAIR:** We've not heard your full argument on whether this should be certified  
3 as showing a --

4 **MR MOSER:** No.

5 **THE CHAIR:** So we certainly wouldn't make that decision at this stage. We don't  
6 have to hear full argument from you on it. If on the other hand you are attracted to the  
7 proposition of getting disclosure and then proceeding on that basis, you can take  
8 instructions over the adjournment or you can tell me that now or we can see where we  
9 get to. Of course it's up to you.

10 **MR MOSER:** Can I propose a particular course, which is that I finish with the thing  
11 that I was about to finish with when we took a break for the shorthand writer -- I have  
12 been told, by the way, to read more slowly, so I will try and do that -- and, sir, then  
13 perhaps I will take instructions for a moment as to your suggestion, sir, and we see  
14 where we go. I am grateful.

15 **THE CHAIR:** You were on the expert report, weren't we?

16 **MR MOSER:** We were on expert reports and the last expert report I was going to take  
17 you to on this subject was Mr Sinclair's second report.

18 **THE CHAIR:** Yes.

19 **MR MOSER:** I have been previewing, as it were, what he says there in my  
20 submissions but it is in fact evidence, there has been no application to cross-examine  
21 him for present purposes, but it's at tab 6 of bundle A. It starts at page 319. Mr Sinclair  
22 notes at 5 that Apple have not explained fully how this worked, the PMF worked. His  
23 thesis is that it may have caused an across-the-board device slowdown.

24 He concentrates on the importance of the CPU in delivering user experience and we  
25 see that at page 324, starting at 11, where he also deals with the evidence of Mr Rahn  
26 and Mr Crumlin. He says:

1 "Mr Crumlin states that CPU performance is 'one very narrow metric of performance'  
2 not a 'proxy for user experience as a whole'."

3 He disagrees with these statements, obviously the sort of thing that is for trial, but we  
4 see over the page at 14 the fact that the CPU and the GPU -- the GPU is the graphics  
5 processing unit, that's the hardware component:

6 "CPU and GPU are components in a complex high-dependency system that may  
7 suffer from bottlenecks. Given that both CPU and GPU act as components in a  
8 complex system, the impact of the user experience of these interdependent  
9 components is mutually inclusive meaning that the user experience would be impacted  
10 by the component that is, at that specific time, the bottleneck and thus, in my opinion,  
11 CPU is as important as GPU when considering user experience."

12 That is in answer to Mr Crumlin's arguments about the relationship between CPU and  
13 GPU. There is a reference to a paper published by members of the University of  
14 Texas entitled 'Mobile CPU's rise to power' and it states, quoted at 15, on the criticality  
15 of CPU:

16 "Mobile applications are developed in general-purpose programming languages that  
17 primarily target the mobile CPU. Even for applications that utilize other SOC  
18 components [SOC is systems on chips] such as the GPU and image decoder, end-  
19 user satisfaction still depends on the CPU performance. Therefore, mobile CPU  
20 design remains relevant as hardware acceleration [i.e. GPUs] and [what's called]  
21 heterogenous execution [i.e., the use of multi-core processors and other accelerators]  
22 catch on."

23 So in other words, he says:

24 "My [meaning his proxy of looking at CPU] is a good one."

25 Over the page at 326 there's reference to a satisfaction survey: "User Observation:  
26 Number 4:

1 Even for applications that utilize other SOC components, such as the GPU and image  
2 encoder/decoder heavily, mobile CPU performance capability remains critical."  
3 And although that study, we are told at 18, was about a Galaxy Android device, it's  
4 exactly the same bit architecture as the iPhone 6s and so on.  
5 He then responds to the criticism of the Geekbench data at 20 and following. Then  
6 over the page at 327 he says, and this is the first bullet point, last sentence:  
7 "Pending further disclosure, even if it is not perfect, the data gathered by Geekbench  
8 is the best publicly available data to use as a suitable proxy for demonstrating the  
9 PCR's provisional methodology."  
10 The third bullet point, again the last sentence:  
11 "The Geekbench data shows the 'collective wisdom' of the performance scores of  
12 120,000 affected iPhones in the form of graphs of users with the PMF and without the  
13 PMF on their devices."  
14 Over the page at 328, 24, there is, again the last sentence of 24:  
15 "The paper submitted to the IEEE symposium further supports this by stating that the  
16 bottleneck in future (i.e., after 2016) applications is the CPU and not the GPU ..."  
17 And so on. We know, of course, Mr Sinclair's conclusions on the CPU.  
18 There's then a lengthy section that includes the way that Dr Rahn and Mr Sinclair read  
19 the same graph in slightly different ways, which is largely a matter for evidence. I  
20 know that's something my learned friend complains of in his skeleton argument but  
21 the dispute is essentially summarised at paragraph 26, page 329, five lines down:  
22 "Dr Rahn states that rough estimations of 70 per cent of iPhone 6 users and  
23 80 per cent of iPhone 7 users did not experience any PMF intervention."  
24 He agrees with analysis of his data.  
25 "However, this still shows that 30 per cent of iPhone 6 users and 20 per cent of iPhone  
26 7 users did experience some form of PMF mitigation."

1 | Importantly, that is only a snapshot taken at that particular time, it does not reflect the  
2 | overall picture of the lifetime of the affected iPhones, because of course my learned  
3 | friend has latched onto that, he agrees with Dr Rahn, so there's no problem:  
4 | "As the calendar and chemical age of the battery increases, a higher proportion of  
5 | affected iPhones will become increasingly subject to the interventions by the PMF."  
6 | He explains to the extent that this is in a sense the data that is being used is both sides  
7 | simply making a stab in the dark. We see that at page 330, paragraph 29, the last  
8 | sentence:  
9 | "Both analyses of the data are valid and both suffer from the same accuracy limitations  
10 | inherent in a visual inspection of graphs of data."  
11 | At 30 his conclusion is, last sentence of 30:  
12 | "So over time, the figures Dr Rahn refers to will increase continuously and the  
13 | 70 per cent and 80 per cent for unaffected users will decrease continuously. As the  
14 | devices' batteries age, it is realistic to assume that once a certain period of battery  
15 | ageing has elapsed, all the devices may be subject to PMF mitigations."  
16 | So we are talking, sir, about all of the devices and for present purposes that is the best  
17 | evidence that we can produce based on what is available. Obviously Mr Sinclair says  
18 | more. I can't read it all out now, but some of it is important and then also section is  
19 | important.  
20 | Paragraphs 32 and 33 are really worth alighting upon because first of all it reiterates:  
21 | "[...] Apple's iPhone 6S launch press release advertising 70 per cent faster CPU and  
22 | 90 per cent faster GPU, Apple themselves are using CPU and GPU speed as an  
23 | indication to potential purchasers of the better than the previous model user  
24 | experience."  
25 | That's the point I pre-advertised and here is the expert putting it into evidence.  
26 | His conclusion on that at 33 --

1 **THE CHAIR:** That advert at 28 --

2 **MR MOSER:** Yes.

3 **THE CHAIR:** -- that was published in the UK?

4 **MR MOSER:** Yes, it was.

5 **THE CHAIR:** Was that part of marketing materials going to the shop?

6 **MR MOSER:** It was certainly part of the marketing materials that went on to the

7 internet.

8 **THE CHAIR:** Press release. Do we know if that gets repeated?

9 **MR MOSER:** I will have to come back to you on that.

10 **THE CHAIR:** Yes.

11 **MR MOSER:** So he explains his provisional methodology and he's used the logic that

12 a fully performing CPU operates 70 per cent faster. Then he's taken the conclusions

13 from Geekbench data and compared it. He says, by first hole punch:

14 "This means that the CPU in the sub-performing iPhone 6S is operating only

15 11 per cent faster rather than the 70 per cent faster as advertised than the fully

16 performing CPU in the iPhone 6."

17 He says at 34 he does not yet have access to GPU data although Apple will

18 presumably have it. He concludes there:

19 "It should be reiterated in the absence of the PMF the iPhone should be performing

20 70 per cent better."

21 I am told that if one clicks on the link in footnote 28 it brings up the press report or the

22 press release.

23 **THE CHAIR:** Is this the press release on Apple's website?

24 **MR MOSER:** Yes. 36, the expert's conclusion:

25 "What has become apparent from Mr Crumlin's witness statement is that whilst my

26 first report relied on the Geekbench data which deals only with CPU performance, the

1 PMF mitigation seems to have also caused a reduction in the performance of some  
2 other hardware components over and above the CPU and GPU, although a complete  
3 and explicit list of system components is not provided. Once this is provided with any  
4 relevant testing data, I will be able to supplement my assessment."

5 At 40, evidence that will likely become available on disclosure, there's the reference  
6 to Mr Crumlin talking about extensive testing at 40. At 41 Mr Crumlin refers to the  
7 access that Apple has to performance data about the behaviour of the affected  
8 iPhones. There's data gathered from standard automated testing.

9 Thirdly, Mr Crumlin refers to other testing, further examination. Fourthly, he refers to  
10 Apple gathering additional data. And at 45, in addition to all of that which is referred  
11 to expressly by Mr Crumlin -- that's me talking, not what it says here -- in addition to  
12 all of that, there is further data, says Mr Sinclair, that has not been referred to in Apple's  
13 witness evidence, and he sets it out in his bullet points.

14 **THE CHAIR:** You say you've not had disclosure of any of this.

15 **MR MOSER:** We've asked for it. I mean, one of the things that we've said is: look,  
16 you've referred to this in the witness statement, we are entitled to it, but we haven't  
17 had it. So it exists. We are entitled to see it. I mean, depending on how you want to  
18 take the matter forward, this would be the moment perhaps to take instructions on, sir,  
19 your suggestion in relation to disclosure.

20 **THE CHAIR:** Yes.

21 **MR MOSER:** But I am in your hands.

22 **THE CHAIR:** I appreciate you've not fully developed your case and we are not  
23 shutting you out from developing these arguments further, but obviously you have  
24 seen some of our provisional questions and provisional concerns. If it's attractive to  
25 you to get documents and be able to plead the case a bit more fully and a bit more  
26 precisely, particularly in the areas we are talking about, then it would be helpful to have



1 | submissions from you on that and then we are in your hands whether you want to  
2 | press ahead irrespective of that.

3 | Mr Moser, I don't want to rush you, if you want to have ...

4 | **MR MOSER:** Well, sir, I am very happy to take 5 minutes, discuss it with my clients --

5 | **THE CHAIR:** Yes.

6 | **MR MOSER:** -- and then come back and maybe take you through the correspondence  
7 | where we've asked for disclosure.

8 | **THE CHAIR:** Yes.

9 | **MR MOSER:** I am conscious --

10 | **THE CHAIR:** If we are going down that route, there will need to be discussion on  
11 | disclosure classes.

12 | **MR MOSER:** Yes.

13 | **THE CHAIR:** Disclosure documents. I perhaps don't quite want to deal with that  
14 | extensively until you are attracted to that as a route to go down I think.

15 | **MR MOSER:** Quite.

16 | **THE CHAIR:** Then obviously we'll need to get into that in some detail no doubt.

17 | **MR MOSER:** Indeed, and whether we can do that today is perhaps a different matter.

18 | **THE CHAIR:** Indeed, that would be for further discussion I think.

19 | **MR MOSER:** May I ask for 5 minutes and we'll see where we go?

20 | **THE CHAIR:** Yes, we'll come back at 12.35 pm.

21 | **MR MOSER:** I am most grateful.

22 | **(12.27 pm)**

23 | **(A short break)**

24 | **(12.44 pm)**

25 | **THE CHAIR:** Right.

26 | **MR MOSER:** I am very grateful for the time. I am also very conscious of the tribunal's

1 gatekeeper role in all of this and in the end I have to help you by persuading you of  
2 the things that you think matter, not by trying to bang on about the things that I think  
3 matter if there is a logically prior issue that is troubling the tribunal.

4 So we are attracted to the idea of further disclosure if that is the route that the tribunal  
5 were minded to go down and I have explained my case on why we say the data must  
6 be available. I've shown you what data is already available, including our expert  
7 evidence and the Geekbench data.

8 If that isn't sufficient to surmount the gatekeeper role on a prima facie case, I say of  
9 course it is, but if there's any concern about that whatsoever, there is an obvious  
10 answer.

11 Now, how we do that technically is a different matter. I wouldn't want to spring on my  
12 learned friend a disclosure application today, nor I think is that what the tribunal is  
13 envisaging but I can explain what we seek and what we've sought and we've got  
14 quarter of an hour before lunch. In that time if I could show you where we've been on  
15 that.

16 **THE CHAIR:** Yes. I mean, before we get into that.

17 **MR MOSER:** Yes.

18 **THE CHAIR:** First of all mechanistically if this action isn't certified, is this akin to  
19 pre-action disclosure presumably?

20 **MR MOSER:** Yes.

21 **THE CHAIR:** I will hear from Lord Wolfson whether there is any objections to that.  
22 I think probably if we are going to start talking about documents I should probably hear  
23 from him briefly if that would be --

24 **MR MOSER:** No doubt.

25 **THE CHAIR:** Then we can discuss the mechanics of how we go forward perhaps  
26 before you start discussing --

1 **MR MOSER:** That's fine, I wasn't proposing, as I said, to launch into an application at  
2 12.45 pm.

3 **THE CHAIR:** I mean, obviously the tribunal will hear submissions but we are  
4 envisaging not full disclosure at this stage, disclosure of a manageable compass and  
5 that could possibly be argued this afternoon, that may be too soon or it could be argued  
6 on -- we've got Thursday, haven't we, in the diary? So --

7 **MR MOSER:** Yes.

8 **THE CHAIR:** So that would be an option. I don't know if that --

9 **MR MOSER:** It may well be. It would be a pity to lose Thursday -- to come back on  
10 Thursday with our putting in tomorrow, depending on when we broke today, later today  
11 or in the early part of tomorrow what we seek in writing so that everyone has notice  
12 and can react to it.

13 The exact mechanics -- and we'll hear from Lord Wolfson as to what they say. But it  
14 would be pre-action disclosure. This is not unusual. To be pre-action disclosure, it  
15 would have to be key documents anyway.

16 **THE CHAIR:** Yes.

17 **MR MOSER:** You don't get pre-action disclosure of the -- nor do we want 7 million  
18 documents, to be perfectly frank, at this stage, and it would be subject to the usual  
19 stringent confidentiality.

20 **THE CHAIR:** Yes.

21 **MR MOSER:** But none of that is unusual or unmanageable.

22 **THE CHAIR:** In terms of -- perhaps we should hear today whether Mr Gutmann is  
23 a suitable --

24 **MR MOSER:** We can certainly hear that today.

25 **THE CHAIR:** -- class representative. Because if he's not a suitable class  
26 representative, I am not sure on what basis he'd be getting the documents. So it may

1 be that that would need to be seen.

2 But then the other points, Lord Wolfson's narrower question of his reverse strike out,  
3 and I think the question the economic basis upon which you are going to assess loss  
4 probably would have to be adjourned until -- because I think it flows from the nature of  
5 the abuse.

6 But, Lord Wolfson, sorry, you have been sitting there very patiently, it would be helpful  
7 just to hear from you a little bit on what your concerns are at this stage if we were to  
8 go down this course. Obviously I am conscious of the fact you haven't applied to strike  
9 out the action or to resist it on the merits.

10

11 **Submissions by LORD WOLFSON**

12 **LORD WOLFSON:** Exactly. Well, sir, the position is this. Essentially what is now  
13 said is: I want to bring the claim. It's a different claim to the claim I was previously  
14 bringing. The burden, as I understand it, of the tribunal's questions this morning  
15 is: where is the evidence to support that claim?

16 In response to that, my learned friend says: well, I've got bits and pieces here which  
17 I can show you, but there's some vast treasure trove at Apple and once I get hold of  
18 that I will be able to show you how I will support my claim.

19 Now we make a number of points, and I am conscious I am interrupting my learned  
20 friend so I will do this shortly but I hope it's helpful just to sketch out where we are.

21 **THE CHAIR:** Yes.

22 **LORD WOLFSON:** First of all, we say with respect that that is the wrong approach.  
23 This isn't like when you used to rock up in front of the Master on a summary judgment  
24 application and you defended it on basis of: well, I've got ten files here of material,  
25 there's got to be a defence in there somewhere. What's now put against me is: well,  
26 there's all this material out there, there's got to be a claim in there somewhere. No,

1 they've got to set out what the claim is and at least have a prima facie proper evidential  
2 basis for it, and then if the claim continues we'll have disclosure.

3 I will make these submissions in more detail, but as a matter of principle I would  
4 respectfully submit that it's the wrong way to proceed to say: well, let them have  
5 disclosure, even on a pre-action basis, without there being a proper basis for the claim  
6 in the first place, but I'll come back to that.

7 Secondly, in relation -- don't be misled by the requests they've made for disclosure  
8 until now, because a lot of the requests they made for disclosure until now were made  
9 on the basis of the original case, i.e., a lot of those requests were going to the original  
10 case of defective batteries in the real sense. That's been a lot of the interchange this  
11 morning.

12 Indeed, the short answer to a lot of, sir, your questions this morning is: actually all of  
13 this is really a remnant of a case now which I am not running. What they've not done  
14 is to work out what their new case is. I'll come back to all of that. So we don't know  
15 therefore what their putative request for specific disclosure would be, and we'd have  
16 to see it if we are going to go down that route.

17 I also, if I may say, don't think it's realistic to deal with this on Thursday, not least  
18 because I have to take instructions and also because, as I will explain in a moment, in  
19 my respectful submission we actually have plenty enough still on the agenda to deal  
20 with, and that's because of the next two points.

21 First of all, as regards my strike-out application, now I accept that of course  
22 conceptually if my learned friend was to come back at some future date, having had  
23 the disclosure, and still couldn't persuade the tribunal that there is a proper claim here,  
24 of course the lesser is included in the greater: my strike out would not be necessary  
25 because the whole claim would go. But the converse isn't the case, the converse isn't  
26 the case, and since we are all here ready to do the strike out, I do submit that it would

1 be worth my spending time on Thursday morning explaining what that is, as we were  
2 planning to do, and my learned friend responding to it.

3 That is because, and I come back to the first point, the evidence my learned friend is  
4 seeking, as I understand it, is not evidence to produce a different claim. He is not  
5 saying: I've got claim A, but once I see the evidence I might have claim B as well.  
6 What he is saying is: I have claim A. The tribunal is saying: what's the basis for claim  
7 A? It's in the evidence. So we know what the claim is and we are attacking a particular  
8 part of that claim from the date of the message, as the tribunal knows.

9 So in my respectful submission it would be a good use of time to argue that out, that  
10 essentially is a Thursday point anyway because --

11 **THE CHAIR:** Sorry, just -- I didn't quite follow, to argue what out?

12 **LORD WOLFSON:** The strike out.

13 **THE CHAIR:** Yes, your strike-out summary judgment.

14 **LORD WOLFSON:** My strike out anyway, which I will be opening on Thursday  
15 morning and my learned friend will respond to.

16 I also submit, for similar reasons, my learned friend should nonetheless address the  
17 tribunal today and I will respond on Thursday on methodology, because I know, sir,  
18 you just put to my learned friend that that logically falls with or goes with the disclosure  
19 point. With respect, I don't think that's right because, as I said earlier, my learned  
20 friend is not saying: I need the disclosure to bring a different claim. If he brought  
21 a different claim, the methodology to be applied to the loss question for that different  
22 claim might be a different methodology. He is seeking the disclosure to bring the same  
23 claim, to provide an evidential basis for it. What we are saying is that the  
24 counterfactual, which is really what we are dealing with here when we talk about  
25 methodology, the counterfactual is the wrong counterfactual.

26 Now, if I am right on that, that is an answer to the claim and the claim shouldn't be

1 certified, whether or not there's any actual factual evidential basis to bring the claim.  
2 So in my respectful submission where I think we get to is this: we should deal with the  
3 methodology point, as to which essentially the burden, if I can put it that way, is on my  
4 learned friend anyway because it's part of his case for certification and I will respond  
5 to that on Thursday. We should deal with the strike-out point. I will open that on  
6 Thursday, my learned friend will respond. That's a fairly self-contained issue.  
7 I will make submissions as to whether we should go down, if I can put it this way, the  
8 discovery route. If the tribunal is with me on that and thinks there isn't a proper  
9 evidentiary basis -- I don't know whether you can use Latin any more in the  
10 CAT -- cadit quaestio, that's the end of it. If the tribunal is not with me on and we have  
11 some specific disclosure, then obviously we come back once we see what is done with  
12 that disclosure. But he still has to get over the methodology point in any event.  
13 One final point before I sit down, unless there are questions -- I am conscious I am  
14 interrupting.

15 **THE CHAIR:** No, that's fine.

16 **LORD WOLFSON:** There is an important costs point on the disclosure as well.  
17 Now I appreciate here I am mixing principle and practical but practical is also  
18 important. There's a budget we've been told, up to and including certification.  
19 Depending on how focused any disclosure request is, it obviously has a significant  
20 costs implication. That's another reason why, although of course the parties will try  
21 and resolve it between them, I don't think we are going to be in a position to argue  
22 what essentially is a specific disclosure application, of which we have no notice, on  
23 Thursday because one of the issues is going to be time and cost and all the rest of it.  
24 So again apologies for mixing principle and practice, but I hope the tribunal now sees  
25 broadly where I am coming from. But of course I am happy to assist further.

26 **THE CHAIR:** Yes, I understand. But dealing with methodology --

1 **LORD WOLFSON:** Yes.

2 **THE CHAIR:** -- at this stage, so if documents are produced, that will lead to  
3 amendments of pleadings and may well impact the methodology arguments, and we  
4 won't know that until the --

5 **LORD WOLFSON:** Well, again with respect -- I will stop saying with respect, you can  
6 take it with respect.

7 **THE CHAIR:** I will take it as read, yes.

8 **LORD WOLFSON:** We can take it as read from now on. I don't agree with that  
9 because the methodology -- first of all, the question which my learned friend's experts  
10 considered expressly --

11 **THE CHAIR:** Yes.

12 **LORD WOLFSON:** -- was whether the methodology should change between the  
13 original claim and the amended claim.

14 **THE CHAIR:** Yes.

15 **LORD WOLFSON:** They concluded that the methodology didn't change, and I am  
16 going to be submitting they were wrong so to conclude and I will make my submissions  
17 on that. But they were right to consider the question. Why were they right to consider  
18 the question? Because the nature of the claim had changed and therefore, all other  
19 things being equal, the methodology might have changed. We would say it has to  
20 change but at least it might have changed.

21 I do underline the point: my learned friend is not seeking this disclosure, as  
22 I understand the interchanges this morning, to bring a different claim. What the  
23 tribunal is putting to my learned friend is: you are alleging A, B, C, D. I can sort of see  
24 where you might say A comes from. D, okay, there is a hint of D over there. But what  
25 is B and C based on? My learned friend is saying: oh, well, B is here and C is there,  
26 and the tribunal is saying: I'm not really sure about that, an allegation isn't evidence.



1 Obviously we didn't go to recital I, I think it is from memory, in the US complaint where  
2 it's all done obviously without any admission and denials and all the rest of it, so we  
3 don't get anything out of that.

4 Let's say my learned friend comes back after specific disclosure and says: look, here  
5 is a document from Apple's own treasure trove which makes good the point, the factual  
6 point which I was submitting and shows that I have a factual basis for my claim. None  
7 of that, in my submission, changes the methodology point. None of that changes the  
8 methodology point. If he can't get over the methodology point, there is no claim, there  
9 is no claim for certification.

10 Now if the documentation which we produce, assuming we go down this route, means  
11 that he can come back and say: I used to have claim A, now I've got claim B, and you  
12 know what because of this documentation I've also got claim C. Maybe claim C,  
13 whatever it is, might have a different methodology, absolutely, conceptually I can  
14 understand that, but claim B can't because all the tribunal has been asking my learned  
15 friend is: where is your evidence, not how do you put it.

16 Therefore, I do submit that the tribunal should deal with methodology in this hearing,  
17 because otherwise we are just kicking the can down the road. I accept that if I lose on  
18 methodology and we go down the disclosure route, we may have to come back, unless  
19 we agree that whatever they are now putting forward satisfies it. Of course the tribunal  
20 still has a gatekeeper role so it would have to persuade you anyway but it would be  
21 probably a shorter hearing.

22 But if we don't, all we are doing is we are just putting off the methodology point to the  
23 next hearing and it's going to be the same argument. So I do submit it would be  
24 a better use of time for today and Thursday to deal with -- we can probably cut short  
25 some of this if we are going to go down the disclosure route, subject to my principled  
26 objections. We should still deal with methodology, we should still deal with strike out

1 and we should still deal with suitability of Mr Gutmann personally, if I can put it that  
2 way, which is going to be a shorter point, as the tribunal will appreciate.

3 **THE CHAIR:** Yes.

4 **LORD WOLFSON:** Can I just take instructions -- I am conscious I am  
5 interrupting -- but just to make sure that I have set out what we wanted to.  
6 Yes, unless the tribunal has any further questions.

7 **THE CHAIR:** Yes. So we are in a slightly unusual situation in that this is a point that  
8 the tribunal has introduced that's put a spanner in the works. It's a question of the  
9 extent to which you want to make further submissions. Mr Moser has said that he is  
10 not at this stage, as I understand it, arguing against the possibility of disclosure and  
11 postponing final determination of certification. Obviously we are not going to refuse to  
12 certify without hearing further from Mr Moser, plainly.

13 **LORD WOLFSON:** Yes.

14 **THE CHAIR:** We can come back at 2 o'clock and rule on whether we want to hear  
15 the other points today or whether we want them to go off.

16 Is there anything further you are going to want to say on that, Lord Wolfson? You  
17 have made eloquent submissions. It's just whether ...

18 **LORD WOLFSON:** Yes. There might be, in the sense that it strikes me that some of  
19 this might turn on precisely what it is they are asking for. In other words, I accept there  
20 are points of principle and practice, i.e., principle should it be kicked off, but it's hard  
21 to decide that without knowing kicked off to do what. That's why what I would be  
22 submitting I think is that the tribunal, in my respectful submission, should hear my  
23 learned friend on certainly methodology today.

24 **THE CHAIR:** Yes. But if we are against you on that, do you want to make further  
25 submissions on it? If we come back at 2 o'clock and say we are not persuaded --

26 **LORD WOLFSON:** My concern about that is I would be being asked to make

1 | submissions in a complete vacuum of what the disclosure is which is being sought.

2 | **THE CHAIR:** Yes, you've said you want the disclosure to go off.

3 | **LORD WOLFSON:** No, no, absolutely, but in order to make submissions on whether

4 | this is a sensible way forward.

5 | **THE CHAIR:** Yes.

6 | **LORD WOLFSON:** And whether the tribunal, for example, should or shouldn't deal

7 | with methodology.

8 | **THE CHAIR:** Yes.

9 | **LORD WOLFSON:** That obviously is impacted to a significant extent by what it is we

10 | are talking about.

11 | **THE CHAIR:** Yes. So as I understand -- obviously Mr Moser has not had an

12 | opportunity to think about this in detail, but as I understand there has been

13 | correspondence on disclosure.

14 | **LORD WOLFSON:** There has but, as I say, that was all at a much, much earlier stage

15 | when the -- first of all, they were asking, if I can put it colloquially, for something of

16 | a kitchen sink. Secondly, those disclosure requests were in relation to a case which

17 | has now substantially been abandoned and a completely different case is being met.

18 | I think from what my learned friend said it's common ground that if we are essentially

19 | in the area of pre-action disclosure or an analogue -- if I can use that term about

20 | a digital case -- an analogue to pre-action disclosure, that has to be specific and

21 | focused.

22 | **THE CHAIR:** Yes, of course.

23 | **LORD WOLFSON:** So looking at what was asked before and the response to it is not

24 | really going to get us very far.

25 | **THE CHAIR:** But if it's a focused disclosure application, there would seem to be no

26 | reason why that could not be heard on Thursday.

1 **LORD WOLFSON:** Let's see. But can I turn that round. If it comes back to my main  
2 point. If it's a focused disclosure application which is really saying: do you have  
3 evidential support for my current claim, the methodology point is still going to be live.  
4 **THE CHAIR:** I understand your submissions on that, yes.  
5 **LORD WOLFSON:** I am sorry, I didn't notice the time. I was creeping into after one.  
6 **THE CHAIR:** That's fine. We will adjourn now for lunch and come back at 2 o'clock.  
7 Mr Moser, I don't want anyone to miss their lunch but, subject to that, will you start  
8 thinking about disclosure documents. I don't know how long it's going to take you to  
9 get to the bottom of that.  
10 **MR MOSER:** It should not because it's largely in correspondence and we just think  
11 about the key or otherwise key nature of what we've asked for so far in my perhaps  
12 hopeful imagination. I should say this, I mean just it's difficult, and I don't want to take  
13 up time now, but there is an almost sort of religious difference between us as to  
14 whether or not we've changed our case.  
15 **THE CHAIR:** Yes.  
16 **MR MOSER:** But since it matters for disclosure purposes, we disagree of course with  
17 Apple that we've somehow completely altered our case.  
18 **THE CHAIR:** Yes, you've dropped certain phones, the later phones --  
19 **MR MOSER:** We've dropped the later phones. We've dropped one legal argument in  
20 relation to technical development of third parties.  
21 **THE CHAIR:** Yes.  
22 **MR MOSER:** That is largely it.  
23 **THE CHAIR:** Yes, we can see the amendments.  
24 **MR MOSER:** Yes.  
25 **THE CHAIR:** I think it would be unfortunate if we go down this route if we couldn't use  
26 Thursday to at least deal with disclosure of some documents.

1 **MR MOSER:** Sir, yes.

2 **THE CHAIR:** Given that we have the whole of tomorrow and that there has been  
3 correspondence on these documents before. If they raise particular difficulties,  
4 obviously we'll have to deal with that then.

5 So we'll rise now and sit again at 2 o'clock.

6 **(1.06 pm)**

7 **(The luncheon adjournment)**

8 **(2.01 pm)**

9

10 **Submissions by MR MOSER**

11 **MR MOSER:** As I understand it, what would assist the tribunal at this stage is if I set  
12 out briefly the documents that we say we might seek in this regard. Just so that I am  
13 clear, because in a sense this is a sort of reverse application where the tribunal itself  
14 has indicated that it would be assisted potentially, it would be useful, in my submission,  
15 if I simply rehearsed what I submit that we are going to be driving at and if in the  
16 iterative process the tribunal were then able to tell me whether I were in the right  
17 ballpark so that we don't go off on a wrong foot.

18 So what we are looking at, we are looking at pre-certification disclosure that will serve  
19 at certification hearing to allay the potential concern in relation to the battery issue  
20 aspect of the abuse perhaps not being sufficiently evidenced at all. I bear in mind two  
21 things. The first is that this is a certification stage. The threshold is low for these  
22 purposes. This isn't a summary judgment application, so this is the regular threshold  
23 and it's not to be a mini-trial. So bearing those two things in mind, what we submit we  
24 would be asking for, in order to allay the concern to the relatively low threshold  
25 standard which is required for a prima facie case on the facts is data on the way that  
26 the phones were affected by both the initial demands of the technology post iPhone 6

1 and then the PMF, what we call the throttling, I know they don't like the term.

2 So what we've asked for before is at bundle C1 are --

3 **THE CHAIR:** Can you give me those categories again, Mr Moser, just to make sure  
4 I have understood that, those two aspects you said.

5 **MR MOSER:** The two aspects. I am about to do it better through the letter.

6 **THE CHAIR:** Okay.

7 **MR MOSER:** Then I need not paraphrase.

8 **THE CHAIR:** Yes.

9 **MR MOSER:** If I can take you, please, to bundle C1, tab 36, page 274, and our letter  
10 of 7 November 2022. You may remember from the last CMC that you have seen this  
11 letter before. It's 7 November 2022. It makes reference at paragraph 3 to the test in  
12 paragraph 6.28 of the 2015 guide to proceedings that specific and limited disclosure  
13 or the supply of information may be ordered prior to the certification hearing where it's  
14 necessary in order to determine whether the claims are suitable to be brought in  
15 collective proceedings. So going to the eligibility limb.

16 What we had attached to that letter, and it starts at page 279, was a schedule of  
17 documents and information requested. The first category was a copy of the decision  
18 of the DGCCRF in French and/or English, and of course we have now received that,  
19 so we are not seeking that anymore and I have shown it to you already this morning.

20 What we've done is we have looked at this old request in light of everything we've seen  
21 since and we have sought to limit it to the basics and that is in particular request three  
22 on 279 and these are the criteria that I summarised but it's better to take them from  
23 here because here they are written out:

24 "Data on the rate, timing and extent of battery degradation in relation to each model of  
25 the affected iPhones over the course of the relevant period including (a) data evidence  
26 equivalent to the Geekbench data showing the difference in device performance

1 before and after the introduction of the power management feature in each relevant  
2 iOS version and (b) data evidence regarding the prevalence of unexpected power  
3 outages, UPOs, on the models of affected iPhones and devices prior to the  
4 introduction of the power management feature."

5 Of course we are now only seeking it in relation to iPhones 6 to 7, not 8 and later. So  
6 that is, as Lord Wolfson says, we have changed our case in some respect but this is  
7 the way we've changed it that I agree with, we are not pursuing --

8 **THE CHAIR:** So data and evidence could be brought in the sense it could include  
9 electronic files, laboratory notebooks or whatever the equivalent is. Is that what you  
10 are after, the technical reports of such summary reports?

11 **MR MOSER:** We are principally after something that we can read and understand  
12 without, as Lord Wolfson says, spending millions of pounds on it.

13 **THE CHAIR:** Yes.

14 **MR MOSER:** So any conclusions and reports really rather than 7 million pages of  
15 underlying data, absolutely.

16 **THE CHAIR:** So any technical report relating to those matters, would that be --

17 **MR MOSER:** Yes, if it's proportionate, we would not object to the data as  
18 a cross-check but that depends on the data that is available.

19 **THE CHAIR:** At this stage, I appreciate we are not deciding this now, but any  
20 observations on how readily available such materials would be?

21 **MR MOSER:** We have and I will do that again, if I may, via the next two letters. So  
22 I'm only going to show you three letters.

23 **THE CHAIR:** So it is just this category we are focusing on.

24 **MR MOSER:** Just this category we are focusing on for this letter. I will show you next  
25 letter, which is 19 January this year. That's behind tab 64 of this bundle at page 386.  
26 Now, of course, we are in the world where we've seen the French report.

1 **THE CHAIR:** Mm-hmm.

2 **MR MOSER:** And what we say is at one we write further to the CMC and their letter  
3 where they say you don't need or you can't have any of this, the disclosure of the  
4 report, and then two, while this letter focuses on data request three, at the time we  
5 said we'd repeat all the others, I've explained that we are now concentrating on data  
6 request three and this breaks down data request three, so that's what I've just shown  
7 you at page 279 and from the side heading data request three onwards we explain  
8 what we seek. We seek data relating to the battery issues of the affected phones, in  
9 particular our client has explained as part of this request he seeks -- and that's  
10 repeated there, and then a lot of this is in the confidential section. Can I just very  
11 kindly ask you to read paragraphs 7 to 12.

12 **(Pause).**

13 **THE CHAIR:** Okay.

14 **MR MOSER:** I can say, non-confidentially, we are talking about data and analysis.  
15 As before, we don't object to the data if it's proportionate, we certainly want the  
16 analysis, it must be available. At 15 there is another confidential bit that importantly  
17 goes to that.

18 **THE CHAIR:** What do we get out of Mr Crumlin at the same time discusses -- maybe  
19 I am wrong.

20 **MR MOSER:** No, you are absolutely right and that is the next letter.

21 **THE CHAIR:** Right.

22 **MR MOSER:** That is the last letter, the third and last letter. C2 at page 439. That  
23 brings us, as it were, right up to date. That's our letter of 27 March 2023.

24 **THE CHAIR:** Yes.

25 **MR MOSER:** Dated 27 March at page 439, tab 75. You'll recall this morning  
26 I said -- and of course there are documents mentioned in witness statements and that's



1 something they really must have and really we are entitled to since they've referred to  
2 them in the witness statements.

3 **THE CHAIR:** So you'd had the witness statements by this point presumably?

4 **MR MOSER:** By now we have, yes.

5 **THE CHAIR:** Yes.

6 **MR MOSER:** And we had them in February I think or I can't remember but we've  
7 certainly had them. I mean, there is an irony here and the irony is that the parties,  
8 possibly for different reasons in each case, agreed that there was a sufficiency of  
9 evidence to understand our case. So initially they raised the point about the  
10 Geekbench data, I don't know whether you recall this, and we said: no, no, the  
11 Geekbench data, it is what it is, it's the best available data. They dropped their  
12 arguments attacking our use of the Geekbench data at least as far as admissibility is  
13 concerned. They of course haven't brought a case that there isn't a prima facie case  
14 to answer on the facts.

15 So the parties ironically each in their own way say there's more than sufficient  
16 evidence. So here we have our explanation of what their 10 February letter asserted  
17 at two, which is that, well, the witness statements, the expert reports, they provide  
18 more than sufficient evidence and information for our client and his expert to assess  
19 whether he has a plausible case on infringement or theory of harm and to prepare for  
20 the certification hearing. To that extent I suppose we are agreed and we say, well, it's  
21 not so much evidencing what the problem is, it's more about what we do with it.

22 Anyway we are where we are on that. Over the page on four, however, we say that,  
23 well, we reiterate requests for disclosure, although we don't, as it were, propose to die  
24 in a ditch on it, and we don't say at that stage, well, if we don't have it by the certification  
25 hearing its going to be somehow fatal, because that's not an argument that was being  
26 run against us.

1 But we say at 4, four lines down:

2 "Further, in the two factual witness statements accompanying the proposed  
3 defendants' response, you refer to a number of pieces of testing or data gathering  
4 carried out by the proposed defendants. The data and findings related to this testing  
5 and data gathering are clearly relevant to our client's claim and to allowing him to  
6 assess the claim. It is likely that there is an overlap between the disclosure  
7 requested ... previous letters and that data testing referred to in first witness statement  
8 of Alex Justin Crumlin dated 2 February 2023 and Coulson February 2023. These  
9 witness statements make it clear the proposed defendants have this data, that it is  
10 easily accessible, Mr Crumlin and Mr Coulson must have reviewed the data for the  
11 purpose of drafting their witness statements and therefore the proposed defendants  
12 should be able to disclose this without delay. Please provide the data, documentation  
13 and analysis referred to in these witness statements as set out in the table below."

14 Then the table below is all that is straight out of the witness statement and in particular  
15 we always also seek documentation and analysis in relation to the relevant data.

16 I maintain my familiar refrain of the data is great to have. We certainly at the very,  
17 very least require analysis and documentation. This isn't yet my fully formed  
18 application for disclosure. It has not sprung fully armed like --

19 **THE CHAIR:** Yes, I understand.

20 **MR MOSER:** -- Athena, the head of Zeus, it's just to give an indication. This is what  
21 we think the tribunal is aiming at and therefore what we suggest would be the  
22 appropriate disclosure in order to make good that which may not be sufficient.

23 **THE CHAIR:** In terms of timing, as you say, you are not fully armed as yet. Is your  
24 submission you will be in a position to deal with this on Thursday or do you think it's  
25 going to take longer than that?

26 **MR MOSER:** I would have suggested that we are in a position to deal with it on

1 Thursday. I know my learned friend disagrees. I am in the tribunal's hands. Obviously  
2 if we had longer than Thursday it might be that it is more considered than it will be by  
3 Thursday. Thursday is not the end of time.

4 **THE CHAIR:** No.

5 **MR MOSER:** There will be other occasions.

6 **THE CHAIR:** We have the day, that's all, but that doesn't have to drive the timing  
7 necessarily.

8 **MR MOSER:** Exactly. As I said, it's a shame to lose Thursday.

9 **THE CHAIR:** I mean, there is a possibility of hearing it in a few weeks' time, I'm not  
10 going to discuss timing but ...

11 **MR MOSER:** Yes.

12 **THE CHAIR:** Was there anything else you wanted to add at the moment?

13 **MR MOSER:** I will just take instructions.

14 **MR RIDYARD:** Can I just ask, can you comment on why you want the information  
15 about the UPOs. I understand why you want to know about the PMF and how it slowed  
16 down the performance of iPhones but why for your claim do you need to know the  
17 information about the incidents of UPOs?

18 **MR MOSER:** Because it's where matters started and it's something else experienced  
19 on the affected iPhones. So the PMF is one thing and the slowdown is one thing but  
20 over the course of what we say is the single and continuous infringement and in  
21 particular at the beginning of it --

22 **MR RIDYARD:** Sorry to interrupt, was part of the abuse the fact that UPOs occurred?

23 **MR MOSER:** Part of the abuse, we say, is that the UPOs occur, and I appreciate this  
24 is very much at the beginning of it, however instead of being transparent about it, the  
25 so-called fix in fact serves to prolong the UPOs and leads to further UPOs during the  
26 abuse period.

1 So it is part of the abuse during the relevant period, yes, on our case.

2 **MR RIDYARD:** I might have maybe not read it carefully enough but I thought that your  
3 alleged abuse was the PMF and how that slowed down the phone and Apple didn't tell  
4 consumers about it. But it wasn't part of your claim about abuse that Apple produced  
5 phones on which UPOs occurred in the first place?

6 **MR MOSER:** Well, I mean, it's going to be a matter for argument. We say it's a single  
7 and continuous abuse that included all the conduct over the relevant period. The lack  
8 of transparency, we say, prolonged the effect of the UPOs in the way that the  
9 downloads that didn't completely resolve the UPOs in the same way that they created  
10 the slowdown, amongst other things appeared to have had either the very effect of the  
11 UPOs or failing to remedy the UPOs in ways that we can't currently predict until we've  
12 seen what their data says.

13 You may well be right, sir --

14 **MR RIDYARD:** No, I am not arguing, I am just trying to understand what your case  
15 is. So you are saying you want the information about the UPOs that occurred before  
16 the PMF software was introduced as a benchmark to test how UPOs were affected by  
17 the PMF?

18 **MR MOSER:** Yes, and also about 20 per cent of users apparently still suffered UPOs  
19 afterwards. So it's relevant as part of the facts of the case. Although obviously, and  
20 this is part of a feature of single and continuous abuses they happen with different  
21 intensity over time, that the kernel of our abuse, you are absolutely right, is that you  
22 had the PMF, the PMF was designed, designed in order to cut out these peaks and  
23 troughs, the effect of it was, we say, apparently, the slowing down of the iPhones on  
24 which the iOS updates were introduced with what we call the throttling device and  
25 that's when the abuse is, as it were, up and running and at its highest, without telling  
26 the consumers the dominance --

1 **MR RIDYARD:** I understand what you are saying about the PMF. It's just the bit  
2 beforehand that I was a bit confused about.

3 **MR MOSER:** Yes. Of course the lack of transparency started earlier than the PMF.  
4 That's all I am really saying. So we do need to include the UPO data insofar as there  
5 is a prima facie case that that is within period. But, as I said, I was indicating what  
6 documents we were seeking, and you're absolutely within rights to ask why, and it's  
7 useful, if I need to expand on that, then I will.

8 I am happy to answer any other questions.

9 **THE CHAIR:** No, I don't think so. What's your position on arguing materiality today  
10 or on Thursday and the reverse summary judgment application?

11 **MR MOSER:** Well, I am slightly concerned about time, sir, to be frank. I know that's  
12 a secondary concern. But depending on when we finish dealing with disclosure/not  
13 disclosure, there won't be much time left today to deal with methodology, which is  
14 something that I was planning to go into in some detail having introduced the case law  
15 on single and continuous abuse first.

16 If the tribunal is right, it depends on how the tribunal sees this and the ruling that  
17 I anticipate you are about to make. If the tribunal is right, and there will be an effect  
18 on the methodology based on this data, we've seen the Sinclair report, which  
19 Mr Harman also cross-refers to, then we may be arguing over methodology in  
20 a preliminary way because the tribunal at the end of it may say, well, we've heard all  
21 of this now but we will hold over deciding on it until we've seen what the outcome is  
22 on the facts.

23 So I am not attracted, with respect, to the suggestion that we do methodology anyway.

24 It's also to some extent putting us -- forgive me for a moment, I am being handed  
25 a note. I am reminded that some of the categories go to methodology but that's  
26 I suppose what I just said. I won't expand on that now.

1 As for the other matters, I can see that we can in the time available -- and this is  
2 a balance now between what time is left and what points are outstanding, we'll have  
3 spent realistically most of today on this point, which I am not saying is a bad use of  
4 time but it's taken as long as it's taken. One can deal with the suitability of Mr Gutmann  
5 on Thursday certainly and one can deal with probably the question of time, the reverse  
6 summary judgment or strike-out or whatever it is as to December, although of course  
7 that won't ever have to be dealt with if I can't surmount the tribunal's evidence point.  
8 So if the tribunal is right on evidence, we won't have to come back and deal with any  
9 of this.

10 **THE CHAIR:** Sorry to cut through you, you are not urging us to decide those points?

11 **MR MOSER:** I am not urging you, no.

12 **THE CHAIR:** Was there anything else?

13 **MR MOSER:** No, unless there is anything further, that's all.

14 **THE CHAIR:** Lord Wolfson? Did you have any observations on disclosure or anything  
15 else you wanted to add at this stage?

16

17 **Submissions by LORD WOLFSON**

18 **LORD WOLFSON:** Let me make a couple of points and of course I see the way the  
19 judicial wind is blowing, if I can put it that way, so I am not going to repeat points I made  
20 earlier.

21 But let's just remember where we are. We started off, if I can give an analogy,  
22 with an 11 aside game of football. We then cut out part of it, so we started playing  
23 a five aside game of football. From the answer which was given just now about the  
24 UPOs, which has never formed part of the case before, that answer, we now seem to  
25 be playing futsal, i.e., a different but related game, so quite what game it is we are  
26 playing is completely unclear.

1 As to disclosure, a few points. First of all, to make the obvious point, until I see what  
2 we are being asked, I can't really respond to it, but I do put a marker down that it's  
3 unlikely I am going to be able to respond fully to a specific disclosure request on  
4 Thursday, especially given where my clients are, not least because, the tribunal will  
5 appreciate, when you see things in the papers such as data sources, that's not  
6 a document, that's not a single document, it can be a whole load of stuff and are we  
7 talking here about what we'd normally think about specific disclosure or are we talking  
8 about limited categories of disclosure?

9 Now, pre-action outside CAT, if I can put it that way, is normally an identified  
10 document, i.e., the report dated 15 June or whatever it happens to be. Depending on  
11 how my learned friend formulates his claim, we will have different responses to it. So  
12 it's just unlikely, frankly, we are going to be in a position to do that on Thursday. We'll  
13 certainly need a witness statement and it's trite that if you are going to make points  
14 like proportionality, you need to have proper evidence to do so and that means we are  
15 obviously going to have to deal with people in the States and it's going to be tough,  
16 probably unrealistic, to put that together for Thursday, even given time differences.

17 Now, there are also a couple of costs points. Let me just flag them now so we know  
18 where we are. First of all, I am not asking the tribunal to rule on it today but just to be  
19 very clear, we will be saying that if effectively what happens is all of this gets blown off  
20 to a date to be fixed, that is going to be at the -- ought to be at the claimant's expense  
21 because they are totally unprepared to deal with the certification hearing. We don't  
22 need to argue it today. I am just putting a marker down we will be asking for costs of  
23 that.

24 We are here at vast expense, frankly, I'm not only referring to my learned friend's brief  
25 fee, we are here at vast expense and this is just not an efficient way for it to be  
26 conducted.

1 **THE CHAIR:** This is a point you didn't take. It's a point that's been taken by the  
2 tribunal. I am not sure it's --

3 **LORD WOLFSON:** I will come back to argue it but it's a point I don't need to take  
4 because the tribunal has a gatekeeper role.

5 **THE CHAIR:** I understand.

6 **LORD WOLFSON:** As, sir, you identified, given that, it's a bit like, for example, an  
7 illegality point: a defendant does not have to take an illegality point because the court  
8 should; a defendant has to take a limitation point because the court won't.

9 **THE CHAIR:** Sure.

10 **LORD WOLFSON:** So, anyway, we don't need to argue it now, just putting a marker  
11 down.

12 The other cost point though, as I mentioned earlier, is there is a cap on the ATE for up  
13 to and including certification. Now, today was meant to be the end of that process  
14 and, again, depending on the nature of the requests, we are going to have to deal with  
15 that cost point as well. It may be able to be agreed between the parties, I just want to  
16 put the marker down.

17 As to the balance, I really don't want to repeat what I said earlier and I won't say any  
18 more about the strike-out point. You have my submissions on that and whether you  
19 should deal with that.

20 On the personal authorisation point, if I can call it that, if you are against me on the  
21 strike-out and the methodology, it would seem then to be sensible to roll that over as  
22 well because I can see the argument which will no doubt be put against me that: well,  
23 whether he's suitable or not may depend on how the claim is ultimately formulated.  
24 It's a relatively short point so if you are against me on --

25 **THE CHAIR:** You would be content to roll that over? You are not taking the point that  
26 he's not entitled to see your disclosure because he's not a suitable person in the



1 first-hand?

2 **LORD WOLFSON:** I am not putting it as high as that. If you are against me on the  
3 methodology point in particular, so we don't have a substantive hearing now  
4 essentially, then we might as well roll that over as well. But let me finish, if I may, with  
5 the methodology point.

6 The claim put against us at the moment is a transparency claim: it's that we didn't tell  
7 people enough as to what the position was. Obviously we said various things, the real  
8 dispute is: did you say enough and did you say it early enough? Now, the new  
9 documents, the new documents, now I hear a whispered 'no', I'm afraid it's  
10 a resounding 'yes', because, as I will show if I make these submissions on Thursday,  
11 what has been jettisoned overboard is the entirety of the 'these phones were defective'  
12 point. That is jettisoned. That is ultimately why we've had this discussion today  
13 because what we had was a claim which started off as: you were selling defective  
14 phones, the batteries just didn't work, they were no good. That's all gone overboard,  
15 all overboard. They tried to bring it in and say, well, it's part of the abuse, but the  
16 actual claim, the actual claim is not that any more, the claim is unequivocally a  
17 transparency claim and they are stuck with that.

18 **THE CHAIR:** Yes, I think they say that a part of their case may be the batteries were  
19 improperly spec'd for the phones, so they are not suffering from manufacturing  
20 deficiencies but as I understood Mr Moser's submissions earlier he was saying that  
21 they are not good for the purpose.

22 **LORD WOLFSON:** We had a very nice presentation and when we go into the detail  
23 you'll see that what is common ground in this case is that phones degrade over time;  
24 if it's cold, then the impedance is higher.

25 **THE CHAIR:** Sure (**overspeaking**).

26 **LORD WOLFSON:** The fact that that's what happens to batteries -- I said phones -- is

1 | just standard stuff. Now, I don't want to make my submissions on that but what we  
2 | have is a transparency claim and the documents they are asking for are still  
3 | documents which go to how bad, so to speak, are the batteries, what are the  
4 | problems?

5 | Now, our essential point on methodology, our essential point on methodology is this,  
6 | if I can summarise it in one sentence: they say that if we'd said more or we'd said it  
7 | earlier, then because of market forces we would have had to write large cheques, we  
8 | would have had to give discounts, refunds and all the rest of it. Our short answer  
9 | is: well, actually, all the information is now out there. We know it's out there because  
10 | they've actually now deleted their claim that we ceased to do this, that and the other.  
11 | So as of now all the information is out there. Given their recent amendments, that's  
12 | now common ground.

13 | So we have not given refunds, we haven't given discounts and all the rest of it. We  
14 | say the transparency claim is plainly bad. That's our methodology point in a nutshell.  
15 | However, the point I am on now is that none of the material which my learned friend  
16 | is asking for is going to help him respond to that point. He is stuck on that point.

17 | **THE CHAIR:** Well, is it quite that simple? I mean, if the phones -- I am putting  
18 | a hypothesis to you, Lord Wolfson, if the power management function means that the  
19 | phones are performing in a significantly substandard way which interferes with  
20 | ordinary use, and you fail to communicate that to people, then presumably they do  
21 | nothing about it, whinge a little bit. But if you then write to them and say on their  
22 | phones, send them a message on their phones saying you now have a phone that is  
23 | not functioning in accordance with the promises we made, you are entitled to have it  
24 | replaced, you are entitled to have a new battery, that's a very different scenario, that  
25 | counterfactual scenario, and that could be quantified. Now, you'll say those aren't the  
26 | facts, I appreciate that.

1 **LORD WOLFSON:** We have to take account of what the actual facts are. The actual  
2 facts are that we put a message out there and we had stuff on the website, okay?  
3 That's December 2017.

4 **THE CHAIR:** Yes.

5 **LORD WOLFSON:** It's never been identified what it is that we should have said that  
6 we didn't say, never been identified. It's not alleged now that there is still more stuff  
7 that we should be saying. The argument that we are still, so to speak, failing to be  
8 fully transparent has gone. So we know whatever we should have said we've said  
9 because that claim has gone.

10 **THE CHAIR:** Well, it does get horribly circular, doesn't it, because the pleading at the  
11 moment is that the phone doesn't perform as you advertised it would, and I am sure  
12 you disagree with that on the facts, but that's why the methodology point is to some  
13 extent intertwined with whether that allegation can be made good or not.

14 **LORD WOLFSON:** But the question is what do they say is the consequence of the  
15 transparency claim? Now, whether the phone was, so to speak, X bad or the battery  
16 was X bad or X plus 10 per cent bad or X plus 20 per cent bad, how, I ask rhetorically,  
17 does that affect the transparency claim? There is a complete mismatch at the moment  
18 between the methodology and the claim. The reason why there is a mismatch is  
19 because the claim started out as the batteries are defective. That's where we started  
20 and that's why the original methodology worked.

21 **THE CHAIR:** But if the counterfactual is that you were told your phone is  
22 substandard --

23 **LORD WOLFSON:** They were told there was a problem with the batteries in certain  
24 circumstances for some people.

25 **THE CHAIR:** But they weren't told that as a result of the PMF the phones were no  
26 longer performing in an acceptable way, they weren't told that.

1 **LORD WOLFSON:** But that's not the claim put against us, in an acceptable way. With  
2 respect, what does that mean, in an acceptable way?

3 **THE CHAIR:** That's the issue I have been pushing Mr Moser on.

4 **LORD WOLFSON:** Precisely. There's a complete mismatch. What will  
5 happen -- ultimately it's a matter for the tribunal, but what will happen, as sure as eggs  
6 is eggs, is that if the tribunal says: to see whether you can make good the factual  
7 deficiencies -- and, frankly, they are factual deficiencies -- let's say my learned friend  
8 was to say: let's be clear about this, I don't want disclosure, I don't want an  
9 adjournment for disclosure, I want to take my stand on what I've got today, it's pretty  
10 clear where this claim is going and it's going nowhere. So let's just be clear about that.  
11 So if the tribunal says: you know what, we'll give you another chance, let's have some  
12 disclosure, as sure as eggs is eggs we will be back, certainly on the methodology point  
13 because the methodology point, I do submit, is conceptually distinct from the claim  
14 point.

15 Now, how the tribunal wants, so to speak, to allocate the time, that's the reason why  
16 you are sitting there and I am standing here, but I do underline the point that the  
17 problems in the methodology, which have been caused by the fundamental change in  
18 the nature of the claim from defective batteries to a transparency claim while the  
19 methodologies remained the same, that's not going to be cured by greater disclosure  
20 on defective batteries.

21 So that is where we are on that. You've got my submission on that. Let me just check  
22 if I have ... so that's where we are. Our preference would be, if the tribunal is going to  
23 go down the disclosure route, go down it, but the tribunal should hear methodology  
24 and strike-out. If you are against me on hearing methodology and strike-out, then  
25 I agree that the Mr Gutmann point, for shorthand, should go off with it. There's no  
26 point in having that separately.

1 **THE CHAIR:** I am grateful for that indication.

2 **LORD WOLFSON:** Unless I can assist further.

3 **THE CHAIR:** Unless there is anything further you wanted to add, Mr Moser, at this  
4 stage.

5

6 **Submissions by MR MOSER**

7 **MR MOSER:** Apart from disagreeing with my learned friend about how our  
8 methodology works and his attack on the counterfactual -- it's not actually an attack  
9 on the methodology at all, it's an attack on the counterfactual -- and naturally I would  
10 prefer to make my submissions on the methodology once the tribunal isn't at the back  
11 of its mind worried about the facts and whether there was a significant slowing down,  
12 because every time I say, "And then of course because of the significant slowing  
13 down", I may be told, "If there was". So that's where I am.

14 I made the point around the hearing of methodology in a less principled way, that I say,  
15 well, actually, being where we are now on time, it seemed unlikely that there was going  
16 to be enough time, certainly today, to make my arguments about methodology.

17 So, apart from that, I have nothing to add.

18 **THE CHAIR:** We will rise for a few minutes.

19 **(2.40 pm)**

20 **(A short break)**

21 **(2.45 pm)**

22

23 **Ruling(Extracted)**

24

25 **Housekeeping**

26 **THE CHAIR:** Some suggestions for timing for the disclosure application, we think it

1 | may be a little disorderly if it's on Thursday, so we are proposing the following, subject  
2 | to your submissions. That the categories of documents will be identified by 11 May.  
3 | The PCR can put in evidence if necessary but we don't envisage it will be necessary  
4 | as the relevance has been canvassed here.

5 | Lord Wolfson, we understand that Apple may want to put in evidence in response to  
6 | the application dealing with aspects of proportionality and that should come by 25 May.  
7 | We are leaving a period for correspondence between the parties to narrow the issues  
8 | further and we are envisaging a hearing towards the end of June and we will liaise  
9 | with the parties as to a specific date.

10 | Mr Moser, with regards to categories, we are not attracted to broad categories such  
11 | as data, that you are going to have to define your categories much more tightly than  
12 | that. So technical reports are what we have in mind. And obviously, as you have  
13 | done, hitching them to the witness statement of Alex Crumlin at this stage would seem  
14 | to be your best point.

15 | **MR MOSER:** Understood.

16 | **THE CHAIR:** Lord Wolfson, of course one can always argue vigorously about  
17 | disclosure categories and say they are far too broad, but Mr Crumlin has put in  
18 | a witness statement giving evidence in relation to these issues and there have been  
19 | proceedings in other jurisdictions, so we are not anticipating there are going to be  
20 | problems with identifying documents promptly. But obviously if there are problems,  
21 | you can come back and argue it in June, if it's not agreed.

22 | Thereafter, the case will need to be -- may need to be repleaded, it may not, and I don't  
23 | know what your submissions are on timing for that, Mr Moser. There's a possibility of  
24 | hearing this in September. I know people never like hearing things in September but  
25 | I think it would be the second week of September.

26 | Looking at the tribunal, it may be you think that's --

1 **MR MOSER:** Forgive me, just to make sure, to hear the applications that are not going  
2 ahead today?

3 **THE CHAIR:** Well, it obviously will be, yes, the thing -- the tribunal, the gatekeeper  
4 function of the tribunal will need to be reengaged in September.

5 **MR MOSER:** Yes.

6 **THE CHAIR:** And then there will need to be argument on methodology and reverse  
7 summary judgment, to the extent that is still maintained.

8 **MR MOSER:** Yes, indeed. I can see that. The difficulty I suppose is always with the  
9 preparation for a hearing in September having to be in August. It would be --

10 **THE CHAIR:** Well, potentially, I mean it's potentially middle of September.

11 **MR MOSER:** Yes, I am not --

12 **THE CHAIR:** It's not for me to say what your diary is but it may be one could avoid  
13 preparation in August.

14 **MR MOSER:** I am not saying that's a problem for me. I am just saying that's why  
15 people tend not to say September --

16 **THE CHAIR:** Indeed.

17 **MR MOSER:** -- but so be it.

18 Yes, I wonder whether it would be presumptuous of me to say one thing that would be  
19 I suppose useful would be to -- as the arguments then crystallise, and we'll have had  
20 the hearing in June -- well, no, forgive me, I will try not to think on my feet. We will try  
21 and do this in correspondence. It may be the lateness of the hour or the  
22 elevation -- the elevation or the lateness of my night preparing for this last night, but in  
23 a moment of excitement it strikes me that it might even be that Apple would be willing  
24 to volunteer some of this, which would short-circuit the timetable, in the light of the  
25 tribunal's indication that, for instance, those reports readily to hand that Mr Crumlin  
26 refers to in his statement ought really to be available to them, in which case it may not

1 | be necessary to go quite so far. But, yes, September seems to me, completely without  
2 | instructions, perfectly realistic.

3 | **THE CHAIR:** We won't make a firm direction today but that seems --

4 | **MR MOSER:** I see nodding.

5 | **THE CHAIR:** But we don't want it to go off into the never never.

6 | **MR MOSER:** We certainly don't, and Mr Gutmann, who by the way is here, doesn't  
7 | want it to go off into the never never. I know he is very keen for the matters to be dealt  
8 | with.

9 | **THE CHAIR:** Lord Wolfson, anything else today?

10 | **LORD WOLFSON:** Well, just a couple of points on the timing. As I understand it, if  
11 | we do have a hearing towards the end of June presumably the estimate for that would  
12 | be no more than a day, it would likely be shorter than a day, probably half a day.

13 | **THE CHAIR:** I would hope no more than half a day. It may have to be online because  
14 | of pressures on court space.

15 | **LORD WOLFSON:** So be it. On this side of the court, I think we would have  
16 | a preference to, so to speak, nail down dates in September, rather than try to go for  
17 | dates in say July on the assumption, well, maybe if the parties agree the disclosure,  
18 | they can re-plead earlier, because there's a risk that they won't and therefore let's  
19 | actually nail down a time.

20 | **THE CHAIR:** Well, it depends when you are giving your disclosure of course.

21 | **LORD WOLFSON:** Precisely, exactly, and it gives time for that. The week of  
22 | 11 September is fine I think so far as we are concerned. Presumably the estimate for  
23 | that, it strikes me that, although we were going to have two days now, it may be  
24 | prudent -- it's a matter for the tribunal -- to think about holding perhaps three days for  
25 | that because, given that we've now got potentially this other issue of do the documents  
26 | support the case, if I can put it that way, maybe we should allow three days. If it turns



1 out nearer the time everybody thinks we need two, then we've got two. But it's  
2 generally easier to cut time out rather than add time in. So maybe if the tribunal is  
3 thinking about directions we should think about a three-day estimate.

4 I think that's everything from this side on that suggested way of proceeding.

5 **MR MOSER:** I agree with everything Lord Wolfson said.

6 **LORD WOLFSON:** There you are.

7 **THE CHAIR:** Mr Moser, obviously on the gatekeeper function, today we've discussed  
8 the facts but you should not assume you won't have to address us on the law in relation  
9 to the new facts as they emerge, just to put a marker down on that, although one  
10 appreciates it's a low threshold and developing areas of the law and all that sort of  
11 thing.

12 **MR MOSER:** Indeed. If, nearer the time, we may be -- now this is point I was going  
13 to make earlier and I am going to make it anyway, nearer the time we may be so  
14 presumptuous before the September hearing to write and say: is there anything the  
15 tribunal would particularly like us to address it would be extremely kind if --

16 **THE CHAIR:** Yes, sorry for springing it on you today.

17 **MR MOSER:** No, it's not the springing -- I am probably going to be able to help you  
18 more.

19 **THE CHAIR:** Yes, we will do our best.

20 **MR MOSER:** I am grateful. It's not for me to say.

21 **THE CHAIR:** So we won't fix that today. But, Lord Wolfson, you were suggesting the  
22 second week in September I think is what you were suggesting?

23 **LORD WOLFSON:** I thought I was repeating back. When the tribunal said the second  
24 week --

25 **THE CHAIR:** Yes, I think I said the second.

26 **LORD WOLFSON:** -- you didn't identify which week. I was assuming, just looking at

1 my diary --

2 **THE CHAIR:** I think one of us might have a problem from 17 September, that's the  
3 cut-off.

4 **LORD WOLFSON:** Right.

5 **THE CHAIR:** So it's working back from that.

6 **LORD WOLFSON:** Yes. For me, I obviously have not spoken to the rest of the team,  
7 but the week of the 11th is good. If we could do I think earlier in the week, 11th, 12th  
8 and the 13th would be better for me. I am in slight difficulties towards the end of the  
9 week, although I can't say they are -- just being clear, they are not professional  
10 difficulties, they are personal difficulties, so I don't want to misrepresent the position.

11 **THE CHAIR:** The 11th, 12th and 13th.

12 **LORD WOLFSON:** The 11th, 12th and 13th would be better for me.

13 **THE CHAIR:** Mr Moser, any immediate objections to that?

14 **MR MOSER:** None. I can't speak for everyone here but as an initial marker, yes.

15 **THE CHAIR:** Thank you. I am grateful. Potentially last week of June for that  
16 disclosure hearing. I hope with the cooperation of the parties that will be unnecessary.  
17 Whether or not -- well, we'll have to see.

18 **MR MOSER:** Sir.

19 **LORD WOLFSON:** If we are looking for half a day, then, frankly, it is easier to slot in  
20 anyway so yes.

21 **THE CHAIR:** And I assume costs are going to be reserved till the next time.

22 **MR MOSER:** Yes, I didn't rise to the comment about costs so it may be taken we  
23 disagree with it, but certainly for today reserved must be right.

24 **THE CHAIR:** We can argue that another day. Thank you.

25 **(2.56 pm)**

26 **(The tribunal adjourned)**