IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 11th – Tuesday 12th September 2023

Before:

Justin Turner KC
(Chair)

Derek Ridyard

Jane Burgess

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mr Justin Gutmann

Applicant/Proposed Class Representative

V

Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited

Respondents/Proposed Defendants

A P P E A R AN C E S

Philip Moser KC, Anneli Howard KC, Stefan Kuppen, Will Perry & Natalie Nguyen
(Instructed by Charles Lyndon Limited) On behalf of Justin Gutmann.

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

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Monday, 11th September 2023

(10.30 am)

CHAIR: Just give me a minute or two. I just need to read out the notice. As some of you are joining us live stream on our website I am going to start with a warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Mr Moser.

SUBMISSIONS BY MR MOSER

MR MOSER: Thank you, sir. Just the introductions. I am appearing with my learned friends Ms Howard KC, Mr Kuppen, Mr Perry and Ms Nguyen. Lord Wolfson KC and Daniel Piccinin KC on the other side, leading Gayatri Sarathy and Lucinda Cunningham.

There should be nine sets of bundles by now and they include from last time a core bundle, bundles A, B, C in two volumes and D. I don't propose myself to go to C and D at all I think. There are two supplemental bundles produced for this hearing, largely with the revised pleadings and the disclosure evidence, and I am afraid there is one Monday morning bundle, which I don't know whether it has reached, but I am told it has reached the Tribunal. It's only reached me moments ago as well. It is a bundle of most recent correspondence and overspill things that were somehow missed out of the other bundles.

There were then five authorities bundles from last time and a supplementary authorities bundle for this time.

CHAIR: Sorry, Mr Moser.

MR MOSER: It is a lot of bundles and I apologise.

CHAIR: I think we've got everything, yes.

MR MOSER: As the Tribunal knows, and, of course, the Chair has had the pleasure of engaging with this in particular in August, this is the adjourned hearing of Mr Gutmann's application for an opt out collective proceedings order in a proposed claim against the Respondents, who are the UK, Irish and US Apple entities responsible for the manufacture, marketing and distribution of Apple iPhones. It is a standalone action for an abuse of dominance. We say Apple has taken advantage of its market power in several closely related ways.

First, leveraging its dominance in the software market and into the hardware market, concealing battery performance issues with certain iPhone 6 and 7 models from its customers and unfairly withholding material information about something called the power management feature, PMF, which is an algorithm that was designed to cope with the battery issues that had led to sudden shut-offs of the telephones called UPOs. I know the Tribunal is very familiar with that, so I will not belabour the points on the facts.

Put again very shortly, we say at the heart of this is a transparency problem that Apple did not inform its customers about the existence of the PMF, nor did it inform them that the PMF slowed down or throttled the processor and other components in the iPhones and stopped them from enjoying the benefits of the added performance and functionality that they had been promised at the time of purchase or that they were being promised before purchase if they had not yet bought one of the phones.

So the applications before you today are that Apple originally contested the application in a more limited way, by way of strike-out and reverse summary judgment applications, in relation to matters such as post 2017 and the methodology deployed by our expert, Mr Harman, as well as the suitability of the proposed class

representative, Mr Gutmann.

Following the developments at the last hearing, Apple has expanded its strike-out summary judgment, on the basis that it is said there is no factual basis for the allegations regarding the throttling of iPhones and the effects it had on users. There is no separate application notice, but it is in their response, which is in Supplementary Bundle 1 at Tab 4, and that is based, as they put it, on the question of whether the sub-standard performance, as it was put, is something on which we have an arguable case.

Separately, and I propose only to mention that in passing that at the moment on the PCR's funding arrangements, following the Supreme Court's *PACCAR* ruling. That's in Apple's skeleton for today at paragraph 3. What we say about that we have said at the end of our skeleton, which is that we are in the process of discussions with the funder in order to amend the funding arrangement, the LFA, in such a way that it's going to be in accordance with the Supreme Court in *PACCAR*, and we propose to present that to the other side and the Tribunal as soon as we can. I appreciate that that means that until the funding arrangement is satisfactory and has been found to be so by the Tribunal, there is not the possibility for a final certification, even if the Tribunal is with me on everything else this week, but we hope that that is an acceptable way forward, rather than spending time arguing about the theory before we have seen what the new draft is. I am sorry it is not ready today, but there is quite a lot to be getting on with it.

CHAIR: It happens.

MR MOSER: I am grateful. There is also technically the question of the approval of the Draft Amended Claim Form which is in Supplementary Bundle 1, Tab 3. I don't propose, unless the Tribunal are extremely keen for me to do so to go through it in detail now, in relation to all of the amendments that have been made. They are quite

numerous. It includes both the initial amendments from May that we never quite reached and those for which the Tribunal gave permission following pre-action disclosure, which have all been put in there. The Tribunal may prefer --

CHAIR: Has permission formally been given?

MR MOSER: It has not, no. I don't know whether the Tribunal wishes to defer that perhaps to the end of the case once the picture has emerged.

CHAIR: That makes sense.

MR MOSER: I am grateful. Just two headlines about that. If we look at Supplementary Bundle 1, Tab 3, in a sense a lot of water has flowed under the bridge since these things were news in May, but from last time, if we look at paragraph 24 (d) on page 22, after considering Apple's response we didn't extend the coverage of the case to iPhones 8 and X. It is worth saying that that is not something that was ever part of Mr Harman's calculations in any event. So that is a non-extension rather than taking away. It doesn't affect the expert evidence.

The other headline perhaps at paragraph 6, which is on page 4, as far as the legal basis is concerned, we considered again Apple's initial response in which they pointed out, well, really the matter of limiting technical development -- that's three lines up from the bottom of paragraph 6 -- that is really properly something that would go to limiting competitors' technical development or in the market or so on. We took that on board and we removed that.

In the original skeleton argument last time, and there's sometimes an echo of it even now, it was suggested that we had somehow removed all reliance on technical problems, but that is wide of the mark. We have only removed that limited part of the legal basis.

As a kind of sub headline, to avoid all possible confusion, we have removed the references to defects, because we wanted to make it plain, the line that was being

taken against us is that this is a defective product consumer claim is not a line that we recognise.

That's not to say that we have changed our case on it. We have been much clearer when we talk about defective. It was taken initially from the US complaint, where the battery issues were summarised as a defect, but we never said that this is a defective product claim.

Then our case, as it stands, is set out at paragraph 7. I come back to that in our skeleton argument shortly when I address you on what our case on the law is.

CHAIR: Can I just clarify one thing. I know your claim is by reference to particular types of iPhones, but we have also got different software systems. When you get to iOS 11.3, I think it is the user gets a notice -- I am sorry, I am going to inaccurately describe it -- saying whether or not you want the PMF on or you can have the option to switch it off, or something like that. I am just not clear what your claim relates to when one is looking at it from the perspective of software as opposed to the models of phone. It seems the complaint is more directed to software than it is actually to the phones per se, but I may be wrong about that.

MR MOSER: Well, it is more directed to software. It happened to have the effect that we describe on those phones. If we look at the Supplementary Bundle 1, at Tab 3, which is possibly where we are, and turn on to pages 113 and 114 --

CHAIR: Oh, I see. So this is the ... Okay.

MR MOSER: You will see a table there, which gives you not only the affected iPhones but also in the subsequent columns -- we see that on page 113, carrying over to 114 -- the iOS updates.

CHAIR: So it doesn't include phones with the 11.3 on it. 11.3 goes on to which phones? Could you have 11.3 on an iPhone 6 or only an iPhone 7 or does it have to be an iPhone 8?

MR MOSER: No. As I understand it, that's the iPhone 8. If you look at page 114, the last two rows, that's the non-extension, the 8, 8 plus and the X, those are the --

CHAIR: So if 11.3 is -- I will not say infringing -- a non-complained of phone, could you have 11.3 on an iPhone 7?

MR MOSER: It does eventually get rolled out to all of them. If you look at the second column from last on page 113, at the end of the period we are looking at, we hit 11.3.

CHAIR: I see, yes. Okay. That's my recollection. It can be switched off there. You make no complaint of the phones once they have 11.3. Is that right? You don't have to answer that now. I wanted to ask it now before I forget.

MR MOSER: It is similar to the apology point. We say it is going to be a matter for trial but it is a matter of how transparent it was to say "you can switch this off".

CHAIR: So they are still included within your complaint for the time being?

MR MOSER: Yes.

CHAIR: Understood.

MR MOSER: Sir, I am grateful for that. That's equally relevant as well as just which phones.

The structure of my submissions is I am going to make some preliminary remarks on the essence of our amended claim, including in particular the statute and case law.

I am then going to address the further primary facts following disclosure, and I want to bring that in, as it were, upfront with the Tribunal's permission, because that, of course, is what led to the adjournment, and I imagine it is going to be uppermost in the Tribunal's mind as to what we say about that.

Then I am going to address the more standard points around the eligibility condition, such as the blueprint at trial and the quantum case. I will roll up in that submission the question of the expert methodology, why it meets the *Pro-Sys* test, and essentially the reverse summary judgment that's being brought against me, including the nexus

between alleged abuse and harm. It is said against me: "Well, just like *Gormsen*, you haven't got that." We say: "No, you can't fit this case into the *Gormsen* facts. It is just a different case."

Then I will address the question I just adumbrated in relation to strike-out, in relation to the cut-off from the apology in December 2017.

Then I have to deal with perhaps the authorisation condition, although I am in the Tribunal's hands as to whether the Tribunal will wait to hear from my learned friend, Lord Wolfson, about that, i.e., whether Mr Gutmann is a suitable person.

If there are any other administrative matters and questions relating to the CPO documents and so forth, I propose to leave that to the end or whenever the Tribunal would like to ask me about it.

I am not going to belabour the Tribunal's jurisdiction, which I am sure is extremely familiar to the members.

If I could come to my preliminary remarks. Section 47B of the Competition Act 1998, which I don't propose to turn up, but it is obviously in the authorities, sets out the two conditions that have to be satisfied, broadly speaking, the authorisation condition and the eligibility condition.

So it considers the person who brought the proceedings, who if the order were made, the Tribunal could authorise to act as the representative, and in respect of claims which are eligible for inclusion in collective proceedings.

The proposed claim alleges an abuse of a dominant position, as I have explained, in two closely related markets; hardware for the supply of Apple iPhones and software relating to their own proprietary iOS software.

The crux of the abuse is that Apple has failed to act transparently in its dealings with its customers when it became aware of the performance issues with the batteries in iPhones 6 and 7, which caused them to shut down and power off, UPOs. Instead of

being upfront about the problems, we say they sought to conceal them. They leveraged their market power in the iOS market, including surreptitiously introducing the PMF without telling the customers.

Importantly, they didn't disclose that the PMF was designed to slow down or throttle the processor and the other components in the affected iPhones, so that they didn't consume so much battery power. This meant the iPhone couldn't carry out certain tasks, but it would freeze or show a spinning wheel or time out, and they omitted to provide customers with material information.

What I am going to explain when I come to the law is that whilst it may be said that some of these aspects of behaviour are not on their own an obvious abuse of a dominant position, so there's nothing inherently abusive of a dominant position in using your iOS to update an iPhone, for instance, in combination, and used in the way that it was used in this case, particularly non-transparently, that sort of behaviour that on its own is not necessarily unlawful, becomes unlawful as part of the single and continuous abuse that we allege.

I don't propose to address you in detail on the nature of the class unless you would like me to.

CHAIR: No.

MR MOSER: Because there is no debate about that. I don't propose to address you in detail about the nature of all of the common issues. We say that there are common issues here, in the relevant sense, on market definition, on dominance, abuse, theory of harm, causation, quantum and interest.

For your note, it is probably worth just looking at the summary of common issues which are conveniently summarised by the CAT in the *Gutmann Trains* case. That's at Authorities Bundle 11. In my version that's Authorities Bundle Volume 1, Tab 11.

CHAIR: Tab 11 you say?

MR MOSER: Tab 11, which is in Volume 1 of Authorities.

CHAIR: Do we need to turn it up or can you give me the reference?

MR MOSER: I can give you the reference. It is at paragraph 107. It is not really disputed in this case that there are several significant issues which will be common in the UK sense common, not the US sense, where there may be the same, similar or related issues of law or fact.

The key point in dispute between the parties, leaving aside for the moment the question of the primary facts, but the key point of law in dispute between the parties is whether the PCR's expert methodology demonstrates loss on a class-wide basis and whether it passes the *Pro-Sys* test.

The key principles from the *Pro-Sys* test, which again is one that I imagine I don't have to open at length before the Tribunal, but the key principles are whether the proposed methodology is plausible for proving class-wide loss. That doesn't require a detailed appraisal of the merits.

If we look at the Court of Appeal --

CHAIR: What is the difference between -- I struggle with this a little bit -- obviously it has to be plausible and we see references to a broad axe. What is the difference between that and the normal strike-out standard for any issue in the proceedings? Is there one or is it just a different way of saying the same thing?

MR MOSER: I have to prove that I have a more than arguable case for the purposes of strike-out that the proposed methodology is plausible. So once I surmount the testing process --

CHAIR: It is more the height of the bar. So you have to show you have got an arguable case, without wishing to paraphrase the authorities, for the purpose of strike-out. You then get to the *Pro-Sys* test and you are applying -- the plausibility, is the bar higher, lower or is it the same, or is that the wrong way of looking at it?

MR MOSER: It is going to be essentially the same, in my submission. The test for strike-out -- is that in *Easyair*. Shall we look at *Easyair*?

CHAIR: No. I have it in mind.

MR MOSER: As a preliminary rule, if one thinks about *Easyair*, provided the Claimant discloses a legally coherent claim, I say, so the claim would be likely to succeed, subject to the Claimant proving the facts they have alleged, it is going to be difficult for a Defendant to succeed in having the claim terminated on a summary application, rather than after trials, because, especially in circumstances where the Defendant has not yet provided full disclosure of relevant documents, it will be difficult for this Tribunal to conclude that the Claimant has no realistic prospect of succeeding in proving its allegations of fact. That's not to say the courts will be shy of dismissing a claim summarily where, for example, the Defendant points to incontrovertible or undisputed facts that show that we are clearly wrong, but it won't be enough for the Defendant to show merely that our factual case is to a degree, based on inference or even speculation, even if in the end it may be wrong, so that the bar is no higher than that, even under *Easyair*.

What the Supreme Court in *Merricks* says, in my submission, is certification is a relatively low bar, which is essentially the same as strike-out.

CHAIR: Yes, (inaudible) talks about *Pro-Sys*.

MR MOSER: As far as the *Pro-Sys* test is concerned, it is provided that I can satisfy you to the strike-out standard that the methodology is plausible.

CHAIR: It is curious why it is its own distinct test.

MR MOSER: Yes. *Pro-Sys* is itself a low hurdle. So we are dealing with a low bar and a low hurdle in turn. I don't know whether the Tribunal is into equestrianism at all, but of course in tournaments you will find some obstacles that come in two parts. One may be higher than the other. In this case I suggest that both bars are pretty much

the same. You just have to jump over them one at a time.

We don't need a detailed appraisal of the merits under the regular test, and again this is set out helpfully by the Court of Appeal in *Gutmann*. I don't know whether it would assist to take you briefly to that. It is Authorities Bundle 2, Tab 17. When I say 2, I mean Volume 2, because I have it in hard copy.

CHAIR: Yes.

MR MOSER: If we look at what Lord Justice Green says there, at paragraph 46, which is on page 968, he talks about the *Microsoft Pro-Sys* test and we see that there. I am not going to read it out.

CHAIR: Uh-huh.

MR MOSER: Plausible. Then observations on the *Microsoft* test. At 52 and following, page 969:

It is not a statute. No magic to it. Common sense approach. Confers on the court or Tribunal a broad discretion to approve of the methodology evident from the following terms: sufficiently credible, some basis in fact, a realistic prospect of establishing loss, methodology cannot be purely theoretically grounded, and so on and so forth. Those words at the end:

"... highlight both the discretion conferred upon the CAT to make a value judgment but also the relative nature of the exercise". The test is counterfactual, "based upon a counterfactual mode. It is quintessentially hypothetical and will use assumptions and models … It is therefore not a fair criticism to make of a methodology that it is hypothetical; though, equally, the CAT will expect to see "*some*" factual basis … Hence also the reference to being not "*purely*" theoretical", and so on.

"56. At the certification stage, the methodology must identify the issues, not the answers. The CAT is concerned to identify the issues and gauge whether the methodology proposed is workable at trial when the issues are tested and might lead

to different answers. Intuition and common sense: Judges are expected to use their common sense."

That's at 57. At 58, the breadth of the axe that you have mentioned, Mr CHAIR.

"In forming its judgment … the CAT will bear in mind that at trial it is armed with a broad axe by which it can fill gaps and plug lacunae into the methodology."

So the fact that under *Easyair* we are looking at the low hurdle of the strike-out doesn't mean that I then have to satisfy you to the *Easyair* standard that it is somehow more than the some factual basis, more than a realistic prospect and so on. That's the test I have to meet. It doesn't become higher than that.

For good measure, there is very recent reinforcement of the nature of the bar in the Supplementary Authorities Bundle. We have the Court of Appeal in *FX*, which I think was the judgment since the last time. That is at Tab 7 of the Supplementary Authorities Bundle, the case of *Evans v O'Higgins*. I think this is again Lord Justice Green, so there is a continuity. At page 226 of the Supplementary Authorities Bundle, we see at 78:

"It was suggested by the respondent banks that in *McLaren* the Court had imposed an onerous burden on the CAT to ensure that cases going forward were viable and this justified the CAT's very demanding approach to the merits in this case. I do not agree. To be clear, in *McLaren* the CAT had in its judgment identified "*the*" central issue in the trial, but had then brought its analysis to an abrupt end."

Then there is an explanation of what happened in the CAT. A few lines down below the hole punch:

"This Court did not however indicate *how* the CAT should go about this task nor indicate that the "*blueprint*" for the conduct of this central issue necessarily had to be detailed. What the CAT would require would be an exercise of *its* discretion and would be fact and context specific.

79. I should add one final observation concerning the applicants' criticism of the respondent banks."

There is a discussion that in that case it is said that they had, for tactical reasons, declined to put forward an application.

It is also said that the banks adopted this position to avoid having to give any disclosure … "The CAT has a standalone power to strike out a non-viable case. I do not suggest that the CAT should never adopt this course of action. There is nonetheless a risk if it does so because it compels the CAT to do its own thinking without the assistance of a properly formulated, evidence-based, objection from the putative defendants. The CAT does not obtain the same level of assistance from a respondent jumping upon a passing bandwagon whilst, at the same time, keeping its cards far distant from the table. The CAT has a *continuing* power to strike out non-viable claims which it is in principle entitled to exercise after a defendant has given, for instance, disclosure. If the CAT has concerns, it always has the option to adopt a wait and see approach."

I say two things about that. Firstly, there is no indication there that if the CAT does exercise a strike-out power, as opposed to just the certification power, the test suddenly returns to being an onerous burden, and the second is that we do have a species of the bandwagon in this case. It is perhaps not the same. Every case is different, but there was initially no application to strike out on the facts. The Tribunal said what it said last time now. The response is: "Oh, by the way, we would also like you to strike out the whole thing on the facts on the reasons to do with sub-standard that the Tribunal raised last time."

We do not accept, if it is going to be said against me, that they have given sufficiently full disclosure. There is not extensive evidence on the strike-out. They are essentially piggy-backing on the points that were made last time. So I say that some of those words there by Lord Justice Green may be applied in an analogous way to the present

case.

Be that as it may, there's a strike-out before you, and I say it makes no difference in this case whether it was the one articulated by the Tribunal last time or essentially the repetition of the same by repeating the words of the Chair in my learned friend Lord Wolfson's response.

I feel I have already dwelt a little bit on the nature of the abuse, but I do want to talk next before I come to the disclosure and the evidence I do want to talk about our case on the law.

CHAIR: Yes.

MR MOSER: First, the law, then the facts.

CHAIR: I think that's probably the area you need to focus on.

MR MOSER: I am grateful. In my submission, it is easiest to take it from our skeleton argument, at least for starters, because we have set out a summary of our case on the law starting at paragraph 6 of our skeleton argument. I don't know where you have it. It is in various places.

CHAIR: We have it. We can find it.

MR MOSER: As usual, I think everyone has that separately. I will just go by paragraphs.

So paragraph 6, the abuse.

CHAIR: We were rather confused by the second sentence of paragraph 6. We may be misreading it.

MR MOSER: Sorry about that.

CHAIR: Certainly, if you go to your pleading, you do complain about the UPOs and you complain about the batteries, although the second sentence seems to say you don't allege those things, and we were a little bit ...

MR MOSER: I am sorry if it is confusing. It is the same point really that I made earlier

in saying that certain things are not in and of themselves an abuse of dominance.

CHAIR: I think you are saying that's not per se an abuse of dominance. (Inaudible) single continuous way.

MR MOSER: What happened -- and I had an exchange about this on the last occasion with Mr Ridyard in relation to UPOs. What happens in relation to UPOs is they are the starting point for all of this. Apple puts out its whizzy new product.

CHAIR: I am not sure we quite understood your case that way. We thought the starting point, and you refer to this in your pleadings -- is the word "defective" used -- defective batteries. I think you have a definition of them I think.

MR MOSER: The battery issues?

CHAIR: I think you may use another word. Paragraph 7(a) is what I have in mind.

MR MOSER: Page 15.

CHAIR: Just give me a second. Yes. Unable to delivery peak power. Battery issues. I beg your pardon. So your complaint is not that these batteries were defective, as I understand it.

MR MOSER: No.

CHAIR: It is the complaint they were improperly spec'd, that they were not suitable for use?

MR MOSER: They were not suitable for use. All of these things, we are not yet at the threshold for an abuse. What happens is they launch the new iPhone. They say: "Oh, it is going to be 70% faster. It is going to be lightning fast" and all the rest of it. No doubt, as far as we are concerned, we have no reason to believe that that was somehow in bad faith at the time that they launched the first models of these iPhones on to the market.

They contained a lithium ion battery that it turned out was unable to deliver the necessary peak power for the various new requirements that users were placing on it,

and in particular on the central processing unit, the CPU, and the graphics processing unit, the GPU.

CHAIR: What do you rely on to say it is inappropriate. Give me the technical basis why you say this battery was inappropriate. It was spec'd to X and should have been spec'd to Y.

MR MOSER: Let's see if I can unroll it step by step and then see where we get to, because that's not how we put our case.

CHAIR: No.

MR MOSER: I am sorry if there is still confusion about it, which is no doubt our fault. What we say is at this stage the battery issue arises. Only by about 12th December, for reasons the facts show, do we say --

CHAIR: Sorry, the battery issue arises when?

MR MOSER: In the autumn of 2016.

CHAIR: Okay. So there was nothing wrong with the phones when they were sold?

MR MOSER: The phones when they were sold already contained within them the batteries that were going to be leading to the battery issues. So they put out the phones no doubt in good faith. It turns out there's a problem with the batteries. There is a battery issue.

CHAIR: You say there's a problem with the batteries.

MR MOSER: Yes.

CHAIR: We will get into your case in due course, but as I understand Mr Crumlin in his evidence, which I don't I think you challenge, but I may be wrong about that, for example, paragraph 35, says there was a problem that certain apps were introduced which demanded more power. Now, you say that's a problem with the batteries. It seems -- I am just trying to pin down as to why you say that's a problem with the batteries.

MR MOSER: Because it is ultimately the batteries that lead to the shutdown and it is the solution to the problem to put in a new battery.

CHAIR: So you put in a different battery?

MR MOSER: Yes.

CHAIR: So you don't replace the same battery. There are two options. As I understand, when these batteries go in, like most new batteries, they function well or they may be at the limits of their capabilities -- I don't know -- Snapchat, multimedia, third party apps, whatever, but as they age, and particularly if they are under certain environmental conditions, they deteriorate, and then the UPOs become a particular problem. That's as I understand the situation. I thought there was a measure of common ground on that.

MR MOSER: There is.

CHAIR: You say the battery should be replaced. So if the problem, for example, and this is abstract to get the discussion going -- so if there's a problem with these batteries after nine months because they are getting a bit ropy, some of them, and they are then experiencing shutdowns, one solution I expect you would say would be Apple to provide a new battery. The alternative is for Apple to produce a battery of a different specification. Say: "Hands up, the first battery was not sufficiently powerful, did not store enough energy. We are not going to replace your old battery. We are going to give you a new battery, an entirely different spec'd battery."

I am just trying to identify what your case is. Are you saying the batteries were a problem from the get-go? Are you saying they should have been replaced? If so, what should they have been replaced with?

MR MOSER: It seems to be common ground that the battery issues arise because of the use of the phone with certain apps, which cause the battery once, as you rightly say, it reaches a certain age to shut down, which makes it a situation, to pick up on

a word that's going to be found in the disclosure later, that was not I say liveable with. They needed a solution, which then becomes the PMF.

CHAIR: There is a potential incompatibility with the battery's age with these third party apps. As I understand, Apple are not in control of the third party apps.

MR MOSER: It depends on whether it is one of their own, but generally, no.

CHAIR: You are not running a case that Apple's batteries were relatively inferior to other batteries in other phones on the premium market. That's doesn't seem to be part of your case.

MR MOSER: No. I can see the Tribunal's thinking. These are aspects of the case that are not, in fact, central to the way that we put the abuse. It seems to us to be common ground that there were what we have broadly called battery issues, which is the interplay of the performance of the telephone, not just with certain third party apps, but the overall performance of the telephone and the battery usage, which led to the sudden shutdowns. All of that would seem to be broadly common ground.

Where we come in is to say against that background of the UPOs, Apple then, instead of saying "Oh, we have these unacceptable UPOs. Very sorry. Here is a replacement battery".

CHAIR: Replacement --

MR MOSER: With a new battery. I am unaware as to whether the new battery needs to be of a different spec to the previous battery. It seems that the solution to the problem is to have a new battery.

CHAIR: It is central to your case. You are saying -- you plead that if Apple had communicated more information, people would have been able to get replacement batteries.

MR MOSER: Yes.

CHAIR: So you need to think through what you mean by that. You know, any one of

us might replace the phones on our battery (sic) but why is Apple liable -- if a consumer says: "Look, there's a problem with these third party apps", why is there an obligation on Apple to replace the battery? I could understand a case, if it were being made, where you said the initial spec of the battery was not adequate, and Apple were under an obligation to replace it with a higher spec battery. "This is my case and this is my evidence to support that." Then I understand your pleading. If that's not part of your case, then I think we have to look at your pleading very carefully.

MR MOSER: The indication that we have from the evidence is that a replacement battery -- and I am not aware that it is a different spec battery -- a replacement battery solved the issue. In fact, there was a small cohort of Apple customers right at the beginning of this problem arising where replacement batteries were issued for free.

CHAIR: (Inaudible).

MR MOSER: It is part of the evidence. It is not part of our claim.

CHAIR: (Inaudible).

MR MOSER: The point about that is that is one of the things Apple actually did in real life. We say in the counterfactual: "You would have issued replacement batteries. You would have perhaps replaced phones. You would have given people information as to how to deal with the PMFs."

CHAIR: I understand you say that, but that is a crucial part of your case, isn't it --

MR MOSER: It does -- in the actual there were two forms of replacement battery. Right at the beginning a small cohort were given free replacement batteries in order to solve the problem.

CHAIR: I thought they had defective batteries.

MR MOSER: That's what Apple said.

CHAIR: You say more than once your claim absolutely does not concern those defective batteries that were replaced.

MR MOSER: No, but we don't accept that that was because the batteries were defective. We say they were more likely than not suffering from the same problems as all of the iPhones.

CHAIR: You are going to have to take me to your pleading on this. (inaudible). Until I see it in the pleading, because I thought the pleading was to the contrary.

MR MOSER: I am not sure we are in a position to dispute whether or not they were defective. The point we make about these real life comparisons is that Apple was prepared to replace batteries when they felt that consumers were in a position to say there was a problem here. So that is something that we say would have happened in the counterfactual for all of these cases or else there would have been a refund or other value issued, as assessed by our expert.

But the point about the UPOs is just simply that at the beginning Apple identified this problem of UPOs. There was a shutdown. Instead of going public with that and saying "We've got a UPO problem, it is what we have defined as battery issues. That is the combination of the performance of the phone using up too much battery capacity and therefore shutting down as a failsafe", instead of saying all of that and saying "Here's how we are going to fix it. We are either going to give you a replacement battery or you can have this PMF, which is going to slow it down".

CHAIR: Can you add a little bit more to this. If you are replacing it with the same battery, how does that solve the problem?

MR MOSER: Because what we will see when we come to the evidence is that this is a problem that appears with age. It is not a problem that for whatever reasons -- we don't know the answer. It is not a problem that for whatever reason appeared with previous versions of the iPhones. So there is a technical problem here. We can't say at present the precise details as to how the interplay between the performance of the phones or the performance of the batteries led to the battery issues. We don't have

at this stage that information and we don't have at this stage to explain fully how that has occurred.

CHAIR: How are you going to address this at trial? If you are saying there's an incompatibility -- we now have (inaudible). We have the third party software, we have different versions of the phone and you are drawing a distinction between iPhone 6 being inferior to iPhone 5 essentially, in this respect. We have the battery respect, and at trial you are going to have to show that these were, in fact, defective in one way or another, the system was defective, and Apple needed to address that defect, and by failing to be open about it, the consumers could not get redress. Is that ...

MR MOSER: Yes.

CHAIR: If one assumes there is a material defect in the first place, technical defect in terms of batteries, in respect of the phone, you are going to have to -- how are you going to show that at trial? Where is your -- at the moment your expert evidence seems to be pointing at things. These phones are available. You could presumably test them. You could measure how they perform. 20-odd million of them are circulating or were circulating. What's going to be your positive case and how are you going to prove at trial where these defects arise and how they should have been addressed.

MR MOSER: In my respectful submission, we have a very strong case on the defects, as we were not putting it, but for present purposes let's stick to that word. The defect is very obviously manifested in the form of the UPOs that were occurring.

Now, the precise technical interplay between the software and the hardware that led to the UPOs occurring is something that's uniquely within the knowledge of the Proposed Defendants. I cannot --

CHAIR: Why is it within the knowledge of the Proposed Defendants?

MR MOSER: Because it is their closed ecosystem. We can't take an iPhone 6 and take it apart and work out precisely why the UPOs are occurring or, if we could, that's

not something we have to do for the purposes of getting over the certification threshold at this stage.

What we have is we have the pre-existing fact of the shutouts. We have knowledge from the evidence I am about to go to, based on primary facts, that the iPhones in question were shutting down and then had to be throttled in order to try to deal with that, and we say the fact it was surreptitious was part of the abuse. We know, and I am going to come to that as well, from the disclosure, that Apple had diagnostic tests. The diagnostic data in relation to the tests after the release of 10.2, iOS update 10.2 is something that has not yet been disclosed to us.

Presumably, once we see the diagnostic data, that's something our expert says, and he has said that from the start, and we now know that such data exists, once we see that we will be to assist the Tribunal more in relation to exactly what the diagnosis was, why the interplay between the usage or the software and the batteries in this version of the iPhone led to the UPO problem.

CHAIR: As I understand it, this dispute arose when the third party apps became more hungry for current from the phones, and tomorrow someone could issue a new third party app which made demands on batteries such that all premium phones, as soon as you use them on your phone, if the phone is more than three months old, the battery has deteriorated, the phone will not perform satisfactorily. Are you with me, Mr Moser, my example? So the issue of a third party app which consumes a huge amount of current, every premium phone struggles to cope with this app. Why is that -- is that the fault of the phone manufacturer necessarily?

MR MOSER: That's not the facts of this case. If we look at the internal e-mails that we will see, the language of Apple in the e-mails is that of panic. It is absolutely not the usual course of dealing, as it were. It is not the case as far as anyone knows that a particular third party app has turned up.

CHAIR: (Inaudible) contemplating the introduction of (inaudible). It doesn't follow as night follows day that that must be a problem. That must mean that the phones currently on the market are defective or the batteries currently on the market are defective. Now, I accept that could be the reason, but one has to go a little bit further and show that is the problem.

MR MOSER: There's a lot there, Sir, that, with respect, does not make it a completely realistic scenario. In order to get an app on to your Apple phone, you have to get it from the App Store. The apps will be tested by Apple before they go into the App Store. They are supposed to be safe to use with your Apple phone. It is also not, as I say, our case, that it was only third party apps that drove the UPOs, or, if that is so, it hasn't yet emerged from the evidence. We don't know what the diagnostic data is that Apple hold and have not shown us yet that led to or that was the analysis of what led to the UPOs.

CHAIR: As I understand, there is no dispute. It is just that the third party apps consume too much energy from the battery -- the old batteries. Am I wrong about that?

MR MOSER: It is the evidence that the use of apps, but also, as far as we are aware, the use of the phone generally led to the battery struggling. It is not, as far as I --

MR RIDYARD: The use of the phone generally?

MR MOSER: People were using the phone, as far as we can tell, in a not unusual way and not significantly different to the way previous phones had been used, and it led to UPOs. What I am saying is we don't have a specific case -- I am not sure a specific case has been put forward by the other side that certain third party apps or only third party apps have led to the UPO problem.

I am limited in explaining this to the Tribunal by the fact that I am not Apple. Apple have the knowledge of exactly how the UPO shutdowns came about presumably.

I don't know yet, but we do know that there will be disclosure if this case is certified that will assist on that point.

But as far as our submission is concerned, the shutdown of the UPOs, it is, as it were, the base point at which we start our case. It is not our case that the UPOs as such are something that Apple has done that sounds as an abuse. I can see that if that were the case -- and I was asked about that last time. We have been clear in our replies and in our amendments that it is not our case that Apple has done something that led to the UPOs that is an abuse of its dominant position. The UPOs are the fact on which I build my case and on which Apple builds its response.

MR RIDYARD: So are you saying the UPOs are the evidence that the iPhone 6 wasn't properly spec'd?

MR MOSER: Yes.

MR RIDYARD: So Apple's abuse was -- and the thing which as a consumer you are saying the consumer should have redress over is the fact that Apple improperly spec'd the iPhone 6, and because it then didn't work properly, that's where consumers need compensation? It was an abuse of dominance for Apple not to have spec'd the iPhone 6 properly?

MR MOSER: No, we are not saying they should have built a better phone. They didn't spec the iPhone 6 properly, which is proved by the UPOs. Up to that point, no abuse yet. You can occasionally put out a product that doesn't work as well as you had hoped. It is not an abuse of a dominant position.

It is all about what happens next. So that's why I say this is our base point.

The phone battery combination was not properly spec'd. You are quite right to say "you have not identified what the particular problem was with the battery". We don't know. We do know that it appears that putting in a new battery solved the problem, at least sufficiently. We don't know whether it then reappeared later.

MR RIDYARD: I mean, every phone is going to fail at some stage, isn't it? I mean, if I try to open up my iPhone 4, it would presumably not work so well right now. I mean, isn't it true that all phones die or lose their capabilities over time because of the well-known facts about, you know, the batteries and other things? So what is it specifically about this failure that leads to a finding of abuse with resulting compensation whereas other phones over time don't?

MR MOSER: So a couple of points. All batteries age. I think the Tribunal can take, as it were, judicial notice of the fact that as batteries age they require recharging more often and so on.

Two things. First, that situation has not previously led to repeated UPOs and certainly not as early as was discovered in this case. That's the problem. That's the situation, the panic situation that we see described in the evidence.

The second point, and this is an important point, and it is made by Mr Sinclair in his third witness statement, but it is important to appreciate, is that battery age as such does not slow down phones in the ordinary course of events.

In an iPhone 5, Mr Sinclair explains the battery will have aged with exactly the sort of issues that you have identified, sir, but that didn't mean that this ran more slowly. So an iPhone 5 that was three days old would have run as quickly an iPhone 5 that was three years old. So that prior to the PMF and the circumstances of the iPhones 6/7 that we see in this case, this business of the phone slowing down significantly had not previously occurred simply because of battery age.

CHAIR: Sorry. I do want to just break this down. So the third party app comes along and the iPhone is not -- older batteries don't cope with it, is the generality about that so Apple do nothing. What's the analysis then.

MR MOSER: I don't want to be constantly saying "but". However, just one refinement. We are not talking about significantly aged batteries here. We are talking about maybe

nine months, maybe a year.

CHAIR: Let's say six months. Six month old battery. These new apps come along. They consume a lot of energy. Once a battery is more than six months old -- let's hypothesise -- UPOs mean the performance of the phone is unsatisfactory. What obligation is there on Apple on your analysis at that stage, assuming they decided it is not appropriate to put a PMF in. We are not going to put in a PMF. People are going to have to suck it up and replace their batteries.

MR MOSER: There is an easy answer to that, in my respectful submission. What happens in this case is completely out of the ordinary. Months after the launch of the new iPhone, the phone start shutting down spontaneously and repeatedly. The first thing about that, and it is stating the obvious, is that is not something that Apple could have hidden or swept under the carpet or lived with. It was not a liveable situation. My phone conks out. It has conked out again. So that is something that was obvious and would have led to a counterfactual where Apple would have had to react in some way or another. It wasn't open --

CHAIR: (inaudible) you point to the Gutmann railways case.

MR MOSER: Yes.

CHAIR: You say failure to communicate can be part of an abuse. In that case it is very clear where that leads, because it led to double charging. You shouldn't double charge for things. So I understand. In this case I don't think we are saying the fact that there's a failure to communicate of itself means your claim is bad. No one is suggesting that. But in the railways case it is very easy to understand the double charging being at the heart of the abuse. In this case it is more elusive to get hold of the problem. The way you plead it, as you say, if there had been proper communication -- there is no requirement at law, as I understand it, at least not this area of law, to give full and frank disclosure of what one calls the thinking and

everything you are doing. You may need to come back to that. You may disagree. At the heart of your abuse you are saying is the failure to communicate properly and to patch things up with the PMF means that consumers were not entitled or didn't have the opportunity to pursue other courses, and the course you suggest -- sorry, I am doing it from memory -- in your pleading, demanding a replacement battery at Apple's expense or getting a refund on their phone or partial refund on their phone, things like that. But for that case it is quite important to analyse why, if there had been that communication, there was an obligation on Apple to do those things. That's the bit of your case at the moment that I'm struggling with. I don't see how you make good the fact that it follows on your pleaded case why Apple had to replace batteries and why Apple was overcharging for its phones. That's the bit you really need to assist me with. Hand-waving, which I feel we are at, at the moment, does not quite satisfy the Tribunal at the moment. If you say: "Look, the battery was spec'd at X and plainly with the nature of the phone and the nature of the software that was coming, could be contemplated, it needed to be spec'd to Y", if that was your case, I would understand it. But you say "No, no, no, that's not part of my case". But you need to make good that bit, that had Apple communicated properly, consumers would have potentially been entitled to reparations from Apple.

MR MOSER: They would. It's about the concealment. So what we have is we have the UPOs occurring --

CHAIR: Let's assume there was not concealment. This is on your counterfactual. Apple have been absolutely upfront with everyone and told them what has happened. What are the entitlements of consumers, in those circumstances, on your case?

MR MOSER: If Apple had been entirely upfront at that time, bearing in mind the background now is the UPOs are occurring, people's iPhones are shutting down across the place, consumers are rightly, understandably saying "What's going on?"

Apple says: "We are terribly sorry. We are investigating it. There is something about the interplay between the way the iPhones are being used and the batteries that is causing these UPO shutdowns. There are a number of things we can do about this", says Apple. "We can try to slow down your phones".

CHAIR: I want to keep off that. Just assuming Apple is not -- what potential claims or actual claims do consumers have?

MR MOSER: All right. I am just putting down the marker that it is an important part of our case, what Apple does.

CHAIR: We will come back to that.

MR MOSER: Leaving it with the consumers, so what the consumers in that case would do, is they would of course have a complaint. They might try and trigger the one year warranty under their phones, which Apple puts on the phone, saying precisely the sort of thing that you are saying to me, which is: "This is not somehow an obvious inherent defect. This is a problem with Apple's phone and how it works." They would have their statutory rights. They would have their statutory rights under the Consumer Rights Act 2015.

CHAIR: You need to make good that case. I understand that. Why is that case arguable at the moment, that this would trigger their consumer rights?

MR MOSER: Well, if we look at the Consumer Rights Act 2015 --

CHAIR: On the facts you mean?

MR MOSER: On the facts, under section 9 of the Consumer Rights Act, the goods have to be of satisfactory quality. That includes freedom from minor defects, for instance. It includes durability. That's section 9(3) of the Consumer Rights Act.

CHAIR: It is not the law I am struggling with; it is the facts. You are saying that it is part of your case that these are defective phones?

MR MOSER: They are unusable in that sense, according to Apple's own internal

e-mails.

CHAIR: So if we go to 146 of your pleading --

MR MOSER: Yes.

CHAIR: -- you refer to -- sorry. As we read through --

MR MOSER: 147 is single and continuous.

CHAIR: Yes. You talk about failure to offer product recall, refund, battery replacement. Sorry, I have got the wrong paragraph number plainly. Can you remind me --

MR MOSER: What are you looking for?

CHAIR: Failure to offer product recall or battery replacement.

LORD WOLFSON: I don't know if the Tribunal is referring to 175(c), where that point is made in relation to the Consumer Act. I don't know.

MR MOSER: It is 175 to 178.

CHAIR: It is a very long pleading. It is not straightforward. I will find it over the adjournment.

MR MOSER: There we are, sections 9, 10, satisfactory quality and so on. We have in today's bundle, in the Monday bundle, sections 22 to 24 of the Consumer Rights Act.

CHAIR: No. I am not talking about consumer legislation. You made it very clear that's not part of your case. What I am concerned with is somewhere you pleaded that the abuse involves not only the failure to explain but the failure to offer product recall and battery replacement. It's the factual basis for that claim, that had Apple communicated properly with consumers, consumers would have been entitled to battery replacement at Apple's expense, or a recall of the phones, and it's the factual basis of that which I'm finding difficult to grasp at the moment.

MR MOSER: I am not sure we go as far as to say that we have a 100% case that they

would have been entitled to that. What we do say is that in the counterfactual, where Apple had been entirely open and there had been no concealment via the PMF or at all, we certainly say that that's what happened, because in our submission it is unimaginable that people would have just been told: "You will just have to struggle on with your UPOs. We are not going to help you with a new battery. We are not going to replace your phone".

People certainly have wished to make use of their consumer rights. That is what the CMA says in the document that was disclosed in the last hearing, where the CMA says one of the things that might have happened is consumers may have been constrained. I can give you the exact quote later. Consumers may have missed the opportunity to use their statutory rights, effectively.

That's what we plead. I don't have to go further than that, in my submission at any rate, because that's not, in fact, what happened. Apple did something else and the something else is what led to the abuse.

I sense we are at a conceptual crossroads where you look at it simply from the point of view of what would the consumers have done? In the actual what happened is that Apple did certain things. The conduct that Apple followed had the consequence that whatever it is consumers would have done, would have been able to do under their statutory rights, either because the products did not correspond with their description or weren't of a satisfactory quality, whatever consumers would have done is something they didn't have the opportunity to do.

If consumers had risen up and said "we are going to exercise our statutory rights" or "we are going to make a claim under the warranty" or "generally, we are going to cause a storm online about the performance or under-performance of these iPhones", it is inconceivable that Apple would have waited for 20 million individual claims under the CRA or similar legislation around the world before it acted in order to remedy the

situation.

What happened is that the consumers were deprived of their redress, their opportunity for redress both at the time which they could have used under, for instance, the statutes and their consumer law rights, and later on when we say that instead of continuing to conceal this, Apple would have, as a matter of fact, acted to replace the batteries, or otherwise --

CHAIR: Sorry, just looking at 158, for example, of your pleading:

"Apple's lack of transparency … concealed use of the throttle hindered its customers' ability to make informed decisions … therefore likely to distort the Proposed Class Members' decisions, including as to whether to buy an Affected iPhone or install relevant … upgrades, and impeded or deterred them from exercising their legal rights, whether under Apple's warranty … or through separate complaints, to seek a refund or replacement battery."

So you need to make good that they arguably had an entitlement to exercise under the warranty or to seek a replacement battery.

MR MOSER: Well, we don't shy away from the fact that they arguably had such an entitlement. We have pleaded it. We have got the Consumer Rights Act. I've outlined why we say the state of the goods, including its condition and fitness for purposes which goods of that kind are commonly supplied, and I am quoting from --

CHAIR: So we have to go back to saying that when the phone was sold -- if I am going to say there's a breach of warranty, that was exercisable the day the phone was sold, surely?

MR MOSER: Well, there's a one year hardware warranty on the iPhone.

CHAIR: Yes. So the day the phone was sold you would say: "Look, you could have come back into the shop and said, 'This is not fit for purpose, this phone'". I mean, you may not have had all the knowledge, but if you had taken it home and, with

an engineering disposition, had analysed it, you would be able to say: "The battery is inappropriately spec'd. The phone software is so complicated the battery is not going to be able to handle third party apps".

Does it satisfy all the conditions of sale on the day it is sold, and yet six months later ceases to satisfy them?

MR MOSER: There I must part company I am afraid with you, sir --

CHAIR: Okay.

MR MOSER: -- on the reality of that. There is no way on earth that a purchaser purchasing an iPhone, simply by looking at it, taking it apart, doing whatever on the day of purchase would have discovered any of the things that subsequently occurred. What happened in the actual, and that must I think be common ground, is that the phone was sold and only in the course of events, although relatively soon --

CHAIR: Is it your case it was defective when it was sold or it wasn't defective when it was sold?

MR MOSER: Whatever was wrong with the phone when it was sold that led to the UPOs was inherent in it at the time that it was sold. It is just that nobody knew that. Apple didn't know that.

CHAIR: I appreciate that. It may depend on the date the phone was sold.

MR MOSER: I say Apple didn't know that. We may still discover the e-mail that says "I am a bit concerned".

CHAIR: It may depend on the date on which the phone was sold.

MR MOSER: Yes, it does, because if you bought your phone after autumn 2016, certainly after December 2016, then Apple knew.

CHAIR: Snapchat was already around. You could have picked up the phone and looked at it and taken it -- of course, in practice people don't do this, but I am just investigating what your position is. You could have looked at Snapchat. You could

have looked at the phone. You could have looked at the battery and you could have said: "Look, this is not adequately spec'd, from an engineering perspective".

MR MOSER: I respectfully disagree. It seems to me that really only Apple was in a position to analyse its digital content and the hardware, and to see what combination of the two was leading to the UPOs.

CHAIR: I think we are at cross-purposes. Sorry, I am too much of a patent lawyer. Let's go back to your position. You are saying these phones were defective when they were sold. Is that going to be part of your case at trial?

MR MOSER: It is not a necessary part of my case to say specifically they were defective, but that they had the problem of UPOs inherent within them at all material times clearly, because nothing more happened to the telephone between its launch and when the problems occurred.

I mean, if we look forward into the future, the iPhone --

CHAIR: I do want to pin you down. Are you saying at trial you may be arguing that these phones were defective --

MR MOSER: Well, if by --

CHAIR: -- or you won't be arguing these phones are defective. It is kind of one or the other. It is a bit of a binary question.

MR MOSER: We have been saying, perhaps increasingly sadly, since the beginning, this is not a defective product claim and therefore that is not how we have framed it. We used the word "defective" to describe the battery issues.

CHAIR: Fine. Go to paragraph 158 and tell me how if I take away the fact that they are defective, how paragraph 158 works?

MR MOSER: It works regardless of the label of defective or whatever other label you want to put on it, the state of the goods, the condition, the fitness for purpose for the kind of use for which such goods are commonly supplied, those things that go towards

satisfactory quality were not given in this -- if you want to put the label defective on it, so be it.

CHAIR: You are saying they could exercise their legal rights under Apple's warranty?

MR MOSER: They could have done that as well.

CHAIR: Then you are saying they are defective. Do you want to take instructions about this over lunch? I just need a position from you on this, whether it is going to be part of your case that these phones were defective and/or that the batteries were defective.

MR MOSER: I will happily take instructions. I just want to make it clear that it is not just about defective. What we are saying in relation -- let's stick first to statutory rights -- is that they didn't match their descriptions. Standard consumer rights aspects -- there's reference in paragraph 158 to what the CMA say about it at annex B of the Consultation Letter. That is in Supplementary Bundle 1 at page 623. It seems to be confidential. We haven't had a debate yet about what is or is not confidential, but if you look at page 623 of the Supplementary Bundle, you will find there paragraph 33 of the CMA's Consultation Letter.

CHAIR: Give me the paragraph number?

MR MOSER: 46. Have you got it? It is in Volume 1, Supplementary?

CHAIR: I think I have it on my desk. Which paragraph?

MR MOSER: 33. Internal page 12, page 623 of the bundle. So we are certainly in good company in saying this.

CHAIR: It doesn't say what they are, though. They are just bullet points. I am trying to just get a little bit -- anyone can say you missed the opportunity to exercise your warranty rights, but what are the warranty rights that you don't have the opportunity of exercising?

MR MOSER: There is a hardware warranty for a year put out by Apple. There is the

Consumer Rights Act at paragraphs 9 and following.

CHAIR: I understand that. It is not what is the breach of warranty. If it is a defective phone, you can say improperly spec'd phone, defective battery, improperly spec'd battery. Of course you have consumer rights, and if that information is kept away from you, you miss the opportunity of exercising them potentially. I understand that case. The bit I am struggling with is whether you are saying -- because if this is going to be a part of your case, and at the moment I think it has to be, but I may be wrong about that, if it's going to be part of your case, that is one of the aspects we have to consider, whether it's passing the strike-out test at this stage.

MR MOSER: Well, it is part of our case that's pleaded. Forgive me that I hadn't really struggled with it to that extent, but it seemed to us that we would relatively easily surmount the necessary hurdle as far as the potential consumer law rights aspects are concerned that were not taken advantage of. That is not the case we are bringing. This is not a consumer law claim, but of course in the scenario you have posited, what if we never reach the PMF, what if Apple did nothing, the Consumer Rights Act is in scope. You have not only the condition and fitness under section 9. You have not corresponding with description under section 11 of the Consumer Rights Act, so pre-contract information. You say "This oven dish is oven proof" and then it shatters when you make an ordinary lasagne. You say: "This phone is fit for purpose. You can download all the apps. You can use it in the usual way". And then it shuts down. So, in my respectful submission, that's reasonably straightforward. That's clearly the sort of thing the CMA had in mind. Then you have all the usual remedies that you have under the CRA, which are the right to reject, repair or replacement, a refund or damages. All of those things will have been open to consumers in this case, had they had either the adequate information supplied to them by Apple at the relevant time -- "Terribly sorry, this is the problem that's occurring" -- or, at the very least, not

an attempt to disguise the problem, which is where we are going with the abuse, but instead they are told: "Right. This is the problem. We can either throttle it with a PMF, your phones will run slower, or you are going to suffer the UPOs". Then they would at least have made that informed choice. They would still have been left, by the way, with an iPhone that performed less well. That's not what happened. What happened is a different thing.

CHAIR: I am aware of what happened, yes.

MR MOSER: Instead of getting redress at that point, instead of saying "No, I am not happy to have an iPhone that either shuts down or is 50% slower", or whatever, "I want a different iPhone. I want to give it back. I want my money back. I want a refund. I want a new battery". Instead of any of that happening, and we say, as a matter of reality, it is unthinkable that Apple wouldn't have provided some sort of redress of that kind. Instead of that happening, they lost the opportunity for any of those things because the UPOs and their effects were simply disguised, and people were left none the wiser as to what was happening with their iPhones that were suddenly running slow. That's where I get on to the abuse.

So yes, we say the consumer rights, the intermediate counterfactual of what would have happened if Apple had done nothing, they are an important part of the story. They are the leaping off point for abuse.

I appreciate -- I don't just say that in a sort of random way -- I do appreciate that you are probing me on this, because if that's troubling the Tribunal, this is a very, very important point, but we say we easily surmount the low hurdle at this stage of the story, before I have really started telling our story, of course, but at this stage we have the common ground situation of the UPOs at an unacceptably early time, to an unacceptably high level, and what I say is surely a well arguable point that in those circumstances the consumers would have reacted. They would have been able to

exercise their statutory rights or, even if they only did, which they certainly would have done, the sort of thing consumers do nowadays, go on Reddit, go on Twitter and say "This is a complete outrage".

Apple, despite being a super dominant firm, is to its credit highly reactive to especially its savvy customers' views. Apple itself would have taken some of these actions in response to the consumer complaints and the consumer-generated publicity.

CHAIR: Can we have five minutes for the shorthand writer? Is that going to delay you significantly? Can we have five minutes for the shorthand writer?

MR MOSER: Absolutely.

(Short break)

MR MOSER: So in attempted summary of this we can't say, on the evidence, and we don't need to on the law, that it is more likely than not that the batteries were defective, defective in the sense that there was some technological problem with them. We know a number of things. We know, and it is undisputed, that batteries caused the UPOs, at least in the sense that the interplay between the usage of the phone and the battery in iPhones 6 and 7 caused the UPOs. We know that the UPOs were unacceptable to consumers. That must also be indisputable or common sense. Therefore they were unacceptable. They were of unacceptable quality in a consumer law sense. It is very likely that consumers would have exercised their rights. They might also have tried to say that the battery was defective under the Apple warranty, and that's what the CMA says.

In that scenario, which is not the scenario that we put forward for our abuse, because our scenario is to do with the PMF, but in that scenario Apple would already back in 2016 have been in a position where it had to give redress, either as a matter of law or as a matter of fact, because it would have felt constrained to do something about this if it had not come up with its PMF solution.

So that's what would have happened if we are talking entirely about what the consumers would have done in a counterfactual world, and it would have led to, we say, redress either in the form of money, replacement batteries or other similar form as pleaded.

We say that is all we have to say at this stage. We cannot be told "well, you have to prove that the batteries were defective". We don't know. And, of course, there is a great danger, with respect to hindsight about this, looking at it now and saying --

CHAIR: Not the batteries were defective. The batteries were inappropriately spec'd.

MR MOSER: Inappropriately spec'd. Looking at it now, it must have been obvious it was the batteries. Well, it would have been obvious it was the batteries that failed, but, of course, we are looking at it now through the reverse end of the telescope, having had explanations and disclosure from Apple and eventually the publication in December and finally the undertakings given to the CMA in 2018. So we now know a lot about what was going on.

A consumer back in 2016 would have known that their phone kept shutting down. That's why I respectfully disagree with the idea that somebody on day one or day two or even day 100 would have been able to look at the phone or the battery -- let's remember, as a matter of fact, the batteries in the iPhone 6 were internal. You could not take it out and somehow analyse it. You had to go to Apple for that. It is not the case that the consumer would have been any the wiser about any of this at the time.

CHAIR: Okay. That wasn't really my question.

MR MOSER: Then I have misunderstood and I apologise. Really that's my answer to this. We don't have to show that the batteries were defective from a particular time or perhaps at all. What we know is that the problem of UPOs occurred. Replacing the battery appeared to solve the problem. For how long actually we don't know. We don't have that information. We know that Apple has run some data analysis that

means they have data on what the problem was. We just haven't seen it yet. When we see that disclosure, we will be able to tell you more. That is the unwrapping, as it were, of the second sentence of paragraph 6 of our skeleton argument, which is as far as I got with this.

All we said there was that in and of itself the fact that the iPhones didn't live up to expectations, suffered UPOs, etc, etc, and then had to be throttled did not, one might say in brackets, in and of itself amount to an abuse of dominance.

We had not expected that it would be somehow in doubt what had happened to lead to the UPOs was that there was an interplay between the ordinary usage of the iPhone and the battery that meant that it couldn't be used in the way that was advertised.

CHAIR: Is there any case law -- I will ask Lord Wolfson the same question -- which throws light one way or the other on whether the concealment of a consumer defect -- sorry -- of a product defect -- the concealment of a product defect can amount to an abuse? Is there a case either for or against that proposition?

MR MOSER: We have certainly got in the bundles cases on misleading statements, in that case in relation to patents as it happens.

CHAIR: *AstraZeneca*.

MR MOSER: That was the *AstraZeneca* case, that was considered in the context of abuse.

CHAIR: That's not quite on point.

MR MOSER: It forms part of the legal argument here.

CHAIR: It is not a case where there was a concealment of a consumer defect. I mean, the heart of your case, as I understand, is that Apple partially concealed a defect in its product, and, given its super-dominant position, that's simply not on and that can amount to an abuse.

MR MOSER: Exactly.

CHAIR: That's at the heart of your case. You make the point very fairly that classes of abuse are not limited, but there is nothing on this. This is essentially a novel form of abuse.

MR MOSER: This is going to be --

CHAIR: Not necessarily any worse for it but it is essentially a novel form of abuse.

MR MOSER: This is going to be that case that we are going to ask this Tribunal to find. As we know from the pronouncements of the Court of Appeal and the CAT in other cases, this is an area of the law that is developing.

CHAIR: That I understand.

MR MOSER: That's actually part of the test in relation to certification. Where you are looking at in *Gutmann*, for instance, the Court of Appeal looked at the question of an unfair selling system. Where you are looking at a new point like that in competition law cases, and that's Mr Justice Roth in *Sel-Imperial*, part of thinking about strike-out, thinking about certification, is that there is a forward looking aspect where competition law is being taken forward on a continual basis.

CHAIR: Generally the legal principle is, where you are developing a new area of law, you should be slow to strike out.

MR MOSER: Exactly. That's the case we are putting forward. We say it's no different from those other forms of abuse where, for instance, a misleading statement to a patent office or the Commission's decision in the *Rambus* case, intentional deceptive conduct in that case, not in and of itself cases where you find them listed in Article 102 or in the Competition Act. It doesn't say anywhere "You must not go around the patent offices of Europe exaggerating your patent, but by the way that's unlawful and by the way, as part of your single and continuous abuse case, that can become an abuse in and of itself".

If I have a handy case where I say well, the fact that the consumers weren't able to

exercise their Consumer Rights Act rights sounds in competition law, I would, of course, have led with it, but that's, in my respect physical submission --

CHAIR: You seem sensitive to the fact that this is not a product defect claim. You repeat that statement on a number of occasions. But product defect -- correct me if I am wrong -- is a key aspect of your claim, but you are saying that it's the product defect combined with the lack of candour from a super-dominant player in the market which is really what this case is about.

MR MOSER: My claim is not a product defect claim. I am bringing a competition law claim. But that is part of the underlying route of how we get to the single and continuous abuse that we complain about, as you put it. That is how it is pleaded. It is sometimes unfortunate how cases develop, because there was an earlier version of the pleading. That was met with strong objection from the other side that you can't bring a product defect claim as a collective action in the CAT.

CHAIR: I am aware of that background.

MR MOSER: Yes, indeed. So we steered the other way. Perhaps we over-corrected by repeating quite so often "this is not a product defect claim". My claim is not a product defect claim.

CHAIR: I understand. The point isn't in the nuance. If the product -- and one can argue what the product is -- is it the phone, is it the software, is it the battery -- but if the product is not defective and doesn't give rise to a potential claim from consumers, it is more difficult to understand then what the abuse is.

MR MOSER: Absolutely. Perhaps we have been making far too -- this is certainly down to me -- far too heavy weather of this this morning, because that underlines the whole thing. It is defective in the sense of there's plainly something wrong with it. It doesn't meet the description. It isn't fit for purpose, because of the problem of the UPOs.

CHAIR: You put it slightly differently a moment ago. You said Apple would have to give redress as a matter of fact or law.

MR MOSER: Yes.

CHAIR: You are saying it may give rise to the potential for consumer claims, and at some point we will need to think, if this claim were to advance, if it were to be certified, to what extent is the underlying product defect necessary for the case. Would you have a case where actually the product was satisfactory in law, Apple was not required to do anything to address the problems, but had it not done the PMF, it would have taken some other course to keep consumers happy? At the moment I don't really understand how that fits in. I have not thought about it --

MR MOSER: That is also a possibility in my respectful submission. Again, in our case we are not bringing a consumer defect case. We are bringing a competition law case. The question is whether they have obtained an advantage on the market through their behaviour that they would not otherwise have enjoyed if they had not brought out the PMF and disguised the UPOs as described. I have not yet reached that part of our case, which really is the abuse part.

We have dealt with, as it were, the factual/legal background, and the factual/legal background until about December 2016 is all about the UPOs that may or may not sound in consumer law and what the consumers would have been able to do if matters had been different from there. But as soon as we get into December 2016, the PMF throttling situation, we are into the abuse proper, as far as our case is concerned.

It is part of my submission, very much part of my submission, whether or not the consumer claims would have eventually succeeded, the facts in the counterfactual where there was no PMF are that Apple would have been constrained to give some form of redress, if they had been transparent, in exactly the same way really as to whether the consumer claims can be proven or whether they would simply have been

brought. There would have been, as it were, an uprising of the iPhone community. So the problem was the UPOs, the interplay, however it works between the batteries and the apps, but then we move on to the surreptitious launch of the PMF that we describe. That's where we get into the abuse that we complain about.

CHAIR: I think we understand that part of your case. By all means elaborate.

MR MOSER: For the avoidance of doubt, I repeat I am absolutely putting it on both tracks, as it were.

...the first track is that they would have had effective legal rights and the other is even if they had just been asserted. Again, I say I am in good company, because that is essentially how the CMA puts it. They say they may have been prevented from doing all of these things. Ultimately, the question, from a competition law point of view, is: "has that enabled Apple to gain an advantage in the market that it would not otherwise have had, or maintain an advantage in the market that would otherwise have been imperilled?". We say well, very much yes. Without the behaviour that we complain about, there would have been great negative publicity around these iPhones. The iPhone 7 was launched in about September 2016, I think. It had the same difficulties and the US complaint information indicates that difficulties appeared within days of purchase in some cases.

So there would have been fewer purchases, greater complaints. Something would have had to have been done. The product would have been – the value of the product would quite obviously have decreased with the negative publicity. It wouldn't have been able to charge the price that a premium product deserves.

That ties in precisely with the sort of abuse that we are talking about. That is, in fact, independent of whether I can prove to you that the battery was defective or whether I can prove to you that the consumer law claims would have succeeded. It is, however, well arguable it would have succeeded in any event, so I have both tracks.

Ms Howard points out to me in a note that the market share against the other main player in the market – there are two main players, the Android phone and the iPhone – the market share might well have been affected, and that's something to keep an eye on if you are Apple, understandably.

So that takes one to the single and continuous abuse, as we describe it. I don't know whether this is the time to press on.

CHAIR: Well, I think the other area that we need some help with is just why the PMF was unsatisfactory. I think where we are on – as I understand the evidence and I think it is common ground that Apple has at no stage disputed that it leads to slower processing speeds, but why that is material or is a matter that should concern the consumer is perhaps an area you might wish to focus on. If it takes an eighth of a second to launch my photos and then after this software it takes a quarter of a second, so what, particularly as you have been so keen point out that Apple needed to address the problem of its UPOs.

MR MOSER: I am happy to go there. What I was planning to do, but it may well be unnecessary, is to take the Tribunal through the law we described at paragraphs 7 to 14 of our skeleton argument in greater detail, in order to explain how we put this case as part of a single and continuous abuse, variously including unfair pricing, unfair failure to act transparently, leveraging and unfair intrusion into consumer rights as a form of unfair trading conditions. The phrase "unfair intrusion into consumer rights" is the one taken from the Court of Appeal in *Gutmann*, because it is absolutely an abuse to do that, to seek to prevent your consumers from exercising your consumer rights.

CHAIR: Yes.

MR MOSER: That is established. So if I don't need to take you there you that, as it were, at length -- I sense that the Tribunal is keen to get to the nitty-gritty of the PMF

and what it actually did, because I submit it is a great deal worse than you have just outlined. We are not talking about a few eighths of a second or whatever. It is, in fact, now that we have had a smidgen of disclosure, how Apple has flashed an ankle of the information that's likely to be available at trial, it is in my submission clear that the effects of the PMF were in fact considerably more than Mr Sinclair estimated even in our other expert evidence. If that's more useful, I am happy to go there more directly.

CHAIR: I am in your hands. If there are any points that are not apparent from the face of your skeleton on the authorities, by all means take us to them, or alternatively see what Lord Wolfson has to say. If he disagrees with any of those principles, we can deal with it in reply.

MR MOSER: I think we have 25 minutes until lunch. May I suggest I try to take those 25 minutes for the rest of the abuse part of our skeleton.

CHAIR: Yes.

MR MOSER: And then come to the facts in the afternoon.

CHAIR: Yes, of course.

MR MOSER: We talk in our skeleton about the abuse and at paragraph 7 we introduce the idea of the single and continuous abuse. That is mentioned in *Whish and Bailey* we see in the footnote. The reference there is to that authority in authorities bundle 5 at Tab 57. Within it at page 3448 we see paragraph number H. The learned editors of that work say:

"Just as it is possible under Article 101 for there to be a ‘single and continuous infringement’ that violates that provision, so too it is possible for there to be a ‘single and continuous abuse’ under Article 102. For example, in *AstraZeneca v Commission*, the … General Court confirmed the finding of the Commission that AstraZeneca was guilty of a single and continuous abuse consisting of a deliberate strategy of misleading national patent offices."

There is a reference there to *Intel*, where the Court of Justice concluded:

"for the purposes of establishing jurisdiction … it was appropriate to look at Intel's 'overall strategy', rather than looking at each separate act on its part, which 'would lead to an artificial fragmentation of comprehensive anti-competitive conduct'. The Commission has found single and continuous abuse in a number of decisions: recent examples are *Google Android* and *Qualcomm*".

In our skeleton argument we give the example of *Orange Polska* being another one.

The term "single and continuous abuse" in *AstraZeneca* is actually found within the Commission's decision. It is useful to turn that up briefly to see out it is used. That's in authorities bundle 3 at Tab 27. That's the *AstraZeneca* case. You will be familiar with it. It is the one where Astra's strategy was to apply for so-called supplementary protection certificates, or SPCs, extending the protection for the active substance omeprazole in an anti-ulcer medicine called Losec.

At page 1602, at paragraph 626, we see:

"In essence, the abuse consists of a pattern of misleading representations."

CHAIR: Sorry. Give me the page number again.

MR MOSER: 1602.

CHAIR: Yes.

MR MOSER: 626.

"In essence", at 626, "the abuse consists of a pattern of misleading representations… as part of its overall SPC strategy - to patent agents, patent offices and national courts in order to acquire (or preserve) SPCs … [with] these misleading representations AZ aimed to keep generic manufacturers away from the market."

Then it explains that the abusive character arises from the specific facts set out in this decision. At 628:

"AZ's single and continuous abuse unfolds in stages."

We see there was a decision not to reveal certain crucial data on the final form for instructions for omeprazole.

Then:

"More precisely, AZ conceals two … authorisation dates which it [knew to be] pre-1 January 1988 … replaces them with two later dates, post … January 1988 … as “effective marketing” dates … [and, in that connection,] misleading representations in connection with its SPC … [to various authorities]."

Then it goes on to a second stage and so on. In that case at paragraph 631, the representations formed part of a centralised and coordinated strategy covering numerous parties.

That was the *AstraZeneca* decision.

CHAIR: Just explain how it matters whether it's a single continuous abuse in this case or just an abuse.

MR MOSER: It is just an abuse but the form of it is a single and continuous abuse in the sense you have a series of different things which in and of themselves might or might not be an abuse, but certainly when you see them together, they are. There is often an attempt in the skeleton argument on the other side to seek to unbundle the abuse and refer in isolation to what we complain is a lack of transparency or in isolation to the act of using the ISO (sic) as leveraging. What you have here is you have all these aspects of Apple's conduct which are all aimed at --

CHAIR: You are really saying you have to look at the conduct as a whole.

MR MOSER: You have to look at the conduct as a whole, yes. Yes. Indeed, and not dissimilar to AZ, *AstraZeneca*, we say there was a common plan here.

CHAIR: Yes. I think in AZ it was even more segmented really, which is why it was perhaps more important to look at the overall strategy.

MR MOSER: Perhaps.

CHAIR: I think here you are pushing at an open door by saying we need to look at these things -- at least at this stage.

MR MOSER: Fine, sir. I am not going to push further at that open door.

What we say about the different aspects of the abuse is first we have, as we see in paragraph 8, a form of leveraging of the dominant position in the software market, the iOS market into the hardware market. I suspect it's quite straightforward, what we are saying here, and we say that that is capable of falling foul of the statutory test under section 18(1).

There is a typo in the first line of paragraph 8 of our skeleton. We are talking about (2)(a) of the Act and Article 102(a), not (b). I apologise for that.

The case that goes to this, I don't propose to take you to it now but it is again the *Google Shopping* case. It is at authorities bundle 4, Tab 34. The relevant paragraphs are 163 to 167. It doesn't say anything very spectacular. Again it says leveraging is not in and of itself abusive, but it depends on the context. If in the context it has abusive effects, then it will be an abuse.

We also say at paragraph 9 that Apple's abusive conduct constitutes unfair pricing. Again, important to note that we don't say that this was a straightforward matter of unfair pricing. They didn't set the price and say: "Oh, well, we will set an unfair price". It effectively became an unfair pricing case because they reaped trading benefits which they could not have obtained in conditions of normal and sufficiently effective competition because of the way that we say the value of the phones decreased once it became clear at least to Apple what was going on.

The Court of Appeal has pointed out in *Flynn Pharma* that there's no fixed way of establishing that a price is unfair. As we have seen from Flynn Pharma and also in *Kent v Apple*, what we need is a price or a value that is less or that is higher than it should be, and a methodology for working this out. We say we have both of those

things.

So again I don't propose to go there if the Tribunal does not particularly want to take me there.

We have also got an exploitative abuse due to the unfair failure to act transparently. We have the point in *Gutmann* which is mentioned at paragraph 11, which is that a lack of transparency can be an important factor in rendering unlawful that which might otherwise be lawful.

Of course, as we have seen, that is a phrase that one might use with regard to any of these aspects. Leveraging can be lawful. Obviously, Apple is perfectly entitled to use its iOS in order to adjust the software or the hardware. That's what it is there for. It is all a question of context.

We have drawn an analogy with other instances where lack of transparency has been held to constitute an abuse of dominance. I would really like to make that point, as I already have in exchanges with you around why do we need single and continuous abuse. I would like to make that point with regard to all of the aspects that we complain, including the unfair intrusion into consumer rights.

What we see there as part of a single and continuous infringement of abuse in *AstraZeneca v Commission*, the provision of misleading information led to a patent authority wrongly excluding patent protection, as we have seen.

The reference there is Authorities Bundle 4. I have it as Tab 29b, which is the C.M.L.R. reports, the AstraZeneca case before the General Court, not the decision.

There are just a number of points that I want to make by reference to *AstraZeneca* in the GC. That is at paragraph 352 following of the judgment. That's the classification of the behaviour in question is an abuse of a dominant position.

At 353 --

CHAIR: Give me a second. Page number?

MR MOSER: 2453.79. It is an insert.

CHAIR: Give me a second. My bundle is falling apart. Yes.

MR MOSER: So at paragraph 353 they say:

"In this respect, it should be borne in mind that Article 82", as it then was, "is aimed both at practices which may cause damage to consumers directly and at those which are detrimental to them through their impact on an effective competition structure".

I just read that because AZ is, of course, a case about exclusionary abuse, but we say clearly applies equally to exploitative abuse, to causing damages to consumers directly.

Paragraph 355 is the central observation around the submission of misleading information liable to lead authorities into error "to make possible the grant of an exclusive right to which [the] undertaking [was] not entitled, or … for a shorter period, constitutes a practice falling outside the scope of competition on the merits … Such conduct is not in keeping with the special responsibility of an undertaking in a dominant position not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the common market", as was relevant at the time.

So that's the point I made without reference to this paragraph earlier, that when we come to the competition law aspect of this, as opposed to the defective product aspect of this, the damage we are looking at is not to impair the scope of competition on the market.

The nature of the abuse is objective. It is a *Hoffmann-La Roche*, well-known point. So bad faith is not required.

At 357:

"the question whether representations made to public authorities for the purposes of improperly obtaining exclusive rights are misleading must be assessed *in concreto*

and that assessment may vary according to the specific circumstances of each case."

Of course, we make that submission also. The court points out at paragraph 359 that, although it is not necessary, intrusion constitutes a relevant factor and should be taken into consideration.

Paragraph 360, some authorities were not misled. The conclusion is in the last sentence of that paragraph:

"where it is established … behaviour is objectively of such a nature as to restrict competition, the question whether it is abusive in nature cannot depend on the contingencies of the reactions of third parties."

361:

"the Commission [was consequently correct] in taking the view that the submission to the patent offices of objectively misleading representations", and so on, "resulting in a restriction or elimination of competition, constituted an abuse of that position."

We have a similar finding -- and that's all I was proposing to say in that relation to that authority -- we have a similar finding in the Commission decision in a case called *Rambus*. Can I just ask you so put that away and turn up the Supplementary Bundle of Authorities at Tab 2? We see in that case -- it starts at 19 and the decision starts at page 20. It is addressed to a Delaware company in relation to the claiming of potentially abusive royalties for the use of certain patents for Dynamic Random Access Memory, DRAM chips, as they are called.

At paragraph 3 on page 21 we see:

"The Commission took the preliminary view that Rambus' practice of claiming royalties for the use of its patents from industry standard-compliant DRAM manufacturers at a level which, absent its allegedly intentional deceptive conduct, it would not have been able to charge raised concerns as to the compatibility with Article 102 of the Treaty on the Functioning of the European Union."

Over the page twice to page 23, paragraph 18.

"JEDEC, an industry-wide US-based standard setting organisation, developed a standard for DRAMs. JEDEC SDR DRAM standard-compliant chips were the main type of DRAM chip on the market … accounting for 84% of DRAM chips sold. By August 1999, the JEDEC … DRAM standard had been agreed, further entrenching the evolutionary path of the JEDEC DRAM standards."

Why does that matter? We see that over the page under the heading, "Practices raising concerns". At paragraph 27:

"In the preliminary assessment the Commission considered that Rambus may have engaged in intentional deceptive conduct in the context of the standard-setting process by not disclosing the existence of the patents and patent applications [they] later claimed were relevant …Such behaviour is known as a “patent ambush”."

You may be familiar with that, sir.

"The Commission took the view that Rambus may have been abusing its dominant position by claiming royalties for the use of its patents from JEDEC-compliant DRAM manufacturers at a level which, absent [the] conduct, it would not have been able to charge. In the preliminary assessment, the Commission provisionally concluded that claiming such royalties was incompatible with Article 102 TFEU, in light of the specific circumstances of this case, including Rambus' intentional breach of JEDEC policy and the underlying duty of good faith in the context of standard-setting, which resulted in the deliberate frustration of the legitimate expectations of the other participants in the standard-setting process."

“Furthermore [it] … undermined confidence in the standard setting process, given that … in the sector relevant in the present case [that's] a precondition to technical development and the development of the market in general to the benefit of consumers.”

So we have in a sense a stage further even than *AstraZeneca*, where what you have here is the special responsibility of the dominant company not to breach the JEDEC policy in relation to standard setting, and because of the circumstances of the case that in the view of the Commission amounted to an abuse. One can see easily why that should be so.

So, sir, when you ask me, "Do we have somewhere a case that says avoiding the consequences of consumer law is -- has that been held to be an abuse?", I haven't got that handy, but I can show you these cases. I can show you *AstraZeneca* and I can show you *Rambus*, and I can say, "Well, this is here is a company that has avoided the consequences of "broke" patent law. Here is a company that has acted contrary to the policy of a standard setting body in the United States, and it was found that those things sound potentially in damages but sound as a breach of Article 102.

So I say it is in the present case, where the fact that what we say is the abuse, the fact of concealing the difficulties experienced with the iPhones, imposing the PMF, surreptitiously slowing down the telephones and withholding from the consumers the information that would not only have led them to be able to exercise their consumer rights, so an intrusion into their consumer rights, but that also meant that the phones were worth less than consumers thought they were, according to our metric, because, in fact, they were not able to do what a premium product is supposed to do, and doing all of that by leveraging their dominance in one market into another market, doing all of that deliberately with the aim we say of avoiding any of this coming out into the open and leading to the phones becoming less valuable or the market position of Apple becoming endangered, all of that we say absolutely sounds in consumer law in the same way that we see in these cases in Europe. So that's in a nutshell the case that we bring.

Of course, it is important for that, and I will just use the last sort of two minutes not to

leave out of account the fact that what we complain of is the abuse that started in or about autumn or December of 2016 and started with what it was that Apple did, not what the consumers did.

I know we have concentrated a lot this morning on what the consumers would have done. I just don't want to lose sight of the fact that the operative abuse is not what was happening with UPOs in autumn of 2016. The operative abuse is Apple's reaction to it.

CHAIR: We understand that.

MR MOSER: So, unless I can assist you further, what I would like to come to at the start of the afternoon session is the facts, and in particular the primary facts, that we say have arisen out of the very helpful disclosure, however limited, where we say that it is now clear, based on primary facts, that there was a material slowing down of the phones as a result of the PMF.

CHAIR: Shall we stop a couple of minutes early? You seem to have paused as a natural break.

MR MOSER: Yes. Sorry. You are probably seeing the hands by reason of parallax a little further from 12 than I am, but I would be very happy to stop now unless there's --

CHAIR: We are moving on to a new topic now?

MR MOSER: We are moving on to a new topic.

CHAIR: Well, let's rise now and come back at 2 o'clock. Thank you.

(12.58 pm)

(Lunch break)

(2.00 pm)

MR MOSER: I would like, if I may, to pick up on two things I said this morning, which have been raised with me during the short adjournment. The first is apparently I committed a solecism as far as the working of iPhones is concerned. I should say

I myself am a user of an iPhone. I've had it for over ten years. Not this one. I am told an iOS update 16.6.1 is available later tonight. I trust non-abusively.

I gather that I said a phrase of my own devising in that the slowdown would have led to the spinning wheel. Of course iPhones don't have spinning wheels, but everybody else will have picked up on that apart from me. So that was the solecism.

The other thing is that despite what I considered to be an excellent equestrian analogy in relation to strike-out, it has been pointed out to me that arguably, and I leave that up to the Tribunal, an even more authoritative description is given by the Supreme Court in *Merricks v Mastercard* in answer to that same conundrum. That's at Authorities Bundle 1, Tab 9, Lord Briggs, giving the judgment of the majority, states at page 496, paragraph 39, that the leading case is *Pro-Sys.* He explains what happened there. At C:

"For present purposes there were two relevant conclusions. The first was that the threshold test for establishing that the pleadings disclosed a cause of action was the equivalent of the strike-out test in English civil procedure."

So that is, as it were, the procedural aspect:

"The second was that the threshold for the establishment of the other conditions for certification was that there should be “some basis in fact” for a conclusion that the requirement was met."

Some basis in fact.

"This low threshold, derived from the Supreme Court's earlier decision in the *Hollick* case, … was not a merits test, applied to the claim itself … the question was whether the applicant could show there was some factual basis for thinking that the procedural requirements for a class action were satisfied, so that the action was not doomed to failure at the merits stage".

So that's the level for the *Merricks* enquiry. For good measure Lord Briggs adds:

"The standard of proof at the certification stage came nowhere near the balance of probabilities."

At paragraph 41 there is the reference to the low threshold that I did mention, which is where I got it. Over the page at 42:

"I regard the Canadian jurisprudence as persuasive in the UK".

And so forth. So that is the low bar and the low threshold, as it were, of course put rather better by the Supreme Court.

So I have shown you --

CHAIR: I just struggle a little bit about how some basis in fact compares to the normal standard that would be applied on a normal summary judgment application, say. Is that higher or lower?

MR MOSER: That is a question of whether there is some basis in fact, as it were, as a matter of the appreciation of the Tribunal's reading of the evidence. The point that has been raised --

CHAIR: All cases can only proceed if there is some basis in fact.

MR MOSER: Indeed. It may simply be stating the obvious. It is just that that happens to be the phrase that Justice Rothstein used in *Pro-Sys*, some basis in fact.

CHAIR: I am not sure we need to grapple with the conundrum in this particular case.

MR MOSER: The case history was that in *Pro-Sys* the other side had argued -- the respondents in that case had argued you need to have some cogent facts, or similar, and Rothstein J said: "No, what you need is you need some basis in fact". That has, of course, been emphasised in *Merricks* and in *Gutmann*, Court of Appeal and so on. That's what I have to show you about that.

I come on to some basis in fact now, because I submit we now have clear evidence, based on primary facts, that the iPhones in question were throttled, and that it was done surreptitiously, and it must be inferred that had a significant effect on their

performance and efficiency and upon the users' experience of the same.

We rely, of course, on our expert. Now at trial that's either going to turn out to be right or wrong.

CHAIR: Which bit of your expert do you rely on?

MR MOSER: For present purposes, that more than suffices. Before I come to which bit of our expert I rely on, if I may, can I just introduce a problem and the nature of the disclosure that I principally want to address?

CHAIR: Uh-huh.

MR MOSER: So a problem is confidentiality. It has been addressed to some extent by an unredacted version of Mr Crumlin's statement and by some helpful clarifications from my learned friends as to what I can and cannot say. I am going to have a go at speaking to this evidence without mentioning any numbers.

CHAIR: The specific numbers are in the tables.

MR MOSER: Or percentages based on those tables. I can mention some numbers but I can't mention the percentages. I would also attempt to concentrate primarily on a table called the CPU throttle table, which is at page 373 of SB1. I have asked for it to be enlarged. May I hand up an enlarged versions of page 373.

CHAIR: Yes. Let me just see where it is. So this is different to the one that's set out in Mr Crumlin's evidence? Is it the same table as in his evidence.

MR MOSER: It is the same table as everywhere as far as I am aware. It is also in our skeleton argument. There is a CPU one in our skeleton argument and also GPU. GPU at present doesn't form an active part of Mr Sinclair's methodology. It is, as it were, a bonus, so we can presume that everything to do with the GPU makes it worse. I am going to concentrate primarily on the CPU for today's purposes, because it is I say sufficient for the hurdle that I need to surmount.

CHAIR: We have seen this table already, as you say, set out in the evidence.

MR MOSER: I will say a couple of things about this table. The first thing is you will have noticed the headline. This is perhaps a jury point and I apologise if it is. In the early iterations of exchanges between the parties, Apple has been extremely keen to avoid any suggestion that this involved throttling, which is an objection that is not pursued, and indeed can no longer be pursued in view of the fact that we now see what this table was called. It was a throttle table. It has been euphemistically described as a mitigation table, but that's what it is and that is what it did, and somewhere there is an e-mail from a sort of message management person at Apple -- it is at page 601 of the Supplementary Bundle -- putting out to the press "Don't say throttle. There is no throttling". Internally this was the CPU throttle table.

It refers to, by certain code names, the iPhone 6s, 6s Plus and SE. That's what those other numbers at the top mean.

First, about this table it is disclosure of the post 2016 situation in relation to the affected iPhones. We have not had any disclosure of the previous situation in relation, say, to the iPhone 5 as a means of comparison, although I will come back to that because I am going to say I think we can infer what the previous situation would have looked like, quite importantly.

The second point that I want to make about this is that it is not, as I said in opening earlier, the case that all iPhones age and, therefore, that all iPhones' performance would have looked something like this table.

I have referred to our expert Mr Sinclair's point and that's in the Supplementary Bundle, Tab 7, page 270. I have not taken you to it yet. At 270 he says at 36, and this is not redacted, there is a comparison to be drawn.

CHAIR: Hold on.

MR MOSER: Yes.

CHAIR: 36. Yes.

MR MOSER: "There is a comparison to be drawn, which may help to highlight the difference in user experience between an iPhone that is subject to the PMF introduced in iOS 10.2.1 and one that is not. Earlier iPhone models before the iPhone 6 did not receive the iOS 10.2.1 PMF, so the performance of these devices did not decrease as their batteries aged. This meant that a user with an iPhone 5 would experience the same level of performance when the battery was 3 days old as when the battery was 3 years old. The introduction of the PMF therefore significantly altered how iPhones behaved as they aged."

So we are seeing here a new development as far as users are concerned, so that any change will have been different to what went before and, according to our expert, significant, significantly altered how iPhones behaved as they age. That's the point I was going to -- you asked me to take you to. So that's the basic approach.

Sir, you will recall that we have pointed out that the situation moving from the previous phone to this phone was described in exalted or exalting terms in the advertisements that were put out by Apple at the time. Again, if we are talking about user expectation, we say this is relevant.

There is that bundle I called this morning's bundle, the Second Supplementary Bundle. That's where the relevant press releases are to be found.

The first one I want to go to is at Tab 12, page 66. The words will be familiar. I think we have never seen the actual press release before. By the second hole punch:

"Packed with innovative new technologies, iPhone 6 and iPhone 6 Plus include: the Apple-designed A8 chip with second generation 64-bit desktop-class architecture for blazing fast performance and power efficiency ...", and so on and so forth.

"... ultrafast wireless technologies", and so on. That was 9th September 2014.

There is one from September 2015 for the iPhone 6s and 6s Plus. Behind 13, that's where we get that 70% figure. You see that at page 71 between the two hole punches:

"Advanced Technology.

A9, Apple's third-generation 64-bit chip powers these innovations with 70 percent faster CPU and 90 percent faster GPU performance ...", and so on and so forth.

There is one from 2016 behind --

CHAIR: These are quite important. You are romping through them quite quickly. Just taking the first one, you are not suggesting -- they are not terms of the contract. Why is this not just a bit of advertising puff?

MR MOSER: Why is it not an advertising puff? Because it leads consumers to believe these things.

CHAIR: Which bits in particular?

MR MOSER: Well, "blazing fast performance" by specific reference to "64-bit desktop-class architecture", for instance. It is not just giving an advertising puff. It is giving you a precise reason why this is faster than previous models.

CHAIR: You are not disputing that it is second generation 64-bit desktop-class architecture, or at least -- I don't know. Are you disputing that or ...

MR MOSER: I am disputing that there was a blazing fast performance.

CHAIR: "Blazing fast" is sort of --

MR MOSER: Or four lines further down:

"... featuring a simpler, faster and more intuitive user experience with new Messages and Photos ..."

CHAIR: "... faster … with new Messages and Photos features ..."

MR MOSER: Faster than the previous iPhone 5.

CHAIR: With new messages and photos.

MR MOSER: So the consumer expectation was this phone was going to be faster than iPhone 5. In relation to the next one was quite specifically --

CHAIR: So you are saying -- take the first one. So faster and more intuitive with new

messages. Are you saying that the iPhone 6 -- is it part of your case that the iPhone 6 is slower and less intuitive with new messages?

MR MOSER: It is certainly slower.

CHAIR: Where is your evidence of that or your pleading of that?

MR MOSER: That's what I am just coming to and about to show you on this table.

CHAIR: On messages?

MR MOSER: On everything. I will come back on everything by reference to some of the confidential French material.

CHAIR: Okay, but just to be clear, this is not saying everything. This says:

"... new Messages and Photos … QuickType keyboard, a new Health app, Family Sharing and iCloud Drive."

Maybe there's a comma -- a nominal comma:

"simpler, faster and more intuitive user experience", plus it has, "new Messages and Photos ..."

MR MOSER: That may be so. This is not to be read like a statute. Indeed, the line I first took you to:

"... blazing fast performance and power efficiency."

That is not so qualified in any way.

CHAIR: Okay. All right. Then the next one you were just taking us to, you said 70 percent faster CPU.

MR MOSER: And 90 percent faster GPU.

CHAIR: "... all with gains in energy efficiency for great battery life."

If it is energy efficiency, that means how often you have to recharge. It is not talking about degradative battery over a period.

MR MOSER: No, nor would there be a reason in September of 2015 for Apple to be talking about that. I am showing you these things principally to establish what the user

expectation was, what the consumer expectation was and how these things were marketed, what makes them such a premium product.

The next paragraph down says:

"With advanced wireless technologies including faster Wi-Fi and LTE Advanced, iPhone 6s and iPhone 6s Plus users can browse, download and stream content even faster", if it matters.

CHAIR: Sorry. Again the same problem. As I understand -- well, you are going to come to the evidence, but if you are saying that browsing -- you have pleaded that browsing is slower and downloading stream content is slower --

MR MOSER: Browsing involves scrolling, and we know scrolling was affected. That's common ground.

CHAIR: No, no. What's common ground, to the extent that it is, is that the PMF slows things. That's common ground. As I understand, you are going to this to make comparisons with the previous model of the iPhone, which is a separate matter.

MR MOSER: Yes, to establish the fact that in previous models things were not so slow, i.e., not as demonstrated in the CPU throttle table. I am going to keep coming back to that with more evidence.

CHAIR: Let's go to that then.

MR MOSER: Let's look at this table, because it is, in my submission, an important piece of evidence. You may have seen how the table works. I will seek to explain it. What you have in the first seven columns is you have what we are calling the impedance columns. That is to do with, and I am entitled to say this, Ra and chemical age. In the left most column, you have the situation with what Mr Crumlin describes as a new battery. You will see the Ra for that -- I am not going to say it out loud -- at the very top on the left-hand side. One can ignore really all of those further words in that column that say, "If Ra [something], move up one row". That just describes how

the following columns work.

I think Mr Crumlin has taken the 20-25 line and has progressed it by way of red boxes to show that as chemical age increases, the way that this table works is that they have moved up the degrees of temperature so as to make the table work graphically.

Anyway, the far left column, that's the situation with that Ra. You then move through incrementally larger chemical ageing through the second to sixth column.

Now, we don't know at the moment how quickly you get from column 1 to column 7. That's something we have yet to find out. It is an important point, because it involves the question of how long the impedance was suffered by the users. We don't know that at the moment.

Continuing on, you have the state of charge column, which starts at the eighth column at [✂]% to [✂]% charge, and all the way through to 100% at the far right.

On the left-hand side, you have the temperature range. We see temperatures ranging from -- indeed, it seems infinity minus 10 all the way up to [✂] degrees to infinity.

What Apple itself describes as the ambient temperature is everything from about zero to about 25 on the left-hand side. Mr Crumlin has chosen to highlight the [✂], but we say there's no magic in that. We're looking at that.

Then, if you combine the temperature range with the state of charge, you will get the relevant figure for processor speed in the white and green boxes, which form most of the right-hand side of this chart.

Now, unless we go into camera, I can't read out loud the numbers that are in these boxes. I am in the Tribunal's hands as to whether it would assist at all.

CHAIR: We can read them ourselves.

MR MOSER: Indeed. What we can plainly see is that with what's described as a new battery for most of the time within the ambient range we are within the white boxes. Very unusually, at the lowest point of charge, close to zero percent, lowest ambient

temperature close to zero percent, you reach that first slightly darker green box, which is seven rows up in the first green column. Do you see that?

CHAIR: Uh-huh.

MR MOSER: So extremely unusually with the usual chemical age at the outset, at the very coldest you might experience that.

CHAIR: Mr Moser, we can see the figures. You don't need to describe them. We can see the figures and we appreciate there's a difference between the figures in the green and the figures in the white, and it depends on the variables that you have helpfully described.

MR MOSER: And the differences, however, are considerable. I mean, at the outset, if we look at the top of that green column, you'll see the figure that you have there, which is, in fact, way beyond the figure that (inaudible) and Mr Sinclair had speculated upon originally prior to the disclosure of this evidence.

CHAIR: Again, I don't think there's anything between the parties that the PMF slows processor speed under certain conditions. I don't think there is anything in dispute as to that on our last outing.

MR MOSER: We now know to what extent. Importantly we also know by crosschecking this against the percentage tables that we find, for instance, in Mr Sinclair's report -- so if we look at page 260 of Mr Sinclair's statement.

CHAIR: Just remind me of the bundle.

MR MOSER: Supplementary Bundle 1. Forgive me. Mr Sinclair, 3.

CHAIR: Oh, yes. We had the statement, didn't we? Yes.

MR MOSER: If we look at 260, you see the percentage for the Apple CPU throttle table. I think I am allowed to say the percentages. No, I am not.

CHAIR: We can see them. Let's take the one that's three up from the bottom.

MR MOSER: Yes.

CHAIR: There is a figure there. As you were rightly pointing out, the consumer, when they have a phone in their hand has no idea about what's going on inside. So the consumer is not going to know about processor speeds *per se*. They are just concerned as to whether their fabulous -- initially fabulous iPhone is now no longer -- is now annoyingly slow. As I understand it, that will be the point. I think the criticism we had last time you were before this Tribunal is it is all very well saying "I am going to pick a percentage randomly, I am not reading it off the table" -- so it is all very well saying process speed is reduced by, let's say, 40%, but if my app is opening in a fraction of a second and it is now a fraction plus 40%, I mean, why does it suddenly become a sub-standard phone? I think that was the point we were on at the last hearing and that was our concern, that the evidence that this actually made the phones fall short of their promise, as you put it, or were sub-standard, that that was the bit we didn't quite understand the evidential basis, and pointing to process or speed does not of itself answer that question. It just tells us the processor is working more slowly.

MR MOSER: Sir, I am not quite sure what evidence you are referring to when you say it opened in the fraction of a second.

CHAIR: I am hypothesising. The absence of evidence means we don't know how this translates materially to what happens when you try to open an app. I can understand, look, if it took half a second to open photos, you put in the PMF and it now takes ten seconds, that would be of concern to consumers of course, but what I don't understand is what the relative -- if it takes 1/100th of a second and now takes 2/100ths of a second, I am not even going to be able to tell the difference. That's where we got to last time. You are saying the phones are now sub-standard once you apply the green figures, and it is why you say that.

MR MOSER: I will try that in a number of ways, if I may.

CHAIR: Yes.

MR MOSER: The first is we ask the Tribunal not to hypothesise without evidence.

CHAIR: We are not hypothesising. We are asking you where the evidence is.

MR MOSER: We don't have that information yet.

CHAIR: Right.

MR MOSER: But, as we say in the skeleton, and as I have shown also by reference to things like 70%, which is what the purpose of that was, the app itself ascribes great importance to this sort of speed, CPU speed specifically. That is what the 70% was absolutely specifically about. 70% faster than the iPhone 5.

Once that suffers, regardless of whatever figures, but plucking a figure out of the air, once that suffers a throttling of, say, 50%, you have no longer got a phone that is faster than the previous generation's phone because --

CHAIR: Tell me the relative speeds of the iPhone 5 and the iPhone 6 on day 1, prior to encountering any problem --

MR MOSER: On the assumption that the iPhone 5 is 100% and 70% more is 170%, then if the new phone, the iPhone 6, at 170% on this information put out in their open publicity, if the new phone were throttled by, take an easy figure, 50%, you would be at 85% of the performance of the earlier phone.

MR RIDYARD: Is it clear nothing is happening to the iPhone 5?

MR MOSER: We think that must be inferred. Shall I explain to you how that works? So we have Mr Sinclair who says it.

CHAIR: It is not what Mr Sinclair says. If you take a brand new iPhone 5 and compare it to a brand new iPhone 6 --

MR MOSER: Yes.

CHAIR: -- there may be a difference. If you are going to say "I am now going to take a year old iPhone 6", it is scarcely appropriate to compare it to a brand new iPhone 5. You would have to compare it to a year old iPhone. You say the processing speeds

don't change as the iPhone 5 ages.

MR MOSER: That is right.

CHAIR: That evidence is where.

MR MOSER: That evidence -- I will take you through it. If we look at Mr Crumlin's evidence first. That is Supplementary Bundle 1 at Tab 13. That's page 359, paragraph 13. This bit has been unredacted. Mr Crumlin says --

CHAIR: Give me a second. I am slow.

MR MOSER: 359. 13. Mr Crumlin is talking about this table here. He says:

"Apple took chemical age into account in this fashion in order to take advantage of a preexisting architecture which existed from the iPhone 5 series (*i.e.,* before iOS 10.2.1) that imposed similar power budgets based only on state of charge and temperature to enable the device to change its behaviour to regulate its power consumption in low temperature conditions."

So what he's telling us it seems is that under the previous arrangements the iPhone 5 only had state of charge and temperature as the variables. He goes on to say in reference to figure 1, that's this:

"a similar table structure was already in place, but with only a single column with temperature ranges corresponding to the [first] column in Figure 1."

So then if we look at the CPU throttle table and look only at the first column, the big table, we look only at the first column, we can work out what would have been in place for the iPhone 5. You can effectively ignore columns 2 to 7, because they deal with Ra, and Ra was not part of the PMF for the iPhone 5. So you are then looking -- take the ambient temperature at column 1, the rows from temperature zero to temperature 25.

CHAIR: I understand your point. You have the variable of the state of charge and the state of charge you spend as the phone ages, and I am talking about an iPhone 5, you

spend a greater percentage of the time at the left-hand side of the table. So assuming that all phones charge less efficiently or the batteries are less efficient as the phones get older, you are naturally biased towards the left-hand side of the table with any phone that ages.

MR MOSER: Not as far as CPU performance is concerned.

CHAIR: No, no. I am talking about the percentage charge.

MR MOSER: The percentage charge.

CHAIR: You will spend a greater percentage of your time above 80% charge with a brand new iPhone.

MR MOSER: Because your battery is going to be lower.

CHAIR: Your battery is fighting fit. Once the phone is a year old, it is probably spending less of its time above 80% and more of its time below 80%.

MR MOSER: The exact figures are speculation. Whilst that may be right in principle, it is a completely different concept. You can control that as the user. You can recharge your battery. Even if that is right, if you are looking for a standard, you will see under the previous phone, under the standard that previous users might have a right to expect, indeed to exceed because of advertising 70% faster, in the worst case scenario you would be at that first medium green that I pointed out to you earlier, seven rows up from the bottom in the first green column. There is only one of those under the first column of temperature ranges, if there is no impedance. As soon as the impedance marches on, you very quickly and exponentially get into the darker greens. That simply would not have happened under the previous standard. We resist the idea that there is a particular line to be drawn which is the standard, and you are either above or below it. But if you searched for a standard, in my submission, then the line to be drawn would be that between the minus [✂] and the [✂] to [✂] on the left-hand side, right across, which would be ambient temperature operation under the

previous PMF regime for iPhone 5s.

You will see a radical difference between what is above that line and what is beneath that line, and that is why we say there is a significant difference between the standard that was approved before the PMF 10.2.1 and the introduction of chemical ageing as one of the variables and the standard that was achieved afterwards, with the introduction of the impedance columns 2 to 7 at the top end of the table.

Another point to make about this is what is clear as anything is in the end all of the phones will have reached the absolute minimum, which is represented by the top right-hand corner darkest green, and that percentage, which is a lower percentage than anything we had previously speculated might be the lowest.

We don't know how quickly the batteries went from the first column to the 7th column. We don't know how quickly the chemical ageing process set in with these batteries in iPhone 6 and 7, reacting to the PMF mitigation.

I submit that as far as some basis in fact is concerned, it is inevitable that there is a significant impact on the operation of CPU, the central processor unit. So that is operating the phone. It is not just some --

CHAIR: I mean this is a press release. It is not a representation to consumers, is it?

MR MOSER: Even if it is not the 70%, even if you are not expecting 170, even if you are just expecting 100, even if you are expecting quite unreasonably in a new generation premium iPhone the same performance as before, instead of being under the blue line, on my version, you are very quickly going to be above the blue line even at room temperature, let alone if you go out on an autumn day and it is 5 to 10 degrees --

CHAIR: We don't have the figure for the processing speed of the iPhone -- all other things being equal, you are extrapolating, if that's the right word -- maybe the opposite -- what the speed of the iPhone 5 is by saying it must be 70%

less -- sorry -- less than the iPhone 6, taking that 70% figure.

MR MOSER: That's a not only but also. Two points about that. No, we don't have the pre-existing situation. That's obviously because of the stage where we are at with this action. They have not given us that. We fully expect to see that in disclosure once this is certified.

The second point about that is I don't want to get too hung up on the fact that you would have expected 170. So that is a not only but also argument. Even if you had no expectations whatsoever of the new generation iPhone, you would have experienced significant reductions very quickly as a result of what we see in this table, against any situation as it pertained before.

Indeed, the happy situation of the white box would be completely gone as soon as you reached column 5, where you see only green boxes. By the time you reach column 7 within the ambient range, you are already right at the bottom at the beginning of the ambient range, way beyond even what Mr Sinclair thought and the Geekbench people thought.

Not only is it not 170% of the previous performance. It is significantly worse than the previous performance. If I need some basis in fact for saying that this must have had a significant effect on user experience, I say I easily surmount that hurdle.

MR RIDYARD: I just want to be clear what the situation with the iPhone 5 was. So is paragraph 13 of Mr Crumlin saying that the iPhone 5 does and did have throttling in place but the throttling only took place in relation to the temperature of the device?

MR MOSER: Whether it was throttling or whatever it was, but it imposed --

MR RIDYARD: Slowing down of the speed of the CPU processor.

MR MOSER: No, it is not. What we are told is that the previous one would not have had the impedance columns 2 to 7 -- is it?

MR RIDYARD: So this statement says that -- when you say the previous one, are you

talking about what was on the iPhone 5?

MR MOSER: Yes.

MR RIDYARD: Before I asked 10.2.1. This seems to be saying that imposed similar power budgets but only based on state of charge and temperature. So it did reduce the speed of the CPU on the 5 --

MR MOSER: It did.

MR RIDYARD: -- as temperature went down and as charge went down.

MR MOSER: As charge went down, yes, but not as chemical battery age increased.

MR RIDYARD: Not on temperature.

MR MOSER: It was mitigating on temperature. As temperature went down, CPU performance went down. We see that obviously.

MR RIDYARD: In the iPhone 5 I am talking about.

MR MOSER: The iPhone 5 situation we don't have here, but if we accept their evidence that it is like the first column of this table --

MR RIDYARD: Yes.

MR MOSER: -- then yes, it will have reduced as temperature went down. For instance, if we look at Mr Crumlin's first red box in the first column, you will see that it was fine until you reach the very lowest state of charge, SOC, in the first green box that you see there.

MR RIDYARD: You don't know it was identical in iPhone 5 as it was in the -- they are different processors, aren't they?

MR MOSER: We don't know it is identical. It appears to be modelled on that. For instance, if you look at Apple's skeleton argument, they pick up on that very point themselves in what was then still a confidential bit of their skeleton argument at 18(d). It says essentially the same thing as Mr Crumlin at 13. Then it states, and I think I can say this openly:

"The PMF in iOS 10.2.1 added chemical age as a third factor."

So they had two factors before, which were simply temperature and state of charge. If you take out from this table chemical age, which is this part, all I am saying is we can get a fair idea of what the same table would have looked like for the iPhone 5 from just looking at the first column.

MR RIDYARD: Only if the rate of throttling on the iPhone 5 processor was the same as it was on the iPhone 6.

MR MOSER: Yes, but they say it was based on a pre-existing architecture based introduced in iPhone 5.

MR RIDYARD: It doesn't say it was the same as the one in the iPhone 6.

CHAIR: I am still a little confused as to what your case is on this. You are not saying that the 70% -- it is not coming with a representation that it is 70% faster than the iPhone 5. That is not your case I think. It's not pleaded. Is that right? So a consumer goes to a store and buys an iPhone 6, and there are various terms and conditions, some imposed by law, some imposed by the nature of the advertising or the representations made on the material sold with the phone, but you are not saying it was a term of the contract that it was 70% or it was a representation it was 70% faster than iPhone 5, such that if it fell short of that, that would give rise to a claim? That is not your case, is it?

MR MOSER: We are not bringing a contract claim but what we are saying with respect --

CHAIR: You may not be bringing a contract claim but again we are getting into --

MR MOSER: We are but again we are getting into consumer behaviour and the behaviour of a dominant company, but what we have pleaded --

CHAIR: Sorry. Can you say yes or no whether or not it is part of your case that it was a term of the contract or representation made to parties to the contract that it would be

70% faster than iPhone 5. I see it in that press release but --

MR MOSER: It was not a term of the contract but it was a representation that was made in the press release. The consumer was led to believe that this was a new generation iPhone. It was going to be faster than the previous one and it was going to be 70% faster as far as the processing unit was concerned.

CHAIR: (Inaudible). So I could bring a claim for misrep against Apple because my iPhone is only 50% faster than iPhone 5?

MR MOSER: You could bring a claim not for misrep but in relation to the description of the goods under the CRA.

CHAIR: Right. That's not pleaded at the moment, is it?

MR MOSER: Whether it is pleaded in those exact terms, but we have pleaded that there was an advertisement of the 70% greater, blazing fast and so on. We have pleaded that the consumer was misled and we have pleaded that the outcome was that, amongst other things, they didn't have the opportunity to consider taking consumer statutory rights steps. That is absolutely part and parcel of what we said happened here. What we say this amounts to -- you have asked me the question "have you got a direct authority saying abuse of dominance by way of consumer law rights". I have pointed you in the direction of *Gutmann*, saying interfering with a consumer's rights is an abuse. It doesn't require, in my respectful submission, my showing that there was a breach of contract or a breach of -- or an actionable misrepresentation. That is not what we are dealing with here.

We are dealing with a super-dominant company that has certain obligations towards its consumers. That includes not misleading them, analogy *AstraZeneca*, although there it was the authorities --

CHAIR: So the misleading is -- I mean, at the last hearing the discussion was focused on whether it behaved as a premium phone, whether it was substandard. I know you

say too much focus has been put on that, but there were discussions around that. So insofar as it falls short, your case -- I understand you are saying it may be less than 70 per cent faster than the iPhone 5. Are you also saying it is sub-standard or is that no longer part of your case?

MR MOSER: I ask rhetorically why should it not be part of our case if Apple itself has set the standard to say this is going to be 170% faster.

CHAIR: Sub-standard is -- a premium phone --

MR MOSER: The line --

CHAIR: I appreciate we are only at certification stage, but I am just trying to see how this case -- I mean, I assume the iPhone 6 was different to the iPhone 5 in lots of respects. It's a new model. It maybe had a better camera. It may have been better. It may have been worse, but it would have been different. I am just trying to find out what your benchmark is to say that there was a potential claim for consumers that once this PMF had been installed that the phone was inadequate, sub-standard, and I understand the 70% point. I just wondered if there was anything else.

MR MOSER: In a sense, without weakening it, I want to get away a bit from the 70% point, because as I said at the outset as part of our discussion, I was not actually making a 70% point in relation to this table.

CHAIR: No, but you are saying this table shows -- I put to you reduced processor speed. So what? That doesn't tell me of itself that the phone is in any way unsatisfactory. It just says -- and I gave the example of 100th. If it takes 1/100th of a second or 1/200th of a second. We move on to the 70%. We are parking 70 --

MR MOSER: I am parking 70% because it is a different point. I started with 70%. Then we had the discussion around is that advertising or whatever it is. If you expect your iPhone 6 -- actually, I think it was the 6s that was said to be 70% faster than the previous generation. But if you expect your 6s to be 70% faster than whatever went

before, that gives you a benchmark as to what Apple is doing here when it talks, for instance, in relation to the iPhone 6 about the biggest advance in iPhone history. Consumers are expecting a premium product and a product that is better than what went before, 6 better than the 5, the 6s, 70% better than the 6.

CHAIR: You have made two distinct submissions there. You said they appreciate a premium product. So one has to ask what a premium product is and say what is the arguable case on what is a premium product. Then, better than iPhone 5. Then one has to say okay, what are the benchmarks that one judges better by and have you shown that to be arguable at this stage?

MR MOSER: As far as the iPhone 5 is concerned, that's why we went slightly off course, in my respectful submission, on the 70. I was not making my iPhone 5 point in relation to the 70%. I was making my iPhone 5 point in relation to the throttle table, and to say if what we are told is right, that the PMF was based on the pre-existing architecture introduced in iPhone 5, with the only significant difference, as far as we are sighted, being the introduction of chemical age, then the reduction in CPU speed right down to the top left percentage, which is -- I can't say it but extreme, compared to the previous situation, must, in my respectful submission, applying any view of performance, must be a significant reduction in performance.

CHAIR: These third party apps, would they run on the iPhone 5?

MR MOSER: Yes, third party apps will have run on the iPhone 5.

CHAIR: The problem ones, the Snapchat that led to the UPOs. They would run on the iPhone 5 without problems.

MR MOSER: That's not an answer I can give at the moment. Perhaps I can take instructions and give you that answer later today or tomorrow, but almost regardless on my case of what apps were being run on iPhone 5 and the iPhone 6 and iPhone 6s, the fact was that these phones were meant to be used in the normal way to run

apps. There was nothing unusual about the running of these apps or the way they were run, nothing unusual about scrolling, nothing unusual about opening and closing apps and doing searches. Those ordinary functions were significantly slowed, as we can see on this table, compared to it appears the previous situation.

CHAIR: The trouble is it is translating this into user experience. That's a gap at the moment. I put to you again -- you say to me don't hypothesise, but I want to find some touchstone, but if prior to the PMF it took 1/100th of a second to open an app and it now took 2/100ths of a second, but the problem with shutdowns was cured, it is very difficult to say why the phone is no longer behaving as a premium product in that example. What we don't know at the moment is the extent to which these differences are material to user experience, such that users may wish to take action against Apple. That is the bit that is missing.

MR MOSER: All right. Shall we continue our tour through the evidence and see whether we can find within Apple's disclosure firm evidence that this was significant? Remember, I only have to give some basis in fact that is more than arguable. I don't have to prove at this stage that this was -- I don't have to reach the level of proof, as Merricks said "on the balance of probabilities" that this was substantial.

We are going to look at the evidence that we have and I will ask the Tribunal to infer that it must have been substantial or serious, however you want to put it, because otherwise none of this anguish, none of this difficulty would have occurred.

CHAIR: Okay. That would be helpful.

MR MOSER: Just a word about sub-standards. The word "sub-standard" is used as a shorthand for this phenomenon. We put it in a number of ways, including performing materially worse than could be expected, for instance, could be another longer way of putting it. So that's why I say we don't want to draw a line and say there is the standard, though, as I say, if you wanted to look for a standard, you could, for instance,

look at what I've submitted to you.

I say that even if we have only the throttle table, there is sufficient prima facie evidence of in that sense sub-standard performance. So I do repeat before I move on, because there is more.

We know from Mr Sinclair's third statement -- and I know you are familiar with it -- why he says that the CPU is a very important proxy for consumer experience. We also know that scrolling and app launches are important to consumers, and Mr Sinclair makes that point in his third statement.

We do rely on the fact that it seems that from an answer given in the confidential proceedings in France, Apple takes the same view.

Can I ask you, please -- I will not read it out, but can I ask you, please, to turn to Bundle A, Tab 12.

CHAIR: Tab?

MR MOSER: 12. We went to this briefly at the first hearing in May. So that's the official reported translation. At page 411 you see the front page.

CHAIR: Yes.

MR MOSER: If one looks at page 434, as a perhaps useful way into this area of the argument, and you see the second paragraph there that starts:

"The solution ..."

Can I ask you to read that?

CHAIR: Uh-huh.

MR MOSER: I think Apple is trying to say -- that must be a translation problem or something. It is hard to see in context how that could be a translation problem.

CHAIR: This is the bit underlined.

MR MOSER: As I said this morning, and I said I was going to take you to it in the evidence, it does seem that it is not just some apps. It is not Snapchat that is

responsible for all of this. So that is important.

CHAIR: We don't get a lot out of that.

MR MOSER: That's what I get out of it.

CHAIR: It is talking about how the algorithm doesn't take into account that thing.

MR MOSER: It means that it slows down. I submit that there is evidence here that there is a slowdown, not just when you are using a particular third party app. Obviously that needs to be investigated by further disclosure and testing of the evidence, rather than just looking at the shadows on the walls of a confidential French report.

If we can look then against that background, against further evidence of iPhone performance and user experience, can I ask you, please, to put that bundle away and look at the Supplementary Bundle 1, starting at Tab 14. That's the new disclosure.

CHAIR: Supplementary Bundle.

MR MOSER: Supplementary Bundle 1, Tab 14. There is an e-mail chain that starts at page 415 and runs through over the following pages. We can pick it up, please, at 418. We see by the second hole punch there is an e-mail of 3rd January. Can you see that?

CHAIR: Yes.

MR MOSER: There's a name there -- I don't think this bit is confidential -- of the Genius Bar cases -- oh, it is. I am sorry. Apparently it is confidential. So can you just read, please, the question of the Genius Bar cases.

CHAIR: Uh-huh.

MR MOSER: There is an action point there. We say that action point is significant.

CHAIR: The action point. Still on the same page?

MR MOSER: Yes. So the action point is the last two lines between "get" and "if possible".

CHAIR: Yes. Okay.

MR MOSER: That's all under "[✂]".

CHAIR: Uh-huh.

MR MOSER: That's the bit I mentioned from time to time, where I say that Apple must hold information about the distribution of chemical age rates for different iPhone models. Once that information and other relevant information about the distribution of RA is disclosed, the Tribunal and we will be in a better position to judge key assumptions such as how long were the iPhones subject to impedance. You know that Mr Harman's assumption is 56% of their life cycle, and we don't know whether that's right or not. So that's one aspect of this new disclosure.

If you go back a page to 417, the e-mail that starts:

"Hi, [✂]."

CHAIR: Uh-huh.

MR MOSER: And there's a bit that starts:

"Additionally, [✂]..."

Do you see that?

CHAIR: Uh-huh.

MR MOSER: I draw your attention to it, because it seems that Apple rely on it. They say that this shows that the PMF's effects were acceptable to users. I think I must be able to say that they concentrate on the word "[✂]", but we say that the points made by Apple in their skeleton at subparagraph 18 (e) (i) that this is somehow in their favour. We simply don't get that from this bit of disclosure. It has not been explained what the parameters of this testing were. We don't know what "[✂]" means. There is no attempt to explain what is meant by "[✂]".

There's a further point, which is that if you look at the next paragraph, which starts "if", it's clear that further tests were undertaken by Apple. So the tests undertaken by [✂]

were provisional. Further tests were undertaken. No-one repeats the word "[✂]" in the rest of the disclosure.

So I will make that because that is a point --

CHAIR: This was after, looking at the date -- don't read it out because it is sensitive -- this was -- remind me, the date when the PMF went in was December?

MR MOSER: December.

CHAIR: 2017.

MR MOSER: This is 3rd January 2017. Sorry. 23rd January 2017. This is before. This is 3rd January. It must be remembered, of course --

CHAIR: This was during the beta testing. There was beta testing, wasn't there?

MR MOSER: Yes, it was before. This was the testing before the 10.2.1 was implemented.

CHAIR: Was it before the beta testing of 10?

MR MOSER: Presumably there is beta testing of 10. I don't know.

CHAIR: I have seen references to that. Okay.

MR MOSER: My learned friend nods. It is beta testing.

CHAIR: Maybe Lord Wolfson can tie up the loose ends on that if he has them in due course.

MR MOSER: Another point we make about liveable in the skeleton, for the sake of completeness, is when we are talking about liveable here, the context is the UPOs, which by inference I would suggest were not liveable. So they were putting in place a PMF.

What we see at 416, if we just look at the bit between the two hole punches that starts: "The test plan ..."

And there is a reference to launch and scrolling. Pausing there, we can safely infer from this e-mail that Apple holds testing data on launching and scrolling rates. That's

what I mentioned earlier today and this makes good that statement.

That information is going to be significant because that's the discussion we are having. Mr Sinclair has explained that fast screen rolling is one of the most important user actions on an iPhone. For your reference, that's in particular his third report at para 30 to 31 and his second report at paragraph 37.

Apple have not disclosed this yet. They have not referred to it in a witness statement. So we don't know what the launch and scrolling test revealed.

This is further relevant because it perhaps overtakes the evidence of whatever testing was liveable beforehand.

We then have, turning back one more page to 415, a further e-mail from [✂]. You see what that says. In part it addresses the Tribunal's point about an eighth of a second or similar. Can I just ask you to read that and also the tables that come with it.

CHAIR: So the first table on page --

MR MOSER: Sorry, no. It is the second hole punch. It is the e-mail on January 5th, 2017:

"After running ..."

CHAIR: So there is a time period in there.

MR MOSER: There is a time period in there. Whatever view one takes of those things we say that that multiple at that time period, even if that's right --

CHAIR: You say that disposes of the point that these might all be such small periods that the user wouldn't --

MR MOSER: Yes.

CHAIR: I see.

MR MOSER: Yes. We see in particular the GPU speeds, the green ones, that go on over the page. Significant percentage increases.

CHAIR: No, I understand the percentage increases. I was just trying to say whether those are arguably material to the user, but you say look at those figures on 415 and that gives us a feel for potential materiality, you say. That's sufficient for the moment, you say.

MR MOSER: Yes. We are dealing with a sort of product where performance is meant to be pretty much instant. We have seen from Mr Sinclair, paragraph 37 of his second report, paragraph 30 of his third report, launching applications are one of the most important user actions on an iPhone and increased application launch times are, I submit, a clear indication that it will feel slower.

CHAIR: Yes. I mean, that's the generality which has arguably been unhelpful, but you say you have some specifics, which is maybe your better point.

MR MOSER: The first bullet on page 415, by the first hole punch, the one that says "was not effected" is unhelpful to us, on the face of it, but it is also contradictory if you look at evidence elsewhere, because that, the thing they are talking about there, in various other places, is absolutely referred to as something that is affected by the CPU throttling. Most obviously, if I can ask you to turn, please, to Tab 14, the same tab at page 509 -- is that the same tab? No. Sorry. It's not at all the same tab. It's Tab 29. Again this is confidential, so I will not read it out, but at 509 we see that strange document that you were taken to in August, sir. It may be new to the other members of the Tribunal. The report of statement and of taking copies. So this is the translated version of what happened in France. Evidence from Apple is at page 511. That's [✂]. Then, down by the second hole punch, there is the statement in this regard. Although the second part of that sentence starting "only" seeks to qualify the problem, the thing we have just been looking at is very much included there.

CHAIR: It may be helpful if you explain -- this was taking evidence from [✂] I understand, and the answers were recorded in this document.

MR MOSER: Yes, for the French competition authority.

CHAIR: This document would have been drafted by the Competition Authority in response. It was an interview. Is that correct?

MR MOSER: And then translated by someone.

CHAIR: Yes.

MR MOSER: But again I submit respectfully it is unlikely -- it is quite a short document and the point is quite straightforward. It is unlikely that that has been got wrong. It is not just for demanding apps and so on. If we look at page 513, there's a similar discussion, above the first hole punch, in relation to the question asked of [✂]at the top of the page, and part of the evidence, the paragraph that starts:

"Based on ..."

CHAIR: Yes.

MR MOSER: Then the last sentence.

CHAIR: Yes. Okay.

MR MOSER: The evidence is in passing inconsistent, but it seems to us that greater weight is perhaps to be placed on --

CHAIR: You say it is all for trial.

MR MOSER: It is all for trial. But perhaps greater weight, if you are trying to get an impression is to be placed on the evidence that was given to a state regulator rather than some beta testing in early e-mails. We say, broadly, all of this is helpful. It shows above all that this was a matter of genuine concern within Apple. So the suggestion that somehow it may be so slight as not to matter we say is wide of the mark. All of the evidence that we have points to the fact -- even the very limited evidence we have of internal discussion points to the fact that this was a matter of considerable concern, because it was substantial.

MR RIDYARD: You have taken us to lots of pieces of evidence about the slowing

down of the processor and the adverse impact that might have on user experience. In a way, all these are sort of the costs, as it were, of achieving the objective, in Apple's terms, of reducing the PMOs (sic). Where does the benefit come into the assessment here, or is it not relevant to the fact that the slowing down was achieving a virtual elimination or substantial reduction in the incidence of PMOs (sic)?

CHAIR: UPOs.

MR RIDYARD: UPOs, sorry.

MR MOSER: They say that it achieved I think an 80% reduction in the UPOs. The problem with that idea, and I see where my learned friends go with that --

MR RIDYARD: I was not going anywhere. I just wanted to know where the UPO fits in.

MR MOSER: Not where the Tribunal is going. I can see where they are going to go with it. They are going to say: "Look, the UPOs were terrible and this made it better, so where is your loss?"

MR RIDYARD: Yes.

MR MOSER: The problem is not whether the PMF was more liveable than the UPOs. It probably was, because the phones did not close down completely, which made them unusable. The problem is the disguising of the issue, of the battery issue and indeed of the effect of the PMF itself in due course led to consumers being misled, to their detriment, about the value of their phones.

CHAIR: That is a difficulty for you, isn't it? Any manufacturer is balancing components when they make something. Let's assume that the iPhone 6 was about to be launched and Apple got sight -- let's assume it was Snapchat -- got sight of Snapchat and were alert to this problem before they sold the iPhone. They said: "All right. We can see there's trouble ahead, so let's delay the launch this week. Let's come up with some software to make sure the phones aren't going to shut down". Then they relaunch

a few weeks later their iPhones with already installed the PMF. Now I understand your point on 70% and representations. Just park that for the moment. They wouldn't be then under an obligation to tell consumers that these phones contained a PMF, would they, on any reckoning? They would just say: "Look, here's the phone".

They sell it with the solution to the problem of power offs, so you don't get the power offs. There would be no obligation on them to be transparent. You seem to suggest the obligation of transparency comes merely because by happenstance the software had to be loaded after the phone had left the shop.

MR MOSER: No, I disagree. May I say first that is a really helpful example for the following reason, because it illustrates that what we are looking at is a phone that was inherently less valuable from the beginning, whether anyone happened to know it or not. On the facts there was happenstance --

CHAIR: That may be so, but I am talking about the abuse, the transparency.

MR MOSER: Absolutely. But in response to the point that I inferred Mr Ridyard might be driving at, in relation to does it just become a little more valuable than it was before with the PMF, and how does that work, no. From the beginning, and that's the corollary of the sort of point we were dealing with this morning, in relation to the UPOs, from the beginning this iPhone was inherently less valuable. It is just that its inherently less valuable nature was disguised through the medium of the PMF, whereas full transparency would have brought it out into the open much, much earlier. So that's a really helpful example in that way.

CHAIR: Just answer my question. What was the obligation on Apple to be transparent about the PMF that was installed before the phone was sold?

MR MOSER: If it is installed before the phone is sold, on that scenario, we assume that Apple would know that it was selling a product that was going to be in many, many scenarios outlined on this throttling table slower than the previous iPhone.

MR RIDYARD: I am not sure that's right, is it, because -- I am not sure you can make that comparison between the iPhone 5 and iPhone 6s in that way.

MR MOSER: It's the inference that we invite the Tribunal to draw for the reasons I have mentioned, which is that they themselves have mentioned: "We did not do chemical age before the success".

CHAIR: On that assumption, let's take -- so the iPhone 6 is disappointingly slow and consumers might -- there might be a claim for misrep or something, but there's no abuse case, because your abuse case is dependent on transparency, and the fact is when people sell complicated items, whether it is computers or cars or rockets or phones, they don't have to enter into a process of full and frank disclosure of all the technical compromises they made in getting it to the market. So you wouldn't have an abuse case. You might say consumers would be disappointed in the product before it was received. You might possibly say there would be a claim under some consumer rights legislation. Why is there an obligation -- how could you possibly say that would be an abuse of a dominant position.

MR MOSER: It is an important point and I am going to have to persuade you of this. My case is that it makes no difference. If Apple had known from the off exactly what the problem was and what they had done about it, and that they had slowed the whole thing by way of a PMF with this outcome, I say --

CHAIR: It is like a --

MR MOSER: It is a distinction without a difference.

CHAIR: It is like a BMW or let's take a Bugatti, put in an 8 litre engine with extraordinary performance, but they can't let it go out completely unthrottled, if you like, because it would destroy the gearbox. So the manufacturers go, "This is fantastic. Take the edge off it, particularly in the manual version. The automatic version can cope a bit more. The manual version we need to take 20 horsepower off the

horsepower we are selling just to make sure that we don't destroy the gearbox." There would be no obligation on that full and frank disclosure as to what extremely difficult technical compromises they had made to make sure the engine does not tear out the gearbox.

MR MOSER: On the assumption that the car manufacturer is a dominant, even a super-dominant company, there is in my submission a strong obligation to be transparent about the performance of the product.

CHAIR: About the performance, yes, but not about the technical compromises.

MR MOSER: No, nobody needs to know how the internals work, but I say with respect you can't have a situation where a dominant car manufacturer, say -- say there's only two car manufacturers in the world of this sort of product -- makes what is de facto a misleading statement or description of its product, puts it out and says, "Here is a premium" --

CHAIR: Sorry. I am just going to stop you. My question may be at fault. I am not talking about making misleading statements. I understand your concern about misleading statements. You are talking about lack of transparency.

MR MOSER: It all goes hand in hand, doesn't it? If you have a product that's believed to have 700 horsepower, but actually most of the time in most models it is only going to have 350, then that, if you're a super dominant company --

CHAIR: That's failing to satisfy the representations made at the point of sale.

MR MOSER: Yes.

CHAIR: That I understand, but there's no obligation per se of transparency. You say once you put the PMF on, you are obliged to tell consumers that it's going on to their phones. So they then can make choices about whether to use it, whether not to use it or whether to seek refunds.

The point I am putting to you is if that had been put on before the point of sale, there

would be no obligation to talk about the PMF any more than there is any obligation to talk about all the other myriad of components and compromises that have been made. I mean, the camera is a little bit smaller because we couldn't fit the battery in. We don't have to worry -- dominant or not, they don't have to come up with a big explanation as to why the camera isn't as good as it might have been or why the battery is smaller than it might have been. There's no obligation of transparency per se, is there, in those circumstances?

MR MOSER: We are talking about the central processor unit and graphics processor unit, so the central things that drive the phone, the engine and the gearbox, if you like. If those are significantly less powerful than advertised, than reasonably to be expected, than appropriate for a premium product, that is something that the dominant company has to come clean about. What they do instead is they maintain the price of the product as though it were working in the way the consumers expect. So this model is more expensive than the previous iPhone. The whole thing is already extremely expensive. The consumer goes into it with the reasonable expectation, with the representations around speed --

CHAIR: It cannot be abuse of a dominant position, even if you are super dominant, to sell a disappointing product.

MR MOSER: If you know it's a disappointing product, and you say it isn't, here you are --

CHAIR: What about all these movies? The sequel is always worse than the original. Would that be a breach of -- abuse of dominant position. It seems an extraordinary proposition.

MR MOSER: That's not this case, happily.

CHAIR: Godfather being the exception.

MR MOSER: Quite. But that's not this case. Every further generation of these phones

is an event. It is awaited worldwide. The new iPhone 15 is going to be launched tomorrow I think to great fanfare. I wish them very well. I am sure it is an excellent product. We are not anti-Apple, in that way.

CHAIR: How else would you make a living, Mr Moser.

MR MOSER: Well, we say, however, in relation to the iPhones 6 and 7 and that generation there was a problem and that problem was hidden. I absolutely take your example but I don't shy away from it, because if they had known all of this beforehand and put it all out and the big event happened for the big price: "Buy the iPhone 6. Buy the iPhone 6s. The iPhone 6 is better than everything that has gone before. The 6s is 70% faster than the 6", and they had known all the time, in fact, most of the time that's just not going to be true, then, as a super dominant company, they had the obligation to be transparent about that, because what are they doing? This is again the competition law harm. They are shoring up their market share.

It was crucial at that point that this product be seen to succeed in relation to the other of the two -- the duopoly players in relation to the Android phone. If this had gone wrong, if they had come out and said "Actually, this one is" -- I forget your exact description -- "This one is a dud, we are sorry", that would have been extremely consequential for Apple and the market and its position in the market.

CHAIR: I have been asked to have a five minute break for the shorthand writer. How are we doing? I appreciate I have been asking far too many questions, Mr Moser. It is not your fault that we are --

MR MOSER: How are we doing? I would like to take you to the CMA letter, the Consultation Letter.

CHAIR: Yes.

MR MOSER: And I'm afraid far, far behind where I was hoping to be at this point today.

CHAIR: What other topics do we need to deal with?

MR MOSER: The topics that are raised against me are no plausible methodology.

CHAIR: Yes. I think at the moment you can be fairly concise on that. We have obviously read your skeleton and we will hear from Lord Wolfson.

MR MOSER: That's very helpful.

CHAIR: I think a lot of it -- the difficulties with the methodology depend to some extent on where one finds the abuse.

MR MOSER: They were not really objecting to the methodology, as I read it. They are really complaining about the counterfactual.

CHAIR: So we have that to deal with. But on this topic you wanted to look at the CMA letter and then we think we are there, are we?

MR MOSER: Then we think we are there on this topic. There is also the question about post 28th December. That is a much shorter point, seeking to strike out the time period beyond the apology.

There is also, if they are maintaining it, an objection to Mr Gutmann himself.

CHAIR: Yes, I have that point in mind. That's very helpful. Just take five minutes.

(Short break)

MR MOSER: So two quick things on performance before I come to the CMA. I also have, if you want them, larger versions of the GPU throttle tables, if that would be considered helpful, but --

CHAIR: I don't think we need them.

MR MOSER: That's fine.

CHAIR: That was very helpful. Thank you for that.

MR MOSER: I have taken you through the CPU for reasons I mentioned. Of course the GPU throttling table is there as well. You will see the numbers in there. They are actually in percentage terms very similar to the CPU tables, in some cases. Worse if

one compares to the slowdown percentages in the first of them. We don't exactly know how the two GPU tables -- I think one is headed utilization and the other headed performance. I am not sure how that works. Anyway, it is another metric and we know what the GPU does. Of course, the GPU is important for app launches, so that matters.

Right. Now, the third document I want to take the Tribunal to is the CMA Consultation Letter. I think that is still considered confidential. Yes. Why is that relevant? We know from the claim form that there was an investigation. Can I show you the claim form at paragraph 119? That's Supplementary Bundle, Tab 3, page 63, and within paragraph 119 and following. So that's just to remind the Tribunal --

CHAIR: This is a complaint about -- this wasn't abuse of dominant position. This was --

MR MOSER: No.

CHAIR: -- breach of consumer law. Yes?

MR MOSER: Yes. It was done by the CMA. It concluded in May 2019 with the undertaking about transparency, about battery health, unexpected shutdowns and performance management. So the facts are entirely on point. The legal framework is consumer law, but none the worse for it.

We now have, which we didn't have before, the CMA Consultation Letter, which the CMA sent to Apple in the course of its investigation.

Now, it is said against us or at least was said against us before that this is all inadmissible. I don't know whether that's maintained, but for the avoidance of doubt we say it is not inadmissible, because we have the Court of Appeal now in *Evans* that says that the rule in *Hollington v Hewthorn* about regulator statements being inadmissible, the rule in *Hollington v Hewthorn* does not apply to the CAT, which has its own rules of procedure and evidence. I don't know whether you want to be taken

to that.

CHAIR: There has been *Qualcomm* as well, hasn't there?

MR MOSER: *Qualcomm* came before.

CHAIR: What did *Evans* say about *Qualcomm*?

MR MOSER: I will show you.

CHAIR: That might be worth ...

MR MOSER: Dare I say it, it is quite amusingly done. *Evans v Barclays* is at Supplementary Authority, Tab 7. This is the *FX* appeal. I think I have gone to it in a different context today. That is the bandwagon point. It is again -- who else -- Lord Justice Green. I want to pick it up at paragraph 98. He has been discussing the rule in *Hollington v Hewthorn*. His Lordship has been discussing the ruling in *Hollington v Hewthorn*. At 98, he finds:

"There are however a growing number of exceptions to the rule."

He talks about children and careless driving:

"99. Most importantly, it is well established that the rule does not apply to the CAT, which has its own rules of procedure and evidence. CAT Rule 55(1)(b) makes clear that the CAT has a wide discretion as to the evidence to be admitted. This has been recognised on many occasions and is, in my view, correct."

Then there is cited a slew of authority, including at the end *Consumer Association* v *Qualcomm*.

CHAIR: I thought what *Qualcomm* said was -- sorry. We may be -- it doesn't apply to the CAT. The CAT must decide what to do and the CAT is going to apply *Hollington*.

MR MOSER: It was read by some as that.

CHAIR: Right.

MR MOSER: Clearly, and who am I to disagree -- the Court of Appeal didn't read it like that. The Court of Appeal said *Hollington* v *Hewthorn* doesn't apply.

CHAIR: That's what *Qualcomm* said.

MR MOSER: Forgive me. We are *ad idem*.

CHAIR: *Qualcomm* then went on to say, "As a Tribunal we are not bound by it. We have to decide what to do."

MR MOSER: There was some uncertainty, let's put it this way, after *Qualcomm*. Perhaps I am overstating it.

CHAIR: No, you may not be.

MR MOSER: What the Court of Appeal alights on is *Le Patourel* and says: “In *Le Patourel* the CAT had relied upon the findings in the prior settlement decision between the respondent, BT, and Ofcom. The Court of Appeal agreed with the CAT” --

CHAIR: Sorry. Where are you? I'm with you.

MR MOSER: I am carrying on.

“The Court of Appeal agreed with the CAT that the findings were relevant as showing a serious case to be advanced but made clear that they were not binding upon the CAT at trial”.

That's making a difference between the importance of a prior settlement decision at the certification stage and at trial.

CHAIR: Yes. So, I mean, the position may well be -- you may agree with this -- there is nothing wrong with pointing to what the Tribunal has done at certification stage, but ultimately it's going to be the question for the CAT to form its own view on the evidence and how much weight it attaches to it at certification stage, if any, is a matter for the CAT and all the circumstances and so forth. Does that sound about right?

MR MOSER: Indeed. Ofcom's provisional conclusions did not bind the CAT or the parties. The findings that the CAT might reach at trial might differ from those provisional conclusions, but the CAT in its discretion may have regard to what the provisional decision said at the certification stage. That is all I am inviting.

CHAIR: Yes. Okay.

MR MOSER: I don't know whether Lord Wolfson disagrees.

LORD WOLFSON: I was enjoying the interchange. I think both of you, if I may say respectfully, were anticipating what was said in 101 of this decision, where I think these very points are made. So I am not sure any of this is controversial.

CHAIR: In 101 of this decision.

MR MOSER: I am grateful. Page 233:

"The CAT, if confronted with prior findings … will carefully decide what weight can be attached to those findings."

It seems there is nothing between us now, which means happily I can carry on and take you to the CMA Consultation Letter, which had previously been said by the other side to have been inadmissible.

LORD WOLFSON: There is nothing between us on the legal test. How that legal test applies to this document, there is an issue, but subject to that --

CHAIR: We will look at it and then.

MR MOSER: We will look at it. My learned friend will say "You must ignore this". I will say "No, no, it is very important".

CHAIR: Just remind me where it is.

MR MOSER: It is at Supplementary Bundle, Tab 46. It is still Supplementary Bundle, first volume. Because we are dealing with it as a confidential document, I am going to be taking you to paragraphs and asking you to read them, please.

CHAIR: I have read it previously, so you can take it ...

MR MOSER: See paragraph 3 in particular and if any other members of the Tribunal have not seen it, the paragraph starting:

"The CMA ..."

CHAIR: Yes.

MR MOSER: There we are.

Now, as has been said in open, this was not about competition law as such. It was about unfair commercial practices, but the relevant provisions of the statute that is referred to there deals with misleading actions, misleading omissions, importantly, and provisions that are analogous to the pervasive lack of transparency and candour which we say characterises the case in the present situation. That's why we say it's relevant. We say it provides a good proxy for assessing the PCR's allegations of abuse for the purposes of at any rate the strike-out, but also certification.

We have summarised this in paragraph 120A of the draft amended claim form. I don't propose to turn it up again. Can I ask you also to turn to paragraph 29.

CHAIR: This is in the practice --

MR MOSER: In the CMA at page 622. This is annex B. You are quite right. It is about the practices. If you just cast your eye down to paragraph 29. The heading, of course, relevantly. Then there is paragraph 30 and the reference to the impact.

Over the page, paragraph 30 ends in a footnote, and the footnote says something similar to what I have been saying in the course of today. Of course, I have already shown the Tribunal paragraph 33, which I can say in open relates to consumer rights, warranties and so on.

CHAIR: We don't know what analysis is underlying any of this, do we? This has been scrutinised in far more detail than you have been able to scrutinise matters.

MR MOSER: Absolutely.

CHAIR: There is very little detail. That is all. It is just conclusory statements. 31, for example.

MR MOSER: We fully expect to be able to analyse it more closely once we have had disclosure akin to whatever it is the CMA have seen.

You will see in the footnotes references to Apple's response of such and such a date

and Apple's response of such and such a date. We have not seen any of that yet.

CHAIR: I mean, paragraph 32 just seems to be -- I don't really know how consumers do that sort of thing. I am probably imperfectly approaching this from the perspective of my ignorance when I engage in some form of updating.

MR MOSER: Consumers typically -- one can take what Lord Justice Green in *Gutmann* calls a common sense approach, or rather the Tribunal is told to take a common sense approach to these matters so I think one can have regard to the fact that it is not surprising that consumers are not at all cited when an update comes on your phone.

CHAIR: It will come with a note saying "this fixes bugs".

MR MOSER: They all say that, don't they.

CHAIR: "and addresses the problem of unexpected shutdowns by installing a PMF". I mean, it didn't say that but this seems to suggest --

MR MOSER: It didn't even say that. If it did, that would tell your average consumer precisely nothing.

CHAIR: Quite.

MR MOSER: You have to be transparent in a way that's understood. It is going to come in to when I talk about the customer, December 2017, and so on, where I say that "Yes, the coded language of even that apology isn't really good enough", but we will have that discussion tomorrow I expect.

At 31, the first sentence is perhaps revealing, page 623. That's what they consider.

CHAIR: Anyway, you say this was looked at by the Commission (sic) in some detail, and they reached these conclusions, and that has helped you in showing that it must at the very least be arguable in this Tribunal, particularly when combined with the evidence that you have.

MR MOSER: The conclusions that the CMA draws as to the impact is not only at

paragraph 30 but also at paragraph 35. You see there the second bullet point again, their conclusion on impact on the user, and we certainly rely on that.

It will be recalled what all of this led to was an undertaking by Apple. Ms Howard points me quite rightly to the third bullet point in paragraph 35, on page 624, the one that starts:

"The read me notes ..."

Then there's the last bit of that paragraph.

Just to round this off -- and forgive me -- my notes end suddenly -- there is the undertaking -- if you will bear with me for a second.

CHAIR: Yes, of course.

MR MOSER: Ah, it is in today's bundle.

CHAIR: Didn't you plead the undertaking.

MR MOSER: I imagine so. It is Tab 25. I don't think this is confidential. Is this confidential?

LORD WOLFSON: No.

MR MOSER: No.

CHAIR: Tab 25.

MR MOSER: So there we are. All the familiar terms:

"Apple … has provided the following undertaking."

We see above the first hole punch:

"The CMA accepts these undertaking on the basis of Apple's assurances as to:

(i) its future conduct regarding material issues affecting the performance of iPhones ..."

For obvious reasons I stress the word "material".

"... and

(ii) steps it has already taken to improve the provision of clear, unambiguous, timely

and easily accessible information to consumers."

There is (sic) the definitions, including performance management. Transparency is prominently treated.

"…[p]rominent information about the existence of, and links to, easily accessible webpage(s) that provide clear and comprehensible information to Consumers …

2. If a future iOS update materially changes the impact of Performance Management when downloaded … Apple will notify Consumers in a clear manner."

CHAIR: What I do get out of this undertaking?

MR MOSER: Everything we say that the CMA obviously didn't think had been done at the material time, or indeed -- and this will be relevant again tomorrow to the cut-off date, that the CMA obviously was not satisfied that the information put out in December 2017 was sufficiently cogent. There's a further undertaking as to consumer facing staff --

CHAIR: Anyway, I have got that point.

MR MOSER: This matters, sir. It is not just somehow something writ in water and Apple can forget about it. It matters jurisdictionally because it is given, of course, in lieu of enforcement action or other CMA action. It matters because the CMA clearly thought that the issues were material, and it matters because the CMA clearly thought what Apple had done was not only wrong but also had not been remedied by any previous statements.

So that's the CMA. That's really all I wanted to do by way of evidence.

Can I just, because I have about a minute, just row us back to -- I think --

CHAIR: I think we are going to keep going for a little bit longer. We can get this topic done today.

MR MOSER: I can start the new topic. Because there was a question to me of the user impact in relation to CPU. We do, of course, also have our other expert, BRG

and Mr Harman, who also deals with this point. I was going to come to it in the context of the methodology, but it's rightly pointed out to me that if we are looking for evidence of the importance of CPU, as far as users and the usage of the phones is concerned, it is worth pointing out what Mr Harman says in his reports.

So there is at Bundle A, Tab 6 -- I am so sorry. Mr Sinclair first and then Mr Harman. Bundle A, Tab 6, page 325 in Sinclair 2.

CHAIR: Yes. We have looked at this before.

MR MOSER: Yes, we have. What I wanted to point out here is what happens in relations to academic opinion as to the importance of CPU, and that starts at paragraph 15.

CHAIR: Yes. We looked at --

MR MOSER: We looked at this back in May.

CHAIR: I mean, I understand the general point that CPU performance is relevant. I mean, there's no --

MR MOSER: It is not just we who say that. This was the universe of text.

CHAIR: Of course. Self-evidently, CPU performance is relevant.

MR MOSER: It was a survey of 25,478 participants, so not irrelevant.

Then a similar point for your note is made -- this time it is the BRG report. That's Tab 3 of this Bundle, page 127. We have probably been to this one before as well.

CHAIR: Yes. There's a new one, isn't there?

MR MOSER: There is a new one. This was the old one. That's at paragraph 8.4.13 through to 15. Of course, as we know, and we will come to, BRG use CPU performance to estimate incremental value to the consumer, and that is not just because they feel like it. That's because they have found evidence that CPU speed is a useful proxy for value for the reasons that they cite there.

So we have the scientific and economic evidence in relation to the CPU.

CHAIR: Mr Harman's disclaimers are quite interesting. They may require looking at before this progresses to the next hearing, the latest one.

MR MOSER: The disclaimer in this one is at 52. Is that the one you are addressing or --

CHAIR: Page 52, exactly, yes. I am not sure it is up to him to give written consent, if we decide it is not confidential. I think the last one you said it can only be used by you, can't even be used by the Tribunal. (inaudible) whether these disclaimers are appropriate, I don't know.

MR MOSER: I will happily double check with Mr Harman.

CHAIR: I expect that was cut and paste.

MR MOSER: I don't know whether he wrote that. I feel confident in saying that he would object either to the use of it by the Tribunal or citing any part of it that you should feel appropriate.

So there we are. That I think brings us to the end of what people want me to say about the evidence.

So the next section of this -- I am grateful for the extra time and indeed we are running behind. Can I just ask, is it 4.30 that you are envisaging?

CHAIR: Yes. We will aim for 4.30. So the topics we have to do now are?

MR MOSER: No plausible methodology.

CHAIR: I said you could take fairly briefly. We have read your skeleton. We need to hear probably from Lord Wolfson about that. If there are any points you want to highlight. At the moment I do think it hinges a bit -- our provisional view I think is there are likely to be plausible methodologies, once one has pinned down what the abuse is, if we find there is abuse.

If the abuse was bare transparency and there was no entitlement for consumers to seek reparations from Apple with respect to replacement batteries or sub-standard

phones, that might present certain challenges. In other cases it may be that looking at the value of the phone or the value of replacement may be appropriate, depending on the scope of the abuse. I think that's what our provisional view is. Probably there is not a nettle to grasp at this stage.

MR MOSER: That is not a nettle to grasp at this stage. I perceive to some extent, however, that's not quite how the case is being put against me, because it seems to me that the attempt is made in this part of their strike-out -- this is the original strike-out -- to say: "This is just like *Gormsen*. You have an expert who is addressing in his methodology a different breach to the one that is being alleged and he's looking at the wrong counterfactual".

So I don't perceive either that Lord Wolfson and Apple are saying: "Well, the hedonic pricing analysis or the alternative conjoined approach are unacceptable". What they are really saying is: "We think that Mr Harman has aimed his fire at the wrong counterfactual". That is the point. I mean, it's probably clearest in their amended response.

If we look at --

CHAIR: But, I mean, that might be right. So let's assume that we find that this is a form of abuse. Apple have, by failing to be transparent, failed to give consumers the opportunity to obtain a new battery from Apple. One potential way of calculating loss is by looking at the value or loss to value by reason of the failure to provide those batteries. I mean, that would be an approach.

Alternatively, depending on if we find abuse, it may be to do with the fact that actually providing a new battery was not really an issue. The fact is the phone is performing less efficiently, and then one might look at the marginal value, depending on the relatively poor performance of the phone. As I say, perhaps it just depends on where we get to.

MR MOSER: It does to an extent depend on where we get to, absolutely. We certainly say it is arguable that Apple would have provided some form of redress that sounds in damages to the value of that redress. The way that Mr Harman measures that is by looking at the diminution in value of the phone, which is a perfectly I say acceptable proxy for doing so, whether you find that there should have been a replacement battery or whether you find that there should have been a reduction in price or any of the counterfactual scenarios that we have laid out.

So we say that you can't really fault Mr Harman unless you wilfully misread what he is saying in his statements.

Can I just show you perhaps the easiest way or perhaps the most extreme example of this is at Apple's own response, where it sums up its case. That's Supplementary Bundle 1, Tab 4, page 145.

CHAIR: Give me the page again.

MR MOSER: 145, paragraph 74.

CHAIR: Yes.

MR MOSER: The way it is calculated there at paragraph 74 is:

" Mr Harman's methodology for calculating Substandard Performance losses seeks to measure how much better off the Proposed Class Members would have been if their devices had not suffered from the alleged performance issues that the PCR says Apple should have told them about."

With respect, that is wrong. They go on to say:

"The legal flaw in that approach is that it quantifies compensation that the proposed Class Members have no right to receive."

But it is a straw man that they have themselves set up for the purposes of the argument that's being made against Mr Harman. I respectfully submit that attempt I mentioned earlier to shoehorn this into a *Gormsen* type situation, with an alleged mismatch

between the methodology and the facts.

I respectfully say that is simply wrong. What they do, and this is in the written -- I know you will have to hear Lord Wolfson, how he puts it on his feet, but what I perceive they do is they alight on one sentence in Harman 1, and ignore everything else Mr Harman says in Harman 1 about the counterfactual and everything he says in Harman 2 and Harman 3.

It's perhaps more fairly put in the skeleton argument for the first CPO hearing, where Apple said this. I am not sure we need to turn it up. It is at paragraph 10(b) of its old skeleton, which is in Core Bundle 9, page 296.3. They said:

"the PCR's proposed methodology is designed to put users in the position they would have been in if Apple had voluntarily compensated consumers for the alleged deficiencies with the performance and technical capability of the Relevant iPhones."

Then they say that is the wrong measure of loss. Now, we still don't agree completely that that is the only thing that we are saying, but that is at least closer to what we say a key feature of our counterfactual would be. Apple would have offered some sort of redress, because indeed that is what they did in the actual.

So Apple understands that. Where they go further in their response and in their skeleton for today, we respectfully say they are setting up a straw man and they are knocking it down themselves.

What I want to address you on in particular, therefore, is the counterfactual and how Mr Harman is addressing the right counterfactual, contrary to what Apple says.

Our case about the counterfactual -- again for your note it is summarised in our reply at paragraph 34 onwards. That's Core Bundle Tab 7b and then especially at paragraph 36. What we say, and I will just describe it, is, first, Apple would have been transparent about what was going on, and we have just seen the undertaking to the CMA.

Then, as to the battery issues, and we discussed this morning what this term means, the mismatch between what the phones were able to deliver and what the phones, in fact, delivered, they would have had to have been transparent about that.

Apple's case in various places, that involves no more than saying to people "well, batteries age". I hope I have made clear this morning why that's clearly not the extent of the issues. We have set out I think *ad nauseam* what we say the real effects were.

Then, of course, it would have to be clear about the effects of the PMF, and not just, sir, as you pointed out some moments ago, to say in an update: "Oh, by the way, there is going to be a PMF", but as per the undertaking given to the CMA, being entirely clear with consumers about what has happened.

Now, Apple say: "Well, so what? We are a dominant company. We wouldn't have had to do anything about it by way of redress or the things you speculate about". But we say that's not what the evidence shows.

On the evidence that you have seen and that's pleaded, Apple has been very sensitive to reputational and commercial consequences for its business and its market position. As we set out, particularly in the reply, that may involve a concern about damages actions, about users on the margins, switching to Android or not coming to Apple for the first time, or just the general damage to the brand and the trust in products going forward. That's an important part of the whole Apple image. So they may be dominant and there is no serious argument advanced by the other side that they are not dominant, so it's hard to see where this takes them, but that does not mean that they wouldn't have reacted to consumer dissatisfaction. As a matter of fact, we say Apple would have reacted.

Apple then go on in their skeleton argument to say what matters, like in *Gormsen*, is what would each class member have done, had the misrepresentation in question not been made? So they argue that any loss --

CHAIR: What misrepresentation?

MR MOSER: Misrepresentation in relation to the performance of the iPhone, by omission.

CHAIR: Right, yes.

MR MOSER: It is in their skeleton at paragraphs 28 and paragraph 41. They argue that loss has to be by reference to what consumers would have done with the additional information.

CHAIR: Where are we on the counterfactual if, say, Apple would have given the information and consumers would not have responded negatively to it, would have said: "What a fabulously responsible company Apple is to invest its resources in addressing the problem". Where are we then? I know you don't wish to contemplate that happening.

MR MOSER: That is not --

CHAIR: It may be that when we hear the evidence at trial that we are not convinced consumers would have been particularly upset, had it been properly explained to them as to why the PMF was there and the benefits of having the PMF there.

MR MOSER: That's in fact roughly what Apple did at various points later on.

CHAIR: Later on, yes.

MR MOSER: So in December 2017 they put out a statement saying: "Oh, this is terribly beneficial for you. We have given you this wonderful gift of the PMF." There you go.

CHAIR: They might have given more information saying: "It switches on in these circumstances. In the worst case scenario it is going to increase your scrolling by Y% and opening apps by up to an additional second". Let's assume they said all that, so they have been absolutely upfront. There is not necessarily --

MR MOSER: If they were completely upfront, my first submission is that it's

implausible to imagine a counterfactual where the consumers would have been delighted with the situation. Of course they would have said: "Well, we bought this." I don't want to belabour these points. "We bought this blazing fast telephone. This was supposed to be better than anything that went before. Now we learn it is nothing of the sort." It is unlikely that they would have said: "Thank you for this lovely PMF." The second point is Mr Harman's methodology, in fact, still applies, because the resale value of the phone would still be affected, even if the consumers --

CHAIR: It may be, but it depends --

MR MOSER: It would still be affected. My primary point is consumers would not have been delighted with this and rushed to buy more of these products if there were proper transparency, not just something implying that it is all beneficial and it will be fine.

MR RIDYARD: Can you help me a little bit with the admission that Apple -- the statement Apple would be making to consumers.

MR MOSER: Yes.

MR RIDYARD: Let me put two kind of caricatures of what it might look like to you. The first one will be: "Sorry, consumers. We realise we didn't spec the iPhone 6s properly and that's why it keeps breaking down and therefore we owe you compensation. You thought you were buying an iPhone 6s that was superfast but, in fact, it isn't, because it either breaks down or if it doesn't break down, it gets compromised on speed, and here is the cheque".

The second scenario would be Apple would say to consumers: "Something happened after we launched the iPhone 6s, which meant that it didn't work as well as we had hoped it had been working, but it wasn't our fault. We made that mistake in good faith. What we are doing now is we are fixing the problem of them breaking down, even though it is going to cost you a little bit in terms of an extra second when you reload an app and we owe you for that".

Which of the two things are you asking Apple to make the confession for and to cough up for?

MR MOSER: The point of law I make about that, and I think the reference is to *Gutmann* in the CAT, is that it's not up to the proposed class representative at this stage of the action to pinpoint exactly what Apple would have done in the --

MR RIDYARD: Both of my scenarios were caricatures. I am trying to understand broadly speaking where you -- the reason I am asking is I am not sure why you think the Apple argument is a straw man here. The substance of what Mr Harman is measuring is putting consumers back to the situation they were in when they thought the iPhone 6s was unblemished and perfect.

MR MOSER: Well, that's the key, putting them back in a situation. It is not the counterfactual --

MR RIDYARD: Which situation? The situation before we found out that the iPhone 6s might have had these problems?

MR MOSER: Yes.

MR RIDYARD: Or after that but before Apple put in the solution which more or less fixed the problem but at a cost? They are two different things, aren't they?

MR MOSER: It may be my misreading of what they are saying. I will come to the two scenarios in a second. As I read it, it seems to me they are really saying Mr Harman is looking at a counterfactual where there was a perfect phone.

MR RIDYARD: Yes.

MR MOSER: In no counterfactual that we put forward would there have been a perfect phone, even if the measure of damages is to compensate people for the loss of --

MR RIDYARD: Maybe not a perfect phone but the idealised phone that was sold in the marketing materials.

MR MOSER: There is no counterfactual in which the phone would have been okay,

because we know it wasn't. So the counterfactual is always about what would the consumers have done and what would Apple have done? That's another important point that is not taken into account, but I am getting ahead of myself, by their arguments. So they just want to look at what the consumers would have done. But in a sense you are already ahead of me and them in that, because you are already asking me about what would Apple have done.

Scenario one may be a slight caricature but it is not in essence an implausible scenario, because I absolutely say that a responsible company that is dominant in this situation would say something like that, would come up with a proper apology that said: "Look, this is not what we thought it was going to be". In a sense, there is no shame in that. They had not designed this phone, as far as we know, unless something turns up, they had not designed this phone to be like this. "It isn't what we thought it was going to be and here is whatever, £25 quid or the free battery" and so on.

MR RIDYARD: I will not carry on asking questions, but just on the dominance question, are you saying that they didn't do that because they are dominant and they can get away with not doing it, and therefore had they been in a competitive situation that they would have had to do it because they were in a competitive situation? That's your --

MR MOSER: No. That's their argument in a way.

MR RIDYARD: I am asking you what you think.

MR MOSER: They didn't do it because they thought they would get away with it by disguising the problem.

MR RIDYARD: Has that got anything to do with their dominance or would they have done that even if this problem had arisen with some minor brand of Android phone, which was one of seven suppliers of Android phones and therefore had no market

power?

MR MOSER: This has to do with the fact that they didn't want this information, I infer, to get out into the market, so rather than choosing scenario 1 or scenario 2, they chose the actual scenario.

MR RIDYARD: I understand what you are saying. Does it have any link to their dominance? I mean, would a firm without market power have looked at that any differently than a firm, as you say, with market power?

MR MOSER: They might still have done it if they had 5% of the market. Who knows?

MR RIDYARD: It is not about dominance then?

MR MOSER: It is not their dominance that has caused them to behave the way they have, but it is their dominance which caused them to behave differently. I am sorry. Ms Howard makes the correct point that, of course, their dominance had something to do with it because of the leveraging of their dominance in iOS in the hardware market. I mean, they used their dominance in order to be effective, but I perceived your question was more about motive and whether their dominance gave them a motive to do it, that the motive to do it was in order to protect their dominance, not because they were dominant.

MR RIDYARD: My question was more really about whether -- some things dominant companies do are possible only because they are dominant, and if they were not dominant, you wouldn't be able to do that because you face competition. I just wondered whether that was an argument you were making here, because I couldn't really see why that would be the case here.

MR MOSER: I am not sure how relevant that is here. They are not doing it because they are dominant. Of course, two basic points. The first is it is not an abuse to be dominant. The second point is that the abuse doesn't need to be linked to the dominance to be an abuse.

MR RIDYARD: Okay.

MR MOSER: It is the inherent property of the dominant company that imbues it with the special responsibility not to do certain things, and it doesn't have to be directly linked to the dominance in the way you are suggesting.

MR RIDYARD: Okay. Thanks.

MR MOSER: So that's where I am with that. I haven't answered fully on your scenarios, because you had scenario 2 as well, which may also be a perfectly plausible scenario. As I say, I don't have to point to the exact reaction that Apple would have.

In each case the resale value of the phone would still be affected. Perhaps in answer to Mr Turner KC's interjection on this point, it might be more affected in scenario two than in scenario one. I don't know. Mr Harman gives us his view of what an appropriate proxy would be and he bases it largely on the user's appreciation of the performance of a phone based on the CPU. So that's probably unaffected.

As I say, the fact that we are having this discussion indicates perhaps that I don't have to persuade the Tribunal very hard, when looking at the counterfactual, one is not just looking at the reaction of the consumers. Where I perceive their argument is that that's what one ought to be looking at, I think that's because of their reliance in *Gormsen*. In *Gormsen* it was hard to see who other than the consumer would be reacting in the alternative. That was the *Facebook* case where it was argued effectively: Well, all the users of Facebook are having their data used without being paid for it", and there was an attack on the methodology, which the President found didn't create the link between the alleged abuse and the alleged loss. In that case, a counterfactual involving action by Facebook may not have worked. I don't want to interfere with other people's cases, but it may not have worked because they were essentially, according to the President, positing a counterfactual world where social media worked completely differently,

where Facebook would pay people to go on Facebook, and that's just not realistic, but that doesn't mean that you can't ask "What is the realistic reaction by Apple?"

Perhaps the best use of the remainder of the afternoon is if I just take you to an authority that we have inserted into the Monday bundle today that we say goes to how to assess the counterfactual in these situations. So that's Supplementary Bundle 28 at Tab 16. Supplementary for today, today's bundle. I am sorry. I also only got it when I came into court.

CHAIR: Sorry. Which tab again?

MR MOSER: 16.

CHAIR: *Mastercard*. Yes?

MR MOSER: *Mastercard*. That's the ECJ interchange fee case. For context, we have it in the reports. It probably doesn't matter very much exactly what the facts are, but the facts of the multilateral interchange fee cases are likely to be familiar.

So there was a question of was that an anti-competitive decision of an association of undertakings.

The approach to a counterfactual is discussed starting at page 165 of the bundle, 1141 of the C.M.L.Rs. It is useful to start at paragraph 110, unless somebody wants me to start earlier, where the court says:

"as is apparent from", an earlier paragraph, "the appellants also submit, in essence, that the General Court wrongly" -- this is an appeal from the General Court -- "wrongly failed to penalise the Commission for not having tried. in the decision at issue, to understand how competition would function in the absence both of the MIF and of the prohibition of *ex post* pricing, a prohibition which the appellants would not have chosen to adopt without a regulatory intervention."

So they are talking about the further consequences of the alleged abuse being absent, that is the MIF.

110.

"However, the alternatives on which the Commission may rely in the context of the assessment of the objective necessary of a restriction are not limited to the situation that would arise in the absence of the restriction in question but may also extend to other counterfactual hypotheses based, inter alia, on realistic situations that might arise in the absence of that restriction. The General Court was therefore correct in concluding in [paragraph] 99 of the judgment under appeal, that the counterfactual hypothesis put forward by the Commission could be taken into account", and so on, "insofar as it was realistic and enabled the … system to be economically viable."

The similar point, if necessary, is made at paragraph 166. That's page 175. It leads on from paragraph 165. 165, they talk about it being necessary to take into consideration the actual context, particularly the economic and legal context, the nature of the goods as well as the real conditions of the functioning and structure of the market. They cite a lot of traditional old authority, starting with *Delimitis*.

Then at 166:

"It follows from this that the scenario envisaged on the basis of the hypothesis that the coordination arrangements in question are absent must be realistic. From that perspective, it is permissible, where appropriate, to take account of the likely developments that would occur on the market in the absence of those arrangements."

So although, as I say, I sense I don't have to persuade the Tribunal of this, in so far as it is said against me that our counterfactual and the counterfactual Mr Harman relies on goes too far in saying "Apple would have done this, Apple would have done that", it is only the absence of the abuse, it is only taking away the transparency, and nothing more, and then you are just looking at what the consumers would have done with the information they have been given. That's not enough.

You have to look at the context. What would have happened in relation to the

economic context, the legal context, the legal context including, of course, the possibility of seeking to take advantage of consumer law rights, warranties, etc, whether that's successful or not, and I have given you my two tracks on that.

Then you ask yourself "what would occur in the market?" That's why we say, as night follows day, Apple would have done something along the lines it did before, when it thought, for instance, it had a defective battery or when it offered a partial refund, even without the full facts having been revealed. So what happened in the actual, commendable with a company that is sensitive to its customers' needs, is an indication of what would have happened in the counterfactual as far as redress is concerned. That's a perfectly acceptable view of the counterfactual. You don't just look at: "Okay, we take away the lack of information. We put back in the lack of information and then let's see what the consumers thought about it", which I perceive is how that is being put against me.

I have now gone slightly over 4.30, but I hope that was useful.

CHAIR: That was very useful. We will hear from Lord Wolfson on that tomorrow.

MR MOSER: I suspect so. Were you proposing to hear from Lord Wolfson directly on that or do you want me to go through tomorrow the strike-out on 28th December and the authorisation.

CHAIR: I think you need -- whether you want to deal with 28th December before -- I mean, I think we understand -- I think our provisional view is it's difficult to see quite how we can say there's no arguable case on the basis of the press release on 28th December, subject to obviously hearing from Lord Wolfson on that. So if you want to address us on it -- we have obviously read your skeleton -- you can do that in the morning or alternatively you can see where we get to when Lord Wolfson has addressed the Tribunal.

MR MOSER: Do you mean I have no arguable case or that they have no arguable

case on their strike-out?

CHAIR: I think if you succeed on your primary -- on the case at the outset, it's difficult to see how your case evaporates by reason of the press release on 28th December.

MR MOSER: I am grateful. That's very helpful. Perhaps we will see how Lord Wolfson gets on with that first.

CHAIR: Obviously we have heard you on the issues that were at the front of our mind at the last hearing and still at this hearing. I don't think we need to hear from you first unless again you want to on the suitability of Mr Gutmann.

MR MOSER: I do not want to.

CHAIR: So we can probably kick-off with Lord Wolfson tomorrow. Lord Wolfson, obviously I appreciate you have been extremely patient sitting there. I don't know where you think we are on timing, if there's a possibility of finishing tomorrow, that would be attractive to the Tribunal. Whether that would be more likely if we had a slightly earlier start.

LORD WOLFSON: I think finishing tomorrow -- it depends how much my learned friend says in reply. Finishing tomorrow might be a stretch, but it is certainly not impossible.

CHAIR: Shall we start at 10 o'clock? It might give us a possibility. Obviously these are important matters and I don't want to cut anyone off.

LORD WOLFSON: That is the point. On the one hand, I appreciate the Tribunal has done a lot of reading and we went around some of the issues first time round in May. Equally, I am conscious that in May, unlike my learned friend, I didn't actually get to say anything. So I do want at least to have a good crack at some of these issues. So we will try to finish tomorrow, but we might dribble into Wednesday morning. I would be very surprised if we went past Wednesday lunchtime, but let's see how we go.

CHAIR: It is what it is. All right.

(4.36 pm)

(Court adjourned until 10.00 am on Tuesday, 12th September 2023)