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5 **IN THE COMPETITION**

Case No: 1468/7/7/22

6 **APPEAL**

7 **TRIBUNAL**

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

12 Monday 11th – Tuesday 12th September 2023

13
14 Before:

15
16 Justin Turner KC
17 (Chair)

18
19 Derek Ridyard

20
21 Jane Burgess

22
23 (Sitting as a Tribunal in England and Wales)

24
25 BETWEEN:

26
27
28 **Mr Justin Gutmann**

29 **Applicant/Proposed Class Representative**

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31 V

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

36 **Respondents/Proposed Defendants**

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38
39
40 **A P P E A R A N C E S**

41
42 Philip Moser KC, Anneli Howard KC, Stefan Kuppen, Will Perry & Natalie Nguyen
43 (Instructed by Charles Lyndon Limited) On behalf of Justin Gutmann

44
45 Lord Wolfson KC, Daniel Piccinin KC, Gayatri Sarathy & Lucinda Cunningham
46 (Instructed by Covington & Burling LLP) On behalf of Apple.

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Tuesday, 12th September 2023

(10.00 am)

Mention by MR MOSER

MR MOSER: Good morning, sir. With Lord Wolfson's kind agreement I want to hand up one sheet of paper and explain what it is, if you may.

CHAIR: Of course.

(Handed to Tribunal)

MR MOSER: This is effectively from Mr Sinclair. He has not done it in the form of a further witness statement because it is a minor point, at least an arithmetic point. He has spotted in his Second and Third Witness Statements two related arithmetic errors and he has corrected them here. I will not read them out, because they are part of the confidential percentage material, but you will perhaps recall those passages in respect of the AS2 and AS3.

CHAIR: Just remind me where Mr Sinclair's evidence is.

MR MOSER: The first one is at Bundle A, Tab 6.

CHAIR: I am sorry, Mr Moser. I put it back in the wrong place. Bundle A, Tab 6.

MR MOSER: Within it at page 331.

CHAIR: Yes, okay. The second one, just give me the reference to the second statement?

MR MOSER: The second statement is in Supplementary Bundle 1, Tab 7 at page 270, paragraph 39.

CHAIR: So if no objection is made to this correction, it may be helpful if we have corrected versions in the bundles at some point -- it doesn't have to happen -- if we

1 are going to refer to these in future hearings or not.

2 **MR MOSER:** Thank you.

3

4 **Reply by LORD WOLFSON**

5 **LORD WOLFSON:** Good morning. Subject to the Tribunal's views, I plan to start this
6 morning on what might be called the main point, i.e., the strike-out, because that's the
7 strike-out of the whole basis of the abuse allegation and that seems to us anyway the
8 logical place to start. It follows on very much from yesterday's session with my learned
9 friend, Mr Moser.

10 Can I say right at the outset, and I say this with respect -- I am only going to say that
11 once, and please take it as read as we carry on -- and I will come back to this point
12 later, we do say that the preliminary -- and they were, to be fair, expressed as
13 preliminary views, that the Chair expressed yesterday about our methodology point
14 were wrong.

15 We say that even if it's arguable that there was some kind of abusive failure to inform
16 consumers about UPOs or the effects of the PMF, the methodology really is absolutely
17 inadequate.

18 Now, just take a moment on this, but I will come back to develop this later, just so the
19 Tribunal knows where I am going to be going on this.

20 Mr Ridyard, we say, correctly characterised yesterday one of our criticisms of the
21 methodology. This was in the afternoon in an exchange with my learned friend. I will
22 give the transcript reference, but we don't need to turn it up. It is at page 108, lines 20
23 to 22 when Mr Ridyard said our point was that, and I quote:

24 "The substance of what Mr Harman is measuring is putting consumers back to the
25 situation they were in when they thought the iPhone 6s was unblemished and perfect."

26 That's correct. One of our objections is that Mr Harman is effectively compensating

1 consumers on the assumption that it was abusive to supply iPhones that could suffer
2 from UPOs one or more years down the line and needed a PMF.

3 That made sense on the claim as originally pleaded, when precisely that abuse was
4 squarely alleged, but, as I will show you, that is no longer alleged, and so there is
5 a mismatch, and we will submit a fatal mismatch, between the claim and the
6 methodology.

7 That was, therefore, one of the methodology points we have which was anticipated
8 yesterday and which I will develop hopefully later today. You can't compensate
9 a failure of transparency with this measure of loss even if it is a failure of transparency
10 about a product defect in any real sense of that term.

11 But that is not the end of our challenge as to methodology. I don't want this point to
12 get lost, and again I will come back to this later on. We also say, on our methodology
13 challenge, that my learned friend's case on the counterfactual is absolutely hopeless.
14 It doesn't meet any standard that you could conceivably apply to a counterfactual. A
15 counterfactual is not Alice-in-Wonderland. There has to be some basis.

16 Now, the authorities use different phrases, but one of the phrases is whether the
17 counterfactual has no basis in fact. If it has no basis in fact, it is not a counterfactual.
18 It is Alice-in-Wonderland territory. It is Through the Looking Glass.

19 Now, one of the odd things about this counterfactual, i.e., what Apple would have done
20 had it told the world about the battery issues and the PMF at the beginning of 2017, is
21 that we know what actually happened at the end of the year when we did put out the
22 announcement.

23 I will show you later that Apple fully disclosed the battery issues and the effects of the
24 PMF. That, of course, is the basis for my December 2017 strike-out.

25 But it is also relevant for the methodology point, because we know exactly what Apple,
26 in fact, did to assuage customers and their concerns about the way things had

1 developed. What did we do? We ran a battery replacement programme.
2 Now, I know my learned friend says that battery replacement programme was
3 inadequate. We disagree, but the relevant point for this part of the case, i.e., this
4 second methodology objection, is that that is all we actually did in the real world and
5 there's no reason, we say, to think in any counterfactual which has some basis in fact
6 that we would have done anything more or different if we had told the world eleven or
7 twelve months earlier. So that's a second objection to methodology, which I'll come
8 to.
9 Now, I said I would start on the strike-out and I will. I have made a couple of points
10 just to indicate to the Tribunal where I'm going on methodology.
11 Can I make a very short point on authorisation? I accept, I hope realistically -- I hope
12 everything I say is realistic -- the indication the Tribunal gave yesterday on the
13 authorisation condition -- and I accept that indication is well founded, at least to this
14 limited extent, and that is this.
15 I accept that if I were to lose on both abuse and methodology, it is unlikely certainly,
16 at this level, that I am going to win on the authorisation condition. I accept that. With
17 that in mind, what I propose to do in my oral submissions, given there is always some
18 sort of constraint on time, is I am going to focus orally on those two points, strike-out
19 and methodology, and invite the Tribunal to re-read our submissions on the
20 authorisation condition, because we have set that out fairly fully in our written
21 argument.
22 Now, before I get to my submissions on abuse, I would like to start with a thumbnail
23 sketch of the history of these proceedings and the changes of case, which are quite
24 extraordinary, that the PCR has gone through.
25 Now why am I doing this? I am not doing this to throw mud. I am not doing this to
26 score some sort of forensic point that you've changed your case. I am doing this

1 because it only becomes clear from that exercise precisely what the PCR's case on
2 abuse now is. I am afraid we do have to look at the archaeology just a little bit to see
3 what was argued, importantly what was abandoned and against that to know what is
4 currently being argued, because we say that the series of U-turns that the PCR has
5 been through are, frankly, the root cause of the fatal problems in this case, both the
6 absence of any factual basis for the allegations of abuse on my first main point and
7 also the problems on methodology for my second main point.

8 They also illustrate our concerns about the PCR as a proper representative. I am not
9 going to say any more orally about that.

10 So, to put it shortly, the procedural history of this case does have substantive
11 consequences, we say.

12 Now to give a flavour, and this really will just be a flavour of how Mr Gutmann's case
13 has changed from pre-action to today, in the pre-action stages he chopped and
14 changed first of all the iPhones which were said to have performance issues. They
15 were called "the Affected iPhones". Because of time, I am just going to give you the
16 references here.

17 He started out with everything from iPhone 5C to iPhone 7 Plus. That's in the letter
18 before action, 22nd December 2021. That's at C/1. That's at paragraphs 1.2 and 2.1
19 of the letter.

20 About five months later, in a letter dated 16th May 2022, again just for the reference,
21 that's C/7/67 at paragraph 2(2). At that time he dropped iPhone 5C -- he was right to
22 do so -- but he expanded the definition by adding in five more. SE8, 8 plus, X and XS.
23 By the time the Claim Form was filed, the 5C and the XS models had been dropped
24 by Mr Gutmann and no longer featured in the definition. So the Claim Form included
25 all models from 6 to X.

26 Now, the allegations in the Claim Form we say are very poorly pleaded. It is actually

1 very difficult to work out what precisely the claim is. So in our response we try to put
2 some order to them, to impose a bit of intellectual rigour on them, as best we could.
3 So what we did was we categorised them into various categories of abuse and we
4 sought to strike out four of those allegations. We also sought to strike out the
5 allegations as they concerned the later models, i.e., 8 to X.
6 What then happened, and this will become a theme, is that once we made a strike-out
7 application, the PCR changed his case. There were substantial changes made in the
8 face of that strike-out application, and an amended Claim Form was filed on 6th April
9 this year. There were lots of changes, three main ones.
10 First, he withdrew all claims in relation to the later models. Secondly, he withdrew the
11 allegation that Apple "limited technical development, to the prejudice of users, contrary
12 to section 18(1) and 2(b) of the Act and Article 102(b) TFEU."
13 In other words, he no longer said that our hardware and software design choices were
14 themselves abusive.
15 Now, that's a really important point, and I know it is one that the Tribunal has noted,
16 because it means that designing the relevant iPhones in such a way that after a few
17 years, in particular conditions, they might experience a UPO is not said to be an abuse.
18 The trade-off -- and we touched on this yesterday -- between extra performance on
19 the one hand and the possibility of UPOs down the line on the other, is not one about
20 which competition law has anything to say. That appears now to be common ground.
21 **CHAIR:** Just show me the allegation that was withdrawn. Is that possible to tell on
22 the face of the document? Is it crossed out?
23 **LORD WOLFSON:** Actually, let me get you that reference.
24 **CHAIR:** Sure.
25 **LORD WOLFSON:** I will just carry on and then I will give you that reference, because
26 I haven't got it in my note. It is in the Amended Claim Form on 6th April. I will get it to

1 you in a moment.

2 Just to carry on that point, though, the same is true -- and this is important -- about the
3 PMF. Mr Gutmann now accepts that there's nothing abusive in and of itself about
4 introducing a software fix that would cap the output of various components of the
5 device in particular circumstances, to avoid a UPO, and allow the user to keep using
6 the phone. Even if that reduces performance, he accepts that there is nothing abusive
7 about this. It's a software design choice, again one of those trade-offs. Obviously, it
8 was made to improve the device overall and, in any event, competition law has nothing
9 to say about it. We say that's also common ground.

10 To give you, sir, the reference, it is in the Supplementary Bundle, Tab 3 at page 73.
11 You will see it is 153(a).

12 **CHAIR:** Yes. It has been crossed out, yes.

13 **LORD WOLFSON:** We will be coming back to that paragraph later on.

14 Now, we say those concessions and the consequential deletions from the Claim Form
15 were rightly made, because the allegations that our hardware and software choices
16 were themselves abusive were always hopeless and shouldn't have been made.

17 The relevance for today, though, is that the consequence of Mr Gutmann recognising
18 reality and deleting those allegations and making those concessions has caused real
19 problems for his case, and I will show you this in due course. It has transformed his
20 case into a pure transparency case.

21 It is now only said that it was abusive for us to fail to provide sufficient or sufficiently
22 timely information about those legitimate hardware and software design choices.

23 That's a second consequence.

24 The third consequence is that he has confirmed that he doesn't pursue the allegation
25 that the battery replacement programme was itself an abuse of dominance. Indeed,
26 he has confirmed that he no longer alleges that we owed any duty to provide "redress"

1 for UPOs or the PMF at all. That concession was also rightly made.

2 **CHAIR:** Where was that concession made?

3 **LORD WOLFSON:** That's at -- again I will give you the reference in a moment. I think
4 it is probably more or less in the same place. It is coming. I will give you the reference.

5 That concession -- I was tempted to say the corollary -- it is either the corollary or it is
6 very closely linked to the previous concession. They are very closely linked.

7 Again, however, that was another key support removed from the case.

8 Fourth, and importantly for the methodology issue in particular --

9 **CHAIR:** Sorry. Just so I am following, the battery replacement issue you are talking
10 about, is that the -- because there were some battery replacements. You are not
11 talking about those?

12 **LORD WOLFSON:** He has confirmed that the battery replacement programme was
13 not itself an abuse of dominance.

14 **MR RIDYARD:** Are you talking about there was faulty batteries, wasn't there?

15 **LORD WOLFSON:** There was, but we are talking about the next one. For today's
16 purposes, what we might call the faulty battery replacement programme is a bit of
17 a red herring.

18 **CHAIR:** Yes, I think so. So what are we talking about now?

19 **LORD WOLFSON:** The battery replacement programme when in the announcement
20 you could have some and if you wanted to change your battery -- he is no longer
21 saying that was an abuse of dominance. It is really all part of the same point. The
22 central allegation now made against us is a transparency claim. That's really where
23 we have got to.

24 The reason I am taking a little bit of time on this is because it is just as important, in
25 my submission, to be very clear about what's no longer part of the PCR's case as it is
26 to know what is part of the PCR's case, because, as I will show, there is a danger that

1 at times the PCR trespasses and prays in aid points which actually he has explicitly
2 abandoned, and I will show you how that has happened.

3 The battery replacement programme, it is in our Reply, paragraph 24, which is in the
4 document we were just looking at. Sorry, it is not the document we were looking at.
5 It is our Reply, paragraph 24. It is in Core 7b at page 294.10.

6 **CHAIR:** Sorry, just say that again. 294?

7 **LORD WOLFSON:** 294.10.

8 **CHAIR:** Thank you.

9 **LORD WOLFSON:** Now, the fourth point, and this is very important for the
10 methodology issue in particular, which I will be coming to later, is that he also
11 confirmed that the alleged failure to provide prompt and effective redress is not itself
12 abusive.

13 Now on this point I would like to show the Tribunal a few documents, because of the
14 way my learned friend put this part of the case yesterday. Here we do have to go into
15 a little bit of the archaeology. Actually, we are going to start in the document I did just
16 mention, which is the reply at Core 7b. If we could look at it at page 294.7, which is
17 paragraph 14 of the Reply.

18 If I could invite the Tribunal to read paragraph 14(a).

19 (Pause.)

20 **CHAIR:** Right.

21 **LORD WOLFSON:** You will see that's also picked up at paragraph 34, if you turn
22 through to 294.14, and in particular the last sentence of that paragraph.

23 **CHAIR:** 29...?

24 **LORD WOLFSON:** ...4.14, paragraph 34, under the heading "Counterfactual". You
25 will see the last sentence there.

26 **CHAIR:** Okay.

1 **LORD WOLFSON:** What then happened is that we wrote to the PCR's lawyers, and
2 for this we will need Bundle C, please. I don't know whether the Tribunal has this on
3 paper or electronically. So this is C. It is at Tab 93. Perhaps I need to give you the
4 volumes because I am working off electronically.

5 If we turn through, please, to 93. We don't need to read the whole letter. If we turn to
6 the end at page 482, you will see there's a paragraph 4 under heading "3. Alleged
7 failure to provide prompt and effective redress."

8 If you could just read those questions. We asked them to clarify whether the alleged
9 failure to provide effective redress was maintained as itself abusive or only as a factual
10 consequence of the alleged concealment of the battery issues.

11 So those questions arose from those paragraphs of the Reply which I showed you.

12 Now we hadn't received a reply by the time we came to agree a draft list of issues for
13 the May hearing, so what we did -- if you could turn through to Tab 104, please, if
14 that's in the same file.

15 **CHAIR:** Yes.

16 **LORD WOLFSON:** What we did is -- sorry. I think it is 103 actually. We put together
17 a draft list of issues, which you should see starting -- well, if you could turn to page 504,
18 please.

19 **CHAIR:** Yes.

20 **LORD WOLFSON:** You will see the draft list of issues. If you have a look at footnote 2
21 at the bottom of page 505, you will see we put a caveat in there.

22 **CHAIR:** Uh-huh.

23 **LORD WOLFSON:** What then happened, the PCR did reply at Tab 113. The only
24 paragraph we need of that is paragraph 6, which perhaps you could read to yourself.

25 **CHAIR:** Sorry, give me a minute. Just catching up on my note. 11...

26 **LORD WOLFSON:** 113, page 533, paragraph 6.

1 **CHAIR:** Right. Yes.

2 **LORD WOLFSON:** So we considered, and frankly reading it now I still consider that's
3 a bit impenetrable. We asked -- well, we wondered what it was about. We thought,
4 therefore, as we don't understand, we proposed an issue for the May hearing on this
5 point.

6 You will see that at Tab 116, where we attached another draft of the agreed list of
7 issues. If you see at 539, we added issue 3.

8 **CHAIR:** Yes.

9 **LORD WOLFSON:** Now, that did provoke a bit more clarity, because at Tab 118 we
10 got a letter back from the PCR's solicitors. If you see that letter at 545, you will see
11 that they object to the inclusion of issue 3, because they say "the PCR does not allege
12 that a failure to provide... redress [was] by itself abusive".

13 **CHAIR:** Um hmm.

14 **LORD WOLFSON:** Now, just to conclude this correspondence, we replied on
15 24th April. That's at Tab 122. If you could look, please, at paragraph 2, which really
16 rehearses the history, and in particular paragraph 3.

17 **CHAIR:** Right.

18 **LORD WOLFSON:** Turning the pages, next Tab, page 560, the PCR's response,
19 Mr Gutmann, through his solicitors, repeats the point that the failure to provide redress
20 was not said to be abusive.

21 That was then set out in the PCR's skeleton for the hearing. I don't know whether you
22 have the Core Bundle still to hand.

23 **CHAIR:** Yes.

24 **MR MOSER:** I am sorry. I am reluctant to interrupt. Just before we leave the point,
25 the important words "was itself abusive" have been read over in 560, so that is the key
26 word.

1 **LORD WOLFSON:** I think I have said "itself" on several occasions.

2 **MR MOSER:** You said it every time except this time.

3 **LORD WOLFSON:** Thank you for pointing that out. In the skeleton --

4 **CHAIR:** Which tab?

5 **LORD WOLFSON:** Tab 8, please, at page 295.25.

6 **CHAIR:** Right. Give me a second.

7 **LORD WOLFSON:** Paragraph 83. 295.25. The essential response to our strike-out

8 application is contained in the last sentence:

9 "There is therefore simply no allegation to strike out."

10 I.e., "there is nothing to strike out because we are not alleging this". Fine.

11 That was reflected in the pleading, because if we go to the supplemental bundle at

12 paragraph 7(g).

13 **CHAIR:** Sorry. Which tab?

14 **LORD WOLFSON:** Tab 3. This is the Amended Claim Form. Internal numbering

15 page 6, page 17 of the bundle.

16 **CHAIR:** Yes.

17 **LORD WOLFSON:** This is now reflected in the pleading. You see in the green,

18 towards the end of that paragraph:

19 "while Apple's lack of candour and transparency allowed it to avoid having to offer

20 redress ..."

21 I.e., it's a factual consequence of the abuse, but the abuse is a transparency alone.

22 The same point, just for your note -- we might come to this later -- is at paragraph 187

23 of the same pleading, i.e., it is relied on purely on the basis that the PCR says it would

24 have occurred on the facts, but there is no allegation that there was any legal obligation

25 to provide redress.

26 Now, that's actually put beyond doubt. Let me just show you this.

1 **CHAIR:** No allegation?

2 **LORD WOLFSON:** That there was any legal obligation to provide redress under
3 competition law. I will come if I need to consumer rights and all the rest of it.

4 **CHAIR:** No. Understood. My confusion.

5 **LORD WOLFSON:** It is put beyond doubt by the amendment at paragraph 165, which
6 is at page 79 of the bundle. You will see what is struck through there. This is about
7 the battery replacement programme. So those competition law allegations about the
8 battery replacement programme have been struck through.

9 So that's where the point was left. I know I have taken a bit of time on it and shown
10 you a few documents, but it is very important because it is not said that there was an
11 abuse in competition law terms to provide redress. It is only said if we had been
12 transparent, then we would have chosen to provide redress as a matter of fact.

13 Now, at times yesterday, my learned friend --

14 **CHAIR:** It wasn't only as a matter of practice. It was also as an obligation under
15 consumer law. And/or I think is how it was put.

16 **LORD WOLFSON:** I will come to that if I need to. At times yesterday my learned
17 friend did seem to muddy the waters on this point, suggesting that we would have
18 provided redress both as a matter of fact and a matter of law. He referred to some
19 possible warranty and consumer right claims that customers may have had. I will
20 come to that as part of the strike-out of the abuse claim, but I do underline, because it
21 is very important to keep this in mind, that it is simply not open to my learned friend, in
22 light of the concessions made in May and the consequential amendments to the
23 pleadings, to suggest it was an abuse for us to fail to provide redress, and that is true
24 whether we are talking about December 2016 or January 2017.

25 **CHAIR:** Right. I didn't understand Mr Moser to be saying otherwise. In so far as his
26 answers may have given that suggestion, there is probably a problem with my

1 | questions, I suspect.

2 | **LORD WOLFSON:** I am not seeking to allocate responsibility. I just want to make my
3 | submissions very clear. Two things. It's both the target I am aiming at, but also the
4 | way the PCR's claim has to be circumscribed by reference to what he has said he is
5 | not alleging.

6 | **CHAIR:** The abuse is all about transparency.

7 | **LORD WOLFSON:** Precisely.

8 | **CHAIR:** I don't think Mr Moser demurs from that.

9 | **LORD WOLFSON:** Let me turn to a related point. As, of course, we all know, when
10 | we were here in May, on the first day, the Tribunal expressed various concerns about
11 | the factual basis of the PCR's claim, and the Tribunal indicated that it understood that
12 | the premise for the claim was that the PMF rendered the relevant phones
13 | sub-standard. But the Tribunal was concerned that the PCR couldn't point to any
14 | evidence that that was the case.

15 | Of course, what happened was the PCR said "maybe Apple has some documents"
16 | and the Tribunal permitted the PCR, pretty exceptionally I think it is fair to say, to make
17 | a disclosure application and adjourned that hearing. So in the end we were here for
18 | one day and not three.

19 | The order that was made -- and I appreciate that in the hearing we had a couple of
20 | weeks ago I made some of these points, but I am also conscious that was only before
21 | the Chair. Forgive me if I just make some of these points very briefly, because not
22 | everybody was there. We submit that the Order for disclosure which was made was
23 | a carefully crafted Order, made by the Tribunal after hearing submissions from both
24 | sides, and the idea was that it would produce documents which would support the
25 | PCR's case if those documents existed.

26 | Now, I accept it wasn't a full order for disclosure, obviously not, and it wasn't intended

1 to produce every document that might support the PCR's case, but the converse,
2 I submit, was intended, i.e., if there were any documents that supported the PCR's
3 case, at least some of them would be caught by the order that was made.

4 We disclosed a number of documents responsive to that order. None of those
5 documents we say is supportive of the PCR's case. What happened after the
6 disclosure? Another amendment to the claim.

7 Now, what are the amendments which now have been made? Here, of course, I think
8 the document which we have open is the Draft Amended Claim Form at, Tab 3. So if
9 we roll back in it to paragraph 7, and in particular our favourite 7(g), the PCR now
10 pleads that from December 2016 Apple became aware that the relevant iPhones

11 **CHAIR:** Sorry. Where are you reading?

12 **LORD WOLFSON:** I am reading in 7 -- sorry. I am in 7(a) first. Let's start with 7(a):
13 "Apple was aware, from 12 December 2016 onwards at the latest" -- that's the bit in
14 green -- "that... [the relevant iPhones] contained ... batteries that were unable to
15 deliver the necessary peak power required by" the device, and that caused UPOs.
16 That's what's called battery issues, and it is really important to pick up that definition,
17 because later, when we see the phrase "battery issues", we need to know that's what's
18 talked about in 7(a).

19 Expressly, in 7(g) -- this is the point about 7(g) -- actually, let me first just pick up and
20 point out to you the last sentence of 7(a) while I am still on 7(a):

21 "For the avoidance of doubt, it is not alleged that the cause of the battery issues was
22 a manufacturing defect with the batteries contained in the [Relevant] iPhones."

23 So there's no allegation that there's something wrong with the batteries. There again
24 I am going to have to come back to that, because I am afraid on reading the transcript
25 last night it was far from clear to me yesterday that that's still the claim. There were
26 several sideswipes, if I can put it this way, yesterday about the batteries and we will

1 need to look at those again.

2 Now, what there happened is we released the PMF. That largely resolved the UPO
3 issue. But, and here we do come to 7(g), the PCR claims the class members suffered:
4 "prolonged substandard performance of their premium handset, whether in the form
5 of UPOs or as a result of the throttling issues."

6 Now, the alleged abuse is said to consist of failing to inform users about the battery
7 issues, UPOs and the impact of the PMF. As we have said, that's now the only abuse
8 pleaded by the PCR.

9 Having provided disclosure, we sought to strike out the entirety of the PCR's case,
10 including the claim that the devices were sub-standard as a result of the UPOs or the
11 effect of the PMF. Again, I am not sure whether this is Macavity's cat or Schrödinger's
12 cat or whatever it is, but as soon as you try to look at it, it either moves or disappears
13 or explodes. As soon as we issue a strike-out application, "Oh", says the PCR, "that's
14 not my case at all". He now resiles, it is said, from the claim that the devices were
15 sub-standard, a word that my learned friend seemed to try to be very keen to get away
16 from yesterday on several occasions, or didn't perform as premium products. Instead,
17 it is now said, and I am quoting from my learned friend's skeleton, paragraph 32:
18 "there is no magic in the terms "*substandard*" or "*premium*".

19 Well, we were only using those words because they had used those words. That was
20 their case.

21 He now says:

22 "The PCR's case is that the Affected iPhones did not perform as expected and as
23 a result were worth less."

24 Okay. That's where we were until yesterday morning. What happened yesterday
25 morning? I am just going to give you the references to the transcript, because we
26 were all here yesterday.

1 First, my learned friend said the batteries were not suitable for use. Page 16, line 17.
2 Second, he came pretty close to saying it had been a mistake to repeat quite so often
3 that his claim was not a product defect claim, i.e., it was a mistake on his part to repeat
4 that quite so often. Page 42, line 21.
5 Third, he positively alleged that the devices are defective "in the sense of there's
6 plainly something wrong with it". Page 43, line 3.
7 Fourth, he also developed a case, which has not been squarely pleaded, that
8 consumers had warranty or consumer rights claims because of the battery issues.
9 Now, that's where we've got to, twists and turns. Why does all this matter. Let me
10 bring it back to where I am today.
11 This shows, we submit, two fundamental flaws in the entire case. First flaw: there is
12 no evidence at all for the allegation that the performance of the iPhone with the PMF
13 was sub-standard or, as it was put in the skeleton, didn't perform as expected, or, as
14 it was put yesterday, gave rise to an arguable breach of the Consumer Rights Act or
15 the warranty.
16 **CHAIR:** Are you talking about pre-PMF or post-PMF?
17 **LORD WOLFSON:** Well, frankly either. Frankly, either. I mean, certainly with the
18 PMF, but frankly either. There's no evidence for any of those different but treated as
19 all part of the same mixed bag formulations of the point, nor still has the PCR -- and
20 this was a point the Tribunal put to my learned friend in May -- nor do we yet have any
21 definition of what standard we are talking about if they are meant to be sub-standard.
22 **CHAIR:** Is this the first point still?
23 **LORD WOLFSON:** Absolutely. This is still the first flaw.
24 Nor do we have the relevant expectations we are talking about, if it's said that they
25 didn't perform as expected. Against what measure are we measuring performance,
26 whether that's for the purposes of the consumer rights claim or otherwise? That's why

1 we are applying to strike out the entire claim on that basis.

2 There is no evidence. There is no definition of standard. There is simply nothing
3 there.

4 **CHAIR:** But, as I understand, I mean, Mr Moser said there is enough to get his foot
5 in the door, because PMF was not just a theoretical difference in performance. This
6 was a real difference and he pointed to some e-mails.

7 **LORD WOLFSON:** Yes.

8 **CHAIR:** Equally well, you have not put in evidence saying this was performance
9 neutral or any differences were irrelevant. Am I right about that? Sorry, that's
10 a question, not a statement.

11 **LORD WOLFSON:** Yes. I mean, well, we see what the materials show.

12 **CHAIR:** Yes.

13 **LORD WOLFSON:** But the question is whether that is evidence which can support
14 the claim now being alleged, and that's why it's so important to start with what is the
15 claim now being alleged? I will look at those materials and hopefully I will come back
16 to this point.

17 **CHAIR:** Come back to it, but you have not put in evidence -- Apple have not put in
18 evidence a positive case, as I understand it, saying that the PMF did not materially
19 affect the performance of the phone.

20 **LORD WOLFSON:** Well, have a look at what Mr Crumlin says. There is lots of
21 evidence there to say for a lot of users you wouldn't notice anything at all. For other
22 users, even if you notice something, it would only be in certain times and when you
23 are doing certain things, and users would find it acceptable. We will have a look at
24 some of this, the number of complaints and the nature of complaints. We will look at
25 all of that.

26 **CHAIR:** Yes.

1 **LORD WOLFSON:** That's the shape of what we say is the first flaw and the reason
2 why all this history is relevant.

3 The second is --

4 **MR RIDYARD:** Sorry to interrupt. There is evidence of UPOs, isn't there, and there
5 is evidence that Apple thought they were something that needed to be dealt with.

6 **LORD WOLFSON:** Exactly. Exactly. That's why -- we will come to this -- for example,
7 one of the things that Mr Crumlin deals with is, well, should we just have a battery
8 replacement programme? Of course, the problem with that is you are going to replace
9 the battery with the same battery. So you are going to have the same problem further
10 down the line. That's why it was thought a much better approach was to have the
11 PMF, which dealt with the issues.

12 **MR RIDYARD:** I understand that. I was just responding to your claim that there was
13 no evidence of a problem with the phones. There was that evidence that there was
14 a problem with these phones.

15 **LORD WOLFSON:** Well, it depends what you mean by problem with the phones.
16 I mean, certainly UPOs occur when you have particular ages of battery, particular
17 chargers, particular temperatures, people running particular applications. If you have
18 particular concatenations of circumstances, you can have a UPO. Certainly UPOs are
19 not good and Apple wanted to minimise or frankly reduce them to zero or as far to zero
20 as one can ever go. The whole world operates under the law of physics.

21 **MR RIDYARD:** I understand that, but if I say I have got a ten year old phone and it is
22 suffering a UPO, because I used it in Northern Scotland, you are not going to have
23 much sympathy for me. On this occasion, these UPOs were something which lead to
24 a desire of Apple not just to say "That's just physics. Too bad". They said "This is
25 a problem we want to deal with".

26 **LORD WOLFSON:** Absolutely. Put in those terms, I not only don't disagree; I agree.

1 That's what Mr Crumlin says in his evidence. Absolutely, I accept that, of course. We
2 wanted to solve it and our case is we did solve it and we told everybody we had solved
3 it.

4 Now, I don't think I had mentioned the second flaw.

5 **CHAIR:** No, you hadn't.

6 **LORD WOLFSON:** The second flaw was the point I mentioned earlier, which is there
7 is now this complete mismatch between the infringement alleged and the losses
8 claimed. I have taken a little bit of time on that, because we do submit that is a very
9 important point. When we come to methodology, it is really so important to have in
10 mind very, very clearly what is the infringement which is actually alleged, because
11 otherwise the nature of the mismatch becomes a bit of a soft shoe shuffle, and my
12 learned friend can shuffle out of it, but, in fact, we submit he shouldn't be allowed to
13 shuffle out of it, because there is a hard edged point here, which the Tribunal should
14 grasp at this stage.

15 Now, let me then turn to my first main set of submissions on the strike-out or reverse
16 summary judgment. I am not sure it matters frankly which way it is characterised. It
17 is the same legal standard. I am not going to say anything about the legal standards
18 in place. The Tribunal knows. It has been rehearsed. I don't think there's any point
19 unless the Tribunal wants me to say that.

20 Just for the reference, we have set it out in full in our second Response, at
21 paragraphs 21 to 24 but I won't spend any time on it.

22 Now, one way to look at the submissions on the strike-out is to look at how we got
23 here and how we got here was from May. So perhaps we can look at the Adjournment
24 Judgment that the Tribunal delivered after that hearing.

25 **CHAIR:** Obviously we have that in mind. Which bits did you want to remind us of?

26 **LORD WOLFSON:** I was just going to give up the paragraph references. First of all,

1 paragraph 6, which summarises the alleged infringement, and that was about lack of
2 transparency of the battery issues and the introduction of the PMF, and the Tribunal
3 noted that it was alleged that it led to the iPhone becoming "sub-standard".
4 There is another reference to sub-standard in paragraph 14.
5 Paragraph 16 records that we don't accept the case.
6 Paragraph 19 is where the Tribunal dealt with *Gutmann Trains*. Importantly, the
7 Tribunal said this, if I can quote the Tribunal back to itself, that *Gutmann Trains* is:
8 "not authority for the proposition that a failure to communicate facts to a customer is,
9 of itself, an abuse of a dominant position."
10 Then, at 20, the Tribunal said:
11 "It is not without more inappropriate whether ... competition law or consumer law" for
12 effectively a manufacturer to make a design trade-off decision, if I can paraphrase.
13 Can I invite the Tribunal -- what counsel always refer to and Tribunals always
14 laughingly respond to as in your spare time, can I ask you to re-read what you said at
15 paragraphs 22 to 23 of the adjournment decision.
16 **CHAIR:** Just remind me where this judgment is in the bundle?
17 **LORD WOLFSON:** Tab 49 of the supplemental, yes.
18 Essentially, my learned friend had submitted that it was potentially abusive if after
19 installation the phone was no longer performing as "a premium product" or "not ... in
20 accordance with the manufacturer's representations".
21 The PCR's case at that time was that the phone was not a premium product and was
22 sub-standard as a result of the PMF.
23 Now, as I will show you, he now appears to have resiled from that in his skeleton, no
24 doubt because there is no evidence that the phones were sub-standard after the
25 installation of the PMF, but to get his case off the ground he would have to show that
26 the devices with the PMF were in some way sub-standard or non-premium, and he

1 | can't do that.

2 | Now, as I just said, in the skeleton he resiles from the case that the relevant phones

3 | failed to meet any particular standards or were rendered non-premium devices by the

4 | PMF. The reference for that, which I know you have seen before, is paragraphs 32 to

5 | 33 of his written argument.

6 | **CHAIR:** Can we just turn that up?

7 | **LORD WOLFSON:** Yes.

8 | **CHAIR:** This is the skeleton you mean?

9 | **LORD WOLFSON:** Skeleton for today, 32 to 33. I have it as a standalone, but ...

10 | **CHAIR:** "... as expected ..."

11 | **LORD WOLFSON:** Yes. I will be coming back to this.

12 | **CHAIR:** Okay.

13 | **LORD WOLFSON:** If we look, however, at the current draft of the Claim Form --

14 | **CHAIR:** He just seems to be -- the PCR seems to be keen to avoid a hard edged

15 | question of a standard and are you above or are you below, and replacing that with

16 | just "not as expected" or perhaps "disappointment", paraphrasing the ...

17 | **LORD WOLFSON:** Even "as expected", compared to what? Again you need to have

18 | some sort of standard.

19 | **CHAIR:** Yes. So what's being discussed -- I appreciate we need to look at the

20 | pleading -- is relative to the premium phones, relative to iPhone 5. Those things have

21 | been discussed.

22 | **LORD WOLFSON:** We will come back to those points. We will come back to that

23 | following on from yesterday.

24 | **MR RIDYARD:** There is a kind of implied standard when you come to the damage

25 | calculation, because you have to decide what you think consumers should be

26 | compensated to, don't you?

1 **LORD WOLFSON:** I didn't hear I think the second word. There is an implied standard
2 when it comes to.

3 **MR RIDYARD:** Assessing the damages.

4 **LORD WOLFSON:** Oh, yes. I accept when it comes to assessment of damages you
5 really have to assess it by reference to something, if that's what --

6 **MR RIDYARD:** That's what I am saying, yes.

7 **LORD WOLFSON:** I accept when it comes to that -- I knew we would hear a lot about
8 broad axes and so we did. I accept broad axes when it comes to that sort of point, but
9 that's sort of quite a long way down the damages issue. First, you have to have
10 a proper question of what is the methodology, so to speak, in a conceptual sense. You
11 have to identify the counterfactual. Then you can come to this point of how are we
12 going to measure it?

13 **MR RIDYARD:** I see that entirely, but I was making the point about the first part of
14 that process. You need to be clear what you are trying to do, and then obviously doing
15 it is sometimes difficult.

16 **LORD WOLFSON:** Precisely. Exactly. My challenge to the methodology -- I am
17 trying to keep my challenge to methodology on conceptual points, because I accept
18 that once we get into -- at this stage, once we get into "should it be quite here or quite
19 there", those are not points the Tribunal is going to be able to or probably should even
20 resolve at this stage. But I do urge the Tribunal really to grasp the conceptual points,
21 because they are either, so to speak, right or wrong.

22 Now, as the Chair just mentioned, we should look at the way it is put in the Claim
23 Form. That's at Tab 3 of what I call today's bundle, the most recent bundle.

24 We start at paragraph 146 at internal page 60.

25 **CHAIR:** Sorry. Page again?

26 **LORD WOLFSON:** Internal page 60, paragraph 146, where you should see a little

1 heading (e), "Abuse".

2 **CHAIR:** Page 60 internal?

3 **LORD WOLFSON:** Sorry, 71 of the bundle, 60 of the document.

4 **CHAIR:** Yes.

5 **LORD WOLFSON:** I have not got time and I am not going to go through all these
6 paragraphs, but I don't think we need to because it is really brought together at 153.

7 I said earlier we would come back to 153.

8 **CHAIR:** Yes.

9 **LORD WOLFSON:** As we saw earlier, 153(a) is struck out.

10 **CHAIR:** Yes.

11 **LORD WOLFSON:** That's the allegation about it was abusive to supply iPhones
12 containing batteries which couldn't deliver peak power, etc. So struck through, no
13 longer part of the abuse.

14 153(b) is the first aspect of the abuse, that we "failed to take all reasonable steps to
15 inform users about the battery issues in a timely and transparent manner as soon as
16 [we] knew, or ought to have known, about those problems".

17 Later, in the same paragraph, it is said during the relevant period we "failed to give
18 [the consumers] a transparent explanation about the battery issues".

19 I showed you earlier what the battery issues are and how they are defined in 7(a).
20 Nothing to do with defective batteries.

21 **CHAIR:** Inappropriately spec'd.

22 **LORD WOLFSON:** Unable to deliver the peak power, exactly. Importantly, there was
23 that amendment in green that the cause of the battery issues wasn't a manufacturing
24 defect.

25 Now, that ties in with the second aspect of the abuse here at 153(c), and you will see
26 what's pleaded there, that we "sought to conceal ... [without adequately informing]

1 customers ... [about] the detrimental impact ... [and the effect] on the functionality and
2 performance of the” Relevant iPhones. We didn't disclose it and incorporated the
3 PMF, and that all of this would or would be likely to have a “deleterious effect on the
4 performance or functionality of their iPhone”.

5 Now, it is important here just to pick up another defined term used by the PCR and
6 that's "throttling issues". That's defined at 7(d). That's referring to us installing the
7 PMF in a manner which, I quote:

8 "sought to manage the battery issues but which actually slowed down or “throttled”,
9 the performance of hardware components, including the CPU and GPU, thereby
10 adversely affecting the performance, functionality and technical capabilities” of the
11 iPhones.

12 Now, let me just pause there, because yesterday, as expected, we had something of
13 a focus on the word "throttling". Let me take 30 seconds, so far as is relevant, on this
14 word.

15 It is true we, as we saw from a document yesterday, that Apple sometimes has used
16 that word internally as a shorthand for some of the things that the PMF does, but there
17 is nothing nefarious about that. When Apple uses the word "throttling", it is not
18 synonymous with -- it is not a nefarious word. It is like -- remember when you used to
19 have cars that had a choke on the car. What this does here, throttling, is this. This
20 refers to the gas pedal or throttle of a car, and it means that you take your foot off
21 the gas pedal or control the engine speed.

22 **CHAIR:** I don't think there is any need to be sensitive about throttle, for today's
23 proceedings anyway.

24 **LORD WOLFSON:** The reason we are a bit sensitive is because there is a big screen
25 up here, and things said in this room are reported outside it, and sometimes points are
26 made ostensibly to the Tribunal but perhaps actually have an audience elsewhere.

1 That's why -- I won't say any more about it but that's why I wanted just to put that on
2 the record properly.

3 Now, can we go back to 7(g) of the pleading and just pick up the term "sub-standard
4 performance". I appreciate this is a term which is now being moved away from, but
5 the Chair mentioned a moment ago continues perhaps in another guise. We looked
6 at this a few moments ago.

7 " substandard performance of their premium handset, whether in the form of UPOs or
8 as a result of the throttling issues."

9 Now, certainly in the amendment in green in lines 2 to 3, it would appear that the PCRs
10 are tending to include UPOs in addition to throttling issues, "whether or". The factual
11 claims underpinning the abuse are the ones we saw at 153(c). It is that allegation
12 which I will come to and show there is really no evidential support for it.

13 Now I made the submission a few moments ago that there is no standard against
14 which to address performance. Let me just give the Tribunal some references here,
15 without taking time on it. The issue was summarised in the adjournment judgment at
16 paragraph 30. In yesterday's transcript, and I invite the Tribunal to look at again
17 page 75, where the Chair made the point to my learned friend that he was trying to
18 find out what the benchmark was to say that there's a potential claim. There wasn't
19 an answer, we submit, to that question. We say that the Amended Claim Form suffers
20 from the same fundamental flaw, and when it comes to the skeleton and the
21 reasonable expectations, as I said a moment ago, there's no attempt to explain what
22 those reasonable expectations were or what it means, beyond a reference to
23 expectations as a result of Apple's marketing. I will come to some of that if it's relevant.

24 My learned friend yesterday put it in these terms. He said that the issue was that the
25 relevant iPhones were "unacceptable". To quote him, this is page 38, lines 21 to 23:
26 "They were of unacceptable quality in a consumer law sense. It is very likely that

1 consumers would have exercised their rights. They might have also tried to say that
2 the battery was defective under the Apple warranty."

3 Now, to take a minute on this, so far as it is actually pleaded against me in a proper
4 point, first of all, I understand the point on consumer law to be closely linked to the
5 advertised expectations, as it is now called. In other words, it is said that the iPhones
6 weren't of satisfactory quality or fit for purpose or as described, because they didn't
7 meet the standards in the marketing materials.

8 The advertising claims relied on are at paragraph 61 of the current draft of the Claim
9 Form, which I know the Tribunal has already seen.

10 Just for the transcript reference that is at page 38, internal page 27, namely superior
11 battery life, blazing fast performance and power efficiency, faster performance and
12 more energy efficient, delivering higher sustained performance with greater battery
13 life.

14 The problem for my learned friend and the PCR is that none of the marketing materials
15 on which the PCR relies in this context concerns the rate at which batteries age over
16 time and after use, or the performance of devices over time or the prevalence of UPOs.

17 It can't be realistically argued that these statements are made and intended to cover
18 the lifetime of the device. I mean, that is simply utterly unrealistic.

19 I mean, we need not turn it up but as Dr Martin explains in his Expert Report, at
20 paragraph 24, the reference is Bundle A, Tab 10, as soon as you open the box and
21 you start to download apps, every device is thereafter in a unique state. No two
22 phones are thereafter the same. They will all perform differently. I was going to say
23 we don't need to turn it up. Perhaps you will let me read out this paragraph but I do
24 invite you to take a note of it and reread it:

25 "the moment that an iOS device is taken out of its box and the user begins to download
26 applications and to customise and program their device, it is then running a complex

1 combination of user-installed software... [apps] and is therefore in a unique state
2 compared to all other devices ... Depending on the configuration, a user may have
3 installed software that uses more or fewer iOS resources than another user's software.
4 The first user will observe different "performance" compared to the second user,
5 though neither the device nor the iOS will be the underlying reason for this
6 performance difference."

7 That's why Mr Sinclair is clearly wrong to say when he does -- this is Sinclair 3,
8 paragraph 36 -- again I will just give up the reference -- supplemental reference
9 Tab 8 --

10 **CHAIR:** Can you give me the reference to the bit you just read out. It was paragraph?

11 **LORD WOLFSON:** Dr Martin, A10, paragraph 24, page 371.

12 **CHAIR:** The next reference is?

13 **LORD WOLFSON:** Sinclair 3, paragraph 36, Supplemental Volume Tab 8, page 270.

14 **CHAIR:** Thank you.

15 **LORD WOLFSON:** What he said there is:

16 "This meant that a user with an iPhone 5 would experience the same level of
17 performance when the battery was 3 days old as when the battery was 3 years old."

18 Now, the performance of a device depends on use. I would have thought it is obvious
19 that an iPhone that's used for several years will perform less well than one which is
20 fresh out of the box, including for the reason which the Chair gave yesterday, that the
21 battery degrades. So the effect of temperature and state of charge and the mitigations
22 in those regards would bite more frequently.

23 To be fair to Mr Sinclair, what he must be saying, or at least trying to say, is that it is
24 just that there was nothing that slowed ageing iPhone 5 devices down by reference
25 specifically to the battery's chemical age. If that's what he meant, then that's fine.

26 A second reference to this -- I said earlier Mr Crumlin deals with it. Again, I will just

1 give you the reference. Bundle A, Tab 8, paragraph 22, page 349, and I quote:
2 "Chemical ageing depends very much on individual User behaviour, that is, how
3 a User uses his or her device, and is therefore distinct from calendar aging."
4 Obviously, when we are talking about ageing here, we don't mean calendar ageing.
5 That's why, to come back to these marketing materials, it would not be practicable to
6 make advertising claims comparing the performance of one generation of devices over
7 X period of time to the performance of another generation of devices either after that
8 same period of time or after some other period of time. That comparison is just
9 necessarily meaningless. It's not a comparison.
10 Any reasonable reading, therefore, of the press releases my learned friend took you
11 to yesterday, and sir, as you noted, they are press releases, not actually advertising
12 materials. That's different. Any reasonable reading of them would read them as
13 comparing the performance of different generations of iPhones straight out of the box.
14 That makes sense. That makes sense but anything else doesn't make sense.
15 **CHAIR:** I am not sure I could go quite that far. It's a comparison of like with like. So
16 I appreciate every individual -- one would have to control for individual variation to do
17 with what the phone is being asked to do, what apps it may have on, one would expect.
18 It is not just instantly the moment it comes out of the box necessarily, is it? It could be
19 after six months of typical use and you could control for typical use and say --
20 **LORD WOLFSON:** The whole point is, to take the phrase from the film, "We are all
21 individuals". Each iPhone is unique once it is out of the box and is being used. That's
22 the thing. You can't control it in any meaningful sense. I don't need to get into
23 a theoretical discussion as to whether one could or could not do it. I submit one
24 couldn't, for the reasons I have explained. But when one is looking at the marketing
25 materials and you are asking what are they saying, it is clear we say that what they
26 are saying is when you take this out of the box and you compare it to that out of the

1 box, this does this and it is sort of 20 times better than that does that. Anything else,
2 it is an impossible comparison.

3 **CHAIR:** Just tell me what happens with the iPhone 5 when you put the problematic
4 third party software -- I think Snapchat is used as the example -- you put that on
5 iPhone 5? I don't recall seeing that in the evidence. Does that hit problems, UPOs
6 and power issues or is it just the iPhone 5 is configured very differently so, that simply
7 isn't a problem?

8 **LORD WOLFSON:** To a certain extent -- let me come back to this. This ties into
9 a point I am going to be coming to later, because we will see a graph which compares,
10 from memory, is it 5 to 6 and 6 to 7? Can I come back to this point, because I think
11 I will be coming back to the iPhone 5 later.

12 **CHAIR:** Give me a taste of what's to come. Does the iPhone 5 have the problems of
13 UPOs or just not, because it is configured differently, or is that just an unanswered
14 question at the moment?

15 **LORD WOLFSON:** We will see that in 5, 6 and 7. You can theoretically have a UPO
16 in iPhone 5. That's right, isn't it? I don't want to take this in bits. When we look at the
17 data and we will see how it was that the iPhone 5 was compared to the iPhone 6, both,
18 so to speak, in reality and also with regard to what consumers thought was going on.
19 I hope that's -- maybe that is a teaser rather than a taster.

20 Just to finish this point about the marketing materials, the other point that the marketing
21 materials don't do is that they don't offer a standard for performance of a device with
22 the PMF.

23 Now, yesterday one of the -- just to take one example, yesterday my learned friend
24 referred on a number of occasions to the press release for iPhone 6s, that the batteries
25 would be 70% faster. You remember that from yesterday? We simply don't
26 understand that point, because when you look at the press release, what's being

1 compared is a comparison between 6 and 6s. Both those devices suffered from the
2 UPO issues.

3 **CHAIR:** Can you show me that?

4 **LORD WOLFSON:** Both were models to which the PMF was applied. That's the
5 second supplemental bundle.

6 **CHAIR:** Yes.

7 **LORD WOLFSON:** The second supplemental was the one that came in yesterday.

8 **MR RIDYARD:** The 6 and 6s had different chips, did they not?

9 **LORD WOLFSON:** Yes.

10 **MR RIDYARD:** I think you said the comparison was of the speed of the CPU, was
11 it the speed of the batteries --

12 **LORD WOLFSON:** No, I said the advertising materials don't offer a standard for
13 performance in the device with the PMF, in the sense that the 6 and the 6s both have
14 the PMF applied.

15 **MR RIDYARD:** Yes.

16 **LORD WOLFSON:** I just want to pick up this 70% point, and that's at page 71. You
17 will see under "Advanced Technology" the A9 is the 6s and the A8 is the 6. Now, no
18 other standard --

19 **CHAIR:** The A9 is the 6s and the A8 --

20 **LORD WOLFSON:** A8 is the 6.

21 **CHAIR:** What about "even faster" in the next paragraph?

22 **LORD WOLFSON:** Beginning?

23 **CHAIR:** "With advanced wireless technologies, including faster Wi-Fi and LTE ...
24 iPhone 6s and iPhone 6s Plus can browse ... and stream content even faster."

25 **LORD WOLFSON:** Yes, but that's about your ability to use the internet connection
26 even faster. Indeed, if you look at the footnote --

1 **CHAIR:** Faster than what?

2 **LORD WOLFSON:** To 6. Again to 6.

3 **MR RIDYARD:** Again, it is comparing the two chips.

4 **LORD WOLFSON:** Exactly. Just to pick up that last point, that was also relating to
5 your internet speed. If you flip over the page, you will see about a third of the way
6 down by a (i), which is where that footnote goes to, and you will see that footnote is all
7 about data plan required and speed varies based on site conditions. That's obviously
8 the internet connection --

9 **CHAIR:** Okay.

10 **LORD WOLFSON:** The central point is this. There's no standard put forward by the
11 PCR to assess at what stage slowdown is acceptable, i.e., after how many years, or
12 at what stage and in what circumstances UPOs are acceptable.

13 **CHAIR:** I think the PCR puts their case different ways. The PCR squares up to the
14 fact that this is about transparency, and says if Apple had been transparent, then
15 consumers would have responded or would have had the opportunity of responding
16 differently, and then raises a number of possibilities. One is that these phones with
17 the PMF -- let's just concentrate on with the PMF at the moment, may give rise to
18 misrepresentations, because once the phone has its PMF on, it is not living up to the
19 promises made to the consumer.

20 They also say that it may be in breach of consumer law, which may be the same point.

21 It may overlap considerably. They also put it a third way and say: "Look, it would have
22 given rise to a lot of disappointed customers", even if it wasn't a strict breach of
23 contract or breach of consumer law, it would have given rise to a lot of disappointed
24 customers, who would have acted in such a way that Apple would have had to take
25 some actions in order to assuage that disappointment or would have taken action.

26 **LORD WOLFSON:** Yes.

1 **CHAIR:** Putting it those three different ways, does that matter for your analysis? I
2 understand your point, you say there is no hard edged evidence of breach of contract
3 here. Breach of consumer law we are going to have to come on to, because obviously
4 you have got some decisions potentially against you on that. Where does it leave us,
5 if it is the soft case that this is a reduction in performance that a consumer can
6 recognise and, consequently, if Apple had been more open about it, Apple would have
7 had to respond to consumer pressure? What do you say about that last point?

8 **LORD WOLFSON:** We will be coming to that point later. That takes us to an extent
9 into the arguments on the methodology point. We say Apple was open about it. I will
10 be taking you in some detail to what we say.

11 **CHAIR:** Just assume against yourself, for present purposes. The fact it is not a hard
12 edged sub-standard performance but is a performance to which consumers would
13 have been -- in respect of which consumers would have been disappointed, and Apple
14 would have had to assuage that disappointment, what do you say about that? Is that
15 sufficient to make the case arguable?

16 **LORD WOLFSON:** But where is the evidence for any of that, because we know what
17 consumers did. We know what Apple did. We know what consumers did.

18 **CHAIR:** I am just asking you to make those assumptions against yourself at the
19 moment. Then where does that analysis leave us?

20 **LORD WOLFSON:** There comes a point -- we can't make assumptions against
21 ourselves. We know actually in the real world what actually happened. We know what
22 happened when Apple was, we say, fully open about it.

23 **CHAIR:** When you say Apple was fully open, what are you referring to?

24 **LORD WOLFSON:** The December 2017 announcement.

25 **CHAIR:** Are you saying that consumers were all aware of that announcement.

26 **LORD WOLFSON:** Yes. It was absolutely all over the place. Not only was it on things

1 | like BBC and newspapers. There was a rumour, which is of course entirely false,
2 | which I will be coming to, that all of this had actually been done deliberately, and the
3 | Tribunal may or may not have personal recollection of that. A few months later that
4 | was absolutely all over the place. The simplest -- if you had a phone which was
5 | experiencing UPOs, or you thought was running slowly, and you did any sort of Google
6 | search to say "Why is my iPhone running slowly", you would have found everything
7 | immediately from the --

8 | **CHAIR:** If you did a Google search on your iPhone, and had the patience to wait for
9 | the answer -- that was a joke.

10 | **LORD WOLFSON:** I know. I think we can assume that a consumer who can be
11 | bothered to do the search will wait for the answer. Actually, given today's hearing in
12 | the States, that's a very well timed question. You would have found everything. This
13 | is a very important point. You would have found everything ranging from the Apple
14 | official announcement to the most mad conspiracy theories.

15 | **CHAIR:** Yes.

16 | **LORD WOLFSON:** I think in one phrase when somebody tried to argue -- the Morning
17 | Star tried to argue that the Daily Star -- rather different newspaper -- was going to
18 | confuse people. The judge memorably said: "Only a moron in a hurry could possibly
19 | confuse the Communist Morning Star with the rather more demotic let's say Daily
20 | Star." Even that person would have picked up what was going on here.

21 | It is not said -- and this is really important -- that as at today there is something which,
22 | so to speak, we have held back. The PCR has not pointed to anything which we
23 | should have said and have still not said or is still not known. It is all out there and we
24 | say it was out there in the December 2017 announcement.

25 | **CHAIR:** You are not drawing a distinction between hard edged entitlement of
26 | consumers to seek reparations as a misrep or as a --

1 **LORD WOLFSON:** No.

2 **CHAIR:** -- on the one hand, and the ability of consumers to put pressure on Apple to
3 make good what they consider is a less than satisfactory phone. You are not drawing
4 that distinction. You are saying that that's just unrealistic and doesn't apply to the facts
5 of this case.

6 **LORD WOLFSON:** I am not drawing that distinction. Even if you want to draw that
7 distinction -- I am answering it both ways really. It doesn't help you. The PCR has to
8 have some basic factual underpinning for the case he's putting.

9 In my respectful submission, it simply won't do to say: "Who knows? Who knows
10 what might have happened if this, or if that or if the other?"

11 **CHAIR:** You are going to come to the views of the Commission (sic) and so forth?

12 **LORD WOLFSON:** Absolutely. I will come to that. We will look at the French material.
13 Our submission is none of this goes anywhere, properly analysed. I mean, it's that old
14 mathematical point. You know, sometimes -- and it happens in court all the
15 time -- often somebody who hasn't got a point on which they can really get home says:
16 "Well, look, here's a point. Okay, that works 60%. Here is another point. That may
17 be a 40% point. Here is a 25% point. I accept I can't win on any of them individually
18 but put them all together, give them a big stir, there should be enough there".

19 With respect, that can't work here. The PCR has to have at this stage -- I am not
20 saying a case at the 51/49 stage. We know what the test is. Applying that test, the
21 PCR has to have some cogent evidential support for what he is alleging.

22 **CHAIR:** On all the elements of his claim.

23 **LORD WOLFSON:** On all the elements of the claim. I submit he doesn't. I also
24 submit, and appreciate the Tribunal wants to break because we started early --

25 **CHAIR:** Now is a good time, when you finish this.

26 **LORD WOLFSON:** I absolutely appreciate that one has to have some allowance for

1 the fact maybe this is a developing area of law and all the rest of it. That only helps
2 the PCR when it comes to a legal issue. There has to be a factual basis. That might
3 be a convenient moment.

4 **MR RIDYARD:** Can I ask one question that might be useful to do before the break.
5 Going back to the impossibility of comparing real life phones once they are out of the
6 box, I understand that the user experience differs according to the history of the use
7 of the phone. I also understand that the speed of the CPU is just one element of the
8 quality of the user experience. But if you were to focus purely just on the speed of the
9 CPU, is it still the case that you can't compare, you know, a phone with an A8 with
10 an A9 CPU and you couldn't make the comparison about how quickly that CPU was
11 doing its thing systematically over time? Does the CPU speed change from one year
12 to the next or is it just the use that the phone makes of that speed, as it were?

13 **LORD WOLFSON:** As we are going to the break can I make sure I give the right
14 answer.

15 **MR RIDYARD:** That's why I asked the question now.

16 **LORD WOLFSON:** Can I say very quickly -- we will come to this point -- we shouldn't
17 only think of the CPU in terms of speed. We will see later that different CPUs have
18 different qualitative effects as well.

19 **MR RIDYARD:** I am quite prepared to believe it is a bit more complicated than --

20 **LORD WOLFSON:** I will answer you on the speed point.

21 **MR RIDYARD:** Yes.

22 **(Short break)**

23 **LORD WOLFSON:** Just to pick up the question, and it may be that what I say will
24 provoke another question and we may need to return to it, but the short answer is that
25 when you're comparing clock speed of a CPU, it is not only a question of sort of how
26 quickly each tick takes and how fast it is ticking. It is also a question, if you are going

1 to compare CPUs, as to how much work is getting done on each tick. So, therefore,
2 when you want to compare speed of CPUs, looking at clock speed is a comparison
3 you can make, but it doesn't actually tell you enough meaningfully about the two CPUs,
4 because I say it is not only how quickly each will be ticking, but also how much work
5 is getting done in each tick. The longer and no doubt more comprehensive explanation
6 is in Martin at A10, page 278 at paragraph 41.

7 And having given you that reference --

8 **MR RIDYARD:** I will read that in my spare time.

9 **LORD WOLFSON:** You will read it in your spare time. If, sir, you do have a follow-on
10 question, we will be very happy to do our best to answer it.

11 I appreciate I also have a question I was going to come back to on the iPhone 5. I will
12 come back to that.

13 I had made a few submissions about the press releases and this was in response to
14 the expectations point. I was going to say a word about the other way it is put, i.e.,
15 customers would have exercised their warranty rights. Remember there were a few
16 references to warranty rights.

17 Now, that's a one-year warranty and there are a number of points here. First off, the
18 warranty only covers defective batteries, and my learned friend was clear to say that
19 defective batteries was not his case.

20 Secondly --

21 **CHAIR:** Warranty only covers batteries?

22 **LORD WOLFSON:** Defective batteries, in relation to batteries. I am not saying it is
23 only defective batteries. I am in battery world.

24 **CHAIR:** Understood.

25 **LORD WOLFSON:** In battery world, the warranty only relates to defective batteries.

26 Secondly, because what we are doing here is answering the putative question, could

1 there have been an arguable claim under the warranty, there wouldn't be an arguable
2 claim under the warranty, not only because of that point, but also because the warranty
3 was only for a year. That is the point I have just made.

4 Mr Harman's provisional loss estimate assumes that the relevant iPhones did not
5 suffer sub-standard performance during the first year of their lives. That's at A3 at
6 131, paragraph 8.8.3(i). The basis of that assumption is that before then there was no
7 onset of reduced performance.

8 Now, if that's the assumption being made, that's inconsistent with any assumption that
9 there could have been a warranty claim.

10 Now, I said I would turn to the evidence relating to UPOs and substandard
11 performance in the Amended Claim Form. Now, as I showed the Tribunal a little
12 earlier, the PCR's case now appears to include a complaint that Apple failed to inform
13 consumers that UPOs were not eliminated by the PMF, so that the phones fell short
14 of reasonable expectations.

15 Now, in the Amended Claim Form, which is the one we are looking at, at Tab 3, and
16 going back to our old friend paragraph 7(g), which is at page 17, the PCR alleges that
17 the existence of UPOs before the PMF was introduced amounted to sub-standard
18 performance. See the beginning of that paragraph.

19 Now, at the disclosure hearing a couple of weeks ago the Tribunal also understood
20 the PCR's case to be limited to alleged sub-standard performance as a result of the
21 PMF.

22 The Chair said and I quote -- the transcript is not in the bundle but I am quoting from
23 it:

24 "This case isn't about UPOs. It's about the impact of the PMF."

25 To which PCR's leading counsel said:

26 "Yes, but the impact of the PMF did not completely resolve the UPOs."

1 So the complaint appears to be now that we failed to inform customers that the PMF
2 failed to eliminate completely the risk of UPOs. The reductions of 80% for iPhone 6s
3 or 70% for iPhone 6 were apparently not good enough, and I quote now from
4 paragraph 89 of the Claim Form. It is said:

5 "That still left users suffering extensive and unacceptable levels of unexpected
6 shutdowns."

7 So that it seems is what Apple is supposed to have told them.

8 Yesterday my learned friend put it slightly differently and suggested there may be
9 some issue with the battery itself, and that a replacement battery, either a different
10 battery or the same battery, may be the solution.

11 This aspect of the claim we say is absolutely hopeless. Firstly, UPOs are not unique
12 to iPhones. They can occur in any battery powered device. See Crumlin 1, para 29.

13 I will just give you the reference. A8, page 350.

14 "UPOs are not unique to iPhones, but can occur in any battery-powered device with
15 widely carrying loads and a minimum voltage requirement."

16 That's the first point.

17 The second point is that there was no issue with the batteries themselves.
18 A replacement battery, as I said earlier, would not have solved the problem, because
19 it would have had the same spec.

20 I can take you I think briefly to the evidence on this, if I may. This is in Crumlin 1 at
21 Tab 35. So that's Bundle A.

22 **CHAIR:** Bundle A.

23 **LORD WOLFSON:** Tab 8 and it is at page 351 of the bundle. There should be
24 a heading B:

25 "UPOs not explained by manufacturing excursion."

26 You will see if you start from the second line:

1 "...in some cases UPOs occurred when certain third party apps were being used and
2 in particular, augmented reality apps, multimedia calling and chat capabilities such as
3 Snapchat ... photographs and videos, etc."

4 Then the same point is at 37. It is over the page, so to speak, on page 352 at the top.
5 If you just cast your eye from "Specifically" in the second line to the end of that
6 paragraph.

7 **CHAIR:** Yes.

8 **LORD WOLFSON:** Then you could read paragraph 40 in full, please, because that's
9 the key point. You will see what was considered, what was rejected and why it was
10 rejected.

11 **CHAIR:** Yes. A new battery alleviates the problem short-term.

12 **LORD WOLFSON:** We can characterise it differently. One person's 'alleviating the
13 problem'. It is the other person's 'kicking the can down the road'. It really doesn't
14 solve it. In so far as you are much less likely to have it happen with a new battery,
15 yes, but insofar as the problem remains there, no.

16 **CHAIR:** Understood.

17 **LORD WOLFSON:** We say two points flow from that. First of all, we say Mr Crumlin
18 was obviously right that the PMF was a better idea than the battery replacement, for
19 the reason, sir, you and I have just exchanged. It eliminates effectively UPOs
20 permanently, whether or not they also replace their batteries.

21 Secondly, however, it also illustrates the arbitrariness of the PCR's case here. I am
22 not sure this point has been appreciated perhaps even by the PCR. If consumer law,
23 he says, required Apple to provide a new battery free of charge, why stop at one
24 battery? Why wouldn't we have to provide two batteries? Why one year later or two
25 years later? I mean, you know, if the problem arises in one and a half years, that's
26 said to be inadequate and we would have to give them a new battery, but if it occurred

1 four years later, is that okay? His case would appear to end up in the proposition that
2 we are somehow obliged --

3 **CHAIR:** Not necessarily. That's not ludicrous or perhaps I should say unsustainable.
4 I mean, if indeed the battery was inappropriately spec'd, one might be faced with three
5 possible choices. One is to give a refund on the phone, one is to say "we will give you
6 a new battery every year", and the third is the PMF. They may all be -- it is not
7 self-evidently ridiculous.

8 **LORD WOLFSON:** It is very difficult to see how that is the right conceptual answer
9 when the claim is not about defective batteries themselves.

10 **CHAIR:** I understand that point, yes.

11 **LORD WOLFSON:** Or, to put it in terms of the advertising, where is, we ask
12 rhetorically, the advertising claim that told consumers what to expect about the useful
13 life of their batteries if they used the very powerful new apps that were now on the
14 market, which worked with these very powerful new devices, and they use them both
15 to the full? I mean, where is the advertising statement that my learned friend relies
16 on? Where we get to --

17 **CHAIR:** There is no evidence in that respect that Apple's performance was materially
18 worse than other premium -- there is no evidence on that.

19 **LORD WOLFSON:** It is certainly not the way it is put against us, because if that was
20 the sort of thing that was put against us, you could try to morph that. In other words,
21 if there was such evidence, I could see how an inventive lawyer could try to morph
22 that into a sort of standard point. If there were eight products on the market, all of
23 which advertise themselves as premium handsets, one to seven do X, Y and Z. Yours
24 does X and Y but won't be do Z, and therefore it is not premium. I mean, I can begin
25 to see that argument. In other words, you sort of create a standard by your rivals.
26 That's certainly not the way the claim is put against us.

1 So what we say is, when properly analysed, and it does take a bit of analysis I am
2 afraid, any complaint regarding UPOs really boils down to a complaint about the basic
3 physics of a lithium ion battery, in the real world, the more powerful devices and the
4 exciting new apps that consumers loved to use or somebody who doesn't use
5 Snapchat, some other consumers love to use.

6 **CHAIR:** I mean, there is a potential difference, isn't there? There are the phones that
7 were sold before Snapchat or the problematic versions of the third party apps
8 and -- I will just use Snapchat as a shorthand.

9 **LORD WOLFSON:** Yes.

10 **CHAIR:** There is a period when it couldn't readily be contemplated that Snapchat was
11 going to be a problem, but then there's a period when Snapchat was known to be
12 a problem and phones with that specification were nevertheless sold. I have not got
13 clear in my mind quite how the parties are dealing with those potentially different
14 scenarios. So one might say, using -- I am, of course, speaking in the abstract -- one
15 might say using a patch, and I appreciate this is all about transparency, using a patch
16 for those phones that were already on the market, if a PMF could be characterised as
17 a patch, might be appropriate, but at some point a patch is not appropriate. It is
18 necessary to do something about the specification of your phone or battery in order to
19 deal with the third party apps. As I understand it, the parties have not as yet sliced
20 any of this up.

21 **LORD WOLFSON:** Well, it is not for me to do the slicing.

22 **CHAIR:** No, of course, yes.

23 **LORD WOLFSON:** If that's the claim my learned friend wants to make, then he needs
24 to make it and he has to identify when it was okay, when it wasn't okay, etc. That's
25 not the case I am facing.

26 **CHAIR:** It also bites on you to some extent, because you are saying this is just the

1 physics of lithium batteries, and at some point one could say the physics of lithium
2 batteries are known to be inadequate, given the third party apps that we know to be
3 used by these phones. That could be put against you.

4 **LORD WOLFSON:** The point is that the PMF resolves it. I mean, that's our point.
5 The PMF resolves it. So, you know what --

6 **CHAIR:** Resolves it at a cost. It may be a very minor cost. It may be a more
7 significant cost according to --

8 **LORD WOLFSON:** But then we have another sort of trade-off point. One way is to
9 say to customers: "Well, here is a phone but you can't use X or Y app". That is one
10 would have thought unrealistic. The claim is not put against me, and this is really why
11 I wanted to start there this morning. It is not challenging, as I understand it, my design
12 or software choices. It is only a transparency point. What, if I may say, is so
13 interesting about the interchanges which I've had with the Tribunal and my learned
14 friend has had with the Tribunal is that they show, if I may say, time and time again
15 how the fact that the PCR's case is circumscribed by what he has jettisoned, because
16 he had to, and is now only a transparency case, not only limits the case but makes it
17 an unarguable case. Because if there is an arguable case here, it has to be a case
18 which does challenge head on, and says: "This is defective. That was an abusive
19 choice", etc. All of that has been jettisoned so on. This is what these interchanges
20 show so often. I'm not saying that conceptually -- of course we say factually they
21 would be wrong, but I accept that conceptually those sort of cases could work.

22 What simply does not work is what's left. It is not surprising it doesn't work, because
23 it is not where he started. He started somewhere completely different, threw half of it
24 overboard. It is not surprising now that that makes the ship list, if you chuck half your
25 cargo overboard from one end of the ship.

26 Just to finish this point on the batteries, all batteries -- the Tribunal knows all batteries

1 deteriorate. There will always be a point where a battery cannot deliver the peak
2 power demanded. Whether that's in two years' time or four years' time, there will
3 always be at that point a risk of a UPO.

4 Indeed, remarkably -- I don't know whether the Tribunal has picked this up -- only for
5 your note paragraph 34 of the PCR skeleton says:

6 "Apple now wishes to portray UPOs as a normal feature of battery powered devices."
7 It depends what you mean by normal. The devil may be in the detail there.

8 One of the essential problems, therefore, with the PCR's case is this. No-one is saying
9 that these devices experienced UPOs all the time or when they were anything like
10 brand new.

11 Equally, no-one can say with a straight face that they expected a device to work
12 forever without running into problems with delivering peak power in some
13 circumstances.

14 Both those extremes are clear. So what is it we ask rhetorically that the PCR is saying
15 that were sub-standard or unexpected about UPOs on these devices after the PMF?
16 To that there is no answer.

17 Now, the evidence in support so far as the PCR is concerned, again I make the point
18 we are in a very different world than we would normally be at a certification stage after
19 disclosure. He has had factual evidence, expert evidence and disclosure of
20 documents.

21 Now, to pick up a point put to me by the Chair before the break, we don't dispute that
22 the PMF may have had an effect on phones in some circumstances. That's clear. We
23 also don't dispute that the effect might be noticeable in some circumstances. What
24 we do dispute is that the effect was such as to turn the device into something other
25 than a premium product or something that was inconsistent with the advertised or
26 reasonable expectations, or fell below any standard which the relevant phones could

1 reasonably be held to, such that competition law, underlying competition law imposed
2 an obligation to tell consumers about it.

3 You heard some of the evidence yesterday. My learned friend told you about the
4 temperature and stage of charge throttling on the iPhone 5, which Mr Crumlin had
5 explained. Dr Martin gives some other examples. This goes back to the question
6 which I was asked. The reference is A10, 374 at paragraph 31, where Dr Martin
7 makes the point that CPU clock speed is regulated based on core temperature. That
8 is really the same for all mobile devices.

9 Now, when one actually looks at the evidence, we say there is no evidence that the
10 PMF rendered the relevant iPhones sub-standard. Even at the highest levels of
11 mitigation, the effect was considered acceptable and didn't render the iPhones "unfit
12 for purpose", to use my learned friend's phrase.

13 We say, because this is the certification stage, there is no prospect of further evidence
14 that can reasonably be expected to be available at trial which support the PCR's new
15 claim or claim as currently drafted.

16 Now, turning to the evidence, first, we note the PCR's own evidence on the PMF
17 mitigations is inconsistent with his case. Let's start with the data put forward by the
18 PCR's own expert, Mr Sinclair, which is the Geekbench data. That shows that the
19 number of devices subject to PMF mitigations in December 2017 was very small. This
20 is at A11.

21 **CHAIR:** Just remind me of the -- I looked at this in May, but I have not reminded
22 myself. What is the status of this? This is from a social media site, isn't it?

23 **LORD WOLFSON:** The Geekbench data? It is some sort of user forum.

24 **CHAIR:** But no-one has given evidence. I mean, it is just pulled off a website, isn't it?

25 **LORD WOLFSON:** We have set out in our second response that we have serious
26 concerns with the reliability of this material in any event. It is a self-selecting group. It

1 is not controlled in any way, absolutely. But even looking at this, if you look at this, it
2 is A11, page 407.

3 **CHAIR:** Yes.

4 **LORD WOLFSON:** It is at paragraph 50. What Dr Rahn does is to reproduce the
5 tables put forward by Mr Sinclair, if you see over the page at 408. Now, I mean, putting
6 aside our serious concerns as to the reliability and usefulness of any of this Geekbench
7 data material, as you can see from paragraph 50 and the tables over the page, only
8 a fraction of iPhone 6s users experienced any reduction in CPU performance at that
9 point in time, and at that time the iPhone 6s was already more than two years old.

10 **CHAIR:** Where is the Geekbench data pleaded?

11 **LORD WOLFSON:** Where is it pleaded?

12 **CHAIR:** Yes. I want to see how it is put in the pleading. You can come back to it if
13 that's easier.

14 **MR WOLFSON:** I am looking at the current pleading. Paragraph 189 at (d). There
15 is reference there to the Geekbench material. I am not sure if you are referring to any
16 particular point.

17 **CHAIR:** The state of the pleading. Obviously there is data via Geekbench. It is
18 referred to there. Have you put it in issue?

19 **LORD WOLFSON:** Yes.

20 **CHAIR:** Could you just tell me where you put it in issue?

21 **LORD WOLFSON:** Yes. I am going to give you the reference for that. It is
22 paragraph 76. Oh, yes. We said the same thing. Paragraph 76(2) and (3).

23 **CHAIR:** Of what?

24 **LORD WOLFSON:** Of our response at Tab 4, page 146 of the Supplementary Bundle.
25 You will see at paragraph 76(2) we say it is of limited value for a number of reasons
26 and we make three points at, (a), (b), and (c).

1 **CHAIR:** I mean, even at certification stage, the extent to which one should be
2 attaching weight to evidence that is pulled off a website is something I wouldn't mind
3 being addressed on, whether that ...

4 **LORD WOLFSON:** Sure. Let me make my point on it.

5 **CHAIR:** Yes.

6 **LORD WOLFSON:** If I can sort of pull together shortly a legal submission as to weight,
7 I might make that after the short adjournment.

8 **CHAIR:** Just because the experts pick it up, its status cannot change. It is just
9 unproven data off a website. I may be wrong about that.

10 **LORD WOLFSON:** Absolutely. My other point is it is self-selecting. These are likely
11 to be very high use users.

12 **CHAIR:** You can find support for almost anything on a website, which is why one
13 normally requires some sort of evidence.

14 **LORD WOLFSON:** Absolutely. See counsel's puff on their chambers' website as very
15 good example of that particular point.

16 If one comes back to Dr Rahn, when I said, so to speak, in parentheses, we have
17 serious problems about the Geekbench data, that was not a throwaway remark. We
18 do have serious problems with it, but even taking it as -- I think we were at Bundle A,
19 Tab 11, at pages 407 and 408. Even two years after release, most users, nearly 70%,
20 didn't experience any reduction at all. On average, the devices in the sample
21 experienced only around a 10% reduction in performance compared with an iPhone
22 6s without the PMF installed.

23 In relation to the iPhone 7 --

24 **CHAIR:** You are reading from where at the moment?

25 **LORD WOLFSON:** I am pulling the data off paragraph 50 and the tables below it.

26 **CHAIR:** Paragraph 50 of.

1 **LORD WOLFSON:** In Dr Rahn's Expert Report in A11, paragraph 50.

2 **CHAIR:** Yes. Understood.

3 **LORD WOLFSON:** The point I was going to make, for iPhone 7, which was more than
4 a year old by then, 80% of users did not experience PMF mitigations at all, because
5 their scores were the same as users of iPhone 7 without the PMF installed.
6 Now, you have to take the whole of this not just with a grain of salt but a whole bucket
7 of salt, because we do say this is biased to heavy users, whose batteries will
8 deteriorate much more quickly than average. But even after quite some time, and
9 each in the Northern Hemisphere winter, you can't call these problems pervasive or
10 universal. They are certainly clearly in the minority.
11 Now, what my learned friend says, and I think he said this yesterday, is this doesn't
12 matter, because eventually all devices would be subject to mitigations. I mean this is
13 like the Greek Zeno and the Tortoise. The problem with that proposition is it doesn't
14 reflect the real world. After how long and after how much use?
15 We are back really to the same point about standards. It is simply ridiculous to say
16 the consumers expect that their devices will perform in the same way as straight out
17 of the box for many, many years. No consumer believes that.
18 Now, moving on to the contemporaneous communications exhibited to Mr Crumlin's
19 Second Witness Statement, relating to testing of the PMF, what my learned friend has
20 done is to rely selectively, as is traditional, on contents of communications disclosed
21 by us and exhibited to Crumlin 2. They are referred to at 90A of the Amended Claim
22 Form.
23 As you are looking at this on paper, perhaps I could invite you to keep a thumb, so to
24 speak, or keep 90(a) open. That's at page 49 at Tab 3. At the same time we will go
25 through AJC 2-1, which is the confidential exhibit to Crumlin 2, which is in the --
26 **CHAIR:** Which is where?

1 **LORD WOLFSON:** In the Supplementary Bundle at Tab 14.

2 **CHAIR:** 14.

3 **LORD WOLFSON:** Yes, 14.

4 **CHAIR:** Page 418, that one?

5 **LORD WOLFSON:** Yes.

6 **CHAIR:** 417?

7 **LORD WOLFSON:** That's right. We will start with the e-mail chain at page 417. You
8 will see -- we looked at this yesterday -- the start of the e-mail relevantly on 418. The
9 question is asked regarding performance and mitigations. The response is on 41.
10 I am not going to read this out because all of this is confidential, but the first
11 line describes the type of testing carried out.
12 The fourth line down, with the sentence starting "Additionally" explains the effect of the
13 tests and assessment.

14 **CHAIR:** Why is this confidential?

15 **LORD WOLFSON:** This is confidential because it sets out essentially the decisions
16 made by us as to how to resolve the issue. It also has material relating to how the
17 phones work and their spec and operation.

18 **CHAIR:** I just can't understand why, given the discussions that are taking place in this
19 courtroom in any event, I can't understand why anything in this e-mail is confidential.
20 It seems to be dealing with the very matters that you are addressing me on.

21 **LORD WOLFSON:** Yes.

22 **CHAIR:** And have been addressing me on.

23 **LORD WOLFSON:** Yes. I am happy to accept that, you know, if this case was to go
24 to trial -- we obviously say it shouldn't -- one could go through some of these exhibits
25 with a finer toothcomb and identify more clearly what is confidential and what isn't.
26 I absolutely accept that, but given the time and given where we are --

1 **CHAIR:** But this is an e-mail that's particularly relied upon by the PCR in this
2 application.

3 **LORD WOLFSON:** Yes.

4 **CHAIR:** And in one light or another is likely to be -- ought to be referred to in the
5 judgment. I can't see why it shouldn't be in the judgment.

6 **LORD WOLFSON:** I absolutely see, sir, where you are coming from. Let me take
7 instructions on this particular e-mail, because I understand in writing the judgment the
8 Tribunal may want to quote it. Let's see if we can deal with that as a standalone point.
9 I really don't want to have arguments I don't need to have about confidentiality.

10 **CHAIR:** Let's see that as we go through all these e-mails that are relied upon whether
11 they are ...

12 **LORD WOLFSON:** So fourth line down, sentence starting "Additionally". I hope you
13 have that in the middle.

14 **CHAIR:** Sorry. I have distracted myself. I am on page 417. "Additionally", yes.

15 **LORD WOLFSON:** You have got that. Note the word "liveable" is used. It is important
16 to note that the effects referred to in this communication concern tests run on devices
17 subject to the highest mitigations of the PMF, so these are not representative of the
18 daily device --

19 **CHAIR:** Just remind me. How do we know it is the highest mitigation?

20 **LORD WOLFSON:** Because in the next paragraph, do you see the way it starts?

21 **CHAIR:** Yes, I am with you.

22 **LORD WOLFSON:** This e-mail chain is consistent with Mr Crumlin's evidence in his
23 Second Witness Statement, that following beta testing of the PMF that effects under
24 the highest mitigations were considered acceptable. I will just give you the reference,
25 because I think we looked at it yesterday. It is his Second Witness Statement at
26 Tab 13, paragraphs 24 and 30.

1 The PCR has put forward no evidence to gainsay Apple's assessment of the effect
2 being liveable under the highest levels of mitigation. Nothing is put against us to
3 gainsay this, and this, combined with the other evidence, which I will come on to, is
4 inconsistent we say with the PCR's case. So that's the first piece of contemporaneous
5 evidence which was relied on by the PCR.

6 The second is an iMessage chat.

7 **CHAIR:** It is 415 that is relied on.

8 **LORD WOLFSON:** I will come to 415. I am going to come to one before that, but
9 I will come to 415. I want to show you one that you were not taken to by my learned
10 friend yesterday. That's at 411.

11 **CHAIR:** 411.

12 **LORD WOLFSON:** 411. Forgive me, I just lost my place. I just need to scroll back.

13 Thank you.

14 This is an iMessage chat between Apple engineers concerning testing of the PMF.

15 This is another document which was disclosed.

16 Now you can see the context of the discussion from the start of 411, beginning with
17 the word "folks". This is obviously taking place in California. Over the page, 412, you
18 will see from the first sentence at the top of the page that an issue was identified and
19 it was fixed. Halfway down the page you will see a paragraph beginning "Playing
20 around". Do you have that?

21 **CHAIR:** Yes.

22 **LORD WOLFSON:** If you could read just those three lines.

23 **CHAIR:** Remind me, what is UISOC?

24 **LORD WOLFSON:** UISOC means the user interface state of charge. You will see
25 the word "jerkier" is used. The assessment is clear, that even the highest PMF
26 mitigations were better than UPOs. Again, we say this is plainly inconsistent with the

1 PCR's case that the PMF "rendered the phones unfit for purpose". Nor does it support
2 the suggestion that somehow the PMF was a worse alternative to UPOs, such that
3 customers needed to be told about it.

4 The position, in reality --

5 **CHAIR:** Certainly today I don't think we are concerned with whether PMFs are worse
6 than UPOs. I don't think we are being invited to -- I think the concern is the consumer
7 wasn't given an informed choice. If you look at the sentence that starts "Plain" and
8 ends "personally", the use of the word "personally" suggests that this is arguable as to
9 which is preferable.

10 **LORD WOLFSON:** But then we are coming back to our software and design choices
11 point. We looked at it. It was clear that the PMF was the way to resolve this. There's
12 no sensible challenge to that. There's no material against which that can be
13 challenged. I am reminded when it comes to iOS 11.3, at that stage people were given
14 a choice whether to continue with the PMF or not, and you have seen the figures.

15 **CHAIR:** You are not drawing a sharp line down on iOS 11.3?

16 **LORD WOLFSON:** No, but that's a very good indication that the call we took was the
17 plainly right call, the plainly right decision, because when people were given the
18 choice, they opted to stay with the PMF.

19 **CHAIR:** They opted to stay with the PMF. Right. Okay. I mean, we are getting quite
20 into the weeds on a lot of this I feel for a strike-out application.

21 **LORD WOLFSON:** But the problem is this. It's the old problem, which you would
22 have in the Queen's Bench Master's corridor 30 years ago and you still have now. You
23 have one side who says: "Look. Look at all this material. There's got to be a case in
24 there somewhere", which is essentially what the PCR is doing.

25 **CHAIR:** The PCR is saying that it is arguable that the PMF had a material impact
26 upon phone performance. They are not saying that it's -- arguable that it had

1 a material effect on phone performance, and I don't understand you to disagree with
2 that. It is arguable that it had a material effect on phone performance, in terms of
3 processing speeds and material -- it is not immaterial, processing speed. It is material.
4 Whether or not it is preferable to UPO is a separate question.

5 **LORD WOLFSON:** But even at that first stage, the danger is we think about the PMF
6 as kicking into everybody's phone all the time. One has to remember the PMF kicks
7 in for some people not at all, for some people in a way that you wouldn't notice, for
8 most people in a way that you might just about notice, but frankly you wouldn't care or
9 probably you wouldn't even notice. But it is no basis to say -- I mean, this is all the
10 backdrop to the disclosure point which is a central issue. This is the background, it is
11 now said, to the disclosure, the transparency point, which is said to be the main point.
12 But one has to have a proper handle on what the PMF did and didn't do and what its
13 effects were and were not for the users.

14 **CHAIR:** Right. We know it has a material effect on users. That is not to say it's not
15 infinitely preferable to UPOs. Perhaps, in some people's view, it is. But it has
16 a material effect, and that I anticipate Mr Moser would say is all he needs at this stage,
17 is having a material effect.

18 One of the questions we were pressing him on was actually is it material at all? He
19 points to this material and says yes, it is material. He points to these documents and
20 says it is material.

21 I don't think the Tribunal is in a position to form any view as to whether or not it was
22 a sensible design choice or whether it was preferable. I don't think Mr Moser's case
23 is that this was a bad design choice by Apple. I don't think that's his case at all.

24 **LORD WOLFSON:** Well, the starting point is the PMF is not an issue for most users
25 most of the time. I am concerned about the way you put it to say --

26 **CHAIR:** So how do I today conclude that there's no case --

1 **LORD WOLFSON:** That what?

2 **CHAIR:** That is different to that. You say it is not an issue for most users, most of the
3 time.

4 **LORD WOLFSON:** Because we have seen that in the documents.

5 **CHAIR:** Just remind me which document?

6 **LORD WOLFSON:** We are going to have a look at some. We are going to have a
7 look at some. If when I sit down the question is still extant, I will deal with it.

8 **CHAIR:** Right.

9 **LORD WOLFSON:** We will look at some.

10 Then the question is what is precisely the case put against us? The only case put
11 against us is the transparency point. So the relevance of all of this is it's the backdrop
12 to --

13 **CHAIR:** The case put against you is that you weren't transparent about putting the
14 PMF on the phones and that consumers should have been informed of that, such that
15 they could make decisions based on that information.

16 So they say you have two technical issues. One is the UPOs. The other is how you
17 deal with the UPOs, and if you had been transparent with consumers, they would have
18 been able to address those matters as they saw fit, whether it be by complaining to
19 you, by choosing to buy alternative phones, by using their strong consumer arm to
20 make you reduce your prices, or whether it goes further, invoking warranty.

21 All those things weren't open to consumers because of the lack of transparency. That,
22 as I understand, is the case put against you, rather than whether this was a good or
23 bad design choice in the circumstances.

24 **LORD WOLFSON:** Absolutely, and I understand that, but the starting point is, as you
25 rightly identify, whether the PMF impact was material I think was the word used.
26 Where, we ask rhetorically, is any expert evidence, and the PCR has produced a lot

1 of expert evidence, that the data we have disclosed shows an effect that is so material
2 such that consumers would have been disappointed and taken action if they had
3 known about it? I mean, there is none.

4 **CHAIR:** There is evidence that it's having an effect on the CPU and there are some
5 figures which we are going to come to next, I think.

6 **LORD WOLFSON:** With respect, that isn't good enough. I mean, to say there is
7 evidence that it has an effect, one might be able to take that approach if it was an effect
8 on everybody, so to speak, every day of the week, but that's common ground that it's
9 not. Right?

10 **CHAIR:** Does it matter if it's a subset of consumers? It may knock a big hole in
11 Mr Moser's case, but it wouldn't knock out the entirety of it.

12 **LORD WOLFSON:** It may not hole it below the waterline, absolutely, but there still
13 needs to be an expert to come along, or proper material from which the Tribunal can
14 say: "This data shows the effect was so material that customers would have been
15 complaining about it." Nobody said that. Nobody said that.

16 **CHAIR:** Are we going to come to the next e-mail now?

17 **LORD WOLFSON:** Yes. This is the one I think, sir, you referred to, which is 415.
18 This was the one we looked at yesterday. This presents results of app launch times
19 for different models of relevant iPhones with the PMF applied. Halfway down, 415, is
20 the e-mail we looked at yesterday, 5th January 2017 at 9.49 pm. We see a series of
21 bullet points which summarise the results of the testing. I am not going to read it out,
22 but if you could look at the first bullet point starting "scroll" --

23 **CHAIR:** We have read that. We read it yesterday.

24 **LORD WOLFSON:** You will see then that at the highest mitigation levels, the increase
25 in launch time, you will see the comparison between iPhone 6 and 6 plus and iPhone
26 6s and 6s Plus compared to the baseline. The baseline is that there's no PMF.

1 When translated into the real world, I mean, as Mr Crumlin explains, the references to
2 his paragraph 27, this is a matter of seconds. It is a one to two second range.

3 **CHAIR:** You are reading out time periods, are you?

4 **LORD WOLFSON:** Sorry?

5 **CHAIR:** You are getting the one to two seconds from where?

6 **LORD WOLFSON:** From Crumlin 2, paragraph 27.

7 **CHAIR:** Sorry, I beg your pardon.

8 **LORD WOLFSON:** I read that out because Crumlin's Witness Statement is
9 unredacted.

10 **CHAIR:** Understood, yes. Yes. Just remind me -- sorry, so Crumlin -- I would just
11 like to look at that.

12 **LORD WOLFSON:** Oh, sure. This is Crumlin 2, which is at Tab 13, the same bundle.

13 **CHAIR:** So Crumlin 2.

14 **LORD WOLFSON:** Paragraph 24. The bit I referred to, the one to two seconds, is
15 27, page 364.

16 **CHAIR:** He says:

17 "The absolute time scales for opening an application are also relatively small, with the
18 test results indicating times in general in the 1-2 second range."
19 He is referring to what when he says one to two seconds?

20 **LORD WOLFSON:** He is referring to the point we were just looking at in that table.

21 **CHAIR:** So there's a table above, which I expect is confidential.

22 **LORD WOLFSON:** A moment ago, when we were looking at the material in the exhibit
23 at page 415, I was making the point there that there was a comparison, which I didn't
24 want to read out, between launch times for iPhones 6 and 6 Plus and iPhone 6S and
25 6s Plus, compared to the baseline. I just wanted to -- because that's put in terms of
26 [X], I just wanted to make sure the Tribunal had a grip on what that actually means in

1 the real world, i.e., the whole thing is in the range one to two seconds. See Crumlin,
2 paragraph 27.

3 All of this is for devices under the highest levels of mitigation when you compare it to
4 a device without mitigation.

5 **CHAIR:** So if normal were one to two --

6 **LORD WOLFSON:** No. One to two is with the delay.

7 **CHAIR:** He says:

8 "In general in the 1-2 second range, even for devices"

9 **LORD WOLFSON:** Yes.

10 **CHAIR:** He is suggesting generally apps take one to two and actually mitigation is not
11 making that much difference, or am I misreading that.

12 **LORD WOLFSON:** With respect, I think you are misreading it. What he is saying is
13 the absolute timescales for opening are generally within one to two, even if you are
14 running the PMF at the highest levels of mitigation. If you weren't running it, it would
15 be faster. It might be a fraction of a second, half a second.

16 **CHAIR:** Maybe. I mean, if it's two -- okay. Right. I think we've probably milked that
17 one as much as we can.

18 **LORD WOLFSON:** If we could just go back up to the previous page, still in Crumlin
19 2, he explains what is meant by "worst-case", because you will have seen that in
20 a document as well, what's meant by "worst-case" in this context. If you could read
21 paragraph 24 in full, please.

22 (Pause.)

23 In particular where he says:

24 "So timing application launch is a useful way of evaluating what might be the "worst-
25 case" impact for the PMF on perceived performance of an iPhone with mitigations
26 applied."

1 He explains two paragraphs further on, in 26, that there isn't a simple inverse
2 relationship between CPU clock speed and application launch time. This perhaps
3 goes back to my answer earlier about CPO clock speed. He explains why that is and
4 I will not re-read that.

5 Now, Mr Sinclair agrees with Mr Crumlin -- I will give the reference. We don't need to
6 look it up. Sinclair 3, para 33, at Tab 7, which is the same bundle at page 269. He
7 agrees with Mr Crumlin, that opening an application makes intensive use of the CPU.
8 What we say we get from that is that again there is simply no evidence from all of that
9 that the extent of this issue was sufficiently material, to use the word earlier, that
10 customers, in fact, would have been complaining about it. I do emphasise the point
11 that we looked through all the material. Where is the expert evidence to support this
12 on the other side? There simply isn't any.

13 **CHAIR:** The question I have been meaning to ask, to what extent is it appropriate to
14 have expert evidence at this stage of proceedings at all? I appreciate the parties have
15 put in expert evidence, but why is that necessary or appropriate?

16 **LORD WOLFSON:** Because otherwise one is left with -- I mean, one could have in
17 this case, with respect, one could easily end up with three members of the Tribunal,
18 none of whom have a smartphone, or two of whom have a smartphone.

19 **CHAIR:** This applies in actions in other courts. One does not normally, when faced
20 with a strike-out, start off a strike-out application with expert evidence, and here we
21 are dealing with a certification, and I just wondered whether you have anything to say
22 on whether in certification cases it is necessary to put in expert evidence at all.

23 **LORD WOLFSON:** I certainly would not say it is necessary in every case, but my
24 point is really this. This is a case where the PCR has clearly decided that it's in his
25 interests to arm himself with expert evidence, and he's done that. He's come along
26 with expert evidence. In those circumstances I must be entitled to say there is

1 a glaring hole in this expert evidence, because look at what they don't say. Look at
2 what they never say.

3 **CHAIR:** The experts of course need material with which to develop their opinions,
4 and they either have data or they have -- and Mr Moser says the data is all there, or
5 they perform experiments on phones. They can't just sit in their metaphorical offices
6 and conjure up the effects. They would require data. So absent experiments and
7 absent full disclosure from Apple, they wouldn't be able to say anymore at this stage.

8 **LORD WOLFSON:** But they have got data. We have been looking at data. My
9 learned friend was at pains to show you tables. This is the effect of --

10 **CHAIR:** They have not got data on the effects. They have got data on the CPU
11 speeds.

12 **LORD WOLFSON:** Yes, and the app launch speeds. We have been looking at what
13 is said about app launch speeds.

14 **CHAIR:** We got a little bit of that.

15 **LORD WOLFSON:** But even on that, where is the material.

16 **CHAIR:** We have some time periods. One person may not be troubled how quickly
17 Safari opens and another person may be. It is not really for an expert at this stage to
18 definitively say "I'm telling you, users of iPhones that you don't mind whether your
19 Safari takes X or Y in which to open, or whether your back light is 40% brighter or not."
20 It is not really a matter necessarily for an expert to set out clearly at this stage of
21 proceedings. That will no doubt be the subject of much argument, if this matter
22 proceeds to trial.

23 **LORD WOLFSON:** On that basis, let's say the effect of the PMF was to change the
24 opening of an app from a third of a second to 40% of a second.

25 **CHAIR:** Right, but that's not -- I mean, you can give that example. Those are the
26 examples I was putting to Mr Moser. You are stealing my thunder.

1 **LORD WOLFSON:** I will steal anybody's thunder if it is useful. But one has to ground
2 this in some sort of reality. Because the point put against me is that consumers would
3 have been jumping up and down. Well, there's got to be some material to support that
4 proposition.

5 **CHAIR:** What do you say to Mr Moser's point that, look, all the relevant documents
6 are with Apple?

7 **LORD WOLFSON:** First of all, that is the sort of point which I used to hear, frankly, in
8 the Queen's Bench Master's corridor, when someone wanted to bring a claim against
9 the bank but didn't have any documents to support them.

10 **CHAIR:** I have never been to the Queen's Bench Master's corridor.

11 **LORD WOLFSON:** Let's put it this way. It isn't what it was. That sort of submission
12 has an element of attraction. Of course it does. "You've got all the documents. How
13 can I ...?" But the way litigation is played at this stage, and this is what the authorities
14 do say, there has to be a cogent, factual basis. We are going back to that point.

15 **CHAIR:** We are going back.

16 **LORD WOLFSON:** The standard is low and all the rest of it. It is not good enough to
17 say: "How can you expect me to show you any factual support for my case? They've
18 got all the documents." That's the general point.

19 **CHAIR:** You are saying: "Shame that it is arguable that it may have -- times may
20 have gone up by the sort of the figures that we are seeing. It simply doesn't get
21 Mr Moser home".

22 **LORD WOLFSON:** It doesn't get them home. In this case they have got documents.
23 I mean, that disclosure argument was drafted --

24 **CHAIR:** They have seen some documents.

25 **LORD WOLFSON:** Yes, but as I said earlier, it is very important to think conceptually.
26 What was the point of the disclosure order? As I understand it, the point of disclosure

1 order was not that they would get all documents which supported their case, if there
2 were any. The point was, if there were any documents which supported their case, at
3 least some of them would be responsive to the disclosure order. That was the thinking.
4 Well, there aren't any. There still aren't any. Therefore, at this stage of the argument,
5 to say Apple are sitting on all the documents, Mr Micawber, "something might turn up",
6 we say really isn't good enough.

7 **CHAIR:** We have looked at the evidence.

8 **LORD WOLFSON:** We have looked at some of the evidence. Let me take you slightly
9 out of turn. As we are talking about whether customers would have complained, let
10 me take this point now. The starting point is Mr Coulson makes clear in his Witness
11 Statement -- I think his First Witness Statement at A7. Yes. Paragraph 9. We don't
12 need to turn it up. I will just read the paragraph and I will give you the reference. A7,
13 page 338:

14 "In the months ... following the release of the PMF in iOS 10.2.1, the customer
15 complaints across [the Relevant iPhones], reporting a device running slowly did not
16 show any increase."

17 We can see that from the data exhibited to Mr Coulson's statement, which is at B33,
18 3537, AAC1, page 2.

19 Now, what we know is this. You will remember earlier today that I referred to those tin
20 foil hat conspiracy theories stuff, that all of this was designed by Apple to make people
21 buy new products, which is going round, which is utterly refuted and complete
22 nonsense.

23 The dates are these. The PMF was released on 23rd January 2017. That data
24 shows -- and when you look at the reference I have just given you, you will see it -- that
25 it's not until after September 2017 that there's an uptick in complaints.

26 Mr Coulson explains at paragraph 10 of his statement -- this is his first statement at

1 A7 -- that the reason for that uptick were those nonsense rumours.

2 This data is also, therefore, inconsistent with the PCR's case that the PMF caused
3 customers' devices --

4 **CHAIR:** I am really not sure we are in a position to draw any conclusions today as to
5 the presence or absence of complaints. I mean, if there had not been a single
6 complaint, it doesn't mean we would strike out Mr Moser's claim on that basis. Equally,
7 if there had been lots of complaints, it would be very difficult, without significant
8 scrutiny, to know that they were relating specifically to your lack of transparency
9 around the PMF. So I am really not sure what we can get out of showing there is
10 a steady level of complaints.

11 **LORD WOLFSON:** What you get out of it is that if it is put against me that what the
12 PMF was doing was so drastic that if people had been told what was going on, they
13 would have been jumping up and down when it came out, there was not any uptick in
14 complaints at all. I mean, it is simply inconsistent with it.
15 Again, I don't need to show inconsistency. There is certainly no evidence in support
16 of it. That's why I make the submission. Where is the evidence in support?

17 **CHAIR:** You've made that point.

18 **LORD WOLFSON:** The evidence in support that the PCR relies on, beyond the
19 survey, that's at B19, page 2084.

20 **CHAIR:** B19?

21 **LORD WOLFSON:** Page 2084. Again, rather like the Geekbench stuff, we don't really
22 know how this survey was conducted, but the PCR relies on it, but it absolutely
23 undermines his case. Let me take a moment to explain why.

24 **CHAIR:** I have seen this. I have it marked up. I do remember it.

25 **LORD WOLFSON:** I think my learned friend took you to it -- was it yesterday? No, it
26 was in May. That's right. In May, because I have yellow highlights, which are my May

1 highlights.

2 Let's have a look at slide 24. Bottom right-hand corner you get the number 2084. You
3 will see at the bottom of this page question 25. Mr Gutmann asked people in 2021 --

4 **CHAIR:** Sorry, I beg your pardon. I have lost concentration. You are reading
5 where -- I beg your pardon?

6 **LORD WOLFSON:** Have you got it, Q25 at the bottom of the page. Quite small.

7 **CHAIR:** Yes.

8 **LORD WOLFSON:** Mr Gutmann asked people in 2021 what problems they were
9 experiencing in the iPhone 5 -- that is on the left -- the 6 -- in the middle -- and the
10 7 -- on the right. He chose what particular problems to ask them about. These were
11 not unprompted. It is also not specific to any point in time. So it is not asking
12 customers about their experiences sort of out of the box. They could look through
13 their whole period of ownership of the devices.

14 Now, what's interesting is that most of the questions he asked are not relevant to this
15 claim at all. Battery running down quickly, dropping calls, unable to save data. You
16 know, no allegation is made about any of that stuff.

17 **CHAIR:** Are you trying to say we shouldn't place any reliance on this?

18 **LORD WOLFSON:** No, no. What I am saying is he asked a barrage of questions.

19 **CHAIR:** What's your submission ultimately? Why are we looking at this? What's your
20 submission ultimately on this document?

21 **LORD WOLFSON:** I am going to be showing you the paragraphs, which are
22 comparisons between 5, 6 and 7.

23 **CHAIR:** For what purpose?

24 **LORD WOLFSON:** To show you how customers remembered the performance of the
25 phones and whether they were --

26 **CHAIR:** We have looked at this and seen the figures. I don't see how either party can

1 get anything out of this.

2 **LORD WOLFSON:** I think I can.

3 **CHAIR:** I will bear with you.

4 **LORD WOLFSON:** I think the point I get out of it has not been put to you.

5 **CHAIR:** I see. I understand.

6 **LORD WOLFSON:** What is interesting here, first of all, is the majority of people who
7 owned an iPhone 6 and 7 have no recollection of experiencing either of the centrality
8 problems at all. The problems we are concerned about here are the second one,
9 iPhone slowed down after updating the software, and the third, iPhone would shut
10 down unexpectedly. They come the closest to what we are talking about in this case.
11 The vast majority for the iPhone 6 and the 7 have no recollection of either: 76%, i.e.,
12 the inverse of 24%, for the iPhone 6; 79%, i.e., the inverse of 21%, for the iPhone 7.
13 First point.

14 Secondly, the proportion of iPhone 5 users who have recollection of these problems,
15 i.e., who were bothered by these problems, is actually higher than iPhone 6 or iPhone
16 7, and that's interesting, because it's not alleged there is anything wrong in PCR terms
17 with the iPhone 5.

18 **CHAIR:** Yes. I mean, we have not looked at -- I am not in a position to say how good
19 or bad iPhone 5 was in that respect. I mean, there may be other issues with iPhone
20 5. I have no idea.

21 **LORD WOLFSON:** There may be other reasons why people had an issue with an
22 iPhone 5, but what it goes to show, and this is the data the PCR is relying on, the
23 proportion of customers who remember problems with iPhone 5 in relation to these
24 two matters --

25 **CHAIR:** You are not saying that 25% of people had problems with their phones
26 slowing down after they uploaded new software on the iPhone 5. That's not Apple's

1 positive case, I assume. I assume Apple says it was all a load of nonsense.

2 **LORD WOLFSON:** There may be a number of reasons why people had or
3 remembered they had these problems with an iPhone 5. My point is this. The PCR's
4 case is that if we had told people about the problems which led to the PMF, there
5 would have been an uptick in complaints. People would have complained. People
6 would have demanded this. People would have demanded that.

7 This data, which is the data relied on by the PCR, there is nothing else, shows that
8 when this comes to these two issues, there is no difference between iPhone 5, 6 and
9 7.

10 I submit that this supports my case. It certainly does not support my learned friend's
11 case.

12 **CHAIR:** One could drive so many coaches and horses through this table really,
13 starting with the fact that they are different time periods. The iPhone 5 is -- you are
14 thinking back in a further time period, presumably.

15 **LORD WOLFSON:** Well, you might be and you might not be.

16 **CHAIR:** Exactly. How can one draw any conclusions from anything like this? Is it the
17 same people who are asked about the iPhone 5 and iPhone 6? I mean, it is not exactly
18 a scientific study.

19 **LORD WOLFSON:** No, but it is what the PCRs bases his case on. I do come back
20 to my central point, where is the evidence?

21 **CHAIR:** I have that point. If that's all the PCR had to base its case on, it would be in
22 difficulty I think, yes.

23 **LORD WOLFSON:** Well, I do submit that all of these pieces of evidence point in only
24 one direction, that there is no factual basis to the PCR's claim.

25 Let me just take a moment to see if ...

26 One other point I should probably just pick up quickly, because my learned friend took

1 | you yesterday to an annex in the French report.

2 | **CHAIR:** Yes.

3 | **LORD WOLFSON:** So let me take you to that. That is the interview at supplemental
4 | bundle at Tab 29. He took you to page 511.

5 | **CHAIR:** This is the interview.

6 | **LORD WOLFSON:** This is the interview. Exactly. And noted the penultimate
7 | paragraph, and in particular the bit where it says the word "only".

8 | **CHAIR:** Sorry, which page?

9 | **LORD WOLFSON:** On 511, the penultimate paragraph.

10 | **CHAIR:** I beg your pardon. I was looking at the wrong page.

11 | **LORD WOLFSON:** Then at 513 I think we also went to the paragraph starting "Based
12 | on". It is one I have highlighted. He suggested that this evidence was in some way
13 | inconsistent. Do you remember the line starting "scroll" in that exchange between the
14 | people inside Apple. I've had to take this out of order --

15 | **CHAIR:** Yes, yes, yes.

16 | **LORD WOLFSON:** Now, we say it is not inconsistent. The internal e-mail we were
17 | looking at was recording the result of one test. There's no dispute that scrolling may
18 | take more time. Mr Crumlin made that clear in paragraph 8 of his Second Witness
19 | Statement, which is in the same bundle at Tab 13. I'll give the reference, at page 358,
20 | paragraph 8, where he says:

21 | "When budgets are applied to the CPU and GPU, certain tasks, such as opening an
22 | application or scrolling, may take more time. For other tasks that are less intensive in
23 | their use of the CPU and GPU, the effect is less noticeable from the perspective of the
24 | user."

25 | **CHAIR:** Yes.

26 | **LORD WOLFSON:** What is clear, though, is that to the extent that scrolling was

1 affected at all, the impact was absolutely minimal, and you see that at paragraph 30
2 of Mr Crumlin's Witness Statement, which I think we looked at earlier.

3 **CHAIR:** Okay. Right.

4 **LORD WOLFSON:** So if we then go back to -- actually, let me then turn to the CMA
5 consultation letter. I think that was the other point you wanted me to deal with. So
6 that's --

7 **CHAIR:** Sorry. You will have to remind me where it is.

8 **LORD WOLFSON:** I haven't got my reference for that. Give me a second. Tab 46 of
9 the Supplementary Bundle.

10 **CHAIR:** Thank you.

11 **LORD WOLFSON:** Here we are. Thanks very much. Now a few points about this
12 letter. First of all, we submit that -- I intervened very briefly yesterday to make this
13 point -- that no weight ought to be given to this letter following the decision in
14 *Qualcomm*, applying *Hollington v Hewthorn*.

15 **CHAIR:** *Qualcomm* was concerned with what was going to be relied upon at trial, not
16 at certification.

17 **LORD WOLFSON:** Well, I submit for these purposes there shouldn't be a material
18 difference. I mean, if it can't be relied on at trial --

19 **CHAIR:** The reason it can't be relied upon is because this Tribunal has to make its
20 own decisions, based upon the evidence before it.

21 **LORD WOLFSON:** Yes.

22 **CHAIR:** At this stage all we are seeking to do is find out essentially whether there is
23 an arguable case or not. Is your submission that even at the certification level it's not
24 appropriate for this Tribunal to have regard to the investigation?

25 **LORD WOLFSON:** Yes. On the facts of this case, yes. I will explain why.

26 **CHAIR:** With that qualification -- in other cases it might be appropriate but not in this

1 one.

2 **LORD WOLFSON:** The way I put it is this. I don't need to go so far as to say in every
3 case or rather in no certification case could you ever place reliance on the CMA letter.
4 I don't need to go as far as that. I don't need to go as far as that.

5 We submit that a preliminary view of a regulator, as opposed to in *Evans* it was a final
6 decision of the Commission, is not entitled to any weight at all, in light of the principles
7 in *Qualcomm*.

8 Now, I will explain why I say this in this case. This was a letter which is issued at the
9 early stages of an investigation and the views, therefore, are provisional. It is also fair
10 to say, with respect to the CMA, and I think --

11 **CHAIR:** How much investigation would have gone on at this stage?

12 **LORD WOLFSON:** That's the point I am on. Exactly. That's the point I am on. It is
13 fair to say, as you pointed out, that a number of the paragraphs are what American
14 lawyers would call conclusory. They simply state a conclusion without setting out the
15 reasoning.

16 My learned friend -- and I think I am answering your point -- invited you yesterday to
17 assume there was much detailed analysis sitting behind the letter.

18 **CHAIR:** He did, yes.

19 **LORD WOLFSON:** In other words, they pored over our internal documents to reach
20 those preliminary conclusions. There was no basis for that submission. The
21 document itself does not refer to any such analysis, but in any event -- and this is why
22 I said in this case -- we were ordered to produce all pre-existing, non-privileged
23 documents created by us in the ordinary course of business that we had submitted to
24 the CMA in the investigation if they related to the impact of the PMF. That was
25 paragraph 2(a) of the Tribunal's disclosure Order.

26 **CHAIR:** So how many documents had been submitted to the CMA?

1 **LORD WOLFSON:** How many documents did we submit to the CMA? I have not got
2 that at my fingertips, but I can come back to you on that.

3 **CHAIR:** Just a ball-park. How long between when they were submitted and when this
4 decision was issued. It would be useful to know that as well.

5 **LORD WOLFSON:** I will come back to you on that as well. We were ordered – 2(a)
6 of the Tribunal's order -- to provide to my learned friend all pre-existing, non-privileged
7 documents created by us in the ordinary course of business that we had submitted to
8 the CMA in the investigation if they related to the impact of the PMF. So if there were,
9 therefore, Apple documents which supported these conclusions, the PCR would have
10 them.

11 **CHAIR:** Uh-huh.

12 **LORD WOLFSON:** So my learned friend should not have to go to this document. If
13 he is having to go to this document but he is not able to rely on anything we have
14 produced, that shows the problem he has.

15 **CHAIR:** It was not subject to the qualification of which you were aware or ...?

16 **LORD WOLFSON:** No, no, no.

17 **CHAIR:** All documents (inaudible)?

18 **LORD WOLFSON:** Absolutely, yes. There was an "if you are aware". That was
19 a different part of the order. This is 2(a).

20 Importantly, of course, also the CMA investigation doesn't govern the application of
21 competition law. I mean, it is consumer law obviously.

22 **CHAIR:** I have that point very much in mind.

23 **LORD WOLFSON:** The CMA also does not come to any conclusion as to whether
24 the iPhones are sub-standard, inferior or anything else. The CMA ultimately -- and
25 I will be coming back to this point when I come to the mitigation -- I am sorry -- the
26 methodology arguments -- accepted forward looking undertakings from Apple to close

1 the investigation. When I said methodology, I actually mean 28th December 2017
2 strikeout, i.e., the sub-set strikeout.

3 So my learned friend can't get anything out of this letter for all of those reasons. If
4 necessary, I will stand on the legal hill of saying that because it can't be relied on at
5 trial, it also shouldn't be given any reliance now, but I don't need to here, because you
6 ordered us to provide the underlying documents and we did. So if he hasn't got
7 anything out of the underlying documents, the letter itself can't help him.

8 **CHAIR:** They were documents you provided, but it doesn't mean the Commission
9 (sic) wasn't in possession of other material and had access to other material.

10 **LORD WOLFSON:** Well, there is no basis for that. There is no reference for that.
11 The main problem is also it is just looking at a completely different question.

12 So to draw those threads together, because I see the time, we do submit that the
13 allegation that the iPhones were rendered unfit for purpose by the PMF has got no
14 factual basis. We do submit that especially in light of the disclosure which we have
15 already been ordered to provide, which has shown nothing we say, there is no basis
16 to assume that anything more can or is likely to turn up.

17 The order of 4th July was carefully crafted. If there was something there, we would
18 have seen it. We haven't seen it. There is nothing there. Obviously we have complied
19 fully with the terms of the order.

20 For the reasons which I have submitted we do say that the claim should be struck out
21 in full for those reasons.

22 Now I see the time. I know that I've got a couple of minor bits and pieces, so to speak,
23 to come back to the Tribunal on, on particular questions, and I will find a convenient
24 moment to do that, but those are our submissions on the main strikeout.

25 Let me pre-empt the question as to "How are you doing on time?" Pretty well in the
26 sense that I don't think I will be as long -- I mean, at present, subject always to

1 questions which, if I may say --

2 **CHAIR:** On the date point, striking out the second half, I mean I think you are facing
3 the very significant hurdle of showing that that communication would have been
4 received by all the Apple -- all the relevant Apple users, and that may well be the case,
5 that you may well end up being able to prove that at trial, but at present on the materials
6 before us I am not quite sure how you are going to get home on that sufficient to strike
7 it out.

8 **LORD WOLFSON:** I will try to focus on that point. What I would say rhetorically is
9 how would you show that it had been so received, because otherwise you are in
10 the position that you could never strike out a certain allegation?

11 **CHAIR:** Again, I am slightly perplexed why you don't take the cut-off at iOS 11.3 , of
12 course, the people are informed that there's a PMF and you can switch it off, but you
13 don't place reliance on that. You place reliance instead on a press release. I am
14 slightly perplexed as to why the press release is a better case. I am not saying iOS
15 11.3 is a good case.

16 **LORD WOLFSON:** No, I was not taking it that way. Good. I am very grateful. If
17 I may, then I will continue after the break. I will make some submissions on that point.
18 I hear where the Tribunal is, but allow me to make some submissions on that point.
19 Then I will deal with the methodology.

20 **CHAIR:** Yes, yes. Very good.

21 **LORD WOLFSON:** Thank you.

22 **CHAIR:** Back at 2 o'clock.

23 **LORD WOLFSON:** Yes.

24 **(12.59 pm)**

25 **(Lunch break)**

26 **(2.00 pm)**

1 **LORD WOLFSON:** I am going to turn to the strike-out based on the message of
2 28th December 2017. Before I do, can I just make clear that this is not a performance
3 now of Hamlet without the Prince. Mr Gutmann has left the room but he has not lost
4 interest. I am not adding this to my submissions on the authorisation condition.

5 I am told -- and he asked this to be pointed out -- that the hearing position, the loop is
6 better in the other room.

7 **CHAIR:** Ah, right.

8 **LORD WOLFSON:** Therefore, he is following I am sure very attentively from there.
9 I am just asked to make that clear.

10 Before I come to my main submissions on this point, can I just pick up the point put to
11 me by you, sir, on iOS 11.3. Of course, if this matter were to go to trial, we would take
12 the 11.3 point, if I can put it that way. We are taking this point because it is earlier and
13 we submit it is correct. So they are not alternative points, obviously.

14 Now, the background, and I can take some of this pretty quickly I think, is set out in
15 Mr Coulson's Witness Statement at A7 at page 337. What I will do is I will give you
16 the paragraph references and just summarise what it says, but you will want in due
17 course to refresh your memory really from 6 to 10.

18 **CHAIR:** 6 to 10.

19 **LORD WOLFSON:** 6 to 10, in particular 6 and 7. You see what it says there. There
20 was a battery manufacturing defect. That was a different issue. The engineering team
21 was continuing to research.

22 In particular, when we come to paragraph 9, in the months after the release of the
23 PMF in January 2017, there was no increase in customer complaints reporting
24 a device running slowly, but in the autumn and winter of 2017, which is more than half
25 a year after the PMF was released, there was an uptick in number of customers who
26 were contacting about iPhone devices running slowly. That's when those nefarious

1 rumours were going round about intentionally slowing down iPhones, which, as I said
2 earlier, were obviously false.

3 In December 2017 we put in place a discounted battery replacement programme.
4 That's set out in paragraph 10. The message itself is at B34 at page 3544. So that's
5 B, Tab 34.

6 What you will appreciate I am sure -- if I hold it up, if your eyesight is sufficiently
7 good -- you see where it says about halfway down the page:

8 "To help customers learn more about iPhones' rechargeable battery."

9 Have you got that halfway down 3544. The penultimate paragraph.

10 **CHAIR:** Give me a second I apologise. My bundle is struggling a bit. Say again.
11 Where are you. I am on 3544 now.

12 **LORD WOLFSON:** There is a heading "How batteries age". Penultimate paragraph:
13 "To help customers learn more."

14 **CHAIR:** Yes.

15 **LORD WOLFSON:** Do you see where it says "iPhone battery and performance"? In
16 the way these things work that's a hyperlink. So in the real world it would normally
17 be -- I've had one printed out from the internet Wayback Machine. That's in blue. It
18 stands out. You just don't get that on this print but you know the way these things
19 work.

20 Obviously I am going to ask you to read the message in full. I am going to take this
21 fairly quickly for two reasons. First of all, because I understood from the exchange
22 before the short adjournment that the central point the Tribunal was concerned with
23 here was dissemination, and I will come to that.

24 Secondly, because the PCR has not even now identified what it is we should have
25 said that we didn't say, so I am very happy to go through and show you everything we
26 did say.

1 **CHAIR:** So the hyperlink goes to what?

2 **LORD WOLFSON:** The hyperlink -- let me show you. Let's just run through this very,
3 very quickly. We have a heading "How batteries age". It talks about chemically aged
4 batteries.

5 **CHAIR:** Yes.

6 **LORD WOLFSON:** Then we link to a support article. I will come to that in a second.

7 **CHAIR:** Is it in the bundles?

8 **LORD WOLFSON:** Absolutely.

9 **CHAIR:** So I can put in a pen mark where I find it.

10 **LORD WOLFSON:** B34, page 3547.

11 **CHAIR:** That was so I can make a note then.

12 **LORD WOLFSON:** Then we have "Preventing unexpected shutdowns", and also sets
13 out the consequences.
14 "In some case users may experience longer launch times for apps and other
15 reductions in performance ... [The PMF] successfully reduced the occurrence of
16 [UPOs]", and it refers to the roll-out for iPhone 7 and 7 plus in iOS 11.2.
17 So that's Apple informing consumers of the purpose and effects of the PMF and what
18 the PCR characterises the detrimental impact it has on functionality and performance.
19 That's the point put against us.

20 **CHAIR:** I don't recall anything from Mr Moser, but you say no complaint has been
21 made to the content of this --

22 **LORD WOLFSON:** Precisely. Perhaps I can take it even more quickly. Recent user
23 feedback. Addressing customer concerns. Addressing customer concerns is
24 a replacement programme.
25 Now let's look then at the message quickly.

26 **CHAIR:** Addressing customer concerns --

1 **LORD WOLFSON:** Is the replacement programme. The webpage is at page 3547.
2 So if you just turn through, that's where you get to with the hyperlink.

3 **CHAIR:** Okay, right. Yes, fine.

4 **LORD WOLFSON:** In due course I would ask you to read this carefully as well. Again
5 it sets out, we say very clearly, what chemical ageing is all about.

6 **CHAIR:** Remind me. What's the pleading on this from the PCR objecting to this
7 article?

8 **LORD WOLFSON:** I will come to that.

9 **CHAIR:** You are going to come to that.

10 **LORD WOLFSON:** I will come to that. There is the dissemination point. There are
11 a couple of odds and sods, which frankly we don't really understand, but I will come to
12 them. I will come to the PCR objections.

13 Well, as you say, it is not said that there is anything we should have said and did not
14 say. It is certainly not said as of today there is something still out potentially which we
15 should be saying out there which we have not yet said. It is all out there.

16 We say, therefore, that at the certification stage the Tribunal can and should proceed
17 on the basis that by 28th December 2017 we had provided all relevant information.
18 I will come to the "had we provided it to who", but all the relevant information was
19 there.

20 Now, the objections. The objections are set out at 64 to 66 of the PCR's skeleton.
21 That's probably the best place to find them. The first point at 64 -- it is internal
22 page 23 -- is about the communication of the apology. That's really (a) to (c). The
23 apology wasn't notified to users or displayed in a prominent way in (a). That assertion,
24 which I understand to be very close to, if not the same as the points you were putting
25 to me before the short adjournment, we invite you to reject that on
26 a strike-out/summary judgment basis. I mean, that is absolutely unarguable for this

1 | reason. The message was picked up by the national and international press.

2 | Now, there are some examples exhibited by Mr Coulson to his statement. I will give

3 | you the references. That's B, Tab 34, 3555 and thereafter and onwards.

4 | The point, however, is these are just examples. So at B3555 we have an article from

5 | the BBC and we have articles also from Technology Intelligence Newsletter. These

6 | are just examples. Mr Sinclair has some others. I will give the reference. A, Tab 4,

7 | 229.

8 | **CHAIR:** Sorry. A?

9 | **LORD WOLFSON:** Tab 4, 229. That's reference to a Reuters article and a CNBC

10 | online article.

11 | If we just look at that very quickly if you have it to hand --

12 | **CHAIR:** CNBC.

13 | **LORD WOLFSON:** CNBC online.

14 | **CHAIR:** I understand your point on BBC. Is the CNBC article widely read?

15 | **LORD WOLFSON:** If you search "Why is my iPhone slow?", you are going to get all

16 | these hits.

17 | **CHAIR:** Right, if you search.

18 | **LORD WOLFSON:** We are dealing here with the world according to the PCR in which

19 | customers are bothered about this. Well, if they are bothered about it, they will do

20 | something about it. They will either complain to us, and we have seen the complaints

21 | data didn't go up, or at the very least they will say "What's going on", and they will do

22 | a Google search. We disseminated it. This question of did we disseminate it enough,

23 | was this out there.

24 | Now, if we had come along and said we told --

25 | **CHAIR:** Are you suggesting you sponsored these articles?

26 | **LORD WOLFSON:** No, but it doesn't matter whether we sponsored them or not. We

1 don't have an obligation --

2 **CHAIR:** You put something on your website.

3 **LORD WOLFSON:** Yes.

4 **CHAIR:** That's all you did.

5 **LORD WOLFSON:** And it is picked up. Let me just, if I may, unpack that a little bit.

6 If I know, because I am such a famous person, that if I put something on my website,

7 every other news organisation in the world will in fact pick it up, it can't be said against

8 me: "All you did is put a single line on your website and that's not sufficient

9 dissemination", if in the real world putting a single line on my website means that

10 everybody else will pick it up. We have to look at the effect, not whether we did it --

11 **CHAIR:** I understand the point.

12 **LORD WOLFSON:** In my submission, that's obviously right. The real question here

13 is not did we sponsor these articles --

14 **CHAIR:** We are not in a position today to say it is unarguable that even 50% of iPhone

15 users read the article. I mean, we are not in a position to say it is unarguable.

16 **LORD WOLFSON:** You are in a position today to say it is unarguable that this

17 message was not disseminated sufficiently for competition law purposes, because one

18 asks rhetorically what else is it? How else should we have disseminated?

19 **CHAIR:** Going back to the *Gutmann Trains* case, there, there was -- wasn't it? You

20 have obviously the right people in the room. It wasn't that the information wasn't

21 disseminated at all. It was that it wasn't disseminated sufficiently for the boundary

22 fares. Isn't that right?

23 **LORD WOLFSON:** Each case is going to depend on its own facts. "And there's

24 more". I have forgotten whose catchphrase that was.

25 **CHAIR:** It will depend.

26 **LORD WOLFSON:** We provided to my learned friends -- as it is coming up, let me tell

1 | you what delights are coming your way. There is an article from the Daily Express.
2 | There's stuff from The Guardian. I couldn't find a typo, but the one -- you will see the
3 | Daily Express one is this one.

4 | **CHAIR:** One each.

5 | **LORD WOLFSON:** Just one each. Sorry, I thought they were clipped by person.
6 | They were clipped by content. Sorry.

7 | **CHAIR:** That's all right.

8 | **LORD WOLFSON:** I think the loser ends up with two copies of The Guardian. So this
9 | is the Daily Express.

10 | **CHAIR:** All right.

11 | **LORD WOLFSON:** This is CNET. This is Guardian. One asks rhetorically, when you
12 | look at the articles, and this is not just a sort of demonstrative handout. Look at the
13 | articles. They refer to the message. They refer to the issue. They refer to lithium-ion
14 | batteries. It is simply impossible, and I do say that, impossible to submit that a public
15 | statement like this, which is picked up by national press, international press, where the
16 | simplest of searches on Google or, frankly, any search engine would pick up the issue,
17 | is not distributed widely enough to constitute all possible steps. One asks rhetorically
18 | what else are you meant to do? What else are you meant to do? I mean, this was
19 | disseminated much more widely than most other information is disseminated, dare
20 | I say the most --

21 | **CHAIR:** Sorry. I mean, the obvious -- what is said you should have done is when you
22 | provided the software update is communicated at that stage. That's what is said you
23 | should have done.

24 | **LORD WOLFSON:** And a moment's thought will indicate the unreality of that
25 | submission. I could absolutely understand in a world where nothing else is being said
26 | that saying something in the software update could be useful. Absolutely. And we do

1 say things in software updates and of course that's useful.

2 Just imagine if we had done that. If I was standing here and said: "Ah, we said it in
3 the software update". So when you got the little thing on your phone saying "Please
4 install the iOS update", there was a sentence saying this, that and the other. It would
5 be said "who clicks them?"

6 **CHAIR:** You ask rhetorically the question what is said should have been done. That
7 is what is being said that should have been done.

8 **LORD WOLFSON:** That's right. That sort of point, if the certification stage, if I can
9 put it this way, is going to mean anything, that's the sort of point which obviously is
10 a thoroughly bad point, and ought to be disposed of at the certification stage, because
11 otherwise one is saying: "Who knows? Could be, should be." How is the judge at trial
12 in a better position to resolve that point than you are now? There is not any evidence
13 that any meaningful media outlet did not carry this story.

14 **CHAIR:** We have got that point.

15 **LORD WOLFSON:** I mean, I think I made this point a moment ago, but just to be clear
16 about it, if all of this information wasn't enough to have customers jumping up and
17 down and saying "what's going on? We want this, that or the other", then it tells you
18 that's the information wasn't troubling to customers or at least it wasn't troubling
19 enough to prompt us to provide more redress than we actually did. That's, of course,
20 the submission I was making this morning before the adjournment.

21 **CHAIR:** Yes, you made that's submission.

22 **LORD WOLFSON:** So that's paragraph 64(a) to (c). (d) is -- I am just back in my
23 learned friend's skeleton.

24 **CHAIR:** Yes.

25 **LORD WOLFSON:** The very low take-up of the battery replacement programme
26 shows there was little public awareness of either.

1 Well, I mean, this is when did you last -- when did you stop beating your wife type
2 point? The battery replacement programme was well publicised. There were
3 a number of hits. It was actually very popular from launch. In fact, just to explain how
4 popular it was, in less than 48 hours we had appointments that would take us out of
5 stock of batteries worldwide, notwithstanding that's we carried four to six weeks of
6 stock.

7 So the programme was initially meant to end on 31st December 2018. It was actually
8 extended for a further three weeks into January 2019, so that's everybody who wanted
9 a new battery had the opportunity to get one.

10 I am just going to give the reference. A33, page 3540. That's the data on the number
11 of battery replacements in the UK in 2017 before the programme, in 2018 during the
12 programme and 2019 after the programme. So that's the data, A33, 3540.

13 But the central point the PCR makes, I mean, of course it is true that there are many
14 iPhone users who didn't replace the batteries, but the inference the PCR seeks to draw
15 is that's iPhone users who didn't participate weren't aware of the programme. Well,
16 the most obvious reason for someone not changing their battery is because they didn't
17 have any problems with the battery. So the point at (d) is really a thoroughly bad point
18 and assumes what it is that's the PCR is trying to prove.

19 Of course, it is not surprising that's there were lots of people who didn't take up the
20 offer of a new battery, because, to repeat what I was saying this morning, the number
21 of iPhones affected was extremely limited. So that's paragraph 64.

22 Paragraph 65 purports to identify some ways in which the message was deficient.

23 I mean, this is really --

24 **CHAIR:** I overlooked these when I put a point to you earlier. Yes. Okay.

25 **LORD WOLFSON:** This is really hopeless stuff, with respect. First, Apple suggested
26 the battery issues are common to all smartphones with lithium-ion batteries. Short

1 answer. Look at the message. You know what the expert evidence is. There is
2 nothing false or misleading about the material under the heading "When batteries
3 chemically age" at all. All that's ought to be common ground. There is simply nothing
4 wrong with any of that.

5 The second point: Apple failed to explain in a clear and comprehensive manner, in
6 essence, the effect of the PMF. That's really the same point at (e). It comes back
7 again at (e). I mean, that is just simply untrue. Both the message and the web
8 page mention the negative impacts. Again, read them. The web page has a bullet list
9 point of negative impact. That's just wrong.

10 (c). Apple claimed the customer response was positive. There is nothing false about
11 that. In the months after the release of iOS 10.2.1 there was no increase in the number
12 of complaints reporting a device running slowly. The uptick in September onwards, as
13 I have explained, is due to those rumours which Mr Coulson explains. So that's (c).

14 (d) claims the message was misleading because it refers to slower performance being
15 caused as a result of upgrading iOS and minor bugs. Again, you have seen the
16 message. It says:

17 "Based on our experience, we initially thought that this was due to a combination of
18 two factors."

19 "We initially thought."

20 Then it goes on to explain what the position is. So that is completely wrong as well.

21 I mean, this is the best the PCR can do. So what we have so far is paragraph 64, you
22 didn't publicise it. It is hard to think how this could have been more publicised.

23 Paragraph 65, you should have said this, that's and the other, or this was false.

24 Absolutely nothing in any of those.

25 Paragraph 66, this is the third and last point. Regulatory enforcement action was
26 commenced against Apple after the "apology".

1 I mean, this is little more than trying to get a leg up from something which won't give
2 you any support at all.

3 Insofar as they are trying to rely here on the CMA, and the undertakings we gave to
4 the CMA, the critical point, which I am not sure was picked up yesterday, is that the
5 undertakings to the CMA are that we will maintain prominent information about the
6 existence of this issue and the access to the web page. The language of the
7 undertakings we gave to the CMA were forward looking, that's going forward we would
8 maintain the web pages, and indeed the PCR elsewhere in the Claim Form accepts
9 that's these are forward looking undertakings.

10 We don't need to turn it up. I will just give you the reference. Paragraph 27 of the
11 Claim Form, final sentence:

12 "Apple has given forward-looking undertakings."

13 So there's nothing in the undertakings to the CMA to require us to do more than we'd
14 already done. It was about keeping up material which had already been published.

15 So this won't help. It can't help the PCR. The CMA didn't require us to revise the web
16 pages or say anything different or do anything different than we'd already done.

17 There are ultimately really two questions here. One, is there anything wrong with the
18 message itself or the web page? Answer, no. Two, dissemination. Now, under that
19 heading there may be two issues. One, do you have to disseminate yourself or is it
20 enough that it is, in fact, disseminated. The latter must be right.

21 Second, on the material before this Tribunal today, can it be said that this material was
22 not sufficiently disseminated? I do submit --

23 **CHAIR:** What do you mean by sufficiently disseminated?

24 **LORD WOLFSON:** Disseminated to --

25 **CHAIR:** There is no legal standard of dissemination. This is just a question of fact.

26 **LORD WOLFSON:** It is a question of fact but the Tribunal has to ask oneself at trial

1 does the PCR have any real prospect of establishing that there was something
2 inadequate, that we didn't take reasonable steps, that the message was not -- I mean,
3 I can use --

4 **CHAIR:** That's legal test of reasonable, as I understood, this is a sort of relatively new
5 area of law that's we are exploring, which may be a point ultimately in your favour,
6 Lord Wolfson, but in terms of how much dissemination is enough, I understand we are
7 looking at the facts, but are you saying unarguably 90% dissemination is enough or
8 50% is enough.

9 **LORD WOLFSON:** It is not a matter of percentage.

10 **CHAIR:** Is it a qualitative test?

11 **LORD WOLFSON:** The question is does the PCR standing today have a realistic
12 prospect of being able to show at trial that there is something defective or insufficient
13 about the way this message was disseminated. Now, of course, at one end I think we
14 would all agree that it can't be enough for the PCR to find one person who lived in
15 a cave somewhere who had not heard about it. Equally, if all you do is publish it on
16 your intranet, to which your own employees and a few selected customers have
17 access, obviously that's not enough.

18 **CHAIR:** But neither party is urging those positions.

19 **LORD WOLFSON:** No. So the question is if the Tribunal -- as I say, if the certification
20 stage is going to mean anything, the Tribunal has to ask itself the question: is there
21 a proper question here?

22 **CHAIR:** What is the question that's the Tribunal has to ask itself today?

23 **LORD WOLFSON:** Is there any real case or prospect of a case that the -- let me see
24 how -- I would say that's the question is whether the putative defendant has taken
25 proper steps to disseminate the information to its customers?

26 Now, you can test that --

1 **CHAIR:** All its customers or a proportion of its customers?

2 **LORD WOLFSON:** It may depend which customers are going to be affected. In some
3 cases only a certain number of customers may be affected. In this case we can be
4 a bit more precise about it, and this goes back to our discussion this morning. Given
5 the way the case is put against us, the worst case for us has to be, i.e., the highest
6 bar that we would have to meet, would be that we would have to disseminate the
7 information sufficiently so that's if the information was bad, customers would have
8 reacted. That's the way you can test it here.

9 Now, what you have here is dissemination on a vast scale both on our website, in
10 news media, online and in newspapers and on Google Search, and you find that
11 nobody essentially is jumping up and knocking on our door.

12 The danger is we get into a bit of an Alice-in-Wonderland territory, if I may say. This
13 morning I was making the point that people are hardly affected and people are not
14 jumping up. The point is put against me: "Well, who knows what material means".

15 This afternoon I say 28th December 2017 we told the world -- I will put it in passive
16 terms -- the world was told. Still people are not jumping up and down. At some point
17 these two points have to meet. I do say that the Tribunal was absolutely right in May
18 when it said that's there was no support for any of this, and the corollary of that or the
19 consequence, better, of that is it is not surprising, therefore, that when you get to
20 28th December 2017 that we put the announcement out, it carried round the world and
21 the figures don't move. It's not surprising.

22 Those are our submissions on that -- I was going to say minor strike-out, but you know
23 what I mean.

24 The only other point I would make is that the Tribunal should not get the idea that the
25 purpose of the strike-out is just, so to speak, to lop a bit off the case time-wise. As
26 I think this exchange has shown, the advantage and importance of this strike-out, and

1 if it is struck out is that it will place conceptual boundaries on any claim going forward
2 as well. It is not one of those strike-outs where you say if the loss ends on X date then
3 the claim is no longer worth a million. It can only be worth 600,000. It is much more
4 than that. It imposes conceptual boundaries on the claim as well as temporal and
5 monetary boundaries as well.

6 Unless any further questions on that, I was going to go to methodology.

7 Now, the Tribunal know where I am going here. The first point essentially is there's
8 been a shift in the case and the methodology and quantum has not kept up with it.

9 Let me start with that's point. I will start, therefore, with Mr Harman's explanation of
10 his methodology. I think you saw some of this I think perhaps on a previous occasion,
11 but I don't think all of it. So let me show you. We start in Bundle A with Mr Harman's
12 first report at page 46, please.

13 **CHAIR:** Tab 3. Yes.

14 **LORD WOLFSON:** Tab 3, yes. If we could pick it up from page 114 of the bundle,
15 which should be internal page 65. Paragraph 7.2.1. He starts in the right place
16 acknowledging that's the object of the award is to put the injured party back in the
17 position they would have been in but for the wrongful act. Tick.

18 7.2.4, over the page, so you need to compare the collective financial position of
19 potential class members in two scenarios: one, financial position absent the wrongful
20 acts; two, financial position that the PCMs were actually in. Tick.

21 7.4.1. Now on page 117. There is a heading here: "The counterfactual scenario",
22 and he identifies the conduct that he says needs to be removed in the counterfactual.
23 Now, let's be very clear what he does here. He takes out four things. Concealment
24 of battery issues.

25 **CHAIR:** Where are you reading?

26 **LORD WOLFSON:** Paragraph 7.4.1. Concealment of battery issues, continued

1 supply of iPhones with no battery issues. Imposition of iOS updates with the PMF, and
2 failure to offer appropriate resolution. They are not numbered one to four, but those
3 are the four things.

4 **CHAIR:** Yes, yes.

5 **LORD WOLFSON:** Next paragraph, 7.4.2. He's instructed that's Apple should have
6 made immediate and effective voluntary redress. Those are his instructions. Because
7 I will be coming back to this, can I invite you to underline the word "should" at the end
8 of that's first line, please? We can see where this takes him when we pick it up on the
9 next page, 118, under the heading "consumer losses".

10 7.5.1, he introduces the three heads of loss that's he plans to measure. The main one
11 is the first one, which is sub-standard performance losses, and I'll focus mainly on
12 those. I will come at the end to the other two, battery replacement and premature
13 upgrade.

14 8.2.1, please. Page 121. This is under the heading "Sub-standard performance
15 losses". You will see at 8.2.1, under the heading "Approach", he calculates what he
16 means by sub-standard performance losses. That's the difference between the
17 willingness to pay for an affected iPhone, assuming full knowledge of lifetime
18 performance, on the one hand, and willingness to pay for a phone that would perform
19 as consumers had expected.

20 At 8.2.2, he explains how he measures that. He estimates the incremental value of
21 a 1% change in CPU performance. He multiplies that by an average reduction in CPU
22 performance, and again by the proportion of lifetime affected by the sub-standard
23 performance.

24 The good news for today, as I indicated earlier, is that I am not going to get into that
25 level of detail. That is not the focus of my challenge. It doesn't matter for the purposes
26 of today how he plans to calculate any of those things. What's relevant is that's the

1 shape of the calculation he is going to make. He is calculating how much better off
2 they would have been if their devices had operated at the expected CPU level.

3 Now, on the PCR's original claim you can understand why that's what Mr Harman was
4 doing, because it was originally said it was abusive for us to continue to sell devices
5 that suffered from these defects. Remember that was one of the four things he
6 removes in his counterfactual. So that's all fine.

7 The problem for my learned friend is that that is no longer said to be abusive. He
8 accepts it was not a breach of competition law for us to supply the phones we actually
9 supplied in the real world, and it wasn't a breach of competition law for us to supply
10 the iOS versions and updates together with the PMF.

11 So why, one asks, and this is not rhetorical, because I have the answer, does
12 Mr Harman still calculate loss by measuring how much better off Proposed Class
13 Members would have been if we had supplied better phones. The answer to that is in
14 the second report. That's at A5, 273. If we could pick it up, please, at the first
15 substantive page at 276. At 1.2.4 -- I hope at the bottom of the page you will see he
16 has been instructed to consider whether in light of our response and the PCR's reply,
17 the methodology remains appropriate. He goes on through that's disclaimer. I must
18 say I had missed that's disclaimer. We can leave that.

19 At 279, paragraph 2.2.1 is the important bit. He restates the abuse in line with the
20 reply. So he no longer says that the continued supply of iPhones or the PMF was
21 abusive. He no longer includes here anything about the failure to provide redress
22 being abusive.

23 At 2.3.5, if we can turn through at 281, this is very important:

24 "I have been instructed to confirm whether, given the PCR's allegations and
25 Counterfactual Scenario, the approach proposed in my First Report remains
26 an appropriate methodology for assessing consumers' losses. I am instructed to

1 assume that the Counterfactual Scenario, which reflects the financial position users
2 would have been in absent all the features of the SCA, has the following
3 characteristics."

4 You see there's footnote 12 there to the PCR's reply, paragraph 36.

5 So he has been instructed to make certain assumptions, and there were three of them.
6 (I) and (II) are straightforward enough. We would have been transparent about battery
7 issues in the PMF. Fine. But look at (III). This is what he was being instructed to
8 assume:

9 "Apple would have provided" -- would, not should -- "would have provided prompt
10 redress in the form of free battery replacements, a partial refund, a reduction in the
11 retail prices of the Affected iPhones and/or other equivalent redress."

12 In paragraph 2.3.6, just to close off this point before I make my submission on it, you
13 will see that's he says, and I am not criticising Mr Harman, I shall be very clear,
14 because he has been instructed to assume this -- at 2.3.6, he says it is on the basis
15 of those assumptions in the counterfactual, because of those assumptions, he doesn't
16 need to update his methodology.

17 Now, he doesn't explain why that is so, but when one looks at (I), (II) and (III), the
18 answer is obvious. It can only be because of (III) that he does not need to update his
19 methodology, because he has been instructed to assume that we would have provided
20 prompt redress in the counterfactual. So that assumption, assumption (III), is we
21 submit absolutely critical to his analysis.

22 Now, that assumption in 2.3.5, (III) is a bit odd. It is a bit odd because he doesn't refer
23 to any second or subsequent letter of instructions for this. It is only to the PCR's Reply.

24 As I showed you, paragraph 36 of the PCR's Reply. It seems that he has just taken
25 his instructions to mean that the PCR is right about what the PCR says would have
26 happened in the counterfactual. That's important. 2.3.5 (III) is not Mr Harman's

1 opinion. It is what he has been told through the solicitors, based on the pleading, to
2 assume in the counterfactual. He's assuming that's what the PCR says is correct.

3 Now, that takes us then to what is the PCR's claim as to the counterfactual? That was
4 originally set out in the Reply, but it has now been reflected in the Amended Claim
5 Form. It is probably easiest actually now to take it from there. If I could invite you to
6 take up the Amended Claim Form. That's back in the -- I think we are calling it the
7 Supplementary Bundle, what I call the main bundle really for today, Tab 3, and as
8 you're getting to it we'll start, as is customary, with paragraph 7(g), and you will see
9 the amendment in the green. We touched on this in a different context earlier.

10 "Apple's lack of candour and transparency allowed it to avoid having to offer redress."
11 Now, that's where it is said shortly, but it is expanded at paragraph 187, which is at
12 page 87 of the bundle. You will see in particular the last five lines of that's:

13 "In contrast, in the counterfactual, Apple would have felt compelled to take these
14 steps."

15 You can see what the steps are:

16 "... as it would have been concerned about the significant adverse reputational and
17 commercial consequences that might otherwise have resulted from transparency
18 about the battery and throttling issues (as to which Mr Gutmann relies on paragraph 36
19 of his Reply as if it were set out here)."

20 Of course, that's a paragraph we also saw footnoted in Mr Harman's Expert Report.
21 So let's turn that up. That's in the official Core Bundle at Tab 7b.

22 **CHAIR:** Give me a second.

23 **LORD WOLFSON:** We are looking at paragraph 36, which is at page 294.15. So this
24 is the counterfactual.

25 **CHAIR:** Sorry. 36 you said.

26 **LORD WOLFSON:** Paragraph 36. This is the counterfactual. It begins:

1 "Mr Gutmann considers that the counterfactual includes the following features."
2 Well, that's a bit unpromising, because we can't really place much weight on what
3 Mr Gutmann considers or doesn't consider. I mean, by his own admission he is a man
4 who knows nothing about iPhones. He is not delivering any industry expert evidence
5 or economic evidence about our incentives or commercial structure. This paragraph is
6 pure assertion by Mr Gutmann based on nothing more frankly than his own say-so.
7 Even with that, let's look at it and let's see what the assertions are in any event.
8 "(a). Apple would have been transparent about [the various matters that Mr Gutmann
9 says we should have disclosed]."
10 (b). "Apple would have been concerned that transparency [on these points] would
11 have ... significant ... reputational and commercial consequences."
12 It refers to damages claims, switching to android, and reduced customer trust.
13 (c). All of this leads to (c).
14 "In order to avoid [all of this], Apple would have had to ... [offer refunds to people who
15 purchased the iPhones, reduced prices to people who were yet to purchase or who
16 were upgrading]."
17 Now, that is what Mr Harman is relying on in his second report. It is a very different
18 proposition to the one he relied on in his first report.
19 We can summarise it this way. In the first report, Mr Harman is relying on
20 an assumption about what we should have done. In the second report, he's relying
21 on assumptions about what we would have done.
22 Therefore why is it said, if this is a "would" case, that we would have done this or would
23 have chosen to do any of these things? The answer we are given by Mr Gutmann, on
24 his say-so, is in light of certain alleged commercial pressures that's would have existed
25 in the counterfactual.
26 Now, there are a number of problems with that. I will limit myself to three, you will be

1 | pleased to hear. Any of these three individually is fatal to the case. That's why I will
2 | just take three.

3 | First problem. There is no basis in fact for any of these assertions. I know we are in
4 | a counterfactual, but *Pro-Sys* -- and I think this is common ground -- the *Pro-Sys* test
5 | for methodology requires that any methodology must be sufficiently credible or
6 | plausible and must be based on some basis in fact for the commonality requirement.

7 | **CHAIR:** I mean, this is overlapping with the abuse, isn't, it, inasmuch as it is said:
8 | "Look, if you had been transparent, there would be potential warranty claims against
9 | you." If that is right, and I've heard submissions that you say it is not even arguable,
10 | but if that was right, there would be a basis in fact. So if they get over that hurdle on
11 | the abuse, then there would be a basis in fact when it comes to measurement of
12 | (inaudible). Am I wrong about that's?

13 | **LORD WOLFSON:** I think warranty might be the worst one to pick.

14 | **CHAIR:** Or misrep?

15 | **LORD WOLFSON:** At the level of generality, if I can be helpful, of course I accept
16 | there is going to be an interplay, an inter-relationship between the Tribunal's decisions
17 | on abuse and its decision on methodology, of course. That's why -- I hope I did not
18 | belabour it -- this morning I was at some pains to invite the Tribunal to be very precise
19 | and clear about what the alleged abuse actually is, because you will need to carry that
20 | through into your approach to methodology.

21 | Insofar as that's a central point being put to me, then yes, I agree. I would not agree
22 | with that example, but you were using that, as I understand it, as an example of
23 | a proposition, so yes. There is plainly an interplay, but one has to be very careful,
24 | therefore -- I am not going to repeat my submissions. There has to be some credible
25 | basis for the methodology. See *Pro-Sys*. Ditto for abuse. Otherwise you end up in
26 | a ridiculous situation where you apply a very, very low test on the abuse side, and then

1 say, "Oh, because it is all Mr Micawber on that side, when I get to methodology, who
2 knows, I will have to say it is credible". That can't be right.

3 **CHAIR:** There is a spectrum, isn't there? There are those hard cases where the
4 consumers, when all the facts come out on liability, and assuming your PCR is
5 successful, where the consumer has a sound basis in fact for complaint to Apple, and
6 in those circumstances Apple would have to recompense. But there is another set of
7 facts, which I think the PCR also relies upon, where consumers may be annoyed that
8 they were not told about this, but they don't have a financial claim against Apple and
9 there would be no basis upon which Apple would be required to meet that. In that
10 second case I can see that there may be problems with how to evaluate damage, but
11 on the first case I don't see -- I mean, whether Mr Harman has applied precisely the
12 right methodology is another matter, but I don't see why a methodology couldn't be
13 applied.

14 **LORD WOLFSON:** I mean, that's part of the reason why I have two objections to
15 methodology. I will be coming to them a moment.

16 **CHAIR:** You have only given me your first one so far.

17 **LORD WOLFSON:** On this point, that there is no basis of fact, we do need to see, in
18 my respectful submission -- *Meta* made this clear as well -- we do need to see some
19 basis of fact for the assertion that this would be the case in the counterfactual.

20 Let me just explain where I am going here. Let me show you -- at the risk of repeating
21 what I said earlier, but it is really relevant here, even if the PCR was right to say there
22 was a failure of transparency in early 2017, we submit that it is indisputable that in
23 December 2017 we had provided full transparency, and I have made my submissions
24 on that point.

25 If you are with me, therefore, obviously on the strike-out application in relation to the
26 period post December 2017, then that must be, in my submission, fatal to this part of

1 the case also, because we know what Apple did when it provided that information in
2 December 2017. This isn't a counterfactual where we have to -- I will come to this
3 point again later -- we have to really look into the looking glass or into the crystal ball.
4 We know what happened. It just happened later. We know what happened in
5 December 2017. We launched a discounted battery replacement programme. We
6 didn't offer refunds. We didn't cut prices. That's the same position, frankly, if the
7 information had come out even later, whether -- for example, at the 11.3 issue stage.
8 So we know what happened.

9 What happened was we only had a discounted battery replacement programme.
10 Now, the way my learned friend deals with this and his answer it appears to this
11 point -- let me show you it in his own words because I don't want to paraphrase. In
12 paragraph 92 of his written argument. I don't know whether you have that in the
13 bundles. I think you have that separately.

14 Page 33, paragraph 92. It says this. It refers to our first criticism. It is unfounded:
15 "As explained above (see §17)" -- we will come to that -- "the PCR's case is that its
16 counterfactual is consistent with, and therefore amply supported by the commercial
17 motivations underpinning battery replacement programmes Apple has offered in the
18 past, Apple's December 2017 apology, and Apple's 2018 battery replacement
19 programme, all of which are characterised by an extreme sensitivity to user trust and
20 the strength of its brand."

21 Before I make my submission, let's pick up paragraph 17, because we are told to look
22 at this as well on that point. That doesn't do anymore when you get there -- it is
23 between pages 5 and 6 -- than really repeat the central point which we have just seen
24 in 92, and add, and I have to say somewhat bizarrely:

25 "In particular, the PCR does not consider it realistic that Apple would have waited for
26 users to seek to exercise their legal rights in large numbers (whether under Apple's

1 warranty or through other avenues), or waited to see any effects on users switching
2 away from Apple to Android, and/or any negative impact on the switching of Android
3 users to iPhones."

4 Now, I mean, of course, we say there aren't any legal rights. I have made those
5 submissions. Apple's message and the discounted battery replacement programme
6 show what we would have done in the counterfactual. We didn't offer refunds. We
7 didn't offer free batteries. How can it be said in the counterfactual that we would have
8 done so? With respect, it can't.

9 The problem for the PCR in this case is that we have a counterfactual. The
10 counterfactual is the real world, just a little bit later. That's the counterfactual. Why is
11 it said that our behaviour in January 2017 would have been different to what it, in fact,
12 was in December 2017? No answer. No answer. No engagement with --

13 **CHAIR:** But the battery replacement, assuming you are right, the battery replacement
14 programme would have been much earlier.

15 **LORD WOLFSON:** On this basis, yes, it would have taken place earlier.

16 **CHAIR:** So that must be something that can be quantified, the value of an earlier
17 battery --

18 **LORD WOLFSON:** That's not what Mr Harman is doing.

19 **CHAIR:** I know that's not what Mr Harman is doing, but we are not here just
20 to -- Mr Harman has looked at the value of batteries. You then say "Well, they wouldn't
21 have been free batteries. We would have done a battery replacement programme."
22 It doesn't mean the entire claim goes because there's a difference between you and
23 Mr Harman as to how the precise calculation should be carried out, surely?

24 **LORD WOLFSON:** Surely, with respect, this is not just a difference in calculation.
25 This is a different claim. What you then have to do is you have to say: If we had done
26 this earlier, then are people actually worse off in any meaningful sense because of

1 this? I can only fight the claim put against me. Mr Harman has now had two cracks
2 at this.

3 The uptake would have been either the same as it actually was or lower actually,
4 because these were newer. In other words, at the time, if people bought an iPhone,
5 say, at the end of 2015 or early 2016, their phones would have been newer in January
6 2017 than they were obviously in December 2017. So, if anything, the uptake on the
7 battery replacement programme would be lower.

8 **CHAIR:** Right.

9 **LORD WOLFSON:** I mean, that really is -- first of all, it is not the case I am here to
10 fight, but it is an absolute dead end. If the *Pro-Sys* test is going to mean anything, and
11 I accept broad axe -- I made it very clear I was not getting into Mr Harman's 1% or
12 10% or anything like that. I can't ask you to deal with that today. I absolutely
13 appreciate that. But this is a conceptual point. This is a conceptual point as to what
14 is the counterfactual.

15 It is not Mr Harman I am arguing against. It is the PCR, because he told Mr Harman
16 what the counterfactual was to be. If the PCR's counterfactual is utterly unreal, that is
17 the end of it. It has to be the end of it, in my respectful submission.

18 As I say, the PCR has no reason to think we would have offered refunds or cut prices
19 if all this had happened eleven or twelve months earlier. All we are doing in the
20 counterfactual is changing the date. The PCR has not identified anything different in
21 the counterfactual.

22 I made that submission on the basis that if you are with me on the strike-out of the
23 claim from December 2017, but even if you are against me, the PCR here would still
24 have to identify what additional information we should have provided and why that
25 additional information would have changed our commercial response so radically that
26 we end up in his counterfactual rather than the real world. I mean, obviously there is

1 nothing in that. That's a total brick wall for Mr Gutmann.

2 Now, let me just pick up here.

3 **CHAIR:** We are still on the first point, are we?

4 **LORD WOLFSON:** We are still on the first point. Let me just take one point very
5 quickly. My learned friend yesterday took you to the CJEU's decision in *Mastercard v*
6 *Commission* at paragraphs 96 to 114 and 166.

7 With respect, we simply do not understand how that decision can help. Most of that
8 discussion, the whole section between 96 and 114, comes from the part of the
9 judgment that considered what is known as the objective necessity or ancillary
10 restraints defence. That's a particular defence to an allegation of infringement, in
11 which a defendant says: "Well, I couldn't have operated the scheme without the
12 allegedly infringing restriction".

13 But we are not concerned with an objective necessity test here at all. We are actually
14 in the realms of causation here, at this stage of the argument, which was not
15 considered at all in *Mastercard*, because it is not a damages claim. So that decision
16 does not shed any light, we say, on what makes an appropriate or inappropriate
17 counterfactual for a damages quantification exercise.

18 In any event, the other paragraph which my learned friend showed you, 166 of the
19 judgment, confirms that even in the context of proving anti-competitive effects of
20 an agreement, a counterfactual has to be likely. That is in 166. For your note it is also
21 in 169.

22 In so far as that decision said anything, it certainly does not help my learned friend.
23 He can't show it is likely, if you want to use that word, that we would have done
24 anything in January 2017 beyond what we did in December 2017. So that's the first
25 problem.

26 The second problem is that this is the wrong approach as a matter of law. As we said

1 a number of times this morning, the alleged breach is only a failure of transparency.
2 So we are trying to compensate consumers for the harm caused to them by that lack
3 of transparency but only for that lack of transparency. That is really important. Lack
4 of transparency is not a sort of a key which opens some sort of treasure chest. No,
5 no. You get compensated for the breach. So you get compensated for the lack of
6 transparency. In *Meta* this Tribunal explained the right approach for measuring loss
7 for claims of this kind. I will just give you the references I think to *Meta*. We don't need
8 to turn it up. Let me just give you the references.

9 At paragraph 32, the Tribunal was discussing the reasons why the counterfactual for
10 assessing loss was different for the different abuses in the case. There were different
11 counterfactuals.

12 At subparagraph 2, the Tribunal picked up the unfair trading conditions abuse, which
13 basically was an argument that Meta had misled their customers about the nature of
14 its terms.

15 In the middle of the paragraph, the Tribunal sets out what the test actually is, that you
16 have to ask the question what was the effect of that particular breach on the class?
17 I mean, we say that's a correct approach in any misrepresentation claim. That's pretty
18 Hornbook law. A Claimant must always prove they relied on a fraudulent
19 misrepresentation in some way. Even in a fraudulent misrep claim you have got to
20 show inducement. What the Tribunal in this case should be proceeding on is the basis
21 that the losses that a Claimant can claim are only reliance losses, essentially. The
22 losses are caused by the Claimant's reliance on the misrepresentation.

23 So what in this case the class members would have to show, is that they relied on the
24 information they were given by us, but if they'd been given the putative other
25 information, which it is said they should have been given, they would have acted
26 differently. Then the exercise would be how much better off they would have been if

1 they had acted in that different way.

2 Again, the methodology just does not do that. It doesn't grapple with the central legal
3 basis of the claim. It can't do that and it can't do that for this reason. Let me just finish
4 this point and then that might be a good moment for a break. It doesn't do that
5 because when you look at the commercial reality here, most of the devices had already
6 been purchased before the supposed failure of transparency in late 2016 or early
7 2017. So the PCR can't say: "Well, if they had known the truth, they wouldn't have
8 downloaded the PMF."

9 We know that people were given the choice as to whether to disable the PMF. Virtually
10 nobody did so. It is figures which would flatter even a dictator in some African states.
11 For each and every affected iPhone, more than [X] % of users, and in most cases [X
12 % of users, kept the PMF.

13 **CHAIR:** Where is that evidence?

14 **LORD WOLFSON:** I will give the reference. It is the exhibit to Crumlin 1, B35, 3566.
15 This was why it is all so unreal, because on one hand we are told --

16 **MR RIDYARD:** Is there an argument that you are not quite comparing like with like?
17 Under the scenario that the PCR is talking about, we are talking about an abuse of
18 a dominant position, so it is an unlawful act. In that situation, would we not be talking
19 about an admission by Apple that it had done something unlawful and had to tell
20 customers that? Is that a bit different than Apple producing a press release on its own
21 terms, as it were, as it did in December 2017, just saying: "We have come across
22 a little glitch. Don't worry. We have sorted it all out". I just ask the question. Is that
23 one reason why there's sort of such a big gap between you on this point?

24 **LORD WOLFSON:** It might be but of course the premise of the question is a difficult
25 premise, if I can put it that way. I mean, first of all, one has to identify what it is we
26 should have told them, that we didn't tell them. I don't understand it to be put against

1 me that a defendant has to say:

2 "We have acted in breach of competition law."

3 That's not an argument I have heard so far.

4 **MR RIDYARD:** I am literally thinking aloud, which is always a bit dangerous. Is that
5 not a consequence of an abusive act? It is an unlawful act, isn't it?

6 **LORD WOLFSON:** The question is what you have to tell the customers. The central
7 question in this case, in the counterfactual, is what we would have had to tell the
8 customers to avoid --

9 **MR RIDYARD:** Not to have done an abuse.

10 **LORD WOLFSON:** Exactly. That's why I said I am struggling with the premise. I think
11 the premise, if I may say, turns it on its head. It's not that --

12 **MR RIDYARD:** You can be as rude as you like about my premise. That's fine.

13 **LORD WOLFSON:** The premise I think is not we have been, you know, naughty boys
14 and we have done X. The premise is, we are telling you this so we are not naughty
15 boys and in breach. The premise for this whole counterfactual is no breach. So that's
16 why I don't think that that line of analysis is actually productive, because the premise
17 is wrong.

18 **CHAIR:** Just on your second point, just comparing it to the *Gutmann* railways case,
19 why is the analysis different? There was a lack of information in both cases. In
20 *Gutmann* railways, the -- call them consumers -- these passengers then claim the
21 cheaper ticket, and that's the calculation. So here, if they had been given the
22 information, they would have claimed the battery, or whatever. I understand your
23 argument on the facts -- or some compensation. I understand your argument on the
24 facts that they would be happy with a battery replacement. I have that point.

25 On your second point, why is the analysis different?

26 **LORD WOLFSON:** I don't want to fight other people's cases or pour cold water on

1 other people's cases. *Gutmann Trains* is a very different case. If I may say, one of
2 the problems with *Gutmann Trains* is it is quite difficult to identify a reason why you
3 would buy a more expensive ticket when you could have bought a cheaper ticket one,
4 or why your response to being told you could have bought a cheaper ticket would be
5 anything other than: "Well, can't I have the difference between the ticket I bought and
6 the cheaper ticket?"

7 There was no real world counterfactual in *Gutmann Trains*, but it wasn't very difficult
8 to work out what the counterfactual was.

9 **CHAIR:** So here on your second point --

10 **LORD WOLFSON:** The counterfactual is you have to say how would they have acted
11 differently if they had been told, assuming there is some further information? Now, of
12 course --

13 **CHAIR:** We are about to put -- putting it at its most unfair perhaps to you, your phones
14 are not adequately spec'd. You are now putting some software on my phones which
15 is just going to make them perform unacceptably slowly, unacceptably to me. Now,
16 assuming the PCR gets that far, then I don't understand why the claim isn't: "Well,
17 you have got to sort this out by" and then we can go into subdividing new battery,
18 giving me a refund. I don't understand quite what the second point is I think.

19 **LORD WOLFSON:** The second point is there is no allegation of reliance here. I mean,
20 what we don't have --

21 **CHAIR:** There was not reliance in *Gutmann* either. In both cases there is an absence
22 of information rather than reliance on information.

23 **LORD WOLFSON:** But it is very clear in *Gutmann* what they would have done had
24 they had the information. Here, all those point to a very different road, because when
25 we did put the information out, we know what people --

26 **CHAIR:** I understand, but that comes under your first point.

1 **LORD WOLFSON:** Yes, that does. Well, we do say that here we don't have any
2 proper allegation of reliance on the putative extra information. Obviously, I see that
3 you can say: "Well, who knows what they would have done." We have to identify
4 what is the further information they would have had, how they would have acted
5 differently, if they would have had that information.

6 **CHAIR:** I see. Okay.

7 **LORD WOLFSON:** So that's the second reason why we say that part of the claim is
8 no good. Now let me just deal quickly with the battery replacement or premature
9 upgrade losses, because I identified earlier there were three heads of loss. I have
10 really focused on the first.

11 I can take the others fairly quickly, because I think conceptually the same sorts of
12 issues arise.

13 Let me just take the first, the battery replacement losses. We can pick this up I hope
14 in Mr Harman's supplementary report. We are back in A5, 293.

15 **CHAIR:** Hold on.

16 **LORD WOLFSON:** You can see when you get there that I can take this very quickly.
17 Tab 5, page 293, paragraph 4.2.1. This is under the heading "Battery replacement
18 losses".

19 **CHAIR:** Okay, I am sorry. I am being slow.

20 **LORD WOLFSON:** You will see the third and fourth lines --

21 **CHAIR:** Sorry, page 293.

22 **LORD WOLFSON:** Yes. Are we in Bundle A?

23 **CHAIR:** A, tab?

24 **LORD WOLFSON:** 5.

25 **CHAIR:** I don't have a 293. I have 292 and 294. I am just missing page 293.

26 **LORD WOLFSON:** I am sure we can provide you with a 293.

1 **CHAIR:** I have got one. Maybe it's gone in back to front. Sorry. 4.2.

2 **LORD WOLFSON:** 4.2.1. What I will try to do is I will just try to finish these points
3 and then might be time for the afternoon break.

4 **CHAIR:** Yes.

5 **LORD WOLFSON:** You will see that that is based on the same assumptions as the
6 sub-standard performances losses, i.e., we would have provided prompt and effective
7 redress.

8 You can see in the next paragraph, 4.2.2, second sentence, that that's why he
9 assumes that anyone who paid to replace their batteries in the real world suffered
10 a loss equal to the additional costs they incurred.

11 So, essentially, for the reasons I have submitted, this suffers from the same flaw as
12 the sub-standard performance losses, because there's no basis for calculating loss on
13 the assumption that in the counterfactual we would have provided any different redress
14 than we actually did in the real world.

15 I am not going to repeat it. It is the same point. I just wanted to show you that it
16 applies here as well.

17 That only leaves the third head of loss, the premature upgrade losses. These are
18 alleged losses, just so we are clear what they are, arising from potential class
19 members choosing to upgrade their devices earlier than they otherwise would have
20 done. That is the head of loss.

21 I think I only need to explain what that head of loss is to show that it's got absolutely
22 nothing to do with the abuse that's now alleged.

23 Again, on the original claim, it made sense. On the original claim there was
24 an allegation that it was abusive to supply iPhones with sub-standard performance.

25 So you could -- I mean, even then it was a bit of a stretch. You could just about
26 understand where the PCR was coming from here. If the sub-standard performance

1 led the user to upgrade earlier, then they might have incurred some additional costs
2 in doing so. I can see that. But there were other problems on that version of the claim,
3 because, of course, you would have to take account of the benefits they got from the
4 upgrade as well. You can't look at loss by only looking at the downsides.

5 **CHAIR:** I mean, couldn't it -- if you don't know what's going on, and again these facts
6 may be criticised for being hypothetical, but you notice you are having real trouble
7 uploading (sic) Safari, and you don't know why, so you say: "Right. Time for a new
8 phone". But if you told them what the problem was, they would have known it wasn't
9 a problem with the phone and they wouldn't have gone out and bought a new phone.
10 Why is that not a ...

11 **LORD WOLFSON:** Either your user has a problem with the way their device -- doesn't
12 like the way their device is operating or they find it okay. I mean, the user --

13 **CHAIR:** Rather than upgrade the phone, they might say: "Oy, Apple, you have to sort
14 this problem out. I don't like your PMF. I don't like your UPOs. You have to give me
15 a new battery". The two things sort of tie in.

16 **LORD WOLFSON:** I have already made that submission. The fact is they didn't do
17 it.

18 **CHAIR:** I understand.

19 **LORD WOLFSON:** I don't mind counterfactuals when there's a basis for the
20 counterfactual, but, I mean, there is no basis for that. The putative user, sir, that you
21 put to me is in the same position. He either likes his phone and what it is doing and will
22 stick with it, or he won't and he will upgrade.

23 **CHAIR:** Yes.

24 **LORD WOLFSON:** There is a further conceptual problem that you can't just look at
25 the downsides of an upgrade, i.e., the costs and not the benefits that it brings with you
26 as well, but that's a separate point.

1 The critical point is, and the conceptual point is, that the alleged abuse is only
2 transparency, and there is simply no reason to think that giving customers more
3 information about alleged battery use or the PMF would cause them to delay
4 upgrading. There is no logical connection. That's the exchange, sir, that you and
5 I have just had.

6 So the conclusion on that is, we submit, that there are fundamental problems on
7 methodology. That is because this really started out as a defective product claim. It's
8 now a claim about lack of transparency and a failure to provide information, and the
9 methodology just hasn't caught up with it. So there is a disconnect between the claim
10 and the loss, both as a matter of logic and, we submit, as a matter of law, and both of
11 those is fatal to the claim.

12 I see the time. The good news is that I have very little left. What I was going to do is
13 to give you, sir, a short answer which I know I owe you on iPhone 5.

14 **CHAIR:** Yes.

15 **LORD WOLFSON:** I was going to say a very short word about funding, really not a lot
16 on funding.

17 **CHAIR:** Yes.

18 **LORD WOLFSON:** Oh, yes, you also asked a question about information provided to
19 the CMA. I will give you an answer on that as well. Then, unless you had any more
20 questions, I was going to sit down, because I said at the outset authorisation we will
21 leave in writing. That is where we are. We are making good time.

22 **CHAIR:** Shall we have five minutes now and then you can deal with those points.

23 **LORD WOLFSON:** Thank you.

24 **(Short break)**

25 **CHAIR:** Lord Wolfson, before you start on your new point, can I just ask you one
26 question?

1 **LORD WOLFSON:** Yes.

2 **CHAIR:** You were saying the proof of the pudding is in the eating. See what happens
3 when we offered batteries. The fact that in practice people don't make a claim, so let's
4 assume that everyone was entitled to a new battery, the fact that in practice they don't
5 make a claim or they settle for paying whatever it was, \$25 for a battery, doesn't mean
6 that they are not entitled to more, and that when we are considering damages we don't
7 look at in practice whether people are motivated to make claims. We have to -- I can
8 see.

9 **LORD WOLFSON:** When we are dealing with a competition law claim, it is not alleged
10 that we had a competition law duty to provide redress.

11 **CHAIR:** Right.

12 **LORD WOLFSON:** I think, if I may say, the problem with that line --

13 **CHAIR:** Sorry, just elaborate on that for me, sorry. I am not sure I follow that.

14 **LORD WOLFSON:** I am waiting for you to speak.

15 **CHAIR:** I am waiting for you. I am not following what you said. Can you just
16 elaborate.

17 **LORD WOLFSON:** The abuse is said to be a failure to provide information.

18 **CHAIR:** Yes.

19 **LORD WOLFSON:** It is not said that we had a duty in competition law to provide
20 financial redress in the form that you have just put it.

21 **CHAIR:** No, I understand that. We are about a more causation argument. Failure to
22 provide transparency means that we are then looking at a counterfactual.

23 **LORD WOLFSON:** Exactly.

24 **CHAIR:** I see what you are saying. You are saying whether there's an entitlement or
25 not, it is what happens in the counterfactual in practice.

26 **LORD WOLFSON:** Exactly, in practice. Just because it draws a nice distinction and

1 it is an easy way to remember -- can I invite you to think of "in practice" as the "would",
2 because it is a useful way to look at it because it compares to the "should". It is the
3 difference between the "should" and the "would".

4 **CHAIR:** I understand that.

5 **LORD WOLFSON:** I hear your "in practice" as my "would", in the counterfactual.
6 What they are entitled to, they can only claim what --

7 **CHAIR:** So the realities of what happens in the real world matter, you say, in this
8 claim. Yes.

9 **LORD WOLFSON:** Exactly. Not in all cases.

10 **CHAIR:** No. I am with you.

11 **LORD WOLFSON:** Not in all cases. Let's contrast this with *Gutmann Trains* for the
12 reasons, frankly, of that exchange we had. Counterfactual (a) is probably the easier
13 counterfactual to posit, and (b) has no real world analogue really.

14 **CHAIR:** Yes.

15 **LORD WOLFSON:** It is all counterfactual. The beauty about this case, which is
16 a great advantage, really should be an advantage for everybody, it should be
17 an advantage for us because we say "this is what we would have done, because look
18 what we did". It should be an advantage for the PCR, because he should have
19 a proper target to aim at. It also is an advantage for the Tribunal because you don't
20 have to think about what the counterfactual would be. You already know what the
21 counterfactual is. It is an advantage for everybody, but it doesn't mean -- you have to
22 engage with it. It is really about the failure to engage with it which is at the heart of my
23 submission.

24 **CHAIR:** You were going to make some new points, to answer some questions and
25 things.

26 **LORD WOLFSON:** Shall I just deal with funding very, very quickly. The funding issue

1 is obviously out there. The short point is that the PCR's current funding arrangements
2 appear to be unenforceable, full stop. I think it is common ground, because I didn't
3 understand my learned friend to argue differently, that the claim certainly can't be
4 certified on that basis, on the current basis with an unenforceable funding position.

5 **CHAIR:** We are going to park that point and it can't be certified until --

6 **LORD WOLFSON:** It can't be certified until. The real question is how do we deal with
7 it? My learned friend wants a bit more time. I hear where he's coming from but he
8 has had some time to sort this out. We are now six weeks after the judgment in
9 *PACCAR*. We don't have any revised funding arrangements before the Tribunal.
10 I won't say anymore about it now. Plainly it can't be certified until we have proper
11 funding arrangements in place.

12 One way to deal with it would be to either impose some sort of timetable for the PCR
13 to provide arrangements for us to respond, etc, and it can be dealt with that way and/or,
14 depending how long it takes the Tribunal to put together a draft judgment, it can be
15 dealt with either at the same time or after that draft judgment.

16 Clearly, if it is not in place at the time of judgment hand down, any judgment hand
17 down would have to be contingent or provisional, or whatever the right word is. I am
18 not sure there is anything particularly controversial there.

19 **CHAIR:** Yes.

20 **LORD WOLFSON:** CMA material. The relevant dates are these. On
21 9th February 2018, that's the date of the first information notice from the CMA, i.e., the
22 investigation opens.

23 About six weeks later, 21st March 2018, we provided our primary response to the
24 information notice. We annexed about 60 documents to that notice. They are mostly
25 contemporaneous, for example, support pages, terms and conditions and a handful of
26 documents which are created for the purpose of responding to the CMA's request for

1 information, service events data and such like.

2 On 27th November 2018, the consultation letter comes out, i.e., roughly eight months
3 following the provision of the documents.

4 Now, I just make two other points on that. First of all, if the CMA had thought --

5 **CHAIR:** No interviews or anything or --

6 **LORD WOLFSON:** No. There was a meeting. There was a meeting.

7 **CHAIR:** One meeting at some point. Okay.

8 **LORD WOLFSON:** If the CMA had thought there was something in our
9 documentation or frankly something they got from anybody else, we would say, which
10 was really, really problematic, and they thought: "Oh, my God, what on earth does
11 Apple say to this, because on its face this is devastating", well, they didn't come back
12 to us and ask us. I appreciate that's a bit of an argument from silence, but it is the
13 fact. They didn't come back and ask us anything.

14 The second point and this is relevant to the certification stage, when you are thinking
15 well, what documentation will there be out there? Any documentation which the CMA
16 got from third parties they didn't give to us. When you are thinking "what disclosure
17 will there be", in other words will disclosure from Apple in this case provide the PCR
18 with all the material that the CMA got from third parties --

19 **CHAIR:** You are not holding any?

20 **LORD WOLFSON:** We haven't got it. So that's the CMA, unless there was anything
21 else on that.

22 **CHAIR:** No, that's helpful.

23 **LORD WOLFSON:** I should say that when I refer to third party information, there may
24 be some. There may have been some. There may be not. We don't have any reason
25 to believe there was any.

26 **CHAIR:** You will not be providing it.

1 **LORD WOLFSON:** Even if there was, we haven't got it anyway.

2 Now, UPOs and iPhone 5 devices.

3 **CHAIR:** Yes.

4 **LORD WOLFSON:** The position is that iPhone 5 devices could experience UPOs, as
5 a matter of theory.

6 **CHAIR:** Sure, yes.

7 **LORD WOLFSON:** And in extreme cases practice, but the critical point is, and I think
8 this was really the burden of your question, there are various differences between the
9 5 and the 6 which explain why the rate at which the UPOs might arise on one device
10 are different from another.

11 First of all, the set of apps that can be used is different, and in particular the features
12 within those apps that can be used is different. So when you talk about, you know,
13 app X -- I can't use X anymore after Elon Musk has just --

14 **CHAIR:** The alphabet --

15 **LORD WOLFSON:** I will have to use Y now. I only realised that as I said it. It is
16 available on 5 and 6. Although it is called app Y, the features within it may be different
17 on 5 and 6, so it's not as straightforward as saying can you use app Y on a 5 and on
18 a 6? So there are some apps and features of apps that could be used on the 6 which
19 couldn't be used on the 5. That was the first reason.

20 **CHAIR:** One of the challenges that the PCR is going to have to meet, if this goes
21 ahead, is to when they are saying that promises that 6 is better to 5, I mean, there are
22 going to be lots of differences --

23 **LORD WOLFSON:** Precisely. I made some other points earlier, but absolutely.

24 **CHAIR:** At the moment we don't know -- it is unfair, because this is a new question to
25 answer in any detail, but in terms of the Snapchat and contemporaneous video editing
26 and everything, you are not in a position to tell me today the extent to which --

1 **LORD WOLFSON:** I am not. One would have to look at that in some detail. For the
2 purposes of today, if I can put it this way, if the Tribunal is with me on my arguments,
3 I don't need that point. If the Tribunal is against me on my arguments, that detail is
4 not going to help.

5 The second point, the apps and features within the apps is important. The second
6 point, that there are other hardware differences that can affect the range of power that
7 could be demanded. For example, the 5 has got a screen which is significantly smaller
8 than the 6.

9 **CHAIR:** A whole bunch of hardware and software differences --

10 **LORD WOLFSON:** The range of power, exactly. Going on from there, if I can just
11 take a moment and I will sit down, that's why we say it is wrong to say that the iPhone
12 6 battery is inappropriately spec'd in any material sense.

13 I mean, maybe the iPhone 6 could have had a smaller screen. Maybe if it had a
14 smaller screen, UPOs would have been less of a problem or maybe they'd have
15 arisen, you know, further into the future. But, you know, if it had a smaller screen, then
16 the reality is that for that initial period of ownership, in the counterfactual, people would
17 have an iPhone 6 which is inferior to the real world iPhone 6 because it is has got
18 a smaller screen, and, you know, maybe we could have put a bit bigger battery in it.
19 Okay, fine. But if it had a bigger battery, it would have been bigger. That means you're
20 carrying round a bigger phone for the initial period of ownership as well.

21 This goes back to the trade-offs, but the central point is all of this shows that the
22 language of inappropriately spec'd, when you really think about it, is meaningless
23 because it is all essentially a trade-off and design choice.

24 **CHAIR:** Engineering is all about trade-offs.

25 **LORD WOLFSON:** Exactly. There is nothing in the evidence, whether the factual or
26 expert evidence, that providing an iPhone with different specs would have been better,

1 even using that word in its broadest sense, for consumers, because if you have fewer
2 UPOs, do you want to carry round a bigger iPhone? Do you want an iPhone with
3 a smaller screen? What is better in this sense? Certainly not better in any meaningful
4 competition law sense.

5 On that rather philosophical note, unless the Tribunal has any further questions, I was
6 going to sit down.

7 **CHAIR:** Thank you.

8 **LORD WOLFSON:** I am grateful.

9

10 **Reply by MR MOSER**

11 **MR MOSER:** Right. Do I take it you are planning to sit to about 4.30?

12 **CHAIR:** We may be able to sit a little longer. How long are you planning on being?

13 **MR MOSER:** I don't have very much actually. I imagine I am not going to need much
14 longer than 4.30. Maybe slightly longer.

15 **CHAIR:** If you need ten minutes more, that's no problem.

16 **MR MOSER:** I am grateful. See how we go.

17 I propose to reply to my learned friend's points broadly in the order in which he made
18 them in the traditional way, although I sense that perhaps some are going to be of
19 more interest to the Tribunal than others and we will be guided by the Tribunal.

20 **CHAIR:** We will push you along where --

21 **MR MOSER:** Indeed. Push me along or tell me you don't need to hear on something.
22 That will be even more welcome.

23 There's the initial skirmish at the beginning of Lord Wolfson's submissions today where
24 about the first half hour or so was spent going through our pleadings and certain
25 disagreements.

26 Now, I have an overall submission on that, which is that about the half hour mark, sir,

1 you pointed out to Lord Wolfson how the Tribunal appreciated our case was being put,
2 and I had no difficulty with that. So I do not perceive there is a pleading problem with
3 the way the case is understood.

4 There are perhaps a number of points that I feel I ought to make, in fairness to
5 everyone who both started pleading this and then all of us in due course. For instance,
6 there is the point about technology that was made in relation to what was amended
7 out of the particulars of claim. You will remember we put a line through that thing that
8 said that one of the aspects of the abuse was the fact that technical innovation or
9 technological development was affected.

10 Lord Wolfson alighted on that rather as he did in the first skeleton, and he said: "Aha,
11 there you are. They are no longer relying on technical problems".

12 That is, of course, not at all how that is to be read.

13 **CHAIR:** I mean, as I understand it, the case has evolved.

14 **MR MOSER:** It has.

15 **CHAIR:** And transparency is a necessary element of your case.

16 **MR MOSER:** Yes, it is.

17 **CHAIR:** It is a single and continuous -- you don't look at transparency in isolation,
18 whether from the point of liability or for assessing quantum, and I think we understand
19 that I think.

20 **MR MOSER:** That's fine. There is nuance to that. He is right to say some of it was
21 reactive to what they produced. For instance, on that technology point, they said: "No,
22 no. We think that means third parties' development technology". We considered that
23 and said: "That's probably right. We don't need it". It has developed, as you say.

24 There is a constant, of course, niggling difference between us where understandably
25 Apple wish to salami-slice the abuse and then isolate bits of the single and continuous
26 abuse and say: "Oh, well, it is not that and it is not that and it is not that". That's why

1 we say it is all of it together. You were absolutely, with respect, right to identify as the
2 keystone of that structure the transparency. That is the glue that sticks all of these
3 things together, even if it is the whole that we are always looking at.
4 I don't have to go into all of that or the arguments around by itself and all the rest of it.
5 We then come to the question of the standard. I have detected I hope rightly that there
6 is no great difference between us on the standard. It seems to me what's really going
7 to be at the heart of the Tribunal's decision around this is whether there is some basis
8 in fact for what we say was a material effect and for what they say was not. The
9 nuances of that can't possibly be for this stage. It can't possibly be for certification as
10 to whether it mattered that something lasted two seconds or three seconds, whether
11 that was sufficient to show the abuse. It can't possibly be for now to speculate on
12 whether there was a wider effect, maybe a cumulative effect, of all of the different
13 usage of the apps and so forth.
14 What matters is whether we have established that there is some basis in fact for saying
15 that the performance of scrolling, the performance of opening of apps, the
16 performance of opening Safari, whatever it is, was materially affected.
17 We rely, of course, for that purpose very heavily on the evidence that has emerged
18 that shows the significant reduction in percentage performance of phones, that yes,
19 will eventually affect all phones. Something we had been saying before but had not
20 previously been apparent.
21 I showed you the CPU throttle table and I showed you the columns and the rows and
22 how that worked, and the fact that there is another semantic difference between Lord
23 Wolfson and myself on what exactly may or may not be said to be the standard, if we
24 are saying something is sub-standard, is -- again it is more perceived than real.
25 I have explained where I have said if one is seeking a standard, that standard ought
26 to be drawn, and I have done that by inference as to what we say would have been

1 the previous performance and then the performance of the iPhone 6.

2 A lot has been said, especially at the end and in response to your question, sir, about
3 what would the performance of the iPhone 5 really have been. Again, we don't know.
4 We have not got that evidence. They have not chosen to put that in their disclosure
5 as to exactly what that performance would have been.

6 In the same way, we don't know what the evidence is of user experience, of user
7 impact and hence the question of two seconds, three seconds, 8 seconds,
8 four minutes, whatever it might be. How much does that matter? We don't know,
9 because even in response to the disclosure, which quite rightly at the disclosure
10 hearing, sir, you pointed out it is without doubt there will be documents other than
11 those to have been disclosed, and I think Lord Wolfson put it very fairly when he said,
12 it is clear that if there were documents, some would have been produced. We know
13 and it must be right that many have not been produced. We know of the 6 million in
14 the United States. There are the other actions in Canada and so on where there will
15 be further disclosure. We know from the disclosure that has been given that there was
16 diagnostic testing.

17 So we know that more is yet to come. We know we have not yet seen what their user
18 experience evidence is, but I can say this to the Tribunal. If they had evidence that
19 the user experience was "there's no problem", they would have produced it, and we
20 have had nothing like that, even though we have had a number of witness statements
21 from Mr Crumlin and Dr Rahn and others.

22 I know that Mr Crumlin has said in his Witness Statement in his opinion that this was
23 somehow not material, but that's we say/they say. That's classically a matter for trial.
24 So we know that there is further evidence that is yet to come, and that we have not
25 seen, and we know this. Forgive me while I find my place. We know what happened
26 is what set all of this off was the Geekbench data that we saw as the only thing that

1 was in the public domain at a very early stage of these proceedings.

2 There has been some criticism of it is just data from a website. Mr Sinclair says in his
3 statement yes, it is from a website but it was the best available public data at that time.
4 That was in his second statement. I will just give you the reference. It is in Bundle A,
5 Tab 6, page 327 at paragraph 21. Best available public data.

6 In his third statement, at supplementary Bundle Tab 7, page 260, at paragraphs 8 and
7 9, he is then able to go further. I would just like to turn up the supplementary bundle.
8 That is Supplementary Bundle 1, the one for this hearing at Tab 7, and within it at
9 paragraphs 8 and 9. This is because some aspersions were cast on Geekbench.
10 What we see is when we got the disclosure, the important disclosure in relation to the
11 RA and chemical ageing and the Apple CPU throttle table, we see that table on
12 page 260 where the Geekbench findings and the Apple internal findings are put in side
13 by side. The people at Geekbench were remarkably accurate.

14 **CHAIR:** (inaudible) pulling data off websites. You have got the Apple data now. Why
15 are you even looking at the Geekbench data?

16 **MR MOSER:** Two reasons. The first is to explain partly why this has been
17 a developing picture, because really if we don't look at this with hindsight, I just remind
18 everyone in this way, that at the beginning we only had this to go on.
19 The second is because I wanted to perhaps out of deference to Geekbench wanted to
20 say they are more than just a website. Can I show you one more thing to put in context
21 what Geekbench is.

22 **CHAIR:** Do you need to rely on Geekbench, given that you have data from Apple?
23 Are you getting something out of Geekbench that you are not getting out of the Apple
24 data that I have in mind?

25 **MR MOSER:** I am going to show you one more thing and then we will see whether
26 you find it of use. I am afraid this is going to require us to go into the soft copy, the

1 | online version of things, but I can read it out, sir. It's not long.

2 | **CHAIR:** Which bundle.

3 | **MR MOSER:** This is at Bundle B, page 1369. It's a report of the Standing Committee
4 | on Industry, Science and Technology of the House of Commons. That's the House of
5 | Commons in Canada.

6 | **CHAIR:** I am with you.

7 | **MR MOSER:** It starts at 1369. It is the evidence to the Standing Committee. Two
8 | pages further on we see what it is. It is a session on 1st March 2018. Two further
9 | pages on, 1373, we see the next witness is the Chief Executive of Primate Labs or the
10 | founder and President of Primate Labs, a software company based in Toronto, called
11 | Mr John Poole. It is Primate Labs that develops Geekbench. He explains that. If we
12 | look at the left-hand column, under his name Mr John Poole, next paragraph:

13 | "Primate Labs develops Geekbench, which is a cross-platform benchmark available
14 | for Android, iOS and other platforms. Geekbench provides an objective measure of
15 | performance for devices and computers. It reports this performance through a score
16 | .These scores are calibrated against a baseline machine", and so on.

17 | It is explained at the bottom of that page that they have about 400,000 to 1.1 million
18 | results each month from their users, and they are able to take them and publish them
19 | to the public in general.

20 | **CHAIR:** This is exhibited, is it?

21 | **MR MOSER:** It is. It is not printed out. This is the exhibit to Mr Harman's report. Is
22 | that right? I am just looking at it in context. It is B -- whose exhibit is this? I think it is
23 | Mr Harman's report. Somebody will tell you.

24 | **CHAIR:** You say you have randomly produced a document which gives some
25 | indication of its provenance --

26 | **MR MOSER:** Yes, and it is also useful to see how even experts like Geekbench were

1 initially in the dark about this. The next column he talks about how in approximately
2 September 2017 they started receiving complaints from Geekbench users. Their
3 phones felt slow. These reports were also backed by reduced Geekbench scores.
4 "Normally we can identify cause. In this case we were unable to determine the cause.
5 We initially assumed it was due to a software update, iOS 11, that Apple released at
6 approximately the same time", and so on."

7 Then further down:

8 "However in December 2017 we came across a Reddit post with the title 'PSA: iPhone
9 slow? Try replacing your battery!'"

10 We have heard about that Reddit post before. It was that Reddit post that led Apple
11 then, within days of the Reddit post appearing, to issue the apology in December 2017.
12 That's the Reddit post that said "PSA: iPhone slow? Try replacing your battery!" which
13 contained the quote "Apple slows down phones with low capacity batteries, replacing
14 it"-meaning the battery- "makes them full speed again."

15 Then he explains how Geekbench changed their theory. So there is a lot in here from
16 the story we have been hearing, and a lot of things that I say one draws from that,
17 including the reactivity of Apple, how within days of Reddit they come out with their
18 apology, but also how we have the internal evidence from Apple now, the earlier
19 evidence from Geekbench. All of that we say is valid primary fact.

20 Geekbench is in its own way, a form of primary fact, because it is based on over
21 1 million people sending in their data.

22 What we also have here is the evidence of complaints. It is not that nobody was
23 complaining about it and that everyone was silent. Indeed, we know, of course, from
24 the whole history of this that by the time of the Apple apology in December 2017 there
25 had been lawsuits brought in the United States. We see that in the excellent Guardian
26 article that my learned friend handed up today, dated Friday, 29th December 2017,

1 Patrick Greenfield writes in the Guardian:

2 "At least eight separate class action lawsuits have been filed in the US in relation to
3 the admission."

4 So immediately upon the apology, lawsuits came out. So there is a direct interplay
5 here between what Apple says and does and what its consumers do, which is why we
6 say that you have a company that's extremely reactive to what its customers do.

7 That's not speculation. That is all stuff that happened in the real world.

8 We have these matters and, of course, sir, we know where all of this ends up. It ends
9 up with the undertaking given by Apple to the CMA or extracted by the CMA from

10 Apple. We know what -- we know two things. We know what the undertakings say.

11 Can I just ask you one more time to turn up the CMA undertakings, which are at
12 Bundle B, Tab 8, page 1007.

13 **CHAIR:** Bundle B, Tab 8.

14 **MR MOSER:** Bundle B, Tab 8, page 1007. "Our reliance on this undertaking is
15 illogical. In fact, it supports its case that the December 2017 apology was
16 an appropriate cut-off date", but I leave that to one side. It says that partly, if you look
17 at it, because Lord Wolfson recently pointed it out: "Apple will maintain prominent
18 information." He says he reads that as suggesting that prominent information already
19 exists. I respectfully disagree, not least because the rest of that paragraph is in the
20 future tense:

21 "webpage(s) will provide guidance.... The webpage(s) will also describe the
22 operation" of performance management and so on.

23 **CHAIR:** (inaudible).

24 **MR MOSER:** I am so sorry. I am told that's the online version. It is apparently also
25 in the Monday bundle.

26 **CHAIR:** We can look at it here if that's more convenient. I just wanted it for my notes.

1 **MR MOSER:** It is Tab 25 of the Monday bundle, page 286. We know it ends up with
2 the summary of undertakings that the CMA has imposed in lieu of taking other
3 enforcement action. What we see in the second paragraph of the summary of
4 undertaking is:

5 "The CMA accepts these undertakings on the basis of Apple's assurances as to:
6 (i) its future conduct regarding material issues affecting the performance of iPhones,
7 and (ii) steps it has already taken to improve the provision of clear, unambiguous,
8 timely and easily accessible information to consumers."

9 Further in -- I have dealt with 1. Further in 2 it is said:

10 "If a future iOS update materially changes the impact of Performance Management
11 when downloaded and installed on an iPhone, Apple will notify Consumers in a clear
12 manner of those changes in the installation notes for the update."

13 So here is an undertaking that to some extent is the result of give and take between
14 the CMA and Apple, and it is based on the premise that there was a material issue
15 affecting the performance of iPhones and that the iOS update materially changed the
16 impact of the PMF. It is the conclusions of the CMA. I do rely on that.

17 My learned friend made a second attempt to rely on *Qualcomm* to say I can't rely on
18 anything the CMA did. As far as the undertaking is concerned, he can't do that at all.
19 The undertaking I think is my bedrock.

20 In addition we have, of course, the CMA report which has now been disclosed which
21 we have -- can you remind me where it is? It is in the Supplementary Bundle at
22 Tab 46. I do just want to come to it briefly.

23 **CHAIR:** Is it the Monday bundle, as people call it?

24 **MR MOSER:** No, it is Supplementary Bundle 1.

25 **CHAIR:** Sorry, which tab?

26 **MR MOSER:** SB1, Tab 46.

1 **CHAIR:** Yes.

2 **MR MOSER:** I have taken you through this in my submissions. I just want to reiterate
3 what I said about the law on this, which is that we prefer the more recent findings of
4 the Court of Appeal in *Evans* and the reference back to *Le Patourel*. I have given you
5 that, which I say quite clearly indicate that the CAT can take this into account in its
6 discretion, if it wishes to do so, and I say it should wish to do so, because whatever
7 the information is, and it is said by Lord Wolfson "Well, if there had been truly relevant
8 information, it would, of course, have been picked up by the disclosure order." But we
9 have simply not seen what the underlying information is. We have not seen what the
10 third party information was, and at trial or prior to trial we would ask, of course, this
11 Tribunal to ask the CMA for assistance in this matter, as it has the power to do, so we
12 would see all of the information that the CMA had on which to base its findings with
13 regard to transparency, and all the matters that I don't read out, because this is
14 confidential.

15 I do say that even on the face of this document there seems to have been a little more
16 by way of information passing from Apple to the CMA than my Lord, Lord Wolfson,
17 indicated a few moments ago.

18 Just looking at the footnotes, yes, there is at page 618 to annex B the Apple response
19 to the CMA, dated 21st March 2018. There was also apparently over the page at 4 --

20 **CHAIR:** I beg your pardon. Which page?

21 **MR MOSER:** 618. I think we heard about 21st March 2018 one. That is in footnote 3.
22 There was also apparently a response dated 15th June 2018 in footnote 4, a response
23 on 4th July, page 620, footnote 6, and there was I think also something in February, if
24 I can just -- yes. There was also a response we have not yet heard about on page 625,
25 Apple's response to the CMA, dated 26th February 2018.

26 **CHAIR:** In terms of third party information where do I get that from? You referred to

1 third party information.

2 **MR MOSER:** I got that from Lord Wolfson. He indicated that any third party
3 information, if there was any --

4 **CHAIR:** There is no indication from this document whether there is third party
5 information?

6 **MR MOSER:** No, there isn't, but it would not be unusual.

7 **CHAIR:** No, of course not.

8 **MR MOSER:** In particular, one may speculate that the impetus for the investigation
9 must have come from somewhere.

10 So in summary we reiterate that there is ample evidence before the Tribunal, even on
11 what we do say, and not lightly, what we do say is limited disclosure, ample
12 information, that there was a considerable slowing down of the iPhones. It is after all
13 the premise for all of the class actions that we have seen in the United States, the
14 investigations that were carried out in France and in the United Kingdom and
15 elsewhere. We have pleaded the fact that, of course, without any admission of liability
16 the US proceedings were settled at a very high figure. All of that is part of the
17 evidential background to this. It is not by any stretch fanciful to say that there was
18 a problem with the slowing down of the iPhones that would have been felt by the users,
19 and we say it is plain that there is some basis in fact, more than we need for present
20 purposes, for that.

21 As to exactly how material it is, that is something that this Tribunal is obviously in no
22 position to find at this stage. I don't invite you to make such a detailed finding.

23 You have pointed out it is, in fact, unusual to have this extent of technical expert
24 evidence at this point. It is unusual. We have more than one might otherwise perhaps
25 expect.

26 So I take that as being my overall response to the point about material effect and about

1 primary facts. I don't know whether the Tribunal has any further questions on that.
2 If not, I am going to move on, if I may, to the other points that my learned friend had
3 and in particular the questions of methodology and the other strike-out points made at
4 the end. Forgive me. I will just see where the next point was. The next point was
5 methodology.

6 I may, in fact, when I was opening this case have overstated the extent of the
7 objections that I detected Apple had to our methodology, because I had perceived that
8 there was a much broader attack on the mismatch between what they say is the
9 alleged mismatch between our methodology and what Mr Harman was assessing.

10 Now, as I listened to my learned friend's submissions, it boiled down again to
11 a semantic point, the difference between "would" or "should". He makes an attractive
12 point right at the end of his submissions to say that's the difference between a legal
13 obligation and a factual consequence. Of course, that's also where he started.

14 But as far as our counterfactual is concerned, I did not in the end understand him to
15 be saying that Mr Harman had misunderstood the counterfactual at all. There was
16 a development between the first report and the second report and we've discussed
17 the way that the case moved on when we considered the response and the
18 amendments that you have seen.

19 **CHAIR:** What's the position -- so I understand, let's assume we are against you on
20 your case that there's a legal claim -- I don't say we are against you. Park that -- that
21 consumers weren't informed and they may have some legal form of redress, be it
22 misrep or -- let's ignore those and then look at the case where there has been an
23 abuse in the sense of failing to inform consumers.

24 **MR MOSER:** Yes.

25 **CHAIR:** -- as a result of which they have stuck with Apple rather than -- as a result of
26 which Apple's goodwill has not been damaged, because people don't know what's

1 going on.

2 How does one assess damages in those circumstances?

3 **MR MOSER:** Sir, the first point, and I have just made it, that is the methodology at
4 which Mr Harman's report is aimed, and that's the methodology that we are pursuing
5 at least on the basis of what has now been parked. So that is that part.

6 There is no disconnect between what we are saying and what Mr Harman is saying.

7 So that's the first point, important because that's what I thought was the strike-out
8 point. So really we go back to the question of how realistic is our counterfactual, and

9 we say certainly for present purposes it is extremely realistic to assume that in a world

10 where there had been complete transparency in the way that Mr Harman describes in

11 his second report, in other words, Apple will have come out and said: "Look, we have

12 done this. This is the situation", they would have felt compelled to provide the sort of

13 redress that we posit, as in my learned friend's words, as a consequential matter.

14 We say that for the reasons that I have already set out. It is clear that they are very

15 sensitive to consumer reaction. When they thought, for instance, that there was

16 a defect -- I know to some extent this is considered a red herring, but there's that small

17 cohort of people who got a replacement battery immediately, when it was felt that there

18 was a defect, and I think we now all agree that there was a manufacturing problem.

19 So when that arose, indisputable problem, Apple's reaction "have a new battery".

20 My argument and why I do say it is not completely a red herring is that in my

21 counterfactual everybody would realise that the problem was of the like magnitude, as

22 though it were a manufacturing fault, because everybody would say -- everybody

23 would know what we now know, which is that you either have the UPOs that may

24 render the phones unusable, in the words of --

25 **CHAIR:** Sorry. My question may not have been precise enough. Let's assume that

26 Apple don't wish to be -- this is absolutely an assumption -- I am hypothesising -- Apple

1 were not full and frank in their dealings with their customers. They didn't explain what
2 the PMFs were for, because they thought that would set hares running or not be
3 a good thing to have discussed openly and may damage their reputational goodwill.
4 Let's just assume that was the case. But in practice -- and one might say that in law
5 that's abusive. Let's assume that of itself is abusive. So someone in a dominant
6 position, they are not disclosing the problems with their phone.

7 **MR MOSER:** Yes.

8 **CHAIR:** And they are not being transparent. Let's assume that amounts to an abuse.

9 **MR MOSER:** Yes.

10 **CHAIR:** But let's also assume that that doesn't give rise in practice or as a matter of
11 law to claims against Apple, so people are not going to write into Apple and say "You
12 owe me some money", either under a warranty or at all. What happens then? So
13 there has been abuse. Apple is perhaps, it might be said, preserved a market position
14 it is not entitled to preserve, because had it been more open, people might
15 have -- proportionate people might have gone to other phones or not bought new
16 Apple phones. How do we -- because we are not concerned with damage to Apple's
17 rivals; we are concerned with the consumer of the phones. How does one even begin
18 to assess damages in that circumstance? How would you do it?

19 **MR MOSER:** I understand. We are dealing with the logically prior point just before
20 the point I was just addressing.

21 **CHAIR:** Yes.

22 **MR MOSER:** To make this work we have to assume that at this stage there is
23 transparency. Until there is transparency, the abuse is still in place. So we continue
24 on in the timeline. Apple have not fessed up and still abuse. So nothing new happens
25 in the counterfactual.

26 When they make the full announcement of the kind that the CMA indicate ought to

1 have been given, so when they are completely transparent about the problems, at that
2 point we say a likely outcome is that they would have given redress alongside it.

3 However, if they didn't do that --

4 **CHAIR:** Let's assume they have been open from the outset.

5 **MR MOSER:** Well, if they have been open from the outset --

6 **CHAIR:** Pick a date they have been open from the outset. When that was released,
7 when 10.1.2, whatever it is, was released, they had made an announcement: "This is
8 why we are doing it, because we have got problems with UPOs and this will fix it, we
9 think. Your phone will run a bit more slowly".

10 **MR MOSER:** That is interesting. That is not our counterfactual, of course.

11 **CHAIR:** I am trying to get to how the -- I am less concerned with the details of the
12 counterfactual than as to how the assessment of damages would work. So then the
13 consumer wouldn't make a claim, whether they couldn't or wouldn't make a claim --

14 **MR MOSER:** In your example, Chair, what we say is in the actual what would have
15 happened is that the market would have adjusted to a realistic level. People wouldn't
16 have bought the phones or they would have not wanted to pay the full price. The
17 market would have adjusted and there would have been the appropriate price for an
18 iPhone that was at that standard.

19 **MR RIDYARD:** How do you address Apple's point that this happened in
20 December 2017 and there was not this readjustment?

21 **MR MOSER:** It didn't happen in December 2017. It is a point that is specious, with
22 respect, in that it is initially attractive but it didn't fully happen in December 2017,
23 because for reasons we have not really reached, because I have not addressed you
24 on the December strike-out, we say, and it is all set out in our skeleton argument, the
25 December apology was simply insufficient. It wasn't published in a prominent place.

26 **CHAIR:** It was not prominent enough, that is your point.

1 **MR MOSER:** The content was not prominent enough. Yes, they had as a bullet point,
2 broadly speaking, all of the issues that might be said to be included, like speed and all
3 the rest of it, but didn't explain in the detail that was necessary what the problem
4 actually was. I mean, we have had disclosure and we have had expert reports and
5 we are still not completely at --

6 **CHAIR:** Going back to my question, what happens as a matter of fact, if Apple had
7 been abusive, they obtained a benefit with no damage to their goodwill, but consumers
8 wouldn't have sought to exercise warranties or to seek reparations from Apple. Does
9 that mean there's a finding of abuse and no damage?

10 **MR MOSER:** No. There would have been an uprising of consumers. There would
11 have been the lawsuits.

12 **CHAIR:** I am assuming there wouldn't. If on the facts there would have been, fine.
13 Let's assume on the facts for the moment -- indulge me -- that consumers may have
14 thought "Apple is not the company I hoped it would have been". On the counterfactual
15 they have now been told and they are disappointed with their UPOs and their PMF.
16 They are a bit disappointed, but they are not so disappointed as to make claims
17 against Apple, legal claims. I don't quite know how we could end up in a situation
18 where there is abuse but there's no easy way to calculate damage. How would you
19 go about calculating damage in those circumstances?

20 **MR MOSER:** It becomes difficult, because we are now imagining counterfactuals that
21 are other than actual counterfactuals, as it were, if that's the right phrase.

22 The way our case works is that we say if full disclosure had been made at
23 an appropriate time and in an appropriate form, which, for instance, didn't happen in
24 December 2017, then there would have been the necessary consumer reaction to
25 cause Apple to react in turn. We have seen how reactive Apple can be. As soon as --

26 **CHAIR:** You may be able to prove on enquiry that Apple would have sent everyone

1 a cheque for £50. All right. Then there's no problem about calculating damages. I am
2 just hypothesising a fight which is not altogether unrealistic, if these are relatively small
3 differences, noticeable but relatively small differences in the performance of the
4 phone, and the facts are that Apple wouldn't voluntarily offer compensation, and
5 equally well consumers or the vast majority of consumers wouldn't have sought
6 reparations. Where does that leave us?

7 **MR MOSER:** We have what happened in the actual to guide us. So I've stressed the
8 reactivity -- for instance, we saw today --

9 **CHAIR:** No. This is assuming that Apple were transparent from the outset. It may be
10 there is not a ready answer to that.

11 **MR MOSER:** I mean, the ready answer to that is --

12 **CHAIR:** You are being shown a piece of paper. I don't know if that helps.

13 **MR MOSER:** I know about the piece of paper. I am about to come to that. The
14 problem is I can't get to the piece of paper because of the questions. I will try and
15 come to it.

16 The problem with what you're putting to me is it's not our case that this should have
17 happened, would or should have happened at the outset, because, of course, our case
18 is based on an abuse that involves a lack of transparency and the time period --

19 **CHAIR:** The counterfactual is that Apple should have been open at all times.

20 **MR MOSER:** If Apple had been open at all times, there may be an argument that this
21 is *de minimis* and that abuse never really arises, and people would have been able to
22 take an informed decision at the time not even to buy their first iPhone. It does take
23 me very far away --

24 **CHAIR:** Maybe today is not the day to pin this today, but if this case proceeds, if this
25 case proceeds, this is going to need grappling with I think because it's certainly not
26 an unrealistic possibility I am putting, that the court doesn't say that these changes to

1 the phone were so bad that people would rise up and issue claims against
2 Apple -- consumers I am talking about. There is a possibility the result would be that
3 people would be a bit miffed but do nothing. Apple, nevertheless, having been
4 dominant, gets a big boost, because it has protected its goodwill, and actually, in those
5 circumstances, the companies suffer, the competitors, not the consumers, but the
6 competitors. Therefore, would there be a claim in a class action for damages, so at
7 some point I think that might require some thought. It may be the facts never come
8 close to that, in which case it's a puzzle we don't have to grapple with.

9 **MR MOSER:** Indeed. I don't think the facts would come close to that, but, I mean,
10 I welcome the point. It gives us something --

11 **CHAIR:** You both agree on that for completely different reasons.

12 **MR MOSER:** -- to think about, but it is a middle ground. However, it is not the pleaded
13 counterfactual.

14 I want to say at least two things about the pleaded counterfactual.

15 **CHAIR:** Your pleaded counterfactual?

16 **MR MOSER:** Our pleaded counterfactual. The first thing is they have not specifically
17 attempted ever to strike out the counterfactual. I know they say they want to strike out
18 everything now, on the bandwagon basis, but the only specific strikeouts in relation to
19 post 2017 and methodology -- never have they attempted to strike out the
20 counterfactual itself.

21 **CHAIR:** No, but I expect your case is that you are going to be held to give precise
22 terms of your counterfactual through the rest of these proceedings. You may well
23 have to refine it as the nature of the abuse, if any, were to become, assuming this
24 progresses, were going to become apparent.

25 **MR MOSER:** Exactly.

26 **CHAIR:** You don't want to be banging the table metaphorically to be saying: "We

1 have to be held precisely to our counterfactual".

2 **MR MOSER:** Precisely. We do draw, as I say, from the actual, for the purposes of
3 the counterfactual. That's the document people are very keen I should show you. It
4 is one you have seen, because it is Mr Sinclair's second statement at Tab 4 of Bundle
5 A.

6 **CHAIR:** 4 of?

7 **MR MOSER:** Of Bundle A.

8 At page 232 you will see that -- you remember that at paragraph 123.

9 **CHAIR:** Sorry. I am slow catching up. 232. Yes.

10 **MR MOSER:** There is a useful summary of all the things that happened in the actual,
11 when either Apple or the other manufacturers were faced with battery problems. There
12 you can see at 123 I have addressed the unplanned effects that happened. Suddenly
13 experiencing a shorter battery life. There was a battery replacement programme free
14 of charge launched by Apple. There is at B mention of what happened in relation to
15 the MacBook -- I will not read it all out -- and at C in relation to another company.
16 There is some of what I say. It is not just me saying it, in other words. We have got
17 in evidence how reactive these companies are. That is to their credit.

18 **CHAIR:** I understand. As you rightly said, that was not really the point I was on. On
19 the one hand, Lord Wolfson said the proof of the pudding is in the eating. Actually, no
20 one really cares that much. A few of them might buy a new battery but that is really it.
21 On the other hand you are saying they will rise up. I am just saying at some point we
22 may have to grapple with the middle ground, if this progresses.

23 **MR MOSER:** There is a lot to say about the December apology, not least it happened
24 on 28th December, when people's minds are elsewhere and it happened at a time
25 when the iPhone 8 had already launched. So it was too little, too late, because we are
26 really dealing by then with the next generation. So this ought to have happened when

1 the iPhone 6 was current, maybe when the iPhone 7 was current. So the apology, the
2 transparency earlier, much greater. By the time of the CMA undertaking, not wishing
3 in any way to criticise the time taken or the findings, but really by the time of the CMA
4 undertakings, it wasn't a very onerous undertaking for Apple to agree to, because by
5 then the horse had bolted and we are really dealing with operation stable door by the
6 time of round about 11.3 and the undertaking.

7 So all of that goes into the mix. I don't know whether you want me actually to address
8 you on the December apology.

9 **CHAIR:** I think we understand your point. Your key point is we don't --

10 **MR MOSER:** I repeat that, of course, the CMA found the December apology
11 inadequate, otherwise we wouldn't have had the 2018 undertaking.

12 **CHAIR:** I think there is much shaking of heads.

13 **MR MOSER:** Solicitors for Apple say, "No, it doesn't say that".

14 **LORD WOLFSON:** There is really absolutely no basis for that. We are in open court.
15 There is simply no basis to say that when one actually looks at the CMA materials.
16 We do have to draw a line somewhere and I think that might be a good place to draw
17 it. We are in open court. To say the CMA found there is something inadequate, they
18 just didn't. We can look at the materials again. We can have a nice argument about
19 what the word "maintain" means. I have made my submissions on that and I think it
20 is clear. The idea there is something negative said is well over the line.

21 **MR MOSER:** I am simply going to ask the Tribunal to read paragraphs 41 to 44 of the
22 consultation letter and leave it at that.

23 So that's I think all I want to say about the 28th December 2017 apology, although
24 Lord Wolfson is right to say, in a sense, these things are all of a piece, his strike-out
25 of the December apology and his attack on the methodology.

26 In the end, where we ended up this afternoon with my learned friend's attack on the

1 methodology is that I didn't in the end perceive him to really be submitting with any
2 force that Mr Harman had misunderstood our case on the counterfactual. So that
3 really falls away. So what you're left with effectively -- maybe I am
4 overstating -- effectively it is Lord Wolfson saying "I don't agree with your
5 counterfactual" and we say "Well, we maintain our counterfactual".

6 As you rightly say, a counterfactual can be a moving feast. Importantly,
7 a counterfactual is partly law as well as fact. So counterfactual is not the sole preserve
8 of an expert. Lord Wolfson generously says he is not criticising Mr Harman. Too right
9 he isn't because the counterfactual is something he has taken from us.

10 **CHAIR:** That's what Lord Wolfson said.

11 **MR MOSER:** He has understood it correctly. Therefore, his methodology is directed
12 at the right thing. So really in the end I didn't understand what part of the challenge to
13 the methodology really survived in a strike-out sense.

14 There were a few other things that were said. There was a reference, for instance, to
15 *Meta* and reliance as a matter of law. I don't know whether you want me to go there.
16 I must disagree with my learned friend as to the relevance of paragraph 32(2) of *Meta*.
17 That's the part where the CAT said: "This is not really a competition law case", and in
18 dismissing it discussed how reliance by consumers would have to be shown. That
19 can't be, if that were the suggestion, authority for somehow turning reliance into
20 a necessary ingredient for abuse of a dominant position in this case.

21 I don't know whether you want me to take you back to *Meta*. I am not sure, in fact,
22 you were even taken to it. I think it was just referred to.

23 Insofar as that is thought to have mattered at all, I say do not be swayed, to put it
24 neutrally, in relation to paragraph 32(2) of *Meta* and reliance. That is not an aspect
25 that we have to plead or prove in relation to the abuse of dominance that we are
26 alleging, which is instead exactly as, sir, you repeatedly mentioned to Lord Wolfson in

1 the course of today.

2 No reliance losses. The important thing, as I said, regardless of the subject matter of
3 *Mastercard v Commission*, the important thing about the counterfactual is that you look
4 at what would have happened on the market in the counterfactual, including the
5 consequential, so hence the uprising or not or the reactivity of Apple or not, are
6 matters properly for the counterfactual as part of our case.

7 The counterfactual, as you say, it may mutate. It may move. So I reject whatever it is
8 that may remain of Apple's attack on our methodology.

9 I have dealt with strike-out 2017. My learned friend did not address you orally on
10 authorisation and Mr Gutmann. I am not going to do so either. I am only going to say
11 this. There is a criticism made that Mr Gutmann is involved in a number of these
12 cases. It is important to note that the three other cases that are said to be live are, in
13 fact, really one case. It is *Gutmann Trains*. It is technically three cases. He may or
14 may not be planning a further one. We don't know. The suggestion that somehow he
15 hasn't got the bandwidth or time to deal with this case as well I say is fanciful. I speak
16 as counsel in those other cases as well, and I have somehow found the time to be in
17 those cases and this and I am happy to say I do have some other cases as well.

18 **CHAIR:** He may be your best client but not your only client.

19 **MR MOSER:** I couldn't improve on that. I think that is all I wanted to say. I have been
20 passed one note, which is a sort of jury point, but I will make this point anyway. When
21 we talk about battery replacement programmes and the take up of battery replacement
22 programmes it is, of course, completely different when you are told your new battery
23 is going to be free to being told you can have a new battery at a reduced price. So
24 the take-up would be quite different in the counterfactual that we say applied.

25 Let me just check whether there is something else to be said on the strike-out points.

26 The Canadian House of Commons report was annexed to Mr Gutmann's statement.

1 **CHAIR:** Yes.

2 **MR MOSER:** It was an exhibit to the US proceedings. It will be a public document no
3 doubt.

4 **CHAIR:** Sorry. Say again.

5 **MR MOSER:** It was an exhibit to the US proceedings and it was annexed to
6 Mr Gutmann's Witness statement.

7 **CHAIR:** Okay. Thank you.

8 **MR MOSER:** Another micro point perhaps. I am being reminded there was some talk
9 of [X]% of people retained the PMF when eventually there was the option to switch
10 off the PMF.

11 Two things about that. One is the vast majority of consumers simply accept the
12 updates without reading the small print and the second is that, of course, at that stage
13 the choice would have been, "Do you want to return to UPOs that make your phone
14 unusable or do you want to have a PMF?" So it is perhaps not a real choice.

15 **CHAIR:** That's ultimately what Apple are going to be arguing should this progress,
16 isn't it, that they did the right thing and nobody realistically would complain about it --

17 **MR MOSER:** Yes.

18 **CHAIR:** -- even if they knew about it.

19 **MR MOSER:** These are exactly the sort of arguments for trial. Remember all I am
20 standing here and saying today is we should be allowed to take this one step further
21 and investigate these matters with proper disclosure and full argument and that is
22 really what the certification stage is.

23 You have to ask yourself, "Is there enough here to find that there is some basis in fact
24 for material effect on the speed of the iPhones that would have been felt by users?",
25 and absolutely, absolutely, yes, there was.

26 On funding I am just going to say, yes, we will absolutely deal with it. We will produce

1 a revised version, and I would hope to do so before -- I mean, I don't know when you
2 plan to deliver your judgment. I am not expecting any indication either, but we would
3 hope to do that within a couple of weeks, that sort of time period. I believe that's
4 probably all.

5 **CHAIR:** Okay. Thank you all very much. Thank you, please, to everyone who has
6 assisted.

7

8 **Reply by LORD WOLFSON**

9 **LORD WOLFSON:** Can I make two points, very, very short, both on confidentiality?
10 First, just to make clear what I said earlier -- and I hope this is a helpful way
11 forward -- I anticipate any judgment will be circulated in draft. Therefore if there are
12 any confidentiality issues, we can respond to the draft judgment if the Tribunal has
13 quoted something which --

14 **CHAIR:** So those e-mails --

15 **LORD WOLFSON:** Proceed on the basis that that's okay, but there may be other
16 ones. Because we have a draft judgment, I am confident we can resolve that in the
17 drafting stage.

18 **CHAIR:** Okay.

19 **LORD WOLFSON:** The second point, related to that, is that, to use the shorthand,
20 the African dictator figures which I gave earlier were, in fact, confidential. So we will
21 take that up with the transcript writers, but just to make it clear --

22 **CHAIR:** The percentage just repeated by Mr Moser.

23 **LORD WOLFSON:** Exactly.

24 **CHAIR:** Can you just remind me where that is, the bundle reference?

25 **LORD WOLFSON:** Let me just try to find it.

26 **CHAIR:** I think you might have given it to me already actually. Yes. B35, 3566.

1 | **LORD WOLFSON:** That's it. Exactly. Thank you. That was it.

2 | **(4.49 pm)**

3 | **(Hearing concluded)**