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**IN THE COMPETITION**  
**APPEAL**  
**TRIBUNAL**

Case No: 1689/7/7/24

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

19<sup>th</sup> November 2025

Before:

The Honourable Mr Justice Waksman (The Chair)  
Michael Cutting  
Professor Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Applicant / Proposed Class Representative**

**Consumers' Association ("Which?")**

And

**Respondents / Proposed Defendants**

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

**A P P E A R A N C E S**

PHILIP WOOLFE KC, JACK WILLIAMS (instructed by Willkie Farr & Gallagher (UK)  
LLP) on behalf of the Consumers' Association ("**Which?**")

MARIE DEMETRIOU KC, MAX SCHAEFER, MICHAEL QUAYLE (instructed by  
Covington & Burling LLP) on behalf of Apple Inc., Apple Distribution International Limited,  
Apple Europe Limited and Apple Retail UK Limited

1  
2  
3 Wednesday, 19 November 2025

4 (10.30 am)

5  
6 Housekeeping

7 THE CHAIR: I'll just read out the usual warning before we start.

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

13 Thank you all very much for the timetable. Just two points to raise. We'll take our  
14 break almost exactly halfway through the morning and halfway through the afternoon,  
15 and we will have a 10-minute break at that stage. And I hope all of you were advised  
16 of the fact that we're starting at 10.00 am tomorrow and finishing at 4.00 pm.

17 Yes, Mr Woolfe.

18  
19 Submissions by MR WOOLFE

20 MR WOOLFE: Thank you, sir. Introductions. I appear with Mr Jack Williams for the  
21 applicant, the Consumers' Association (known as Which?). I will refer to them as  
22 Which? or the PCR on occasion. And the defendant is represented by  
23 Ms Demetriou QC, Mr Schaefer and Mr Quayle.

24 Just to check on the bundles. You should have, sir, in hard copy, a core bundle A,  
25 a supplementary bundle B, which has been updated in various respects. And you may  
26 have a hard copy of a supplemental clip of documents from Apple. Mine is in white,

1 but it should say in it something along the line of, "proposed supplemental clip", that  
2 has in it, a ruling from Kent v Apple, a ruling from Coll v Alphabet and an extract from  
3 Hollander. (inaudible) documentary evidence. Let's check you all have those. And  
4 you should also have electronic access to an authorities bundle.

5 To explain, the reason why this is a supplemental clip is there had to be a cut-off time  
6 for the electronic authorities bundle. So they're just some supplementary ones put in  
7 late yesterday.

8 Now, I'm going to be addressing the Tribunal on the authorisation and certification  
9 issues. In terms of how I propose to address it, I was going to do it under, sort of, four  
10 headings.

11 First, I was going to open the matter generally for you, introduce you to the proposed  
12 claim and the application, and show you the key parts of the draft amended collective  
13 proceedings Claim Form. You may well have read that in advance. I'm not sure how  
14 much time you've got to spend with it, so if you feel I'm spending too much time telling  
15 you things you already know, please do hurry me along. I won't do it for the sake of  
16 it.

17 Secondly, having done the Claim Form, I'm going to address the certification  
18 requirements in rule 79. Since I'll already have taken you to the relevant material in  
19 the Claim Form, I can do that pretty briskly. I think that's not in dispute.

20 Thirdly, I was going to turn to the requirements for authorisation of the PCR in rule 78  
21 and address those requirements and take you through the relevant parts of the suite  
22 of accompanying documents, the litigation funding agreement, litigation plan, and so  
23 forth, and make submissions on why those general requirements are met. I'm going  
24 to pick up most of Apple's objections in the course of doing that, because most of them  
25 are points of detail on those documents.

26 But then, fourthly, I'll turn to Apple's other objections, principally about funding, what

1 they call the LCM issues, somewhat freestanding points.

2 THE CHAIR: Can I just ask in terms of, as it were, live issues, apart from you dealing  
3 with the general points that you have to satisfy us about.

4 Have they been narrowed?

5 Is it absolutely clear what the remaining issues still are?

6 MR WOOLFE: Well, I was going to say, there is one issue that has been narrowed,  
7 taken off the table this morning. Mr Williams was going to address you on the question  
8 of the end date for the class definition.

9 THE CHAIR: Right.

10 MR WOOLFE: It's now been agreed simply that that can be done by reference to the  
11 date of the amended Claim Form, so that sort of procedural mechanics can get around  
12 the issue. We're not going to trouble you today on the point of principle as to whether  
13 the Tribunal can simply pick a different date.

14 THE CHAIR: There's been an amended Claim Form?

15 MR WOOLFE: There is a draft amended Claim Form.

16 THE CHAIR: A draft, yes.

17 MR WOOLFE: The draft amended Claim Form is at tab 3.

18 THE CHAIR: But that will just -- I don't think we need to go to it at the moment, but,  
19 on that basis, that will extend the end date to the date of the issue of the amended  
20 Claim Form?

21 MR WOOLFE: The date of the amendments are made pursuant to permission being  
22 given by the Tribunal to amend the Claim Form, yes.

23 THE CHAIR: Yes.

24 And then is it going to be proposed to amend it further down the line, or is this it on the  
25 end date?

26 MR WOOLFE: Sorry.

1 THE CHAIR: Mr Williams.

2 MR WILLIAMS: Sir, in due course it's very likely to be updated. So the normal practice  
3 in these proceedings, as you will recall from Le Patourel-

4 THE CHAIR: Yes, I do.

5 MR WILLIAMS: -- and Kent and Gutmann and so forth, is to extend it to the date of  
6 the PTR eventually. It's convenient to extend it now because we've had a year's gap  
7 already --

8 THE CHAIR: Right.

9 MR WILLIAMS: -- and that means the opt-out process and the notification process  
10 can capture that year's group already.

11 THE CHAIR: So unless there's any objection next time round, whether now isn't an  
12 objection, that can be done fairly quickly.

13 MR WILLIAMS: Exactly.

14 THE CHAIR: Thank you.

15 MR WOOLFE: Thank you, sir. But I think all the other points are -- we haven't heard  
16 that anything else has been conceded.

17 THE CHAIR: Right.

18 MR WOOLFE: So in terms of the points as I understand them to be, there is the LCM  
19 issues --

20 THE CHAIR: Yes.

21 MR WOOLFE: -- concerns about LCM as a funder --

22 THE CHAIR: Yes.

23 MR WOOLFE: -- arising from its accounts and so forth.

24 There's the priority point about whether or not fees due to funder, solicitors and  
25 counsel can be paid directly out of the recovery or only from undistributed damages at  
26 that point.

1 There's the termination point of to what extent Which? can object if the fund chooses  
2 to terminate the funding arrangements.

3 There's the point about the extent of cover for appeals.

4 And then there are complaints about transparency, as well.

5 THE CHAIR: Those are the five issues.

6 MR WOOLFE: Those are the five sets of issues, as I understand it, and essentially  
7 I will pick up the priority point, the termination point and the appeals cover point as I go  
8 through the (overspeaking).

9 THE CHAIR: Just pause there.

10 So, Ms Demetriou, that's accurate in terms of capturing the issues.

11 MS DEMETRIOU: That's right.

12 THE CHAIR: Thank you.

13 Yes.

14 MR WOOLFE: So, if I can bring with my first topic, then. I'll take this fairly swiftly if  
15 I may. The draft amended Claim Form is at bundle A, tab 3.

16 And the central allegation, as you will be aware, is that Apple is using its control of the  
17 iOS platform to grant preferential treatment to its iCloud storage service, and that  
18 constitutes an abuse of dominant position.

19 There are two aspects to the preferential treatment, namely technical restrictions that  
20 make it impossible to use competing cloud storage services in certain respects, and  
21 also a choice architecture that steers consumers towards using iCloud.

22 The first thing I'm going to show you, actually, is the class definition that's clearly  
23 relevant to, the certification criteria. That's at bundle A, tab 3, pages 53 and 54.

24 It's important obviously in itself, but also it sets some parameters for the claim, so I will  
25 spend a bit of time on that.

26 As you will see, the definition is quoted under paragraph 33, but I'd like to call your

1 attention to certain elements of it.

2 First, the definition of "iOS users", which is paragraph 34.1, it is defined as:

3 "Natural persons who use an Apple smart mobile device", essentially. [as read]

4 And "iOS device" is defined in 34.3. Essentially, it is "a smart mobile device running  
5 Apple's iOS operating system" [as read], so that includes iPad as well as iPhone and  
6 the old iPod Touch as well.

7 If you go back to the main definition -- this is important -- it refers to iOS users who  
8 obtained iCloud services, and the definition of iCloud services makes clear that this  
9 captures whether they purchase those services or otherwise. In 34.5, you can see in  
10 the middle of that paragraph, "whether purchased or otherwise".

11 Finally, you can see that the class definition refers to those who used iCloud services  
12 under paragraph 33:

13 "On an iOS device on which the United Kingdom was selected as the country or region,  
14 in the Apple ID account settings." [as read]

15 So it's limited in that way, and we've included personal representatives.

16 In terms of the factual background -- do stop me if this is unnecessary, but in terms of  
17 understanding how the iOS and iCloud are linked together, how the claim  
18 works -- there are restrictions that operate at a technical level. Those are set out in  
19 the Claim Form at paragraphs 55 to 59. That's bundle A, tab 3, pages 59 through  
20 to 61.

21 And the short point is that, as matters stand, for an undertaking to provide cloud  
22 storage to an iOS user on an iOS device, that undertaking has to offer an app. You  
23 can, for example, get the Microsoft OneDrive app on an iPhone. But since apps are  
24 subject to what is called sandboxing, which is described at paragraph 57, the result is  
25 that the app can only access its own data or data to which it is granted permission by  
26 the iOS, and there are certain file types which the iOS does not allow any third-party

1 apps to access, such as chat histories, passwords, device settings, and so forth.

2 The result is you cannot carry out a comprehensive backup of an iPhone or iPad using  
3 a third-party cloud storage service, the kind of backup if your phone is lost or stolen or  
4 smashed, you can restore it to a new phone.

5 We call that capability to offer comprehensive backup in the Claim Form "full service  
6 cloud solutions for iOS". I think we have that definition in paragraph 59. It's a very  
7 cumbersome and ugly term, but you can see it refers to something that, in the real  
8 world, consumers are going to want to do. More detail about this is in the report of  
9 Professor Mickens at bundle B, tab 7, paragraphs 37 through to 53.

10 The second point about how the facts from which the abuse arises, is a point about  
11 the Apple ID, Apple ID now being called an Apple account. Apple, through the  
12 Apple ID, has created links between the use of the iOS device and the use of iCloud,  
13 both at a contractual level and as a technical level as well.

14 The Apple ID is what you use to sign in to an iPhone or iPad. You can use an iPhone  
15 to some degree, I think, without signing in, but you need to sign in to use many Apple  
16 apps such as iMessage, FaceTime, and so forth, as well as iCloud. But, importantly,  
17 you also need an Apple ID to access the app store and buy any third-party app that  
18 does anything more interesting. That is dealt with in the Claim Form at paragraph 60,  
19 bundle A, tab 3, page 62.

20 So, at a contractual level, you have to sign up to the iCloud, terms and conditions as  
21 part of getting an Apple ID. You see that paragraph 61.1 of the Claim Form on  
22 page 63.

23 But also, at 61.2, when you sign in with your Apple ID, it automatically signs into iCloud  
24 as well and activates it on the device. So the net effect is, unless you're using the  
25 iPhone or iPad in an incredibly basic mode without an Apple ID, in practice at the  
26 moment you sign into a device and start using it, iCloud is effectively installed and



1 operating.

2 For the final point about iCloud, I will take you to page 66. You can see from the tiered  
3 pricing, how it operates. There's a basic free tier, up to 5 gigabytes, and there have  
4 been various prices at various times for today. Nothing turns upon the different prices.  
5 You can see there's a free tier, and then a series of tiers. And note the point of  
6 paragraph 67, that Apple does not itself operate the service at wholesale level.

7 So that's the factual background in the claim. In terms of how the claim is put, this  
8 goes to whether there are common issues; I think it's fairly obvious there are.

9 Market definition is obviously a first major issue. If you look at paragraph 99 of the  
10 Claim Form, page 79, you can see that we define markets at two relevant levels,  
11 paragraphs 99.1, 99.2. That's the operating system level, and then the level of the  
12 market for storage services. Operating system level, we allege a distinct market for  
13 the supply of operating systems for Apple smart devices. There may be two separate  
14 markets for iPad and iPhone, but that's not material.

15 Then cloud storage: there is, again, a pair of relevant markets, which we call the  
16 markets for full service cloud storage, for comprehensive backup, and the other market  
17 for other cloud storage. (Pause)

18 That's market definition.

19 Turning to dominance, paragraphs 110 to 112, that's pages 86 to 87. We say that  
20 Apple is dominant both on the operating system market and on the market for full  
21 service cloud storage services for iOS. And that is addressed in Mr Hughes' evidence,  
22 if you wanted to look at it, at bundle B tab 5, pages 113 to 119, we needn't go there.

23 Turning to abuse: I think for present purposes it is summarised sufficiently at  
24 paragraph 113. That's bundle A, tab 3, page 88. The alleged abuse consisting in  
25 conduct which had the aim of excluding competition in respect of cloud storage for  
26 iOS, and exploiting consumers in respect of that storage, which we call the preferential

1 treatment abuse. And you can see the two distinct elements set out at 113.1 and  
2 113.2 respectively, so the technical restrictions with respect to files, and the choice  
3 architecture. (Pause)

4 If you want to understand more about the choice architecture point, that's dealt with in  
5 the report of Dr Hunt at bundle B, tab 6, page 91.

6 The anti-competitive effect is also an important element of the allegation of abuse.  
7 That's pleaded at paragraphs 124 to 128. That's pages 94 through to 97. And we  
8 say, in short, that Apple has monopolised the market for full service cloud storage and  
9 distorted competition by giving itself an advantage in respect of other cloud storage.  
10 It has been able to raise the price to iCloud above the competitive level, that's  
11 paragraph 125, and also has suppressed the volumes of storage being purchased and  
12 sold, that is 126. The flip side of the price raising point has been loss of quality,  
13 innovation and artificial segmentation of the market. That's 127.

14 So that's the actual conduct we allege is abusive. I'm going to briefly turn to loss and  
15 damage, and on this I am going to go a little bit more into the supporting expert  
16 evidence, because it goes more to the criteria for the Tribunal today. Can we go to  
17 paragraph 134? That's page 102. And we pick up again the point about the  
18 anti-competitive effect. There would have been more competition to iCloud on the  
19 parameters of price, storage capacity and quality. Consumers could have got the  
20 same for less, or more or better quality for the same price. And we then set out at  
21 paragraphs 135 to 136 how that caused loss to the class members who did pay for  
22 iCloud, and we say in short, paragraphs 135 and 136, at page 103, they either would  
23 have paid less for their cloud storage, or some of them may have been able to fulfil  
24 their storage needs for free, if the market had moved to offering more free storage in  
25 the counterfactual.

26 And then paragraphs 137 to 138, we cover how it caused loss to class members who

1 | did not, in the actual, pay for iCloud. You may as well know this today; it'll be relevant  
2 | to the strike out point. We may pick it up here.

3 | You can see that two forms of loss are alleged at 138. To the extent that their valuation  
4 | of this full service cloud storage was higher than the price for such services that would  
5 | have prevailed in the counterfactual, they would have purchased the services.

6 | And the second way is: they have also lost the opportunity to make use of a greater  
7 | amount of free cloud storage services.

8 | THE CHAIR: Can I just pause there? I've had a look at the report of Mr Hughes. Am  
9 | I right in thinking that so far, the quantified element of your claim is 136.1 and 138.1?  
10 | There hasn't yet been a quantification of the loss of opportunity to make use of greater  
11 | storage capacity.

12 | MR WOOLFE: I think that in the weighted average counterfactual price which is used,  
13 | it does pick up the provision of free storage. So I think that, in respect of -- perhaps  
14 | we can check and come back to you, but I don't think it's separately quantified, but  
15 | I think it's been picked up through those means, because it definitely attributes as  
16 | a zero price to certain purchases. So I think as regards those who did pay, it has been  
17 | picked up. I'm not so confident right now that the methodology for those who did not  
18 | pay, that it's been picked up in the same way. (Pause)

19 | I'll take you to, Mr Hughes's report now, actually, but simply before we do that, because  
20 | we've got the Claim Form open, can I just show you page 106. You'll see lots of text  
21 | has been deleted. We were at one point trying to go back to 2015 with the claim, on  
22 | the basis that limitation could be disapplied. Following the decision of the Court of  
23 | Appeal, last year, I think, in the interchange proceedings, we accepted we can only go  
24 | back for six years from the date of issue. So we now go back to 2018. So that's that.

25 | Okay, so, Mr Hughes's report, that's in bundle B, tab 5. (Pause)

26 | And essentially Mr Hughes sets out his methodologies in section 5, and then his initial

1 estimates of loss in section 6.

2 THE CHAIR: Yes.

3 MR WOOLFE: And then in section 7 he deals with estimates of class size.

4 THE CHAIR: Yes.

5 MR WOOLFE: But I'm going to principally look at section 5 and dip into section 6, for  
6 some illustrative detail. Section 5 begins at page 136, bundle B.

7 So for paying subscribers, what Mr Hughes is doing is estimating an overcharge. It's  
8 a difference between the actual price paid by subscribers, less the counterfactual  
9 price. It's expected that Apple will have data on the number of subscribers and the  
10 revenue associated with them. Mr Hughes says that at 5.2.14, page 139, and Apple  
11 is not so far suggested that's not the case. So what is more involved is the point of  
12 estimating what the counterfactual price would have been, and Mr Hughes deals with  
13 that at paragraphs 5.2.2 through to 5.2.13.

14 There are essentially two methods: a cost based methodology, building up Apple's  
15 actual costs and adding a reasonable profit margin; or a comparator based  
16 methodology, based on looking at how much cloud storage costs in competitive  
17 markets. Those are two ways, and on his initial estimates, they reach slightly different  
18 results. One comparator Mr Hughes looks at in particular is one called IDrive.  
19 Perhaps we could go to page 148, and you can see the pricing structure for this  
20 service, called IDrive. Just a few points to note.

21 It first started off as up to 10 gigabytes of storage for free, rather than five. So that's  
22 where the additional free storage may come in. If you want, you can do a comparison,  
23 where you look at, page 66 of the Claim Form where we set out Apple's pricing. And  
24 look at this. But you see the highest tier here, up to five gigabytes is £6.55 --

25 THE CHAIR: Sorry, can you just give me the page reference again, please?

26 MR WOOLFE: Sorry, it's bundle B, page 148.

1 THE CHAIR: Thank you. (Pause)

2 Yes.

3 MR WOOLFE: And broadly, by way of comparison, whereas iCloud costs £0.99  
4 a month for up to 50gb, IDrive costs £0.19 a month for up to 100, and you can get  
5 500gb a month on IDrive for less than 50gb costs on iCloud. So you see how the  
6 pricing structure works, and Mr Hughes sets out, back at pages 136 to 139, how he  
7 proposes to use those to estimate a counterfactual price. I'll show you in a moment  
8 the estimates of aggregate loss that you get from those.

9 Turning to non-paying subscribers, he deals with this at section 5.3, that's page 139.  
10 And can I ask you to read paragraph 5.3.2, which just goes over the bottom of the  
11 page? (Pause)

12 You can see that this is the central issue to explore iOS users' willingness to pay.  
13 Perhaps before we have the argument on strike out, you might like to read the  
14 remainder of that section, but you needn't do it now. But let's pick up at, 5.3.6. He  
15 says:

16 "I will need to gather information on iOS users' willingness to pay, according to their  
17 requirements and the options open to them. This is a matter to be explored through  
18 market research. My starting point will be to look at Apple's internal documents and  
19 market research on consumer willingness to pay, and then determine if further  
20 consumer research is needed." [as read]

21 So that's how you would address that.

22 In terms of giving some figures on rough estimates of the value of these elements of  
23 the claim, for paying subscribers, if you go to table 6.13, that's on page 153. (Pause)

24 Now, Mr Hughes's report, when he prepared it, went back to 2015. So you need to  
25 pose a bit of a cut off and ignore the earlier years. You can see that he's estimating  
26 in the middle line of that table, an annual overcharge based on comparators, starting

1 in 2018, of £5.76 a year, rising to £13.36 a year in 2024. That gives you an idea of  
2 the sort of average quantum. And what you can see is that if you go back to 6.3.18  
3 on the previous page, he's referring to using a weighted average price. And if you go  
4 back to table 6.7, page 149, you can see how he derives a weighted average price for  
5 iDrive, and you see that he is attributing a share of the users in table 6.7 to the free  
6 storage tier. So my understanding is that is how the estimate of those people who  
7 would have obtained free storage in the counterfactual is coming in for paying  
8 subscribers.

9 THE CHAIR: On 6.7?

10 MR WOOLFE: Yes, table 6.7 on page 149. (Pause)

11 Does that help you with the question you were raising?

12 THE CHAIR: When it does for the paying customers, yes.

13 MR WOOLFE: Yes. And to give you an idea of the total loss to date, if you go back  
14 to table 6.13, if you simply tot up the annual overcharge per person from 2018 through  
15 to 2024, I came out about £57 per person as an average.

16 THE CHAIR: Yes.

17 MR WOOLFE: For the cost-based methodology, which is his other methodology for  
18 looking at damage to paying subscribers, you can see the results of that, effectively,  
19 at page 145, in his estimates of excess revenue for iCloud. And you can see table 6.4,  
20 page 145, in his estimates of excess revenue per year of 119 million, ranging up and  
21 down, up to about 225 million in 2023, and slightly lower in 2024. To give an estimate  
22 for you, you'd have to divide those by the number of iCloud users. So those are,  
23 broadly speaking, results of his two methodologies, based on current assumptions.

24 THE CHAIR: Yes.

25 MR WOOLFE: Now, for non-paying subscribers, he deals with this at section 6.4, and  
26 he summarises the position in tables 6.14 and table 6.15 on page 154. And we do

1 acknowledge that this is necessarily heavily based on an assumption. If you look at  
2 paragraph 6.4.5, he explains how the current working assumption he's used to  
3 estimate willingness to pay. He's simply taking the midpoint between the iCloud price  
4 and the IDrive price. So you can see it's deliberately straightforward.

5 THE CHAIR: He assumes, first of all, 50 percent of the non-paying customers  
6 wouldn't, in fact, in the counterfactual, have paid.

7 MR WOOLFE: Yes.

8 THE CHAIR: And then for the remaining 50 percent, he's taken an average, to  
9 ascertain on the basis of all of them, of the price they would have been willing to pay.

10 Is it 50 percent of the actual price, or is it 50 percent of the difference between the  
11 actual price and the competitive price? I thought it was 50 percent of the actual price.

12 MR WOOLFE: Sir, he's excluded paragraph 6.4.4 of those who wouldn't pay at all.

13 THE CHAIR: Yes.

14 MR WOOLFE: And then what he does is he takes a midpoint between the current  
15 iCloud price and what he calls the benchmark price.

16 THE CHAIR: Yes, that's what I wanted to see. Which paragraph does he say that in?

17 MR WOOLFE: 6.4.5.

18 THE CHAIR: That's the bit I wanted to check, thank you. Let me just have a look.

19 (Pause)

20 MR WOOLFE: But again --

21 THE CHAIR: That's -- yes.

22 MR WOOLFE: Yes. What he's done is, if you compare table 6.8, which is at page 149,  
23 and look, he's taken the IDrive figures from that and plugged them in at table 6.15,  
24 those are the weighted average prices that he is using. So again, as I understand  
25 it -- and I'll be corrected and we'll come back to you if this is mistaken -- because those  
26 weighted averages necessarily include the completely free provision because they

1 attribute a proportion of users simply to the free tier in the sense they embed both  
2 forms of loss -- both those arising in respect of those who would in the counterfactual  
3 pay and those who in the counterfactual would simply have got more for free.

4 THE CHAIR: There's no separate claim for, if I can put it this way, the storage  
5 advantage that is simply taken into account when calculating the primary head of loss  
6 for each of those who pay, and also for those who don't pay?

7 MR WOOLFE: There's no separate calculation.

8 THE CHAIR: No.

9 MR WOOLFE: I'm afraid I don't know whether more data is available, some more  
10 complex methodology might involve a different calculation but as done at the moment,  
11 I don't think.

12 THE CHAIR: Thank you.

13 MR WOOLFE: Finally, then, in Mr Hughes's report, if I can very quickly show you  
14 section 7: his estimates of the class size and aggregate damages per class member.  
15 If you go to page 159.

16 Now, Mr Hughes has had to work on the basis of assumptions for the number of unique  
17 iCloud users, and we suspect they'll be very much simplified following disclosure but  
18 you can see how he's done it at -- in a sense, he starts off with data on the number of  
19 UK phone and iPad users, as at table 7.1, then he makes a series of adjustments for  
20 what's called "mortality overlap". So overlaps for new iPhone, iPad users, mortality  
21 and what's called an "exit rate" -- people who either leave the country or shift to using  
22 Google.

23 Then what he comes up with is estimates at table 7.5 and you can see in the top line  
24 of that table 7.5, a rolling -- his estimate of the unique number of iCloud users at the  
25 end of each year but then because some people get added, some people stay from  
26 year to year, you get adjusted figures and at the bottom of that table, the class, which



1 is sort of constantly growing, starts off. It would have been 29 million in 2015, but in  
2 2018 it starts at 30 -- whatever figure that is -- in 2018 and grows over time.

3 Those figures will be different if we're looking at a 2018 starting date, because it's  
4 going to start with the estimated number of unique iCloud users in 2018 and add them  
5 in. But you see, broadly, the idea and we're looking at between 30 and 40 million class  
6 members on that basis.

7 His estimates of the aggregate damages per class member again, on the basis they're  
8 for 2015, are at table 7.6 and you see two different figures depending on which  
9 methodology used for paying class members.

10 So if I can just have a moment. (Pause)

11 I'm reminded that whereas Mr Hughes is addressing from 2015, in our draft amended  
12 Claim Form, we have updated estimates for loss, which take account of the  
13 amendment from 2018. That is in bundle A, tab 3, pages 104 to 105. They will be  
14 updated again when we file an amended claim.

15 THE CHAIR: Yes.

16 MR WOOLFE: So that's everything I wanted to show to you about the claim. I'm now  
17 going to turn to the certification requirements claim itself, those set out in rule 79. I can  
18 deal with them fairly briefly based on what we've seen in the Claim Form. The three  
19 requirements in rule 79 you'll be well familiar with.

20 Sir, first of all, the claim is brought on behalf of an identifiable class of persons.  
21 Secondly, that the claims raise common issues, and thirdly, that the claims are suitable  
22 to be brought in collective proceedings.

23 We submit that as regards the first criterion, an identifiable class of persons, that is  
24 clearly the case. You've seen the class definition at paragraph 33 of the Claim Form,  
25 bundle A, tab 3, page 53. No point is being taken that is somehow unclear. If the  
26 strike out point were to succeed, that class definition would be amended. There's no

1 problem with lack of clarity.

2 Of course, a class may be conceptually clear in principle but difficult to identify in  
3 practice. We've heard about cases where that may be the case. But here we say, in  
4 practical terms, the class is in fact also very easily identifiable in practical sense.  
5 People know if they have an iPhone and can readily check their phone settings to see  
6 if they have iCloud enabled. They will also very likely know if they pay for iCloud,  
7 because they would have had to authorise the payment, and they'll get billing  
8 notifications every month.

9 Moreover, Apple will have data as to the iCloud accounts. It will have the Apple ID  
10 associated with the accounts and in respect of anybody paying for iCloud, it will have  
11 their payment details with a real name attached. We deal with this in the Claim Form  
12 at paragraph 152. That's bundle A, tab 3, page 109. So that's the first  
13 requirement -- identify the class.

14 Second requirement is common issues. We say this is also straightforward as all the  
15 issues in the claim are likely to be common to the class as a whole, or at least to very  
16 large subclasses, in the case of the distinction between paying and non-paying  
17 subscribers. Market definition is a common issue. Dominance is a common issue.  
18 Whether Apple has engaged in the abusive conduct and the effects on consumer  
19 choice is a common issue. Objection justification will be, if that is raised, and the  
20 issues around loss and quantification, we say, will be common to the respective  
21 subclasses. We deal with that in the Claim Form, paragraph 156, bundle A, tab 3,  
22 pages 100 and 111.

23 Finally, the third requirement as to whether these claims are suitable for collective  
24 proceedings. That's the requirement in rule 79(1)(c) but you have to see what's said  
25 in rule 79(2). Perhaps we can look at that briefly. In the authorities bundle at tab 3 --

26 THE CHAIR: Is there a point being taken on this aspect?

1 MR WOOLFE: I don't think so. No.

2 THE CHAIR: I'm not sure we need to explore it further at this stage.

3 MR WOOLFE: Fine. In that case, I can skip over that.

4 The only final point to note, just so you are aware of it, is the point about opt in versus  
5 opt out.

6 THE CHAIR: Yes.

7 MR WOOLFE: The primary claim is brought on an opt-out basis -- the UK domiciled  
8 class member should be brought in on an opt-out basis -- but that should be a separate  
9 opt-in element for non-UK domiciled class members. We submit that's the best way  
10 of indicating the class members claims as a whole. They are in the Claim Form  
11 paragraphs 169 to 176, pages 115 to 117.

12 Opt-out is plainly sensible for UK domiciled claimants because otherwise you'd get  
13 a low participation rate. But notice as to why there is an opt-in, you will have seen that  
14 the class definition requires you to have enabled the UK as your region. However,  
15 there may be people who have done that who aren't domiciled in the UK. They may  
16 be here for a period of time or they may have emigrated and so on and so forth. So  
17 that's why we have an opt-in class to capture those people.

18 THE CHAIR: Yes.

19 MR WOOLFE: Right, on that basis, we can go on to authorisation of the class  
20 representative, which includes funding issues, which is more where the disputes are.

21 THE CHAIR: Yes.

22 MR WOOLFE: In terms of how I'm going to divide my submissions on this, doing it  
23 under four headings. First, I'm going to address you briefly on the test and the rules.  
24 Secondly, I'm going to take you through the relevant parts of the suite of documents.  
25 So that's the witness statement of Ms Averty, the cost budget, the litigation plan, the  
26 litigation funding agreement and ATE insurance, because those are the materials

1 which go to whether or not the requirements for the authorisation of the class  
2 representative are met and I'll pick up Apple's points of details as I do so.

3 Further, I'm going to address you quite briefly on why, in view of those documents, the  
4 certification criteria are met. And then fourthly, I'm going to turn to deal with the LCM  
5 funding issues.

6 Can we go then to rule 78. That's in the authorities bundle, tab 3 at page 53. That is  
7 the page that is numbered 53 in the right-hand corner, I think it's page 58 of the PDF.

8 The basic test, set out in rule 78(1)(b), is whether or not it is just and reasonable for  
9 the applicant to act as a class representative. That's the fundamental test to which  
10 you have to address yourself. And rule 78(2) then sets out a series of matters which  
11 you must consider in applying that just and reasonable test. I think we are only really  
12 concerned today with subparagraphs (a) and (d). So (a):

13 "Whether the PCR would fairly and adequately act in the interests of class members."  
14 [as read]

15 And (d):

16 "Whether [Which?] Will be able to pay the defendant's recoverable costs if ordered to  
17 do so." [as read]

18 I don't think there's any suggestion of a conflict of interest -- that's at paragraph (b).  
19 There's no other application for collective proceedings order so paragraph (c) is  
20 irrelevant and there's no application for interim injunction so (e) is also irrelevant.  
21 We're just looking at (a) and (d).

22 Rule 78(3) fleshes out 78(2). In terms of whether or not the PCR would act fairly  
23 inadequately in the interest of class members, you have to take into account all the  
24 circumstances, but then some are specified. So it's a non-exhaustive list: if other  
25 matters are relevant you can consider them, but you should look at these.

26 In terms of those, we can ignore paragraph 78(3)(a) because that concerns the case

1 when the PCR is a member of the class. We're just looking at (b), "whether the [PCR]  
2 is a pre-existing body and the nature and functions", and then (c), whether there's  
3 a plan for collective proceedings that satisfactory includes these requirements as to  
4 notification, governance, consultation and estimates of and details of arrangements as  
5 to cost, fees or disbursements.

6 And I'm going to show you somewhat later on the recent decision of this Tribunal in  
7 the Gutmann Handsets case, where -- I'll take you to it later -- but the Tribunal said, in  
8 a sense, that it's a holistic assessment. These are not sort of unbending mandatory  
9 requirements; they're a list of factors you have to look at and then you take a view in  
10 the round as to whether or not it's -- the PCR will fairly and adequately act in the  
11 interests of class members, and the just and reasonableness requirement.

12 Okay. Beginning with Ms Averty's statement. Now, this is primarily relevant to the  
13 nature of Which? as a body, which is one of the specific requirements. If you are  
14 satisfied on that, I can take you through pretty -- we can skip over it, but you may find  
15 it helpful to have the references for this.

16 THE CHAIR: There isn't a point taken on this aspect, is there?

17 MR WOOLFE: Well, not directly, but the issue is that they -- what is said is that Which?  
18 is paying insufficient attention to funding issues --

19 THE CHAIR: Yes.

20 MR WOOLFE: -- and this casts doubt on its ability to act generally.

21 THE CHAIR: Yes.

22 MR WOOLFE: It is important in the context of what Which? is as a body and its internal  
23 capability.

24 THE CHAIR: Well, we better look at it, at least to some extent.

25 MR WOOLFE: Okay.

26 So if we go to B 1, tab 1, page 1, this is Ms Averty's statement. On page 2, she's the

1 general counsel of Which? That matters not just because she gives the statement,  
2 but she also will have a role in the litigation. And that comprises both the charitable  
3 branch of which she refers to at paragraph 1(a) and the commercial subsidiary, which  
4 is Which? Limited. And it's the charity which is the proposed class representative in  
5 the present case.

6 She says at paragraph 8 on page 4:

7 "In terms of its own resources, it has more than 1.2 million members and supporters,  
8 the largest consumer organisation in the UK." [as read]

9 And on the previous page, paragraph 6. She says that the resources are shared  
10 between the charity and the commercial subsidiary. Okay.

11 Paragraph 7, on top of page 4, she refers to Which?'s charitable objects, which are  
12 listed further. Clearly, the most relevant one is the one she lists at (ii), "to uphold and  
13 promote compliance with consumer laws, regulations and public policies".

14 So that's its object as an organisation.

15 Paragraph 9 on page 7 sets out Which?'s previous experience of acting both through  
16 the current collective action regime and its predecessor. You may recall, so Which?  
17 was actually designated, as she says at paragraph 9(a), by statutory instrument under  
18 the old collective actions regime, as a body able to bring collective actions specifically  
19 sanctioned by legislation as an appropriate class representative, albeit under a slightly  
20 different regime. As she says there, it intervened in Merricks and it also has brought  
21 collective proceedings in the Qualcomm case.

22 Then I can skip through to page 13, paragraph 29. Ms Averty there expands upon  
23 Which?'s experience and relative capabilities.

24 She refers again at paragraph 29(a) to its previous experience.

25 Adds to that at 29(b) on page 14, that:

26 "Which? has the ability and capacity to direct and control large and complex litigation.

1 The Which? group has its own in-house legal team with broad experience, and that  
2 includes a team that specialises in litigation with extensive experience of high profile  
3 litigation." [as read]

4 It is quite unusual for a class representative to be such a large body that has in-house  
5 litigation capability with which it can oversee the litigation. It's quite different from many  
6 of the individual class representatives or incorporated special purpose vehicles that  
7 you see in other cases.

8 She goes on to say that access to specialised personnel of various kinds,  
9 paragraph 29(c), economists, data sciences and so forth.

10 And then she says at (b) perhaps the more normal point that many class  
11 representatives can say they've instructed specialist competition litigation solicitors  
12 and experts, and they say they share the Tribunal's concern that the collective  
13 proceedings regime should benefit consumers and not become a cash cow for either  
14 lawyers or funders. They obviously committed to that as a charity.

15 Now, in terms of the engagement with the litigation, at paragraph 31 is again,  
16 Ms Averty, again Which's general council, said that she will have primary responsibility  
17 for the conduct of the proposed collective proceedings, and she's a member of the  
18 Which's group's leadership team.

19 She'll be assisted by the in-house litigation team on a day-to-day basis. But then,  
20 importantly, will be overseen by Which?'s trustees, board of trustees. That's at  
21 paragraph 33. She says:

22 "Any significant strategic decisions, such as settlement, will be taken by Which?'s  
23 trustees and will regularly report to the trustees on the status of the proposed collective  
24 proceedings." [as read]

25 So, again, Which? has in-house that mechanism for governance and oversight,  
26 trustees who have responsibilities to the charity commission and so forth, to pursue

1 Which?'s charitable object.

2 Now that's everything I wanted to show you about the nature of Which? as a body.

3 The litigation plan is at bundle B, tab 2.

4 I think we can skip over most of this, but it covers -- I'll just give you the  
5 references -- the method for bringing the collective proceedings, that's  
6 paragraph 19 to 22, bundle B, tab 2, pages 35 to 36.

7 In terms of notification, again, no point is taken on this, but the litigation plan deals with  
8 this at paragraphs 23 to 26. That's bundle B, tab 2, page 37.

9 And the notice and administration plan is at bundle B, tab 3. How that will be done.

10 So that's all fairly standard and no point is being taken about it. I can take you to it if  
11 you want.

12 Now the parties go briefly in the litigation plan to 31 to 37. So that's bundle B, tab 2,  
13 pages 39 to 40.

14 This is the provision for governance. This is somewhat relevant because, insofar as  
15 it's being said that Which? is not being well directed or doesn't know what it's doing is  
16 not questioning what its lawyers or the funder is saying to it, this is relevant, and this  
17 describes in some more detail how governance will work.

18 Ms Averty will have overall authority. 32.1, should be supported by the head of group  
19 legal and the litigation lawyers of Which? The case team will regularly report to the  
20 charity's trustees on the status and trustees will refer to any time to ask for updates or  
21 table discussions. And they'll also consult with the chief economist, having in-house  
22 economics expertise as well.

23 And the litigation plan says:

24 "These governance arrangements mean that decision-making will be appropriately  
25 informed by the wide range of experience within the Which? team." [as read]

26 Then in terms of arrangements for costs, fees and disbursements, this is where we



1 turn to the cost budget litigation funding agreement and the ATE. The budget for your  
2 note is at bundle B, tab 4.

3 "This has been prepared on the basis of sensible and robust assumptions. It assumes  
4 case management over a period of three years, leading to an eight-week trial."

5 [as read]

6 And includes within it provision for the purchase of ATE cover.

7 Now, the litigation funding agreement is at bundle A, tab 8.

8 Here we start coming to some of the points of detail that are raised against us.

9 Bundle A, tab 8, page 197.

10 THE CHAIR: Just a moment, please.

11 MR WOOLFE: There are a couple of points you need to note on the --

12 THE CHAIR: Sorry, just one second. I just need to go back and get to the core bundle  
13 up.

14 Yes.

15 MR WOOLFE: So bundle A, tab 8. Page 197 is the front page.

16 THE CHAIR: Thank you, yes. Got that. Thank you.

17 MR WOOLFE: There are a few points on the definitions just to show you how some  
18 of the points arrive on that.

19 So on page 198 there's a definition of the action that's quite important. It flows through  
20 the provisions and you can see it at clause 1.1.4. The action is only defined to include  
21 any appeal if the funder has issued what's called an appeal funding confirmation notice  
22 pursuant to clause 11.

23 And then that flows into the definition of action costs, you can see at 1.2.

24 Adverse cost, the definition at 1.3 is at page 200, means the defendants and/or  
25 third-party costs in the action. So adverse costs as defined in this agreement only  
26 includes costs in the action as defined, which again, appeals only fall within that if an

1 appeal funding confirmation notice has been issued.

2 Now, adverse costs indemnity limit at paragraph 1.4 is defined as 15 million. And, as  
3 it stands, it says "that is the total fund that will pay in respect of adverse costs pursuant  
4 to this agreement or such other sums as the parties may, from time to time, agree."

5 [as read]

6 And at paragraph 1.31 there is the funding limit, which is the total amount that the  
7 funder will provide pursuant to the agreement, and that matches the amount of the  
8 cost budget.

9 And the only other definition, I think, to note is that of recovery, which becomes  
10 important to the priorities point. I ask you to note that definition:

11 "All or any amounts received by or on behalf of the PCR or class members related to  
12 arising out of the action." [as read]

13 It's a small point, but it does include at 1.39.6, any payments received in respect of  
14 costs, as well as also defined as part of the recovery.

15 THE CHAIR: Just a moment. (Pause)

16 Yes.

17 MR WOOLFE: The actual obligations to pay action costs and adverse costs are in  
18 paragraph 4.2 on page 205, and in the whole of clause 5 on pages 206 to 207, and  
19 that allows the funder to enter into ATE insurance as well, there's provision for that.

20 At clause 9 on page 209, if I can show you that, clause 9.1:

21 "The PCR shall have complete control of the action, albeit that the PCR will have  
22 regard to ensure compliance with its obligations as provided for by this agreement."

23 [as read]

24 And there are some provisions, essentially that if the PCR wants to withdraw from the  
25 proceedings, it would have to take advice before doing so.

26 Now, clause 10 is the provision for receipt and distribution of recovery, and this is one

1 of Apple's bones of contention.

2 Paragraph 10.1:

3 "Subject to any order of the Tribunal to the contrary, the PCR shall procure payment  
4 of any and all recovery directly into a bank account." [as read]

5 That is subject to order of the Tribunal, so if the Tribunal wanted, for example, to  
6 require that payments be made directly by Apple to class members, it might be  
7 possible, that would override provisions of this agreement.

8 And then 10.2, again subject to any order of the Tribunal:

9 "PCR shall hold the recovery on trust for class members, funder solicitors, counsel,  
10 ATE insurance providers." [as read]

11 So anybody who may have an interest in the recovery is held on trust.

12 And then 10.3 -- this is the one that Apple takes a point about:

13 "To the extent not recovered from the defendants and to the extent required, the PCR  
14 shall seek approval from the Tribunal for the payment of the PCR's costs, fees and  
15 disbursements, including, for the avoidance of doubt, funders fee, ATE insurance  
16 premiums and uplifts under CFAs in accordance with this clause 10." [as read]

17 Now, what do we say about this? We say that, first, the obligation to seek approval  
18 for payment of the PCR's costs, including these matters, and that is inherently subject  
19 to the control of the Tribunal, because it requires the Tribunal's approval. Which? is  
20 not going to be making any payments to anyone without approval from the Tribunal.  
21 That's our first point about it.

22 Secondly, paragraph 10.2 does not specify that Which? has to seek approval for such  
23 payments to be made directly out of recovery rather than out of any remaining  
24 undistributed damages.

25 THE CHAIR: Sorry, just repeat that point again please.

26 MR WOOLFE: 10.2. Apple says --

1 THE CHAIR: 10.2?

2 MR WOOLFE: Sorry, 10.3, rather. 10.3.

3 THE CHAIR: Just a moment.

4 MR WOOLFE: 10.3. Apple says that this somehow gives priority to the interests of  
5 funders and lawyers over the interests of the class. As a simple point of construction,  
6 this doesn't specify that Which? has to seek approval for payments to be made directly  
7 out of recovery before distribution. It simply says that approval for the payment of  
8 these amounts must be sought to the extent required. That allows for the possibility  
9 of seeking approval for payment directly out of recovery, but does not require it. It  
10 depends what --

11 THE CHAIR: This is the bit I'd like some help on because it says "to the extent not  
12 recovered from the defendant", that's costs principally, "and to the extent required".  
13 What does that mean?  
14 Required by whom?  
15 Does it mean, "and to the extent that there is" -- does it mean, for example, in relation  
16 to costs, "to the extent not recovered from the defendant because there's a shortfall  
17 and to the extent required", what does that mean?  
18 Because there's a shortfall, or what does it mean?

19 MR WOOLFE: Well, I think it might mean two things.

20 The first point is: the PCR's cost fees and the funders fee, et cetera, will -- there are  
21 other provisions, as you can see in here, under 10.5 and so forth, as to how that ramps  
22 up. And -- for instance, uplift fees et cetera may or may not be due depending on the  
23 exact -- whether that recovery is made. And so there's no separate obligation being  
24 imposed by 10.3, it's simply dealing with satisfaction of the obligations that otherwise  
25 arise.

26 THE CHAIR: Then surely in those circumstances, then, it is mandatory?

1 MR WOOLFE: It is mandatory to seek this approval, yes, and we're not disputing that.

2 THE CHAIR: Right.

3 MR WOOLFE: The point that's being made is that it somehow requires that, as

4 I understand it, the PCR must seek approval for these payments to be made, straight

5 out of the recovery, rather than out of any leftover undistributed damages. (Pause)

6 THE CHAIR: But the context here, at least in 10.1 to 10.3, is about the recovery.

7 MR WOOLFE: Yes, but there's a recovery before distributions and recovery after

8 distribution. This is all about the recovery.

9 THE CHAIR: You've made a separate point, which is to the extent that all of this is

10 done before damages is distributed, there's nothing wrong in that, as a matter of law.

11 That's your separate point.

12 MR WOOLFE: Yes.

13 THE CHAIR: But I think the residual point that's being made against you is, but you

14 don't seem to accept, that this is an obligation which actually is applicable to taking

15 the money first out of the recovery. I think the argument is you seem to be confused

16 about what it means --

17 MR WOOLFE: Yes.

18 THE CHAIR: -- and that we should say what it means.

19 MR WOOLFE: That's really why I'm addressing it, and I think the correspondence has

20 got rather bogged down on this point, when really it is nothing to the point, an obligation

21 to seek recovery directly out of the recovery is okay.

22 THE CHAIR: Yes.

23 MR WOOLFE: Simply, as a matter of fact, what's been said in correspondence is

24 Which?'s understanding of this, is that it allows it to seek payment of these matters

25 directly out of the recovery from the Tribunal. But the Tribunal could instead say no,

26 they get paid out of undistributed, out of remaining undistributed damages. There isn't

1 a -- Which? hasn't -- this clause in itself doesn't require that the approval that is sought  
2 is that it comes out of recovery before any distribution is made.

3 THE CHAIR: You say it can apply at any stage. It can apply before the damages are  
4 distributed --

5 MR WOOLFE: Yes.

6 THE CHAIR: -- or after they're distributed.

7 MR WOOLFE: Yes.

8 THE CHAIR: So in the latter case, suppose there's a recovery, and all the damages  
9 are distributed and there's nothing left. Nobody's going to get anything.

10 MR WOOLFE: Well, that's why, in a sense, you need to take a view on what is actually  
11 required. That's the other point I was going to say, because this may be a case -- we  
12 said at 22.3 of our skeleton -- where there is a very high level of distribution, for  
13 example, if Apple is able to provide payment details for large numbers of its  
14 subscribers. And this is, in fact, a case where there is a risk, there's only allowing for  
15 payment out of undistributed damages, would put too much risk on the fund and make  
16 it uneconomic. So it's precisely why there should be provision that allows for payment  
17 directly out of recovery, yes, and we said the CAT does have jurisdiction to allow for  
18 payment to be made in this way. As the Court of Appeal said in Gutmann, there is  
19 absolutely nothing wrong. On the reference for that, it's authorities bundle, tab 52 --

20 THE CHAIR: Yes.

21 MR WOOLFE: -- paragraphs 97 to 100. (Pause)

22 And we submit that, as Lord Justice Flaux said, there's no reason to suppose that the  
23 class representative will not be able to represent the class interest effectively in that.

24 (Pause)

25 That's what we say about that, it doesn't really matter.

26 THE CHAIR: Yes. (Pause)

1 MR WOOLFE: Okay, then the other point --

2 THE CHAIR: Just help me out here, on the meaning of "to the extent required", the  
3 second time, and "to the extent required".

4 MR WOOLFE: Sorry --

5 THE CHAIR: Well, we're going to take a break anyway shortly. Let's take a break  
6 now, and then you can come back and answer Mr Cutting's question after the break.  
7 So we'll take a ten minute break now. Thank you.

8 (11.37 am)

9 (A short break)

10 (11.51 am)

11 THE CHAIR: Yes.

12 MR WOOLFE: Thanks, sir.

13 So on the meaning of these words, "to the extent required", bundle A, tab 8, page 210.  
14 I do have an example for you of a situation where such approval would not be required,  
15 and therefore why the words have been included. Under rule 94 of the Tribunal rules,  
16 that's the provision for the approval of collective settlements in opt-out proceedings.

17 THE CHAIR: Yes.

18 MR WOOLFE: And that explicitly provides that:

19 "The collective settlement may make provision for the payment of costs, fees and  
20 disbursements." [as read]

21 If that were to happen, that settlement as a whole has to be approved by the Tribunal,  
22 under rule 94.8, it has to determine the settlement as a whole is just and reasonable,  
23 and there are various matters set out in rule 94.9 as to what it must consider, including  
24 any provisions of cost, fees and disbursements. But in that scenario, there's no  
25 separate approval for costs, fees and disbursements as a distinct category. The  
26 Tribunal can't say, "I approve the settlement, but I don't like this provision as a cost,

1 fees and disbursements, do something else".

2 And so there are situations, that one at least, where the PCR may make payment, in  
3 a manner, broadly speaking, is approved, but is not separately approved, under this  
4 rule.

5 THE CHAIR: Let's see what Ms Demetriou says about it.

6 MR WOOLFE: Okay. If I can turn now to the question of appeal funding.

7 THE CHAIR: Yes.

8 MR WOOLFE: So that's governed by clause 11 of the litigation funding agreement.  
9 There's no dispute, really, about what these words mean. It's common ground that  
10 the funder is only liable to pay adverse costs on an appeal, under this agreement, if  
11 an appeal funding confirmation notice is issued. But I do ask you to note a couple of  
12 points about clause 11. Firstly, if the funder does agree to fund the appeal, either to  
13 fund an appeal by the PCR or the defence of an appeal by the defendants, then 11.2  
14 provides for the funding limit and adverse costs indemnity limits to be increased to  
15 cover it.

16 And then importantly, 11.3 -- I draw your attention to on page 202 -- the funder is  
17 required to use all reasonable endeavours to provide the appeal funding confirmation  
18 notice in quite tight timescales. You can see, in respect of the PCR's appeal, within  
19 five days of the date of the award or order, and the funder will agree to fund the  
20 defence of the defendant's appeal within seven business days of service of the  
21 defendant's appeal or application for permission to appeal. This is important in terms  
22 of whether there is practically any major risk here, because there isn't any risk of an  
23 appeal being pursued --

24 THE CHAIR: I missed that, because --

25 MR WOOLFE: There is no risk of an appeal being pursued by the defendants for an  
26 extended period not knowing whether or not an appeal funding confirmation notice has



1 | been issued or not. The PCR is going to know very swiftly from the funder whether or  
2 | not it has funding for an appeal, and that's quite important in the context where Apple  
3 | are saying they're exposed to some form of risk.

4 | THE CHAIR: Just one second, please. (Pause)

5 | Thank you.

6 | MR WOOLFE: Apple are saying they're exposed to some risk, because adverse costs  
7 | on appeal may go unpaid, and we submit this is unreal. Any appeal by the PCR will  
8 | only be brought with the benefit of an appeal funding confirmation notice, or else the  
9 | PCR would know, it would be at risk of having to pay a court order.

10 | Any appeal by the defendant that the PCR wants to resist, and in respect of which an  
11 | appeal funding confirmation notice is issued, is also covered -- is wrapped into the  
12 | definition of an action, and there's adverse costs. Indemnity covers it.

13 | If the defendants were to appeal, but Which? does not resist the appeal, simply does  
14 | not contest it, there's some point of interest to Apple that's not of interest to us for  
15 | some reason, it says hard to see how Which? would be made responsible for the cost  
16 | of that appeal in any event.

17 | So, the only lacuna they can refer to would be an appeal by the defendant, which the  
18 | funder doesn't wish to cover, but that Which? is somehow resisting, and that's just an  
19 | unreal scenario, and Apple have not been able to suggest what such an appeal might  
20 | be, nor that the costs of doing so would be so great that Which? couldn't meet them.

21 | The requirement in rule 78(2) is simply that the Tribunal is satisfied the PCR will be  
22 | able to pay recoverable costs if ordered to do so. That's not a requirement to have  
23 | secured committed litigation funding to indemnify in respect of adverse costs, in  
24 | respect of every possible contingency that could ever arise.

25 | THE CHAIR: Yes, okay. (Pause)

26 | MR WOOLFE: Then if I can turn to the other point in dispute about the litigation

1 funding agreement are the rights on termination.

2 THE CHAIR: Yes.

3 MR WOOLFE: And the right for termination arises. That's clause 17.1 on page 216.

4 (Pause)

5 THE CHAIR: Yes.

6 MR WOOLFE: There's clause 17.1:

7 "Funders can give 14 days' notice to terminate, if it reasonably considers that the  
8 merits are no longer satisfactory, or that the claim is no longer economically viable."

9 [as read]

10 And Apple's complaint is there is no explicit requirement that the funder must seek  
11 independent advice before terminating. We make two points about that.

12 First, this has to be a reasonable view, on behalf of funder. 17.1 says if the funder  
13 "reasonably considers".

14 But secondly, more tellingly, this clause is subject to the right of the PCR to seek expert  
15 determination under clause 15. So I'll take you back to clause 15 and show you that,  
16 that's pages 214 to 125.

17 THE CHAIR: That's the provision, then, to invoke the expert determination process.

18 But can I just pause there.

19 MR WOOLFE: Yes.

20 THE CHAIR: I follow what you say, but it's quite common to have a KC clause in these  
21 sorts of agreements, after taking advice from KC case. It not more sensible, and in  
22 particular in the interests of the class as a whole, for there to be that obligation there,  
23 rather than just waiting for some protracted procedure? For expert determination.  
24 I think one of the points you make in your skeleton argument is, well, if the fund is  
25 acting reasonably, of course it will have taken legal advice. Well, why not say so  
26 expressly?

1 MR WOOLFE: Well, we simply say that provision wasn't in there, and going back and  
2 rewriting things, it could be done, but for the sake of it, it's not necessary.

3 THE CHAIR: Well, it can be done. The Tribunal does sometimes do this. It looks at  
4 a funding agreement and says, well, we need to sort out these various points and they  
5 usually are sorted out.

6 MR WOOLFE: Yes.

7 THE CHAIR: Obviously continue with your submissions. I'll hear what Ms Demetriou  
8 says. But at the moment, I think we take the view that we think it is sensible to have  
9 something in there, for example, that says if the funder, if after taking legal advice from  
10 a KC, the funder reasonably considers.

11 MR WOOLFE: Obviously I can't unilaterally make that decision.

12 THE CHAIR: I'm putting it on the table now, that's all I'm doing.

13 MR WOOLFE: If the Tribunal says that this is a condition of certification being granted,  
14 then everybody will know where they stand.

15 THE CHAIR: Well, I understand that. We're not saying that at this stage, but what we  
16 are saying is you should take some instructions on it now.

17 MR WOOLFE: Thank you. I will do so over the short adjournment.

18 In terms of now, what we do say is that much more -- I appreciate it may be slightly  
19 slower -- but much more stringent protection is provided by clause 15, but that  
20 provides for an independent and binding determination, not merely a procedural  
21 requirement to consult, as it were, on behalf of the funder.

22 THE CHAIR: All I'm saying is the fact that if you have an obligation there to take legal  
23 advice and you say you're acting reasonably in respect of it, and you disclose that  
24 advice, then it may discourage the PCR from going down the route of even seeking  
25 an expert determination, because it knows that it's got the comfort that you've taken  
26 advice on it. That's the reason why we're mentioning it. It's a matter of efficiency,

1 | really. Anyway.

2 | MR WOOLFE: So you say (inaudible).

3 | MR CUTTING: Sir, can I ask a question, which is that there's not a defined term in

4 | this agreement for the economic viability of the claim and if it's a funder's

5 | determination, does the economic viability relate only to the financial position of the

6 | funder?

7 | MR WOOLFE: Well, it's a --

8 | MR CUTTING: Because I mean, a QC's a QC, but if he's making a judgment about

9 | economic viability for the funder, where's the comfort there for the class?

10 | MR WOOLFE: The economically viability must refer to whether or not and since the

11 | game is worth the candle. I appreciate you will say, "the game for who?"

12 | MR CUTTING: Yes.

13 | MR WOOLFE: But in terms of there has to be -- the basic question is, is there

14 | a recovery which is going to be sufficient to cover the cost, let alone provide any

15 | recovery for anybody else? And if there isn't going to -- I mean, in a sense, the funder

16 | is going to have an interest in pursuing the case to get whatever recovery it can until

17 | such point it considers it's better just to write the matter off. But the question is whether

18 | or not there's going to be -- the claim is worthwhile for the class members, whether it's

19 | economically viable in that sense.

20 | MR CUTTING: Doesn't say that, does it?

21 | MR WOOLFE: It refers to the economic viability of the claim. Is the claim still worth

22 | pursuing? (Pause)

23 | I appreciate it does relate to the provision of the funder because, in a sense, it's the

24 | funder who is invoking this to say this is no longer worth us pouring more money into.

25 | MR CUTTING: Well, if the funder says actually our costs of capital have gone up.

26 | They're now higher than they were when we originally funded the action. Is that

1 a change of circumstance that changes the definition of economic viability from day 1  
2 to day 400?

3 MR WOOLFE: Well, in terms of looking at what the actual result of this is, it's  
4 termination on 40 days' notice. The PCR would then be in a position to go and seek  
5 alternative funding at that point, if the funder were to terminate based on such matters  
6 affecting economic viability. It doesn't necessarily bring the claim to a screeching halt  
7 in that sense. (Pause)

8 As you'll see when we come to discussing the funder's position somewhat later, a large  
9 part of the funding for the claim comes from funds, which, in a sense, is already there  
10 as invested capital, the third-party funding.

11 THE CHAIR: Sorry, I missed that.

12 MR WOOLFE: A large part of the funding is coming from not LCM's own balance  
13 sheet, but from these third-party funds when the fund has already been collected, is  
14 there and is being committed so the cost of capital changing wouldn't be applicable to  
15 that.

16 Sir, in a sense, the only point I had to make about this was to say that the  
17 independence of the assessment that gets made under clause 15 is a greater  
18 protection than merely seeking an external opinion. We'll take instructions over the  
19 short adjournment about your suggestion that this should be amended, and we'll come  
20 back to you on that.

21 THE CHAIR: Thank you.

22 MR WOOLFE: Just two more short points on the documents as a whole. So you can  
23 just see that these go broadly to the policy of the funding arrangements and the  
24 provision of best costs.

25 At clause 12.4, on page 213, there is the warranty from the funder that it has available  
26 and until the action is concluded or this agreement is terminated, it will continue to

1 maintain adequate funds to fulfil its obligations under this agreement --

2 MR CUTTING: Yes.

3 MR WOOLFE: -- including obligations in respect of adverse costs. And it further  
4 warranties, in the event of any material adverse change in the funds available to fulfil  
5 its obligations, it will promptly notify the PCR so the PCR can decide whether or not to  
6 terminate for breach. That is relevant, in part a response to Apple's complaint that the  
7 LCM is not a member of the Association of Litigation Funders, and the LCM should be  
8 required to give an undertaking to comply with capital adequacy requirements. We  
9 say this is a direct contractual obligation owed by the funder to which it's enforceable,  
10 by Which?

11 And a final point: documents in respect of meeting of adverse costs. The ATE  
12 insurance policy, which is at A/10, the important point to note is there is an  
13 anti-avoidance endorsement. I'm not sure the Tribunal is aware of this and the  
14 significance of that. So bundle A, tab 10, page 243. At clause 1.3:

15 "If an anti-avoidance endorsement has been issued by the insurer [so this is the ATE  
16 insurance of adverse costs], the third-party policy holder [which is effectively the  
17 defendant], will be indemnified by the insurer for the insured liability subject to the  
18 terms of the anti-avoidance endorsement." [as read]

19 Such an anti-endorsement --

20 THE CHAIR: I'm at 243.

21 MR WOOLFE: 243, paragraph 1.3. The bottom of the page.

22 THE CHAIR: Just a second. (Pause)

23 MR WOOLFE: That is simply an enabling provision that if an anti-avoidance  
24 endorsement has been entered into, then Apple, the defendant, benefits from a direct  
25 indemnity under the insurance policy. It can claim directly against the insurance policy  
26 rather than having to claim from the funder or Which?

1 THE CHAIR: Apple being a third-party policyholder, here?

2 MR WOOLFE: Yes, a third-party policyholder.

3 THE CHAIR: That's what I wanted to check --

4 MR WOOLFE: Yes.

5 THE CHAIR: -- at the moment.

6 MR WOOLFE: The definition of third-party policyholder is at the top of the page. The

7 anti-avoidance --

8 THE CHAIR: It's the party that has -- it's expressed to have the benefit of the

9 insurance. Is that right?

10 MR WOOLFE: Yes. That is right. And the endorsement is at bundle A, tab 12. The

11 relevance of that is it protects Apple from the possibility of insolvency on the part of

12 either LCM or Which? up to the limit of the ATE insurance cover, which is 15 million.

13 THE CHAIR: Yes.

14 MR WOOLFE: Okay. Those are all the documents. Can I address you now on the

15 authorisation criteria, which is the ability to act fairly and adequately in the interest of

16 the class. We say Which? is exceptionally well set up to do so. It exists to serve the

17 interest of consumers and will be held to that in the litigation by the board of trustees

18 and it has the internal capacity, through its legal function, to engage seriously with

19 litigation and were it to prove necessary to do so, Which? has both the capability and

20 the motivation to act independently of its external legal advisers or funders, to a degree

21 far greater than that of most class representatives.

22 It has a well-prepared litigation plan, and it is well funded to cover those costs and has

23 in place substantial adverse cost protection, both in terms of an indemnity from the

24 funder and in terms of the ATE policy under which Apple can claim directly.

25 Now, in terms of the issues raised by Apple that I haven't directly covered, I've covered

26 the priority point, the appeals cover point, and the termination point. So that just leaves

1 over the LCM issues and the transparency points. Now, Apple really rather links those  
2 together. It's one hybrid point. It's framed as an attack on Which?'s suitability as the  
3 class rep.

4 THE CHAIR: Yes.

5 MR WOOLFE: That's not just in the technical sense that funding goes to authorisation.  
6 Apple seems to be actually trying to argue that our concerns about whether Which? is  
7 suitable and understand the terms of the funding arrangements.

8 Now, in terms of the concerns about Which? those are issues about the funder's parent  
9 company. We can take those from Apple's skeleton argument at paragraph 39,  
10 bundle A, tab 2. And there was this point about an investigation in Dubai, which we  
11 say has fallen away. I'm not sure to what extent Apple is still making any point.

12 THE CHAIR: Let's just check. Is there a point being made, now, on an investigation  
13 in Dubai?

14 MS DEMETRIOU: No, not substantively about the investigation, but about Which?'s  
15 failure, really diligently, to tackle the point and to address the point when we asked  
16 them about it. So we are making a general point about Which?'s inadequate response  
17 to all of these events but we're not making a substantive point about the investigation,  
18 other than that the annual report indicates that one of the effects of the investigation  
19 has been to leave LCM in a financially much weaker state. So we rely on that point.

20 THE CHAIR: Those are the two elements.

21 MR WOOLFE: Yes.

22 THE CHAIR: Thank you very much.

23 MR WOOLFE: Apple's point now seems to centre more on the group's financial  
24 statements for the year ended June 2025. They said in their skeleton, paragraph 40,  
25 and they refer to -- in the middle of that paragraph -- it's one of those paragraphs,  
26 again, where what's been done is to draft a paragraph, slotting in certain quotes. But



1 I think what I'm going to take you to in a moment is where those quotes come from.  
2 The overall impression is slightly different when you do that.  
3 They say that there's material uncertainty regarding its status as a going concern and  
4 in the opinion of its auditors, significant doubt as to the ability of the group to continue  
5 as a going concern and discharge its liabilities. So they're attributing that opinion to  
6 its auditors.  
7 I'll go through some more points of financial statements at the moment, but at the  
8 outset I want to call your attention to that is not actually quite what the auditors say. If  
9 you can go to bundle A, tab 22, page 400. The impression that's created by Apple's  
10 skeleton is to suggest that there is -- the auditors are saying there is significant doubt  
11 as to whether or not the group has sufficient assets to discharge its liabilities. But if  
12 you look at -- this is the BDO auditors' report.  
13 THE CHAIR: Page 400?  
14 MR WOOLFE: Yes. Page 400 is where I'm going. We start at 399.  
15 THE CHAIR: Right.  
16 MR WOOLFE: The opinion that they give, overall, as auditors always do, is that the  
17 financial statements give a true and fair view, complying with accounting standards.  
18 That is their opinion. In a sense, they don't express any opinion as to anything about  
19 the company. They express an opinion on the accounts.  
20 And then at the top of page 400, they draw attention to note 2 in the financial report,  
21 which describes the events or conditions which give rise to the existence of a material  
22 uncertainty that may cast significant doubt about the group's ability to continue as  
23 a going concern, and therefore, that the group may be unable to realise its assets and  
24 discharge its liabilities in the normal course of business. And they go on to say, "Our  
25 opinion is not modified in respect of this matter."  
26 THE CHAIR: That's page 400, did you say?

1 MR WOOLFE: Yes. Top of page 400.

2 THE CHAIR: Just a moment. (Pause)

3 MR WOOLFE: So what they're actually doing is noting something that is stated in the  
4 accounts, and then they are saying that their opinion that the accounts give a true and  
5 fair view is not modified by the existence of that point, that material uncertainty as to  
6 a going concern basis. And going concern is, in that sense, is just a part of the way  
7 that the accounts are prepared. Do you look at this business on the basis it's going to  
8 have to sell things off, or it's going to continue to trade? That's what they are saying.  
9 Now, in terms of my overall response to the funding issues, four points.

10 First, you need to have an accurate view of LCM's position as stated into its accounts.

11 Secondly, that financial position needs to be placed into context, in particular where  
12 ATE insurance is in place and also where funding is coming in significant part from  
13 funds that LCA manages but which don't form part of its balance sheet.

14 Thirdly, I'll be switching to this, this is a point that which has taken seriously since it  
15 arose and on which it is acting responsibly as a proposed class representative.

16 And fourth, I'm going to take you to the recent decision in the Gutmann Handsets case,  
17 where the chairman dealt with a similar submission.

18 So, the LCM accounts are at bundle A, tab 21.

19 These issues are in no way hidden away. They are addressed fairly and squarely in  
20 the chairman's statement at the front of the report, page 329 of the bundle. And can  
21 I just invite you to read to yourself the third and fourth paragraphs on that page. So  
22 that's the paragraph starting "The financial strain" and the paragraph starting "Looking  
23 ahead". (Pause)

24 THE CHAIR: Chairman's statement.

25 MR WOOLFE: Yes. Chairman's statement. That's right.

26 In particular, I've said that the third and fourth paragraphs, just in the interest of time.

1 THE CHAIR: So the next 12 months begins at the date of these statements, which is  
2 when?

3 MR WOOLFE: 1 October.

4 THE CHAIR: Of this year.

5 MR WOOLFE: Yes. The end date for the statements is 30 June 2025, but they're  
6 published on the first.

7 THE CHAIR: Yes. Thank you.

8 MR WOOLFE: Now, in terms of the debt covenants that I mentioned, so you  
9 understand what those are, you go to page 381 of the bundle. That is note 14 to the  
10 accounts.

11 And you have some accounting columns in the top half of the page, and the bottom  
12 half of the page is some text which set out the detail as to LCM's debt facility with  
13 Northleaf Capital Partners as it's working debt facility. And you can see the total debt  
14 facility of two tranches of US\$75 million each, so a total of US\$150 million, that is  
15 secured against LCM's assets.

16 The information about the debt covenants is in the third paragraph up from the bottom  
17 of that:

18 "LCM agreed to various debt covenants, including" then you see them listed out. We  
19 don't have the exact terms of them, but we see the broad nature of them.

20 "A minimum effective net tangible worth, borrowings as a percentage of effective net  
21 tangible worth, minimum liquidity, minimum consolidated EBIT, and a minimum  
22 multiple of invested capital on concluded contract assets over a specified period.

23 There'd be no defaults or breaches related to the facility during the period ending  
24 30 June 2025. Should LCM not satisfy any of these covenants, the outstanding  
25 balance of facility may become due and payable." [as read]

26 So that's the nature of the risk. It's that there may be a breach of one or more of these

1 metrics, even though LCM is trading otherwise perfectly happily. The debt that it  
2 becomes repayable and suddenly it has to either arrange something else or stop  
3 trading, that's the concern, and that's what leads to the material uncertainty.

4 But if you look at page 337.

5 You see, "going concern material uncertainty" in the middle of the page. If I can draw  
6 your attention to some facts there. Second paragraph, "LCM lender has granted  
7 a debt covenant waiver through to 30 December 2025." [as read]

8 THE CHAIR: I'm so sorry. What was the page that we're now on?

9 MR WOOLFE: 337.

10 THE CHAIR: 337. (Pause)

11 MR WOOLFE: You see, second paragraph, under "going concern material  
12 uncertainty":

13 LCM's lender has granted a debt covenant waiver through to 30th December 2025, for  
14 which an increase in the cost of debt is (audio distortion) but further amendments will  
15 be subject to negotiation.

16 And then, next paragraph:

17 After considering the LCM's forecast, stress testing available, mitigating actions, and  
18 having regard to the inherent risk associated with the binary nature of LCM's  
19 investment model [its litigation funding] directors have concluded that a material  
20 uncertainty exists, which may cast significant doubt on LCM's ability to continue as  
21 a going concern.

22 So it's the directors themselves proactively raising it, and they then explain that:

23 But ultimately the financial statements have been prepared on a going-concern basis  
24 whilst noting the material uncertainty that arises. [as read]

25 In terms of the overall picture of the financial health shown by the financial accounts,  
26 the balance sheet is at page 362 of the bundle. That shows net assets of

1 approximately AU\$114 million. That's LCM's own balance sheet, not these funds.  
2 You can see why that is deconsolidated from its funds on page 373 if you want, but  
3 you don't need to go there.

4 The exchange rate between Australian dollars and pounds is almost exactly two to  
5 one at the moment, so, effectively, if you halve those numbers to get pound sterling, it  
6 gives you a view. So we have an undertaking with us, still a very substantial balance  
7 sheet.

8 Now, in terms of points of context, we set these out at paragraph 26.2 of our skeleton  
9 argument. If I can ask you to turn that up. That's bundle A, tab 1, page 13. You might  
10 have that separately.

11 THE CHAIR: Yes.

12 MR WOOLFE: the first point is that the funder has met all costs and disbursements  
13 to date.

14 Second -- this is paragraph 26.2 of our skeleton.

15 THE CHAIR: Yes.

16 MR WOOLFE: Second, is that the funder hasn't given notice under the LFA of any  
17 material adverse change in the funds available. That is a requirement under  
18 clause 12.4 of the litigation funding agreement which I showed you, and that is  
19 still -- no such notice has been given.

20 The third point is that of the funding, total budget of just over 30 million, of the first  
21 14.5 million, 75 percent is being supplied by funds that are managed by LCM, not  
22 LCM's own balance sheet. I'll take you in a moment to a letter where that is said. And  
23 those funds are committed irrespective of LCM's.

24 THE CHAIR: That 75 percent, but that's not the same as LCM's lender.

25 MR WOOLFE: No, that's not that. Those are because what -- LCM's business model  
26 involves investing its own money --

1 THE CHAIR: Yes --

2 MR WOOLFE: -- and then separately managing a fund which has committed

3 investors. I think it refers to Ivy League universities and other people.

4 THE CHAIR: Yes.

5 PROF SMITH: Could you explain in what sense is it committed?

6 These investors cannot withdraw the funding from this, irrespective of what happens

7 to LCM?

8 MR WOOLFE: Yes. Some of this appears from the accounts. In terms of the overall

9 funds, you can see at page 373, so bundle A, tab 21.

10 And you can see there are separate columns in that statement of financial provision,

11 on the one hand for LCM and on the other hand for the funds with which it manages.

12 And so, in that sense, the funds are not part of LCM's own balance sheet that holds

13 them, manage them separately.

14 THE CHAIR: What's the reference to that again please?

15 MR WOOLFE: Bundle A, tab 21, page 373.

16 THE CHAIR: Yes.

17 MR WOOLFE: And if we look back at page 371, it describes the nature of

18 funds 1 and two, and it refers to "the third-party interest in the funds have been

19 consolidated in the financial statements". [as read]

20 Maybe there's some other references in the accounts. We see it more clearly in the

21 letter that which is received from LCM, giving assurances as to the separate nature of

22 the funds. So perhaps I'll take you to those, in a moment.

23 PROF SMITH: No, I'm clear about the separate nature of the funds. What I'm not

24 clear about is in what sense these funds are irrevocably committed.

25 MR WOOLFE: My understanding is that they have been irrevocably committed, in

26 a sense, to the fund, and then LCM's decision is to commit them to particular litigation

1 as manager of the funds.

2 So are you questioning whether or not the funds, in a sense, the fact that 100 million  
3 in fund 1 is irrevocable, or that the commitment on that fund to investment, in particular  
4 litigation?

5 PROF SMITH: I suppose what I trying to understand is if someone -- you mentioned  
6 Ivy League universities. Some Ivy League universities have decided to invest in this.  
7 They don't have the option of becoming uneasy about the viability of LCM or the  
8 viability of the projects in which the funds are invested and withdraw. That's what  
9 I don't understand.

10 MR WOOLFE: I think some impression is given in two letters I'm going to show you.  
11 If I can't find the letter, we'll have a look over the other information can be given.

12 So in terms of points of contact, they met costs and disbursement to date, no notice  
13 given of material adverse change, the supply of these funds, which we'll go into some  
14 more detail shortly.

15 Northleaf is giving continued support and LCM has substantial net assets.

16 Apple is directly covered for adverse costs up to a 15 million limit by ATE insurance,  
17 irrespective of any point about the solvency of LCM.

18 And finally the LCM as a listed business is subject to reporting requirements as an  
19 AIM-listed business, it must report any change in financial condition which would be  
20 likely to lead to a substantial movement in its share price. That's another relevant  
21 point of context.

22 Now, I'm going to take you to two letters, as well, which was received from LCM, giving  
23 information as to its financial position. That's bundle A, tab 29 and bundle A, tab 30.  
24 The first is dated 23 October. The second is dated 11 November. And since I'm going  
25 to --

26 THE CHAIR: What's the page?

1 MR WOOLFE: Well, can we do -- if I ask you to read the 23 October one at your  
2 leisure, that's tab 29, page 554.

3 THE CHAIR: Yes.

4 MR WOOLFE: I'll show you now the one of 11 November. Bundle A, tab 30,  
5 page 556.

6 THE CHAIR: Thank you.

7 MR WOOLFE: The context of this letter is given in the second paragraph, which is the  
8 annual report. And in the middle of the second paragraph:

9 "Certain statements in the annual report have been referred to by the PDs [Proposed  
10 Defendants], Apple, in the proceedings in which the claim is being pursued, to question  
11 the ability of LCM to fund the claim." [as read]

12 And refers to statement in the accounts:

13 "The context of this letter is to provide additional detail to the PCR as to the LCM's  
14 ability to provide funding." [as read]

15 And then goes on to give detail about funding given to date.

16 And over the page, 557, we have a series of numbered paragraphs about further  
17 detail. I draw your attention to paragraph 5:

18 "In financing its portfolio of funded claims, LCM utilises its own capital, as well as  
19 third-party capital committed by large institutional investors, through LCM's funds  
20 management business." [as read]

21 Point 6:

22 The managed funds do not include capital provided or owned by LCM. There's no  
23 double counting. They're drawn down and utilised by LCM at its discretion, in order to  
24 provide funding, adverse costs, indemnities, and other financial support for the  
25 managed fund investments. This claim has been allocated to Fund II, and the funds  
26 for the claim are sourced from a combination of funds from Fund II and the balance



1 sheet.

2 And then you can see at point 8, there is the allocation of the funds required for this  
3 matter to LCM's balance sheet and the fund set out. So of the first £14.5 million  
4 incurred on this matter, 75 percent will be contributed by investment Fund II and the  
5 remaining 25 percent from the balance sheet. That's where that comes from.

6 And then paragraph 10:

7 The contractual obligations by third-party investors in Fund II is to provide their  
8 respective commitments, including the commitment for the claim, regardless of the  
9 financial position and overall solvency of LCM.

10 That's what is said.

11 And 11:

12 Third-party investors remain liable. Financial obligations of Fund II and for committed  
13 capital, irrespective of the solvency of LCM entities.

14 And then some more information is given about the debt covenant, but that's  
15 information we've already seen. And that letter was signed by the CEO of LCM on  
16 11 November.

17 So, turning to the question of what Which? is doing, Which? is obviously is taking these  
18 points seriously. Which? wants to make sure it has committed funding for the claim.  
19 But on the basis of the information it has received, and the assurances received from  
20 LCM, in particular in those letters and the accounts as a whole, Which? considers that  
21 the funding is such that it continues to meet the authorisation requirements. The  
22 requirements to show an ability to pay Apple's recoverable costs is covered by  
23 ATE Insurance. Insofar as any increases required, then it can be increased, and that  
24 will run ahead of any -- you'd expect if Apple thinks it's going to be spending more than  
25 15 million, it will let us know before it gets there, and consideration could be given to  
26 extending the limit of cover.

1 In terms of Which?'s ability to fund its own costs, that's not actually a strict, inflexible  
2 requirement of the rules. The requirement to be able to meet adverse costs, in  
3 a sense, is in a slightly different category; that's specifically stated. In terms of  
4 Which?'s ability to fund its own costs, the Tribunal is required to have regards to the  
5 litigation plan, the budget and any arrangements for costs, and reach a holistic  
6 assessment of whether these are satisfactory, and such as to enable the PCR to act  
7 fairly and adequately in the interests of class members. Which? hasn't been notified  
8 by LCM that there is a risk of these funding commitments not being met. It has been  
9 reassured that they will be.

10 With that, can I take you to the Gutmann Handsets judgment, just to finish? That's in  
11 the authorities bundle, tab 55.1 at page 2092.1. (Pause)

12 That was a judgment handed down by the Tribunal just last week on 14 November,  
13 with Lord Richardson presiding.

14 THE CHAIR: Yes.

15 MR WOOLFE: The funder in that case was LCM. I think we did put this in a note  
16 asking you to read certain paragraphs of it. I don't know if you had the chance to do  
17 that, sir.

18 THE CHAIR: Yes.

19 MR WOOLFE: So similar points were being made by the MNOs, including  
20 represented by my learned friend -- it was Mr Kennelly, I think, who was arguing the  
21 point -- that LCM's 2025 financial statements cast doubt on its ability to fund the case.  
22 And further, this cast doubt on the PCR's ability to act in the interests of class  
23 members.

24 If I can pick it up on page 271 -- so paragraph 271, which is page 90 of the judgment,  
25 which I think is around -- if you're in a PDF, page 2232 of the PDF, marked 2092.90 at  
26 the bottom.

1 THE CHAIR: Yes.

2 MR WOOLFE: The Tribunal started with the criteria set down in rule 78(1) and (2).

3 They noted, paragraph 272 -- again, that was being cast on the PCR's response, and  
4 this was rejected at paragraph 273.

5 274, they noted the PCR had investigated and they do not see -- the last sentence of  
6 that paragraph:

7 "We do not see any reason to doubt that the PCR will continue to keep his funding  
8 arrangements, and the position of LCM Ltd, under review. Submit, the same would  
9 apply here." [as read]

10 276 supports really as a -- the point I've already made, you need to consider the PCR's  
11 ability to fund his own costs separately from the PCR's ability to meet an order for  
12 recoverable costs separately, and they're separate requirements.

13 And at 277, the Tribunal said that adverse costs can easily be disposed of, where  
14 there was ATE Insurance in place, and the same is true here.

15 Then in respect of the own costs, that's 278 to 284, and paragraph 279, the Tribunal  
16 makes the important point, one I've already made, there is no absolute requirement to  
17 have secured committed funding for all costs, all the way to trial. Rather, the Tribunal  
18 is required to consider the estimates and arrangements, and then consider whether  
19 those arrangements would enable the PCR to act fairly and adequately in the interests  
20 of class members in a holistic sense.

21 Paragraph 280, the Tribunal noted the Director's statement, that they have  
22 a reasonable expectation that LCM will continue to receive the necessary support, and  
23 the Tribunal say they have no reason to doubt that statement.

24 Paragraph 281, the Tribunal considered the funding split. This is a slight point of  
25 distinction between the two cases. In that case, as I understand, 75 percent of all the  
26 funding was coming from the funds LCM had under management, whereas in our case

1 it's only 75 percent of the first half of funding. But the first half is the one that's most  
2 imminent.

3 Fourth, paragraph 282, they say there is no reason to go behind the position as stated  
4 in the accounts, and it goes to the net asset position.

5 283, they make the possibility that alternative funding arrangements could be put in  
6 place or required to do so.

7 And then paragraph 284, they take a holistic view, and they're satisfied that the  
8 present arrangements will enable the PCR to act fairly and adequately, but stress they  
9 will keep it under review, and they give certain directions. The PCR is required to  
10 inform the Tribunal of any material development, and to file a summary before the next  
11 CMC. So the Tribunal, rather than saying certification not met, throw it out, treat it as  
12 an issue which can be managed, and makes perfect sense.

13 Also, in our case, we have ATE insurance in place. We have the funder in place. We  
14 have committed third-party funds for 75 percent of the funding, of the first half of the  
15 funding, and we submit the Tribunal should take the same approach in this case.

16 That's everything I wanted to say; I'll come back and reply as necessary.

17 THE CHAIR: Just before you sit down, and it's not something I want an immediate  
18 answer on, but just give me one second, please. (Pause)

19 Can you just check paragraph 1.5.6 of Mr Hughes's report, page 100 of the bundle.

20 I only ask that, because that's a summary of his approach to the calculation of  
21 damages for the non-paying customers, and at that point, he says for the 50 percent  
22 that they assume he would have bought, he says he's taking an average of half of the  
23 Apple price, not the midpoint between the Apple price and the competitive price, which  
24 is why I was asking the earlier question. Whereas he later on says "midpoint". If you  
25 can just clarify that later on, or for tomorrow morning, just so we know where we are.

26 MR WOOLFE: I think that's a distinction between estimating willingness to pay

1 | versus -- no, sorry, well --

2 | THE CHAIR: Don't answer me now, but check it with Mr Williams. You can come  
3 | back on it tomorrow if necessary. I just wanted to raise that point.

4 | Right, now, Ms Demetriou.

5 |  
6 | Submissions by MS DEMETRIOU

7 | MS DEMETRIOU: Thank you, Tribunal.

8 | Apple is, as I'm sure you've seen, only raising points that go to certification. Apple  
9 | obviously would vigorously contest the claim, but I'm not going to get into that. Its  
10 | position in a nutshell is that the PCR has failed to satisfy the authorisation requirement  
11 | under rule 78(2) of the Tribunal rules, and that's essentially for two reasons, which are  
12 | connected with its funding arrangements.

13 | First, there are serious concerns about the ability of the PCR's funder to continue to  
14 | fund these complex and expensive proceedings on an ongoing basis. We don't agree  
15 | with the position put by my learned friend, which is, well, it's all right for the time being,  
16 | and you can worry about, later. These are, as I say, complex and expensive  
17 | proceedings, and if there's a doubt now as to the PCR's funder's ability to fund them,  
18 | then the Tribunal should step in.

19 | Secondly, we say that the PCR's approach to that issue, and to other aspects of its  
20 | funding arrangements, has been singularly unimpressive. It falls short of the standard  
21 | set for class representatives in the Tribunal rules, as expounded by this Tribunal in the  
22 | authorities, and I'm going to structure my submissions as follows.

23 | So first, I'd like to draw out some of the key points from the authorities, in relation to  
24 | the authorisation criterion.

25 | Secondly, I'm going to address the limited evidence that Which? has provided, as to  
26 | how it's approached the funding of its proposed claims.

1 Thirdly, I'll address the issues arising from the financial situation of the funder, LCM.  
2 These are matters which are addressed in our skeleton argument, but I'm also going  
3 to address the PCR's belated response to those issues and its reliance on the  
4 Gutmann judgment of last week. And just to foreshadow what we say about Gutmann  
5 now, we say that the PCR is wrong to submit that it's somehow conclusive of the  
6 funding related issues that arise in this case. The Tribunal in Gutmann did consider  
7 LCM's precarious financial position, and in that case concluded that it would certify  
8 those proceedings, but keep a careful eye on developments. But there are  
9 two significant factual distinctions between this case and that one.

10 The first is that these proceedings are far more exposed to LCM's own balance sheet,  
11 because a much greater proportion of the funding in the other case was being provided  
12 by a ring-fenced investment fund. So you've seen that in that case, it's 75 percent of  
13 the funding was going to come from this fund, where the investments are said to be  
14 ring fenced. In the present case, it's 35 percent, and I'll show you how we get to that  
15 figure. So, in this case, 65 percent of the funding is going to come from LCM's -- it is  
16 exposed to LCM's own balance sheet. It's going to come from LCM's own balance  
17 sheet. So that's a very important factual distinction, which means that the risk in these  
18 proceedings is much greater.

19 And the second point of distinction is that a factor that weighed heavily with the  
20 Tribunal in passages which my learned friend rather skated over, but we'll have to go  
21 back to, weighed heavily with the Tribunal in Gutmann, was the diligent and  
22 transparent manner that Mr Gutmann had gone about interrogating the position. And  
23 here, as I'll show you, we've got precisely the opposite.

24 Now, fourthly, I'll address, and I think I can do it more briskly, the other aspects of  
25 which is approach to funding, which give rise to further concerns, and those are the  
26 four matters raised in our skeleton argument. So they're the priority point, the

1 termination point, the appeals point, and transparency. And I'll deal with those last.

2 So starting with the legal framework, can I ask you to pick up the Riefa judgment  
3 please, and that's in the third volume of the authorities, behind tab 50. And can we  
4 take it, please? If we pick it up from page 1894 of the bundle.

5 THE CHAIR: 1894.

6 MS DEMETRIOU: So you should see -- I'm hoping that my pagination is the same as  
7 the electronic pagination, but does your 1894 start with paragraph 23 at the top of the  
8 page?

9 THE CHAIR: Yes.

10 MS DEMETRIOU: Thank you. That's a relief. You see the overall heading is the  
11 "Authorisation Condition". Paragraph 24 quotes from the Tribunal's guide noting that:  
12 "... being a class representative involves significant and serious obligations, not  
13 a responsibility to be taken lightly. And in considering whether it would be just and  
14 reasonable for the PCR to act in that capacity, whether the PCR would fairly and  
15 adequately act in the interests of the class members, the Tribunal will consider the  
16 PCR's ability to manage the proceedings and instruct its lawyers." [as read]

17 And then we see, at paragraph 25, by extension, the proposed class representative's  
18 ability to fund its own costs of bringing the collective proceedings is also relevant. So  
19 is its ability to fund its own costs.

20 "In considering this aspect, the Tribunal will have regard to the proposed class  
21 representative's financial resources, including any relevant fee arrangements with its  
22 lawyers and third-party funders or insurers." [as read]

23 So just pausing here, my learned friend made the point about the provision of ATE  
24 insurance but, of course, that doesn't bear upon the question of whether the PCR has  
25 the ability to fund its own costs in these proceedings.

26 Then we have, at paragraph 26, a quotation from this Tribunal's observations in

1 Trucks:

2 "In considering the adequacy of the funding arrangements, the Tribunal's concern is  
3 for the potential class members, they should have the benefit of effectively conducted  
4 proceedings." [as read]

5 And then at 27, we have the Gutmann trains -- a citation from the Court of Appeal's  
6 judgment in those proceedings, noting Lord Justice Green's comments regarding the  
7 competing considerations:

8 "On the one hand, the collective actions regime needs funders and funders need to  
9 make a return. On the other hand, there's a risk of perverse incentives, and funders  
10 have an incentive to sue and settle quickly for an undervalue." [as read]

11 Pausing here. Of course, these points are all interrelated. For the class to have the  
12 benefit of effectively conducted proceedings, the PCR must be able to fund its own  
13 costs as the litigation progresses. So it's hardly surprising that the guide says that's  
14 a relevant factor. And if, for whatever reason, the source of funding is under threat,  
15 that's not only a risk to the effective conduct of proceedings, but it could also increase  
16 pressure on the funder and from the funder to settle rather than carry on, even if that  
17 may not be in the interests of the class. And there we have an interaction, if I can put  
18 it that way, with the termination provisions, which I'm going to come to later on.

19 But just picking up -- going back to Riefa, bottom of 1894, the CAT there quotes from  
20 the Alex Neill proceedings against Sony and the comments are over the page, at the  
21 top of the page, where the Tribunal in that case says that:

22 "... the Tribunal must satisfy itself that a class representative is sufficiently  
23 independent and robust so as to act fairly and adequately in the interests of the class."  
24 [as read]

25 And then you see at (2):

26 "... scrutinising the funding arrangements at the certification stage, if there are



1 concerns that can't otherwise be managed."

2 And then you see paragraph 29 refers to the judgment in Gormsen v Meta and the key  
3 point for our purposes is over the page. If you could turn over the page to 1896 and  
4 at the top of the page by letter (c), it's paragraph 37. There the Tribunal said that:

5 "There's no justification in withholding the funding terms from public scrutiny and  
6 considerable benefit." [as read]

7 So here we see the Tribunal emphasising the importance of transparency in the  
8 funding arrangements.

9 At paragraph 30, there's a quotation from the Tribunal's judgment in Gutmann against  
10 Apple and there we see that the Tribunal:

11 "... cautioned against unnecessary hurdles for funders but [it] also identified two key  
12 safeguards against inappropriate funding arrangements." [as read]

13 So first, the class representative:

14 "Class members will have a suitable class representative in receipt of legal advice who  
15 will act in their best interests in negotiating an appropriate and competitive litigation  
16 funding agreement."

17 And second:

18 "The Tribunal itself acts as a safeguard at the certification stage, as part of which it will  
19 consider the proposed funding arrangements and their adequacy."

20 And then at paragraph 31, we see that the Tribunal draws eight principles from the  
21 statutory framework, and these authorities, as to how the Tribunal should scrutinise  
22 a PCR'S funding arrangements at this certification stage. Four of these principles bear  
23 emphasis in the present case. Can I draw your attention to point 3:

24 "Consideration of the PCR's ability to pay the defendant's recoverable costs, as well  
25 as its ability to fund its own costs such that the proceedings are conducted effectively."

26 [as read]

1 And then at (5), we have:

2 "The important protection for potential class members is the PCR's role when agreeing  
3 funding arrangements and managing the proceedings going forward, including  
4 ongoing interactions with funders." [as read]

5 And we emphasise those words.

6 That requires the PCR to be sufficiently independent and robust.

7 And then at (6):

8 "Informing the view as to the ability of the PCR to act fairly and adequately in the  
9 interests of potential class members, the Tribunal will consider all relevant  
10 circumstances, including the question of how the PCR has satisfied itself that the  
11 funding arrangements reasonably serve and protect those interests." [as read]

12 And I emphasise those words because we say that the PCR's conduct in that regard  
13 has been singularly lacking. Unimpressive.

14 And then, we see at (7) is also relevant. So, insofar as it stresses the importance of  
15 transparency about funding, so it can be scrutinised by the Tribunal and the class.

16 And then we see it at (8), a note of caution against excessive intervention in relation  
17 to funding but as the Tribunal can see, that caution explicitly concerns the Tribunal  
18 intervening in relation to the funder's return. We're not making any point here about  
19 the funder's return.

20 Now, Riefa is not only relevant here for its distillation of the relevant principles  
21 applicable to the authorisation condition; the facts of that case and what the Tribunal  
22 decided are also important. I just want to show you those briefly. Because what the  
23 facts show, and the Tribunal's decision shows, is that there is a heavy burden on the  
24 PCR itself to satisfy the Tribunal that it's capable of bearing the considerable  
25 responsibilities entrusted to it as a representative of the class. And that's something  
26 which only the PCR can do. It's not something which its lawyers or its funders can do.

1 And in Riefa, the central question was whether the PCR, Professor Riefa, properly  
2 understood the funding arrangements that had been entered into in order to fund the  
3 claim. That was the central question. Professor Riefa filed three witness statements  
4 in that regard. We see that -- I don't think we need to turn it up -- but we can see that  
5 at -- well, perhaps let's turn it up. If we go to page 1892, paragraphs 14 to 15 explain  
6 the position.

7 One of the witness statements was served with the application for certification. There  
8 was a second witness statement filed at the Tribunal's direction, following the initial  
9 certification hearing, which addressed the basis on which she had satisfied herself as  
10 to the appropriateness of the funding arrangements and her ability to scrutinise them.  
11 And we can see reference to that, if you go on to page 1903, you can see reference  
12 to that statement at paragraph 64.

13 THE CHAIR: Sorry. 1903?

14 MS DEMETRIOU: 1903, paragraph 64. So Riefa 2 was submitted following the July  
15 hearing. That was the initial certification hearing.

16 And then if we go over the page -- sorry, over a couple of pages, in fact, to 1906, you  
17 see a heading on that page, "Professor Riefa's third witness statement". That was  
18 a third witness statement filed of the PCR's own motion, further explaining elements  
19 of the funding arrangements, which the witness statement was filed in order to seek  
20 to satisfy the Tribunal's concerns.

21 There were two certification hearings and Professor Riefa gave oral evidence at the  
22 second hearing. And if we turn, please, back to page 1898, we can see -- and this is  
23 discussed at the bottom of the page. It's really paragraphs 38 through to 40 -- that  
24 one aspect of Professor Riefa's approach to her funding arrangements, which caused  
25 particular concern to the Tribunal, which is discussed in these paragraphs, was that  
26 the PCR was obliged on a successful outcome to apply to the Tribunal for an order

1 permitting payment of costs, fees and disbursements, including solicitor and funder  
2 fees, out of the damages award. So, payments to those stakeholders would rank in  
3 priority to any distribution of damages to the class.

4 Initially, the PCR was under an absolute obligation to make the application but upon  
5 concerns being raised by the Tribunal at the first certification hearing, it was watered  
6 down to an obligation to do so where it's appropriate in all the circumstances.

7 Now, I should say that the Tribunal's ultimate decision to refuse certification in this  
8 case was not based on that clause being problematic per se. This is an important  
9 point. Rather, the Tribunal was concerned that the PCR had not shown that she  
10 properly understood the provision and indeed other aspects of her funding  
11 arrangements, and so she had failed to demonstrate that she was sufficiently robust  
12 to represent the interests of the class on an ongoing basis. And that's an important  
13 point for present purposes, because we say that the same has happened here. And  
14 I'm going to explain why we say that.

15 When it comes to the points like the priority point, in particular, we're not saying it's  
16 never been part of our case that having a priority of payments clause in that way is per  
17 se unlawful. But what is clear is that the PCR has to grapple with the provision and  
18 understand it. And we say that even today, my learned friend didn't properly and  
19 adequately explain what the effect of the clause is even in today's hearing.

20 Now, if we go to page 1908.

21 I can see the time. Shall we pause here?

22 THE CHAIR: If that's convenient, yes.

23 MS DEMETRIOU: It is. I'll have to come back to do a bit more on Riefa, but I think  
24 it's probably best to do that after the break.

25 THE CHAIR: Right. Well, we'll rise now. 2.00 pm, please.

26 (1.00 pm)

1 (The short adjournment)

2 (2.00 pm)

3 THE CHAIR: Yes, Ms Demetriou.

4 MS DEMETRIOU: Thank you.

5 Can I ask the Tribunal to Riefa again, please, which is at tab 50 of the authorities  
6 bundle. And if we could take it, please, from page 1908.

7 And what you see there set out are the Tribunal's concerns that the initial certification  
8 hearing. And at paragraph 89.2 of the judgment, you can see the Tribunal's concern  
9 that:

10 "The PCR's first witness statement misunderstood her obligations under the LFA  
11 regarding payments to the funder." [as read]

12 And subparagraph 3 criticises:

13 "The brevity of the discussion in the PCR's first witness statement, brevity of its  
14 discussion of funding issues, which failed to show independent, detailed consideration  
15 of its terms." [as read]

16 And then over the page, paragraphs 90 to 91:

17 "The Tribunal found that the PCR in that case was extremely reliant on her legal  
18 advisors, and they weren't convinced that she had properly understood the funding  
19 arrangements. [And they said that] Its cumulative concerns caused it considerable  
20 doubts about her suitability." [as read]

21 And then if we could go on, please, to page 1911. At paragraph 100 onwards, the  
22 Tribunal set out its concerns about:

23 "The PCR's comprehension of its obligation to seek to pay the funder in priority to the  
24 class. [And it found that] Professor Riefa didn't understand the provision, and she  
25 couldn't explain why it might be in the best interests of the class to have such  
26 a provision." [as read]

1 And then paragraph 103 and over the page:

2 "The Tribunal noted that Professor Riefa hadn't appreciated the conflicts of interest  
3 that arose in taking advice from her solicitors on these arrangements." [as read]

4 And then you see the conclusion at 104:

5 "The Tribunal found that Professor Riefa didn't have a strong understanding of the  
6 nature and extent of her responsibilities to protect the interests of the class, she seeks  
7 to represent." [as read]

8 And it noted at 105 to 106 that:

9 "Although she would inevitably need to rely on the advice of her solicitors, she needed  
10 to show that she herself could engage robustly with the advice and understand the  
11 funding terms and the context of any advice she received on it." [as read]

12 And the Tribunal went on to reiterate, if we go on to page 1914, especially at  
13 paragraph 117(e), that:

14 "It's for each PCR to demonstrate to the satisfaction of the Tribunal that it's suitably  
15 qualified to act for the class, and that the manner in which it has approached the  
16 funding arrangements reflects sufficient regard to the interests of the class members."  
17 [as read]

18 There's one other authority I want to show you very quickly, which is the  
19 Hammond v Amazon case, and that's behind tab 51. And if we could pick this up,  
20 please, at page 1935 of the bundle.

21 And, could I just ask you to read paragraph 67 one to yourselves?

22 THE CHAIR: Just a moment, please. (Pause)

23 MS DEMETRIOU: Page 1935 and it's paragraph 67.1.

24 So there are two matters that the Tribunal is emphasising. The first is here:

25 "Tribunal wishes to be satisfied that the PCR's made proper efforts to secure  
26 favourable funding terms."

1 And then you see here that:

2 "At the request of the Tribunal, Mr Hammond provided a further witness statement  
3 which gave much more information of the evolution of the final form of the LFA. We  
4 consider it should be standard practice for the PCR to address in their evidence the  
5 steps they took to secure an LFA on appropriate terms." [as read]

6 And then you can see at paragraph 68 a familiar concern raised by the Tribunal, which  
7 was a clause which enabled the PCR to seek an order paying the funder in priority to  
8 the class. And that was addressed in a second witness statement. A further  
9 clarification at the hearing and a further amendment to the funding arrangements.

10 And then turning the page at paragraph 60, turning the page to 1936. Top of the page,  
11 paragraph 69. You can see that:

12 "The Tribunal was satisfied by the additional steps the PCR had taken in this regard,  
13 and it explicitly contrasted the case with the Riefa case." [as read]

14 So it's against that backdrop that the Tribunal must consider what the PCR in this case  
15 has done to satisfy the Tribunal, that it's got to grips with the funding arrangements for  
16 these proceedings. And what you have is a single witness statement from its general  
17 council, Ms Averty, which, my learned friend took you to, but if we take that up in  
18 bundle 1, tab 1 page 19.

19 And you can see at the bottom of page 19 the heading "Suitable Funding  
20 Arrangements" and the explanation of the funding arrangements just occupies just two  
21 pages of this statement. You can see --

22 THE CHAIR: Sorry, can you just give us a moment, please?

23 MS DEMETRIOU: Of course. (Pause)

24 THE CHAIR: Sorry. Which page are we going to?

25 MS DEMETRIOU: Page 19, bundle B, tab 1.

26 And at the bottom of the page, do you see a heading B, which has "Suitable Funding

1 Arrangements".

2 THE CHAIR: Just a moment. (Pause)

3 Yes.

4 MS DEMETRIOU: And really, the point I wish to make is that this is very cursory. If  
5 you look -- let's just go through it, it's very short. So if we go on to page 20,  
6 paragraph 44 says it's going to address key points.

7 You see at 44(b):

8 "LCM is a highly experienced litigation funder which I consider to be suitable."  
9 [as read]

10 So that's an assertion.

11 Rest of 44 discusses Which?'s resources, the indemnity insurance and CFAs with its  
12 lawyers.

13 Then paragraph 45 on page 21 at the bottom addresses how the funder will be paid.

14 Can I just ask you to read that to yourselves? (Pause)

15 And note the last sentence in particular.

16 So that's really it. Paras 44 and 45 are the sum total of Ms Averty's evidence on the  
17 funder and the funding arrangements. And we say that this is remarkably brief  
18 evidence and not at all consonant with what the Tribunal has been looking for in other  
19 cases. So there's no discussion of which funders were approached and how LCM was  
20 selected, nothing on how relevant aspects of the funding arrangements were  
21 negotiated, nothing on how Which? has satisfied itself as to the appropriateness of the  
22 terms of the LFA.

23 Indeed, on the priorities clause, Ms Averty simply says she was advised that LCM  
24 could be paid from any damages. She doesn't at all grapple with questions of whether  
25 those priority of payments are in the interests of the class, which is the point picked up  
26 by the Tribunal in Riefa.



1 We say that this evidence doesn't come close to satisfying the standard that's required,  
2 as set out in the two authorities I've taken you to, but particularly that would be troubling  
3 in any case. But it's particularly troubling in this case, given that the issues that have  
4 come to light regarding the precarious financial situation of LCM, Which?'s funder.  
5 And so that's what I want to turn to now.

6 The Tribunal will be aware that the funder is LCM UK, which is an entity based in this  
7 jurisdiction, which is part of a group controlled by an Australian company,  
8 LCM Limited. You asked me, during the course of my learned friend's submissions,  
9 about what we made of the Dubai investigation, and I said it was really the way in  
10 Which? that had been addressed or approached by which that was troubling.

11 Let me just show you so -- well, I don't think I need to take you to our letter, but Apple's  
12 solicitors wrote to the PCR about this once the news reports came through of the  
13 investigation, wrote to Which? on 24 June 2025. We don't need to go to that letter,  
14 but I would like to take you to the response, which is at bundle B, tab 12, page 415.

15 So this is a response a month later. And if you go to the second page of that letter,  
16 you see the heading at the bottom of page 416 "Investigation Into Funder".

17 Now what said here is that, the concerns or the queries that Apple raised were of no  
18 merit. And we see why that said to be so when we go on to page 416. So you can  
19 see there that it says -- sorry, if we go to the top of page 417, the main paragraphs  
20 there, three lines down:

21 "The investigation does not concern the entity funding the proposed collective  
22 proceedings and accordingly, even if anything were to arise from the investigation, it  
23 would not affect the finances of the entity that's funding the proposed collective  
24 proceedings. The PCR has made enquiries of the funder regarding the investigation,  
25 and is satisfied that the funder continues to be able to meet its financial obligations  
26 under the LFA, and that its resources can be relied upon to satisfy the authorisation

1 conditions." [as read]

2 So you see, the distinction that's being made there is between the parent company,  
3 which is the subject of the investigation, and the funder in this case, which is the wholly  
4 owned subsidiary.

5 So what's being said is, "Well, this is irrelevant, this investigation, because it doesn't  
6 concern the subsidiary". And that's a surprising point for the PCR to have made for  
7 the reasons set out in paragraph 62 of Apple's Response to the CPO application. I'll  
8 just summarise what those points are.

9 The points are that LCM UK is a wholly owned subsidiary of LCM Limited, that  
10 Mr Maloney, who was the subject of the investigation; was, until February of this year,  
11 a director of LCM UK, alongside his role as CEO of the parent company; and that  
12 LCM's UK accounts suggested it received financial support from its parent.

13 Now, it was also a surprising response given that it's directly contrary to witness  
14 evidence given several months earlier by Mr Maloney on behalf of LCM UK in the  
15 Gutmann v Vodafone proceedings. And let me just show you that. So if we could turn  
16 to bundle A, tab 26.

17 This is Mr Maloney's first statement and it's dated 30 January 2025. And could I just  
18 ask you to turn to page 426.

19 Paragraph 15 says:

20 "The LCM group's funds flow to subsidiaries including LCM UK as required. LCM UK,  
21 which is the contracting entity for all LCM Group UK originated investments, has the  
22 full support of LCM Limited's substantial resources to draw upon to meet its financial  
23 obligations." [as read]

24 Then over the page, please, paragraph 17:

25 "As at 30 June 2024, there were 58 cases that LCM Limited was actively invested in,  
26 of which 19 were subject to litigation funding agreements entered into with LCM UK,

1 including the four related proceedings. By investing in a number of cases, LCM Group  
2 has a balanced portfolio which provides us diversification and resilience, enabling the  
3 group to fund cases to conclusion." [as read]

4 So what you can see here is that Mr Maloney stressed the close financial links  
5 between LCM Limited and LCM UK, yet the response of the PCR to our legitimate  
6 queries, hearing about the investigation of the LCM Group was to say, well, that  
7 doesn't matter because it's the parent company.

8 Now, I'm not going to turn it up, but the same point was forcefully made by the PCR's  
9 counsel at the certification hearing in the Gutmann proceedings. And what he said  
10 there was Mr Maloney's evidence -- he relied on Mr Maloney's evidence that, and I'm  
11 quoting:

12 "The LCM Group is a substantial and viable funding business that's well capable of  
13 supporting its local subsidiaries, including LCM UK." [as read]

14 So that's what the PCR said in that case, and that was part of the evidence that the  
15 Tribunal in Gutmann had before it.

16 Now, clearly, whatever enquiries the PCR in this case or its solicitors had made of  
17 LCM UK in July 2025 when the PCR's solicitors sent that letter hadn't picked up on  
18 any of this.

19 And then, if we go, please, to the PCR's Reply of 3 October. And if we pick that up,  
20 please, at bundle A, tab 5, page 178, paragraph 71.

21 So there -- this is October -- the PCR says:

22 "Apple thus appears to imply, but notably stops short of explicitly alleging, that the  
23 funders ability to meet the cost of proceedings depends upon support from its parent  
24 company. Notably, Apple ignores any of the actual financial information in the last  
25 filed accounts." [as read]

26 So what you see there is it's doubling down on the line that it took in its letter that

1 I asked you to note earlier. So again, that's inconsistent with the evidence and the  
2 submissions that were made in Gutmann, and it does rather indicate that the PCR is  
3 trying to just brush all of this off without properly getting to the bottom of the position.  
4 And then if we stay in this document and please go to page 176, paragraph 67, this is  
5 under the heading "The LCM issues", you can see that the key point here that's being  
6 made was that the concerns arising from the criminal proceedings in Dubai had now  
7 fallen away, because the company and Mr Maloney had been exonerated in those  
8 proceedings. And it relies in this paragraph, we can go over the page and see this, it  
9 relies on, for this purpose, on statements to that effect made in LCM's annual report  
10 for the year ended 30 June 2025, which was published on 1 October 2025, and we  
11 can see that annual report, it's at tab 21 of this bundle, and it starts at page 327.  
12 But what this shows, if we turn to page 331, is that the excerpts relied on by the PCR  
13 in its response are far from the full picture, because if we pick it up from page 331,  
14 under the heading "Dubai", and we see the second paragraph:  
15 "While LCM has been fully exonerated in this matter, the process has clearly  
16 negatively impacted the company, affecting multiple key business areas and restricting  
17 strategic opportunities that were advanced at the time, including the anticipated first  
18 close of fund 3." [as read]  
19 And then we can see at the end of that:  
20 "The financial impact has been significant." [as read]  
21 So that's not a point that the PCR put to the Tribunal in its response, it just points to  
22 the part saying, "Well, we've been exonerated, the parent company's been  
23 exonerated, you can now forget about that". But in the same annual report, it makes  
24 clear that the financial impact has cast a long shadow over the company's financial  
25 situation.  
26 Now, what the 2025 annual report also makes clear is that the financial health of the

1 LCM Group is in a perilous state, and if we go to page 329, the first page, "The  
2 Chairman's Statement", it opens, in the first paragraph, with an acknowledgment of:  
3 "The significant challenges LCM has encountered, and that the 2025 financial year  
4 has been the most difficult year in the company's history, marked by an unprecedented  
5 number of case losses that have adversely affected our financial performance and  
6 cash flows. Despite these setbacks, our team has demonstrated resilience, taking  
7 decisive actions to stabilise the business amid near-term pressures from elevated debt  
8 levels. We remain committed to our long term vision." [as read]

9 And then what we see is, if we look at the third paragraph -- or perhaps I can just ask  
10 you to read the third paragraph, beginning "the financial strain from case losses" to  
11 yourselves.

12 THE CHAIR: 329 now?

13 MS DEMETRIOU: Yes.

14 THE CHAIR: Just a minute. (Pause)

15 MS DEMETRIOU: So what we're seeing there is a reference to increasing  
16 indebtedness. And then on the fifth line:

17 "A risk that, in certain circumstances, future case losses could lead to a breach of  
18 LCM's debt covenants. As a result, we're reporting a material uncertainty in relation  
19 to our going concern status." [as read]

20 Then it seems that the ongoing involvement of its lender is in doubt, because you can  
21 see that the lender has indicated that its current intention, which is subject to ongoing  
22 review and may be considered in light of future developments, is to continue to support  
23 LCM for the next 12 months. So it's highly caveated.

24 And then further down the page, what you see is a reference -- sorry, perhaps we can  
25 go over the page, because the chairman's sentiments are echoed in the CEO's report.

26 And you can see again in the first paragraph of that, reference to the unprecedented

1 number of adverse case results.

2 The second paragraph, you see, he describes the termination of the group's  
3 investment in an Australian class action.

4 Further down the page, he talks about the company proactively realigning its portfolio,  
5 and what that means, you can see at the bottom of the page in bold, the first bullet,  
6 "decisive action on underperforming investments", which means rapid evaluations and  
7 timely exits where warranted. (Pause)

8 And there's more detail on the going concern point on page 337, which I think my  
9 learned friend took you to.

10 THE CHAIR: Yes.

11 MS DEMETRIOU: Again, that mentions the risk of breach of debt covenants. And it  
12 says that future covenant waivers are subject to negotiation, linked to a robust  
13 assessment of the risks facing LCM. So again, on that basis, LCM's directors have  
14 concluded that a material uncertainty exists, which may cast significant doubt on  
15 LCM's ability to continue as a going concern.

16 Now, what we see here, if we go to page 366, let me just show you, make this point,  
17 is -- you see at page 366, you again see note 2, material accounting policies  
18 continued, and then the heading "Going Concern". The sentence under that:

19 "Litigation Capital Management Limited and its wholly owned subsidiaries have been  
20 prepared on the basis of the going concern basis." [as read]

21 And so the short point is that the material uncertainty as to LCM's status as a going  
22 concern applies to LCM Limited and to its subsidiaries so as to include the funder in  
23 this case.

24 Now, unsurprisingly, LCM Limited's share price fell dramatically on the day that its  
25 annual report was published, and we've got news reports in the bundle; I don't need  
26 to take you to those, but the news reports described a drop of 60 percent on the day,

1 amounting to a 99 percent drop since November 2024, and notably, that very  
2 significant drop in share price has taken place in the same time period since these  
3 proceedings and Ms Averty's witness statement were filed. But there's nothing  
4 proactively coming from the PCR to the Tribunal to front up to these really serious  
5 problems, to investigate them, interrogate them and put the picture before the Tribunal.  
6 But what's clear is that the company is in trouble, it's highly indebted, the ongoing  
7 involvement of its lender is uncertain and it's terminating investments and actively  
8 looking to see what further cases it should exit. Significant uncertainty about its status  
9 as a going concern.

10 Now, I'm going to come back to Gutmann, but I want to first of all address the PCR's  
11 approach to these issues, to LCM's financial situation. Now, on 15 October, so  
12 two weeks after publication of the annual report, Apple's solicitors wrote to Which?'s  
13 solicitors to query how the PCR had satisfied itself that its funder could meet its  
14 obligations under the funding agreement, given the statements in the annual report,  
15 some of which I've just shown you. And as I say, Apple's solicitors sent that letter,  
16 because there had been nothing proactive from the PCR, either in the Reply or since,  
17 that so much has touched on this issue.

18 Now, several weeks passed without any response, and Apple's solicitors had to chase,  
19 and we finally got a response on 4 November. And that is in the core bundle,  
20 at -- sorry, supplementary bundle, the B bundle, at tab 20.2. Page 437. Can I ask you  
21 to turn to that? (Pause)

22 What you see is a short letter, and what's said is that what the PCR's solicitors say is  
23 that:

24 "The PCR is considering Apple's latest piecemeal attempt to generate a point they can  
25 try and raise before the Tribunal regarding the funding arrangements." [as read]

26 That's what's said. So all this has been going on. 99 percent of the shares -- there's

1 | been a 99 percent drop in share value, there's been an annual report which says  
2 | there's a material uncertainty as to whether this business is a going concern. Rather  
3 | than coming to the Tribunal proactively to raise these issues itself, the PCR's solicitors  
4 | are seeking to brush them off as being a litigation tactic. (Pause)

5 | But you also see, in the last sentence, that the PCR promises a substantive response,  
6 | as soon as possible and in good time, ahead of the filing of skeleton arguments.

7 | Further chases, and their response finally arrived at lunchtime the day before  
8 | skeletons were due to be filed. 1.00 am, the day before skeletons were due to be filed.

9 | And the letter is at tab 21, starting at page 440. And you can see, if you turn to page 2,  
10 | to page 441, that the very first point that's made is that Apple is somehow, again,  
11 | manufacturing points to raise before the Tribunal. And we say that's a remarkable  
12 | starting point, given the obvious importance set out in the CAT guide and the  
13 | authorities I took you to, of the PCR being able to fund its proposed claim, something  
14 | which the Tribunal will need to satisfy itself, regardless of what Apple might choose to  
15 | draw to the Tribunal's attention. And also, given the fact that the issue that Apple had  
16 | raised was hardly of its own manufacture, but the subject of express warnings by  
17 | LCM's own directors in LCM's published financial statements.

18 | Now, turning to the substance of Which?'s response, and we can see this starts in  
19 | a number -- there are numbered points starting at the bottom of page 2, and there are  
20 | a series of rebuttals about the financial health of LCM. So it's said at 1, that:

21 | LCM UK has not given notice to Which? of a material adverse change in the funds  
22 | available to fulfil its obligations.

23 | 2 says:

24 | LCM has paid Which?'s bills to date.

25 | 3 and 4 make various points based on the content of the 2025 annual report. The only  
26 | new information is that apparently \$19 million of the \$75 million facility on which LCM



1 presently relies remains undrawn.

2 And then it said at paragraph 4(c) on page 442, that even if LCM Limited ceased  
3 trading, there would still be an obligation on LCM UK to pay, which is somewhat stating  
4 the obvious.

5 Then 5 says that of the first 14.5 million of the budget, of the 30.89 million budget for  
6 the proposed proceedings, this is being covered 75 percent by Fund II, a ring fenced  
7 fund comprising capital sourced from institutional investors, and LCM UK has to cover  
8 approximately four million, which, as noted above, it's been doing in paying the  
9 invoices incurred by the PCR to date.

10 Now, in terms of the maths, what that equates to, unlike the position in Gutmann, is  
11 that the ring fenced fund is responsible for only 35 percent of the litigation budget, of  
12 the whole budget. (Pause)

13 THE CHAIR: That's taking what its contribution would be, in relation to the first  
14 14.5 million.

15 MS DEMETRIOU: 75 percent of the first 14.5 million, but then the rest of the  
16 budget -- so 25 percent of the first 14.5 million is LCM, and the rest of it is LCM.

17 THE CHAIR: That's how you get to 35 percent of their entire budget.

18 MS DEMETRIOU: Of the entire budget.

19 THE CHAIR: 30 million, or whatever it is.

20 MS DEMETRIOU: Exactly. (Pause)

21 And then for completeness, over the page, it said at 6 that:

22 The PCR understands that the contractual terms are such there's no scope for the  
23 institutional investors to withdraw their investment commitment in the event there were  
24 to be any issue as to the ability of LCM UK to continue to operate.

25 Now, we say that this belated response, received just before service of skeleton  
26 arguments and substantial amount of time after the annual report was published,

1 doesn't come close to providing sufficient comfort in relation to these serious issues.  
2 Aside from the fact that this is, of course, a solicitor's letter, rather than a witness  
3 statement explaining what steps the PCR has taken, it's very light on detail,  
4 substantively. It contains remarkably little, new, or detailed information, of the sort that  
5 one might expect would be gleaned from a more thorough investigation by the PCR  
6 into the financial health of its funder. Mostly, the letter parrots information in the 2025  
7 annual report and speculates as to how things might improve.

8 Now, the information in the letter is also unclear and incomplete, and we were unable  
9 to address it in our skeleton argument, given how late it came. So Apple's solicitors  
10 responded to it after the exchange of skeleton arguments, and can I just show you the  
11 further questions that we sent? So they're behind tab 22 at page 445. And I think we  
12 can take it from page 447 and paragraph 5, and that sets out a list of matters which  
13 remain unclear following the PCR's letter. And can I just ask you quickly to scan down,  
14 rather than me reading it out, so you can see what the points are? They mostly relate  
15 to Fund II, which is apparently --

16 THE CHAIR: All under paragraph 5?

17 MS DEMETRIOU: Yes.

18 THE CHAIR: Just a moment. (Pause)

19 Yes.

20 MS DEMETRIOU: And just to pick out one point at letter (d) and you'll recall I just  
21 showed you a moment ago that there were some speculative suggestions in the PCR's  
22 solicitors' letter about the Fund II investors stepping in to cover any shortfall from LCM  
23 and what Apple's solicitors note here is that that's surprising, given that the 2025  
24 annual report says that Fund II is closed to new business and new investment. So  
25 there are inconsistencies with the speculative suggestions in Which?'s solicitor's letter  
26 and the facts as set out in the annual report.

1 The next turn of events is that the Gutmann judgment was handed down by the  
2 Tribunal on Friday and then on Saturday, Apple's solicitors received a letter on  
3 Saturday morning and you can see this behind tab 23, starting at page 451. This sets  
4 out various passages of the Gutmann judgment. You've probably read this letter. But  
5 if you go to page 455, to the end of the letter, the PCR says this. It says:

6 "In light of the above, rather than having written to the Tribunal to put before it further  
7 correspondence suggesting that there is any merit at all in the proposed defendants'  
8 concerns about the funding in these proposed collective proceedings, the proposed  
9 defendants should have written to withdraw their submissions at paragraphs 34 to 60  
10 of their skeleton argument ..."

11 Pausing here. That's the totality of Apple's submissions on funding.

12 "... on the basis that they are hopeless. Should the proposed defendants not now do  
13 so by 4.00 pm on Monday, then our clients will seek an order for their costs of dealing  
14 with the funding issues to be paid on an indemnity basis." [as read]

15 Now, this, of course, this letter was, we have to assume, written on the PCR's  
16 instructions. Let's be very clear about what the PCR is saying here. It's resorting to  
17 aggressive threats, the aim of which is to procure that Apple does not raise any  
18 concerns at all about the funding arrangements to this Tribunal at this hearing. So  
19 none of these points, the PCR is saying, should be flagged to the Tribunal. That's  
20 despite the important role the Tribunal has to exercise, as you've seen in the legislation  
21 and in the Riefa and Hammond judgments.

22 Where it's the function at this hearing of the Tribunal to satisfy itself as to those funding  
23 arrangements where a specific factor that the Tribunal will need to bear in mind is  
24 whether or not the PCR can fund the proceedings, and where there have been grave  
25 doubts thrown on the viability of the funder in its own annual report. We say that's the  
26 opposite -- the opposite of responsible, diligent and transparent behaviour.

1 The PCR is trying to sweep these points under the carpet and is resorting to  
2 aggressive litigation tactics in order to try and achieve that aim.

3 Now, in the same letter, at the same time, they belatedly enclosed two letters sent by  
4 its funder, LCM, which it's obtained in the course of its enquiries. And my learned  
5 friend took you to those, focusing on the second one, no doubt, because the first one  
6 is extremely light on detail.

7 Let's go to the second one. It's at bundle B, tab 30, page 556. And it's dated --

8 THE CHAIR: Bundle B?

9 MS DEMETRIOU: Is it A? Sorry. It's A. It's my mistake. That's why I couldn't find it  
10 either.

11 THE CHAIR: Yes. 556?

12 MS DEMETRIOU: Page 556, tab 30.

13 You can see that it's dated 11 November, and it's addressed to Ms Averty of Which?  
14 and the final sentence on the first page, confirms Apple's understanding that LCM has  
15 been providing all the funding for the claim since April 2024 despite this 25/75 percent  
16 split.

17 Now, there then follows a description of LCM's business -- if you go over the page to  
18 557 -- in a series of numbered paragraphs and this appears to be referring to the  
19 LCM Group and much of this is the detail that was included in the PCR's solicitor's  
20 letter of 11 November, which I've addressed already, but there are a few new points.

21 So at paragraph 8 on page 558, it said -- no, sorry, I've made this point already. That's  
22 the point that the ring fenced fund is responsible for 35 percent of the overall funding,  
23 if you do the same maths I took you to before, that becomes clear from that.

24 There's then an oblique statement, in paragraph 9, that it may be possible to increase  
25 the amount to be committed by Fund II, perhaps to 75 percent of the entire budget.

26 So that would be to commit around another £12.3 million but there's no information in

1 this letter on Fund II's total assets or exposure to the 37 other cases it funds.

2 Then paragraph 10 says that the contractual obligations by third-party investors in  
3 Fund II is to provide their respective commitments, including the commitment for  
4 £10.875 million for the claim, regardless of the financial position and overall solvency  
5 of LCM. That's reassuring as far as it goes, but we now know it only goes to 35 percent  
6 of the budget, of Which?'s budget.

7 Paragraph 11 seems to be the basis for the suggestion in Willkie's letter of  
8 11 November, that the investors in Fund II might cover any shortfall should LCM go  
9 under. But that isn't actually what paragraph 11 says. It says only that they would  
10 bring the portfolio under the control of a new manager to protect their investments.  
11 There's no indication that they'd be willing to provide more money. All that's been said  
12 on that front is that it may be possible to increase the fund to investment with the  
13 third-party investors' consent.

14 There's scant further detail in these letters and with one exception, all of the queries  
15 raised by Apple last Friday remain outstanding. It's not clear at all why these letters  
16 were not provided to Apple or to the Tribunal before Saturday morning, recollecting  
17 everything the Tribunal said in previous cases about the need for transparency of  
18 funding arrangements.

19 Now, pausing here and just focusing on one point. So the statement that it might be  
20 possible for Fund II to provide a greater proportion of the funding by committing  
21 a further £12.3 million, if we could go back to the annual report behind tab 21 at  
22 page 337. In the first --

23 THE CHAIR: Which page, sorry?

24 MS DEMETRIOU: The annual report, page 337.

25 If you look at the first full paragraph at the top of the page, you see:

26 "Fund II has invested into 37 cases, net of 13 terminations, and recently closed to new

1 investments. The fund closed to new business at around 65 percent committed." [as  
2 read]

3 So it's closed to new investments and business and then you can see that:

4 "Five investments have concluded to date: two wins and three losses, generating an  
5 aggregate MOIC of 0.2x." [as read]

6 MOIC is explained elsewhere as "multiple on invested capital". And so what we  
7 understand from this, but again it hasn't been explained, is that this amounts to an  
8 80 percent loss on those investments, 80 percent loss.

9 Now, we found further information on LCM's website and if we could go to tab 31 of  
10 this bundle, page -- you can see the document. This was published on the same date  
11 as the annual report, the 2025 annual report, and it's the full year results presentation.  
12 Could we go, please, to page 583, which is slide 24. Slide 24 deals with Fund II. You  
13 can see that at the top of the page. It states that -- you can see on the left-hand  
14 column -- the total external assets under management are \$189 million, which  
15 consistently with the statement in the annual report says is 65 percent -- do you  
16 remember it said it's closed to new investment at 65 percent committed -- 65 percent  
17 of the original \$291 million committed by the investors. And of that \$189 million, it  
18 says \$185 million is fully committed. So that leaves a total of \$4 million under  
19 management in the fund that are not yet committed, which is obviously substantially  
20 less than the £12.3 million, roughly \$16 million, that LCM's letter said Fund II might  
21 additionally contribute.

22 Now, obviously, the PCR has provided no documentation relating to Fund II's  
23 involvement in its proposed claim at all, but we take this to be the reason why LCM  
24 could only bring itself to say that it may be possible to increase the investment with the  
25 consent of the third-party investors in the fund.

26 Now, pausing here, you've heard that the PCR places a lot of reliance on Fund II and

1 the fact that these sums are ring fenced. These are all points which should have been  
2 bottomed out and put transparently before the Tribunal, and they just haven't been.  
3 Instead, the PCR sought to brush the problem under the carpet by saying, "Oh well, it  
4 might be possible to increase the proportion of funds for the entire budget up to  
5 75 percent". That seems distinctly unlikely on the basis of these facts. But we only  
6 have the responsive letters from LCM. We don't know what enquiries were made by  
7 the PCR or, crucially, when they were made.

8 I'm going to turn to the Gutmann judgment on which the PCR relies. So that's in the  
9 authorities bundle, volume 4, tab 55.1. Can we take it, please, from page 2092.84.

10 THE CHAIR: Just a moment. (Pause)

11 MS DEMETRIOU: So 2092.84. This is where the Tribunal's consideration of the  
12 recent developments relating to LCM's financial position begins. You see at  
13 paragraphs 252 and 253, the Tribunal sets out the familiar passages from the 2025  
14 annual report.

15 Paragraph 254, at the bottom of page 85, explains that the Tribunal asked the parties  
16 to make submissions in light of those developments, and explains what the parties did.  
17 Now, pausing here, I asked the Tribunal to note that Mr Gutmann put in a second  
18 witness statement. So there had already been a first witness statement from  
19 Mr Maloney. Mr Gutmann put it in a second witness statement from Mr Maloney of  
20 LCM. That's in addition to the first statement I took you to earlier. And then  
21 subsequently -- we see this in the same paragraph -- Mr Gutmann filed a witness  
22 statement from his solicitor, Mr Burnett. And as I'll come on to it, it appears that that  
23 statement was directed at what he did on behalf of the PCR to investigate the issues  
24 with LCM and to seek assurances.

25 Now, the Tribunal's conclusion starts on page 2092.90 and it starts at paragraph 271.  
26 First of all, you can see that the Tribunal addresses the Vodafone defendant's

1 submission that Mr Gutmann had failed to acknowledge candidly, the issues with LCM,  
2 and the Tribunal rejected that at 273, in light in particular of the statement made by  
3 Mr Burnett.

4 What we don't have is any equivalent in these proceedings to a witness statement  
5 from a solicitor explaining exactly what process has been gone through to interrogate  
6 the troubling financial issues relating to the funder.

7 We see, at paragraph 274, this:

8 "It is apparent from Mr Burnett's statement that the PCR acted promptly and  
9 assiduously on becoming aware of the content of the LCM 2025 statement. On his  
10 instruction, his solicitor sought further information and assurances from LCM Limited  
11 prior to this issue being raised by the proposed defendants. Moreover, it is also  
12 apparent that the suggestion that the PCR has failed to consider and explore the  
13 possibility of LCM's failure is simply unfounded. Mr Burnett makes clear both the  
14 PCR's approach, the steps he has taken, and the advice he has received. On this  
15 basis, we see no reasonable grounds for questioning the PCR's approach. Nor do we  
16 see any reason to doubt that the PCR will continue to keep his funding arrangements  
17 and the position of LCM Limited under review." [as read]

18 Now, pausing here, this is completely contrasted to what the PCR has done in this  
19 case, which is far from putting in a witness statement explaining what steps the PCR  
20 has done to interrogate the financial position of LCM and canvassing contingency plans  
21 has been not to put the information before the Tribunal and to threaten Apple with  
22 indemnity costs should it raise the matter before the Tribunal.

23 Now, we see at 275 that on the basis of that evidence, the Tribunal was unable to, to  
24 identify any lack of candour, but it had all of the evidence that had been submitted.

25 And then we see over the page at 278:

26 The Tribunal considered whether anything else stood in the way of authorisation



1 And it said this:

2 "In respect of the first factor, we accept that the content of the LCM 2025 statement  
3 does highlight issues in respect of LCM Ltd's financial position, which both merited  
4 careful consideration by the PCR and will require to be kept under review both by him  
5 and by the Tribunal." [as read]

6 And again, I repeat in light of that acknowledgment by the Tribunal, was it the act of  
7 a diligent and responsible PCR to write in the terms that it did on Saturday morning,  
8 threatening indemnity costs unless Apple withdrew all of its skeleton argument relating  
9 to costs?

10 "However, overall, we are not persuaded that, at this stage, there is any reason to  
11 consider that, in light of the LCM 2025 Statement, the PCR would be unable to act  
12 fairly and adequately in the interests of class members. We have reached this  
13 conclusion for a number of reasons ..." [as read]

14 Then it goes through the reasons, and can I just emphasise the third reason,  
15 paragraph 281:

16 "We consider that, contrary to what was submitted by the proposed defendants, the  
17 way in which the PCR's funding is structured is a relevant factor. In our view, the fact  
18 that up to 75 percent of the funding has been committed by third-party investors and  
19 would remain available irrespective of whether LCM's funding ceased is of significance  
20 in this regard." [as read]

21 And you have my submission about the distinction between that case and this. In this  
22 case, it's 35 percent.

23 And then you see at 284 the conclusion that:

24 In light of the foregoing, viewing the matter as a whole, we're satisfied that, at this  
25 stage, the present arrangements which the PCR has made will enable him to act fairly  
26 and adequately. However, we stress this is a matter that we will keep under review

1 and direct that the PCR inform the Tribunal and proposed defendants of any material  
2 development in respect of his funding arrangements as soon as reasonably  
3 practicable, and a summary updating the Tribunal of the funding position in advance  
4 of the next case management conference.

5 So, drawing together the threads, Which?'s approach to LCM's financial plight  
6 compounds existing issues in its evidence and provides another basis on which to  
7 doubt that it's done enough to satisfy the authorisation condition because, as I've said,  
8 it's beyond doubt that the financial issues associated or afflicting LCM are very serious.  
9 Yes, it remains a going concern, but that is based on reasonable expectations to be  
10 balanced against significant doubts. And that in itself, as the Tribunal said in Gutmann,  
11 made clear, merits careful consideration by the PCR and by the Tribunal.

12 And contrast what the PCR did in Gutmann with what Which? has done. No proactive  
13 investigation of the issues. To the contrary, it's been aggressively dismissive. That's  
14 evidence from Which?'s Reply. At that point, the PCR not only knew about the 2025  
15 annual report, it positively relied on it. It relied on it, you'll recall, to say, "Well, don't  
16 worry about the Dubai investigation", but without drawing the Tribunal's attention to  
17 any of the very serious issues in that report. No reference at all to the director's  
18 warnings about whether LCM could continue as a going concern, even though it was  
19 flagged in the chairman's statement on the first page. And you have my submissions  
20 about the tenor of the correspondence.

21 One final point on this is that because it is relevant, thinking about Riefa and thinking  
22 about Hammond, it is relevant for the Tribunal to ask itself what enquiries has the PCR  
23 made here.

24 And it's not enough, in our respectful submission, for my learned friend to rest on "Well,  
25 Which? is a very experienced consumer rights organisation". No doubt it is, but that's  
26 a reason, in a sense, to expect a very high standard of it, not what's actually

1 happened.

2 When we asked the PCR to disclose the letters that led to LCM's two letters that it  
3 relies on heavily today and that it belatedly disclosed on Saturday, the PCR's response  
4 is very revealing and is a piece with what I've been submitting. It refused to disclose  
5 those letters, the PCR's letters on the ground that they are privileged.

6 Now, not only is this far from the sort of transparency that's required of a class  
7 representative, not only is it distinctly unhelpful because, as I've shown you, the  
8 Tribunal's role is precisely to interrogate what steps the PCR took. But it's also  
9 incorrect. And there are two points to make here.

10 The first and fundamental point is that the exchanges are not privileged at all. And  
11 can I just show you, very briefly -- I'm not going to take too long on this because they  
12 haven't disclosed them -- but let me just show you very briefly the supplemental bundle  
13 and the excerpt from Hollander. So it's tab 3. You only have this in a hard copy, I'm  
14 afraid. (Pause)

15 And if you could turn, please, to page 518 in this internal pagination. And you should  
16 see a heading -- so it's paragraph 26.0.8, behind tab 3.

17 And this concerns whether or not discussions with funders are subject to litigation  
18 privilege. And what is said here is that:

19 "In one sense, one can say that discussions with funders are created for the dominant  
20 purpose of actual or contemplated litigation. Indeed, this will be the only purpose of  
21 discussions with funders. But the argument that such documents are subject to  
22 litigation privilege misunderstands the nature of litigation privilege, which protects  
23 communications made for the dominant purpose of conducting litigation. Obtaining  
24 funding can't sensibly be regarded as within this principle." [as read]

25 And then it refers to the well-known Excalibur Ventures judgment of  
26 Mr Justice Popplewell, as he then was. So that's litigation privilege.

1 Then you see in the next paragraph that there may be some very -- as  
2 Mr Justice Popplewell recognised in *Excalibur* -- there may be circumstances in which  
3 a claim could be made for legal advice privilege where a document reflects legal  
4 advice given by the solicitor. But that's very -- that's a narrow -- that's limited scope  
5 for that. And it really is impossible to see how that could arise here in relation to the  
6 queries that the PCR sent to LCM, which elicited those letters.

7 Second point we make is that even if they were privileged, privilege has been waived  
8 by disclosure of the two LCM letters. And we wrote to the PCR saying that that's also  
9 a separate excerpt in the Hollander textbook, which I think is in the main authorities  
10 bundle. Yes, it's behind tab 65 of the main authorities bundle. If you could briefly  
11 please look at that. And it's tab 66. It's paragraph 23.18 of the book. Let me just find  
12 the -- yes. So it starts at page 2558 of the bundle.

13 And you've got the classic statement on collateral waiver:

14 "Where a party is deploying in court material which would otherwise be privileged, the  
15 opposite party and the court must have an opportunity of satisfying themselves what  
16 the party has chosen to release from that privilege represents the whole of the material  
17 relevant to the issue in question. To allow an individual item to be plucked out of  
18 context would be to risk injustice through its real weight or meaning being  
19 misunderstood." [as read]

20 It's really the cherry-picking point. So, we say, not privileged. But if it were privileged,  
21 they've waived privilege. But where does this go?

22 Well, where it goes is that the very reliance on privilege not to disclose the letters from  
23 the PCR, asking LCM about all of these problems, the very refusal to disclose those  
24 letters is the opposite of the sort of transparency that the Tribunal should expect of  
25 a class representative. And we can infer, we submit, from the failure to disclose those  
26 letters that the LCM's -- sorry, I think, two things.

1 First, that the questions raised by the class representative, the PCR were not  
2 particularly probing and/or that the LCM response was a heavily lawyered letter  
3 prompted by the request.

4 So those are the submissions that we make on Gutmann, but more fundamentally on  
5 the PCR's unsatisfactory approach to the financial difficulties in which LCM finds itself.  
6 And I'm now going to move on.

7 We say that the PCR has on the basis of the submissions I've made, not satisfied the  
8 authorisation requirement because it's failed to grapple with these serious issues,  
9 failed to show that it's capable properly of protecting the class and ensuring that it has  
10 sufficient funding and failed to approach the Tribunal with transparency. And, we say,  
11 that it's lax approach is also reflected in its approach to the other aspects of its funding  
12 arrangements that we've addressed in our skeleton arguments. I think I can take  
13 those quite briefly, so I'm going to turn to them now.

14 The other problems: I start with the priority point, and my learned friend took you to  
15 clause 10.2 of the funding agreement, and you'll recall that that says that:

16 "Subject to any order of the Tribunal, the PCR shall hold the recovery on trust for the  
17 class members, the funder, and to the extent their charges have not been paid,  
18 solicitors counsel and the ATE providers." [as read]

19 Then clause 10.3, you'll recall, says that:

20 "The PCR shall seek approval from the Tribunal of those costs." [as read]

21 And so our point was that it's an obligation, not a power or a discretion.

22 Now, the point that we made, as I said at the outset, is not that having a clause like  
23 this is per se unlawful. We don't submit that. But what's fundamental is that the PCR  
24 needs to understand the clause and needs to give proper consideration to whether or  
25 not it is in the interests of the class for there to be such a clause. And --

26 THE CHAIR: Sorry to interrupt.

1 Can I just be clear at this stage as to what your interpretation of clause 10.3 is that it  
2 means that the PCR is under an obligation to seek approval to get the relevant  
3 payments from the recovery?

4 MS DEMETRIOU: Yes. That's our interpretation of it.

5 THE CHAIR: If required. Which -- and if required, by whom, or if necessary, or what  
6 do you say?

7 MS DEMETRIOU: I mean, we don't know. And this is part of the problem. We sent  
8 lots of we sent questions to the PCR asking exactly these points. And, really, the  
9 overriding point I make is that they never came back and answered them. And so our  
10 fundamental point is not that this is unlawful, but that the PCR doesn't understand it,  
11 isn't clear as to what its effect is, and with respect to my learned friend, neither was  
12 he. I was left after his submissions completely in the dark as to what their position is  
13 on this clause.

14 THE CHAIR: Well, I understand that, but it would also help us, just for a bit of context,  
15 to understand what your position is.

16 MS DEMETRIOU: Of course, let's turn it up.

17 So, bundle A, tab 8, page 210.

18 So the umbrella clause is 10.2:

19 "The PCR shall hold the recovery on trust for the class members, the funder and to  
20 the extent their charges haven't been paid, solicitors' counsel and the ATE insurance  
21 providers." [as read]

22 And then what you've got is 10.3:

23 "PCR shall seek approval from the Tribunal for the payment of the PCR's costs, fees  
24 and disbursements, including the funders fee [et cetera] in accordance with this  
25 clause 10." [as read]

26 And then what you have at clause 10.6 is a sort of waterfall, which tells you the order

1 of payments. And so you see that throughout clause 10.6, but what you don't see here  
2 is payment of damages to the class.

3 And so reading all of these as a whole, what we say is that if Mr Woolfe after -- let's  
4 say this does proceed, and they succeed in getting an award of damages, which of  
5 course we deny et cetera, and Mr Woolfe afterwards says, "Right, I want my money  
6 before it's been distributed", and the PCR says, "Oh no, no, I don't have to do anything  
7 about that", then he would be entitled to invoke 10.3, and say, "Sorry, you've got a duty  
8 to seek approval from the Tribunal". That's how we read it.

9 THE CHAIR: In other words, you say -- so do you say here that, where it says the  
10 extent there's a shortfall, let's put it like that, at the beginning, and to the extent  
11 required by one of these entities, the funder or the lawyers, is that what --

12 MS DEMETRIOU: I think that's my best interpretation of it.

13 THE CHAIR: To the extent that it's required of them.

14 MS DEMETRIOU: Yes.

15 THE CHAIR: The PCR must then, and that the fund at 10.3 is talking about is the  
16 recovery.

17 MS DEMETRIOU: Yes.

18 THE CHAIR: Right, let me just make a note of that. (Pause)

19 Thank you.

20 MS DEMETRIOU: And then just one further point to make is that what the PCR has  
21 said in its skeleton argument -- and we don't need to turn it up, but it's  
22 paragraph 22.2 -- is that there's no obligation on the PCR to seek permission from the  
23 Tribunal for such priority. But they say, and I'm quoting:

24 "If it's appropriate, having regard to the circumstances that exist at the time that  
25 damages have been recovered and distribution takes place, that it may do so." [as  
26 read]

1 So their point is that it's a discretion. And we say that that's just flatly inconsistent with  
2 the word "shall apply". And so really the dissonance between what they say in their  
3 skeleton argument and the rather jumbled submissions made today, and the wording  
4 which imposes an obligation, is concerning, and we say is another factor that the  
5 Tribunal should bear in mind, because there's just no evidence -- like in Riefa -- that  
6 the PCR has actually understood this clause, still less that the PCR has given any  
7 thought to whether -- let alone what it means, but -- it's in the interests of the class.  
8 And you saw the reference, the very short reference, in Ms Averty's statement, she  
9 simply said, "I've been advised this is okay". Well, that's simply not up to what the  
10 Tribunal in Riefa required, and we say it's inadequate.

11 So that's what we say about the priority point.

12 THE CHAIR: Is that a convenient moment?

13 MS DEMETRIOU: It is.

14 THE CHAIR: Right, we'll take our ten minute break now please.

15 (3.09 pm)

16 (A short break)

17 (3.24 pm)

18 THE CHAIR: Yes.

19 MS DEMETRIOU: I don't have very much more. I was going to move on to the  
20 termination point.

21 THE CHAIR: Yes.

22 MS DEMETRIOU: And could we pick it up from -- if we go to the relevant clause,  
23 which is at tab 8 of bundle A, page 216. (Pause)

24 So you've seen this; I'm just reminding you of it. So 17.1:

25 "If the funder reasonably considers that the merits of any claim are no longer  
26 satisfactory, or that any claim is no longer economically viable, the funder may give



1 the PCR not less than 40 business days written notice of its intention to terminate."

2 [as read]

3 Now, so we can see that the funder's discretion is very broad, and one of the  
4 bases -- so "merits ... no longer satisfactory or the claim is no longer economically  
5 viable" -- not at all clear what's meant by economically viable, but it's, we say, capable  
6 of embracing -- it's drafted very broadly -- not economically viable from the funder's  
7 perspective.

8 Now, my learned friend said, "Oh, no, it's narrower". I didn't quite understand what his  
9 submission was on why it was narrower, but if it is narrower, if that's their intention,  
10 they should amend it to make that clear.

11 But really this provision is brought into sharp relief by what's going on in terms of the  
12 funding, in terms of the economic problems, financial problems, that LCM is suffering,  
13 because as I showed you in the annual reports, and the chairman and the CEO's  
14 statements, they both said upfront that LCM is seeking to exit from investments that it  
15 doesn't think are satisfactory. So it's actively seeking to exit, and so this is all the more  
16 reason why there should be proper protection for the class, because stating the  
17 obvious: it's bad news for the class, if the funder terminates with 40 days' notice, then  
18 the class representative would need to withdraw the claim, unless it could procure  
19 replacement funding in a very short space of time. And so it's bad news for the class  
20 if the funder exits. And for that reason, clauses like this have been the subject of  
21 criticism by several panels of this Tribunal. We've set out the relevant points in our  
22 Response. Let's take it from there. So tab 4, page 140.

23 THE CHAIR: The same bundle? Still in A?

24 MS DEMETRIOU: Exactly.

25 THE CHAIR: It's the pleading.

26 MS DEMETRIOU: It's the pleading. So paragraph 52:

1 "Well established now that any decision by the funder to terminate should be based  
2 on objective and independent advice." [as read]

3 So we've cited Merricks:

4 "Where the Tribunal required the following amendment to a termination clause. Such  
5 a view to be reached based on independent legal and expert advice that's been  
6 provided to the funder." [as read]

7 Similarly in Coll v Google, same point:

8 "Any decision to terminate based on independent, legal, and where appropriate expert  
9 advice." [as read]

10 And then we've got a reference to the CPO hearing in Roberts. Similarly, again, that  
11 was a broad clause saying the funder -- similar wording:

12 "The funder will no longer own a commercially viable return under this agreement,  
13 considered to be a very, very low threshold that gave weak protection to the class."  
14 [as read]

15 So, this sort of clause is being considered on several occasions by the Tribunal, and  
16 the Tribunal has required amendments of it.

17 Now, the PCR says in its skeleton that these issues don't matter, because the power  
18 is subject to a general expert determination clause if there's a challenge. That was  
19 the point going back to funding agreement, tab 8, page 214, clause 15, provides for  
20 an expert determination by a KC or senior solicitor.

21 But the problem with that is that it's unclear -- there are two problems: one, is that it's  
22 after the event, which we say gives insufficient protection, but the second is: it's really  
23 unclear -- taking the economic viability point -- what a KC is going to say about that.  
24 Presumably they'll look at what the funders decided, and will opine on whether what  
25 the funders decided is manifestly unreasonable or irrational, but it's unclear the extent  
26 to which the KC is going to be able to effectively protect the class through that sort of

1 process.

2 But then again, standing back, we say that this issue is really of a piece, with our other  
3 concerns, that we've raised, because it's the sort of clause that's troubled other panels  
4 of the Tribunal. Changing it to provide, as the Tribunal suggested this morning, at  
5 least an independent opinion before the decision to terminate is taken, is something  
6 that would seem like a relatively easy fix, and in light of the now heightened risk that  
7 LCM will seek to terminate the funding, is obviously an important point. But rather  
8 than proactively grappling with this, Which? has steadfastly refused to do so, for  
9 reasons which are just unclear, and unsurprisingly, this is not addressed at all in  
10 Ms Averty's statement. (Pause)

11 Unlike the priority point, of course, this isn't one that the Tribunal has any power to fix  
12 further down the line. So with the priority point, the Tribunal could say, "Well, no, we're  
13 not going to give you permission". But with this, it's sort of now or never.

14 The third issue is what we call the appeals cover point, and again if we go back to the  
15 funding agreement, the relevant provision is -- well, in fact, we don't need to go to  
16 them, because I think they're not in dispute, and Mr Woolfe took you to them. The  
17 point is that the provisions of the funding agreement do not, as of right, cover either  
18 the PCR's or Apple's costs of appeals, and rather the funder may decide at its  
19 discretion as to whether to fund appeals.

20 Now, my learned friend said, "Oh, well, we, the PCR, are unlikely to pursue any appeal  
21 if we don't get funding", and I accept that. But the point is, if Apple pursues an appeal,  
22 and in its complete discretion the funder decides not to cover Apple's costs if it's  
23 successful, now my learned friend says, "Oh, that's a tiny lacuna, which is unreal", but  
24 it's not unreal at all. These cases, as the Tribunal will know, do tend to spawn points  
25 of law, which then go up on appeal. Take the strike out, that we're going to argue  
26 about tomorrow. Now, obviously we say we should be successful on that, and the

1 Tribunal should accept our submissions. But if we lost on the strike out, it's a point of  
2 law, and if Apple appealed, it would be in that the funder's complete discretion, whether  
3 or not to cover Apple's costs of the appeal if it were successful. So it's not an unreal  
4 situation that's unlikely to arise.

5 THE CHAIR: The argument is made that you're going to know that very quickly,  
6 because the PCR, who would be the potential respondent to such an appeal, is going  
7 to have to ask the funder straight away whether it's prepared to cover the costs of an  
8 appeal, and you will know the answer to that, and if the answer is negative, you're  
9 going to know the answer to that almost immediately.

10 MS DEMETRIOU: But that's unsatisfactory, because if the answer is negative, then  
11 that means we're stymied in our ability to pursue appeals that might be perfectly proper  
12 appeals.

13 THE CHAIR: Doesn't mean you're stymied at all. You can pursue the appeal, and if  
14 you're confident about it, you'll win. (Pause)

15 Well, you may not -- and indeed the PCR, realistically -- the PCR is not going to take  
16 any active role in resisting an appeal where it's not protected as to costs, and so the  
17 reality is that if you decide to appeal, there's going to be no real resistance, in which  
18 case I would have thought that benefits you.

19 MS DEMETRIOU: Well, then, if there's some sort of undertaking that's given, that  
20 that's the case, but there's nothing. At the moment, there is a lacuna, with respect.  
21 So if the PCR -- so I understand the point about the timing -- comes back and says,  
22 "Well, sorry, the funder is not going to cover your costs of this appeal", Apple then is  
23 at a litigation risk. It may think it has a good point and it's going to win, but there's  
24 always litigation risk. So if it pursues its appeal, say it thinks it's got a 55 percent  
25 chance of success and it loses, then it will --

26 THE CHAIR: If it loses, you're not going to get your costs from them anyway.

1 MS DEMETRIOU: If it loses, we're not going to get our costs anyway; that's correct.  
2 If we succeed --  
3 THE CHAIR: Yes.  
4 MS DEMETRIOU: -- then the point is we won't recover our costs from the PCR.  
5 THE CHAIR: That's no different. With respect. That's no different from any situation  
6 where the losing party seeks to appeal, and the party that won at first instance  
7 becomes insolvent or whatever, and then you say, "Okay, there's going to be no active  
8 opposition to this appeal", of course, you still, maybe, have to persuade the court of  
9 appeal, but "There's going to be no active opposition to this, which is good for us. It's  
10 going to cost us some money. We're not likely to get our costs back if we win. But on  
11 the other hand, we've got a win".  
12 So, I don't see why I don't really -- I take your point that there is technically a lacuna;  
13 at the moment, I have difficulty seeing that it's of any realistic significance.  
14 MS DEMETRIOU: Well, I mean, if we win, we should normally be entitled to our costs.  
15 And on this hypothesis, we won't get them.  
16 THE CHAIR: No, but as I said to you, that's a risk that happens in all litigation, if one  
17 party decides not to contest it. (Pause)  
18 I mean, if because the PCR is, of course, the respondent, and they would still be at  
19 risk, of course, technically speaking, you may say, well, you're not going to get all your  
20 costs from them, but a PCR in those circumstances may, I'm not saying it will, but in  
21 order to avoid the prospect of an adverse costs order, which it just doesn't want to  
22 have, might agree your appeal. It might be a consent order.  
23 Anyway, I've said what I wanted to say. It's just a question of the reality of that  
24 happening. That's all I was raising.  
25 MS DEMETRIOU: Of course, you're right that if one party goes insolvent and then  
26 doesn't appear and doesn't resist the appeal, then that may be said to enhance the

1 prospects of the appeal. I mean, sometimes it does, sometimes it doesn't. You  
2 obviously have to draw the adverse points to the court's attention.

3 But the point is that we shouldn't be approaching it in that way because that's outside  
4 the norm. So the normal situation is that if the PCR is bringing these complex  
5 proceedings and is seeking to -- it is a requirement specifically that it should be able  
6 to cover the defendant's adverse costs, that's a requirement in the guide. Here there  
7 is a gap. So here there is a gap because what we're relying on in those circumstances  
8 is the circumstance that Apple appeals, LCM says, "Well, we're not interested in this"  
9 and then, on your hypothesis, sir, the PCR says, "Well we're not going to participate  
10 in the appeal. We're not conceding it, but we're not participating because we don't  
11 want to run up our own costs."

12 If Apple then succeeds in its appeal, then it's left without any adverse costs protection,  
13 which is, we say, unsatisfactory. And it's an easy thing to fix. I mean, what the  
14 agreement could say if the funder wants to retain discretion over appeals run by the  
15 PCR -- because I can see that an overenthusiastic PCR might be wanting to appeal  
16 all sorts of points. The funder may want discretion over that -- could retain discretion  
17 over that, but still cover Apple's costs if it pursues an appeal and succeeds. That  
18 doesn't seem to be a very difficult thing to change. And it's consonant with the guide,  
19 which does require the Tribunal to have regard to whether or not the PCR has  
20 arrangements in place which cover the defendant's adverse costs.

21 THE CHAIR: Have there been any other cases where this issue has arisen about  
22 what happens on an appeal, and whether the funding agreement deals with appeals  
23 at all? Just curious to know whether any Tribunal -- has it come before a Tribunal or  
24 not?

25 MS DEMETRIOU: I haven't come across any that have come before a Tribunal. So,  
26 I mean, I think there are generally provisions in funding agreements that deal with

1 | appeals, but I haven't come across this point before a Tribunal but I think --

2 | Mr Schaefer has a point, which is, I think, a good one, which is that if the funder says

3 | no to Apple's appeal and on your hypothesis, the PCR then rolls over because it has

4 | no funds, that can't possibly be in the class's interests. If there's a point there to run,

5 | then the PCR should run it. Sir, that's what we say about that.

6 | The fourth, the final point, was lack of transparency, but I think I've made all my

7 | submissions on lack of transparency. I would say, just to wrap up, that we do say that

8 | the lack of transparency, the lack of diligent and transparent grappling by the PCR with

9 | all of these issues, the points on the wording of the funding agreement, but especially

10 | the financial troubles afflicting the funder, we do say reveal that the PCR has not

11 | satisfied the standard set out by the Tribunal in Riefa. We invite the Tribunal to find

12 | that.

13 | Now, if the Tribunal were to -- as an alternative submission, if I can put it that way -- if

14 | the Tribunal were of the view that it would be -- that it has more questions to ask about

15 | what the PCR has done, especially in view of the fact that the PCR has failed, as

16 | you've seen, to disclose any of the enquiries it's made in relation to the financial

17 | situation of LCM, so if the Tribunal were to think, "Well, I'm not satisfied that the PCR

18 | has gone about this in a terribly good way, but in fact I don't have the information

19 | before me", obviously, one possibility would be for the Tribunal to adjourn this and to

20 | ask the PCR to provide a witness statement, as was done in Gutmann, as was done

21 | in Riefa, as was done in Hammond, setting out precisely what steps she'd taken to

22 | grapple with these issues.

23 | But we do say on the basis of what you've got at the moment, the standards set by the

24 | Tribunal are manifestly not met.

25 | THE CHAIR: Do you mean in those other cases, they were adjourned for witness

26 | statements?

1 MS DEMETRIOU: In Riefa they were and in Gutmann what happened was that the  
2 certification, the CPO hearing, was not adjourned but the financial troubles -- the  
3 annual report postdated.

4 THE CHAIR: That came afterwards so they had to have extra submissions on that.

5 MS DEMETRIOU: Yes. And so what the PCR did of its own motion was submit further  
6 witness statements, both from the PCR and from the solicitor handling the matter. And  
7 it was on that basis, you'll recall, in the Gutmann judgment that the Tribunal said, "Well,  
8 I've looked at all of this and I'm satisfied by the explanation in those witness  
9 statements".

10 Sir, unless you have anything further, those are my submissions on funding.

11 THE CHAIR: Mr Woolfe.

12  
13 Reply submissions by MR WOOLFE

14 MR WOOLFE: Thank you, sir.

15 I'll make a few preliminary points before diving into some points of detail.

16 The first point: Which? is concerned for the long-term health of the CPO regime. It  
17 has an interest in that. As a charity with an interest in this area, and as a body,  
18 Which?, as it said in Ms Averty's evidence, campaigned for the opt-out regime to be  
19 introduced.

20 The focus should be as quickly as possible on the merits of the claim, not having  
21 parties ploughing unnecessary energy and cost, by defendants litigating points about  
22 funding as a way of preventing claims from being certified.

23 The regime, in order to be healthy, needs to be workable, both for funders and for  
24 funded parties and when you're looking at any of the provisions of the LFA or looking  
25 at anything about the types of enquiries that Apple was making of Which?, you need  
26 to bear in mind the need for the regime to be workable in that sense.



1 Second point -- and this goes directly into the workability of the regime, both for funding  
2 and funders -- Mr Cutting, you asked me whether or not economically viable in  
3 clause 17 of the LFA was intended to mean economically viable from the point of view  
4 of the class or the funder, and Which?'s view is that it does mean economically viable  
5 for the funder, and quite explicitly so. Any lack of clarity on my part as to that point  
6 should not be attributed to my client.

7 Economic viability is what funders consider at the start of proceedings. It's a point that  
8 is mentioned, indeed, at paragraph 89 of the Court of Appeal's decision in Gutmann.  
9 I'll try and find you a bundle reference for that later.

10 If funders are required to continue to pour more and more money into proceedings  
11 even if it doesn't make economic sense for them to do so, no funders would want to  
12 fund cases to begin with, or they would only do so at a prohibitively high cost. It's  
13 important the funding agreements do balance the interests of funders as well as  
14 funded parties. I'm also told that it is entirely standard provision of litigation funding  
15 agreements.

16 Third point. Which? as a charity exists to pursue the consumer interest and wants to  
17 be able to bring these type of proceedings, but it wants to make sure, being  
18 responsible to the Charity Commission, et cetera, for its financial health, that the risks  
19 of doing so do not fall upon the balance sheet of that charity, and therefore it wants to  
20 enter into funding and ATE insurance arrangements in the way that it has done. It has  
21 done so. It has sought -- those arrangements have various protections, both for  
22 funders and the funded party.

23 In respect of the funder, it has the protection of being able to terminate under  
24 clause 17, in the event of the claim turning out to be not economically viable. In  
25 respect of Which? for example, its ability to terminate the agreement and seek  
26 alternative funding if the funder fails to maintain adequate funds is a protection for

1 Which? that it wants to be there and if that eventuality arises, its so that Which? can  
2 seek alternative funding.

3 So Which?, having put these provisions in place, asks somewhat rhetorically, what  
4 else could they do? They've tried to secure funding, which generously covers the  
5 requirements of the litigation, and £50 million of adverse costs protection.

6 It is, fourth point, rather extraordinary that Apple should be so concerned about  
7 Which?'s ability to act in the interests of the class that Apple is in some sense  
8 appointing itself to act in the interest of the class by pointing out all the deficiencies in  
9 Which?'s agreements and then saying, in consequence, that the claim should refuse  
10 to be certified. It is clear that Apple is, in a sense, weaponising any apparent  
11 deficiencies. It's not standing up trying to protect the class.

12 Fifth point. One needs to distinguish between whether a point is legitimately a matter  
13 of concern to the PCR of the funded party and the representative of the class, and  
14 whether or not it's a basis for refusing certification. A matter may be a legitimate  
15 matter of concern, which, for instance, the material uncertainty about the going  
16 concern matter is a matter that Which? considers is of legitimate concern but that  
17 doesn't mean that it's a basis for refusing certification.

18 Now, perhaps I'm moving after this preliminary point into some more nitty gritty ones.  
19 It was suggested that Apple was somehow subjected to aggressive threats from  
20 Which? because we suggested that a point that we thought was bad -- the point about  
21 funding -- should be dropped, and that if it wasn't dropped, we would consider seeking  
22 indemnity costs; the kind of thing that is said all the time in correspondence.

23 I note that the risk of perhaps giving evidence, Apple's market cap today is just under  
24 \$4 trillion. The idea that they would be intimidated and drop it, wrongly intimidated into  
25 dropping it, this point is not a good one. We're not saying the issues don't matter,  
26 simply that it shouldn't stop certification.

1 Now, it was said that Which? has not done enough to satisfy itself as to these various  
2 matters. It is said that what is provided in the witness evidence of Ms Averty is  
3 insufficient. Now, can I take you to an example of the correspondence where it's clear  
4 that more is being done than was stated in the statement of Ms Averty. Can we go to  
5 bundle B, tab 10, page 405. This is the letter of 14 May 2025. This is one of several  
6 letters, I think there might be five substantive letters responding to various queries  
7 from Apple. It's not true at all that we haven't been responding to matters.

8 THE CHAIR: Are we looking at the one that actually starts at page 404?

9 MR WOOLFE: The one that starts on page 404. That's right. Yes. Bundle B, tab 10.

10 THE CHAIR: Yes.

11 MR WOOLFE: This is one of the letters which respond to these various points about  
12 priority and so forth. I'll come to what we said about the priority point in a moment.  
13 But if we turn over the page to page 405, we responded to queries about the PCR's  
14 due diligence on the funding documents, and one of the points, for example, that is  
15 said in that -- although we reject their entitlement to inquire into all these points -- the  
16 middle of the paragraph:

17 "The PCR can confirm that they were actively involved in the negotiations as to the  
18 terms of the funding documents and required amendments to the initial terms  
19 proposed, and that they obtained independent legal advice as to the funding  
20 arrangements." [as read]

21 Independence is important. You may have noted in Riefa, you might not have done,  
22 one of the concerns that the Tribunal had was that Ms Riefa had sought advice as to  
23 the propriety of the funding arrangements from Hausfeld, who were the solicitors who  
24 themselves were entering to CFAs and the like, and therefore had an interest in the  
25 funding arrangements.

26 As stated, responding to their queries, we explained that Which? had taken

1 independent legal advice as to the funding arrangements and was involved early on,  
2 prior to funding being obtained, is another point of distinction from Riefa. So the  
3 suggestion that Which? has not been taking proper steps to satisfy itself as to these  
4 matters is, we say, just wrong.

5 Then if I can move to Riefa. That's in the authorities bundle at page 1887.

6 We say it's a very, very different case and nothing really can be taken from it that's  
7 analogous to the present one. If you're in a PDF, at page 1895.

8 THE CHAIR: Yes.

9 MR WOOLFE: First point of distinction, paragraph 2 on page 1890, you can see that  
10 it was the PCR was a special purpose vehicle. It had been incorporated for the  
11 purpose of the litigation. And the only member of it, the only director of it, was  
12 Ms Riefa. That's wholly different from the kind of situation we have here where we  
13 have – Which? has been around for, I think, nearly 70 years. Internal litigation team,  
14 general counsel, board of trustees. It's a very different situation.

15 Then, what actually led to the Tribunal refusing to certify -- to authorise, I should say,  
16 Ms Riefa, rather was -- a cumulative set of concerns. You get that from paragraph 89,  
17 on page 1908.

18 That, in fact, included the Tribunal's own concerns with, substantively, with the LFA,  
19 about the circumstances in which success fee would be paid ahead of the class. So  
20 that's important because there are, as we say, because Court of Appeal in Gutmann,  
21 there are no concerns about the actual substance of the term in the present case. All  
22 that's said is that which somehow Which? doesn't understand it, that doesn't  
23 understand the complaint that's being made about us.

24 But it's worth noting the extent of Ms Riefa's lack of understanding. It's not merely the  
25 case that there's some slight dispute about nuances of meaning. If you look at  
26 paragraph 100 on page 1911, Mr Mallalieu -- if I've pronounced that correctly, don't

1 want to mispronounce it -- asked Ms Riefa, it says in paragraph 100, "the  
2 circumstances in which she would consider it appropriate for the class representative  
3 to apply for the fund to be paid in priority to the members of the class".

4 That's broadly the kind of issue we're talking about here.

5 "After some discussion, she suggested that it would be appropriate if the PCR was not  
6 as successful as hoped or not successful at all. She did not appear to understand if  
7 the claim was successful the clause would not apply at all. Ultimately, she could not  
8 explain why it might be in the best interest of the class the fund to be paid in priority to  
9 the class." [as read]

10 That's the kind of level of lack of understanding that we are talking about.

11 In the present case, Which? has formed the view that it may well be appropriate for  
12 the funders to be paid directly out of recovery. And there's no dispute, at any rate, the  
13 agreement allows for that. And we say that it is appropriate, because this may be  
14 a case where there's a high level of distribution to the class, and otherwise there  
15 wouldn't be a sufficient return to the funder to get them to fund the proceedings. That's  
16 a very clear and coherent answer. Nothing like the kinds of concerns in Riefa.

17 It was said that there was no proactive investigation of issues. We submit that that's  
18 not borne out by the evidence or the chain of correspondence. What appears to be  
19 complained about is that we don't respond sufficiently quickly to Apple's letters. That  
20 is not the same thing as inferring that the PCR is not taking steps.

21 Various complaints were made about our Response in early October to Apple's -- this  
22 is our pleaded Response as well. We have our Claim Form, Apple's Reply to our  
23 Claim Form, that was served in early August, and our Response in early October.  
24 Now, it said we weren't proactively bringing matters to the Tribunal's attention. That  
25 was a Response to Apple's Reply. It was expressly so. We were dealing with the  
26 points that had been put to us, and we appended the full financial statement to it. We

1 were in no way hiding the issue.

2 If I can turn to the priority point, there really isn't, I think, much of a dispute here  
3 between the parties as to what that clause means. If I can turn this up so you can see  
4 it while I talk about it. That bundle A, tab 8, page 210. Clause 10.3.

5 THE CHAIR: Yes.

6 MR WOOLFE: We fully accept -- and I hoped I had made it clear in my submissions  
7 if I garbled it, I apologise -- we fully accept that it is a mandatory obligation on the PCR  
8 to seek approval from the Tribunal that these items are paid. The only point I was  
9 seeking to make this morning was that this clause does not specify whether the PCR  
10 must seek approval for the payments to be made before distribution, or approval for  
11 payments to follow distribution and come out of any undistributed damages. The  
12 clause is simply silent on that point.

13 THE CHAIR: So what that means then is the clause is silent and the funder says you  
14 must now go and get approval for our fee to be paid out of the recovery.

15 What's your answer to it if this happens?

16 We don't have to?

17 We can wait until damages have been distributed, or what?

18 MR WOOLFE: Well, Which? would have to decide in its role as class representative  
19 to the class, but also having regards to its obligations under the agreement to seek  
20 approval that these items are paid what is necessary, and that may depend upon the  
21 level of anticipated level of distribution. It may depend upon exactly where we are in  
22 the incurring of the funders --

23 THE CHAIR: Then that is a discretion. A discretion which you say has to be exercised  
24 properly, then it is a discretion. It's not a mandatory obligation.

25 MR WOOLFE: I might be -- I don't want to seem like I'm disagreeing with you, but I'm  
26 not. I mean --

1 THE CHAIR: I have to say, Mr Woolfe, I do find it slightly unsatisfactory that we are  
2 having this debate at this stage, after this point has been raised a long time ago, about  
3 what seems to be your obligation or not obligation, because if it's that unclear, you're  
4 heading for real trouble should we certify this case and it goes to trial and you win.

5 MR WOOLFE: I think it is actually a non-point, and if the point had been raised in the  
6 way it's being put now, I don't think we'd quite be here. The point that was being raised  
7 originally by Apple, and this is in their Reply -- that's bundle A, tab 4 -- was that the  
8 waterfall that you see out at paragraph 10.6 is somehow all incorporated, and that  
9 there is an actual determined priority over the class's interests.

10 THE CHAIR: That would be. But your answer to that point is, that's lawful. That's  
11 your answer to that point. If the objection was simply under clause 10.3, and, subject  
12 then to the waterfall which doesn't concern the class members, if 10.3 allows you to  
13 ask the Tribunal to take the funder's fee out of recovery before any distribution of  
14 damages, was nothing wrong with that. We know that.

15 MR WOOLFE: Yes.

16 THE CHAIR: That's not the point. What's being raised here, and it may or may not  
17 be a good point, is that Which? itself seems to be unclear as to what this clause  
18 means, and certainly we as a Tribunal have a concern about that because we have to  
19 manage this case, and we have also to consider the interests of the class members.  
20 And I am slightly troubled at the moment that I still don't understand what you say it  
21 means.

22 MR WOOLFE: I apologise if I am unclear as to what I'm saying it means.

23 I think there are two points. One is, is the clause clear and the other is, is somehow it  
24 is clear, but -- and I think this is the point being made by Apple -- that Which?'s  
25 understanding is so deficient that Which? should not properly be appointed as a class  
26 representative, and that, I submit, is a different point.

1 THE CHAIR: I don't want to spend too long on it, although we are making good  
2 progress in time.

3 MR WOOLFE: I don't have that many more points, sir.

4 THE CHAIR: Sorry?

5 MR WOOLFE: I don't have that many more points.

6 THE CHAIR: So forget what Apple said. We've got our own independent duty to  
7 explore the whole question of certification and whether it's justified.

8 I still don't know what you say the clause means. I can tell you what I think at the  
9 moment, originally, we think it means, which is that if there is a shortfall and if someone  
10 requires you to do something about it, for example, a funder or the solicitors at the  
11 stage where the damages have been ascertained and the recovery is held on trust but  
12 not distributed, and they say "You must now go to the Tribunal to get our fee", that is  
13 what you have to do. You don't have any discretion as to whether you think it's  
14 appropriate or not. That is what you have to do because it's effectively a protection  
15 for the lawyers and for the funders who can only act through you because only you  
16 are a party to these proceedings, and therefore they have to be in a position whereby  
17 if there is to be a shortfall, you have to be obliged to put into operation the process for  
18 them to be paid.

19 MR WOOLFE: So if I can deal with --

20 THE CHAIR: Well --

21 MR CUTTING: (inaudible) a further point. It protects everybody because you're  
22 holding the money on trust.

23 THE CHAIR: Yes.

24 MR CUTTING: It says you're holding the money on trust for the claimants and the  
25 people in the waterfall, then doesn't say anything about the payment to the claimants.

26 THE CHAIR: Yes.



1 MR CUTTING: So since you're holding the money as a trustee, you're then going to  
2 seek the protection of the CAT for the distribution of the cash.

3 MR WOOLFE: I think, I don't dissent from what you're saying --

4 THE CHAIR: Can I try and shortcut things, because I don't want you to give me an  
5 answer on the hoof. I actually think in respect of this and some of the other points  
6 we've made about amendments, with respect, that your side need to have a good think  
7 about this evening. I don't want you to come back on the hoof, okay? So we don't  
8 spend any more time on it now. You can come back in the morning.

9 MR WOOLFE: Can I ask one question, sir?

10 THE CHAIR: Yes.

11 MR WOOLFE: You said a number of times that "if there's a shortfall". I'm afraid I didn't  
12 understand what you meant by saying "if there is a shortfall". Do you mean --

13 THE CHAIR: Sorry, I'm only paraphrasing --

14 MR WOOLFE: -- as you said, not recovered from the defendant?

15 THE CHAIR: -- from the first words which say "to the extent not recovered from the  
16 defendant".

17 MR WOOLFE: Okay, yes.

18 THE CHAIR: Obviously, if the defendants pay for all of that, then nobody's going to  
19 worry about it. But anyway, have a think about that tonight and you can come back  
20 tomorrow morning.

21 MR WOOLFE: Thank you, sir, we will. And if I can ask for any other points of that  
22 nature where you think we need to have a good hard think, if you can --

23 THE CHAIR: Well, unless you're going to -- are you going to come back on the  
24 termination provisions?

25 MR WOOLFE: Er, I --

26 THE CHAIR: Is there anything you wanted to say on that?

1 MR WOOLFE: The query you raised for me earlier, on that having some discussions  
2 to see --

3 THE CHAIR: Well, there's a few things. As I say, I don't want answers on the hoof  
4 now. One of the virtues of dealing with the point today and having tomorrow is you  
5 have a little bit of time is the question about whether there should be a KC clause in  
6 there; the question about whether economically viable should be further  
7 defined -- I think your argument is at the moment, it shouldn't be because it's quite  
8 a common clause in that form.

9 We've also seen -- we've just been reminded in paragraph 52 of the Response, I think,  
10 from Apple, about three cases where the Tribunal have expressed concerns about the  
11 drafting. I think that your side should have a look at that as well tonight. But now  
12 I shall let you get on with your reply submissions.

13 MR WOOLFE: Thank you, sir. Now the -- I think it was said that LCM's problems may  
14 lead to it trying to force a settlement. That was a point that was made at one point.  
15 Now there is a provision in the LFA which I'm not sure whether I took you to or not.  
16 So can I take you to it. That's paragraph 9, clause 9, that's on page 209 of the LFA.  
17 That's bundle A, tab 8, page 209. (Pause)

18 And you can see clause 9.1:

19 "PCR shall have complete control of the action that is provided for explicitly under the  
20 LFA." [as read]

21 And 9.2:

22 "Nothing in this agreement will permit the funder to override any advice given by  
23 solicitors or counsel, or to require the PCR to conduct the claim otherwise than in  
24 accordance with that advice." [as read]

25 9.3 and 9.4, 9.5, do limit the PCR, but not abandoning it, if that's contrary to advice  
26 given.

1 Now, in respect of appeals cover -- I'm sorry, I interrupted and I shouldn't have  
2 done -- my learned friend was rather paraphrasing rule 78.2d of the Tribunal rules. It's  
3 important to see what it says. Rule 78.2d -- sorry, if I can pull that up. So this is in the  
4 authorities bundle, tab 3, page 53:

5 "In determining whether it is just and reasonable for the applicant to act as the class  
6 rep, the Tribunal shall consider whether that person, D, will be able to pay the  
7 defendant's recoverable costs, if ordered to do so." [as read]

8 And I do place some emphasis on the word "recoverable". It's not for us, at the start  
9 of these proceedings, to indemnify Apple against any of its "adverse costs", was the  
10 phrase my learned friend used, that it may incur at any point in proceedings, and that  
11 Apple should not be exposed to any risk by virtue of being in these proceedings.

12 If Apple brings an appeal which we choose not to defend, we don't participate in, or  
13 which we say can go by the way, it's hard to see how we, Which?, the class  
14 representative, could be held liable for the costs of that appeal.

15 Now, the allowing of an appeal in those circumstances may reverse a cost order  
16 below, but that's all covered by the LFA, because the cost below are part of the action  
17 on any view. (Pause)

18 We do say this is an unreal lacuna, where somehow there is some -- the funder should  
19 be indemnifying the PCR against some liability to pay costs in the event of an appeal,  
20 which Apple pursues, but neither the funder nor the PCR wants to actively defend.  
21 (Pause)

22 Finally, there's one point, which may be a point of detail that doesn't matter too much,  
23 but bundle A, tab 31, you were taken to a publicly available presentation, published by  
24 LCM, in relation to their full year results, and you were taken to page 583 of that.

25 THE CHAIR: That's in the core bundle?

26 MR WOOLFE: That's in the core bundle, yes. Bundle A. (Pause)

1 What was being said was that it was thought somehow that only \$4 million remained  
2 available, because I think that was achieved by taking away the 185 million fully  
3 committed on the left-hand side from the 189 million external AUM. I infer -- I'm not  
4 sure -- AUM probably means "Assets Under Management". We say that's not the right  
5 way of reading it. If you see footnote 3, you'll see that the 189 million, footnote 3 is to  
6 that, is 65 percent of the original \$291 million committed by LPs.

7 As we read it, you have 189 million has been paid up, and largely pushed out to  
8 investments, but there's a further 35 percent of the \$291 million commitment, which is  
9 available for further investment.

10 THE CHAIR: Sorry, I don't quite follow. So why are they referring to 189 million?

11 MR WOOLFE: As I understand it, it's because the partners commit funding, commit  
12 to make funds available, then that's called upon, actually drawn down, when the need  
13 arises.

14 THE CHAIR: But I thought the 185 is the committed bit.

15 MR WOOLFE: Well, that says "fully committed", and that's actually promised to  
16 litigation; that's definitely going to happen. (Pause)

17 But all I was saying is that you don't work out the capacity of the fund by taking away  
18 185 from 189. As we understand it, consistent with what we've been told in these  
19 letters from LCM, it's the substantial --

20 MS DEMETRIOU: It's my turn to interrupt, I apologise.

21 MR WOOLFE: But if you seem to say --

22 MS DEMETRIOU: None of this is in evidence. The reason why we've subtracted the  
23 184 from the 189, the point that Mr Woolfe makes is that that's only 65 percent of the  
24 commitment. But you'll recall that we took you to the part in the annual report that  
25 says that the fund is now closed to further investment or further business at 65 percent  
26 committed. In other words, the annual report says there's not going to be any further

1 funds. Now, if what Mr Woolfe is now saying is something different, there just is no  
2 evidence on that, which is really part of our concern, that none of this is properly  
3 evidenced.

4 MR WOOLFE: That's quite different. My reading of that part of the account is that by  
5 seeing closed to investment, means no more investors can put money into the fund.

6 MS DEMETRIOU: Investment and business. (Pause)

7 MR WOOLFE: Then a final point, I think, if there's anything else coming from behind,  
8 the various -- it was suggested that there was somehow an inconsistency between  
9 Mr Maloney saying, in his witness statement, in the Gutmann proceedings, to which  
10 we are not party, that the support of the parent company is available to the subsidiary,  
11 and what we had been saying in correspondence, to the effect that the UK entity is  
12 a distinct entity, and was not subject to investigation. There is no -- we see no  
13 inconsistency between those two points. The UK entity is a real and substantial  
14 business. If I can just show you bundle A, tab 14, page 298, that is the balance sheet  
15 for the UK entity, LCM funding UK limited.

16 THE CHAIR: I'm sorry, Mr Woolfe, can you just repeat the page number?

17 MR WOOLFE: Yes, sure. It's 298, tab 14.

18 THE CHAIR: Of the core --

19 MR WOOLFE: Of the core bundle, yes.

20 THE CHAIR: Just one moment, please. (Pause)

21 MR WOOLFE: And you can see that as of 30 June 2024, the net assets of the UK  
22 entity were about £41 million.

23 Now, we are not saying that the UK entity is entirely divorced from the group; clearly  
24 the group accounts were those audited by BDO published on 1 October, and they do,  
25 as my learned friend said, incorporate the position of the UK entity, and I'm not saying  
26 anything to the contrary, but I'm merely providing some context for what was said in

1 | our letter, that the UK entity is a separate entity, and was not under investigation in  
2 | Dubai, which was the point that was then being raised. (Pause)

3 | So that's something I was going to say. We will consider the points that you have  
4 | raised. If I can just make sure I have them. One is in respect of the priority point and  
5 | the clarity of clause 10.3, or perhaps 10.2 and 10.3 together; another is in respect of  
6 | the termination provisions and whether or not there needs to be provision for the funder  
7 | to seek an opinion; you mentioned the possibility of the economically viable test,  
8 | although I do have my submissions I've made about that, that actually is a commonly  
9 | used term; but I think there was another point, sir, where -- oh, sorry, you mentioned  
10 | past cases. I think there's past cases going to those points, but those are the three  
11 | points that you have concerns about.

12 | THE CHAIR: Just give me one moment, please, before we wrap up. (Pause)

13 | (Inaudible) so we will start with the strike out application 10.00 am tomorrow. Thank  
14 | you.

15 | (4.18 pm)

16 | (The hearing was adjourned until 10.00 am on  
17 | Thursday, 20 November 2025)

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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?