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IN THE COMPETITION
APPEAL
TRIBUNAL

Case No: 1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 15th July 2025

Before:

Justin Turner KC
(Chair)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mr Justin Gutmann

Class Representative

V

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

Defendants

A P P E A R A N C E S

Anneli Howard KC and Natalie Nguyen (instructed by Charles Lyndon Limited) on behalf of
Justin Gutmann

Lord Wolfson KC and Daniel Piccinin KC (instructed by Covington & Burling LLP) on
behalf of Apple & Ors.

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Tuesday, 15 July 2025

(10.30 am)

(Proceedings delayed)

(10.35 am)

Housekeeping

THE CHAIR: Ms Howard.

MS HOWARD: Good morning.

THE CHAIR: Good morning.

MS HOWARD: In terms of introductions, the advocate shouldn't need introductions.

But obviously, on behalf of the Class Representative, Mr Justin Gutmann, I'm appearing along with Ms Nguyen. On behalf of the respondents, the defendants, it's Lord Wolfson KC and Daniel Piccinin KC.

Your Lordship should have three sets of bundles. There's a confidential core bundle, a correspondence bundle, and the authorities bundle. And yesterday, my learned friends prepared a draft composite order.

THE CHAIR: Yes. I've just been handed that. I should have it somewhere. (Pause) Yes, I've got it here. Yes. In blue and red. Perfect.

MS HOWARD: We've reviewed that. We're very grateful to my learned friends for preparing that. I think that's a useful sort of agenda to work through, if that would help you marshal the issues.

In terms of the order issues today, I was going to deal with them in terms of the agenda and working the way through the order. So dealing first with the list of issues for disclosure, because I think we need to get those issues nailed down, before turning to KADs, then specific disclosure, general disclosure and then the directions to trial.

THE CHAIR: Yes. Okay. I mean --

1 MS HOWARD: Unless you have another preference.

2
3 Preliminary matters

4 THE CHAIR: Well, I had some preliminary matters.

5 First of all, I just wanted to find out where we are with it, because it's quite unusual to
6 move to disclosure before the pleadings are closed. And I wasn't quite sure why this
7 was happening, although you all seem content with that approach, but can we
8 just -- and I appreciate you've had a trip up to the Court of Appeal, and I've had a look
9 at the Court of Appeal's permission judgment.

10 If we go back to the ruling at -- that's this Tribunal's ruling at tab 28. Then we go to
11 33, I think. Yes. So our conclusion at that stage was that the PCR hadn't:

12 "... been able to put forward primary facts which lead us to conclude it has a reasonable
13 prospect of success in showing that users who were in possession of Affected iPhones
14 had a potential legal claim against Apple for compensation because the Affected
15 iPhones were substandard".

16 Then if we go to the pleading -- and then I understand that went up to the Court of
17 Appeal -- we said we'll stay for now and you can move to disclosure -- went up to the
18 Court of Appeal, the Court of Appeal gave permission on that point. I wasn't sure we
19 were right it had been robust enough about that.

20 Then if we --

21 MR PICCININ: I hesitate to interrupt, but just before you leave that document, it might
22 be helpful if you look at paragraph 71 on page 1020 in the bundle, because that was
23 really the basis --

24 MS HOWARD: Yes.

25 MR PICCININ: -- of what we've done. Paragraph 71, page 1020.

26 THE CHAIR: Yes. So the reference to disclosure on the current pleadings was

1 a reference back to 43.

2 We said it was not appropriate to strike out at this stage. We said:

3 "Notwithstanding ... we have not been persuaded that on the materials before the court
4 there is a reasonable prospect of establishing this at trial, it appears ... that the
5 question of whether the Affected iPhones fall short of a legally relevant standard is
6 intertwined with the general allegation that the performance of the phones was
7 materially impacted ... We also bear in mind that the CMA has had access to material
8 with which the PCR has not yet been provided. In the circumstances the appropriate
9 course is to proceed to disclosure with the pleadings in their current form".

10 So that means without the removal of the paragraphs relating to substandard. That
11 wasn't intended to be a reference to whether or not Apple serve a defence.

12 MR PICCININ: I think so. That's the way we all understood it.

13 MS HOWARD: We wrote to the Tribunal a couple of weeks ago just to get clarity on
14 this matter --

15 THE CHAIR: Yes.

16 MS HOWARD: -- because it is unusual and coming through the experience of the
17 Tribunal, trying to find new ways to push cases forward, necessarily -- we thought,
18 well, maybe this is a new way to try and get the case moving without having a full
19 formal stage of pleadings. I think both parties worked from the assumption that --

20 THE CHAIR: What are the benefits of going forward without pleadings? How does
21 one know what one needs to give disclosure on?

22 MS HOWARD: That's the difficulty that we've had, throughout, in formulating the
23 issues and the list of issues, and also for general disclosure.

24 THE CHAIR: Yes.

25 MS HOWARD: The parties are at odds because we haven't managed to agree on
26 what the issues are and nail them to the pleadings.

1 THE CHAIR: Quite. Yes.

2 MR PICCININ: Sir, there was also a dispute about this and there were -- I think there
3 were competing draft orders.

4 THE CHAIR: We'll come back to this, but I just want to find out what happened in the
5 Court of Appeal. You then went up to the Court of Appeal and there was a suggestion
6 there would be amendments. You would withdraw this allegation.

7 MS HOWARD: There were amendments, but they were fairly limited because the
8 Court of Appeal accepted that there was -- our case on the impact on consumers and
9 whether they would have taken a different transactional decision was a valid ground.
10 So really, the modifications we made after the Court of Appeal were relatively minor
11 and were just adjusting the pleading points.

12 THE CHAIR: If we go to your pleading, which is --

13 MS HOWARD: Yes. That's it. Tab 13.

14 THE CHAIR: You go to 7(f). Sorry. I'm just --

15 MS HOWARD: I find paragraph 7. I was going to take your Lordship to this to sort of
16 show, actually, in reality, our case hasn't changed that much.

17 THE CHAIR: No. Sorry, I'm still perplexed because --

18 MS HOWARD: Paragraph 7 starts at 750. I'm using the electronic bundle references.
19 There's a five-page difference so it may be different (overspeaking).

20 THE CHAIR: Yes. Well, I'm working off the hard copy. So you have to do the maths,
21 I'm afraid.

22 We don't have to read it all, but paragraph 7(f) seems still to --

23 MS HOWARD: So there, there is additional clarificatory pleading to explain the impact
24 of the lack of transparency on the class members and the way that it affected their
25 ability to -- we've referred to it as 'transactional decisions'. That's picking up a concept
26 from consumer law, which is because of the lack of transparency, they either -- they

1 | didn't have full knowledge of what to do --

2 | THE CHAIR: No, I understand that, but it's the:

3 | "... deterred or prevented the Proposed Class Members from seeking to exercise any

4 | legal rights, whether under their warranty protection or pursuant to their statutory

5 | rights ..."

6 | My understanding -- that is what had been said to have been -- had no basis in our

7 | earlier judgment. We didn't strike it out. You went to the Court of Appeal.

8 | Court of Appeal said, "I'm not sure you're right about that", and gave permission and

9 | then it all went away. But did the Court of Appeal see the amended pleadings or --

10 | MS HOWARD: They did ask us to amend the pleadings.

11 | THE CHAIR: Did they see the amended pleadings?

12 | MS HOWARD: I'm not sure whether they -- I'll just check whether they did.

13 | MR PICCININ: I think they did.

14 | THE CHAIR: Did they approve them or --

15 | MS HOWARD: Yes, they signed and approved them.

16 | THE CHAIR: They signed and approved them. Right.

17 | MS HOWARD: Yes.

18 | THE CHAIR: So I just end up slightly perplexed. Are you able to --

19 | MS HOWARD: Well, this is -- when we got the order -- I think the other piece in the

20 | jigsaw is the collective proceedings order, where you also explained that you wanted

21 | us to proceed and produce the list of issues for disclosure at this stage. Again, I think

22 | the reference to current pleadings -- we thought it meant on the basis of the claim form

23 | as it stands, without any requirement to file a defence. We queried this with the

24 | Tribunal because we were not really getting very far, let's be honest. We were trying.

25 | THE CHAIR: With the Tribunal.

26 | MS HOWARD: We wrote to the Tribunal to clarify --

1 THE CHAIR: About two weeks ago.

2 MS HOWARD: Two weeks ago.

3 THE CHAIR: Yes, I know that. I had no idea -- I couldn't even remember what the
4 case was about. So that was --

5 MS HOWARD: Yes.

6 THE CHAIR: You know, I wasn't in a position just to respond at that stage.

7 MS HOWARD: No, that's right.

8 THE CHAIR: So it was necessary to have a hearing just to find out what was going
9 on.

10 MS HOWARD: I think, actually, that the parties have made considerable progress.
11 I don't think -- I think having pleadings would be very, very helpful. But I don't think it's
12 worth throwing out the list of issues for disclosure and the steps that have been taken,
13 because a list of issues is always an iterative document. It's a working document that
14 goes throughout trial. So although we would welcome, and we've sought directions
15 for pleadings and whether they come before earlier or later --

16 THE CHAIR: We'll get on to --

17 MS HOWARD: Yes. That would be valuable.

18 THE CHAIR: -- your application for known adverse documents. But certainly if we
19 take Apple's position, they're saying we should move to disclosure. This is going to
20 be the disclosure, all the searching. That will be done without reference to the
21 pleadings. I don't know what defences Apple are running. I'm assuming there's going
22 to be a defence of justification. How do I determine what disclosure is necessary on
23 those issues?

24 I'd like you both, first of all, to address me on the approach to be taken today. You've
25 got the rival positions of preliminary disclosure, known adverse documents, or
26 alternatively moving to full searches, with the various qualifications to that. I'd like to

1 | just tackle that first and then we can go on and look at the list of issues. Certainly --

2 | MS HOWARD: Well, the Class Representative's position is -- you know, the orthodox
3 | procedure throughout trial is the pleaded issues form the cornerstone of the trial,
4 | essentially. Everything comes from the pleadings.

5 | THE CHAIR: But I see reference to you wanting to amend. You get disclosure and
6 | then you re-plead. What's all that about?

7 | MS HOWARD: I think that was because, probably -- again, as we explained in the
8 | letter, we were confused whether you were wanting us to do a more detailed
9 | amendment to our pleadings, because you found it prolix or unclear or the criticisms
10 | that have been made of it, so whether there needed to be a stage of rationalisation.
11 | So we thought that this exercise was a process to run the disclosure. We would then
12 | amend our pleadings and then they would plead to them. But that's really putting
13 | things back to front. We would be very happy to have -- the Class Representative
14 | position is, if we can proceed and finalise the pleadings, that's the orthodox approach,
15 | which will then run the disclosure. I don't want to abort the whole of today's hearing.
16 | But I think --

17 | THE CHAIR: I'm sure we can do useful things today.

18 | MS HOWARD: Exactly. But, you know, Apple has had our pleading -- a version of
19 | our pleaded case -- which actually hasn't changed very much --

20 | THE CHAIR: Right. Now, in terms of (overspeaking) --

21 | MS HOWARD: -- for the two (overspeaking) --

22 | THE CHAIR: There may be -- sorry, I didn't mean to interrupt. There may be
23 | allegations you wish to add, allegations you wish to withdraw, and then there's the
24 | observation that this Tribunal, the Court of Appeal, have made on the length of the
25 | pleading --

26 | MS HOWARD: Yes.

1 THE CHAIR: -- and whether it can be stated more concisely. Do you want to do
2 anything about that now or not?

3 MS HOWARD: I don't -- we did think about it coming back from the Court of Appeal:
4 should we try and do a more wholesale rationalisation of the pleading? We felt that
5 that would -- all it's going to do is we're going to get into iterative amendments as we
6 see more disclosure and so we thought it's better to do the amendments that were
7 requested by the Court of Appeal. Then, once we got disclosure, that's the point at
8 which to do, in the light of the evidence, because we're always suffering from this
9 information asymmetry.

10 THE CHAIR: But I'm not quite sure what amendments you're anticipating. What is
11 the --

12 MS HOWARD: I mean, I don't think -- on the basis of our case, I think everything's
13 there, as far as we know. But, obviously, we don't know the evidence and we don't
14 know the documents and data which Apple has in its possession.

15 THE CHAIR: Right.

16 MS HOWARD: And that's a normal phase. As your Lordship knows, after disclosure,
17 there's often a refinement or, you know, a narrowing down of the issues more often
18 than not, in the light of disclosure.

19 THE CHAIR: Yes. I'm not sure who I should be addressing. Lord Wolfson, what
20 approach do you feel is ...?

21 LORD WOLFSON: Well, in short, we're here, obviously, ready to deal with this
22 application and the issues before the Court today. I mean, if my learned friend wants
23 to amend in some unspecified way, and the Court would prefer us to plead a defence
24 to that pleading, we can go down that route.

25 THE CHAIR: But she's saying she doesn't at the moment. She's happy to proceed
26 on her pleading currently, which may or may not need amending in the future for: a)

1 | stylistic reasons or b) stylistic, I don't mean to be rude, but to make it more concise
2 | and more directed. She may -- more information may emerge during the course of
3 | disclosure, which may require amendments.

4 | LORD WOLFSON: So, in any case, there may be amendments of pleadings further
5 | down the line.

6 | THE CHAIR: Yes, but you've not put a defence in yet.

7 | LORD WOLFSON: No, exactly, and it does go a bit further than stylistic, if I may say.
8 | I mean, one of the problems here is that the pleading has been discursive from the
9 | outset, and that's one of the issues the Tribunal had right at the outset. I mean, this is
10 | a bit groundhog day today. I mean, the very first hearing in this case bore some
11 | similarities to the points my Lord is making at the moment. You know, what is then
12 | the PCR's case? Now, we can go away and plead. We're still going to, I imagine,
13 | come back to face some of the issues which are before the Court today.

14 | THE CHAIR: Yes.

15 | LORD WOLFSON: We do have the oddity at the moment that disclosure is being
16 | sought in relation to issues which are not pleaded issues and which are certainly not
17 | issues in dispute, but which are opposed to (overspeaking) --

18 | THE CHAIR: I'm not unsympathetic to that, but we'll come on to discuss that in due
19 | course.

20 | LORD WOLFSON: I don't want to mix up issues, but, of course, there is a degree of
21 | overlap here because, as I understand it, what the Court wants to do, if I can
22 | paraphrase, is to impose some rigour and discipline on this. Certainly, we are in favour
23 | of that. Quite how we do it, we're happy to discuss it. It seems to us that we either
24 | deal with the applications today on the basis of where we are, or if the Court says,
25 | "Well, we should have pleadings", that means that my learned friend should get a very
26 | short amount of time to do whatever tidying up and cutting out.

1 THE CHAIR: I don't think she wants --

2 LORD WOLFSON: If she doesn't want to do anything, that's fine. We can put in
3 a short defence, but then we will be back, I suspect, with, if not all, quite a lot of the
4 issues, albeit against pleadings.

5 THE CHAIR: Yes. Well, we may be able to make use of today notwithstanding, but
6 before --

7 LORD WOLFSON: I was not suggesting we'll leave at 10 o'clock. 11 o'clock.

8 THE CHAIR: I've thought about it, but how long do you need to put -- you say, a short
9 defence. I don't know what you mean by short. It's not meant to be a holding defence.
10 This will be your defence.

11 LORD WOLFSON: Sure, sure. Can I just turn my back to the courtroom?

12 THE CHAIR: Yes, of course. (Pause)

13 LORD WOLFSON: End of November.

14 THE CHAIR: Why do you need that long?

15 LORD WOLFSON: Well, it is going to be our defence, and there are a lot of documents
16 which we would need to convert into a pleading. But it's one thing to, so to speak, you
17 know, look at your documents and understand them. It's another thing to plead it.
18 We're in the middle of July. Realistically, work is going to start on this, counsel-wise,
19 I imagine, in early September, and I'm told juniors are in trial at the moment.

20 THE CHAIR: Well, I mean, it's the trouble with the competition bar. Everybody's much
21 too busy and that's -- we're not --

22 LORD WOLFSON: (Inaudible).

23 THE CHAIR: But I don't. Yes. Well, I think that's much too long. So,
24 I think -- Ms Howard, what do you say about time for defence? I mean, it is -- we are
25 in middle of July.

26 MS HOWARD: Yes.

1 THE CHAIR: I'm not expecting anyone to cancel their August holidays for this. So
2 assuming people are back to work second week of September, middle of October,
3 what does that ...?

4 MS HOWARD: Yes. I mean, I was going to say, at the end, they have had this
5 pleading for three years now. As I said, that hasn't actually changed -- if you go
6 through and look at it, it hasn't changed significantly. I was going to say 30 September,
7 if we can, I think -- because, obviously, there's going to be a reply afterwards and we
8 want to try and get the pleadings closed.

9 LORD WOLFSON: I don't want to turn the Court into a Turkish bazaar, but, end of
10 October?

11 THE CHAIR: No, middle of October. Listen, you have had this claim for a very long
12 time.

13 LORD WOLFSON: I mean, I'm just concerned that we might end up having to ask for
14 an extension, but --

15 THE CHAIR: Well, you'll have to come back with evidence if you need an extension,
16 as to why you need it. So I don't know what an appropriate date in the middle -- I was
17 going to say the 14th, if that's not a Sunday or something.

18 MS HOWARD: Should we then deal with the date for the reply? Because I'm just
19 looking at the composite order we could work through. So this would be paragraph 6
20 of the composite order. I'm just going to check my dates.

21 LORD WOLFSON: I think, my Lord, I think the Friday is the 17th. So if we could --

22 THE CHAIR: (Inaudible). It is a Turkish bazaar, it seems. And then how long do you
23 need for a reply, Ms Howard? So that's paragraph 6, you say? (Pause)

24 Paragraph 6. There's lots of different paragraph 6s. (Pause)

25 MR PICCININ: I think, looking at the draft order, it was three weeks that they wanted.

26 MS HOWARD: I mean, my experience in competition claims is you do need longer

1 | than just three or four weeks, because they're going to put in, you know, a detailed
2 | defence, and we will have to do the reply, but there may -- well, we may have to get
3 | experts involved or liaise --

4 | THE CHAIR: Yes, the longer you have, the slower it's going to be to get your
5 | disclosure. So I imagine --

6 | MS HOWARD: My problem is I'm in Dieselgate. We have got a counsel team, as you
7 | know -- a broader counsel team -- but I don't know what their availability is. So I was
8 | going to suggest 28 November, which would give us, I think, five weeks. Just
9 | because, obviously, I don't know my learned friend --

10 | THE CHAIR: I'm going to give you four weeks. If you need longer, again, you'll have
11 | to make an application.

12 | MS HOWARD: Thank you. So that would be the 14th?

13 | THE CHAIR: The 14th. (Pause)

14 | Right. Now, if we're moving forward on that basis, Ms Howard, what would you like to
15 | do with your application for disclosure? You're asking for known adverse documents.
16 | My preliminary indication was it might be better to do disclosure after pleadings have
17 | closed. Are you pushing for known adverse documents? If so, why? And we can talk
18 | about that.

19 | MS HOWARD: Yes. I mean, I was going to go to the list of issues. I don't know how
20 | much energy you want to devote.

21 | THE CHAIR: We will go through them in some detail, but are you seeking --

22 | MS HOWARD: Yes. So I have spoken to my learned friend this morning. We were
23 | preparing the application for KADs, as I affectionately call them, at pace, and we were
24 | expecting to have the defendant's disclosure statement, but obviously they needed
25 | more time to prepare for it. So, having seen their disclosure statement and their
26 | skeleton, we think we can narrow the scope of the KADs application. So it would just

1 be confined to two issues, which would be the complaints and the diagnostic design
2 testing.

3 THE CHAIR: Right. Why do you need that in advance of disclosure?

4 MS HOWARD: Well, what I was going to address -- I don't know whether
5 your Lordship wants to be heard on the ability of the CAT to hear -- to order KADs in
6 the first place.

7 THE CHAIR: We can -- obviously, we can order it if we want. Yes.

8 MS HOWARD: So the basis is on complaints. I'm sorry. I'm just going to --

9 THE CHAIR: But I'm just curious why you need it? So, if disclosure is going to take
10 place after pleadings.

11 MS HOWARD: Yes.

12 THE CHAIR: Why do you need any -- and you're not amending your pleading, why
13 do you need anything before then?

14 MS HOWARD: At the moment, every time we put forward a disclosure category or
15 either an issue or the kind of documents that we regard, the categories of documents
16 that fall into disclosure, we're being brushed back by the defendants.

17 THE CHAIR: So do you want to start with the categories and work backwards from
18 that? Do you want to start with the categories?

19 MS HOWARD: What, in the list of issues?

20 THE CHAIR: In the list of issues. Start with the list of issues, and then --

21 MS HOWARD: Yes, I think that would help, because then that anchors the claim and
22 the scope of what we say.

23 THE CHAIR: Right. So this will be preliminary indications of what the issues are,
24 because at the moment I've not seen Apple's pleadings. So this will be preliminary
25 steer from the Tribunal, as to what disclosure may be necessary.

26 MS HOWARD: That'll probably make the best use of today --

1 THE CHAIR: And we can --

2 MS HOWARD: Yes. And then --

3 THE CHAIR: There is some common ground --

4 MS HOWARD: -- I could take you into KADs, to show you why these two categories
5 are important, because you'll understand the scope of the case and what the disputed
6 issues are.

7 THE CHAIR: Right.

8 LORD WOLFSON: Sorry, we're a little bemused on this side of the court. I mean, the
9 KADs material, they're going to get anyway, as part of disclosure.

10 THE CHAIR: Yes.

11 LORD WOLFSON: The question is: why do they need it now?

12 THE CHAIR: Well --

13 LORD WOLFSON: (Inaudible) especially. We can run this case in one of two ways.
14 We can either do disclosure now and then pleadings, or we can do pleadings now and
15 then disclosure. What we're a little bemused about is that we now seem to be doing
16 pleadings and disclosure simultaneously.

17 THE CHAIR: But I'd like to -- I think, it would be helpful to just look at the issues and
18 see what the rival positions of the parties are on the list of issues, and what disclosure
19 they may or may not give rise to and then we'll see where we are.

20 MS HOWARD: That's fine. I mean, why we want the KADs now is really because
21 we're trying to front load and deal with experts, and we don't want to engage a huge
22 amounts of enquiries on the -- obviously because the experts are quite a considerable
23 cost element of the claim, if actually there is a chance that Apple has its own internal
24 diagnostics and testing materials that may actually act as a shortcut and avoid large
25 areas of expense on expert analysis. That's why we want it now. But I'll come back
26 to that later.

1 THE CHAIR: So, my initial understanding is that these proceedings do not currently
2 comprise a forensic inquiry into the cause of UPOs or the appropriateness of PMF as
3 a way of addressing UPOs. If I'm wrong about that, I'll need your assistance on it. So,
4 do you want me to repeat that?

5 MS HOWARD: No. Thank you.

6 THE CHAIR: You got that, right?

7 MS HOWARD: (Inaudible) We are not saying that the UPOs are an abuse in and of
8 themselves, but we still plead the existence of the UPOs because they are background
9 context to the introduction of the PMF and we can only really understand the PMF and
10 what its purpose was and what its effects were by reference to the problems with the
11 UPOs in the first place.

12 THE CHAIR: That wasn't what I put to you though.

13 MS HOWARD: Yes.

14 THE CHAIR: So what I put to you was: my view at the moment is that these
15 proceedings will not include a forensic inquiry into the cause of UPOs or the
16 appropriateness of the PMF as a way of addressing UPOs. As I understand your
17 complaint -- we can have a look at it -- relates to the information that was given to
18 consumers.

19 MS HOWARD: Well, the complaint isn't just transparency. It's also the fact that the
20 PMF slowed down the phones and so it actually reduced the technical capabilities, the
21 functionality and the performance of the phones, so there's --

22 THE CHAIR: You're going to have to show me that in your pleading.

23 MS HOWARD: If I can maybe -- perhaps this is because I think there is a problem
24 here that the parties, presumably because Apple hasn't yet had the occasion to go
25 through our pleading and plead to it, and therefore it either it misunderstands or
26 mischaracterises our claim and it continues with this narrative that we say

1 mischaracterises our case because there are wholesale parts of the Class
2 Representative's case that Apple entirely ignores.

3 THE CHAIR: Right. I'm asking you the question --

4 MS HOWARD: So I can take you to --

5 THE CHAIR: If you could focus on why there needs to be an inquiry into the cause of
6 UPOs or the appropriateness of the PMF as a way of addressing UPOs. Where have
7 you pleaded the cause of UPOs such that that might lead to a dispute with Apple?

8 MS HOWARD: So I think, if we can just stand back and look at the core allegations,
9 I actually think paragraph 7 of the re-amended claim form sets out our claim. It'll be
10 755, I think, in your hard copy; it's 750 --

11 THE CHAIR: I've got it, I've got it.

12 MS HOWARD: And the core allegation is that -- and some of this is background
13 history, and we say it's relevant background context -- but Apple, the whole factual
14 background starts with Apple's awareness of the UPOs. And we plead, in
15 paragraph 7, that Apple was aware of the UPOs from 2016 onwards. We don't know
16 the exact date. We say it must have been from December onwards, because that's
17 when they started to carry out the diagnostic --

18 THE CHAIR: What I put to you was the cause of the UPOs. I mean, Apple has already
19 filed some evidence for Mr Crumlin as to -- and some of it is a matter of public
20 record -- what was causing these UPOs and is that in dispute?

21 MS HOWARD: Yes. They say it's common knowledge that the cause of the UPOs
22 was the batteries and that they couldn't deliver peak performance. Well, we don't know
23 that. They say that.

24 THE CHAIR: But this is not a fishing -- you're not getting disclosure on a fishing
25 inquiry --

26 MS HOWARD: No.

1 THE CHAIR: -- as to --

2 MS HOWARD: But we need to know what the baseline situation was of the UPOs and
3 what the impact of the UPOs were on the phone because we have to show --

4 THE CHAIR: That's a separate -- the question is, what is the cause of the UPOs?
5 That's the point I'm putting to you. So does there need to be an inquiry into the cause
6 of the UPOs? I appreciate it's crucial background or -- not crucial, it's relevant
7 background to the case, and it is the baseline from which other arguments flow but is
8 it likely to be in dispute as to the cause of the UPOs?

9 Now, you've seen what Apple's position is. Apple has put it forward in the evidence of
10 Mr Crumlin, and said quite a lot about it. Are you disputing any of that?

11 MS HOWARD: Well, what we need to show is that whatever was happening with the
12 phones after the PMF went beyond kind of ordinary issues with the batteries; ordinary
13 ageing. There's a dispute about whether this slowdown was because the batteries
14 were ageing or whether it was because of the impact of the PMF which slowed down
15 the processing unit. So why we're asking --

16 THE CHAIR: My recollection, and I have read Mr Crumlin two years ago and I haven't
17 re-read it, his statement was saying that it was the problem of batteries necessarily
18 age. That's --

19 MS HOWARD: Yes.

20 THE CHAIR: -- no one's fault. You're not suggesting the batteries were defective or
21 inappropriately specified, and that the reason for these UPOs was because third-party
22 apps or other software was actually putting much greater demands on the phones and
23 the UPOs were there as some sort of device, safety device or whatever, to stop too
24 much current flowing through certain parts of the phone and so they would shut down.
25 That's a horrible paraphrase of my recollection of what was in Mr Crumlin's evidence.
26 Now, you've not put anything contrary to that in your pleading, so the starting point will

1 be that you're not going to get a free inquiry into UPOs. If you have reason to doubt
2 that then, and want to plead a contrary case, that's different.

3 MS HOWARD: The problem is, of course, we're just dealing with one side of the case
4 at the moment. So we've pleaded our claim form. They would plead in their defence
5 these batteries -- and then we would have a reply.

6 THE CHAIR: But what do you say the cause of UPOs are?

7 MS HOWARD: Well, at the moment we're not in a position, you know, because of the
8 information that -- we're just taking everything on Apple's say so at the moment. And
9 so this may be an issue that is disputed when we get disclosure.

10 THE CHAIR: But then that is classic fishing disclosure. You have no reason to doubt
11 what Apple is saying.

12 MS HOWARD: But it's material to the issues, my Lord --

13 THE CHAIR: It's not --

14 MS HOWARD: -- what the causes were.

15 THE CHAIR: Yes, but it's not in dispute. It's material but it's not in dispute.

16 MS HOWARD: Okay. We would probably (overspeaking) --

17 THE CHAIR: And I don't see how it's relevant to your claim. I mean, unless you're
18 saying that there was some very different reason for it.

19 MS HOWARD: We don't know whether that is the sole reason. But what we need to
20 do is to be able to assess the impact of the PMF, and we can only assess the impact
21 and effects of the PMF if we establish the baseline. It's a sort of counterfactual
22 analysis to say, well, this was the situation of the phone at launch and this was the
23 situation of the phone with the UPOs. And it's only by comparing the phones with the
24 PMF, with the situation without the PMF, that we can actually calibrate.

25 THE CHAIR: That's talking about the PMF. We haven't got to the PMF. I'm just asking
26 you.

1 MS HOWARD: This is why the sections in A are relevant --

2 THE CHAIR: Okay, okay.

3 MS HOWARD: -- because they're important to establish that baseline counterfactual.

4 THE CHAIR: And so that's the first thing. I've heard your answers on that. The second
5 thing is the appropriateness of the PMF as a way of addressing UPOs. So was it
6 appropriate for Apple to use the PMF as a way of addressing UPOs? Again, do you
7 have a positive case that this was not an appropriate way?

8 MS HOWARD: There is a strongly disputed issue between the parties as to, firstly,
9 whether there were other alternatives. Apple designed the PMF amongst a range of
10 hardware and software solutions that it could have adopted. And one of the issues
11 that we're inquiring into is what was Apple's assessment of these alternatives and why
12 it shows and how it designed the PMF.

13 THE CHAIR: Show me that in your pleading. Let's focus on the summary in
14 paragraph 7.

15 MS HOWARD: And that is agreed between the parties. So that is covered in (a) --

16 THE CHAIR: Can we just see it in the pleading first.

17 MS HOWARD: It's in 7. If you look at 7(d) and (e) and (f).

18 THE CHAIR: Okay, let me just read this carefully. (Pause)

19 So if we look at (d):

20 "... Apple exacerbated the information asymmetry ... by issuing [these updates] in
21 a misleading and non-transparent manner, which portrayed those updates as
22 beneficial features and/or omitted essential information ..."

23 And then -- hold on.

24 MS HOWARD: I think the best thing is to take your Lordship to it. If you've got the list
25 of issues in front of you.

26 THE CHAIR: No, no, I want to take it from the pleadings.

1 MS HOWARD: The relevant parts of the pleadings are listed under issue A(4).

2 THE CHAIR: Just show me, because I just want to focus on the pleadings. Just show
3 me where they are in the pleading. (Pause)

4 MS HOWARD: Sorry, I'm just scrolling down, one second.

5 THE CHAIR: You see your allegation at 7(d), if one takes the "misleading" and the
6 way it was communicated out of that paragraph, I don't understand at the moment that
7 it's in dispute that the power management feature sought to manage the battery
8 issues, and in certain circumstances, this would result in a slowing down. And in
9 certain circumstances would affect the performance and functionality of the affected
10 iPhones. And this is obviously an issue as to how much that mattered. (Pause)

11 But just having looked at these paragraphs, I don't see anything here about the
12 appropriateness of the PMF as a way of addressing UPOs.

13 MS HOWARD: So we have pleaded and it's a core issue in dispute between the
14 parties that the PMF did not entirely resolve the UPO issues. This is a key core issue.
15 We say that after the --

16 THE CHAIR: Can you just show me in the pleading, please.

17 MS HOWARD: I'm just trying.

18 THE CHAIR: If you need time, don't worry, don't rush but I do want to -- (Pause)

19 Do you want me to rise for five minutes, Ms Howard, while we find these allegations?

20 MS HOWARD: I think it would help.

21 THE CHAIR: Yes, of course. Yes. No, I've sprung this on you.

22 MS HOWARD: I want to find you the best examples.

23 THE CHAIR: So, just to be clear, the two issues are: any challenge to the cause of
24 UPOs and then any challenge to the appropriateness of the PMF as a way of
25 addressing UPOs.

26 Thank you.

1 (11.11 am)

2 (A short break)

3 (11.27 am)

4 THE CHAIR: Right. How far have we got?

5 MS HOWARD: I think we've got two alternatives. We can go through the list of issues

6 now, but I think on every single issue, we're going to have this very painful process of

7 your Lordship wanting to see exactly where in the pleadings we've been able to plead

8 evidence, because this is essentially what these issues are coming down to. We've

9 seen --

10 THE CHAIR: I just want to focus on my question at the moment, which is very

11 straightforward. Are these matters pleaded or not?

12 MS HOWARD: So the cause of the UPO is not pleaded. What's critical here is: what

13 did Apple know? What did Apple know about the UPOs --

14 THE CHAIR: Fine. It's not pleaded. What about the appropriateness of the PMF as

15 a way of addressing UPOs? Is that challenged in the pleading?

16 MS HOWARD: The appropriateness of the PMF is -- we've made references as to it

17 in the context of alternative options that were open to Apple, whether that was in turn

18 (overspeaking).

19 THE CHAIR: Can you show me the paragraph?

20 MS HOWARD: Let me take your Lordship to -- it's tab 13.

21 THE CHAIR: You have a paragraph number?

22 MS HOWARD: Sorry. (Pause)

23 THE CHAIR: I think Apple have offered to give disclosure on alternatives, as I recall.

24 MS HOWARD: They have (inaudible). That's what I was trying to explain to you.

25 THE CHAIR: But is it in the pleading or not? That's a slightly -- that's a gloss on what

26 I was asking, not whether there are alternatives, but whether it's an appropriate way

1 of addressing a UPO.

2 MS HOWARD: (Overspeaking) looking at the alternatives, options that were available.
3 You would then say, if they're prepared to do disclosure on A(4) and looking -- this is
4 during the diagnostic and during the design phase. They had a range of alternatives
5 but they chose the PMF.

6 THE CHAIR: Yes.

7 MS HOWARD: And the reason is, you know -- was that actually the most suitable
8 option out of all of them, or were there other motives or other reasons?

9 THE CHAIR: Whether it's the most suitable is different to whether it's appropriate.

10 MS HOWARD: Yes. That's right. There's a range.

11 THE CHAIR: No, no. Whether it's appropriate, whether it's an appropriate way of
12 addressing it. It is not necessarily the same as whether it's the best way of addressing
13 it or whether there are alternative ways.

14 MS HOWARD: Yes, and that the standard will be a matter for debate.

15 THE CHAIR: Okay. All right. Well, I think we probably take (inaudible).

16 MS HOWARD: So A(4) does, and the paragraphs there are -- which I was trying to
17 take your Lordship to before the break -- I think the best examples are 148 of the
18 amended pleading, and 154 and 156. Sorry, I'm on my iPad.

19 THE CHAIR: Let me read these, please. (Pause)

20 MS HOWARD: That's on page 808 of the electronic copy.

21 THE CHAIR: I've got it. (Pause)

22 MS HOWARD: So 148 refers to the diagnostic feature, which was designed to allow
23 Apple to gather information on the UPOs. But instead of remedying the problem for
24 all of the affected products at the outset -- and it talks there about other options, maybe
25 non-technological options -- but other practical ways of resolving the problem would
26 have been to give refunds or compensation or offering a recall or giving a replacement.

1 Apple concealed the battery issues. That's 148.

2 Then at 154 -- (pause)

3 That talks about the throttling, the slowdown of the components. That's why we say

4 that it wasn't an appropriate solution. (Overspeaking) that's why we (overspeaking).

5 THE CHAIR: Apple -- again, I don't think -- trying to think ahead, that's going to

6 disclosure, necessarily. I'll be corrected if I'm wrong, but I thought Apple accepted that

7 in certain circumstances, this could result in a slowing of certain operations. I think

8 there may be a dispute as to how noticeable that is.

9 MS HOWARD: But you'll remember that (overspeaking).

10 THE CHAIR: Lord Wolfson, have I got that wrong?

11 LORD WOLFSON: No, no, that's broadly right. I mean, there are a lot of parameters

12 there, but at a very high level of generality, yes. We've said that.

13 MS HOWARD: I think there are materials in the regulatory investigations. You

14 remember the CMA consultation letter.

15 THE CHAIR: Yes.

16 MS HOWARD: And the materials from the French authority as well.

17 THE CHAIR: You have no positive case apart from the fact that you should offer

18 refunds or replace the batteries, which I understand. I'm not in any way criticising

19 those comments -- offering replacement batteries and so forth. You haven't got

20 a positive case as to the other technical solution that should have been implemented.

21 MS HOWARD: From the limited -- this is from my recall -- of the limited materials that

22 were provided as the pre-certification, there were discussions between the engineers

23 when they were designing the PMF. You'll remember those mitigation tables.

24 THE CHAIR: Yes, but as for your positive case, you're saying you don't know anything.

25 I'm assuming you've got a stellar array of talent behind you, of engineers that you're

26 talking to and so forth, who'll be saying, it makes no sense that Apple did this. They

1 | should have done that. You're not asserting a positive case, that there's an alternative
2 | technical course that Apple should have taken. It's not pleaded and --

3 | MS HOWARD: That will be a matter for evidence, because there could have been
4 | a hardware solution or there could have been a different software solution. But that's
5 | a matter for our evidence in due course.

6 | THE CHAIR: Well, no, you're going to have to plead matters like that if that's part of
7 | your case. At the moment it isn't part of your case.

8 | MS HOWARD: Yes. It isn't, but --

9 | THE CHAIR: If it becomes part of your case, it's going to have to be an application to
10 | amend (overspeaking).

11 | MS HOWARD: But what is critical and what we're trying to -- now, it may be
12 | infelicitously worded in A(2) and A(3), but what we're trying to get to in those issues is:
13 | what did Apple know and when? And A(3) is important, because --

14 | THE CHAIR: Okay. Let's have a look at those --

15 | MS HOWARD: -- if you have the list of issues in front of you.

16 |
17 | List of issues

18 | THE CHAIR: Yes. Let's go to the list of issues now, then. Sorry, you have to remind
19 | me. Which tab are they at? (Inaudible) looked at them.

20 | MS HOWARD: The list of issues -- I think it starts at page 15. It's tab 4 of the core
21 | bundle. The particular issues relating to A(2) and A(3) are on page 17, or it'll be 21 in
22 | your hard copy.

23 | THE CHAIR: Right. So --

24 | MS HOWARD: A(3) is important because that --

25 | THE CHAIR: Why is A(2) --

26 | MS HOWARD: A(2) is important because an important part of the case is we have to

1 | prove the effects of the PMF, and we have to show, and our case is that Apple
2 | regarded the PMF and informed everybody that it was a beneficial feature.

3 | THE CHAIR: Sorry. A(2)(a) is nothing to do with PMFs.

4 | MS HOWARD: That is the UPO rate. Rather than going immediately to the granular
5 | bit, can I just step back and explain to you why it's relevant before we go into the
6 | forensics of the text that have been used, because otherwise I can't put it in context.
7 | I can't explain why it's relevant to our case.

8 | THE CHAIR: Right. Okay.

9 | MS HOWARD: I'm trying to explain what our case is first.

10 | THE CHAIR: Sorry. I thought you wanted to go (inaudible).

11 | MS HOWARD: Apple's case is that -- we have to measure the impact of the PMF.
12 | We've got to show, first, anti-competitive effect. Secondly, we have to show that there
13 | was a causative effect that had an impact on consumers, to their detriment. Those
14 | are important elements of trial 1, the liability trial. We can only really show that the
15 | PMF had negative effects by having a baseline counterfactual. So what was the
16 | situation ex-ante? What was the status quo ex-ante before the PMF was introduced.
17 | We need that baseline scenario of what was happening with the UPOs before we can
18 | measure the impact of the PMF, because Apple's case -- and it portrayed it to users
19 | that this was a beneficial feature -- that's how they described it in their materials on
20 | the download.

21 | THE CHAIR: It addressed a problem. It addressed a problem.

22 | MS HOWARD: They're saying it fully resolved the problem.

23 | THE CHAIR: No, they're saying it addressed a problem. I don't know whether they're
24 | saying it fully resolved a problem. They're saying it addressed a problem.

25 | MS HOWARD: That's right. Whereas --

26 | THE CHAIR: There's no suggestion that it was implemented for any other reason.

1 MS HOWARD: No, I don't think so.

2 THE CHAIR: It was addressing a problem.

3 MS HOWARD: The Class Representative's case is that in brief -- one, it didn't resolve
4 the UPOs fully. Secondly, it introduced its own additional problems in that it slowed
5 down and throttled the phones.

6 THE CHAIR: You say that's your case. Your case, I thought, was about -- well, I don't
7 want to go round and round in circles, but your case is about the lack of transparency.
8 That's the abuse.

9 MS HOWARD: There's two elements to the abuse. One is that they slowed -- they
10 marketed this premium smartphone with all of the advanced technology and the
11 speeds and -- but the setup -- but they effectively throttled the phone. They released
12 the software in a way that actually slowed down the phone rather than improving the
13 phone and they concealed it. So the two go together. There's a lack of transparency,
14 but an integral part of why the lack of transparency was harmful was because the PMF
15 actually had negative impacts, firstly for the functionality of the phone, but secondly on
16 the user experience for the consumer.

17 So in order to measure that impact and to measure the effects, we need to know what
18 the baseline scenario, the counterfactual scenario, was beforehand. And that's why
19 we need to know what the impact of the UPO was and what the UPO rate was before
20 and afterwards.

21 THE CHAIR: Why?

22 MS HOWARD: Because that actually shows you whether the PMF did resolve the
23 UPO problem. Because the evidence that we've seen is that even after the PMF was
24 downloaded, users still experienced UPOs and therefore that is an ongoing negative
25 consequence, negative impact, that feeds into their loss, the harm, and ultimately the
26 measure of damages.

1 THE CHAIR: Right. So what I'm minded to order -- because I think there are a lot of
2 issues. I think you're right. A lot of issues which are relevant background to the case.
3 There's no reason to believe -- well, they're not currently in dispute on the pleadings,
4 and there's no reason to believe they're likely to be in dispute.

5 What I'm minded to do -- and I'll tell you what my suggestion is and you can both tell
6 me whether it's a good or bad idea -- is that a lot of the disclosure can be cut down by
7 requiring Apple to explain certain background matters in a witness statement, which
8 should be supported by proportionate contemporary documentation, and it should
9 address the following issues: Apple's understanding as to the cause of UPOs at the
10 relevant dates and how it impacted consumers; how it reached a decision to introduce
11 PMFs and the technical reasons why it understood this ameliorated the problem of
12 UPOs; the effectiveness of the PMF in reducing UPOs; and the manner by which the
13 PMF was implemented.

14 My understanding is Mr Crumlin has already gone some way to doing that. That would
15 be served as a witness statement, sooner rather than later, quite possibly at the time
16 Apple serve its defence. That would stand as evidence at trial. Because as
17 I understand, these are not matters which are likely to be in dispute. Do you want me
18 to run through those categories again, Ms Howard? Did you get them all?

19 MS HOWARD: I got them all, but I'm sure they'll be on the transcript as well.

20 THE CHAIR: Okay. Then that would -- the intention would be -- a lot of these
21 categories, disclosure would not have to be given. But obviously you'll be at liberty to
22 apply should any disputes arise. Do you want to take instructions on that or --

23 LORD WOLFSON: We've been chatting, hope not too loud. Well, in principle that's
24 fine, but I just want to put a marker down that, as far as we're concerned, actually, as
25 I think my Lord made this point, the information is actually already out there in
26 Mr Crumlin's statement. We do see --

1 THE CHAIR: It may all be there. It may not all be there.

2 LORD WOLFSON: Precisely. We do respectfully see the advantage of sort of
3 collating it in one place, but just to put a marker down that what's produced may be,
4 so to speak, a collation of what's already there but of course there's the disclosure
5 point on top. And --

6 THE CHAIR: Appropriate proportionate documentation should support it. And the
7 person who's signing it, it doesn't have to be Mr Crumlin, it's up to you who signs it,
8 will have to obviously have knowledge of the matters and there would be a witness
9 statement and will be an application to cross-examine. That person will be obviously --

10 LORD WOLFSON: The witness statement in the case --

11 THE CHAIR: Witness statement.

12 MS HOWARD: -- and application could be made on -- to the maker of any witness
13 statement, absolutely.

14 THE CHAIR: Yes. But that would be served early in these proceedings.

15 LORD WOLFSON: Yes.

16 THE CHAIR: And given that most of it has been -- a lot of it has been done --

17 LORD WOLFSON: Yes.

18 THE CHAIR: I don't expect you to answer all these things finally today because I've
19 sprung this on you. But the intention would be that would be done at the same time
20 you do your defence.

21 LORD WOLFSON: I was just about to take instructions on it.

22 Yes, we should be able to do that at the same time as the defence.

23 While I'm on my feet, could I just take a moment, also on the defence, just to put
24 a marker down that again, as we understand it, because we've got a split trial here,
25 what we were going to, so far as we understand it, we're putting our defence in and
26 we were going to deal with the trial one issues because -- just so that's on the record

1 and it's clear.

2 THE CHAIR: Liability and causation.

3 LORD WOLFSON: Precisely. Sorry?

4 MR PICCININ: Abuse and causation.

5 THE CHAIR: Abuse and causation.

6 LORD WOLFSON: Abuse and causation, exactly. Yes. Exactly. I always say liability,

7 Mr Piccinin always corrects me as well.

8 THE CHAIR: Right.

9 MS HOWARD: I think that's a very sensible way forward (overspeaking) --

10 THE CHAIR: And then, when you've seen that, whether any disclosure is necessary.

11 So you're --

12 MS HOWARD: Yes.

13 THE CHAIR: That can be discussed another day but that has to be in relation to

14 pleaded issues. So if we go back to your list of issues, is that appropriate? Sorry,

15 I appreciate I've taken you completely out of your course, but is now an appropriate

16 time to go through the list of issues?

17 MS HOWARD: I think it's worth trying to go through it. We'll go as far as we can. I'm

18 (inaudible) on each issue. I'm going to get some flak because of the (overspeaking) --

19 THE CHAIR: So the first one will have been covered off by this witness statement.

20 MS HOWARD: Yes.

21 THE CHAIR: A(1)?

22 MS HOWARD: Correct.

23 So A(2) and A(3), I think, are going to be covered off in the witness statement as well.

24 I mean, it's important for us to know when Apple first became aware because that must

25 go(?) to the duration.

26 THE CHAIR: Yes, I did -- yes. Obviously, the --

1 MS HOWARD: Yes, that's part of your third category: the decision. But it's also when
2 they first became aware of it.

3 THE CHAIR: When they first became aware of? So my first one was Apple's
4 understanding of the cause of the UPOs.

5 MS HOWARD: Yes.

6 THE CHAIR: And the relevant date.

7 MS HOWARD: And when Apple became aware of it, may be there. You fold in.

8 THE CHAIR: Okay.

9 MS HOWARD: And under A(2), I think, would be folded in within the impact on
10 consumers, which is your second head.

11 Then if we move to B, you'll be pleased to know, I think the parties have made
12 significant progress on B, which is the effect of the power management feature.

13 THE CHAIR: So B(1) is --

14 MS HOWARD: That's largely agreed, I think.

15 THE CHAIR: Largely agreed.

16 MS HOWARD: The red -- I don't think there's any objections on the red text.

17 MR PICCININ: No.

18 THE CHAIR: So, right. Fine. Then?

19 MS HOWARD: And then we come to C where again, there's a lot of red text
20 throughout. And maybe it's worth me just setting out why C is important.

21 MR PICCININ: Sorry to interrupt.

22 THE CHAIR: Yes. No, please.

23 MR PICCININ: Just to be fair, I don't know the answer to this myself, what the scope
24 of what we're doing right now is, just in the sense that if we're going to do a pleading
25 and then we're going to do a defence, and then after that we're going to do disclosure
26 and at the moment we did this agreed list of issues just on the basis of the claim form

1 and not on the basis of the defence. It may be that things, even things that are agreed
2 in this list of issues, won't be agreed after the defence because issues will be taken
3 off the table by (inaudible).

4 THE CHAIR: We're just going through the list of issues.

5 MR PICCININ: We're just going through it.

6 THE CHAIR: We're not making any orders at the moment.

7 MR PICCININ: No, I understand. I'm grateful.

8 THE CHAIR: Obviously there's a firm steer that disclosure on issues A(1), A(2) and
9 A(3) will face an uphill struggle in the light of the order in the witness statement. I've
10 been informed that B(1) is agreed.

11 MR PICCININ: For the moment, and it may be that after we've done the defence, if
12 we come back and redo this, it needs to be reformulated.

13 THE CHAIR: Okay. Maybe. So this is a working document of issues. Talk to me
14 about C(1).

15 MS HOWARD: Section C deals with the user experience. So this is the impact of the
16 PMF, not just on the technical aspects of the phone, how it's slowed down the CPU or
17 the GPU, but actually how that translated into the everyday use of the phone by the
18 consumers, whether it was scrolling, whether it was downloading material, whether it
19 was apps, you know, crashing. So it's the translation on the user experience and what,
20 we say, is the consumer detriment that they suffered as a result.

21 THE CHAIR: Sorry, this is what claims or statements were made by Apple. I'm looking
22 at C(1) about the performance. So how did they promote the performance of the
23 phones?

24 MS HOWARD: C(1) brings in what we're comparing is what consumers thought they
25 were getting and what they ended up (overspeaking) --

26 THE CHAIR: Yes. No, I understand what it is. This is not agreed as an issue.

1 MS HOWARD: No, that's right.

2 THE CHAIR: Can you just explain why it's not agreed as an issue.

3 MR PICCININ: Sir, I mean, to some extent that we were going to take you through

4 some of the history because it's difficult to recall all of it now, but you might recall that

5 one version of the claim that was brought against us was that the thing we had failed

6 to be transparent -- Apple had failed to be transparent about, was that the PMF left

7 consumers with devices that were substandard, and the standard that the Class

8 Representative was trying to establish was a standard by reference to various

9 statements that Apple had made about the performance of these devices, you know,

10 "blazing fast", that kind of language.

11 THE CHAIR: I remember this quite clearly. Yes.

12 MR PICCININ: That's right. And then where we got to in that hearing was that they

13 were unable to even identify any meaningful standard against which they could be

14 (overspeaking) --

15 THE CHAIR: Well, there were these invitations to treat sort of documents that --

16 MR PICCININ: That's right.

17 THE CHAIR: -- had no legal issue. But at the last hearing, I didn't strike out that

18 paragraph.

19 MR PICCININ: But the Court of Appeal then, as a condition for not granting us

20 permission to appeal, required them to remove it.

21 THE CHAIR: But it's still in there?

22 MR PICCININ: There's a lot that's still in there pleaded by way of background, sir, but

23 actually in terms of an allegation that the devices were substandard, that has, I think,

24 faithfully been removed, certainly was supposed to be.

25 THE CHAIR: No, it's not. It's still there.

26 MR PICCININ: Well --

1 THE CHAIR: I thought --

2 MS HOWARD: No, we've removed references to -- substandard was just a term that

3 the experts used.

4 THE CHAIR: Right.

5 MS HOWARD: And they just used it as an umbrella term to cover (overspeaking) --

6 THE CHAIR: But if we look at 7f.

7 Sorry, we looked at it earlier.

8 MR PICCININ: 7f, sir, did you say?

9 THE CHAIR: Yes. Sorry, maybe I'm wrong about this.

10 MR PICCININ: It's on page 752.

11 THE CHAIR: Yes, yes. So:

12 "... deterred or prevented the Proposed Class Members from seeking to exercise any

13 legal rights, whether under their warranty protection or pursuant to their statutory

14 rights ..."

15 MR PICCININ: So my understanding of those edits that you can see being made there

16 in the purple, those are the relevant ones, is that the original allegation was that

17 proposed class members were deterred or prevented from exercising their legal rights,

18 i.e., legal rights that they actually had. And the purpose of the edits was to remove

19 the allegation that they actually had any legal rights, that there was any breach of

20 warranty or any other statutory obligation.

21 THE CHAIR: Deterred or prevented from seeking to exercise. Sorry, that's a nuance,

22 which is --

23 MR PICCININ: It is a nuance, sir, but that was the point of it because the claim that

24 was certified and the claim that you said in the CPO judgment was arguable, was

25 simply this, that if Apple had been transparent about the effects of the PMF -- and of

26 course, we don't accept there was any failure to be -- but if there had been and if we

1 had told everyone, there would have been a consumer uprising of sorts, and that
2 would have driven Apple commercially to make ex-gratia payments or provide free
3 batteries or whatever it is and that's the only claim that has survived the certification
4 and the permission to appeal basis.

5 And so this seeking to exercise language, we understood as being that consumer
6 uprising language: people complaining not that they actually had rights, but that they
7 might have asserted rights and the consequence would have been that Apple would
8 have written cheques --

9 THE CHAIR: Reference to the warranty note?

10 MR PICCININ: It's just seeking to exercise. If we go back and look at the
11 Court of Appeal judgment.

12 THE CHAIR: Well, there isn't a judgment. There's only a --

13 MR PICCININ: There was a ruling on permission.

14 THE CHAIR: Ruling on permission, yes.

15 MR PICCININ: Yes.

16 THE CHAIR: Yes, I've got it in mind, but that's why I was very surprised this was not
17 taken out --

18 MR PICCININ: Yes. Well, the reason --

19 THE CHAIR: -- if the idea was to dispose of the appeal. So they can seek to claim
20 under warranty but that doesn't mean they have a warranty.

21 MR PICCININ: No. Damages are only being claimed on the footing that Apple's
22 reaction to consumer noise, you know, including in the form of asserting rights that
23 they may not have had.

24 THE CHAIR: Right. Well, I'm not going to resolve that today, but I have to say, I think
25 that's -- I understand your construction of that paragraph. But on issue C --

26 MR PICCININ: Yes. So it may be helpful if you also look at footnote 1 in the

1 re-amended claim form. That's page 747.

2 THE CHAIR: Yes.

3 MR PICCININ: Which is the reason why we adopted that construction. I'd forgotten

4 that. Grateful to those behind me.

5 THE CHAIR: Okay. All right. Well, all right.

6 MR PICCININ: That really is crystal clear, and so we say this is just another --

7 THE CHAIR: No, it's not. Maybe crystal clear to you. Not sure it is to me, but --

8 MR PICCININ: But the footnote is clear, sir. It says that they're abandoning the case

9 that anything is substandard. That's why we say that there's no basis for any

10 disclosure.

11 THE CHAIR: But this isn't about warranties anyway, this paragraph. It's my fault I set

12 that hare running, but these are claims that all statements were made about Apple,

13 about the performance of the affected iPhones. So that does seem to still fall within

14 the -- I appreciate you say there's nothing in this, but there are documents in the case

15 which have been relied upon by the Class Representative, saying that they have

16 blistering speed, and I think that was one --

17 LORD WOLFSON: That's all gone.

18 THE CHAIR: What do you mean, it's all gone? It was relied upon by the Class

19 Representative.

20 MR PICCININ: At the hearing.

21 THE CHAIR: That was nothing to do with legal rights or warranties. That was

22 representations.

23 MR PICCININ: Yes, trying to establish the standard against which they were said to

24 be substandard. All of that's gone now. That's exactly the point that's being made in

25 footnote 1.

26 THE CHAIR: Right. Okay. Well, I --

1 MR PICCININ: You might also wonder why there needs to be disclosure on what
2 claims or statements were made at public speaking events.

3 THE CHAIR: You're talking -- well, because they're not easy to get hold of
4 necessarily -- but you are talking about searching within documents that have been
5 provided to the regulators.

6 MR PICCININ: Yes.

7 THE CHAIR: Insofar -- I mean, there'd be no reason for you to object to searching
8 those documents for this.

9 MR PICCININ: Well, sir, it's just that what we're proposing is to provide disclosure
10 from within those data sets, from within those repositories that are relevant to the
11 issues in dispute.

12 THE CHAIR: Yes.

13 MR PICCININ: Yes.

14 THE CHAIR: But it would not be burdensome for you to produce these documents.

15 MR PICCININ: Well, it's just adding additional categories against which the human
16 review then needs to take out -- or take place.

17 I would say, as well -- so, we're kind of doing things in a different order, but our
18 proposal for disclosure was that we would give them the entirety of the CMA file --

19 THE CHAIR: Yes. I've got in mind --

20 MR PICCININ: -- whether it was relevant.

21 THE CHAIR: Yes, yes, yes.

22 MR PICCININ: Insofar as there is material alongside that (overspeaking) --

23 THE CHAIR: Yes, it was the US and the French, is it that you're searching? Or the
24 Italian, I can't remember.

25 MR PICCININ: So, it's the CMA and the French we were going to give in their
26 entirety --

1 THE CHAIR: And then --

2 MR PICCININ: -- except for the individual complaints.

3 THE CHAIR: Yeah.

4 MR PICCININ: Then Italy and the US, we were going to review --

5 THE CHAIR: You were going to search.

6 MR PICCININ: -- against the list of issues for disclosure. Since then, there's been no

7 circumstances --

8 THE CHAIR: Insofar as -- just as a preliminary observation, you may have to argue

9 effectively on C(1), when we get to that. C(2). (Pause)

10 Why doesn't C(2) fall within the ...? (Pause)

11 MR PICCININ: Yes, sir. This one, we object to the impact of the battery issues and

12 the UPOs because, again, the claim that you certified was the claim that related to

13 a failure of transparency.

14 THE CHAIR: Yes. So the batteries and UPOs will be covered by the statement.

15 MR PICCININ: Exactly. And then our point on the PMF for this one is that if you look

16 on to C(3), which was agreed, subject to some points about wording --

17 THE CHAIR: Yes, yes, it would get picked up in C(3).

18 MR PICCININ: Exactly. So there's no need for anything that's in C(2).

19 MS HOWARD: Sorry, I'm not able to get -- I'm not able to explain it --

20 MR PICCININ: I'm sorry --

21 MS HOWARD: I know, it's just we're back in the Turkish bazaar, where I'm not able

22 to actually (overspeaking) --

23 THE CHAIR: My fault, Ms Howard, we were jumping around and --

24 MS HOWARD: I think it's -- I mean what we are --

25 THE CHAIR: I've made an observation on C(1). Feel free to address me on C(2) and

26 C(3).

1 MS HOWARD: So, C(2) is not collapsed within C(3), because C(3) only deals with
2 Apple's knowledge, whereas what we're trying to do here is to get the actual
3 contemporaneous documentation at the time, which shows the impact of the PMF on
4 the scrolling, on the apps, on the use of the components that reflect the user
5 experience from launch until the end of the battery replacement programme. This is
6 important for us to be able to prove our case on effects, but also to show our theory of
7 harm. Because it's not just enough to show the technical implications for the processor
8 or the components, but how that actually fed through and was translated into the user
9 experience --

10 THE CHAIR: Yes, no, I understand.

11 MS HOWARD: -- and then how they would, in the words of the Court of Appeal, react
12 to --

13 THE CHAIR: I understand that. So you say it's not just -- I mean it's maybe
14 a distinction without a difference -- but you say it's any documents that evidence that,
15 not just that evidence, Apple's knowledge of that.

16 MS HOWARD: Yes, but -- yes. And we say that it can't just be confined to the PMF
17 in C(2) because, obviously, the consumers didn't know the PMF existed. So they need
18 to know what the impact was when there was a slowdown or a freeze. It has to be put
19 into everyday events that they would have recognised, rather than the PMF. But the
20 next phase is why it's important, as we go through into, is what were their reactions to
21 that reduction in performance?

22 The 3 and 4 -- C(3) is largely agreed, but C(4) and C(5) are looking at the particular
23 steps that they may have taken to upgrade early, because many of them were tied into
24 contracts with MNOs, and we pleaded this, that they would have upgraded early and
25 they may have had to actually pay additional, to get the upgrade, or they may have
26 been penalised for doing it. Then, in C(5), they may have gone for early battery

1 replacements and had to pay for the battery replacement out of their own pocket, when
2 we say they would have been entitled to a free one.

3 THE CHAIR: In terms of documents, I appreciate we're dealing with issues, but how
4 would this translate into --

5 MS HOWARD: Yes. In terms of documents, what we're really wanting here is not the
6 whole document kind of database. We're just wanting quite targeted information on
7 the number of upgrades and the number of battery replacements over a period of time,
8 so that the experts can spot the trends and look at the period of time to say, "Well,
9 actually, there was an uptick here in the number of early upgrades or the number of
10 battery replacements while the PMF was there".

11 So it's actually quite focused -- rather than having a compendium of multiple
12 documents, what we're seeking is a sort of pack or statement, where Apple can
13 consolidate aggregate information, give us the data in a user friendly format that
14 shows us the number of --

15 THE CHAIR: So weeks arguing on why there was a 3 per cent increase in battery
16 replacements, or battery purchases or phone upgrades. I mean, that would be --

17 MS HOWARD: But this does feed through into one of the heads of loss, eventually,
18 that we say that one of the heads of loss is for the upgrades and the battery
19 replacement. So at some point, it will need to be disclosed.

20 THE CHAIR: Well, it may, if we get that far. Yes, it may need to be, but on liability, to
21 the idea that we were going to have a forensic analysis of consumer behaviour.

22 MS HOWARD: We need to prove that there was -- that this is one of the elements
23 that we've pleaded that consumers did as a reaction to the PMF, and it feeds back into
24 that recognition that the Court of Appeal made, that actually there was an action and
25 a reaction, and they either did take a transactional decision that they wouldn't
26 otherwise have done, by upgrading or by getting a battery replacement, or they may

1 have abstained, so they didn't exercise their statutory warranty rights or claim a refund
2 or a replacement. So it's that analysis of how this fed through into the consumer
3 behaviour that we're trying to trace.

4 THE CHAIR: I'm not sure I quite understand that submission, but I'm not quite sure
5 that these categories quite capture that. That's not part of one of your categories for
6 known adverse documents.

7 MS HOWARD: No, no, no, the KADs is going to actual documents, whereas this is
8 just a sort of data analysis of the number of upgrades or number of battery
9 replacements that were carried out earlier. Because Apple will have this information,
10 they'll have their Apple ID accounts. So, as you have your Apple ID, it tracks your
11 phone, so it will have known when users switched to a new phone, and it will also,
12 through the customer service centre, have details of batteries that were replaced
13 through its customer service centre.

14 THE CHAIR: Before we even think about ordering anything like this we'd need
15 evidence --

16 MS HOWARD: Yes.

17 THE CHAIR: -- on this.

18 MR PICCININ: My understanding is that what's just been said -- and it's just my
19 understanding on instructions -- is that what's been said there about what Apple would
20 know is not right. So ...

21 THE CHAIR: It seems like an extremely ambitious task to be able to do, but I mean,
22 maybe it can be done, but that would obviously need to be the subject of evidence and
23 a particular application. I can't really express a provisional view on that at the moment.
24 But you say you're going to have to prove -- one way or another, you've got to prove
25 the impact on consumers of the PMF.

26 MS HOWARD: Yes.

1 THE CHAIR: And one way of doing that -- I don't know if you're going to have other
2 ways of doing that -- one way of doing that is looking for trends in the data of upgrades
3 and battery replacements.

4 MS HOWARD: Yes, or examples where consumers did --

5 THE CHAIR: And you'll need to think, if that data doesn't show anything, what your
6 case is. If you're putting your eggs in that basket, is that one of many baskets or is
7 that your --

8 MS HOWARD: Well, it is one of many baskets, but it is a specific example of
9 (overspeaking) --

10 THE CHAIR: So how well -- before ordering that, I'd like to understand how else you're
11 going to prove that issue.

12 MS HOWARD: Yes, sir. There will be other routes to get some of this information,
13 but we think that Apple, because they manage the ecosystem, and they have the Apple
14 account ID data, and they've got their customer service records, they'll be able
15 to -- because a lot of -- Apple's official line is you should only get a replacement battery
16 through Apple or through an Apple authorised agent. So --

17 THE CHAIR: Right. I don't want to grapple with the detail today.

18 MS HOWARD: Yes.

19 THE CHAIR: They may or may not. Obviously, that needs to be -- that's potentially
20 a -- I'm not saying this in a negative way from what you're asking for, but that's
21 potentially a very difficult matter that will require some scrutiny before any orders are
22 made, I think, on this part of the case.

23 MR PICCININ: It would be helpful for me just to expand on that very briefly -- on that
24 idea -- just to put a marker down on that. Dealing with -- if I'd understood that this was
25 effectively a data request, what I might have said is that including a generalised list of
26 issues for disclosure is not the best way of airing a debate about what data should be

1 provided for in a kind of data-driven methodology. Normally, the way that would be
2 dealt with in these kind of cases is that you would have an explanation from the Class
3 Representative about what sort of analysis this is going to support -- what sort of expert
4 analysis is going to support -- what sort of data is required, and why it's required, in
5 order to show whatever they want to show.

6 THE CHAIR: The issue can be stated quite concisely. What is the impact of the PMF
7 on consumer behaviour? There's a better word than behaviour, in terms of battery
8 replacements and phone upgrades, but then the question is: what disclosure should
9 be given around that? And you accept that's going to be an issue in the case, the
10 extent to which PMF can impact, or you're conceding that the PMF had an effect on
11 consumers?

12 MR PICCININ: No.

13 THE CHAIR: So it's an issue. It's an issue in the case Yes.

14 MR PICCININ: Although -- so the dividing line between what is causation, and
15 therefore an issue for Trial 1, and what is quantum, and therefore an issue for Trial 2,
16 is another question. At the moment, I understand --

17 THE CHAIR: But if you're fighting causation, then obviously the causation aspects
18 need to be addressed in Trial 1, and this is potentially one way of evidencing the
19 impact of the PMFs.

20 MR PICCININ: I'm hearing that explained for the first time now. Once it's explained,
21 we can then go away and explain what there is and what there isn't. Then they'll have
22 to decide --

23 THE CHAIR: We can't take that any further today.

24 MR PICCININ: No, I don't think so.

25 MS HOWARD: Again, we're going into the territory of trying to determine the issues,
26 when again the pleadings are at quite an early stage.

1 THE CHAIR: Well, I don't think it's anything to do with the pleadings. This is pleaded --

2 MS HOWARD: Yes.

3 THE CHAIR: -- that the PMFs had an impact on consumers. I think we're not really

4 talking about the pleadings. We're talking about what materials you need to prove that

5 at trial.

6 MS HOWARD: Yes, which involves experts and getting what the experts need.

7 THE CHAIR: Yes. But I'd certainly invite the parties to try and narrow the issues on

8 this before we have to grapple with it.

9 MS HOWARD: (Overspeaking) and see if we can narrow the --

10 THE CHAIR: Find out what's available, and it may be an application needed to be

11 supported by evidence. There's not much in D to talk about, is there?

12 MS HOWARD: The good news is that D is --

13 THE CHAIR: Largely --

14 MS HOWARD: -- largely agreed. There's a little wrinkle at the end of D1 on page 25,

15 where we wanted to include the resellers of the affected phones. Apple has objected

16 to that because they say that this is not something that we've pleaded specifically. But

17 we have pleaded this. We may not have put the word reseller in, but this reflects the

18 fact that most smartphones in the UK were sold through MNOs such as --

19 THE CHAIR: Sorry, I'm being slow. Where are you?

20 MS HOWARD: I'm just at the very last part of D1, and it's at the top of page 25 in the

21 soft bundle. It may be 30 in your bundle.

22 So this is the issue. What we're looking at in this bit is the transparency of the PMF

23 and the redress program, and what information was communicated both internally to

24 Apple's own customer service representatives and Apple's retail stores, but then also

25 externally to independent resellers of the affected iPhones. So this goes to the

26 transparency point about the PMF and also about the redress.

1 THE CHAIR: Right. I'm not going to make a decision on that today, but I am
2 (inaudible) see what it is.

3 MS HOWARD: Just to give you some (inaudible) we have pleaded that --

4 THE CHAIR: (Overspeaking) see what it is.

5 MS HOWARD: I can give you the reference in paragraph 19 and paragraph 60 of the
6 amended claim form. Paragraph 19. It's on page 467. And paragraph 60 on
7 page 482. The fact that over 60 per cent of users got their phones through MNOs,
8 network (inaudible) or retail stores.

9 THE CHAIR: Sorry, I don't think we need to spend time on this now.

10 MS HOWARD: And so those are resellers.

11 THE CHAIR: There seems to be an issue on D(6), was it?

12 MS HOWARD: D(6), I think, has been agreed.

13 THE CHAIR: Right. Then D(7).

14 MS HOWARD: D(7). Again, this is about the information that Apple provided about
15 the redress program. This again goes to the transparency of the redress program.
16 This is a rebuttal point, because Apple -- we anticipate in their defence -- are saying,
17 "Well, any harm was mitigated by the redress program, with the message that we sent
18 out and with the offer to replace the battery with a charge. That has remedied any
19 problems", whereas our counter-argument is "no", because that redress program was
20 not actually effective. Either -- it wasn't communicated properly, people didn't know
21 about it and the take-up was extremely low.

22 THE CHAIR: Right. Okay.

23 MS HOWARD: So D(7) is dealing with the transparency of the information that was
24 provided directly to users or to third parties, MNOs, retail stores, and -- what the
25 take-up was in the UK and whether people actually knew that this offer was being
26 made because of the problems with the PMF.

1 MR PICCININ: Sorry, I don't know whether you want to hear from me on that.

2 THE CHAIR: Not at this stage, no.

3 MR PICCININ: Not particularly? I'm grateful.

4 THE CHAIR: Then --

5 MS HOWARD: Then section E is all red, pretty much. We say this is -- this issue of
6 consumer redress in the counterfactual is important to establish the anti-competitive
7 effects of the conduct and the causation, because we need to show -- and it's linked
8 to the earlier provisions -- that the PMF had an impact on consumer behaviour. It's
9 not just the technical impact on the components and performance of the phones. It's
10 not just how that translated into scrolling, freezing, apps crashing, but how consumers
11 then reacted to those negative impacts.

12 This directly brings in the point that the Court of Appeal recognised, that because they
13 didn't have complete information, they couldn't make informed decisions about what
14 to do about it and therefore, that led them to making a transactional decision that they
15 wouldn't otherwise have done. The definition of transactional decision is very broad,
16 so it does include doing nothing. They may have just passively put up with the phones
17 that were impacting on their performance rather than exercising or pursuing routes
18 that would have been available to them. So this section of E explores -- E(1)
19 explores --

20 THE CHAIR: Yes, I've read it.

21 MS HOWARD: -- the options they might have taken.

22 THE CHAIR: What's the issue on this? They seem to be --

23 MR PICCININ: Two observations. One is that in paragraph 39 of our skeleton
24 argument, we did actually say that for E(1), to the extent we spot anything, that
25 responds to that issue in our human review process. We'll provide it.

26 THE CHAIR: But it is an issue in the case, isn't it? The impact of --

1 MR PICCININ: Yes, the concern we have with these ones --

2 THE CHAIR: I mean, these are looking a little bit like disclosure classes at times, but
3 these are going to be issues.

4 MR PICCININ: Yes.

5 THE CHAIR: And subject to nuance, the impact of the alleged lack of transparency
6 on consumers would seem to be a central issue in the case.

7 MR PICCININ: Certainly an issue in the case. Our concern with these issues for
8 disclosure, which is a different thing from an issue in the case, is that framing an issue
9 as to what would third parties have done differently in different circumstances is not
10 a very helpful way to send us off looking for documents, because we're very unlikely
11 to have documents that address what other people would have done in different
12 situations. You know, it's defined by reference to -- had consumers been more aware,
13 more aware of in what sense -- like if consumers had known what? So we're looking
14 for Apple documents stating that if consumers had known something more about any
15 of these points, then would they have done something differently. That's a --

16 THE CHAIR: It's really the effect of the PMF on the performance of the handset.
17 I suppose --

18 MR PICCININ: Well, that we've got back in B(1), all the way back in B(1). So it's
19 important to look at all of these in context.

20 THE CHAIR: Well, it seems that further correspondence on these issues might help.

21 MR PICCININ: Might help. I think there's probably not much point running through
22 the rest.

23 THE CHAIR: Right. Okay.

24 MS HOWARD: So --

25 THE CHAIR: In terms of looking ahead to the type of disclosure, assuming we are not
26 having disclosure until after close of pleadings, and then there's no need for it to be

1 done in chunks. It can be done properly.

2 Apple's proposal -- I appreciate you disagree with some of the list of issues, and we've
3 discussed that -- but Apple's proposal is that they give you everything from the Class
4 Representative -- sorry. everything from the CMA, everything from the French
5 proceedings and do searches, and once we have settled on the issues, searches with
6 regards to the US and Italy. Do you have any objection to that as a course?

7 MS HOWARD: We think that was a very helpful suggestion, which we're happy to
8 accept.

9 THE CHAIR: Right. Now, that may not cover off B.

10 MS HOWARD: There are some other --

11 THE CHAIR: There may be some classes --

12 MS HOWARD: There are other proceedings and there's some other investigations.

13 THE CHAIR: Right. You can discuss that. But in terms of your wanting data on
14 battery, changes in battery habits, if that is ordered, you said you wanted to look
15 at -- that may or may not be in those --

16 MS HOWARD: It may not be in those materials. Yes.

17 THE CHAIR: Yes.

18 MS HOWARD: I think the kind of dividing issues -- we think providing the regulatory
19 materials is a sensible idea, because they're ready baked. They're ready to go.
20 They've already been vetted for privilege. They will have been redacted for
21 confidentiality. There then is a debate about whether Apple should overlay that with
22 some human review and internal searches. Whether that's a useful source of
23 expenditure, I don't know.

24 THE CHAIR: But, I mean, Apple seem on the face to have made a sensible
25 suggestion as to how to deal with disclosure. And at the moment you're not
26 disagreeing with that.

1 MS HOWARD: I think those regulatory investigations -- to have that and to have that
2 in the time frame (overspeaking).

3 THE CHAIR: But I wasn't sure how that addressed -- well, you're not going to have
4 it -- the time frame we haven't discussed yet, because the pleadings aren't closed.
5 What I don't want is Apple to go through and do its searching and then say, "Well,
6 actually you've done all that and there are now another five issues and you've got to
7 go back and do it all again". That's obviously going to be inefficient. So that's why.

8 MR PICCININ: Can I just clarify what we were proposing, just because you've used
9 the shorthand (overspeaking) to be very clear.

10 THE CHAIR: Yes. Okay. I've got (overspeaking). Yes.

11 MR PICCININ: The CMA, we were going to give them everything.

12 THE CHAIR: Everything. Yes.

13 MR PICCININ: But the French -- we were going to give them everything except for
14 the individual complaints, which are individual French complaints, obviously.

15 THE CHAIR: Yes.

16 MR PICCININ: Those are the only ones where we were not going to be doing an
17 issue-based review.

18 THE CHAIR: Yes.

19 MR PICCININ: Outside of that, everything was in issue-based review land with -- that's
20 really all I wanted to say.

21 THE CHAIR: But I'm not sure that gets us home on category B, does it? Do I mean
22 B or do I mean C? Sorry, the one where you wanted to look at the consumer
23 behaviour. Sorry, I've lost track now.

24 MS HOWARD: C, I think.

25 THE CHAIR: Yes. So you were saying you were going to -- how you're going to
26 prove --

1 MS HOWARD: Well --

2 THE CHAIR: -- causation or --

3 MS HOWARD: We were planning that the list of issues would be the template for

4 general disclosure going forwards.

5 THE CHAIR: Yes.

6 MS HOWARD: I think the dividing line between us --

7 THE CHAIR: It's the point I was putting to you earlier that you want to look at

8 comparative data.

9 MS HOWARD: Yes. That's right. We are concerned --

10 THE CHAIR: Full batteries and that wouldn't seem to fall within the -- it may, it may,

11 but it wouldn't seem to fall within the classes --

12 MS HOWARD: That's what we're worried about.

13 THE CHAIR: -- that Apple are proposing.

14 MS HOWARD: That Apple seeing this through the prism of -- I know that they want

15 to find a proportionate way of doing disclosure, but they're seeing it through the prism

16 entirely of the regulatory investigations and by reference to the issues (inaudible)

17 pleaded.

18 THE CHAIR: It's a request. It's not really disclosure in the strict sense. You're not

19 asking for documents, you're asking for some experts to liaise on what sort of data

20 Apple have and what they should provide to you to prove causation and you haven't

21 yet told me what other sources of information you'll be relying upon to prove your case.

22 MS HOWARD: We welcome the regulatory investigation material as a form of early

23 disclosure, which we think is sensible.

24 THE CHAIR: This is not -- we're not --

25 MS HOWARD: But we don't think that should be the entire geography of the disclosure

26 that's provided.

1 THE CHAIR: Right. Well, we're just doing one disclosure.

2 MS HOWARD: Because normally you would do it by reference to the pleaded issues
3 and the issues in the list.

4 THE CHAIR: Right. But we're not having a -- yes. On a lot of these we're not having
5 a disproportionately expensive disclosure exercise. So, it seems a very sensible
6 suggestion to do it by reference to the document sets that Apple have proposed. If
7 you need anything outside that you're going to have to make your case.

8 MS HOWARD: Well, as long as there's liberty to apply, that we can come back and
9 ask (overspeaking) --

10 THE CHAIR: No, it's not liberty but we haven't had the disclosure hearing yet. So
11 we're going to have a disclosure hearing after pleadings are closed and at that hearing,
12 you'll have to say what it is you need.

13 MS HOWARD: Yes.

14 THE CHAIR: You'll have had further correspondence with Apple to identify what's
15 doable and then, that will be disclosed. Obviously, you're always at liberty to apply for
16 further documents, but there won't be a second major disclosure exercise.

17 MS HOWARD: So I think, if we've got access, I'm assuming, to the regulatory
18 investigation materials in good time so that we can review them before that disclosure
19 hearing.

20 THE CHAIR: Well, that is disclosure. You won't get the disclosure before the
21 disclosure hearing.

22 MS HOWARD: But what about the categories that aren't going to be covered by those
23 regulatory materials?

24 THE CHAIR: You'll need to make an application for those. We'll need to discuss those
25 at the disclosure hearing.

26 MS HOWARD: So the status of the listed ones at the moment --

1 THE CHAIR: Well, how quickly can you get the CMA documents over to --

2 MS HOWARD: Sorry to turn my back. I'm just going to --

3 THE CHAIR: No, it's all right.

4 MR PICCININ: So the answer is six weeks.

5 THE CHAIR: Six weeks for the CMA and the French?

6 MR PICCININ: And the French. That's how long the documents will take.

7 THE CHAIR: So the --

8 MR PICCININ: My understanding is we're talking about doing this after the pleadings.

9 THE CHAIR: Well, those documents, if you're just providing them they could be

10 provided now, couldn't they? That would move things along.

11 MR PICCININ: Sir, that does take us into the situation where we're -- which of these

12 exercises are we doing, pleading or disclosure?

13 THE CHAIR: Right. Well, I'm suggesting that Ms Howard is concerned, she says,

14 doing this by reference to the documents regulators have, she doesn't know what

15 documents regulators have. So she's asking for -- saying that there would potentially

16 be further applications but if she's got at least the French and the CMA documents

17 before a further disclosure application, because you're just giving those wholesale, it

18 doesn't require much work in your hand, it will enable us to have a more constructive

19 conversation about what regulators have and don't have at the disclosure application.

20 MR PICCININ: Just taking instructions.

21 MS HOWARD: It might help to have the composite draft order because there's the

22 defendant's wording.

23 THE CHAIR: I don't know if you were listening to that.

24 MS HOWARD: I was trying to, yes.

25 THE CHAIR: Okay. So one option -- I'll wait till you're both -- (Pause)

26 MR PICCININ: Would it be possible for us to take another break? I think we're going

1 to be fine for time today.

2 THE CHAIR: Yes, sure, sure, sure.

3 MR PICCININ: Could we take --

4 THE CHAIR: Let me just explain this. Ms Howard was taking instructions when I -- so,

5 a possible way forward today is that after a period, you receive the CMA and French

6 documents, because they're not being screened. There's no searching within those,

7 you're just getting them, subject to privilege, of course. So you have those. That can

8 go ahead in parallel with the defence coming and you'll reply and then we will have

9 a resolved final issues in dispute on disclosure. So that's the list of issues and

10 categories of disclosure after the pleadings are closed. And you will have at least had

11 a look at the sort of material the regulator has. That's the proposal.

12 MS HOWARD: That's consistent with what the defendants have proposed. There's

13 also the Italian (overspeaking) --

14 THE CHAIR: We're not -- I don't want to keep going back to those because we've

15 moved quite a long way from the original proposal.

16 MS HOWARD: I know we have but there's also the Italian authority materials, which

17 are ready baked.

18 THE CHAIR: They're going to be --

19 MR PICCININ: Our proposal is that we would review those against the list of issues.

20 THE CHAIR: Yes.

21 MR PICCININ: That's entirely separate.

22 THE CHAIR: That's entirely separate. So you'd get French and CMA now and there

23 would be, because there's no searching required because --

24 MS HOWARD: There are six documents in the French production.

25 THE CHAIR: Well, it doesn't matter how many documents. You'll get the same in the

26 French documents now, whether it's six or 60 or six million, you'll get them now or

1 I say now, in a few weeks, and then we'll come back and any further disclosure
2 disputes, whether it's searching within the other categories offered by Apple or whether
3 you're making applications beyond those categories, will be heard after pleadings
4 have closed.

5 MS HOWARD: Can I just raise a query regarding the exclusion of the complaints in
6 the French procedure, because I don't understand the basis for those. Okay, they're --

7 THE CHAIR: But I'm not going to order that today. If you want the complaints, that'll
8 have to go off for further discussion.

9 MS HOWARD: But they're on the case file, so it's going to involve taking them out.

10 THE CHAIR: I'm not going to order that today because that's not -- The purpose of
11 getting early disclosure is disclosure Apple have offered. I'm not going to determine
12 any questions of disclosure until the pleadings are closed and we'll have to see what
13 the relevance of the complaints are. I don't know at the moment. So, that's the
14 proposal.

15 You'd like to take instructions? Of course. And so I'll rise. Where are we on time?
16 Do you want to come back at 2.00 or do you need five minutes? Do you want to be --

17 MR PICCININ: I think it might be helpful to come back earlier.

18 THE CHAIR: Okay.

19 MR PICCININ: So maybe we can wrap.

20 THE CHAIR: We may be able to be finished by then.

21 MR PICCININ: I'm not sure if there's actually anything more to really argue about --

22 THE CHAIR: I'm not sure (overspeaking) --

23 MR PICCININ: Exactly.

24 THE CHAIR: I can see you're chomping at the bit to do other things.

25 MR PICCININ: No, no, no.

26 LORD WOLFSON: There's nothing more exciting than talking about disclosure,

1 my Lord.

2 THE CHAIR: Okay.

3 (12.25 pm)

4 (A short break)

5 (12.37 pm)

6 MR PICCININ: I'm grateful for the ten minutes. I don't want to use the word content

7 to describe the way we feel about the proposal that has been made, but nor are we

8 going to argue against it. I do just want to explain that the offer that we made of

9 providing the disclosure of what we're talking about now, before pleadings closed, was

10 all on the basis of our understanding -- turns out, misunderstanding -- of what the

11 Tribunal had said in the certification judgment. So, ordinarily, this would not be the

12 approach we would be taking, and I don't want anyone to get the impression that it

13 would be, but given what you've said so far, and on the basis that it's this and then

14 we're done, then --

15 THE CHAIR: This and you're done. Well, that'd be disclosure and --

16 MR PICCININ: Done for today.

17 THE CHAIR: Done for today. Yes.

18 MR PICCININ: Then I'm not going to make any further arguments against --

19 THE CHAIR: And how long do you need to provide that, six weeks?

20 MR PICCININ: Six weeks is what we've said, so we can do six weeks.

21 THE CHAIR: So just to be clear, the only orders that I'm making today -- there's been

22 some steers, which shouldn't be seen as more than steers -- is the pleadings and the

23 witness statement.

24 MR PICCININ: Exactly. Yes. And then these two bits of disclosure.

25 THE CHAIR: These two bits of disclosure.

26 MS HOWARD: I think the last direction would be, I think, the date for the disclosure

1 hearing, because I think the capacity of the Tribunal is quite difficult to get hearings at
2 the moment, so it would be good to have a date in the diary.

3 THE CHAIR: I think -- yes, the problem's more getting the parties to, so I can't give
4 you a date now, I'm afraid. But when pleadings are closed -- I mean, when -- it should
5 take place shortly after pleadings have closed.

6 MS HOWARD: Even if we had a direction for the parties to liaise with the Tribunal and
7 together, for January or February, for a window for disclosure hearing, then that'd be
8 sensible.

9 MR PICCININ: That's fine. I'm sure we can put something in the draft.

10 THE CHAIR: Yes. Very good. There's just one other matter. The Court of Appeal
11 judgment, which is -- where is that? Just remind me. 20 something ...

12 MR PICCININ: It's in the core bundle and it is tab 29.

13 THE CHAIR: There was a complaint -- not a complaint, an observation about
14 confidentiality --

15 MR PICCININ: It was.

16 THE CHAIR: -- and about the consultation letter.

17 MR PICCININ: Yes.

18 THE CHAIR: I got the impression, at 77:

19 "The Consultation Letter relates more obviously to the continuation of the collective
20 proceedings in the CAT in relation to which we have refused permission to appeal,
21 and has less obvious relevance to Ground 1 for which we have given permission to
22 appeal. Accordingly, we consider that in the first instance the CAT ought to hear
23 submissions on the point, including, if so advised, from the CMA and, if appropriate,
24 from representatives of the media or members of the public. This Court can then
25 consider the matter further ..."

26 So that needs to be done.

1 MR PICCININ: Yes. Yes, sir, it may be that we should put that on the agenda for that
2 CMC, and we can invite the CMA too.

3 THE CHAIR: Exactly. That's what I was going to propose.

4 MR PICCININ: But I should say, the way this arose was at the hearing -- without prior
5 notice -- that the Court of Appeal raised it at the outset, and so we didn't have the
6 authorities in front of them. Certainly, what they say in paragraph 75 about Pergan is
7 not correct.

8 THE CHAIR: Okay. Well, I'm not going to say anything about the (inaudible), whether
9 it's correct or not, but we should at least address our minds to it, I think, at that hearing,
10 and then we can decide what to do in the light of the authorities.

11 MR PICCININ: Yes.

12 THE CHAIR: Okay. So is there anything else?

13 MS HOWARD: The last issue was the provisions in 17 and 18 of the draft order, which
14 were dealing with kind of cost management and just asking for an update from the
15 defendants on their total costs that have been incurred and to give a notice when their
16 cost levels have got above a certain level. That's just so that -- the Class
17 Representative is obviously mindful of the level of ATE insurance and wants to be
18 informed -- so there's no risk of exceeding that limit. So it's just a sensible mechanism
19 going forwards.

20 MR PICCININ: Yes --

21 MS HOWARD: The cost management.

22 MR PICCININ: This was raised at the last minute and there hasn't been an opportunity
23 for it to be discussed in correspondence. But our position on it is that there's no need
24 for an order on this at all. In the certification process -- and you may not
25 remember -- but there was actually a sub-limit in the ATE insurance cover for the
26 certification process, and Apple, proactively -- I think, is my memory of it -- engaged in

1 | correspondence, which was helpful, to discuss with the CR the relationship between
2 | the cover that they had and the likely costs that might be ordered against them --

3 | THE CHAIR: In your interests --

4 | MR PICCININ: -- to do that. And this kind of straitjacket is actually not really helpful.
5 | You know, items like total costs of the defendants in these proceedings is a concept
6 | that is probably not quite the right one, to bear in mind. So there hasn't actually been
7 | a problem that has arisen, and our suggestion is that the parties can be relied on to
8 | deal with this sensibly in the correspondence.

9 | THE CHAIR: Well, if you can't deal with it, then you can obviously bring it back at the
10 | next CMC.

11 | Thank you very much.

12 | (12.43 pm)

13 | **(The Court adjourned)**

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Key to punctuation used in transcript

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