IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 10th February 2026

Before:

Justin Turner KC (The Chair)
Jane Burgess
Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mr Justin Gutmann

Class Representative

V

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

Defendants

A P P E A R AN C E S

Philip Moser KC and Natalie Nguyen (Instructed by Charles Lyndon Limited) on behalf of Justin Gutmann

Niranjan Venkatesan KC and Drishti Suri (Instructed by Covington & Burling LLP) on behalf of Apple Inc., Apple Distribution International Limited and Apple Retail UK Limited ("**Apple**").

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Tuesday, 10 February 2026

(10.30 am)

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

Good morning.

Submissions by MR VENKATESAN

MR VENKATESAN: Good morning, members of the Tribunal. I appear in this matter for the defendants, Apple, with Ms Suri; my learned friends Mr Moser King's Counsel and Ms Nguyen appear for the Class Representative. We are grateful for the Tribunal's message yesterday about the time estimate for this hearing.

THE CHAIR: I'm sorry, just give me a second.

MR VENKATESAN: Of course. **(Pause)**

Thank you.

THE CHAIR: Thank you very much. Sorry.

MR VENKATESAN: In light of the Tribunal's message yesterday about the time estimate, I've discussed it with my learned friend and what we have agreed, subject to the Tribunal, is that we will divide the time available roughly equally with a view to finishing today. And subject to the Tribunal, I propose to address three topics in my submissions. First, I want to look at the pleaded case to ascertain precisely what conduct of Apple is alleged to constitute an abuse of dominant position.

Second, I will deal in turn with what we would suggest are the three distinct issues that

arise for the Tribunal's determination on this application which we have, I hope helpfully, referred to and numbered as such in our skeleton, issues 1A and B, identifying in each instance the sub-issues to which it gives rise. Thirdly and finally, I propose to deal with some overarching points my learned friends make in their skeleton argument; for example, that aspects of this strike out application constitute an abuse of process because they are an attempt to re-litigate points that were taken in prior applications, or that the Class Representative should not be expected to replead his case until after disclosure. Those points loom large in my learned friends' submissions, and I'll deal with those at the end.

Subject to the Tribunal, that is the proposed running order, as it were.

THE CHAIR: Yes, a couple of things. First of all, the letter from the CMA, which is at tab 10 of the core bundle, instructions were given by the Court of Appeal that the confidentiality of this had to be sorted out, it's unsatisfactory that it couldn't be quoted in the last judgment. You were both sent away to sort this out and I don't think you have, have you?

MR VENKATESAN: That's right, sir, and I apologise for that. One of the reasons for that is there is, as I understand it, a disclosure CMC listed, which I'm not instructed to appear in, on 24 March, to deal with all the confidentiality issues that are live between the parties, and I think it's been parked to be addressed then.

THE CHAIR: It's not satisfactory since clearly you both refer to this document at length on this application, I'm going to have to produce a judgment on this application. We're in exactly the same position.

MR VENKATESAN: Yes.

THE CHAIR: Have you been in touch with the CMA since the last hearing to try and resolve this matter?

MR VENKATESAN: Can I take instructions on that.

THE CHAIR: I'm also going to need you to speak up. It's not your fault, it's mine, I have an ear issue at the moment.

MR VENKATESAN: Not at all.

THE CHAIR: So I'm hearing things through a bit of a fog.

MR VENKATESAN: I'll take instructions on that. If it assists, I'm not intending to refer to that document or any of the confidential documents.

THE CHAIR: Well, it's referred to in the skeletons, and Mr Moser certainly relies on it. So --

MR VENKATESAN: Yes. I'll take instructions, if I may.

THE CHAIR: Perhaps not now, but perhaps over the adjournment we can deal with that.

MR VENKATESAN: Yes, indeed.

THE CHAIR: Second, obviously the pleadings are lengthy as we observed previously. Mr Moser has summarised his case at paragraph 26 of his skeleton argument, and I don't know whether for practical purposes we could work off that today. So that's something to keep in mind, that's certainly what the Tribunal's been focusing on. That doesn't preclude you obviously from referring to other material for the positive or the negative. Thirdly, what we are particularly interested in is -- we've been through this case --

MR VENKATESAN: Yes, indeed.

THE CHAIR: -- twice already; we understand the pleaded case; we understand the issues; we understand what is alleged against Apple in terms of the facts. I think what is new, really, and which wasn't explored previously is how this fits into the law. Taking paragraph 26 as the case is set out there, which is probably sufficient for present purposes, why as a matter of law -- so just remind yourself of it, perhaps, and have a look in particular at paragraphs (f) and (g) -- why as a matter of law does that not

give rise to an abuse of dominant position; what are the authorities for and against; and is that a matter we can resolve today?

MR VENKATESAN: Yes.

THE CHAIR: That's what we are particularly interested in.

MR VENKATESAN: That's very helpful, sir, if I may say. I was proposing to look at paragraph 26 as the most recent summary of the pleaded case. One submission I was going to make, I'll pick it up when I get there, is that in at least two respects it departs from the case actually pleaded in the statements of case, and to make that good I'll need to take you to the statements of case.

THE CHAIR: It may do, but maybe that's resolvable, I don't know, by an amendment, say.

MR VENKATESAN: Exactly. If it were, I wouldn't be taking the point. I am going to be submitting there's a substantive defect --

THE CHAIR: All right, we'll need to look at that.

MR VENKATESAN: -- but I will take you there. And that is very much going to be the focus of my submissions, the law, which is why we've identified it as issue 1A, which is where the legal point principally arises. But what we --

THE CHAIR: Do speak up.

MR VENKATESAN: I'm sorry. Can I then turn -- I don't know if I'm audible now -- can I turn then to the first of my three topics, which is what precisely is the Class Representative's pleaded case. In the light of the indication you've just given me, I think I can take this relatively more shortly than I had anticipated.

The reason why I want to begin with this topic is that it's clear from the authorities that any infringement of competition law is a serious allegation which must be properly --

THE CHAIR: Do we have this --

MR VENKATESAN: Yes. The only specific point I wanted to make arises from

paragraph 77 of the judgment of the Tribunal in the Churchill case, and I will take you to it if I need to. But essentially, what they say is if you bring a claim alleging an abuse of dominant position as the Class Representative's done in this case, then the claimant is required, in their statement of case, to identify "the specific conduct of the defendant" which is alleged to constitute an abuse. That's where I get the phrase "specific conduct" from. Can I just give you a reference to that -- if it would assist to look at that, I can go to it.

THE CHAIR: I think we have it in mind.

MR VENKATESAN: I am grateful. The reference is authorities tab 17, page 854, paragraph 77. As I say, what it says is that the claimant must identify the specific conduct. For those working in hard copy, that will be volume 2 of the authorities.

THE CHAIR: Do we have a transcript today?

MR VENKATESAN: May I just check. **(Pause)**. Not a live transcript, I'm told there will be one.

In any claim which advances the cause of action pleaded in these proceedings, you have to identify "the specific conduct" which is alleged to constitute an abuse. If one asks what follows from that, if the defendant in an abuse case makes a strike out application as we have, then the question must be, we would suggest: first, whether the specific conduct pleaded is capable as a matter of law of amounting to an abuse; and second, does the claimant have an arguable factual case that the specific conduct occurred? That's the analytical framework in any strike out application in an abuse of dominance case. That's one reason why it's important to look at the pleaded case.

The second reason why I want to focus on the pleaded case is really picking up a point the Chair put to me a few minutes ago. Having reflected on paragraphs 26 and 27 of my learned friend's skeleton, it seems to us that there's an important dispute about what the pleaded case actually is. If we are right in our construction of the pleaded

case and its legal analysis, then the defect in the case isn't one that can be addressed by the draftsman's pen, as it were, there's a substantive effect. That's why, with your permission, I do want to look quite closely at the statement of case.

Turning then to that question - what's actually pleaded: as the Tribunal knows better than I would as a newcomer to this case, the claim since it was issued in June 2022 has seen various iterations. Various allegations have been made and dropped along the way. That's why before actually looking at the current pleading or indeed paragraph 26 of the skeleton, it may assist to have in mind what conduct the Class Representative accepts is not an abuse as a matter of law because all of that is common ground now and represents the starting point for analysing this application.

We make seven points about what is now common ground and therefore off the table, as it were -- again, I'll just give you references, but if you would like to be taken --

THE CHAIR: Is that in your skeleton?

MR VENKATESAN: I've set this out in my skeleton, subject to one additional point which I'm going to make now, which is not in my skeleton. It's in paragraph 24, subject to one additional point.

THE CHAIR: Paragraph 24 of your skeleton, yes.

MR VENKATESAN: Again, I will just give you references. First, the Class Representative accepts that the occurrence of UPOs was not of itself an --

THE CHAIR: Yes, we have this --

MR VENKATESAN: Yes, I'm grateful.

THE CHAIR: -- no need to read it out now.

MR VENKATESAN: The only additional point I wanted to make which is not in the skeleton -- really the background to that point is, as we say in our skeleton, they now accept the occurrence of UPOs was not an abuse, the introduction of the PMF of itself was not an abuse. They previously alleged that the relevant iPhones did not meet the

reasonable expectations of users after the introduction of the PMF, that's been abandoned. I don't know if I should show you that, but one --

THE CHAIR: Is this one of your 1 to 7, or is this the additional one?

MR VENKATESAN: No, this is one of my 1 to 7. I will give you the reference.

THE CHAIR: We have those.

MR VENKATESAN: Yes. It's actually paragraph 25(2) at the bottom of page 7 of the skeleton:

"The CR previously alleged that, following the introduction of the PMF ..."

Perhaps I should just show you that. 156 is at page 66 of the core bundle behind tab 1. If one looks at the first sentence, looking at the words crossed out:

"What was previously alleged was that the abuse of infringement resulted in customer detriment since the proposed class members were left with affected iPhones which performed significantly below the level reasonably expected and/or were significantly less valuable than initially thought."

That's been crossed out. I would accept there the word "significantly" is used, but elsewhere in the pleading it was previously alleged that the relevant iPhones did not meet the reasonable expectations of users without the word “significantly”, and that's been crossed out as well. You can see that at paragraph 7(g) of the Claim Form where again that word is crossed out.

As the Tribunal will know, because it decided this point in its previous judgment and the Court of Appeal agreed with it, it is no longer alleged that the relevant iPhones were or became substandard or defective, whether before or after the introduction of the PMF. The additional point I wanted to make, which is not in paragraph 24 of my skeleton, is that it was previously alleged that the relevant iPhones did not comply with advertised expectations following the introduction of the PMF.

THE CHAIR: We have to look at what's left of this background, don't we:

"As a result of the PMF, quality, functionality, speed and performance of the Affected iPhones was negatively affected to such an extent ..."

MR VENKATESAN: Yes, yes, indeed. Then over the page, they go on to say --

THE CHAIR: Sorry, there's a full stop -- no, it's not, it has a dot there on my copy: "The affected iPhones were subject to significant levels of throttling of key hardware components (In particular the CPU and GPU), which resulted in a materially worse user experience ..."

So they are not relying on below a particular standard as a standard --

MR VENKATESAN: No.

THE CHAIR: -- but they are saying these phones were less good than they had been previously.

MR VENKATESAN: Indeed, sir. And that, if I may say so, is an important point for the legal analysis because, just drawing the threads together, taking stock of where we've got to as to what is the pleaded case, I can summarise it in this way to set up the legal analysis which follows:

The Class Representative no longer advances any case that the relevant iPhones were or became substandard or defective. It's not alleged that the relevant iPhones failed to comply either with the reasonable expectations of users or with the advertised expectations. So, when, as you pointed out, they say things like "Nonetheless the performance of the relevant iPhones was negatively affected", that is necessarily operating within the range of reasonable and advertised expectations.

They don't allege that whatever the impact might have been, they don't say it took performance below the minimum standard required to meet both reasonable and advertised expectations. At the risk of oversimplifying this, it may be helpful to take a hypothetical scale of zero to 100.

THE CHAIR: We understand the point. I don't need you to labour this.

MR VENKATESAN: No, I'm grateful.

Finally, the Class Representative does not advance any case of deliberate obsolescence."

So, it's not suggested that Apple deliberately slowed down the relevant iPhones because they wanted users to upgrade to new models. No such case has ever been pleaded, as Lord Justice Green observed in the course of argument in the Court of Appeal -- again, just to give you a reference, that's volume 3, page 823.

THE CHAIR: Sorry, you are going to have to speak up again.

MR VENKATESAN: I'm so sorry. The reference is supplemental bundle, volume 3, tab 67, page 823, lines 6 to 19.

THE CHAIR: Sorry, is this a transcript?

MR VENKATESAN: Of the Court of Appeal hearing.

THE CHAIR: Okay. I'm not sure we -- okay, that's fine.

MR VENKATESAN: So those are the points --

THE CHAIR: I'm not sure that is really helpful particularly.

MR VENKATESAN: No, no, I take the point. It's only argument. Those are the points I wanted to make about what is not alleged to be an abuse.

Can I now turn to what is alleged to be an abuse.

THE CHAIR: Yes.

MR VENKATESAN: That's pleaded in two places. As I say, I want to start with the statement of case because I can then tell you what we say is not in the statement of case but is in paragraph 26 of the skeleton.

It's pleaded in two places in the Claim Form: paragraph 7, which contains a summary, and paragraphs 148 to 159. I was proposing to focus only on 7 in the interests of time, but all the submissions I make about it apply equally to 148 to 159.

In short -- and I'll take you through the detail in a moment, but just to make the

submission, we say that the only conduct of Apple, the only conduct of Apple which is alleged in the statement of case to be an abuse is Apple's failure to communicate certain information for consumers in or around January 2017. In other words, what one might describe and what is described as Apple's alleged lack of transparency. That's not necessarily the most helpful terminology, "lack of transparency", but what I mean by it is a failure to communicate certain information.

THE CHAIR: Mr Moser puts in his skeleton it's not lack of transparency per se, it's a lack of transparency about a particular thing in a particular context.

MR VENKATESAN: Absolutely, sir. It is lack of transparency per se only in this sense. There is no other conduct of Apple -- that is to say act or omission -- which is alleged to be an abuse, and you see that in some lack of transparency cases. You see what is characterised as the abuse is not the mere fact you didn't tell somebody something, but something else you did in addition to not telling somebody about something.

Put another way: it is inherent in any case involving lack of transparency that you were non-transparent about something, some act or event -- that is what lack of transparency means, so I don't disagree with my learned friend that their case is that Apple was allegedly non-transparent about certain matters. But the question is: is that enough for there arguably to be an abuse as a matter of law? We say it is not for reasons I will develop.

But the point I'm making at this stage is if you ask yourself what act or omission, or what thing Apple did or failed to do is alleged to be an abuse, the answer is and only is: a failure to communicate information. There is nothing beyond that. They use terms like "single continuous abuse", but if one searches in the pleading for some conduct of Apple which is --

THE CHAIR: I'm not sure this analysis is particularly helpful. The other side of the

coin might be saying that saying something isn't an abuse, or doing something isn't an abuse. I mean, it depends on the context. Whether there is transparency per se, or in what context transparency can be abusive, is not really what we are here to decide. There's a course of conduct here which failure to communicate is an element. The question we have to decide is: is that abusive? Focusing or stampeding towards the transparency is perhaps unfair to Mr Moser's case.

MR VENKATESAN: No, I see that, sir. Two submissions in response to that, if I may. The first is when I come to the law, which I'm going to do very shortly having foreshadowed it, my submission is going to be that a failure to communicate information, or even the making of misrepresentations, is incapable on its own and without more in any context, of amounting to an abuse as a matter of law. Obviously I am either right or wrong about that. If I'm wrong about that, then I'm wrong about that. But if I'm right about that, then the point I'm now making matters because in this pleading, there is no allegation beyond a failure to communicate information, or at most the making of incorrect statements which is alleged to be an abuse.

That raises what we would submit is actually a point of law, pure point of law in the light, most importantly perhaps, of the recent Trains judgment about the limits of the concept of abuse under section 18. If you are right about that legal submission, which is issue 1(a) in our skeleton argument, then the point I am making now about what the pleaded case actually is is important because it would mean that the pleaded case doesn't disclose any cause of action.

THE CHAIR: I think you are going to explain to us why paragraph 26 is not consistent with the pleading.

MR VENKATESAN: Yes. I can do that briefly and I'll come back to it where it belongs in the analysis. The main reason why it's not consistent with the pleaded case is because it uses the word "calculated" at paragraph 26(g), page 10 of my learned

friend's skeleton. He says there:

"Apple's deliberate concealment of the reasons for, and effects of, the PMF was calculated so as to preserve its commercial reputation, market position ..."

Now again, as I say, I'll come to this where it belongs. But as we read that sentence, the case appears to be that Apple deliberately concealed the reasons for the PMF and for the purpose, hence the word "calculated", of preserving its commercial reputation, et cetera.

That isn't pleaded in the Claim Form. There's an attempt to plead it for the first time in the Reply. We say not only that it's not properly pleaded, but it's not capable of being pleaded because the rules for pleading a serious allegation of that kind --

THE CHAIR: Obviously the statements that were made, particularly in the January communication, were calculated. It was a deliberate statement and insofar as it had aspects of the commercial situation missing, or the technical situation missing, that was deliberate. You are not suggesting it got inadvertently deleted by the printer when the -- I mean, I don't know what significance you are attaching to "calculated". These are deliberate statements that were made first in January and then in February.

MR VENKATESAN: Yes.

THE CHAIR: Which had been commented on in the CMA letter, and those are calculated in the sense they deliberately decide what to put in and deliberately decide what not to put in.

MR VENKATESAN: Yes. It may turn, sir, on precisely what the word "deliberate" means. It seems to be in our submission there are two different points which need to be separated out. The first: did Apple intentionally decide not to disclose the information in question? It's not in dispute --

THE CHAIR: Plainly arguably they didn't, it was a mistake.

MR VENKATESAN: Yes. Nobody is suggesting that it was inadvertent in the sense

that this happened without anybody knowing about it. If the question is did Apple intentionally decide not to disclose the information in question, that's one thing. But if the question is: did Apple intentionally decide not to disclose the information for a particular purpose or objective, that's quite a different question.

My learned friend will no doubt clarify it, but as I read (g), he's not confining himself to the first of those two possibilities. He's not simply saying, "This didn't happen by error or inadvertence" as he put it, it happened because he decided not to disclose the information, he's not confining himself to that case. If he were to confine himself to that case, we say that's not even arguably an abuse as a matter of law.

He appears to be wanting to go further, at least as I read this. He appears to be wanting to say: not only did Apple intentionally decide not to tell, they made that intentional decision for a particular purpose, namely to preserve their commercial reputation. That case we say is not pleaded, not capable of being pleaded.

THE CHAIR: Why do you say not capable of being pleaded?

MR VENKATESAN: Because it amounts to a case of dishonesty or discreditable conduct and the rules for pleading --

THE CHAIR: Why does it amount to dishonesty?

MR VENKATESAN: It amounts to discreditable conduct because what you are saying if that's the case which is intended to be advanced, you deliberately decided not to reveal information because you wanted either to exploit consumers or steal a march on your rivals. It's not saying you deliberately decided not to disclose information for some legitimate commercial reason.

THE CHAIR: I mean, not trashing your reputation is a legitimate commercial reason, isn't it?

MR VENKATESAN: I think they are saying it's not. I mean, it turns on whether they want to say the purpose is illegitimate, and they do. But if you are saying that

an intentional decision was made to conceal information for a purpose which is not commercially legitimate, that's a case which has to be squarely pleaded in the Claim Form. And as I'll come on to show you, it's not.

THE CHAIR: We don't know, you haven't told us, but Apple were no doubt worried about scaring consumers, why wouldn't they be? Any information that comes out (inaudible) worried about your commercial reputation situation, and you're also potentially faced with what is a technically very difficult issue to explain even in a paragraph. Perhaps you were considering things like: are people going to be unduly worried about something we think we can fix? There are all sorts of -- presumably, this would have been very calculated, what you said --

MR VENKATESAN: Yes.

THE CHAIR: -- and aspects you would have been considering is what you are obliged to communicate to consumers. It's necessary to communicate them for technical reasons, what was necessary to protect your commercial reputation. Every step you take, you must be concerned with preserving your commercial reputation. It's not necessarily inconsistent with the benefits consumers enjoy, it's not necessarily inconsistent with it at all.

MR VENKATESAN: No, no.

THE CHAIR: But to suggest that -- okay, I'm not quite sure what there is to argue about here.

MR VENKATESAN: It may be -- and I'll pick it when I get to issue 1(c) -- it may be that the way to analyse this submission is to compare it with what is actually pleaded in the reply at paragraph 29(c). But I'll come to that when I get there.

What I want to start with, if I may, is the point of law that's central to the outcome of this application which we have called issue 1(a), which is: what is the precise relationship as a matter of law between lack of transparency or failure to communicate

and abuse of dominant position?

THE CHAIR: It relates to some conduct or event that you are not being transparent about, and here that is the PMF, isn't it?

MR VENKATESAN: Absolutely, sir.

THE CHAIR: The PMF created some winners and losers, if you like. You understand why the PMF was introduced, it was a compromise between different objectives that would have benefited some people unambiguously and maybe harmed some other people.

MR VENKATESAN: Yes.

THE CHAIR: The allegation is that not being transparent about those pros and cons is the abuse.

MR VENKATESAN: Yes, indeed. The submission I am going to be making to you is that that is incapable on its own of amounting to an abuse as a matter of law. Obviously, I am either right or wrong about that, but it does present a hard-edged legal point for the Tribunal to decide, which is crystallised in the light of recent authority.

I just want to indicate there are three separate reasons why we say the case you've just put to me, which is the case they advance, is not capable as a matter of law of amounting to an abuse, or even as a matter of fact. For the Tribunal's note, they are identified in paragraph 32 of our skeleton, and I want to begin with the first of those three reasons, which is --

THE CHAIR: We were just on pleadings, are we finished pleadings? You mentioned 29(c) of the Reply, which I've just been looking at.

MR VENKATESAN: Yes. I was going to take you through 7, but I think you have the point. I can do if you wish. The submission I was going to make, going through each subparagraph of paragraph 7 of the pleading, is that the only conduct of Apple which is alleged to amount to an abuse of dominant position is a failure to communicate

information. As to what that information is, we get the answer to that at paragraph 91 -- perhaps I should show you that before I turn to the law.

THE CHAIR: Your complaint about paragraph 26 being inconsistent with the pleading is only a dispute about the word "calculated", that's what you have identified.

MR VENKATESAN: That's right. Theres also a dispute about the characterisation of the pleaded case at 27, but I'll come to that. At 27, they say the case as summarised at 26 is an exploitative and exclusionary one as aforesaid. We don't accept that is actually pleaded, but again I need to come to that when I get to issue 1(c).

If you look at paragraph 91, before I turn to the law --

THE CHAIR: Paragraph 91 of the what?

MR VENKATESAN: Of the pleading, Claim Form. That is core bundle tab 1, page 41. The point I'd immediately emphasise about this paragraph is the substitution in green in the second line of the words "such as" with the word "namely", so you see the "such as" has been struck out and "namely" has been put in. Then what it says, reading it with the "namely", is:

"Apple did not provide users with sufficiently clear, unambiguous, transparent, timely and/or easily accessible information about material issues, namely the existence and prevalence of unexpected shutdowns and the nature and purpose of the performance management feature which were affecting the performance of their iPhones."

So, we say the pleaded case is now that Apple acted abusively by failing to communicate information about, and only about, these two categories of information -- hence the use of the word "namely" -- and the two categories are unexpected shutdowns, namely UPOs, and the nature and purpose of the PMF.

So, the question the Tribunal, in my respectful submission, needs to resolve on this application is: as a matter of law and fact, is it arguable that Apple's failure to communicate these two categories of information in this context amounts to an abuse

as a matter of law?

We say there are three separate reasons why it does not. Those are the three reasons which are identified at paragraph 32 of our skeleton, and perhaps I should just remind you of that before I develop those three points. Paragraph 32 of our skeleton is at the bottom of page 9, and we identify there three reasons why we say that the Class Representative's pleaded case is not arguable.

THE CHAIR: Right. But it's really -- I mean, number 1, I don't even know what that ... making statements per se is not capable of amounting to an abuse, it has to be in a particular context. You'll have to work hard to say there's a general rule that a lack of transparency can never be an abuse of dominant position. The crucial one seems to be 2, doesn't it?

MR VENKATESAN: Yes. In a way, 1(b) is crucial. The reason I want to start with 1(a) is that the authorities on 1(a) --

THE CHAIR: Sorry, I think it's 1, 2, 3, if I'm looking at the right paragraph.

MR VENKATESAN: Yes, but I think they amount to the same thing.

I respectfully agree that subparagraph (2) or issue 1(b) is critical, but the reason I want to start with 1(a) is that the authorities on the circumstances in which and the reasons why misrepresentations or lack of transparency can amount to an abuse will assist you in resolving 1(b). Obviously, my submission is there is a rule --

THE CHAIR: Okay, let's get on to the --

MR VENKATESAN: Can I turn then to 1(a). I have to accept at the outset that the categories of abuse are not closed, there are many cases that say that. But nor are they unlimited, and there will necessarily be some forms of conduct which are incapable as a matter of law --

THE CHAIR: Yes. It doesn't mean that every allegation gives rise to an arguable case of abuse of dominance.

MR VENKATESAN: Precisely, sir, you have the point. So, one can't avoid the need to grapple with whether any particular form of conduct which is pleaded in a particular abuse case is capable, if it were to be proved on the facts, of amounting as a matter of law to an abuse, and that is the exercise we are engaged in.

What the Class Representative has to persuade the Tribunal for the purposes of subparagraph (1) or issue 1(a) is that failure to communicate information is capable without more, at least in some contexts, of amounting to an abuse. I say there's a general rule that whatever the context, failure to communicate information, or even the making of false statements, cannot, without more, amount to an abuse of dominant position. The remedies for that lie elsewhere, principally in law relating to misrepresentation, consumer protection, and so on. But can I show you the authorities on this.

In all the European authorities, which I wasn't going to go to, but in all the European authorities about lack of transparency or misrepresentation, it's not lack of transparency or misrepresentation per se which has been regarded as the abuse. Instead, what has happened is that the failure to communicate information or the making of a false statement has rendered the relevant system abusive for some other reason.

The clearest example of this, certainly when I was looking at the authorities, seemed clearest from the European authorities about what are known as rebate or discount systems. Let's say that a supplier, a company, establishes a rebate or discount system for its dealers, so it says to dealers, "If you buy from us in certain quantities, at the end of the year we'll give you a discount of X percentage". Sometimes the company will make it a term of the discount system that you'll only get the discount if you deal exclusively with me and not with my competitors. If the company does that, that will usually be an abuse because it's an exclusionary abuse aimed at foreclosing

(inaudible), that is very straightforward.

But companies precisely for that reason perhaps usually don't do that. What they do instead is they design the rebate of discount system in a way that makes it *de facto* exclusive without actually putting in an express term that says, "You only get the discount if you deal only with me". One of the ways in --

THE CHAIR: (Inaudible) targets, yes.

MR VENKATESAN: Indeed, exactly. One of the ways in which a discount system can de facto become a tied system is through lack of transparency. If the dealer doesn't know what criteria you are using to work out whether they will get a discount, they are much more likely to deal with only with you than with your competitors. That's why in the key European cases -- which in the interests of time I will not go to, but they are Michelin and Intel -- what the Court of Justice has said repeatedly is that it's not lack of transparency per se which renders a discount or rebate system abusive, instead it's the fact that lack of transparency can make the discount system in substance a tied or loyalty-inducing system.

THE CHAIR: You dropped your voice. "The lack of transparency ..."

MR VENKATESAN: I'm sorry. It's not lack of transparency per se that's the abuse; instead lack of transparency can render the system in substance a loyalty-inducing system or a system that ties dealers to the dominant manufacturer, and that's what makes it abusive.

Just to give you a reference to that, if I may, it's the Intel decision, paragraph 535. That is authorities volume 1, tab 7, page 288.036. That's where the European authorities have got to in the relationship between lack of transparency and abuse. There's not a single case that says a failure to communicate can itself in any context amount to an abuse. What it says is if you --

THE CHAIR: The CR isn't saying that, is it? What the CR is saying is it's a failure to

communicate the PMF.

MR VENKATESAN: Yes. But any failure to communicate, sir, is going to be a failure to communicate about something. So, let's call it something, X.

THE CHAIR: Yes, precisely, that is what you need to deal with. You need to deal with whether the something, the PMF, the failure to communicate that is or isn't an abuse.

MR VENKATESAN: Yes. And the submission I'm making to you is that the failure to communicate about anything whatever it might be, which is why I'm calling it X, is without more incapable of amounting to an abuse. That's where I said the European authorities have got to.

THE CHAIR: But the authorities are not saying that. They are giving an example where it wasn't a communication in isolation which gave rise to the abuse, and they observed that.

MR VENKATESAN: Yes.

THE CHAIR: But they are not then saying, "These are circumstances under which" -- I mean, they are dealing with the case, they analyse the case, and they come up with an answer. They are not saying as a matter of law, failure to communicate ...

MR VENKATESAN: Yes. Can I show you one case which does say that, in my submission. That's the Meta case, a domestic case. Before I go to the authorities, in the Meta case, as the Tribunal may recall, certification was originally refused by this Tribunal and then the claim was certified after it was repleaded. But in the claim originally put forward for certification, one of the allegations of abuse was that Meta had acted abusively by making misleading statements to users of Facebook about the terms and conditions and about the privacy features of the Facebook product.

So that's a case in which it's not even just a failure to communicate; the allegation is you positively misrepresented things to users. So, to answer your question, sir: there

the "X" would be the Facebook product, that's what the misrepresentation is about. The allegation was that that is an abuse because it affects the transactional decisions of users, as my learned friends say in their skeleton. The Tribunal dealt with that, if I can take you to authorities volume 2, tab 19, page 954. If I can invite you to look at paragraph 29, which contains a quotation from the Claim Form in that case, in particular at paragraph 131(c) of the Claim Form, where it was alleged:

"Without prejudice to the generality of the aforesaid at all material times" [then]

"(c) Facebook failed to explain adequately or at all the nature, extent and/or scope of Users' personal data it collected and/or the way it utilised Users' personal data."

Then at (e), it says:

"Facebook's conduct entailed misleading representations in relation to its terms and conditions. Facebook thereby concealed that its product was inferior in terms of privacy protection and/or several elements of the terms and the conditions ..."

What was being alleged at that stage of the Meta case was that Meta had acted abusively by (a) concealing things, and (b) by making misrepresentations to Facebook users about the Facebook product. The Tribunal said this about that at the bottom of page 954, and can I invite the Tribunal to read paragraph 30(1), or I can read it if that would assist. **(Pause)**

In my submission, the critical sentence in that passage is the final sentence at paragraph 30(1) at page 955 where the Tribunal says:

"These allegations seem to us not to be competition law infringements at all [emphasis in original] but rather some other - possibly consumer protection-based - claim."

As I said, certification was refused in this judgment and although the claim was subsequently certified, that was only after the misrepresentation claim was abandoned. You can see that -- and the Tribunal remarked on that -- in the second Meta judgment, authorities volume 3, tab 21, page 1053. If I can invite you to please

look at page 1066, footnote 18. At footnote 18, the Tribunal said:

"It is worth noting that these claims are very differently framed from the claims framed on the original application. Further a number of claims have been dropped, notably the abuse relating to misleading and unclear terms, which was a claim that was regarded as difficult to maintain for reasons given in our First Ruling."

So, Meta as we read it, and in our submission, is authority for the proposition that --

THE CHAIR: Hold on before you ... what about 131(c)? Has that gone?

MR VENKATESAN: In the Claim Form?

THE CHAIR: Yes, "The claim form pleaded the failure to explain". If you go back to tab 19, page 954:

"Facebook failed to explain, adequately or at all, the nature and extent of the scope of using personal data ..."

Which is the closest to a lack of transparency. Now you go to the next decision and point to footnote 18, but that doesn't tell us whether 130(c) was dropped or not.

MR VENKATESAN: That's right, sir. But in the second judgment, if you look at paragraph 25, it tells us that only two abuses are now alleged, whereas previously three had been, and the two abuses are then identified. The first was that:

"Meta's collection of all Facebook data was pursuant to a take it or leave it condition imposed on users was unfair."

Then over the page, there's an allegation -- this is at page 1068 -- of unfair price within the meaning of United Brands. As I read the second judgment, all of it that the Tribunal was considering in its previous judgment under the heading of "Misrepresentation" has gone; that is to say both 1(3) and 1(c) and the allegation of misrepresentation in the following passage.

What's now said is that you impose the take it or leave it condition, no real choice for users other than to give up all their Facebook data. Alternatively, you charged an

unfair price, which are traditional ways of bringing an abuse of dominance claim.

MR RIDYARD: I follow all that, but does that mean you can't have an abuse of dominance claim based on a lack of transparency about your conduct?

MR VENKATESAN: That is my submission. Indeed, I go further than that sir. I go further than that because in one sense, a misrepresentation is more serious than lack of transparency. Lack of transparency is just another way of describing a failure to disclose something. It's effectively a complaint of non-disclosure, that is what lack of transparency is. But what we definitely know has gone from footnote 18 is the allegation that Meta acted abusively not merely --

THE CHAIR: This is not authority for that. This is a former president saying he's not sure about this, hasn't really been argued, it then gets removed. How can we reach a summary judgment on a basis as thin as that? We can't begin to, this is not authority. This is just --

MR VENKATESAN: No, I'm certainly not suggesting it's binding authority. What I'm submitting is if you look at the way 30(1) is framed in the previous Meta judgment at page 954, the Tribunal's reaction is that the substance of the claim, because it is one of misleading or misrepresentations to consumers, its natural home is not competition law at all --

THE CHAIR: Yes, I fully understand that.

MR VENKATESAN: -- but something else.

THE CHAIR: Certainly, it would be an overlap between competition law and consumer protection, it seems, potentially. But --

MR VENKATESAN: The final sentence where the Tribunal says, "The allegation seemed to us not to be competition law infringements at all", appears to be going further than saying there is an overlap. It's saying it doesn't belong in this field at all --

MR RIDYARD: It's not saying there could never be a misrepresentation that wasn't

an abuse; or this lack of transparency by Meta in this case doesn't amount to an abuse. Is that good enough to get you to saying that no misrepresentation which could give rise to a consumer law complaint could not be an abuse?

MR VENKATESAN: As I read the final sentence of 30(1), it is saying that if your complaint in an abuse of dominance claim is that the dominant company made misrepresentations about anything --

MR RIDYARD: About anything at all?

MR VENKATESAN: About anything at all. On its own, that's not an abuse. Again, I want to be careful --

MR RIDYARD: But on its own it doesn't mean anything because it has to relate it to what it is that's been untransparent about, and that's different in each case.

MR VENKATESAN: Yes, indeed it's different in each case. But in a way, it's inherent in the concept of non-disclosure or misrepresentation that you fail to disclose something or you've made misrepresentations about something.

MR RIDYARD: Yes, obviously.

MR VENKATESAN: One does have to ask: as a matter of principle, why would that on its own constitute an abuse? That's the same point we've looked at in Meta and comes up more recently in Trains, and perhaps I should take you to that before making some brief submissions.

MR RIDYARD: I just want to know where this goes. Back on page 955, the President says:

"These allegations seem not to us to be competition law infringements but rather some other - possibly consumer protection-based - claim. We say this not because we are concerned about arguability ..."

They say they haven't considered that. They then raise two other concerns, whether they had jurisdiction; and then at 5 they say:

"Having identified a significant concern in relation to this part of the Claim Form, we propose to consider it further in the light of Harvey 1 and Harvey 2."

Do they come back to this point?

MR VENKATESAN: No. The reason for that is they are not dealing with the strike out. There was no strike out in that case.

THE CHAIR: Right. So, it's not been decided; in other words these allegations seem to us means there's a real point here, but we are not deciding it.

MR VENKATESAN: No. I would accept --

THE CHAIR: How does that help us decide anything today?

MR VENKATESAN: Well, one has to ask what is the reason why on the face of it -- I don't put it higher than that -- why does the Tribunal in this case hesitate about concluding that even positive misrepresentations, let alone non-disclosure, can amount to abuse?

THE CHAIR: Mr Venkatesan, you are pushing at an open door if you are saying this is a tricky arguable point. It's a tricky arguable point. The question is: can it be resolved today?

MR VENKATESAN: Yes. It may assist if I take you briefly to Trains, and then I take you to issue 1(b) because I don't need to be right about this point. In other words, I don't need to persuade you for the purposes of this application that in every case, whatever the facts, it's impossible for misrepresentation to be an abuse.

But the very fact that the Tribunal is concerned about the possibility, we submit it informs the analysis. Anyway, Trains also concerned a lack of transparency claim, and just very quickly to summarise the facts before I show you relevant passage. The Class Representative's case was that the train operating companies had acted abusively by failing to provide sufficient information in an accessible way about the existence of a type of ticket known as boundary fares with the result -- and in my

submission, this is critical in understanding the case -- that consumers were double charged for part of their journeys. That was the complaint in Trains.

For the Tribunal's note, we can see that's how the case was put in authorities volume 3, tab 25, page 1259. At paragraph 20, there's a quotation from the Claim Form, then if I can invite the Tribunal to go to paragraph 60 of the judgment, which is at page 1270. Paragraph 60 records that in his opening submissions for the Class Representative, my learned friend in that case stated that the Class Representative's case:

"... hinges on the lack of transparency and the fact that people did not know they were paying over the odds or that they could save."

There's then a reference to the Michelin case, which is the case I mentioned earlier, it's one of the European rebate cases. Then at paragraph 61 over the page, this is what the Tribunal said:

"Michelin was accordingly a case of exclusionary abuse, where the discount system placed pressure on purchasers to buy their tyres from Michelin and not its competitors. Although the lack of transparency in the discount system was a factor, we agree with counsel that it was relied on as an aggregating factor of the effect of a system which was inherently exclusionary."

And then this:

"We were not referred to any case where the lack of transparency of an otherwise innocuous system could in itself constitute an abuse."

Pausing there, you may ask me: this only says we won't refer to any case, it doesn't say this can never happen, and I accept that. But the sense one gets from paragraph 61 is that the Tribunal's view is that where the law has got to is that lack of transparency is only relevant in abuse cases as an aggravating or enabling factor. Put another way: if the only conduct which you allege gives rise to the abuse is

non-disclosure or misrepresentation, that on its own is not even arguably an abuse of dominant position. That's how we read paragraph 61.

In their skeleton argument, my learned friends rely on a different passage in Trains in support of the contrary submission, which I ought to deal with. That's at paragraph 105, page 128(3).

THE CHAIR: Do you want to make any observations on 83 through to that passage?

MR VENKATESAN: Yes, I'm grateful, sir. I do rely on that. I didn't go to it in the interests of time, but we say 83 to 85 supports us because the emphasis in 83 to 85 is on what term has been imposed on consumers. You can see that just above line B at paragraph 83 where the word "term" is shown in double quotation marks. Then the Tribunal says the imposition of a term can be either legal or can be de facto, but you don't need the imposition of a term for there to be an abuse, ordinarily anyway.

In most lack of transparency or misrepresentation cases, you won't have any term enforced on a consumer because if your complaint is non-disclosure or misrepresentation, that doesn't of itself involve the imposition of any term. The complaint is rather that you didn't say something you ought to have said, or you've said something that wasn't true. It's not that you imposed a term in your trading relationship with consumers which was unfair -- and while I can't say that's conclusive because the categories of abuse are not closed, it is a further pointer that mere non-disclosure or mere misrepresentation is not even arguably an abuse.

THE CHAIR: What about the discussion of the CPUTR starting from paragraph 71 through to 76, do you have any observations on that?

MR VENKATESAN: Yes. That goes to a different point, which is whether by alleging and proving an infringement of the CPUTR, my learned friends can bring themselves within abusive if they are not otherwise in it. I say not, but I was going to deal with that separately because it's a separate point and I will come to that in due course.

THE CHAIR: Now we are turning this judgment up, are you going to come back to these passages?

MR VENKATESAN: Yes, but I can give you my submission in a nutshell. It's simply the fact that a dominant firm has infringed some non-competition law which may occur from time to time, that of itself does not mean conduct which is otherwise not an abuse becomes an abuse. Indeed, if that were the position, then abuse would become a form of secondary liability which is engaged whenever you infringe some other law -- it could be consumer law, it could be anything else.

MR RIDYARD: So there can be conduct which is in breach of the CPUTR but which not an abuse?

MR VENKATESAN: Precisely so.

MR RIDYARD: Yes, I can see that argument. Does that also mean that everything which is in breach of CPUTR is not an abuse?

MR VENKATESAN: No, and I'm not running that case.

MR RIDYARD: But they are, aren't they? That's what they are saying.

MR VENKATESAN: No, but I'm saying that the mere fact that -- I'm not talking about this case conceptually. The mere fact that a dominant manufacturer is in breach of the CPUTR, some other law says the GDPR which has come up in some of the European authorities -- the Meta case, that's the case I was going to go to -- that may be a factor you take into account in assessing whether the relevant conduct is abusive. But in this case, if I'm otherwise right that the pleaded case does not even arguably amount to an abuse, that is unaffected even if they can prove a breach of the CPUTR because the conduct doesn't change. If I'm right that Apple was not obliged by competition law to disclose the matters in question, then that is that, that can't change because of the CPUTR. If there was a breach of the CPUTR, and obviously our case is there wasn't, but if there was, there would be different remedies.

MR RIDYARD: You have to proceed on the basis today that there was or could have been a breach of CPUTR.

MR VENKATESAN: It's not actually pleaded. They say they want to amend to allege it, it's not currently alleged there was any breach of the CPUTR. They only rely on it by analogy in the Claim Form. But as I say I will come on to that.

The point I did want to make very quickly in my time is paragraph 105 -- my learned friends rely on it in their skeleton -- at page 1283. Can I please invite the Tribunal to glance at paragraph 105 and I will make one submission about it, if I may. It's at the bottom of 1283. **(Pause)**

In our submission, in paragraph 105, the Tribunal is not saying that concealing a product is of itself capable of being an abuse. I'll explain in a moment why that might have been the case on the facts of Trains, but can I first give you an example that shows why there will necessarily be situations in which even deliberately concealing a product is not an abuse. Imagine that there is a dominant --

THE CHAIR: I am quite happy to accept that, you don't have to give us an example. There may well be circumstances that are not abusive, of course.

MR VENKATESAN: So it's not authority for the proposition that if a product is deliberately concealed, that is an abuse. There isn't any such rule, it just depends on --

THE CHAIR: When I buy a car or a phone, I have no idea what's going -- as we said before and you quote, no idea how the thing works, what's going on, what compromises are made, then if my gearbox is going to last 120,000 miles or 420,000 miles, I don't know how things have been specced. I have no idea, and that applies equally to all suppliers whether dominant or not.

MR VENKATESAN: Indeed. That's actually a convenient segue, if I may say, to the final point I wanted to make on issue 1(a), which is we have looked at the authority --

THE CHAIR: We haven't looked at anything -- we have looked at some authorities which don't answer this question about whether these sorts of circumstances, as put by Mr Moser in paragraph 26, particularly his conclusion in (g), haven't looked at any authorities which assist us in answering that. Unless we are with you and say transparency can never be -- and you are facing an uphill struggle on that. So how do we approach this?

You've rightly said the fact that the categories of abuse are not closed does not mean it's a free for all, with you on that. So how do we decide where in a category which the law should be developed, or the law arguably should be developed, or whether we are not -- these cases hint at best at the answer you are seeking. They don't really --

MR VENKATESAN: No, I accept that these -- I can't point you to a case --

THE CHAIR: What's the nature of abuse of dominance -- taking from first principles, why does this not fall within the category of abuse?

MR VENKATESAN: Let me take it from first principles. There is an example which may assist you in testing whether the conduct pleaded in this case is capable of amounting to an abuse -- I have to confess straight away that it's not my example.

THE CHAIR: I don't want an example, I just want the legal principles which should be applied. Here we are -- assuming against you for present purposes we do today. We have some highly unsatisfactory activity whereby you've not been -- I don't need to (inaudible) not being open to consumers, and so forth, to their detriment, let's assume all that. Why is this an abuse and not, as you say, just a complaint under consumer legislation.

MR VENKATESAN: Two reasons of principle: first, because if lack of transparency or misrepresentation can, at all, amount to an abuse, it must concern information that is sufficiently material to generate a competition law duty to require disclosure, and that test of materiality is not even arguably satisfied here. Second, and I'll develop

these submissions in turn, Apple had a legitimate reason for not disclosing more information than it did at the time which the Class Representative has no real prospect of going behind at trial.

Now both of those submissions assume you're against me, as I detect you are, on my first point of principle, which is lack of transparency or misrepresentation can never under any circumstance amount to an abuse. I'm assuming against myself I'm wrong about that, and there are some circumstances in which the fact that a dominant company has not been transparent or made misrepresentations about something can in principle amount --

THE CHAIR: It's a neutral factor for present purposes.

MR VENKATESAN: Yes.

THE CHAIR: So, assuming it may or may not give rise to abuse. The question is: does it? If you look at what's been stated, and I understand your point on "calculated", it's been stated in 26(g) that it's done this:

"To preserve its commercial reputation, market position, market value and profitability and therefore its dominance."

So the misleading, as the Class Representative would describe it, said that this is misleading behaviour which has been to the detriment of consumers, and has done this to preserve your commercial reputation and therefore your dominance.

MR VENKATESAN: Yes.

THE CHAIR: So you're performing certain acts or not performing certain acts to reinforce your dominant position on the assumption that deliberate concealment can give rise to an abuse. It is not arguable, therefore, that the purpose is to shore up your dominant position?

MR VENKATESAN: Yes. So two answers to that, sir. First, deliberate concealment isn't actually pleaded.

THE CHAIR: I got that point, I'm just trying to get to the law at the moment. Yes, I understand. But you've heard -- obviously what was said was deliberately said, but I don't want to go through that again. Just as a matter of law, assuming it is deliberate concealment, and assuming the effect of that deliberate concealment is to shore up your dominant position, ie you don't start losing sales, can that potentially as a matter of law be an abuse?

MR VENKATESAN: We respectfully submit not, and I'll give you --

THE CHAIR: Do you have the authority for that proposition?

MR VENKATESAN: Yes, but --

THE CHAIR: Or the reason --

MR VENKATESAN: Can I give you the reasoning, because I accept I can't point you to an authority that says in terms that if that's alleged, it can never be an abuse, but we say there are powerful reasons of principle for that. Can I go through them, there are three or four of them?

Just to establish the premise we are operating under, if it's alleged that the dominant manufacturer deliberately concealed the reasons for or effect of the PMF; and if that had the consequences described at paragraph 26(g), namely enabling it to preserve its reputation, market share, and so on, the question is: can that amount to an abuse? Let me give you four reasons why, in our respectful submission, it can't.

First, we submit there's no arguable factual basis for the allegation, and this is relevant even on a strike out. You have to have an argument --

THE CHAIR: I understand about the facts, I'm just trying to get to the point of law. So assume the facts against yourself.

MR VENKATESAN: Okay, then it's my second point. It would give rise to an inconsistency between the characterisation of the abuse in paragraph 26(g) and the theory of harm pleaded by the Class Representative. If deliberate concealment is

abusive because it has exclusionary consequences and enables you to preserve or gain market share, then what has rendered it abusive is the fact that it has had those consequences: you've not lost market share or you've gained market share at the expense of your rivals. But in this claim, the Class Representative is not seeking to compensate Samsung or some other rival --

THE CHAIR: I understand that. I have that point in mind, but that's not the question I'm asking you. I'm asking you whether it's capable of being -- I'm not asking about this claim, just as a matter of law.

MR VENKATESAN: Yes. As a matter of law we say the reason why -- although I'm not sure I need to be right about the law if I'm right about my prior points.

THE CHAIR: No, I understand that. I'm just trying to home in on a legal point.

MR VENKATESAN: Yes, of course. The reason why we submit without more even deliberate concealment with exclusionary consequences can't of itself amount to an abuse is, if it could, that would mean that almost any non-disclosure or misrepresentation about a material matter by a dominant company is automatically an abuse, because almost any material representation about a business will have those consequences. Obviously in this case we say even that test is not satisfied, but talking conceptually about the law and not about the facts of this case, if a dominant manufacturer of goods or provider of services makes a misrepresentation about something to do with its business, that will usually have certain consequences. If that alone were enough to bring an abuse of dominant position claim, then could you turn every misrepresentation, every non-disclosure, for which there are --

THE CHAIR: That would mean dominant companies have an obligation to tell the full truth to their consumers.

MR VENKATESAN: But not under competition law, that's the point. I don't dissent from the proposition that dominant companies may have obligations, but the question

with respect --

THE CHAIR: You say not under competition. That's the bit we are trying to grab hold of at the moment. How do we know that's not under competition law?

MR VENKATESAN: For one, if it were under competition law, it would have far-reaching implications which there is no reason to think Parliament intended when it enacted section 18, which includes the fact that you could repackage every claim about misrepresentation or consumer legislation, even if you did have such a claim, into an abuse of dominant position claim. It could mean that the concept of abuse is virtually unlimited and becomes a secondary means of litigating misrepresentation claims, which is not what -- there is no reason to think Parliament intended.

THE CHAIR: Are you saying it would open the floodgates?

MR VENKATESAN: It would do.

MR RIDYARD: I understand that, but is it possible there could be some misrepresentations that are in breach of competition law but not an abuse, but others which are -- because they are worse or are more impactful or something, they could be an abuse; and if so, how would we draw the distinction between those two things?

MR VENKATESAN: That engages two separate issues. The first is the point of principle, where you have my submission which I don't want to go over. I say that whatever the impact, the misrepresentation alone can't give rise to an abuse because if it could, then you have my submission that would not only open the floodgates, but it would expand the scope of section 18 in a way Parliament could not have envisaged. But in a way, I don't need to go that far for the purposes of this application because my case is that given the concessions the Class Representative has made, namely that the relevant iPhones were not and did not become substandard or defective; they continued to meet the reasonable expectations of users after the introduction of the PMF; they continued to meet advertised expectations after the introduction of the PMF,

you have to ask: is it arguable on those premises that there is a competition law duty -- not a duty under something else but a competition law duty -- to disclose the information pleaded at paragraph 91 of the Claim Form?

In my respectful submission, there isn't. In a way to illustrate that, I want to go back to an example which as I said earlier, isn't mine. I saw it in the transcript --

THE CHAIR: I'm trying to get assistance on how does one approach the question of whether a wrongful act is abusive, an abuse of dominant position. We assume a company is in a dominant position and it's wrongfully failed to disclose information, or disclosed inaccurate information to consumers, I understand your floodgates point which may or may not be right, it may depend. But just as a matter from the authorities and the legislation, how do we decide whether that is an abuse? What principles should we be applying to that question, rather than just saying if we said that, there might be an awful lot of claims?

MR VENKATESAN: I understand that, sir. In my submission, the answer lies in the word that you used in putting the question to me, which is when you said "wrongful act". One has to ask why is that act wrongful. In other words --

THE CHAIR: It's wrongful under the -- again, I don't want to get into the facts, but let's assume for the reasons given by the CMA, there was potentially a wrongful act under the CPUTR.

MR VENKATESAN: Yes. In that case, in my submission, you have to approach it in two stages. The first stage is to ask: leaving aside the CPUTR, if you look just at the underlying conduct, in other words the alleged failure to disclose the information in question, you have to ask yourself: leaving aside for a moment the CPUTR -- I'm intending to come back to it -- leaving that aside, is that arguably an abuse? The answer to that question will turn, in my submission, on whether there was a duty to disclose under competition law because at this stage of the analysis, we are not

considering the CPUTR.

So, at stage 1, you have to ask yourself: was the dominant manufacturer under a competition law duty to disclose the information in question? If the answer to that question is no -- and I'll explain in a moment what we say the answer will turn on -- but if the answer is no, there is no abuse. Then the question is: how do you work out if there is a competition law duty to disclose the information in question? That turns --

THE CHAIR: A legal obligation to give information which wasn't satisfied.

MR VENKATESAN: Yes, but --

THE CHAIR: And the purpose for not giving that information, or the effect of not giving that information, you maintained your very large market share and you induced people to buy your products. That's the -- and I know you completely disagree for lots of good and less good reasons, but that's not the facts of this case.

MR VENKATESAN: Yes.

THE CHAIR: In those circumstances, why can't that be an abuse?

MR VENKATESAN: I think that raises two points, sir, if I may say, in what you put to me. The first is when you say legal obligation to disclose, what is the source of that legal obligation?

THE CHAIR: Well, let's assume it's the acronym I keep forgetting.

MR VENKATESAN: Is it the CPUTR you have in mind?

THE CHAIR: Yes.

MR VENKATESAN: But that's why I say one has to approach this in two different stages. It is obviously a different legislation, and it has to be possible to answer the question whether there was an abuse of a dominant position on its own terms in the first instance. I'm just saying for the purpose of analysis, if you ignore the CPUTR for a moment and if you ask yourself --

THE CHAIR: But I'm asking you to assume there's a breach of the CPUTR. I've been

asking that question -- it's no good telling me to forget it -- I'm asking you to make that assumption.

MR VENKATESAN: If you assume there's a breach of the CPUTR, we say there is still no abuse because this is not the type of information which a dominant manufacturer is required, under competition law to disclose, even if they are required to disclose it under the CPUTR. It's not the type of information which the purpose of section 18 of the Competition Act, which is the cause of action you're concerned with, requires dominant --

THE CHAIR: The purpose of section 18 is not to abuse your dominant position.

MR VENKATESAN: Yes.

MR RIDYARD: You can be in breach of CPUTR, but not in breach of chapter 2, that is your argument.

MR VENKATESAN: Yes.

MR RIDYARD: Therefore the question is: where's the dividing line between those things, given that -- let's hypothesise that in being less transparent in January 2017 and introducing the PMF, they in fact have successfully increased its market share above what it otherwise would have been had they come clean and said to all the consumers, "Look, we've got this terrible problem and we can only fix it by doing something that throttles your phone", that would have damaged their market share. They didn't do that, they stayed quiet about it and implemented the PMF without telling people properly. So that had consequences. But you are saying even though it had consequences, it could have been in breach of the CPUTR, but that's not relevant to you because what's relevant isn't a chapter 2 abuse.

MR VENKATESAN: Indeed --

MR RIDYARD: Where do you draw the line between those two things?

MR VENKATESAN: In a way, even before we get to that stage of the analysis, I have

various prior points, such that if I'm right about any one of those, we never get to this. The first point is not only is it not alleged that the CPUTR was infringed --

THE CHAIR: That's an entirely separate point.

MR VENKATESAN: But is it, sir?

THE CHAIR: I'm asking you to try and -- I'm trying to get to the bottom of the law. We can then come on to your points that the CPUTR hasn't been alleged, I'm alive to that point. But let's assume it's been alleged for present purposes just to try and get -- do we not need to look at the words of the statute, perhaps, and things like that?

MR VENKATESAN: Of course, of course. I mean, one of the points I make about the language of the statute is -- I don't know if you had in mind the CPUTR or the Competition Act.

THE CHAIR: The Competition Act.

MR VENKATESAN: If we turn up section 18, which is authorities volume 3, tab 29, page 1466, section (1)

"Any conduct on the part of one or more undertaking which amounts to the abuse of a dominant position in the market is prohibited if it may affect ..."

Then you have in subsection 2, four types of conduct which constitute an abuse: directly or indirectly imposing unfair purchase or selling prices, or other unfair trade conditions. That is what is relied upon in this case, not subsection (b).

That itself, we submit, points against recognising misrepresentation or lack of transparency of itself as an abuse, even if the CPUTR is infringed because making --

THE CHAIR: Why is it not an unfair trading condition to be playing around with the thing you've just bought?

MR VENKATESAN: Because there's no condition or term at all. It is inherent in the concept of a condition or term that it's imposed on the person you are trading with. For instance, if a dominant firm enters into a contract --

THE CHAIR: It doesn't say "term", it says "trading conditions". I thought it was a condition that you sign up to these software updates.

MR VENKATESAN: Yes, you sign up -- yes.

THE CHAIR: Is that not a trading condition?

MR VENKATESAN: No, of course. There are licensing terms that users sign up to, as you say, and that's how they get their updates. But it's not alleged that there is anything in those terms which is inherently unfair. The case advanced is paragraph 7(c) of the Claim Form.

THE CHAIR: Not inherently, but you've signed up to a trading condition, and I suppose it's the way that's applied. Under that trading condition, they are entitled to mess around with the performance of your phone without telling you.

MR VENKATESAN: First of all, when you say -- I don't want to get into the facts, when you say "mess around with performance of the phone", one has to evaluate that against the concessions they've already made, and you have my submission about that. But even leaving that aside, it's not the condition which on the Class Representative's case is alleged to be unfair. Instead, what he says is because the licensing terms allowed Apple to introduce updates without giving users sufficient opportunity to decline it, it enabled Apple, he says, to introduce the PMF in a non-transparent way, so the complaint is not about the condition. If it were, he would have to be advancing the case that the entire --

THE CHAIR: It was - put fairly broadly, there's no authority which assists on what unfair trading conditions means in this context.

MR VENKATESAN: Trains does assist, the passages you pointed me to earlier -- maybe we should go back that --

THE CHAIR: No, I have that in mind.

MR VENKATESAN: Paragraphs 83 to 85 of Trains, maybe I should just give you the

reference, I know you have it in mind. It's page 1278, if I can just invite you for a moment please to go to page --

THE CHAIR: Just give me a second. **(Pause)**. Where do you want to go to in Trains?

MR VENKATESAN: Page 1278, behind tab 25 in the same volume. Paragraph 83, it refers to a discussion in a textbook, and then it says:

"This discussion is premised entirely on an unfair contractual 'term' which has been imposed on the 'victim' of the exploitative abuse."

Then the Tribunal says:

"That is of course consistent with the language of 102(a) or 18(2)(a) see paragraph 50 above."

That's the basis of my submission that the word "condition" in 18(2)(a) is in fact a reference to terms which are imposed either in law or as a matter of fact, as the Tribunal goes on to say at paragraphs 84 to 85.

If making a misrepresentation or failing to disclose a fact even of the utmost materiality, let's assume, would not otherwise constitute the imposition of an unfair term within the meaning of section 18 -- the fact that there is a CPUTR infringement does not itself change that. The conduct doesn't change depending on whether some other legislation is infringed. The conduct is exactly the same and it's either an abuse or it's not.

But what I want to do, if I may, conscious as I am of the time, is to turn to issue 1(b) which I've covered in part so I can take it more quickly. That is if I'm wrong about all the submissions I've made about the law so far and you can have an abuse by non-disclosure or by misrepresentation, even then, members of the Tribunal, we would suggest that you could only have that if there's a competition law duty to disclose the information, and that will only exist if the information in question is sufficiently material to require disclosure.

The starting point in this context is actually the Tribunal's own judgment, if I can show you that --

THE CHAIR: Sorry, what are you addressing?

MR VENKATESAN: I'm addressing the question whether if lack of transparency or misrepresentation is capable as a matter of law for amounting to an abuse, is it arguable that it does so on the facts of this case? This is issue 1(b) in my skeleton, paragraph 31.

THE CHAIR: This is a -- sorry, it's my fault, not yours, I was thinking about other things about the case, I hasten to add. Can you just summarise where this point is going?

MR VENKATESAN: Yes, of course. Where this point is going is that --

THE CHAIR: We've had lot of argument about this before.

MR VENKATESAN: We have indeed, although this is a new point because it's not a point that was taken in the earlier round of --

THE CHAIR: Right. You haven't explained why none of these points were taken.

MR VENKATESAN: If I don't run out of time, I'm going to say that's quite an important issue.

But anyway, just to give you the reference to orientate the submissions, what I'm about to address starts at paragraph 49 of my skeleton under issue 1(b) on page 16. The starting point of my submissions on this is actually the observation made by the Tribunal which we have quoted here in paragraph 13 of its second CPO judgment. I wonder if I can invite you to glance at that without turning it up. It's in the skeleton, if you look at it in paragraph 50 of the skeleton.

THE CHAIR: You say on the facts, what are the facts? Which facts are we talking about?

MR VENKATESAN: The facts we are talking about are the concessions made by the Class Representative.

THE CHAIR: We've looked at those, yes.

MR VENKATESAN: The question is: was Apple under a competition law duty to disclose information about the existence of UPOs, or the nature and purpose of the PMF in circumstances where the relevant iPhones were not and did not become defective; were not and did not become substandard; did not fail to meet the reasonable expectations of users; and did not fail to meet advertised expectations? Against the background of those concessions, is it arguable that there was a duty to disclose the information that's pleaded at paragraph 91 of the Claim Form.

If the answer to that question is no, then irrespective of where the law might have got to in other cases, the answer in this case is that there's no arguable abuse claim.

THE CHAIR: It is pleaded that the performance -- I'm paraphrasing, I'll get it wrong -- that performance was reduced.

MR VENKATESAN: Yes.

THE CHAIR: Materially reduced.

MR VENKATESAN: Yes.

THE CHAIR: That would lead to -- the desire not to disclose that is at the heart of the abuse. I don't know why this fails on the facts -- I can see it failing on the law, but I'm not sure where it fails on the facts.

MR VENKATESAN: That's why I accept it's pleaded that it had a material impact on performance. But you have my submission that what material means, consistently with the concessions already being made, is material but not capable of reducing performance below the level that would be required to meet reasonable expectations or advertised expectations. That actually gives rise to a point of principle, which is: is a dominant manufacturer required to disclose technical information about a product or service when the product or service continues, despite that act or event to reasonable expectations of users and the advertised expectations?

We submit --

THE CHAIR: Arguably, yes, we got to with the CMA.

MR VENKATESAN: But I'm not sure why the CMA -- first of all, the CMA's conclusions, provisional at the time, are inadmissible. We know that because of the recent Supreme Court judgment which overturned --

THE CHAIR: Not inadmissible. They are evidence I think.

MR VENKATESAN: But the Supreme Court has clarified that in Evans, and I can take you to it. The law before Evans was that in the Competition Appeal Tribunal --

THE CHAIR: They are not inadmissible as evidence, it's just we have to make up our own minds.

MR VENKATESAN: Yes, you can only look at the findings of other regulators to identify what evidence may be available in these proceedings. Any findings or conclusions of other regulators, provisional or final, are inadmissible. That is clear from the Supreme Court judgment in FX. But there is a more fundamental point, which is: whatever the CMA might have said and even if it were admissible, they are not talking about the Competition Act.

THE CHAIR: No, I understand that.

MR VENKATESAN: And one has to ask, leaving aside the CMA, leaving aside the CPUTR: is it really the position under English competition law --

THE CHAIR: But we are back now to your first point, arguing about the law again. I'm just trying to get to the bottom of what it is we have to decide on the facts.

MR VENKATESAN: Test it in this way, sir, and this is why it may be a distinct point. One of the examples you put to my learned friend in the September 2023 hearing was you asked my learned friend: imagine that the relevant iPhones had been sold with the PMF in it. If I may respectfully say, that's quite an important example in relation to this point because if the PMF had been included within the relevant iPhones, and if

the PMF had exactly the same impact that it actually had in the real world, it is, in my submission, not arguable that Apple was under a competition law duty to disclose that information because manufacturers don't usually disclose information about the way their products work, especially technical information.

If that's right, one has to ask: why would the analysis change merely because the PMF was introduced subsequently rather than when the device leaves the shop? Indeed, if it could change in that way, that would mean that the obligations of a dominant firm in relation to the same feature of the same product vary according to when that feature is introduced.

THE CHAIR: It's not the same, is it? I mean, you are now the owner of this phone, it's your phone, for better or worse. It's not the same that when you buy something, you purchase it and it has certain characteristics, then when you've been using it for a year, you're super happy with your phone and then someone comes along and interferes with it. Well, it's not the same, it may be ...

MR VENKATESAN: Well, it's analytically the same in the sense that let's assume, just to take hypothetical figures: on a scale of say 0 to 100, assume that the relevant iPhones -- and this is obviously hypothetical -- meet the reasonable expectations of users and advertised expectations if they are within 90 to 100. So you can't drop below 90 if you want to meet your reasonable expectations of users and the advertised expectations. It is now common ground that despite the introduction of the PMF, whatever the impact was, even if it was material, performance did not fall below 90. I say that's common ground because that necessarily follows from the concession about reasonable expectations and advertised expectations.

One does have to ask, in my submission, leaving aside the --

MR MOSER: I have not risen and I hope I won't rise again, I just feel I need to say that's obviously not common ground and I will make my submissions.

THE CHAIR: Yes.

I'm very sorry, the transcriber has been neglected. I'm not sure how much more there is to cover on this point, perhaps we can have a short adjournment.

MR VENKATESAN: I'm grateful.

THE CHAIR: Just five minutes.

(12.01 pm)

(A short break)

(12.07 pm)

MR VENKATESAN: I'm grateful, sir. In the time that remains, which I'm mindful is not very much, there are three points I want to deal with, if I may, and I rely on my skeleton for my other submissions.

First, why deliberate concealment is not and cannot be pleaded; second, why the CMA's provisional conclusions are inadmissible; third, why it's not an abuse for us to take these points now, not having done so in the previous application, and if there's time --

THE CHAIR: It's not so much an abuse -- we'll hear from Mr Moser about that -- it's just a question of why you haven't.

MR VENKATESAN: Yes, of course. I'll endeavour to explain that.

THE CHAIR: I'm not saying you are precluded, but it does suggest they were points which were not apparent to you a little while ago.

MR VENKATESAN: No, I'll deal with that, partly --

THE CHAIR: Mr Moser would say it's consistent with their being arguable.

MR VENKATESAN: Indeed. Finally, if I have time, I want to deal briefly with the March 2018 point, which is what happens to the abuse case once the PMF is turned off, as it were, in March 2018.

But very quickly, on deliberate concealment -- we have been over this before so I will

take it shortly -- the starting point is that in its defence, Apple has pleaded the reasons why it chose not to disclose more information than it did at the time -- that's paragraph 55.1 of the defence. I won't trouble you to turn it up, but what Apple pleads in paragraph 55.1 is that when the PMF was released in January 2017, Apple had not gathered comprehensive data from using the field as to the effectiveness of the PMF. That remained to be seen because it was only just being released, and Apple wished to obtain that data as naturally as possible -- that is to say, obtained feedback from users about the performance of the PMF, or the phone with the PMF in it, without users having first been told anything about what they may or may not experience.

To give you a reference, paragraph 55.1 of the defence, core bundle, tab 2, page 139, that's the pleaded case.

Importantly, members of the Tribunal, in his reply to the defence, the Class Representative does not plead a positive case challenging those reasons, he pleads a non-admission. In other words, he doesn't advance a positive case that the reasons pleaded by Apple for not giving more information than it did at the time were not in truth its reasons, no such positive case has been pleaded. Instead there's a non-admission --

MR RIDYARD: But it's possible for two things to be true at the same time. So, it could be true that Apple did want to keep consumers in the dark so it could gather market research, but at the time they might have been keen to keep consumers in the dark because they didn't want them to make different decisions that would have reduced Apple's market share. Both of those things could be simultaneously true, couldn't they?

MR VENKATESAN: Yes. But if the Class Representative wants to advance that case, he has to plead it. I'm not saying something is conceptually impossible, I'm only saying if he wants to advance the case that even one of Apple's reasons for not

disclosing more information than it did at the time was to steal a march on its rivals, that has to be pleaded squarely. It can't be done by a non-admission, and that's what he's pleaded. If I can show you the reply at paragraph 29(c), that's core bundle tab 3, page 192. If you look at 29(c) about halfway down the page --

MR RIDYARD: You referred to this earlier.

MR VENKATESAN: Yes. He says in the first sentence:

"Apple rightly admits he did not refer to the PMF~..."

Then the second sentence says this:

"However, Apple is put to proof that the reasons it did not do so is because as it now contends ..."

So there's a non-admission and not a positive case that those were not Apple's only reasons.

THE CHAIR: That's now a pleaded issue and there will be disclosure on that.

MR VENKATESAN: Well, only if our strike out application fails. But the reason I make this point is that it would not be open to the Class Representative to allege at trial, or even to seek disclosure in support of any case that Apple's reasons for not disclosing more information than it did were different from the reasons it has pleaded. Advancing that case amounts to a case of discreditable conduct, which has to be pleaded expressly or clearly, and you have to have arguable basis for pleading it. One authority which may assist on that point is that --

THE CHAIR: How does this fit into the strike out?

MR VENKATESAN: It fits into the strike out because if you were to take the view that what makes the Class Representative's abuse case arguable is paragraph 26(g) of my learned friend's skeleton, where what's alleged is deliberate concealment calculated to preserve market share, I say that is not pleaded because it's only a non-admission and it's not capable of being pleaded for the reason I'm about to

develop now. To the extent that's an essential element of the abuse case, it's not open to the Class Representative to advance that case.

THE CHAIR: Why is it not open to the Class Representative?

MR VENKATESAN: Because it can only be advanced if a positive case is pleaded as distinct from a non-admission, which it hasn't been and I say can't be. It's the "can't be" bit that I would like to develop.

THE CHAIR: Okay. Do we not need to see what Mr Moser says about that?

MR VENKATESAN: I could deal with it in reply if that's what -- but in fairness to my learned friend, I perhaps ought to make the point. The reason why I say it can't be pleaded is paragraphs 60 to 62 of the Invest Bank case, which is authorities volume 3, tab 24, page 1144.

What the learned judge says is if you want to plead a new factual basis for your claim, whatever that claim might be, it has to be pleaded in the particulars of claim, not in the reply. So that's the first problem with what's been pleaded in the reply. But second and more substantively, if you want to allege discreditable conduct against somebody, that has to be --

THE CHAIR: Sorry, where are you reading?

MR VENKATESAN: The paragraph -- if you look at --

THE CHAIR: Where is the word "discreditable"?

MR VENKATESAN: That's Invest Bank. This I'm relying on for the proposition it has to be in the claim form and not in the reply. But if you go to paragraph 400 in the same judgment, page 1227, there the learned judge refers to discreditable conduct. So the learned judge says that:

"In paragraph 201 of the bank's closing submissions, it was suggested that Alex, Ramzy and Ziad deliberately put Mistar into liquidation in 2022 for the purpose of prejudicing the bank's 423 claim. I reject this submission which, as counsel said,

amounts to an allegation of dishonesty or discreditable conduct which has not been pleaded."

THE CHAIR: Right. But I haven't seen the words "dishonest" or "discreditable" in anything Mr Moser has written.

MR VENKATESAN: But it's not that the word must be used. If the allegation that you are making is in substance an allegation of discreditable conduct, it has --

THE CHAIR: Okay. I'll listen to Mr Moser, but I'm not aware that he's saying it's discreditable, he's just saying that's -- well, he makes the criticisms he makes.

MR VENKATESAN: Can I give you --

THE CHAIR: And "calculated", I don't equate calculated with discreditable. If you do, then you'll have to let me know.

MR VENKATESAN: I mean, to give you an analogy -- maybe I should deal with it in more detail in reply once I've heard my learned friend. But for instance in paragraph 400, the submission the learned judge is dealing with is not actually an allegation of dishonesty. What happened in this case is a claim is bought by a UAE bank against a family seeking to reverse property transfers under section 423 of the Insolvency Act, which allows you to claw back transfers which are made for the purpose of prejudicing creditors.

What was alleged by the bank in its closing submissions was that the family defendants had deliberately put a particular company into liquidation in Lebanon for the purpose of prejudicing the bank's claim in the English court. So it's an allegation not of dishonesty but of discreditable conduct in the sense that what the bank was saying is: you went along to some other country and did something for the purpose of interfering with the disposition of this case by the English court. What Mr Justice Calver says at paragraph 400 is if that's your case, you need to plead it and you need to put it to the relevant witness in cross-examination.

That reflects a basic principle of pleading, which is if you are alleging against somebody that they subjectively acted for some purpose which would be regarded by ordinary people as discreditable, you must plead that squarely. In this case, Apple has pleaded the reasons why it says it chose not to give more information -- I've shown you that or given you a reference to it, paragraph 55(1) of the Defence. If the Class Representative wishes to allege that one reason why, one subjective purpose why Apple did not give more information was something else, that is necessarily an allegation that Apple has signed a false statement of truth, and it's a very serious allegation which would have to be put squarely and pleaded squarely, and it hasn't been.

So we say it's simply not open, the case on deliberate concealment, on the pleadings as they stand. We don't have time to do it, but if you were to look in the Claim Form rather than the Reply, it's not even alleged that the concealment was deliberate. What is alleged is that there was concealment --

THE CHAIR: We've been round the houses with this quite a bit, haven't we?

MR VENKATESAN: That was quite my point.

We say if this claim is allowed to proceed to trial on the pleadings as they stand; in other words with non-admission at paragraph 29(c) of the Reply, then at trial the Class Representative would be unable to invite the Tribunal to make any factual finding that Apple's reasons for non-disclosure were anything other than what it has pleaded because that's not a case that would be open to the Class Representative. You then have to ask: if the reason why Apple did not disclose more information is that it wished to obtain untainted user data, which we would submit is a legitimate objective for any smartphone manufacturer to pursue. And if the Class Representative has no real prospect of going behind that, if that's the only factual finding capable of being made at trial as to the reasons why Apple acted as they did, where does that leave the abuse

case, one might ask rhetorically?

In our submission, there's no arguable abuse because on this hypothesis, Apple chose not to disclose information about a software update to a device for a legitimate commercial reason in circumstances where it's not alleged that the device was defective or substandard or whatever -- you have my submissions about that -- nor is it alleged that the update was an abuse. It couldn't be suggested at trial that the reasons why more information was not disclosed was anything other than what Apple has pleaded. In those circumstances, we would respectfully suggest there's no real prospect that the Tribunal will make any finding of abuse on those premises and in light of those concessions. That is our case on issue 1(c).

Can I very quickly deal with what we've described as issue 2, which is our fall-back case if we were to fail on issue 1. We say in any event, the abuse case has no real prospect of success for the period after December 2017 or March 2018. I want to take March 2018 first because in some respects, it's a more straightforward point, given the time constraints. Many things about what actually happened in March 2018 are common ground, and I want to focus on common ground because I am mindful that in a strike out, I am not going to be asking you to resolve disputed factual issues. But the following things are common ground about what happened in March 2018 when iOS 11.3 was released. First, the PMF was turned off by default --

THE CHAIR: Sorry?

MR VENKATESAN: The PMF was turned off by default from March 2018 onwards because iOS 11.3 is released and what that software update does is to turn off the PMF by default. That's the starting point, as it were, for everyone who gets the update. Second, the PMF is only activated, if at all, once a UPO actually occurs. So it's not activated for everyone, it's only activated for that small subset of users who actually experience a UPO -- I'm talking about post-March 2018.

Third, if and when that happens, so a particular user after March 2018 experiences a UPO, the PMF is activated. They are informed that the PMF has been turned on and they are given the option to turn it off.

Fourth, only a very small fraction of users choose to do that, in other words to turn it off. The vast majority of users for whom the PMF gets turned on once a UPO occurs choose to keep it, even though they now know and are told that they can turn it off.

Fifth and finally, and I'll give you references to these points in a moment, even for those who choose to keep the PMF, the PMF periodically reassesses the level of performance management actually necessary to avoid UPOs, and it reduces the level of performance management in any period during which no UPO occurs.

Those are the facts about what happened in March 2018 and, as I say, none of it is or could credibly be disputed. Just to give you a reference to it without going to it, not least because this is confidential, Crumlin 1, paragraph 55, supplementary bundle volume 1, tab 8, page 152; and exhibit AJC1, which is supplemental bundle volume 3, tab 70 page 994. Those are the facts.

Now one has to ask: is it arguable that Apple failed to act transparently after March 2018? In my respectful submission, that is not arguable. After March 2018, users know about the PMF, they are told they can turn off the PMF, and most of them choose not to turn off the PMF. So even if we fail on issue 1, namely is there an arguable abuse case before March 2018, the claim in our respectful submission should be struck out insofar as it alleges abuse after March 2018.

That's the first step in the analysis of this sub-issue. But it doesn't end there because if you are with me so far, so if the Tribunal were to conclude that there's no arguable abuse case after March 2018, that will actually undermine the remainder of the claim. If there's no arguable abuse after March 2018, that means Apple has acted as transparently as competition law required it to act after March 2018. What happens

after that is therefore the best evidence of what would have happened if Apple had acted in the same way earlier. The hypothesis is in March 2018, a line is drawn, there's no abuse, so consumers are told everything they need to be told.

What happens in March 2018 is not that consumers turn up in droves on Regent Street saying, "We want compensation", which is the case that's been certified. Instead, people choose to keep the PMF even though they can turn it off; in other words, they are content with the PMF. So one can infer that if Apple had acted the same way earlier, say in November 2017 or January 2017, if the same thing had happened earlier, that's what would have happened counterfactually at that time.

THE CHAIR: That's not for a strike out application, surely.

MR VENKATESAN: Sir, but I state the point conceptually that normally in a strike out application, you can't make factual findings. But what is different about this case is that on the hypothesis I'm on, which is there is no abuse after March 2018, that is necessarily then the best evidence of what the counterfactual is because it happened in the real world.

THE CHAIR: It may or may not be evidence of counterfactuals. All sorts of things may have changed. It was a different phone, wasn't it? It has a different operating software, it is an 11.2, isn't it?

MR VENKATESAN: It's not --

THE CHAIR: So, it's not -- well, you say that but we don't have evidence of this. If Apple had made an announcement when the matters first arose, we don't know what the impact would be on the consumers. We don't know what it ... how can we can infer it from certain messages appearing on the screen?

This is a strike out application, a summary judgment application. You can't make up evidence, it has to be tested. I understand the cogency of the argument, but it's not something we can make a ruling on today.

MR VENKATESAN: No, but can I put it this way, sir, respectfully why you can, and we respectfully submit, should adopt that approach is if -- this is obviously --

THE CHAIR: These are points you could have made at certification stage.

MR VENKATESAN: Yes. I recognise I need to deal with that, and I'm going to do that a moment. But just on this to answer your question, if the hypothesis is that the abuse -- if there was one earlier -- ends in March 2018, then at a minimum the Class Representative would have to tell you there's some reason why there would have been a different consumer reaction had the same disclosure been made earlier.

One can't simply say, "It might have been different", because as you know from the Easyair case, Mr Justice Lewison, you need a claim that's more than arguable, it must carry some degree of conviction. So, one has to identify some reason of logic or to do with markets why if what happened in March 2018 had happened in January 2017 consumers, instead of choosing to keep the PMF, would come to Regent Street and say, "We are very unhappy and we want compensation". Nobody has identified any such reason, what was different about that period, but you have my submission on that. But even if I'm wrong about the tailpiece, as it were, we do say that post March 2018, the claim should be struck out.

That takes me to the point the Chair just put to me, which is: why didn't we take these points at certification? In analysing this, there's a distinction between what I've called issue 1 and what I've called issue 2. What is common to both is that the claim we were facing at the time was a very different claim. There were all sorts of other allegations which were abandoned in part because of the points that were taken in Apple's previous strike out application. That said, I accept the points I'm now taking could have been taken then, I'm not running away from that. But one has to ask where analytically does that go? Is it said that because I could have taken the points earlier, somehow I'm precluded from taking them now?

THE CHAIR: It's not a question of being -- we will hear from Mr Moser. But we're not suggesting you are precluded from taking them, the question is: if they were all so straightforward, is it not a forensic point to make -- well, if they were all so straightforward, you would have taken them?

MR VENKATESAN: Yes --

THE CHAIR: And coming along and pointing at Trains and saying that's the answer to everything doesn't really cut it, as would be put against you.

MR VENKATESAN: It may be that there's a forensic answer to the forensic point, which is that we were facing a claim which was alleging all sorts of other things: the batteries are defective, the sale of the relevant iPhones was an abuse, there's an abuse under section 18(2)(b), and we made a forensic choice to focus our fire on certain --

THE CHAIR: Your submission today is that none of those things can give rise to an abuse.

MR VENKATESAN: It is, and that's why I said one has to distinguish between issue 1 and issue 2. Issue 1 where I make that submission, Trains is a very important recent development which we didn't have when we were arguing this point about two years ago. What Trains says -- you've seen paragraph 61 and there are other passages, 79 and 102 in particular -- without wanting to go back over ground I've already covered, is that there is not a single case in all the years we've had abuse of dominant position in the authorities in which an otherwise innocuous system has been found to be an abuse merely because of lack of transparency.

There is significant value in a judgment of the Tribunal on a trial that says that, and we didn't have that back then. So, it was a legitimate forensic choice, indeed the responsible forensic choice, to focus our fire in the way we did. The Tribunal will know better than me that the main battleground at the May and September 2023 hearings

was whether the Class Representative had any arguable case that the relevant iPhones were substandard. We contended that he didn't, the Tribunal agreed with us. As to the Court of Appeal, they said it ought to have been struck out, and in the end it was removed. That's one reason why the points weren't taken earlier, and I will respond to any abuse preclusion argument if it's taken by my learned friend instead of doing it in opening.

But another reason is if you look at the Claim Form on tab 1, page 1, you'll see that amendments were made on 12 July 2024, which are shown in violet, it's the final round of amendments. Those amendments are significant to the way I'm putting my case because it is in that round of amendments that the Class Representative conceded -- and I apprehend my learned friend disputes this and I'll hear him -- this is the round of amendments in which the Class Representative conceded that the relevant iPhones meet the reasonable expectations of users and meet advertised expectations.

That's an important element of our case on issue 1: that having conceded that, you haven't got an arguable abuse case because there's no competition law duty to disclose matters about a product or service which everyone's reasonably happy with and which meets advertised expectations.

Indeed, because it was suggested that that was not conceded, I perhaps ought to very quickly show you. If you look at paragraph 163, page 70, you'll see in the penultimate line that it was previously alleged that the relevant iPhones were "inferior to advertised expectations", and those words have been crossed out. That again is something that happened after we had our previous hearing --

THE CHAIR: I'm lost with your position on this. You've just been making submissions to me that if you are in breach of consumer law, nothing to do with abuse of dominance.

MR VENKATESAN: Yes.

THE CHAIR: So why does it matter that amendments are being made of the type you are talking about?

MR VENKATESAN: But it's not in relation to consumer law. I make the point under my issue 1(b) that there can't be a competition law duty to disclose information in relation to a product or service if the product or service meets the reasonable expectations and advertised expectations of users.

That's a submission I make independently of whatever consumer law might or might not say; indeed, it's a submission I would make if the CPUTR did not exist. But that is a submission that is strengthened by, even if it doesn't depend upon, the concession made at paragraph 163. But the point is we have had Trains in this area of the law, which is an important development as regards the relationship between transparency and abuse, and we were facing a very different case back then compared to what we are facing now.

The final point I probably should address before I sit down --

THE CHAIR: So, your position is that it was arguably abusive prior to these amendments -- you say it was arguably abusive before the amendments.

MR VENKATESAN: No, no --

THE CHAIR: As a matter of law, the originally pleaded case would give rise to an arguable case of abuse of dominant position.

MR VENKATESAN: No, sir, I don't accept that.

THE CHAIR: So why do the amendments explain why you didn't make this application before?

MR VENKATESAN: Because it gives me a fall-back argument, that's all. My issue 1(b) is a fall-back point, my primary case is that the claim does not disclose an arguable abuse of dominant position whether before or after the amendments. But you will appreciate I have a fall-back.

THE CHAIR: Why wasn't the point taken before?

MR VENKATESAN: I accept the point it could have been. I don't have evidence about why it wasn't taken. It's recorded in paragraph 16 of your judgment that it wasn't taken.

THE CHAIR: Yes.

MR VENKATESAN: But one submission I am making which explains why the point wasn't taken is that at the time is the leading case on the relationship between lack of transparency and abuse was the Court of Appeal in Trains. We've subsequently had the Trains judgment --

THE CHAIR: It really doesn't. Trains really isn't the answer to this case.

MR VENKATESAN: Well, it's --

THE CHAIR: Just remind me: the sentence you rely on in Trains, you said you didn't want to turn it up again.

MR VENKATESAN: Yes, it's actually three passages --

THE CHAIR: Give me your best passage for the conclusion we can say it's now unarguable.

MR VENKATESAN: If you will allow me to give you two. There's paragraph 61 at page 1271.

THE CHAIR: Remind me what tab.

MR VENKATESAN: Sorry. It's tab 25, volume 3, three paragraphs, if you will allow me. 61 is the first one, page 1271.

THE CHAIR: This is, "We are not referring to any cases".

MR VENKATESAN: But they also say before what the correct analysis of Michelin is. It's only --

THE CHAIR: That's one case, yes.

MR VENKATESAN: Then paragraph 79 at page 1276. I rely in particular on what is

said between letters G and H:

"The fact that the dominant company could have done something differently which would have benefited consumers, does not mean that this conduct crosses the line to constitute abuse. The law provides other means to investigate and potentially control the conduct of enterprises."

THE CHAIR: Again, that doesn't really nail it, does it?

MR VENKATESAN: Well, I mean -- but it's --

THE CHAIR: We can all agree competition law is not a general law of consumer protection.

MR VENKATESAN: I also rely on 102 at page 1283:

"A dominant company has no duty under competition law actively to assist all its consumers ..."

Sir, I accept what you are putting to me: I can't point you to a case that says in terms that --

THE CHAIR: But the fact is you are not seriously submitting that this decision represents a change of the law such that an application that could have been made at the start of these proceedings now can be made because there's been a change of law --

MR VENKATESAN: No, I don't say the law's changed, I do say the law's crystallised in the sense that what you see in paragraph 61, it's the first time certainly to my knowledge any English case has said in terms at least that lack of transparency is usually only an enabling or aggravating factor as distinct itself from giving rise to an abuse.

But it's not just that; it's also the disposition of the Trains case on the facts. What the Class Representative was alleging in Trains was that by obscuring or concealing boundary fares and thereby double charging consumers, that amounted to an abuse.

That case was certified, which is how the world was when we -- I wasn't there, so I can't really say "we" -- had the prior hearing in this case. But the claimant failed at trial in part because the Tribunal found that not taking all possible steps to publicise boundary fares is not as a matter of law an abuse, and that itself was an important development in the law, we say.

Maybe I should leave that point there because unless my learned friend is going to be submitting that the fact we didn't take the point earlier -- and I accept we could have done, I'm not saying this point was not available to us. I'm just saying it was a reasonable forensic choice not to take it, given the smorgasbord of points we were faced with. I'm not saying it's impossible for us to have taken it, but one does have to ask: where does that go? Is it just a forensic point, or is it suggested that we are precluded? If the latter is what my learned friend is submitting, I'll address it in reply.

I ought to just mention before I sit down two points coming out of the Supreme Court decision in the FX or Evans case.

THE CHAIR: Just remind me where it says that it's inadmissible as evidence at any part of the proceedings or close to a trial?

MR VENKATESAN: Yes. It says that at paragraphs 144 and 159, but can I just take you through it. It starts at page --

THE CHAIR: We've all read it, so just go to the key --

MR VENKATESAN: Yes. Paragraph 144 to start with, at page 1444, behind tab 25: "It is a general rule of the common law that findings ..."

THE CHAIR: You don't need to read it out, we've read it. Just the bits you particularly rely on.

MR VENKATESAN: Yes. Then paragraph 149 refers to the previous position, which was established by the Court of Appeal which said --

THE CHAIR: So 147 refers to Hollington --

MR VENKATESAN: 147 refers to Hollington.

THE CHAIR: -- and says that a trial of collective proceedings, it would not be appropriate.

MR VENKATESAN: Yes.

THE CHAIR: That's from Qualcomm, yes.

MR VENKATESAN: That's from Qualcomm then 149 refers to the Court of Appeal in that case where it's said that --

THE CHAIR: A criticism of Lord Justice Green's approach, yes.

MR VENKATESAN: Yes. That is not endorsed at paragraph 151, it says --

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

MR VENKATESAN: Then 152 says:

"In our view, the rule in Hollington v Hewthorn does indeed apply to the Tribunal."

And then importantly at 158 to 159, page 1449, that's the answer to the point you were putting to me earlier, which is 158 refers to Commercial Court decisions which had suggested that the rule in Hollington v Hewthorn doesn't apply in interlocutory proceedings. There's a quotation from a judgment of Mr Justice Miller in the Chancery Division, then at 159 they say:

"We endorse this analysis, save only to observe that reliance on findings of another decision-maker for the purpose of identifying evidence which can reasonably be expected to be tried is not inconsistent with the rule in Hollington v Hewthorn."

What this is saying is you can't rely on findings in their capacity as findings; you can only rely on findings insofar as they tell you what sort of evidence may be available at trial in these proceedings.

If the CMA had said something that in its view Apple's conduct infringed a particular provision, that of itself is inadmissible. What you can do is look at the findings of other regulators if there's an issue about what evidence might be available at trial, but

nothing in the strike out turns on that. To the extent my learned friend wants to pray in aid what the CMA concluded, that is inadmissible in its capacity as a conclusion.

THE CHAIR: Right.

MR VENKATESAN: The other point I wanted to draw to your attention in FX or Evans is at paragraph 79 -- it's not on Hollington v Hewthorn, it's a different point -- page 1425. This refers to the gatekeeper function of the Tribunal and to its power of its own motion to strike out a pleaded claim. It says in the second line at paragraph 79:

"Collective actions absorb a very considerable amount of court time and resources which the Tribunal has the power to --"

THE CHAIR: Yes, you have cited this in your skeleton.

MR VENKATESAN: The only reason I mention it here is it goes back to the point we were just discussing about why didn't Apple take these points last time round. If it's going to be suggested that is somehow preclusive, one difficulty with any such submission is that certainly in a collective action, if you were satisfied that this claim is unarguable, or some aspect of it is unarguable, we would respectfully suggest that the gatekeeper function is a powerful reason to give effect to that.

THE CHAIR: We have that.

MR VENKATESAN: May I have a moment to check, sir ... **(Pause)**

Subject to anything I can assist you with, those are my submissions in opening.

THE CHAIR: We are obviously interested in the correct legal approach in the light of in particular your paragraph (g) --.

MR MOSER: Yes.

THE CHAIR: -- how that fits into the law. You will need to address the pleading points, no doubt, those are the areas we are particularly interested in.

MR MOSER: I appreciate that, and I would seek to concentrate on that.

THE CHAIR: We have to assume the facts are in your favour and the allegations are in your favour.

MR MOSER: Indeed. There's been little mention in fact of the test -- I think my learned friend did avert briefly to Easyair. There's been a shorthand of argument, I'm content with that. There's been no mention at all of the Pro-Sys test, so I discern that there is in fact no decertification as such being brought, it's really all a strike out. Unless somebody tells me otherwise, I'm going to restrict myself to the strike out points which are being brought against me, so arguability --

THE CHAIR: Sorry, Mr Moser. Before you get started, there is one other thing which may be just to be addressed over the adjournment. There's some confusion in my mind as to -- I don't have the dates in my fingertips, back in 2016, whenever it was, where this problem arose, and then the software was updated through that first release, 10.2.1, I think.

MR MOSER: Yes.

THE CHAIR: Then subsequently, still during the period of the claim when people went and bought their phones, did they have it already updated at that stage? I mean, updated the moment they switched it on, as opposed to an owner with an existing phone, if that makes sense.

There would be some people who had a phone without any power management function, and it was then downloaded on to the phone. But presumably there are some others where that was already on the phone when they bought it or installed immediately and they are not in an identical position -- you may tell me it doesn't matter -- the various phones that are affected phones, I'm a little unclear as to what categories they fall into or whether we need to worry about that.

Submissions by MR MOSER

MR MOSER: We'll seek to get you the dates if it matters. My submission, as you with

respect rightly anticipated, is it doesn't matter. If you remember our point on this was that whereas later on during the currency of the claim period, this issue was already, as it were, baked-in because the update had happened earlier. The vice which we are directing our claim at, which is that this was a concealed problem, the vice carries forward so that the consumers may not have had a chance to avoid the update in the first instance, but equally the people who then go and buy it in good faith don't have the chance to make an informed choice either because they already have it with the same problem baked-in. So that was the way it was put at the time. I will get you dates.

I have about ten minutes or so before the short adjournment and I thought it might be useful in that time to look at the pleadings as such and maybe make some remarks about disclosure. We didn't hear very much today about disclosure because there's a lot in the skeleton argument about why haven't you pleaded the disclosure? We have no obligation to do an ambulatory ongoing pleading of disclosure. I'm not going to respond to a lot of points that weren't made, but I may want to show you one or two documents to frame what I say, and then I'll deal with my learned friend's pleading points.

Just by way of a sort of general introduction, I submit there are a number of fatal flaws in Apple's argument. The first one is that they concentrate on a few things which they say are not pleaded or are changed in the pleading and extrapolate back from that that we've made concessions and somehow no longer have a viable case. The point I was going to make is one which has already been made with respect by you, sir, which is: are you alleging there was no case, the way it was -- that there was a case the way it was pleaded before? But my learned friend said, "No, there wasn't a case the way it was pleaded before either". So it's unclear where that leaves me.

But Apple ignores the fact that the case before us is the one that was pleaded and

was certified at the time and was approved by the Court of Appeal and by this Tribunal. It wilfully fails to, or claims to fail to, understand the process as ordered by the Tribunal most recently again last July; namely that disclosure is to be completed and then the pleadings may be reviewed and refined. That is the process we are following. I appreciate my learned friends weren't part of that until today, but that's why it's surprising to be told why haven't you pleaded this or why haven't you pleaded that? This is a tailor-made process that I can readily see is not usual in, say, the Chancery Division, but that is the process we are in in this court, in this Tribunal, with a more iterative approach to a disclosure of pleadings. So --

THE CHAIR: But disclosure, to some extent, it seems to us to be a little bit of a red herring because we are having to assume the facts in your favour so we assume you'll get the documents, or you will be able to make good factual allegations that you rely upon.

MR MOSER: It may be so. I'm going to only make one more point about disclosure, which is perhaps a jury point. We've made it in the skeleton argument and it is our submission, it is our suspicion, that Apple is doing it at this point in order to avoid having to give full disclosure, and that is a point you'll have seen.

As far as the pleaded case is concerned, the pleaded case we say has not altered since certification. If we look at the CPO judgment, this Tribunal's judgment, which is in the core bundle, the relevant part at paragraph 20 onwards. That is core bundle 224 and following. This is your judgment --

THE CHAIR: I know, but which volume is it in?

MR MOSER: Core bundle. At 224, we have the pleaded allegations with the description of what was in paragraph 7(a) of the re-amended collective proceedings Claim Form. It was identified at paragraph 23 what we had said at the time about the battery issues and in particular 23, a few lines down:

"Instead of remedying the problem for all of the affected products [paragraph 148], for instance by offering a refund or compensation ... Apple sought to conceal the battery issues. As a result Apple was able to continue charging and/or escape the consequences of having previously charged prices but that did not reflect the actual lower value of the Affected iPhones, resulting in Apple imposing unfair prices on consumers because Apple charged (and consumers paid) premium prices for handsets that could not perform as expected."

This was essentially certified with certain other aspects. What was not certified was the substandard part -- you will remember this -- and that's referred to at paragraph 24 and paragraph 156. Importantly, over the page at 25, paragraph 158 says:

"Further, Apple's lack of transparency and concealed use of the throttle hindered its customers' ability to make informed decisions. It was therefore likely to distort Proposed Class Members' decisions, including as to whether to buy an affected iPhone [that's the point I've just made to you] or install relevant iOS upgrades [that's the other point] and impeded or deterred them from exercising their legal rights, whether under Apple's warranty or through separate complaints, to seek a refund or replacement battery."

What happens about this in the Court of Appeal is that we say we are not actually ever going to say that we need to prove --

THE CHAIR: Yes. We have that in mind in our (inaudible) procedure, yes.

MR MOSER: Yes, exactly. That's the only change made in that regard.

Again, we have at 26 the citations from 171 and 172, and the second paragraph in 26, three lines down:

"Apple's concealment of the battery and throttling issues and its failure to provide timely and transparent explanations of the purpose and the effects of the PMF and/or redress meant the users of the Affected iPhones, already in a weakened position, were

unable to make an informed choice whether to retain, switch or upgrade device, exercise their legal rights, and suffered detriment as a consequence."

I say even without going very much further, everything that is now said to me which was not pleaded: concealment, detriment, the material effect on the iPhone, all of that is in there.

My learned friend has concentrated very much on one particular paragraph of the re-amended Claim Form, and that is the paragraph at page 66 -- paragraph 156, core bundle page 66, re-amended Claim Form. It's said against me, "They've made a concession, they've made a concession that the phones functioned in a way that was reasonably expected". I have asserted that that is not common ground, as has been said against me. If we look at paragraph 156, what that was is the paragraph which talked about reasonable expectations from advertising and other matters. The Tribunal will recall of course that those were the aspects with which the Tribunal was not impressed.

I was told: I don't think you've established or you would be able at trial to establish that there is a standard below which this phone -- the phone itself, the handset, the functioning product -- a standard below which this phone has fallen. And you remember I had the table and I said, "Well, if you look for a standard, maybe this line here"; and you said, "No, no, you are going to have to get rid of this idea of a standard". That's why it has been amended in the way it has. And that is not because we have somehow changed the Claim Form in a way that has removed an arguable certifiable case, it is because we have amended the Claim Form in precisely the way that the arguable case was certified.

And, of course, we say not only that the affected iPhone was negatively affected to such an extent that the affected iPhone was subject to significant levels of throttling; but also that that resulted in a materially worse user experience than would have

occurred had the power management feature not been implemented. There's the reference then, confidentially, to the CMA consultation letter, "and render the affected items less valuable as a result." So we are putting it differently now because we are no longer making the non-certified argument about substandard. But it's absolutely pleaded that it resulted in a materially worse user experience than would have occurred without the PMF, and that's our case.

To turn that amendment against us and say it's a concession, that somehow the phones performed in the way that was reasonably to the standard that was reasonably expected is with -- well, apart from being unfair -- is, with great respect, entirely illogical. Since it's already been established that the Tribunal doesn't accept that there was such a standard, how can it be said that the phones in fact met it? That is possibly a consequence of changing the counsel team in midstream. I make no criticism of anyone. But the way that you remember these things almost organically from previous hearings, the collective memory of that, that can sometimes be lost. And so now my learned friend looks at it with completely fresh eyes and without the history and makes a submission which I respectfully submit he wouldn't make if he'd been there at the time. He may well have said he would have made different arguments if he had been there at the time, and I will come back to that, but that's by the by, because we cannot go back.

The same is of course true when he was finally pressed on this of paragraph 163, page 70, where "substandard" was replaced by the words "negatively affected as aforesaid", meaning as aforesaid in the amended paragraph 156; and that's because -- well, for the same reason.

So what is this abuse? As briefly as I can before the break, and I sense I don't have to do very much on this because it's clear from the comments made by the Chair and by Mr Ridyard that the Chairman has well in mind how we are putting this case. But

the abuse is not a lack of transparency itself. I have to say that, I know it's been said by the Tribunal but I am going to say it, it's my submission what we have here is a software update. Nothing abusive about a software update. What the software update does is it throttles the phones. Now that is potentially abusive, depending on how and why it's done. But I don't even have to go there because what I say makes it clearly abusive, whether or not it's otherwise arguable, it is that it was all done covertly, as it expressly pleaded. It's pleaded in the particulars, it's pleaded again in the reply, we've summarised it in paragraph 26.

The normal processes of being abused, to put a hidden throttle on the iPhones, with the aim -- and that is pleaded, I've just read it to you from the pleadings -- with the aim of protecting the dominant product and the market position and the high pricing of the dominant company, to the detriment of its customers, potentially keeping them from switching to other products, but above all, to the detriment of its customers. That lack of transparency has rendered what would otherwise be a potentially -- potentially -- legal technical fix abusive in the sense found by the Court of Appeal.

My learned friend says, "Oh, the latest word on this is the CAT in Trains". With great respect to the CAT in Trains, the latest word on how transparency works in competition law remains the Court of Appeal in Trains because that's talking generally. And we remind ourselves just in the last minute of what Lord Justice Green said in the Court of Appeal. It's authorities bundle tab 18 at page 931.

THE CHAIR: Sorry, can you repeat that.

MR MOSER: Yes, authorities bundle, tab 18 at page 931. This is Lord Justice Green talking generally in Trains about a lack of transparency; and Michelin, and he says:

"A lack of transparency can be an important factor in rendering unlawful that which might otherwise be lawful."

There's a discussion of Michelin and there's a reference to:

"The rebates were abusive for a number of reasons, one of which was that they were lacking in transparency."

Michelin is not on all fours with this case. But the point is this Tribunal, certainly on a strike out, remains bound by Lord Justice Green in Trains, Court of Appeal, that wasn't appealed any further. Nothing that was said in the CAT in Trains cuts across this, and indeed, even if it did the Court of Appeal is the higher court. So, nothing has changed about our transparency case and how we put it since the last time.

Trains in the CAT was lost on a number of reasons. Above all it was found on the facts that there was no lack of transparency, it was found on the facts that these boundary fares --

THE CHAIR: Had been advertised.

MR MOSER: Yes, it had been advertised. They were sufficiently available and: nothing to see here. That's the facts of that case. Importantly, we say, on the facts of this case, we are going to say that on the very different argument the hidden throttle was both a throttle and hidden and had a detriment, it's completely a matter on the facts. That's the vice. And the lack of transparency makes that an abuse, even if --

THE CHAIR: Could you give us some assistance on why that makes it an abuse of dominant position and not just some breach of some other consumer-orientated legislation regulation, why it falls into the categories of abuse.

MR MOSER: I'll come back -- indeed, indeed. I will come back to that, but the short answer is that we are talking in section 18 about unfair selling systems. We disagree with my learned friend when he says well that's only talking about terms and conditions, effectively. Not only we disagree, but actually again the Court of Appeal -- sorry, I'm conscious of time but it might well be worth just mentioning this. Again, the Court of Appeal has something to say about that. I'll come

back to that I think after lunch.

THE CHAIR: I suppose the point you make in paragraph (g) is that this activity, leaving aside the discussion on calculated, this is an aspect of the benefits to Apple of engaging this activity, you say is shoring up your market and shoring up your dominant position.

MR MOSER: Exactly it does that, to the detriment --

THE CHAIR: What cases assist us on the fact that an abuse can be taking steps to shore up your dominant position, as opposed to abuse that gives rise to higher prices or affects a consumer in some way? That's the bit that we are having a little bit of difficulty with at the moment I guess.

MR MOSER: Like my learned friend -- and this is perhaps why this is so obviously a case for trial -- like my learned friend --

THE CHAIR: You have the luxury of saying that, he doesn't.

MR MOSER: Exactly. Exactly. This is going to be the case that answers that. But certainly arguable.

THE CHAIR: Shall we come back at 2.00.

(1.06 pm)

(The short adjournment)

(2.00 pm)

MR MOSER: Immediately before the short adjournment, we were talking about where it was perceived I might be able to assist the Tribunal in relation to particularly -- shall we call it paragraph 26(g) of our skeleton argument -- and why is that an abuse? Why do you say that's an abuse? I didn't come armed with some of the things I wanted to say, having reflected on my answer to that question over lunch, but I hope I'll manage to get by and then my learned friend will certainly have it I hope before he rises.

I want to start with section 18 again, which is in authorities bundle 3, I think, but

anyway it's tab 29, AB-1466. That's the law we are dealing with; the Competition Act made in 1998, essentially domesticating what is now Article 102 of the treaty, or at least section 18 encapsulates Articles 102(1) and 102(2). Objective justification is dealt with a bit differently domestically, but it's essentially the same as 102(3), it's just not here.

At the time the Competition Act was originally made of course in 1998, there was no question yet of this Tribunal awarding damages to consumers. The nature of competition law in the 1990s was broadly as it had always been since the 1950s under the treaties and it was about protection of the market. So what article 86, as it then was, about abuse of a dominant position was doing, it was regulating competition in the market and in particular in relation to monopolies and quasi-monopolies, and the like.

The idea that there was an element of consumer protection wasn't even a twinkle in anyone's eye, and I talk about consumer protection strictly in the sense of consumers being able to rely on the relevant provisions in order to bring now damages claims, and that's a 21st century innovation of course.

When we are looking at section 18(1) and (2), we are above all looking at a section which is talking about the protection of competition within a market. Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within, in this case, the United Kingdom; and then there are some examples well-known: prices, unfair trading conditions, limiting production, discrimination of some sort, or supplementary obligations. And the fons et origo of a dominant position is of course the Hoffmann-La Roche case, often cited, and it's cited in various places in the existing bundles. I've asked for a copy of the actual Hoffmann-La Roche to be brought and I'm sorry it hasn't appeared yet. But I can tell you why I want to go to this origo is because apart from

the definition of dominance, which is about firms being able to act independently in the market of its competitors. Apart from the definition of dominance, there's an interesting point made there around the purpose of competition law, and it's at paragraph 91 of Hoffmann La Roche.

THE CHAIR: Tell us what it says now and you can email us a copy.

MR MOSER: I will read it out, I'll show my learned friend -- it's Hoffmann-La Roche, paragraph 91. It's all about at this stage an argument made by the applicant in that case that an abuse implied the use of economic power bestowed by a dominant position has to be the means whereby the abuse has been brought about. It's a slightly different point, but we know that, it's now well-established. You don't have to have used the quality of your particular dominant position to make it an abuse.

But then in the second part of 91, what the court says is interesting:

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where as a result of a very presence of the undertaking in question, the degree of competition is weakened, and which through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction's commercial operators has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

That last bit is what in more modern authorities is called competition on the merits.

What the dominant firm does, by its very presence it, as it were, bends space within the market, so it already has a special responsibility not to abuse its dominant position, and that includes not to abuse it in ways that are not directly related to the reason for its dominance. The originating theory is that they must not further distort the market by their actions.

So it's not the case that just because we are bringing a claim on behalf of a class of

consumers now in 2026 that the abuse of a dominant position has to be founded somehow of direct consumer loss. We need that of course for causation, and we've explained how that comes about. We have the methodology provided by BRG about how the loss of value of the phones, the premature update losses, and all of that, in fact lead to consumer losses. But the theory of the abuse which is encapsulated in paragraph 26(g) of our skeleton argument is one that's based on first principles, and the first principle is the one I've just outlined.

I've relied in my submissions specifically on the phrase "unfair trading conditions", and my learned friend says, "Ah, but if you look at the CAT in Trains, then that's really about terms and procedure", which I reject. I do that to move now from the high-flowing theory to the concrete by pointing to case law that shows it can absolutely be systems that can be an abuse of a dominant position by way of unfair trading conditions.

I need go no further again than the Court of Appeal in Gutmann, and that's authorities bundle, page 925, tab 18. Quite interestingly, there was a strike out sort of argument in Trains about what unfair abuses could be and although eventually on the facts they weren't found established, I think it's informative to remind ourselves that that failed in the Court of Appeal. At paragraph 91, there's a reference to section 18 of the Act, providing that:

"The abuse of a dominant position may consist *inter alia* in directly or indirectly imposing unfair prices or other unfair trading conditions. The CAT set out in some detail the relevant law. It concluded that the law on unfair abuse was in a state of development and that the categories of abuse were not closed."

And that's definitely common ground:

"It held that it was neither an extraordinary nor a fanciful proposition to categorise as an abuse a system operated by a dominant company which failed to be transparent

as to the availability of cheaper alternative prices for the same service."

Those were the facts of that case, and it's interesting to look at Lord Justice Green's judgment and how he discusses that over the page starting at paragraph 93 because much overlooked -- I understand the Gen Z term is "much slept on" -- is paragraph 93 of the Court of Appeal where it's found that the law relating to abuse is concerned with consumer unfairness because when “an undertaking is dominant, it is, by definition, freed from the competitive shackles which otherwise incentivise and discipline it to maximise consumer welfare and benefit."

I pause for a moment: it's not consumer law, competition law is not consumer protection law, but it is always concerned with consumer unfairness. Lord Justice Green explains that is why most laws worldwide which prohibit abuse of dominance include within the prohibition the imposition of some form of unfair term and prices. These are exploitative abuses and of course it was argued in that case, as it's argued against me today, that if you want to establish an unfair trading system, you have to establish unfair terms and prices, full stop. It doesn't go further.

But Lord Justice Green rejects that and he rejects that by reference to a series of cases. So if it is cases we look for -- and they are not unfamiliar to us, these cases, because they keep cropping up in this matter -- the first case is Deutsche Post, which is referred to at paragraph 94 by the Court of Appeal. That was about charging the full rate of postage and not upsetting or otherwise accounting for a part of a service that was already paid for -- you can see why the Class Representative was running that point in that case. But there's a more basic point about Deutsche Post, which is it wasn't about terms and conditions; it was about a selling system whereby they charged the full postage, regardless of whether you'd already paid for the inland leg.

There's a similar point made at 94 in relation to the DSD case, Duales System Deutschland, a company operating a system for collecting waste packaging had

abused its dominant position, and the system was -- there was something called a green dot, Der Grüne Punkt, that if you had applied that, you were exempt. But Duales System Deutschland would charge you regardless of the exemption. So again, no term or condition, it's just a system they operated led to the unfairness, distortion of the market, and loss. 96 is a reference to BRT, an old case, an undertaking which sought something for nothing, held to be abusive.

Then the long reference I won't detain you with, but the long discussion of the Facebook case in Germany at 97. At page 930 of the authorities bundle, paragraph 100 of the Court of Appeal, Lord Justice Green said:

"Facebook is an example of an unfair intrusion into consumer rights. It seems on a par with the case law. Further, illustrations of non-price abuse which also highlight how the law protects consumers against unfair intrusions into their rights are found in Tetra Pak.

It's apposite that all of this is in fact the preamble to that bit I did cite on transparency at paragraph 101 that a lack of transparency can be an important factor in rendering something unlawful. Then there's a reference to Michelin. So what we have here is a whole series of cases which we rely on by analogy which say: yes, a system properly so-called can be part of what is now section 18 on the unfair trading system, and is there a case that establishes that in the digital era, abusing your online update rights, no, no, of course not. But that's going to be this case. And to say there is no more than a fanciful arguable non-strikable point, I say is simply not sustainable.

The highest my learned friend was able to put it, I submit, was by reference to the judgment of the CAT, which is in this same bundle at authorities bundle 1271, at least it's the same in my copy, it might have slipped into the third in your copy.

THE CHAIR: Which case?

MR MOSER: It's the case of Trains, the final judgment in Trains in the CAT, and that's

at paragraph 61 at 1271. It is the one my learned friend relied on.

THE CHAIR: Yes, we didn't get a lot out of that --

MR MOSER: I know, but I'm going to make a different point. I get something out of it because the last sentence:

"We were not referred to any case where the lack of transparency of an otherwise innocuous system could in itself constitute an abuse."

It's very important, in my submission, that they say "an otherwise innocuous system" because we do not say that the system was otherwise innocuous; we say it was made nocuous and it was made nocuous by the hidden throttling that went on. So there we are.

In fact, the Trains case is worse than not taking the matter any further. Properly read, it seems to support what we say in paragraph 61, but of course they didn't have to discuss that for all the reasons we've discussed.

That's how I say the abuse was. Unless I can help you further on that point, I plan to do two things now. The first thing is I do want very briefly to look at some of the disclosure and the CMA letter, just to remind ourselves. For that, we'll have to go into private, but not for very long. Then I'll go through the remaining points made by my learned friend against me.

THE CHAIR: Yes. We obviously have the CMA letter very much in mind. Your point on the extent to which we can rely on it at all at this stage of the proceedings, are you going to address that?

MR MOSER: This is partly a hangover from, as I say, the skeleton argument where there are a lot of points made against us: there's nothing in the disclosure and why haven't you pleaded it? We haven't had full disclosure yet, we have had very selective disclosure. We don't dispute their table, but in many cases, we have documents in single digit numbers and duplicated and redacted, all the rest of it.

All the disclosure to date, including the disclosure in relation to foreign regulators, has been either specific or suggested by them and selected.

THE CHAIR: What are the facts we need to decide today to which disclosure might be relevant? Why are we even addressing the topic?

MR MOSER: It was really -- if you are completely with me -- I might just show you one document.

THE CHAIR: Yes, please do. I'm not trying to stop you, Mr Moser, I'm just trying to understand --

MR MOSER: I might not have to go into private just to show it to you.

THE CHAIR: Let's have a look.

MR MOSER: Even in the distinctly exiguous disclosure we have received, which was either slight or selected by them, and even though parts of it has been redacted allegedly for confidentiality, please could I ask you to turn to the supplementary bundle. The far end of the supplementary bundle at tab 81, which is the exhibits ... yes, it is. It's the exhibit DA3 to Ms Antzoulatos's statement. It's page SB-1366 --

THE CHAIR: Give me a second.

MR MOSER: It's online as well.

THE CHAIR: Yes. Which page of that?

MR MOSER: SB-1366. I'm going to be as careful as I can --

THE CHAIR: Sorry, Mr Moser, can you repeat yourself. What was the page number again?

MR MOSER: S**B-1366.**

THE CHAIR: "Hi" and then someone's name at the top.

MR MOSER: "Hi" and someone's name. The names are Apple engineers' internal communication. I just want to direct --

THE CHAIR: Sorry, my screen is asking me to update software.

MR MOSER: I can't assist with that, I'm afraid. Perhaps some of these Apple engineers would be useful.

THE CHAIR: Yes. Sorry, Mr Moser, can we come back to this -- can I ask you -- hold on, I've managed to get rid of that. Okay, I think we can carry on.

MR MOSER: I can give you a hard copy if it helps.

THE CHAIR: Okay, we can see it. **(Pause)**. What do you want us to read in it?

MR MOSER: I don't think it's in any way forbidden to say this is a document from December 2016. We know this is around the time of the update, and you will see what the engineer whose name is in the middle of the page at 1367 at the end of this email says at the beginning of his email under "Hi team". I won't read anything else, but if you read from there until it says "Redacted", three lines. **(Pause).**

The other engineers put some comments in line, but then there is another line which says "I think".

THE CHAIR: Yes, I have that.

MR MOSER: That's all I wanted to show you as an indication that we are not imagining all of this.

THE CHAIR: No, you say this was a serious issue.

MR MOSER: A serious issue. Is it a smoking gun? I don't know. But that will be a matter for trial. When we talk about all these matters about what has been pleaded and not pleaded, and what is deliberate and not deliberate, those are very technical matters. We've summarised what we're saying in paragraph 26 and far from the disclosure somehow having provided the other side with a clean bill of health, it has put us further on enquiry, and that will be a matter of discussion at the CMC.

THE CHAIR: So, the CMA letter, are you placing any reliance on that today, or --

MR MOSER: I am placing reliance on it very much today as I did before the Court of Appeal, and as we do in our pleading.

THE CHAIR: We've had Evans since -- you heard submissions from Apple on Evans saying that we can't look at it.

MR MOSER: Well, they say you can't look at it as Hollington v Hewthorn. I say you can look at it and you have to make up your own mind on the underlying evidence. The difference between Hollington v Hewthorn as it applies in its strictest form in relation to matters where the party was not involved, as was the case in Evans, is a bit different in this situation where we are talking about Apple itself having been in discussions with the CMA, having been at the wrong end of that letter, and having given undertakings. So that can't exist in an inadmissible box not to be looked at by the Tribunal.

MR RIDYARD: And you are flirting with keeping the CPUTR. Why haven't you done that, what are you waiting for?

MR MOSER: We have pleaded it. It's in the particulars of claim. The flirt or the --

MR RIDYARD: Just remind me where it is in the particulars of claim.

MR MOSER: Yes. It's -- forgive me, I'll just look it up.

MR RIDYARD: 177?

MR MOSER: 176. What happened here is we pleaded reliance on the CPUTR, page 75 --

MR RIDYARD: I suppose by analogy.

MR MOSER: We put in those words "by analogy". What exactly we meant by that may be a matter of debate, but we then said in reply "To be clear, we are saying it's a breach". Two comments to be made about that. The first comment to be made about it is that -- and this is somewhere where arguably the Trains judgment is at fault for something moving on -- in the CAT Trains judgment, they said if you are going to establish that as being a Meta-style vital clue to the fact that there had been a breach of competition law, you do have to establish there was a breach, not just a vague by

analogy.

In Trains, it wasn't pleaded, it was introduced at a very late stage, there was no evidence about it, and the CAT rejected it out of hand. Because the phrase "by analogy" was used in the CAT Trains judgment, we thought let's make it clear that we are not just on this occasion going to allege it in some vague way, but we are going to say there is a breach. That is on all-fours with the way the discussion developed in the Court of Appeal, and my learned friend didn't go for this part of his skeleton --

MR RIDYARD: You say in paragraph 16 you are going to plead it.

MR MOSER: Yes.

MR RIDYARD: Why haven't you?

MR MOSER: Because under the Tribunal's plan, we haven't reached the repleading stage yet.

MR RIDYARD: But this is not dependent on disclosure. Just looking at the CMA letter, there is nothing in there that you don't know already.

MR MOSER: No. We could replead it by simply removing the two words "by analogy". It may not even be necessary to remove "by analogy", the point is we are making it clear and everybody knows, and I said it to the Court of Appeal (inaudible) has led me on to the point. It's there in the transcript at pages 102 to 104.

But yes, what we are going to do in this regard is we are going to establish independently that there was a breach of the CPUTR, and then you have the Meta device which is you have the breach of another form of legislation -- in Meta it was the GDPR -- and the breach of that, whilst not in itself being a finding of breach because the CAT doesn't go about make findings of breach of a CPUTR, is a vital clue to the fact that competition law may have been breached. And that's all it is.

MR RIDYARD: If you plead it, do we then have to make a ruling on it?

MR MOSER: Yes, you'll have to make a ruling of at least in principle the CPUTR

would have been breached. But it doesn't have the consequences of a CMA finding that the CPUTR has been breached because that is not what this case is about. If you like, I can show you the passage in Meta where the Court of Justice discusses how that is done.

MR RIDYARD: Remind me where Meta is. **(Pause)**.

MR MOSER: It's tab 20 in the authorities bundle, page 982 is where it starts. At page 1033, there's a discussion in paragraphs 46 and 47 of the difference between what the Competition Authority can do and what the court can do. It says:

"In accordance with Regulation 1/2003, the Competition Authorities have the power to take decisions finding an abuse of a dominant position by an undertaking whose objective is to establish a system which ensures competition in the internal market is not distorted, having regard also to the consequence of such abuse for consumers in that market ..."

Which is actually a much more concise way of describing what I described at the beginning of this afternoon:

"As the AG observed when taking such a decision, a competition authority must assess, on the basis of all the specific circumstances of the case, whether, by resorting to methods different from those governing normal competition in products or services the conduct of the dominant undertaking has the effect of hindering the maintenance of the degree of competition existing in the market.

In that respect, the compliance or non-compliance of that conduct with the provisions of the GDPR in that case [I would say in this case read the CPUTR] may depending on the circumstances be a vital clue among the relevant circumstances of the case in order to establish whether that conduct entails resorting to methods governing normal competition ...

It follows that in the context of an examination of an abuse of a dominant position by

an undertaking, it may be necessary for the competition authority also to examine whether that undertaking's conduct complies with rules other than those relating to competition law, such as the rules on the protection of personal data laid down by the GDPR."

There's then a further discussion on article 102, and so on article 102 and so on.

THE CHAIR: Whether you are in accordance with consumer law may be a clue as to whether or not this is competition on the (inaudible).

MR MOSER: Yes. That's actually why we've pleaded it by analogy. Perhaps I should stand by "by analogy" --

THE CHAIR: I understand the point. You say "by analogy", but then you do say you are going to plead it. That was (inaudible) my question, as I understand your submission.

MR MOSER: Yes. That's not least because of the discussion I had with Lord Justice Green, who seems to feature a lot for some reason. But he said you have to prove breach; I said yes, yes. That's why we put it in the reply.

That's where we have the CPUTR --

THE CHAIR: Just help me with this: the point which is troubling us a little bit is we understand your case on people who bought their phones and then there's software unbeknownst to them, which has updated and the function of their phone has changed. But it's not clear how that case can extend to people who bought the phone with the PMF in already. Any time a consumer buys a sophisticated article, basically they have no idea how it works, they have no idea what engineering compromises have been made. All they know is it either -- it's sold on the basis of certain promises and it either satisfies those promises or it doesn't, and you've abandoned your promises case.

So what is your case on phones which are purchased with the PMF already installed as an engineering decision -- and by that I am including those where -- or at least

I want to understand better those where the PMF is installed as soon as you switch it on, pretty much.

MR MOSER: Yes. It is as pleaded at the moment, as I mentioned just before the break, that our case is in that situation, the people who are buying the phones are also potentially making a different transactional decision to the one they would have made if all of this had been out in the open. Because it would have been -- first of all, it would haven notorious because all of it would have been properly disclosed, transparently disclosed at the time it should have been. Secondly, it ought to be disclosed to --

MR RIDYARD: What do you disclose? There's nothing to disclose if the problem and the solution are in the phone and you are just faced with a phone that operates slightly more slowly, but then slower than what? Slightly more slowly in certain situations.

MR MOSER: Of course the question -- I'm sorry to start with a contradiction, but I come back to the answer.

MR RIDYARD: I'm just trying to understand.

MR MOSER: The question about slightly more slowly, that's all for evidence, because we of course say it was significant. But what Apple were doing were selling a product that was materially less valuable than expected.

MR RIDYARD: Less valuable -- then you are back into the promises that have been made. Less valuable than what?

MR MOSER: Less valuable than --

MR RIDYARD: Than the fictitious product --

MR MOSER: -- a premium product of this kind. The way this is actually currently pleaded in 156, or whatever it is, it's the same whether you've bought the phone and it is made less valuable at some point by the update; or whether it's already been made less valuable --

MR RIDYARD: Less valuable than what?

MR MOSER: Less valuable than the original product when it went on the market.

MR RIDYARD: But it's not less valuable than the original product which went on the market in the sense that the product that went on the market was always vulnerable to UPOs. There was never a phone which didn't have that problem. As I understand it, the two factors are the demands that are put on the phone, and chemical age of batteries, those are the two things. There was never a phone that was perfect and didn't have those problems.

So your case when you have somebody who has a phone, you say they should have the choice -- to be open with them and they should have the choice as to whether or not they put up with the occasional shutdown, or whether they have their phone slowed in certain circumstances. It's their phone and they should have that choice and Apple should have been open with them.

When you are buying a new phone with everything already installed, or installed when it's switched on, why is that not saying that in every case there's some requirement on vendors to explain all the engineering compromises they've made?

MR MOSER: It's not the case, we say, of simply all the engineering compromises for the people who buy affected iPhones anymore than the people who have already bought one and it becomes an affected iPhone. So, we simply disagree, with respect to my learned friend, and it is as we've pleaded at paragraph 156:

"As a result of the PMF, the quality, functionality, speed and performance of the affected iPhones was negatively affected to such an extent that the affected iPhones were subject to significant levels of throttling of" --

THE CHAIR: Sorry, take that again more slowly. Apologies, I didn't have it open.

MR MOSER: No, so sorry. It's CB-66, I didn't give you the page. Core bundle, paragraph 156:

"As a result of the PMF, the quality, functionality, speed and performance of the

affected iPhones was negatively affected to such an extent the affected iPhones were subject to significant levels of throttling of key hardware components, (CPU, GPU) which resulted in a materially worse user experience than would have occurred had the Power Management Feature not been implemented ..."

This is all as certified:

"... and rendered the effected iPhones less valuable as a result. The high price paid by users was rendered unfair once Apple became aware of the fact that it did not reflect the reduced technical capabilities and actual devaluation of Affected iPhones. Apple did not offer a refund or adjust the price that had been or was being paid, or offer some other form of adequate redress to take account of the reduced functionality ... to users who had already purchased an effected iPhone or adjust the retail price [this is most relevant section] of the affected iPhones for users who had not yet purchased one, as well as for users upgrading from one affected iPhone to another."

So you cast your mind back and remember part of the methodology as certified includes these losses of people who have purchased the affected iPhones post-PMF.

MR RIDYARD: Let's assume Apple is making a new iPhone and it's in development, it's observed that due to the whatever it was -- the Snapchat video editing capacity which we're all thoroughly familiar with -- that it was necessary to have certain protective mechanisms within the phone such that in certain circumstances, the screen would dim, the phone would operate more slowly, apps would open more slowly. If that was discovered at the engineering stage, what was Apple required to do in order to not be on the receiving end of this litigation?

No representations have been made, this is a new phone, software is becoming -- apps are becoming more sophisticated, more energy demanding, compromises had to be made. What do they have to explain to the consumer?

MR MOSER: First of all, I'm not principally talking about new phones, so I think I'm

right in saying --

MR RIDYARD: At the moment, the class includes new phones.

MR MOSER: It does include phones at different stages of development. I think for a substantial part of the claim period, you are dealing with the same phone, but it's then still the same but anyway ...

MR RIDYARD: Let's go back to 2016, whenever it was, so let's say Apple is just about to bring out the iPhone 6, some engineer said: I've just seen that Snapchat is becoming big and it concerns me that when people use Snapchat, this phone we're about to launch tomorrow is going to have problems dealing with the power demands, therefore we should just do a little tweak to this phone before it's put on the market. Let's just -- makes it run slower but prevents it from breaking down, we think that will be better than releasing the phone we are about to release. What should some Apple have done about that?

MR MOSER: They should have reduced the retail price.

MR RIDYARD: To what -- compared to what?

MR MOSER: Compared to what the price ought to be.

MR RIDYARD: So they are about to launch for $700, okay, and the engineer comes in and says: we've just discovered Snapchat, we think therefore we need to reduce the speed of the phone in order to prevent the unplanned shutdowns, therefore they should have released it at $650 instead of $700, so the abuse --

MR MOSER: Yes.

THE CHAIR: So they didn't have to communicate to -- they just had to reduce the price, they didn't have to communicate to purchasers all the stuff about when transparency goes out the window. It's just a question of they were overcharging.

MR MOSER: It depends. I suppose they could have said, "This phone isn't running as well as you might have expected it to because we've made these compromises,

but we're still going to charge you the price, here it is", and people take their choice.

MR RIDYARD: We are focusing on this because we are lawyers and we don't have the imagination or the intelligence to envisage all the other incredible engineering solutions and compromises and trade-offs that have been made with when a phone is developed. It's our lack of imagination that's the problem.

Apple engineers will have been worrying about these things and looking at the size of things that go into the phone case, the cost of the elements, and how they can maximise to produce, you know, the best product they can making all those compromises.

This is another manifestation of -- it's just one example whereby we now have some very demanding apps where you have to make -- if you are going to run those and the batteries are getting a bit old, we're going to have some checks and balances in the system, that's just -- this is all standard stuff, you're not saying it was incompetently done, you're not saying it was under spec'd. So, for a new phone, it's very difficult to say how we could have dealt with it differently.

I understand it, but the updates and things, that's perhaps a different --

MR MOSER: If we are assuming all the facts that we are alleging, to be clear we are putting it all a bit higher than that. In particular, as we've explained in the witness statement for today, there's an aspect to this which isn't just the battery getting old and cold. The effect that was observed in relation to Snapchat was that the battery discharged more quickly than ever before because it used so much battery power, and Apple says each of these batteries has about 500 charges in it, which is -- that's a definition which starts with "C", which is about charge.

The effect is simply that if it appears from what we've seen that the effect is if as an enthusiastic user of Snapchat, you might be able to discharge your battery 500 times in a matter of months, rather than in a matter of years. That's probably the most

dramatic factor, and the case has developed rather more on that side. So, there is that as an aside, I just wanted to say that because it's an important point.

But as pleaded, as pleaded, the case is that for people who had a subsequently affected iPhone, I think the case is well understood. For those who went out and bought a new affected iPhone, it has to be an affected iPhone, our pleaded case is they should have adjusted the retail price.

THE CHAIR: And the definition of affected iPhones is in ...

MR MOSER: Is in here.

THE CHAIR: Just remind me. It's seven models, and then they get the (inaudible) from later in the documents.

MR MOSER: Here we are, and they are the launch dates.

MR RIDYARD: We don't know, and maybe not a matter for now, but we don't know which ones already have the PMF installed?

MR MOSER: None of them at launch date. The PMF didn't come in until --

THE CHAIR: Ah, I see --

MR MOSER: Is that right?

MR RIDYARD: No, no, that's when they were launched, not when they were sold.

(Pause)

MR MOSER: Sorry, I think somebody is preparing a document with this on it.

THE CHAIR: Okay, maybe it's unfair to spring this you on you.

MR MOSER: We are talking about January 2017 -- this is coming back to me now -- we had originally pleaded some subsequent models and we took them out. So all of the models were models that were -- the affected iPhones were models that were out before the PMF, so it's to be presumed that vastly all of the claim is about people who'd already bought their phone in 2014, 2015 and 2016 because of the way these things go.

THE CHAIR: But I could have bought an iPhone 7 Plus I assume in April 2017.

MR MOSER: Absolutely you could.

THE CHAIR: And that would already have had the software installed in it.

MR MOSER: For those long tail purchases, as it were, we have the pleaded case that then the price would have been reduced.

MR RIDYARD: So the abuse was not reducing the price, or the manifestation of the abuse was not reducing the price?

MR MOSER: (Pause) indeed. I'm grateful to my learned friend who reminds me that what we said was that the information should have been part of the technical information and spec as given on purchase of the affected iPhone; that there should essentially have been a kind of warning label that said this is a throttled phone.

THE CHAIR: But if I go out to the high street now and buy a new Apple phone, what obligation on Apple is there to tell me all the engineering compromises that have been built into that phone which they are selling for £1,000?

MR MOSER: Yes, but it's not our case. None of them were new phones in that sense, they were all old phones. I know some of them were still for sale in 2017, but they were all the old phones pre-PMF.

THE CHAIR: They have the -- what I imagine is with the 7 Plus, if I bought one in April, it either would have had the PMF installed when I bought it -- or maybe not because it's been in a warehouse since December 2016, in which case as soon as I plug it in the first time, it will update the software before I even use it, prospectively.

MR MOSER: I'm struggling to see that that's so conceptually different from what happened to the people who had it installed unknowingly in January.

THE CHAIR: If dominant undertakings are required to give full and frank disclosure of all their engineering compromises because they may impact the value of their product, that's --

MR MOSER: That's why I'm glad I've finally alighted on the dates I was searching for that you pointed me to because that's not our case. We are not saying -- I don't have to go that far, that everyone is selling a product with engineering compromises and this is just one of those compromises. It's not. These are specific products that were produced before 2017 and they have the specific compromise of a hidden throttling, and it remained hidden no matter whether you had it downloaded because you bought yours for Christmas in 2016 and you had it downloaded in January without notice, or whether you then bought it in February and it downloaded when you opened it. So the difference between the phone as sold and the phone performing with the PMF installed as much for a 7 Plus that's bought in February 2017 as was for a 7 Plus that's bought in September 2016.

It's, as it were, the obverse of your example my learned friend cited, it's precisely because this isn't a situation where there is some random product that's been produced with an engineering compromise. These are all the same affected iPhones, and I would ask rhetorically -- I know I'm not supposed to ask you questions, but I would ask rhetorically why is it different if I bought the very same phone just before or just after the update, which has come with equally little notice and with equally impaired performance whether I bought it in September 2016 or February 2017. It's the same theory of harm in both cases.

THE CHAIR: Can I just go back to the price thing. Let's take the phone that was bought in February or March 2017 -- so it already has the PMF installed on it when I buy it and take it out the box -- you are saying that what they should have done there was because that was compromised relative to the phone I would have bought six months earlier, the price should be lower.

What do we know about the prices? Are the prices the same in February 2017 as they were in September 2016?

MR MOSER: I presume so, it will be a matter of evidence --

MR RIDYARD: You presume the price is identical between September 2016 and February 2017?

MR MOSER: I'm not presuming it's identical, what I'm saying is whatever the price charged in February 2017 may be presumed to be too high because of the compromised nature of the product that's being sold.

MR RIDYARD: Depends on the prices, doesn't it? There must be a lower price which would satisfy you that --

MR MOSER: It will be the same measure -- we'll establish through BRG what the measure of loss is in relation to a properly functioning phone and an PMF-affected iPhone.

MR RIDYARD: What cost, sorry? You're going to introduce costs now, are you? Do the phones have to be cost-related prices?

MR MOSER: Loss, I said.

MR RIDYARD: Loss, sorry.

MR MOSER: Under our theory of harm, the difference is the value that should be subtracted from the phone. I could equally say it should have, as I say, a warning label saying "Warning throttled", fair enough, then *caveat emptor*, the consumer makes its choice.

MR RIDYARD: But if that's the obligation on the dominant firm, it seems it would have to be a permanent obligation on Apple, assuming Apple is dominant, for every phone it ever sells.

MR MOSER: Well, I respectfully disagree because as I say, we are dealing with these affected iPhones, I don't have to go beyond that. For these affected iPhones, there was this particular problem that's either the same for before or after January sales, or it isn't. But if I'm right that you should have warned and you should not have charged

as much -- we do also say they shouldn't have charged as much from the moment they became aware of this. So all of this applies to all of the affected iPhones equally. That's our pleaded case. It's certainly arguable.

THE CHAIR: Where do we go next?

MR MOSER: Indeed, where to next? I think the best thing is to follow broadly my learned friend's submissions. I can deal with some of them relatively swiftly.

THE CHAIR: Yes. I think we probably understand what you are going to say on most of them, but let's rattle through them and see how we can elaborate on anything we need to as we go.

MR MOSER: Yes. My learned friend sought to derive some comfort for his argument from the difference between the word "calculated" and the word "deliberate", but I submit there's nothing in that. I think he said I'm either right or wrong about that, and he looked at certain authorities I think in the banking field.

THE CHAIR: We need to look at your pleading. You are not going to amend your pleading in the light of your skeleton, you are not intending to do that?

MR MOSER: No. As far as I recall, when he was pressed on to what extent is paragraph 26 of our skeleton different from what is pleaded -- I could go through each one in turn, but --

THE CHAIR: He just pointed to "calculated".

MR MOSER: He just pointed to "calculated". I don't think he specifically means --

MR RIDYARD: We seemed to end up in dispute as to what "calculated" means. I know there's a whole body of authority on it somewhere, which we don't really want to get into today.

MR MOSER: There might well be, and it might be in the field of banking law. But in the field of competition law, there is a whole body of authority which says you don't have to plead dishonesty --

THE CHAIR: You are just saying "deliberate", you are not --

MR MOSER: -- in order to establish an anti-competitive intent. But it is actually -- there is a specific competition law reason for this, which is if every time you allege somebody's in breach of, say, Article 102 and it's aware of it, it's deliberate, if you had to plead fraud or dishonesty, you'd have to plead it in every case other than entirely -- how should I put it -- in cases where something was entirely accidentally in breach of Articles 101 or 102 -- you can't be accidentally in breach of Article 101, I suppose. It makes no sense in the context of competition law specifically to say you have to plead dishonesty, and that's an old argument that's long gone.

There was then the whole issue as to why is this argument being brought now by my learned friend, and my learned friend went through a series of cases starting in fact with the domestic Meta certification case. That was like really all of the relevant cases a pre-certification of this case. All of the cases until Trains which my learned friend relied on were available to him or to his colleagues at the certification hearing of this case.

THE CHAIR: You say what hasn't materially changed in a way as to turn this from a good case into a bad case and -- but there again, subject to your abuse point, there's no reason why as matters crystalised in the minds of lawyers why an application couldn't be brought at this stage -- indeed, there's an obligation on this Tribunal to be attentive to certification and whether there is an arguable case at all stages. Whereas one can make a forensic point that this could have been brought earlier, subject to your abuse case, that's really all it is: it's a forensic point.

MR MOSER: Yes, it is, and I can't really improve on that. Nothing has changed as far as any of the main pillars of my learned friend's attack, as I perceive it to be, are concerned.

The questions of -- this is not consumer law, well, the CAT in the first Trains case, in

the certification case, already said that competition law is not a general law of consumer fair dealing -- and they repeated that that hasn't changed -- Evans about where this Tribunal is gatekeeper and all the rest of it, and there is nothing, as you've said, absolutely nothing new about that. It's trite law.

And yes, of course you can bring back certification. As I said in opening, I didn't perceive in fact there to be any specific certification/de-certification points being made. It's a rerunning of the strike out points, including points which were deliberately not run. The reasons for that I've already explained, they don't seem to hold water. That is not something that can be done ad infinitum because what you see in the application to strike out is an attempted evasion of the appeals process.

They attempt to strike us out, they don't succeed, they go to the Court of Appeal. They don't succeed in the Court of Appeal and then they come back, whatever it is, a year later -- it's only about a year since this case was certified -- and say now you should strike it out for what, as far as I can perceive, essentially the same reasons, "Can you point to any new authority?" "No I can't point to any authority".

My learned friend, for instance, relied very heavily on the post-March 2018 point, so that point around -- well, certainly by the time that the PMF is put out of its misery in March 2018, there should be a line drawn. It was put to him that wasn't run by the people who were arguing this case on the last occasion. It's not just that it wasn't run; what happened, you may recall -- I could give you reference if I could find it, but we don't really want go to transcripts -- what happened was that my learned friend Lord Wolfson said then there is the matter of post-March 2018 but we are not going to run it. Then he starts going into it and you, sir, say, "But really that's getting very much into the weeds for a strike out application", and then the matter was dropped. And to come back now --

THE CHAIR: Do you have the reference in response?

MR MOSER: Yes, I'm grateful. And to come back and say it wasn't -- no doubt my learned friend would have run it beautifully, but it wasn't run. And to come back now is neither fair nor just; nothing has changed, and anyway we had all the arguments lined up. At the time they weren't used -- I don't think I need to trouble you very much with it, but they are exactly -- yes, here it is, it's supplementary bundle, page 732, and it's exactly the same points.

THE CHAIR: Is it the transcript for the hearing, the certification?

MR MOSER: Yes, obviously my learned friend Lord Wolfson. I'm reminded when it comes to iOS 11.3, that's the March one, at that stage people were given a choice whether to continue the PMF.

"You're not drawing a sharp line?

"No, but that's a very good indication that the call we took was plainly the right call, plainly the right decision. Because when people were given the choice, they opted to stay with the PMF.

"They opted, all right.

I mean, we're getting quite into the weeds on a lot of this, I feel, for a strike out application"

And Lord Wolfson:

"The problem is this, it's the old problem which we've had in the Queen's Bench Masters corridor 30 years ago, we still have now. You have one that says 'Look at this material, there's got to be a case in there somewhere', which is essentially [I remember him doing this, it was quite entertaining] what the PCR is doing.

"The chair: the PCR is saying that it is arguable that the PMF had a material impact on phone performance ..."

And so on.

This is all returned to at page 752, albeit only briefly. At 11 and 12 on page 752, my

learned friend Lord Wolfson says:

"If this matter were to go to trial, we would take the level 3 point."

So, it's all dealt with expressly not as part of their strike out -- I think they had it originally and they then abandoned it on the day.

Much the same applies to the point in relation to the previous message -- or apology, depending on how you see it. My learned friend didn't make specific submissions on that today, so you have my skeleton on that, you have his skeleton on that.

THE CHAIR: 11.3 is introduced when?

MR MOSER: Is it March 2018?

MR RIDYARD: I think so.

THE CHAIR: I'm getting confused now, going back to 42 ...

MR MOSER: Sorry, I'll just get the pleadings.

THE CHAIR: How do the software updates relate to particular phones?

MR MOSER: I think the way it's pleaded is that we haven't got an end point. We say that at paragraph 6 of our Claim Form, starting on page 4:

"Over a number of years starting from at least December 2016 with the release of iOS version 10.2 to the determination of these proceedings ..."

And I suppose that must now (inaudible) to issue:

"Apple leveraged its dominant position."

So we have effectively got a period --

THE CHAIR: I suppose my question is, what's the date 11.2 was introduced?

MR MOSER: The date what was introduced, forgive me?

THE CHAIR: In March 2018.

MR MOSER: March 2018.

THE CHAIR: So the phones were 18 months old. The youngest phones were 18 months old at that stage.

MR MOSER: Yes. The oldest were very old in iPhone terms.

That's all that I perceived him to be saying on that. He says we made a forensic choice in relation to not pursuing those things, but so be it. There was then the point on Hollington v Hewthorn, which I've already dealt with in the same way that you've discussed with my learned friend: essentially you can still look at the underlying matters. I've also said that there's a difference between Hollington v Hewthorn in its strictest form and cases where the party itself is in fact involved in the investigation.

Beyond that I don't think I particularly want to trouble you with anything very much unless there's something that I can help you with.

If you give me a moment I'll take a ... **(Pause)**

THE CHAIR: Mr Moser, I think we might take five minutes now, you can take instructions and --

MR MOSER: I do have copies of Hoffman-La Roche if anyone wants ...

THE CHAIR: Yes, it would be helpful if you could hand those up. We'll take five minutes.

(3.15 pm)

(A short break)

(3.20 pm)

Submissions in reply by MR VENKATESAN

THE CHAIR: Yes.

MR VENKATESAN: I'm grateful, sir. Three or four points in reply, if I may. I want to begin with a point that both the Chair and Mr Ridyard put to my learned friend in the course of his submissions this afternoon. If an Apple engineer had discovered in late 2016 that Snapchat and other sophisticated third party apps are becoming increasingly popular and the Apple engineer had thought this might change the way that the relevant iPhones are used and had said, "Let's put something like a PMF into a new

version that hasn't yet been released but is going to be released", imagine this occurs, which was the situation put to my learned friend. Mr Ridyard asked my learned friend what on his case Apple should have done in that hypothetical situation.

I understood my learned friend's answer to be that Apple should have reduced the price, is I think what he said, of that version which is yet to be released. In my respectful submission there are two separate reasons why that's a revealing answer. The first is that on my learned friend's own case, at least in the way he responded to that question, the problem is said to lie not in the lack of transparency but on the price. In other words, what he says would have gone wrong in that hypothetical situation where Apple releases a phone but doesn't say anything about the PMF to consumers is not the fact that consumers were not told, but, he says, the fact that the price is too high. Even leaving aside the question: too high compared to what?, which is the question that was also put to my learned friend, that, we would suggest, immediately undercuts the submission that you can generate a transparency or duty of disclosure under competition law merely by reference to the impact of the PMF on the relevant iPhones. Because if one stands back and asks: what if this case proceeds to trial, what will be the critical issue? It will probably be this: in circumstances where manufacturers of technical or complicated products do not, as the Chair put it last time, enter into a process of full and frank disclosure about engineering compromises, what is special or different about this case, such as to require disclosure about the PMF which would not otherwise have been required?

The reason why we would respectfully suggest that that question which is put to my learned friend is valuable is that it's a way of testing that issue: what is it that generates the duty of disclosure?

Indeed, if my learned friend's case is that the only thing that would be wrong with Apple's conduct in that hypothetical example is unfair price, that is an implicit

concession that at least in that example there's no duty of disclosure. In other words, the lack of transparency would not of itself be an abuse even if the PMF had the same impact on the performance of the relevant iPhones that it does in a situation where it is introduced subsequently, rather than when the phone is released. In that hypothetical example it's hard to see how you could ever avoid the situation in which there's a duty of disclosure.

Indeed, I think this was put to my learned friend by Mr Ridyard when he asked wouldn't Apple be under a permanent obligation of disclosure? And it's not just Apple and it's not just digital products. I mean, it's always slightly dangerous to try to think of examples while also listening to my learned friend's submission, but take something like this: if Mercedes release a new version of their E-Class Sedan and before releasing it they put in a feature that automatically slows down the Mercedes on a motorway and they do it because they think there is data showing an increase or an uptick in accidents saying it would be better if the car is slightly slower, but the Mercedes, with that feature, still complies with advertised expectations, is not defective, is not substandard and satisfies the reasonable expectations of users, in my respectful submission not telling people that we've put the feature in is not even arguably an abuse. If I'm right about that, in the Mercedes example, you then have to ask: would the situation change if the E-Class has already been sold, then they get the data saying, "things are going wrong on the motorway, people are driving too fast, we need to slow it down a bit", and they slow it done by 1 kilometre an hour, does the mere fact that they have not told people they've done it generate an abuse when you --

THE CHAIR: Re-presenting this problem with another scenario, I mean --

MR VENKATESAN: That's a --

THE CHAIR: That doesn't really ...

MR VENKATESAN: That's fair. And I'm doing it only to illustrate the far-reaching

consequences that accepting my learned friend's submission would have. I take that point, it's a very fair observation because I can't point you to a case about Mercedes where the questions are answered in my favour; if I could do that I would be on a much stronger wicket. But the point I'm trying to make, which really comes out of the exchange my learned friend had with Mr Ridyard, is if my learned friend is right you are going to have competition law generating duties of disclosure about all manner of things, in circumstances where the relevant product or service is not defective, not substandard, not inferior to advertised expectations.

THE CHAIR: Yes. But at this stage we are only trying to decide whether these things should go to trial, we are not going to be opening the floodgates by not striking this action out. We are just -- should there be considered argument on this at trial, is what we are concerned with today.

MR VENKATESAN: I see that, sir. But in order to allow this to proceed to trial it seems to me, and we would submit, you have to be satisfied that a proposition of law that has those far-reaching implications is at least arguable and in my respectful submission it isn't. I don't need to go -- obviously that's my --

THE CHAIR: It can't be not arguable because it's a floodgates argument. It could be non-arguable because it's contrary to authority or contrary to the high-level principles of competition law, but it can't be not arguable because it's a problem for Mercedes.

MR VENKATESAN: Yes, but I -- what I would respectfully slightly resist is characterising that merely as a floodgates point. It is a floodgates point but it's more than that. It's a point that, if you stand back and ask yourself: is English law likely to have got to a place where every dominant firm has under competition law a duty of disclosure about all of these things?, in my submission the answer is likely to be no, quite independently of floodgates, because there is no reason for competition law to do that (a) because it would be impractical for such disclosure to be required, but (b)

because to the extent it is required, there are other provisions in the legal system that deal with it, not just consumer legislation but the Misrepresentation Act 1967, et cetera. I mean, why would Parliament, when it enacted section 18, effectively convert section 18 into something that generates a duty of disclosure in a wide-ranging --?

THE CHAIR: We understand that point.

MR VENKATESAN: That's the first point. I should, just before I believe that first point, just clarify this, because of the suggestion that the price was too high. The Class Representative has disclaimed any contention that the price was too high, and I ought to give you a reference to that, to the extent it matters, which it may not. If you have supplementary bundle volume 1, tab 2, page 64, please, if you look at paragraph 31, this is the Class Representative's reply to Apple's CPO response in April 2023. He says at 31(a):

"As Apple correctly recognises, Mr Gutmann does not allege that Apple charged an unfair or excessive price."

So that's been disclaimed.

MR MOSER: Can you read on.

MR VENKATESAN: Of course:

"Instead, he contends that Apple's course of conduct resulted in users paying unfair prices."

That, I accept, is still in the pleading, but it's not a traditional United Brands unfair pricing case.

That's the first point I wanted to make.

MR MOSER: I'm sorry, could I do something unorthodox with apologies to everybody. I know I have no further role technically but we have plenty of time. I just want to make it clear that I haven't abandoned transparency in relation to the example. I point my learned friend to paragraph 158 of our pleading, which is at page 68. And the lack of

transparency is also pleaded in relation to people who buy an affected iPhone. I just wanted to make that -- that was the beginning of my answer --

THE CHAIR: Sorry, slow down, Mr Moser. We are in the Claim Form?

MR MOSER: Claim Form, core bundle page 68, paragraph 158. I read it out a long time ago now.

THE CHAIR: Yes you did, yes.

MR MOSER: Just to make clear that lack of transparency is absolutely in the arena even in relation to buying an affected iPhone. That was the beginning of my answer. And then we started talking a lot about the retail price. But it is absolutely also still in the arena, whether you have a sticker warning throttled, or whatever, or by then it's notorious; that's a matter of fact.

I just wanted to make that plain before the point runs away with itself. Of course my learned friend will come back, and I apologise, I wasn't clear.

MR VENKATESAN: I'm grateful to my learned friend for that clarification. But just to conclude on that point in responding to what my learned friend just said, if he really is going to be submitting that lack of transparency is an abuse not merely when the PMF is introduced by update, but when it's in the relevant iPhones bought with the PMF. That is certainly not pleaded, notwithstanding what he just took you to in paragraph 158.

But more fundamentally, that would actually constitute a collateral attack on the Tribunal's own reasoning. Maybe "collateral attack" is putting it too high but it would be inconsistent with the Tribunal's reasoning in paragraph 13 of the CPO judgment, which is core bundle tab 5, page 221. Actually there are two places -- I'll take you first to -- I should actually start with your previous judgment, that is to say your May 2023 judgment. It's tab 4 in the same hard copy volume, page 209, paragraph 21. Can I invite the Tribunal, please, to glance at paragraph 21.

THE CHAIR: Yes, we have these in mind. You referred to it in your skeleton.

MR VENKATESAN: Indeed. And the similar point is made in the other reference I gave you which is paragraph 13 of the second CPO judgment at page 221. We respectfully submit that what the Tribunal says in those passages is not only right but the contrary is not seriously arguable. It is not seriously arguable that people who engineer a complex product are required to make full and frank disclosure of engineering compromises. And even at the strike out stage I do say that to the extent my learned friend's case depends upon contradicting that proposition it's not arguable and should be struck out.

So if I'm right about that, in other words, where the relevant iPhones are sold with the PMF in it there's no abuse, one then has to ask what implications does that have for the arguability of the remainder of the claim? That's how far I take that first point.

The second point I wanted to make in reply concerns something my learned friend said at an early stage in his submissions before the short adjournment when he helpfully summarised his case. And I think the abuse in this case, in my learned friend's words so far as I have a note of them was he said "to put in a hidden throttle with the aim of protecting Apple's market share and to the detriment of customers."

He used the phrase "hidden throttle" a number of times in the course of his submissions.

In testing that the Tribunal, in my respectful submission, does need to ask: is the Class Representative saying that the alleged preservation of Apple's market share and the alleged exploitation of consumers, is the Class Representative saying that those things were a consequence of Apple's lack of transparency? Or is he saying that those things were a purpose of Apple's lack of transparency? In other words, is he saying that Apple acted as it did for the subjective purpose of preserving its market share? Leaving aside for a moment whether he needs to say it, is that the pleaded case? Or is the

pleaded case that Apple acted as it did for what it perceived to be legitimate commercial reasons, but what Apple did had objectively the consequence of enabling it to preserve its market share, and that is sufficient to generate an abuse? It's quite important to disentangle those two ways of putting the case and to test the arguability of each and I'll take those possibilities in turn. If the Class Representative is advancing the purpose case; namely, the reason why Apple didn't disclose more information is because it wanted to preserve its market share and, say, prevent Samsung from gaining market share, if the Class Representative say -- it wants to say that that was even *a* purpose of Apple's conduct it runs, in my submission, into two problems, neither of which was satisfactorily answered by my learned friend: first, it's not anywhere pleaded in the Claim Form. You will search in vain in the Claim Form, even for the phrase "deliberate concealment", let alone "calculated". The phrase "deliberate concealment" makes its first appearance in the Reply. What the Claim Form says is that the relevant information was concealed, and the concealment "served to protect Apple's profitability and market share." In other words, it is advancing the consequence case rather than the purpose case. And you have my submission that to the extent you want to run the purpose case (a) it has to be pleaded squarely, but (b) it has to be in the Claim Form, it cannot be in reply, because it's a new factual basis for the claim. That's probably a convenient point to pick up the submission my learned friend made where he says that the only difference that we identify between paragraph 26 of his skeleton and the pleaded case lies in the word "calculated", I don't think that's right; that's one difference. But the other difference, an important one, is that paragraph 26, I think it's (g) uses the word "deliberate" concealment, and the word "deliberate" is not in the Claim Form. So it's a case that's been advanced for the first time in the skeleton, or possibly in the reply, which is not pleaded. And what you are testing today is the viability or arguability of the case articulated in the Claim Form which does not

include --

THE CHAIR: You are not saying it's accidental concealment?

MR VENKATESAN: I'm sorry?

THE CHAIR: You are not saying it's accidental concealment?

MR VENKATESAN: No.

THE CHAIR: It's deliberate concealment, of course it is.

MR VENKATESAN: But that goes back to a point I made --

THE CHAIR: It depends on what you mean by "concealment". The decision was made at Apple, rightly or wrongly. I'm not commenting on whether it was right or wrong. The decision was made at Apple to make the statements it did in January and February. It was a deliberate decision, and one needs to be realistic, it would have been very, very carefully considered, in a company as sophisticated as Apple, as to what was said and when it was said.

MR VENKATESAN: Yes.

THE CHAIR: So it was a deliberate statement. And insofar as it had omissions those omissions were deliberate.

MR VENKATESAN: Yes, and --

THE CHAIR: As I put to you before, it's not that it's a press the send button and something got deleted on the computer and it was a mistake.

MR VENKATESAN: Yes.

THE CHAIR: So it was deliberate.

MR VENKATESAN: Yes. My answer then and my submission now is one has to be careful to distinguish two different senses in which the word "deliberate" can be used. If what deliberate means is intentional; in other words, Apple intentionally chose not to disclose the information, they didn't do it inadvertently by pressing the send button by mistake, fine; that's not in dispute. If, however, what "deliberate" means is that Apple

intentionally chose not to disclose this information for the purpose of preserving its market share or exploiting customers that latter case is not pleaded. And that latter case is not capable of being pleaded merely by using the word "deliberate" because the additional words in the submission, as I've just formulated it, goes to Apple's motivation --

THE CHAIR: But there are a dozen nuances within those two points and presumably the Class Representative doesn't know between those two points you lay. And it may be in a multifactorial decision and they didn't want to unnecessarily panic the market, is quite a -- we don't know the answers to all these questions, do we? Or we will no doubt hear from witnesses if this goes ahead.

MR VENKATESAN: But that in a way goes to the heart of this, which is not knowing is not enough because if you want disclosure and if you want to go to trial and your abuse case depends --

THE CHAIR: But Mr Moser's case isn't dependent on showing some -- he was perfectly clear in his submissions, his case is not dependent on showing some nefarious intent.

MR VENKATESAN: Yes.

THE CHAIR: It was a deliberate act and that's all he requires and he goes no further than that. Mr Moser will jump up if I've got that wrong.

MR VENKATESAN: Then I can put it this way, to the extent the case does depend on that kind of nefarious intent, that's not open. And he will correct me if I'm wrong, what is currently pleaded is that Apple intentionally chose not to disclose the information for the reasons it has given in paragraph 55(1) of the defence which is the subject of the non-admission that I showed you earlier. One must then analyse the arguability of the alternative way of putting it, which is the consequence case. So if Apple made an intentional decision not to disclose the information, without any kind of

nefarious or illegitimate purpose, but that decision had objectively the consequence of enabling Apple to preserve its market share, is that sufficient, as a matter of law, to give rise to abuse? And we would respectfully submit that it's not.

For one thing, that case, that way of putting the case, doesn't fit the theory of harm pleaded in the Claim Form, again which has not been amended. Because you will recall that the theory of harm that's pleaded in the Claim Form and which the Tribunal certified last time is essentially that there's user detriment because the PMF had a material and negative impact on performance and because the relevant iPhones were less valuable as a result. The theory of harm is not that Apple gained market share or preserved market share, indeed, having looked again at the Claim Form it is not even alleged that consumers would have switched to Samsung, or somebody else, but for the lack of transparency. So if the case is put in that way as, in the way it's put in the skeleton; namely, this is an exclusionary abuse because you stole a march on your rivals, it doesn't fit the theory of harm. And it's also inconsistent with paragraph 169 of the Claim Form which I ought quickly to show you, core bundle tab 1 -- we should actually start at paragraph 155, and you'll see a heading there called "Theory of Harm", page 66. This is where the Class Representative is pleading what he says was the harm caused by the abusive conduct. And you can see that it's very much focused on what is said to be the impact of the PMF on user experience: "Unexpected power shutdowns; longer application launch times", and so on.

156 then alleges that it was worth less.

Then if you go over, please, to 162 at page 69, just above 162 there's a heading "Apple's conduct was exploitative". So again I would pause there and make the point that in the Claim Form the abuse is alleged to be exploitative, not exclusionary. In fact they say, at 162, they don't need to allege exclusionary abuse, they say, in the second sentence of 169 at page 71:

"Exploitative conduct and unfair terms have been recognised as a form of abuse since the CJEU ruling in United Brands .... It is not necessary, in a case concerning an exploitative abuse under Chapter II of the Act ... to demonstrate that conduct in question resulted in a distortion of competition ..."

Pausing there, members of the Tribunal, if you look at the Claim Form, leaving aside the reply for a moment, the case is put only as an exploitative abuse, it's not said that there was any impact on rivals on market share or anything of the sort; it simply said this is unfair to consumers, consumers suffered, and that's the theory of harm that's pleaded. But paragraph 26 of the skeleton goes further. But if that's the case which needs to be pleaded then it doesn't fit the theory of harm and it would raise not only questions about arguability, but whether it's appropriate to certify the claim, whether there's a blueprint to trial.

That's the first problem, we say, with the Samsung way of putting the case, if I can use that shorthand to refer to the exclusionary abuse.

The second problem picks up on a point the Chair put to my learned friend this afternoon. Assume for a moment, putting their case at its highest, that Apple's alleged lack of transparency did have exclusionary consequences because it prevented Samsung from gaining market share, logically exactly the same thing could have happened if the PMF had been included in the relevant iPhones when they were sold but all the other facts were unchanged. Because in that hypothetical, which we've already discussed, assume that the PMF has exactly the same impact on the physical functionality of the relevant phones iPhones, whatever that impact might be, if it is avoiding disclosure of that impact which enabled Apple to preserve or gain market share that must logically also have been possible in a world in which the PMF is already there in the relevant iPhones, as distinct from being introduced subsequently.

But if I'm right that there is no arguable case of abuse where the relevant iPhones

already have the PMF in it, and we would submit we are right about that, and indeed the Tribunal has more or less decided that already, then --

THE CHAIR: We haven't decided anything.

MR VENKATESAN: I say "more or less" because you did say "provisional view" in paragraph, I think it's 21. You said your "provisional view", I accept, and that's why I said "more or less", in the previous judgment, was that manufacturers do not have to disclose engineering compromises. We respectfully agree with and adopt that.

But if that's right that must call into question the idea that just because the PMF comes in later it can suddenly become an exclusionary abuse even though the impact on rivals, on market share, everything else is the same, I mean, why would competition law work that way?, we ask rhetorically.

It might have been different -- I don't accept it would have been -- it might have been different if the case advanced had been that because of the PMF the relevant iPhones don't do what they say on the tin, they don't meet the advertised promises, they don't meet the reasonable expectations of users, that case has been disclaimed, you see the words that have been crossed out. That's our second point.

Our third point, which is closely related to the first point I made about theory of harm, is we say there's not even an arguable factual case that Apple preserved or gained market share as a result of the lack of transparency. And indeed, if you are not alleging any longer that the relevant iPhones did not meet the reasonable expectations of users or the advertised expectations, one might ask: why would users switch, what are they going to be unhappy about? You then throw into the mix the fact that when this was put to the test in the real world in March 2018 the vast majority of users chose to keep the PMF. It just calls into question the arguability of the idea that there is any kind of exclusionary consequence because of the lack of transparency. If I'm right that the exclusionary abuse case doesn't work then you are left with lack of transparency,

per se, nothing beyond that.

And I understood my learned friend if not to accept, then certainly not to press, the proposition that bare lack of transparency in and of itself can amount to an abuse.

That's the second topic I wanted to address in reply.

The third topic, which I can take more briefly, concerns where we got to in relation to the CPUTR, which was the subject of exchanges between the Chair and my learned friend. I won't take you back to it but you will recall that what they say in the reply is not that Apple actually infringed the CPUTR but that they intend to amend in the future to allege that Apple infringed the CPUTR.

No such application has actually been made. As it stands, the Claim Form refers to the CPUTR only by analogy, but it's not just the use of the words "by analogy" which is a problem for my learned friend's case; it's that the Claim Form doesn't actually allege a breach of the CPUTR, it pleads the alleged lack of transparency, it pleads the provisions of the CPUTR and some other legislation such as the Consumer Rights Act 2015, what it doesn't anywhere do is say that Apple's conduct infringed the CPUTR or the Consumer Rights Act.

So, the viability of the pleading that the Tribunal is currently scrutinising for the purposes of this application does not include any averment that Apple's conduct infringed the CPUTR. There are two reasons why that is, or may become significant, depending on the Tribunal's reasoning on other aspects of this application. The first is one might ask, and indeed the Chair did ask my learned friend this, why haven't they already sought to amend? Because of course it's common experience, not only in the Tribunal, where I certainly have less experience than others, but certainly in the civil courts, if a strike out application is made it's not uncommon for the strike out respondent to say: my claim is good enough to survive strike out but if it's not here is a proposed amendment. We haven't had that. There's been no amendment at all of

seeking to allege a breach of the CPUTR. Had there been, the Tribunal would have been --

THE CHAIR: Mr Moser's point, one can debate whether he was right to do it this way, but his point is it's always been in play that your behaviour falls short of the standards required under the CPUTR; and he says because this Tribunal won't be making an enforceable ruling on that, per se, that's why he's pleaded it by analogy.

MR VENKATESAN: Yes.

THE CHAIR: And insofar as he needs to correct that and make the positive assertion he could, Mr Moser will again shake his head if I've got that wrong. As I understand it the standards required by the CPUTR are in play and Mr Moser says you fall short of them.

MR VENKATESAN: Indeed.

MR MOSER: I'm invited to react. And also we say remember the scheme that's put in place by the Tribunal that any repleading is going to be after disclosure, and we are therefore not going to do it in bits.

THE CHAIR: That's very helpful.

MR VENKATESAN: That's the point I was just going to address. The answer to the first point, which is I can rely on it by analogy because it's just evidentially relevant to the abuse case, the answer to that point, it's paragraph 72 of Trains, I don't know if I need to take the Tribunal back to it, but it's authorities bundle --

THE CHAIR: Yes.

MR VENKATESAN: There's no scope for any -- this is binary: either you allege a breach and prove it or you ignore it, there's nothing in between. That's what the Tribunal said in Trains. Indeed in the reply the Class Representative cites that and says: that's why we now want to allege a breach. So they recognise the need to allege a breach if they want to rely on the CPUTR but they haven't actually applied to allege

it.

That takes us then to the point my learned friend just made when he rose, which is he says the Tribunal put in place a scheme where any amendment would take place after disclosure. But with respect to my learned friend it's exactly the other way around: you only get disclosure in respect of the pleading --

THE CHAIR: We understand that as a ...

MR VENKATESAN: I think the Chair made that point in the July 2025 CMC that any further disclosure request will have to be justified by reference to the pleadings once they close.

Where does that get us in terms of how the CPUTR fits into the strike out application that's now before you? We say that the question the Tribunal has to decide is whether the Class Representative has an arguable case of abuse on the assumption that the CPUTR was not infringed because the contrary has not been pleaded, either actually or even by proposed amendment. And it would be such a serious allegation to make, I mean, a criminal offence, that -- with potentially significant consequences for defendants, a point also made in Trains, that if you want to run it you have to plead it and they haven't.

That's the third topic I wanted to address.

The fourth topic concerns the March 2018 iOS 11.3 point. My learned friend's main answer to this was to take you to the transcript of the September 2023 hearing where Apple said that it was not taking this point last time and would leave it to trial. Realistically, I obviously accept that we said that, I'm not seeking to run away from it. But in my respectful submission one does have to ask the question the Chair put to my learned friend which is: where does it go? Is it a forensic point, or does it have any analytical relevance? If it's just a forensic point then my answer to it is also the forensic point, that the case was very different back then and we made the choices that we did.

But that's less important than the analytical question, which is, where does this actually go?, the argument that we should have taken it last time and didn't. And you have to, in my submission, test that in this way: assume for a moment that the substance of the point is a good one; in other words, that we are right that there is no arguable case of abuse after March 2018, on that assumption if the Tribunal want nonetheless to allow that aspect of the claim to go to trial it will be ordering a trial on a point on which the Class Representative *ex hypothesi* is bound to fail; and that, in my respectful submission, is not consistent with the gatekeeper function to which the Supreme Court refers in the Evans case. That, of course, does not mean the defendants in collective action have a free pass, there may be other ways in which the Tribunal can express its conclusion if that is what it is, that Apple should have taken a point earlier. But what we submit would not be an appropriate exercise of the Tribunal's gatekeeper function is to conclude that a particular point is unarguable but nonetheless allow it to go to trial. It's hard to see how that could be consistent with the efficient allocation of resources and the other considerations to which the Supreme Court refers in FX.

Indeed, it's not just been collective actions. If you look at the law relating to abuse of process, the rule in Henderson v Henderson, it very rarely runs in response to strike out a summary judgment application for precisely this reason. You might be able to take a Henderson v Henderson abuse point against somebody who's seeking some other form of relief, say, fortification of cross-undertaking in support of a freezing order. But if a defendant is bringing a reverse summary judgment, a strike out application, and if that is shut out on Henderson grounds in circumstances where the application would otherwise succeed the court ends up ordering a trial that *ex hypothesi* serves no useful purpose. That's why normally the abuse points don't run. So, we would invite the Tribunal to decide that issue on its merits, the March 2018 point on its merits. Obviously if we are wrong about that then we lose anyway; but if

we are right about it, the fact that we didn't take it earlier isn't a good reason for shutting us out from taking it now.

Fifth and finally, and this is my last point, just standing back from the detail, as it were -- I mean, some of this ground has been covered already -- one does have to ask, in my submission, what is special or different about this case and about the PMF such as to require disclosure under competition law of something like the PMF, which a manufacturer would not usually be required by competition law to disclose?

Now I am slightly hesitant about going back to the transcripts because I respectfully agree with what the Chair put to me earlier today, that one can only get so much value out of transcripts as distinct from actual judgments, but there is one passage I want to show, if I may, and then I'll finish. That is supplemental bundle volume 2, tab --

THE CHAIR: Where are you going to?

MR VENKATESAN: The September 2023 certification hearing.

THE CHAIR: That's the point in reply, is it?

MR VENKATESAN: Yes, it is, I mean -- it responds to some submissions my learned friend made about why there's a duty of disclosure in this case and what was conceded and what wasn't. If you go to page 384 behind tab 62, lines 1 to 14 -- I won't read it out, but essentially the Chair at the time was putting to my learned friend the points we've been debating today; namely, would there have been any disclosure obligation if the relevant iPhones had come with the PMF in it?

Then over the page at page 385, my learned friend said, lines 2 to 3:

"If it remains unaffected and The iPhone works as advertised, we wouldn't be having this problem."

Then at lines 10 to 14 the Chair asked:

"... where is the evidence that it is falling short of those legitimate consumer expectations? ... We will no doubt look at some more. ... is it so much slower that it's

inconsistent with the legitimate expectations of the consumer?"

Answer: "Yes, absolutely."

So at least the way the case was being put in September 2023 --

THE CHAIR: Yes, all that's gone. What --

MR VENKATESAN: Not only has it gone. What my learned friend was submitting then is what makes this case special or different such as to require under competition law disclosure of technical information, which normally would not be required, is that the technical information concerned an event which caused the product to fall below reasonable expectations of consumers.

If that's gone, as it must be common ground it has since the words are crossed out, one has to grapple again with the question of principle that was put to my learned friend back then which is: what is special or different about this case, such that a manufacturer who's not normally required to enter into a process of full and frank disclosure --"

THE CHAIR: You've made this point. We are going round in circles now.

MR VENKATESAN: I just wanted to make sure -- I won't show you the transcript but you have my submissions.

Unless there is anything I can assist the Tribunal with, those are my submissions in reply.

THE CHAIR: Thank you. You will have our judgment in due course.

MR VENKATESAN: I'm grateful.

(3.57 pm)

(The hearing concluded)

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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?