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6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**

Case No: 1689/7/7/24

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

13 Wednesday 3rd June 2026

14
15 Before:

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18 The Honourable Mr Justice Waksman
19 Michael Cutting
20 Professor Alasdair Smith

21
22 (Sitting as a Tribunal in England and Wales)

23
24
25 BETWEEN:

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27 **Consumers' Association ("Which?")**
28 **Proposed Class Representative**

29
30 v

31
32 **Apple Inc, Apple Distribution International Ltd, Apple Europe**
33 **Limited, Apple Retail UK Ltd**
34 **Proposed Defendants**

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36
37 **A P P E A R A N C E S**

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39
40 Philip Woolfe KC & Rowan Stennett (instructed by Willkie Farr & Gallagher) on behalf of
41 the Consumers' Association

42
43 Marie Demetriou KC, Max Schaefer & Michael Quayle (instructed by Covington & Burling
44 LLP) on behalf of Apple Inc., Apple Distribution International Ltd, Apple Europe Limited
45 and Apple Retail UK Ltd

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(10.29 am)

Housekeeping

THE CHAIR: We've got a transcriber today. They'll be transcribing the proceedings so there'll be the usual break mid-morning.

Can I just please check that leaving aside the question of consequential costs and permission to appeal, the collective proceedings order otherwise is agreed; is that correct?

MR WOOLFE: That is my understanding, sir, yes.

THE CHAIR: Right. In which case, on the agenda, we would like to deal first of all, with the question of the costs of the strike-out and the costs of the CPO. We would like to deal with the question of strike-out costs first.

Discussion re strike-out costs

MR WOOLFE: Thank you, sir.

Well, in that case, there is an element which you may or may not be aware of, which is Apple had reserved its position on whether it was liable to pay the costs of the strike-out.

THE CHAIR: Right.

MR WOOLFE: It was reserving its position until receipt of our cost schedule. It reserves -- even as a matter of principle, it wouldn't say "I accept liability".

THE CHAIR: I noticed that, yes.

MR WOOLFE: But late yesterday afternoon they wrote to us -- I can reference that if you want -- where they say they now have accepted liability to pay reasonable proportionate costs.

1 THE CHAIR: Yes.

2 MR WOOLFE: But they're still going to make some points -- we don't know what they
3 are -- about the costs in our cost schedule with respect to the strike-out application.

4 THE CHAIR: Thank you. Well, if that's the case, let me hear from Ms Demetriou on
5 that point.

6 MS DEMETRIOU: So the question is whether or not the costs should be subject to
7 detailed assessment if not agreed, or to summary assessment.

8 THE CHAIR: Yes.

9 MS DEMETRIOU: And this question also arises in relation to the costs of the CPO as
10 well. Obviously, you know, our primary position on that is that they should be costs in
11 the case.

12 THE CHAIR: I do.

13 MS DEMETRIOU: If you're against me, then we say it should be detailed assessment.

14 THE CHAIR: Yes.

15 MS DEMETRIOU: So in a sense I can sweep up the points on detailed versus
16 summary assessment together. Happy to do it now?

17 THE CHAIR: Well, the first point of principle is -- and let's deal with the strike-out costs
18 first -- whether we should summarily assess them or they go to detailed assessment.

19 MS DEMETRIOU: Yes.

20 THE CHAIR: If your primary position is we shouldn't summarily assess, then I'll hear
21 you on that now.

22 MS DEMETRIOU: Yes, that is our position.

23 So we say that you shouldn't summarily assess them. First of all, the hearing of the
24 strike-out and the CPO together took three days. Now, they say, "Well, we're seeking
25 the costs of the strike-out and that was two days". But what's obvious from their costs
26 schedule is that they didn't separately record the costs of the strike-out. So what we

1 don't know is what they actually spent on the strike-out. We know broadly what they
2 spent on the three days, including the CPO.

3 So the first point is that it's not a straightforward matter. Can we turn up the schedule
4 of costs.

5 THE CHAIR: Yes, indeed.

6 MS DEMETRIOU: It's at B3, tab 8.

7 Of course, normally summary assessment of costs is normally carried out only for
8 hearings of one day or less, and the Tribunal would have seen the large sum that the
9 PCR claims. And if we turn up the schedule, the first point to make is that it's not
10 a straightforward matter to separate out the costs of the strike-out from the costs of
11 the CPO, as they were heard at the same time and addressed in the same document,
12 including in Apple's Response and the PCR's Reply. What the Tribunal has here in
13 the schedule is the PCR's unreasoned assertion as to the division of work for each
14 part of the case.

15 If you turn to page 134 of the bundle, at the bottom of 133 you see the heading "The
16 Defendant's Unsuccessful Strike-out Application". So this section of the cost schedule
17 is dealing with the strike-out costs that are claimed.

18 THE CHAIR: Yes.

19 MS DEMETRIOU: If you look at page 134 you can see --

20 THE CHAIR: Ms Demetriou, would you mind also giving us the internal page
21 numbering because I've downloaded it as a separate document.

22 MS DEMETRIOU: Of course. So bottom of page 2, you see the heading "Defendant's
23 Unsuccessful Strike-out Application".

24 THE CHAIR: Yes.

25 MS DEMETRIOU: Then if we go on to page 3 and take the top of that page, reviewing
26 and considering the defendant's response, and then take Mr Bronfentrinker's hours.

1 So he's put 5.60. So that's for everything. Then he attributes to the strike-out
2 30 per cent of that. Then you see that throughout the document. You see
3 percentage -- the same 30 per cent applying to all of the solicitors across that row.
4 Then if we go down on the same page, "Preparation of the class representative's
5 reply". So again, reading across that row, you see the hours spent by various
6 solicitors. But those aren't the hours spent on the strike-out elements. They're the
7 total hours. And then they've applied a broad-brush 40 per cent, which they attribute
8 to the strike-out to every solicitor.

9 So there's no variation here. What you can see is they've applied a broad-brush
10 percentage to everything. They obviously haven't recorded the time separately,
11 otherwise they would have just said which hours each solicitor had actually spent on
12 the strike-out application. What they've done instead is applied very round
13 broad-brush percentages to everybody's time.

14 Then if we look at page 138, so that's page 7 internally, still on the strike-out we have
15 "Counsel's Fees". You can see from the top, there's the heading, you can see that
16 there are estimated fees for the costs incurred in relation to the strike-out application.
17 So, again, that hasn't been addressed separately. What they're doing is applying
18 a broad-brush estimation.

19 We say that given that the costs of the CPO and the costs of the strike-out raise
20 different issues, it's obviously important that this division is done properly, and so it
21 should be subject to detailed assessment. So that's the first point we make.

22 THE CHAIR: Yes.

23 MS DEMETRIOU: The second point we make is that the costs that are said to have
24 been incurred are excessive. An obvious issue that arises here is that the solicitor
25 rates -- if we go back to page 2 internally and page 133 of the bundle, you can see on
26 that page the solicitors' rates hourly rate set out for 2025 and 2026.

1 An obvious issue that arises is that all of these rates are well in excess of the London
2 guideline rates. So all fee earners above trainee level are charging rates between 170
3 to 211 per cent above the London 1 guideline. You can see that the lead partner's
4 rate for 2026 is £1,222.

5 Let me just show you what the Tribunal said about that in Spottiswoode. If you can go
6 to authorities bundle 3. So it's the new authorities that have been produced for this
7 hearing.

8 THE CHAIR: Just one moment. (Pause)

9 MS DEMETRIOU: And it's volume 2 of those authorities tab 20, page 747.

10 THE CHAIR: I'm so sorry. Just a moment. This is AB3?

11 MS DEMETRIOU: You should have two volumes. Are you looking at it electronically,
12 sir?

13 THE CHAIR: Yes.

14 MS DEMETRIOU: So it's AB3 which are the new --there are two volumes in hard
15 copy.

16 PROF ALASDAIR SMITH: We don't have any -- There's an authority for the CPO
17 hearing. Is that the one?

18 MS DEMETRIOU: I'll try and work out what's gone wrong, but could we, so as not to
19 slow things down, take it from the hard copy for now and then perhaps?
20 Tab 20. And if you go to page 747. Could I just ask the Tribunal, could you read to
21 yourselves paragraphs 17 to 19? (Pause)

22 The Tribunal said very similar things in the Riefa case. I don't think I need to take you
23 to that as well, but it's clear that what is required if a party is seeking to recover costs
24 above the London guideline rate, is a clear and compelling justification for that. It's
25 a justification that should be capable of being scrutinised by the Tribunal. In this case,
26 the PCR has offered no justification at all, let alone a clear and compelling one. As

1 | you've seen, they're seeking to recover fees that are much higher than the London
2 | guideline rate. In fact, applying the London guideline rate to these costs would result
3 | in a very significant reduction.

4 | THE CHAIR: Has somebody done the maths on this, just as a matter of interest?

5 | MS DEMETRIOU: So we've done a rough and ready calculation, if you just bear with
6 | me for a moment.

7 | So for these strike-outs what's being claimed in terms of solicitor fee is £147,000. At
8 | the guideline rate, that would be £78,000 or nearly £79,000.

9 | THE CHAIR: Thank you. Yes.

10 | MS DEMETRIOU: And there are other examples of excessive claims in the document.
11 | Can I just show you another example. I don't want to pore through it because, in
12 | a sense, the points I've made already should be sufficient to establish that summary
13 | assessment is not appropriate here.

14 | But if you look at page, go back to the cost schedule and look at page 143 of the
15 | bundle tab, page 12 internally, you can see at (c) that the PCR is claiming costs of
16 | preparing the cost schedule. And the amount is a significant amount, £46,000. It
17 | includes costs incurred in apportioning fees between the strike-out and the CPO part
18 | of the case. So those are obviously not fees occasioned by Apple, by Apple's failure
19 | in the strike-out application. Those are costs occasioned by the PCR's decision not to
20 | record time separately in the first place.

21 | THE CHAIR: These costs, by definition, they're not specific to either the strike-out or
22 | the CPO application. They're sort of across the board, as it were?

23 | MS DEMETRIOU: Yes.

24 | Then there are many other examples. If you can go please to page 137, so page 6.
25 | You have the item "strike-out application hearing attendance by solicitors". Now, the
26 | hearing attendance figures do not include any of the work that they carried out to

1 prepare for the hearing. It's literally just being in the hearing room for the dates of the
2 hearing. What you have are three grade A partners who attended the strike-out
3 hearing. We say that's manifestly excessive and unnecessary.

4 In all these circumstances where the costs have not been split up as between the
5 different parts of the case, where the hearing was, overall, a three-day hearing and
6 the strike-out elements of it were two days, where a very broad-brush approach has
7 been taken to trying to establish the costs of the strike-out hearing, very broad brush,
8 that we have been unable to interrogate because the cost schedule was sent to us
9 late. Indeed, my learned friend's skeleton argument was served late. I'm not taking
10 a point about that, it's just that we haven't had the opportunity properly to interrogate
11 these figures. But these are points which I am able to make, having had the cost
12 schedule since the weekend. And, we say, in all these circumstances, the obvious
13 course is that the costs should go to detailed assessment if not agreed between the
14 parties.

15 THE CHAIR: Thank you very much.

16 Can I hear you, Mr Woolfe, just on that issue of principle, as to whether it should be
17 summary or detailed.

18 MR WOOLFE: Certainly. Well, the overall point we make in that respect, and this
19 applies both in respect of the strike-out application costs and the (inaudible) CPO
20 costs, is if you look at the overall sums of costs claimed in respect of the strike-out
21 application, it is overall a relatively modest sum in terms of total costs. You see that
22 from page 138. The total excluding VAT is £273,000.

23 THE CHAIR: Just one moment. This is ex VAT, yes?

24 MR WOOLFE: Ex VAT. That's the actual costs which were incurred. Including VAT
25 is the relevant figure for payment because Which? being a charity can't recover VAT
26 and therefore --

1 THE CHAIR: It has to --

2 MR WOOLFE: -- throughout, we're always constrained by that.

3 THE CHAIR: Yes.

4 MR WOOLFE: Similarly, for the cost of the CPO challenges, which are very
5 substantial, that is on page 143. You'll see excluding VAT that's £277,000.

6 Now, if we come to run through the cost schedule, I'll show you how actually the total
7 time spent in many respects is very modest in respect of all these different elements.

8 My learned friend, referred to the difficulty --

9 Simply put, going to detailed assessment is going to involve an unnecessary and
10 disproportionate cost in circumstances where you'd have to look at this anyway for the
11 sake of working out an appropriate interim payment. It's better for the Tribunal to grasp
12 the nettle, deal with costs, and then everyone knows where they stand.

13 In terms of the points my learned friend makes, as she says that there's been allocation
14 on some sort of arbitrary basis or it's difficult to distinguish these costs, that would be
15 a problem even on detailed assessment, because as you're aware, there was
16 originally a single hearing that we were going towards, for instance, counsel were
17 briefed for a single hearing, obviously the additional strike-out element and inevitably
18 there was co-mingling of time.

19 This Tribunal is in a better place to judge the overall amount of effort spent on these
20 two relative elements than a cost judge who is simply going to be doing a line by line
21 review.

22 Can I just call your attention to a couple of points on the cost schedule, just so you are
23 clear about understanding how the allocation has been done. I'll give you an example
24 you so you can see. The point I'm making is that the total of the strike-out costs and
25 the CPO costs is not the total of the costs that were incurred during that period of time
26 or in relation to CPO issues. There is a percentage which is left unclaimed, which is

1 costs which would have been incurred in any event. We made that clear on the first
2 day.

3 THE CHAIR: Well, that would be true in relation to your CPO costs. Not in relation to
4 the strike-out, surely, because --

5 MR WOOLFE: No, we're seeking all of our strike-out costs. But if I show you the point
6 (inaudible).

7 THE CHAIR: Yes.

8 MR WOOLFE: So on page 134 --

9 THE CHAIR: Just give me the internal page.

10 MR WOOLFE: Sorry, page 3. You'll see that in respect of work done on documents
11 relating to the strike-out application, "Preparation of the class representative's reply".
12 It's at the bottom of the page. That was a single Reply that covered both the CPO
13 issues and the strike-out issues. You'll see that time attributed to strike-out is
14 40 per cent.

15 THE CHAIR: Yes.

16 MR WOOLFE: If you then go to page 140, you'll see the equivalent line of work on
17 the class representative's Reply for the CPO challenge and you'll see the proportion
18 of time allocated to authorisation issues.

19 THE CHAIR: Just a minute. It's 55 per cent.

20 MR WOOLFE: It's 45 per cent.

21 THE CHAIR: It's not 60 per cent. Right.

22 MR WOOLFE: Yes. So 40 per cent plus 45 per cent gives you 85 per cent. So
23 15 per cent --

24 THE CHAIR: I thought it said at 50 per cent, 55 per cent.

25 MR WOOLFE: No. At page 140.

26 THE CHAIR: Can you give me your internal page.

1 MR WOOLFE: Internal page, page 9.

2 THE CHAIR: Page 9.

3 MR WOOLFE: Page 9. Sorry.

4 THE CHAIR: Right, I see.

5 MR WOOLFE: That's the equivalent line to the one I just showed you. Time to do the
6 authorisation which is 45 per cent. Just to be clear, so as an allocation of 40 per cent
7 to the strike-out, that left 60 per cent over relating to CPO, of which only 45 per cent
8 is (overspeaking).

9 THE CHAIR: That's because the other 15 per cent, you accept, you'd you had to do
10 anyway.

11 MR WOOLFE: Yes.

12 THE CHAIR: Because you're not claiming it against Apple. Well, I understand that
13 but --

14 MR WOOLFE: I just wanted to be clear what we're looking at; how it's done.

15 THE CHAIR: Yes, I understand how it's done. Yes.

16 MR WOOLFE: In terms of certain other points, it was said that it's excessive that three
17 partners attended the strike-out hearing. I refer to page 6. That's actually wrong. If
18 you look at the hours spent by those relevant fee-earner partners, three partners are
19 listed but what you'll see is Mr Bronfentrinker is listed as attending for 14 hours.

20 THE CHAIR: Yes.

21 MR WOOLFE: And the other two attended for seven. This was two days of strike-out
22 hearing. It was Mr Bronfentrinker plus, from memory, Ms Clark who were here in
23 November, and Mr Bronfentrinker and Ms Whiteford who were here in March, for
24 example.

25 In terms of the guideline rates, if you want I can show you authority but the Tribunal
26 has in other cases allowed guideline rates plus 30 per cent.

1 THE CHAIR: We're aware of that authority.

2 MR WOOLFE: Yes. Bear in mind the novelty -- all parties agreed it was novel -- and
3 importance of the point, we would submit that there's no reason why that kind of uplift
4 should not apply to the guideline rates, in any event, if they are being applied. The
5 totals could be recalculated on that basis, but we submit that the overall total is
6 relatively modest given the complexity of the issues involved.

7 THE CHAIR: Yes.

8 MR WOOLFE: And therefore summary assessment would be (inaudible).

9 THE CHAIR: Thank you very much. (Pause)

10 We have formed a clear view that this is a case which is entirely appropriate for
11 summary assessment. It's perfectly true that the two days hearing on strike-out is
12 more than the one day, which is taken as the default for summary assessment in the
13 High Court. But there are numerous cases where the courts have summarily
14 assessed costs involving hearings which go for more than one day.

15 Secondly, there's a number of points made by Ms Demetriou in relation effectively to
16 quantum but those are the matters which are typically dealt with and capably dealt
17 with by a Tribunal on a summary assessment. And of course, so far as guideline rates
18 are concerned, they are specifically directed to a summary assessment. So for all of
19 those reasons, we will summarily assess those costs now.

20 Ms Demetriou, we've obviously heard some of the sort of quantum points, as it were,
21 that you want to make but in the light of the fact we're going to summarily assess it,
22 there may be further points of detail that you want to make. The starting position is
23 £273,000 exclusive of VAT, which is claimed.

24 MS DEMETRIOU: Yes, well you've heard the point about the London guideline rate.

25 THE CHAIR: Yes.

26 MS DEMETRIOU: My learned friend says, "Oh, well, it's typical to award London

1 guideline rates plus 30 per cent". But the judgments that I showed you indicate that
2 it's just not appropriate to take that as a starting point and wave it through. There has
3 to be a clear and compelling justification for that. We say that none has been offered.
4 We've received no clear and compelling justification so they should be assessed using
5 London guideline rates, which means a deduction along the lines of the one which
6 I gave to you. I think you have to --

7 THE CHAIR: Well, you said if you applied them rigorously it would be 78 as opposed
8 to the 147 out of the 273.

9 MS DEMETRIOU: Yes.

10 THE CHAIR: Yes.

11 MS DEMETRIOU: So you have the point about attendance at the hearing, which we
12 say that it was, if we go back to page 4, you can see that there were a total of six fee
13 earners attending the hearing, which we say is excessive. I take the point made by
14 Mr Woolfe about two partners attending, but that's unnecessary too. It's unnecessary
15 to have two partners attending the hearing when it's a point of law that would have
16 been prepared in advance. So it's not the sort of issue where you need to take factual
17 instructions. It was entirely a point of law.

18 Then we see, if we go on to page 6, you then have expert professional fees for
19 AlixPartners of nearly £27,000. It's entirely unclear why they needed to charge fees
20 for expert economists at all when this was entirely a point of law. Certainly nothing in
21 our argument called for any expert analysis, so that should be deducted.

22 Those are our key points.

23 THE CHAIR: Sorry, Mr Woolfe, you ---

24 MR WOOLFE: I'll just explain on the detailed points, if you want to hear me.

25 THE CHAIR: Yes, yes, I do.

26 MR WOOLFE: Simply on the point about guideline rates. In an effort here, we do

1 actually have a schedule which shows -- It's the existing schedule but then with
2 recalculations for pure guideline rates (overspeaking) plus 30.

3 MS DEMETRIOU: Sorry, why was this not provided to us? This is completely
4 unsatisfactory. The cost schedule was provided late. We've had very little limited
5 opportunity to look at it and now my learned friend, in response to my submissions, is
6 handing up a new document. It's entirely inappropriate.

7 THE CHAIR: Yes.

8 MR WOOLFE: All this is -- (inaudible) yesterday -- apply the guideline rates to all the
9 partners and calculate the figures through. The guideline rates differ slightly from my
10 learned friend's. We make the total out as being, I think, slightly higher. Instead of
11 £78,000, the guideline rates would be £87,000-odd.

12 THE CHAIR: Yes. Well, given that you haven't provided this document in advance,
13 I think the benefit of the doubt should go to Apple. I'm going to proceed on the basis
14 of 78.

15 MR WOOLFE: Thank you, sir. Moving on to the expert fees. If you recall, my learned
16 friends raised the point as a pure point of law. I accept that. But if you recall, you did
17 receive that briefing note from the Tribunal in advance of the March hearing, which
18 raised points of economics with the staff working document diagram and so forth and
19 a certain degree of consultation was necessary with the expert economists. We
20 submit those costs are reasonable in the circumstances of the importance of the point.

21 THE CHAIR: Just one moment. (Pause)

22 MR WOOLFE: Beyond that, we do submit that guideline rates plus 30 per cent would
23 be more appropriate in the context of the novelty and complexity.

24 THE CHAIR: Can we just be clear, you've got the solicitor's costs and then taking your
25 original schedule, where the solicitor's costs were --

26 MR WOOLFE: 147.

1 THE CHAIR: -- 147.

2 MR WOOLFE: Yes.

3 THE CHAIR: And therefore to get up to your total of 273 -- yes, I see -- counsel of 97,
4 and no points had been taken about that, and then the experts' reports, ah, that's the
5 26,000.

6 MR WOOLFE: That's right. And a small number of internal costs for the in-house
7 legal function. Class representative (overspeaking).

8 THE CHAIR: Yes. Just give me one moment, please. (Pause)

9 Thank you very much. Just give us one moment. (Pause)

10 We think taking all of those matters into account, applying the guideline rates with
11 a slight uplift, leaving counsel's fees essentially unchanged and some costs for the
12 experts, but not as much as the 26 and something for the CR, we will reach the figure
13 of 200 exclusive of VAT as opposed to 273.

14 MR WOOLFE: Thank you, sir. Just to confirm, the order for costs will be for the
15 inclusive of VAT figure in circumstances where we can't recover?

16 THE CHAIR: Unless it's suggested that for some reason the Consumers' Association
17 is able to claim VAT, then VAT has to be added.

18 MR WOOLFE: To clarify, the VAT is only on external costs?

19 THE CHAIR: On the external cost, yes. Yes. Right.

20 MR WOOLFE: I think we move on to the cost of the CPO --

21 THE CHAIR: Yes.

22 MR WOOLFE: -- on which I understand liability is being resisted.

23 THE CHAIR: Yes.

24 MR WOOLFE: We set out the basic principles in our skeleton. I don't think those are
25 really in dispute. However, I just want to show you one authority which is the
26 Spottiswoode case, which I think you may already have open. That is in the authorities

1 bundle for this hearing at page 742, tab 20 in volume 2.

2 THE CHAIR: Just a moment because we've now -- Yes, we've got it now. Just
3 a moment. (Pause)

4 Wait a minute.

5 MR WOOLFE: This is tab 20, starting at page 742. The relevant passage is at
6 paragraph 7, which is on page 744, where the Tribunal summarises both the general
7 approach to making cost orders and specifically the general approach to cost relating
8 to CPO applications. It summarises the position as follows:

9 "[Point one] Costs which would have been incurred in any event in the absence of
10 opposition costs in the case ... the applicant should be awarded its costs incurred by
11 reason of meeting the opposition to the CPO ... discounts to reflect any significant or
12 material issues on which the respondent has succeeded. Cost prior to the date of
13 filing response should be cost in the case." [as read]

14 And then at paragraph 8, a reference to a general deduction, a percentage reduction
15 to cost representatives costs, of meeting opposition to CPO applications to reflect
16 costs that would have been incurred in any event with the appropriate percentage
17 depending on the facts, and you'll see some different percentages there set out. You'll
18 see that's the approach that's been taken in the cost schedule that's been presented.
19 So that's just the point of principle.

20 Now, Apple's general point is that they say that the overwhelming majority of the
21 individual points made by Apple were vindicated by the Tribunal's findings or
22 concessions, and that it only failed on the cumulative effect of whether or not that
23 meant the claim should be certified. That's in Apple's skeleton at paragraph 11. So if
24 you go to your bundle for this hearing, bundle B3, tab 2 at page 23 -- 23 using the
25 bundle numbering -- that's where they make that point.

26 Then they go on at paragraph 14, which spans pages 23 through to page 25 and refers

1 to the five broad headings of points. The priority point, the termination point, the LCM
2 issue -- issues, I think, at the time, appeals cover point and the transparency point.
3 What Apple says is the appeals cover point 14.4, they say is the only point of the five
4 raised by Apple -- top of page 25 -- which does not either result in concessions or
5 ultimately gain traction with the Tribunal.

6 THE CHAIR: Yes.

7 MR WOOLFE: Now, we say this is rewriting history. Apple was arguing very strongly
8 at the CPO hearing, that Which? failed to meet the eligibility condition such that the
9 CPO should not be granted. Now, it is true that the argument was advanced to some
10 extent cumulatively trying to add together criticisms, but it is important to remember
11 that each of these individual criticisms were not being advanced simply as a point of
12 order. "Oh, this point should be corrected before it is granted." They were being
13 advanced as a reason on their own and in combination why which should not be
14 appointed class representative and the submission being made was that the Tribunal
15 could not be satisfied that Which? would fairly and adequately act in the interests of
16 the class. I can show you Apple's CPO skeleton if you want to substantiate that point.
17 Now, in the CPO judgment, the Tribunal has comprehensively rejected Apple's
18 submissions that any of these points went to Which?'s suitability to act as class
19 representative, and it has rejected that point in respect of each of them. So you can
20 see that, for example, in respect of the LCM issues. I'll show you the references in
21 your judgment. The CPO judgment is bundle B3, tab 11, and the relevant passage
22 starts at page 176. The LCM issues, begin slightly earlier at page 168. But the
23 Tribunal is running through chronologically, and at page 176, paragraph 55, the
24 Tribunal says:
25 "We do not see anything unreasonable or inadequate in Which?'s approach to dealing
26 with the funding issues."

1 And it goes on at paragraphs 64 and 65, page 180, over to page 181, to say that -- this
2 is in respect of whether Which? was sufficiently investigating the issues that were
3 being raised:

4 "Which? as a reputable organisation and experienced class representative, plainly
5 considered the matter very carefully." And it might have been sensible to set this out
6 in a witness statement. However, a detailed reading of all the letters sent by Which?
7 shows the extent of its engagement with the issues, while fairly pointing out the limits
8 to the extent of any investigation of funding matters by the Tribunal when dealing with
9 the questions of certification.

10 The fact that Apple did not agree with Which?'s position on all of this does not alter
11 that fact. In addition, we do consider that there was an extent to which Apple's
12 persistent questioning of every aspect of Which?'s position on the funding issues,
13 requiring Which? to continue to provide further details and information went beyond
14 what was appropriate in the context of certification." [as read]

15 Then at 65, you said:

16 "[You] found it quite impossible to say the way in which Which? had approached the
17 question of funding at whatever stage suggested it had not acted with due diligence."

18 So although there were some points about funding which you were concerned to
19 understand, you rejected the submission, which was being advanced by my learned
20 friend, that Which?'s failure to deal with this went to its eligibility. You rejected that
21 submission comprehensively.

22 THE CHAIR: Can I just ask a question here which is given that, obviously, the costs
23 that you're claiming against Apple here, start from the point of Apple's response to
24 your claim. The costs that you're claiming here, do they include from that date
25 onwards all of your costs relating to funding issues?

26 MR WOOLFE: I don't understand that to be the case, no.

1 THE CHAIR: Well, I need to have some clarification. The reason why is very simply
2 this: when we consider the extent to which you were having to rebut challenges from
3 Apple about funding which you say you should have your costs of, particularly in
4 relation to this funder and the announcement that it had made in the middle of last
5 year, you would have to have addressed the Tribunal on the question of those matters
6 in any event. And what I don't know is whether you're including those costs in this
7 schedule? (Pause)

8 MR WOOLFE: So, as I understand it, and I'm instructed, it does include the time from
9 that date onwards on --

10 THE CHAIR: All the time spent on funding issues?

11 MR WOOLFE: All the time spent on funding issues. But it doesn't include time spent
12 responding to correspondence which predated that.

13 THE CHAIR: I understand that, but it can't be right you should have your costs of
14 dealing with funding issues because some of them you would have to have incurred
15 in any event, particularly with this funder, in satisfying us that there was ultimately to
16 be no problem in relation to this funder, quite apart from Apple making the same points,
17 as it were. What I don't have a handle on at the moment is how much of those costs
18 deal with that?

19 MR WOOLFE: Well, just by way of some assistance on that point. In page 10 of the
20 cost schedule, you'll see that there are different amounts for attendances are set out
21 and attendances and communication with the defendants are set out at the top of the
22 page and attendance and communications with the client and funder are set out at
23 point 3 in the middle of the page. Time spent investigating the position would fall within
24 that element, by the nature of it. (Pause)

25 If I may return to what I was saying in terms of the other points that were being raised
26 by Apple, which don't relate to the funder. So those were the appeals point which

1 don't relate to LCM. These were the appeals point, the termination point and the
2 priority point.

3 The appeals point you rejected, that's paragraph 84 of the judgment. Now in respect
4 of the termination point, that was the circumstances in which the funding arrangement
5 could be terminated. It is true the Tribunal did ask for some drafting changes to be
6 made, but it is important to note that Apple was not simply saying that some form of
7 change needed to be made. Apple's argument was that Which?'s failure to address
8 this issue was a source of material concern, and the Tribunal didn't accept that point,
9 as a criticism of Which?.

10 In terms of priority point, the Tribunal dealt with this at paragraph 95 to 100 of the CPO
11 judgment. Now, it's true your interpretation of the LFA differed from that which Which?
12 had adopted. But two points: first of all, the priorities point itself could never be
13 a ground for refusing certification, given what is said in the CPO judgment of
14 paragraph 97, which is such a priority, is permissible. Then the Tribunal found that
15 nothing further arises having set out its interpretation. But that meant it rejected
16 Apple's contention that was being advanced that Which?'s position somehow showed
17 a lack of understanding, which went to its eligibility as a class representative.

18 Similarly, in respect of transparency Apple was making a number of points one was
19 purely about publication of the LFA, that was resolved before Apple's response was
20 ever served.

21 The broader point, though, that Apple was making is at paragraph 60 of its CPO
22 skeleton -- in bundle A, it's page 38 -- is that Apple was saying Which? needed to
23 justify the steps it took to obtain funding and explain its understanding of the terms of
24 funding, and that its failure to do so went to its eligibility to be class representative.

25 Now, the Tribunal did not agree with Apple about those points. We therefore submit
26 that, across the board, the Tribunal did reject Apple's argument that any of the matters

1 it raised went to Which?'s suitability as to whether or not the CPO should be granted.
2 Apple's opposition and persistent raising of criticisms about points which simply didn't
3 go to certification, massively increased the costs of dealing with certification. It made
4 it a very oppositional process.

5 This was clearly an appropriate claim with a good arguable case, which was
6 appropriate for collective proceedings and with a reputable experienced and
7 well-resourced class representative. The CPO hearing could have proceeded very
8 swiftly and efficiently if Apple had not adopted the stance that it did. I hope the Tribunal
9 will appreciate that there is some difference between if a point of concern is raised in
10 a basically cooperative manner, it may be dealt with cooperatively. If it's raised as an
11 attack on the class representative that should bring down the proceedings as a whole,
12 it ends up being dealt with in that oppositional, and therefore more expensive, manner.

13 On that basis, we do seek our costs of dealing with Apple's challenges to the making
14 of a CPO. That's the point of principle. Should we come back and deal with any points
15 of detail after my learned friend has replied and you've ruled on the point of principle?

16 THE CHAIR: Just a moment please. (Pause)

17 Let me hear from Ms Demetriou. Could I hear from you on two bases? First of all, to
18 add to anything as to why you say that your cost order across the board should be
19 costs in case, but if we were against you on that then you'd need to address the
20 quantum of the costs which have been sought against you?

21

22 MS DEMETRIOU: Also whether it should be they should be summarily assessed?

23 THE CHAIR: Yes. Do you want to add anything - well let's deal with that. So let's
24 wrap those -

25 MS DEMETRIOU: Principle first.

26 THE CHAIR: Principle first, then some summary or not, and then quantum if we get

1 to it.

2 MS DEMETRIOU: So on the principle, you'll have seen that our primary position is
3 that it should be costs in the case. If you're against us on that, then we say that there
4 should be a very hefty discount. I'll come back to that.

5 I start with this observation that the PCR, as you've heard, is approaching the issue of
6 costs here as being a binary one. So it says, "Apple opposed certification, the Tribunal
7 did certify the proceedings, therefore, Apple lost and should pay the costs". But that
8 sort of binary approach, as the Tribunal has just identified, is to mischaracterise the
9 position, because in order for the Tribunal to satisfy itself that the proceedings could
10 properly be certified, the Tribunal needed to be satisfied that the funding arrangements
11 were appropriate. And as you know, there was a serious issue with this particular
12 funder, which the Tribunal absolutely had to scrutinise.

13 What the defendant does in these circumstances is, if I may suggest, it serves
14 a helpful and important role in drawing to the Tribunal's attention the issues that it
15 should scrutinise to satisfy itself as to certification. And yet, as you've heard, the PCR
16 is saying that it should be awarded all of its costs relating to the funding issues after
17 the date of Apple's response. That completely discounts the fact that it would have
18 had to have engaged with these issues in any event.

19 Take the termination point issue. As you know, that concerns the funder's broad
20 discretion to terminate its funding under the original funding agreement. That was an
21 issue that the PCR fought tooth and nail over a considerable period of time, and the
22 Tribunal agreed with Apple on the point and required the PCR to amend the funding
23 agreement. If we go back to the judgment -- so we're in B3, tab 11, page 186 of the
24 bundle -- it's paragraph 94 of the judgment. Sorry, page 187. You can see the
25 Tribunal there said that:

26 "We made clear that these amendments were required before we would be prepared

1 to grant a CPO, if we were other otherwise satisfied that we should ... Which? duly
2 confirmed that those amendments are acceptable ..."

3 We made clear that these amendments were required before we would be prepared
4 to grant a CPO if we were other otherwise satisfied that we should, Which? duly
5 confirmed that those amendments are acceptable. So the Tribunal's position couldn't
6 be clearer. Had the PCR not accepted those amendments, which were the result of
7 Apple drawing this point to the Tribunal's attention, then the CPO would not have been
8 granted.

9 But what does Which? say about this? If you go to their skeleton argument,
10 please -- I don't know if you've got that loose or separately in the bundle, but it's in
11 tab 1, page 4, and look at paragraph 9.2 on page 4. You see there that they say:

12 "The only area in which the Tribunal accepted a point raised by Apple had some
13 bearing on the terms of the CPO was in respect of the Termination Point. However,
14 that was not a point which prevented the grant of the CPO ..."

15 But that's not the right way to look at it, because the Tribunal would not have granted
16 the CPO unless it had made that change. So the starting point of the PCR that Apple
17 must pay its costs in relation to the funding issues, because it didn't succeed in
18 establishing that certification should be refused, is wrong. What's required is a more
19 nuanced approach.

20 Let me turn now to consider the other points raised by Apple. So the priority point, as
21 you know, concerned the correct interpretation of the PCR's obligation to pay any
22 damages to its funder and lawyers in advance of the class. The PCR resisted this
23 point up to and throughout the hearing, and the Tribunal rejected the PCR submissions
24 and agreed with Apple as to the meaning of the clause.

25 If we go back to the judgment, so B3, tab 11, page 188. It's paragraph 100 of the
26 Tribunal's judgment. You can see at paragraph 100 that the Tribunal says that, "It

1 | seemed important that we express our overview as to what this clause meant".
2 | So the Tribunal found that it was important to resolve that issue on interpretation, and
3 | the Tribunal will also recall that it wrote to the PCR asking it to confirm that it would
4 | act accordingly. We can see that letter behind tab 14. So the Tribunal's position
5 | couldn't be clearer. Had, had the PCR not accepted those amendments, which were
6 | the result of Apple's drawing this point to the Tribunal's attention, then the CPO would
7 | not have been granted. But what does Which? say about this? If you go to the
8 | skeleton argument, please, I don't know if you've got that loose or separately in the
9 | bundle, but it's in tab 1, page 4, and look at paragraph 9.2 on page 4. You see there
10 | that they say the only area in which the Tribunal accepted a point raised by Apple had
11 | some bearing on the terms of the CPO was in respect of the termination point.
12 | However, that was not a point which prevented the grant of the CPO. But that's not
13 | the right way to look at it, because the Tribunal would not have granted the CPO unless
14 | it had made that change. So the starting point of the PCR that Apple must pay its
15 | costs in relation to the funding issues, because it didn't succeed in establishing that
16 | certification should be refused, is wrong. What's required is a more nuanced
17 | approach. And let me turn now to consider the other points raised by Apple. So the
18 | priority point, as you know, was the correct interpretation of the PCR's obligation to
19 | pay any damages to its funder and lawyers in advance of the class, and the PCR
20 | resisted this point up to and throughout the hearing, and the Tribunal rejected the PCR
21 | submissions and agreed with Apple as to the meaning of the clause. And if we go
22 | back to the judgment. So b3, tab 11, page 188. It's paragraph 100 of the Tribunal's
23 | judgment. You can see you paragraph 100 that the Tribunal says that it seemed
24 | important that we express our view as to what this clause meant. So the Tribunal
25 | found it that it was important to resolve that issue, on interpretation, and that the
26 | Tribunal will also recall that it wrote to the PCR asking it to confirm that it would act

1 | accordingly. And we can see that letter behind tab 14. If we go to page 276 to 277,
2 | you can see the Tribunal say in the letter that:
3 | "... it is important that the Tribunal's view as to what [is meant] is set out, since it
4 | appeared ... that the PCR might have ... a different view."
5 | Then we see that -- sorry, just bear with me a second.
6 | So if you go over the page to 277:
7 | "The parties are directed, as soon as possible ... to confirm to the Tribunal that they
8 | agree with this interpretation and will act in accordance with it."
9 | So again, that's a point on which Apple prevailed. It's nothing to the point that it didn't
10 | prevent certification. It was perfectly right that we raised this point; the Tribunal found
11 | that it was right and the Tribunal took action and accordingly.
12 | Now, my learned friend said in relation to that, "Well, Apple also made the submission
13 | that the PCR's interpretation of this provision reflected badly on the PCR". Well, that
14 | isn't a point; that's a submission that was made in about 30 seconds. That's not
15 | a point that incurred any costs. The costs were eaten up by the substantive resistance
16 | of the PCR to this issue.
17 | Turning to the LCM issue and, again, the important starting point is the one that the
18 | Tribunal has identified that there were, and remain, very serious concerns about LCM's
19 | financial position, and accordingly, its ability to fund the litigation. It couldn't be a more
20 | serious thing for the Tribunal to investigate and satisfy itself of. It was essential that
21 | the Tribunal was in a position to grapple with this properly on the basis of the up to
22 | date information, otherwise it might have been certifying a claim which later collapsed.
23 | If we go back to the judgment, please -- so, B3, tab 11, page 168 -- you can see at the
24 | top of the page, the heading: "The LCM Issues and the Transparency Point". May
25 | I just make a sort of side point, which is that the Tribunal dealt with the transparency
26 | point as part and parcel altogether with the LCM point.

1 THE CHAIR: Yes.

2 MS DEMETRIOU: The Tribunal then set out the key facts relating to LCM's financial
3 position. No need for me to go over those again now. Then if you go on a couple of
4 pages to paragraph 40 on page 170, the Tribunal set out the relevant principles from
5 Riefa v Apple, and they emphasise the importance of scrutiny by the Tribunal of
6 funding arrangements, including at the bottom of that page, subparagraph 3:

7 "(3) ... the PCR's ability to pay the defendant's recoverable costs, as well as its ability
8 to fund its own costs, such that the proceedings are conducted effectively."

9 So that is an important point for any Tribunal looking at these collective proceedings
10 at the CPO stage. And you see, in fact, over the page at paragraph 41, the Tribunal
11 saying, "Well, that's an important principle".

12 Then paragraph 43, the Tribunal set out the relevant passages from the
13 Gutmann v Vodafone case, because the issue relating to LCM's financial position, as
14 you'll recall, had been raised in that case too. If we go over the page, paragraph 45
15 sets out some of the Tribunal's reasons in Gutmann v Vodafone. If we go to the very
16 bottom of page 173, paragraph 278 of the Tribunal's judgment in that case:

17 "'278. In respect of the first factor, we accept that the content of the LCM 2025
18 Statement does highlight issues in respect of [LCM's] financial position which both
19 merited careful consideration by the PCR and will require to be kept under review both
20 by him and by the Tribunal. However, overall, we're not persuaded that, at this stage,
21 there is any reason to consider that ... the PCR would be unable to act fairly and
22 adequately in the interests of the class members.'"

23 There the Tribunal is emphasising the importance of both the PCR and the Tribunal
24 itself scrutinising the position and keeping the position under review.

25 We can see that at paragraph 284, over the page still in Gutmann v Vodafone that the
26 Tribunal again -- if I just ask you to read paragraph 284 to yourselves -- emphasises

1 that it's a matter that will be kept under review and directs the PCR to inform it of any
2 changes, provide updates, in relation to the funding position.

3 Now, like the Tribunal in Gutmann v Vodafone, this Tribunal found that the concerns
4 relating to LCM's financial position did not lead it to refuse certification. Of course,
5 that's right. But there are two points to emphasise: the first is the Tribunal's conclusion
6 was on the basis of scrutiny of LCM's position in light of the information provided by
7 the PCR as to LCM's position. And you'll have seen that that information was provided
8 in response to Apple's enquiries. So Apple's enquiries served an important purpose
9 for the Tribunal in terms of eliciting this information, which allowed the Tribunal to carry
10 out its scrutiny. And the Tribunal made clear, in this case too, that it would keep the
11 situation under review.

12 Indeed, the process before this Tribunal elicited a commitment by the PCR to inform
13 the Tribunal and Apple of any material developments in its funding arrangements,
14 including in relation to the financial position of LCM, and that's recorded at
15 paragraph 61 of the Tribunal's judgment. And so just thinking about the PCR's
16 position, which is, well, Apple's failed to persuade the Tribunal to certify the
17 proceedings on this basis and therefore, the PCR has won the issue and should have
18 its costs of these issues of this issue being ventilated, we say that that does not reflect
19 the reality of the position, because it was necessary for the Tribunal to consider these
20 issues. Indeed, it was essential that the PCR communicate with its funder and apprise
21 the Tribunal of the funder's financial position. Otherwise, the Tribunal wouldn't be in
22 a position to carry out its gatekeeper function. And indeed, at the CPO hearing, the
23 PCR accepted this.

24 Can we go to a different bundle. So bundle A from the last hearing, which I hope you
25 have. Bundle A, tab 1, page 14. This is my learned friend's skeleton argument for the
26 CPO hearing. It's page 14 of the bundle and also internal page 14. Does the Tribunal

1 have that? This is bundle A, tab 1, page 14 and this is dealing with the LCM matters.
2 And you can see in their skeleton argument for the CPO hearing, they say in relation
3 to those matters, these matters only came to light upon the publication by LCM of the
4 accounts on 1 October 2025. And then, I'm quoting:
5 "Since that time as a responsible and prudent proposed class representative, the PCR
6 has properly sought information from the funder to understand the issues more fully
7 and to satisfy itself that funding will continue to be available. The PCR will, of course,
8 continue to keep the matter under review". [as read]
9 The PCR's position is that it had to carry out investigations and make inquiries of the
10 funder in any event, which of course is correct. But then what it can't do is turn around
11 and say, "Well, Apple has to pay all the costs of those" because those are things it
12 would have had to have done in any event. That would be an utterly inappropriate
13 outcome.
14 If you ask yourselves, well, had Apple not raised these issues, so had Apple not raised
15 these issues, could the PCR have avoided those costs by sitting back and saying,
16 "Well, we're not going to make any enquiries of LCM. We're not going to put this
17 matter before the Tribunal. We're not going to answer the Tribunal's questions about
18 LCM's position". Obviously, the answer to that is a resounding "no". It wouldn't be
19 acting as a prudent PCR, in its own words.
20 Now, my learned friend says, look at paragraph 64, I think it is, of the Tribunal's
21 judgment where you said that to some extent, Apple's inquiries went further than was
22 necessary. True, the Tribunal did find that but the fact that Apple may have sent one
23 letter more than it needed to do or ask a few more questions is not a basis on which
24 to award the PCR its costs of an exercise which fundamentally, it would have had to
25 have carried out in any event. That would be to miss the wood for the trees.
26 We say, ultimately, the PCR can't have it both ways. Either, providing the Tribunal

1 with the information about LCM was part and parcel of its role as a prudent class
2 representative, in which case it would have incurred those costs in any event, or the
3 PCR wouldn't have provided the LCM information to the CAT of its own volition, and
4 only did so because Apple asked for it. Well, if that's the case, then Apple clearly
5 succeeded on the point, and it shouldn't have to bear the costs. That's what we say
6 about the LCM issue.

7 Transparency point. So Apple's initial main objection as to transparency concerning
8 the PCR's refusal to publish its LFA, its funding agreement, was belatedly conceded
9 in correspondence. We've made that point in our skeleton. That concession meant
10 that by the time of the certification hearing, the objection comprised a residual concern
11 regarding the PCR's understanding of its funding arrangement, in light of the other four
12 points raised by Apple, particularly the LCM issue.

13 Indeed, that's how the Tribunal put it itself in its judgment. I don't think we need to go
14 back to it, but it's paragraph 31.

15 THE CHAIR: Yes.

16 MS DEMETRIOU: Paragraph 72 records the PCR's concession that the LFA should
17 be published. So the fact that Apple made submissions about transparency didn't
18 result in any additional costs. What the costs relate to are the substantive points of
19 inquiry Which? has made of the funder and those were all things that should have
20 been done anyway.

21 Drawing these threads together, we say that the appropriate order in principle is costs
22 in the case. The work for the CPO hearing is work that would have had to have been
23 done in any event and in any event, the Tribunal agreed with Apple on the majority of
24 the points it made.

25 The Tribunal also, we say, needs to take account of the fact that for a long period of
26 time, the PCR was advancing a claim in respect of a period that was time barred.

1 Apple raised this issue early on, but the PCR didn't concede it until late. Now, the
2 PCR has now accepted, in its skeleton argument, that it is liable for Apple's wasted
3 costs in relation to this issue, which include preparing legal submissions on the point
4 in its response. And so those costs would need to be offset against any costs due to
5 the PCR. As I've said, any costs due to the PCR as a result of the funding issues are
6 minimal in any event. So the practical way forward, we say, is to say no order for costs
7 and it all comes out in the wash.

8 THE CHAIR: I thought it was costs in the case you were --

9 MS DEMETRIOU: Sorry, costs in the case.

10 THE CHAIR: Yes.

11 MS DEMETRIOU: You're quite right. Costs in the case. Exactly.

12 I mean the alternative position, sir, is that if the Tribunal is against us on that, and if
13 you think it's appropriate to award the PCR some of its costs, then we say two things.
14 First of all, the order should say that Apple has its costs in relation to the limitation
15 issue. That should be set out in the order.

16 Secondly, a very significant discount should be applied to the PCR's costs in order to
17 reflect the points I've made. The discount should be applied to the costs incurred by
18 the PCR in responding to the funding issues. In other words, the costs that would
19 have been incurred by the PCR in relation to the non-funding issues are out of the
20 picture anyway. You've then got the costs which they're claiming, and we say a very
21 significant discount should be applied to those.

22 Essentially, for the reasons I've given, Apple's objections were focused and
23 proportionate. This wasn't a case where we raised an objection, for example, like
24 a process objection on methodology, which we then lost, which required lots of expert
25 evidence. The issues were dealt with in a hearing lasting only one day. A day-long
26 hearing, we say, would have been required even in an uncontested CPO application.

1 Of Apple's objections, the vast majority were substantively endorsed by the Tribunal
2 in its consideration, or would have had to have been considered in any event.

3 THE CHAIR: Yes.

4 MS DEMETRIOU: And so we say a very large discount should be applied. If we get
5 to that point, we say at least 80 per cent discount. That's of course a higher discount
6 that's been awarded in some other cases. We address those cases at paragraph 20
7 of our skeleton argument. But this case is different for the reasons that I've given.

8 THE CHAIR: Yes.

9 MS DEMETRIOU: Those cases raised a variety of much more meaty challenges to
10 certification concerning process, class definition and the like. They failed and the
11 PCRs there wouldn't have had to deal with those in any event, so the discount was
12 smaller. That's quite different to the funding points we raised, which the PCR would
13 have had to deal with in any event.

14 Sir, members of the Tribunal, those are my submissions on the principle. We also do
15 say that, if any costs are going to be awarded, they shouldn't be summarily assessed.

16 THE CHAIR: Right.

17 MS DEMETRIOU: I'll come back to that but I can deal with that separately.

18 THE CHAIR: Well, in your submissions as to whether we should summarily assess or
19 not, you presumably rely on what you've said and the same kind of thing that you've
20 said in relation to the strike-out application.

21 MS DEMETRIOU: We do. We do. But the position is even more acute here because
22 the PCR, as you've heard, is seeking all of their costs in relation to the funding matters.
23 They simply haven't made any attempt to separate out those costs that they would
24 have had to have incurred in relation to funding in any event. They've just made no
25 attempt to do that at all.

26 THE CHAIR: Right.

1 MS DEMETRIOU: And so in a sense, the issue of the percentages that they've put in
2 is much more acute because they're applying the percentage to the wrong thing, if
3 I can put it that way.
4 I don't know if you want me to make submissions on summary assessment. I've got
5 a few other points.

6 THE CHAIR: Well, I think we would appreciate if you could, if we decide to summarily
7 assess. I can explain what we're going to do. When you've finished your submissions,
8 I will hear any submissions in reply by Mr Woolfe and then we will take our transcriber
9 break and make a ruling on everything when we come back in.

10 You can take it as read that we've got your points on guideline hourly rate and partner
11 attendance, which you made in relation to the strike-out application and which you
12 would presumably repeat on quantum here if we got to that stage.

13 MS DEMETRIOU: Yes. Can I just show you something else. If we go to the cost
14 schedule. That's B3, tab 8. I know you have it separately, sir, but if we go to bundle
15 page 142, which is page 11 internally. Let me just show you this by way of example
16 to illustrate the point I made about the percentages being an even blunter tool when it
17 comes to the CPO costs.

18 Looking here at counsel's brief fees, you see here that Mr Woolfe's fee for dealing with
19 the matters occasioned by Apple is estimated at £34,500. We saw that his estimated
20 fee for the strike-out hearing was £67,000. That's a total of about £100,000. What we
21 don't know is what his total brief fee was, and so we don't know what portion of his
22 brief fee, if any, has been designated as referable to CPO matters that the PCR would
23 have had to have addressed in any event.

24 If, in fact, the PCR is seeking to recover the whole of his brief fee, that would be wrong.
25 If it were seeking to recover a high proportion of it, that would also be wrong, bearing
26 in mind that the CPO hearing lasted a day, and these points on funding were points

1 that the Tribunal would have had to have considered. It's hard to think that the hearing
2 would have taken much less than a day in any event.

3 Then you've got my points on London guidelines. I don't need to repeat those. You've
4 got my points on -- I gave you some examples about solicitor attendance, which we
5 say also applies in relation to the CPO hearing as well.

6 We think there are some small errors in the schedule, but I don't think it's going to be
7 cost time effective to go through those now.

8 THE CHAIR: Right.

9 MS DEMETRIOU: Just give me one minute. (Pause)

10 There are some items, if you look, for example, at page 9 and you have, "Preparation
11 of bundles for the CPO Hearing". Now, one might think bundles would have had to
12 have been prepared in any event with all of this material. You've got, for example, for
13 a B grade lawyer, 26 hours -- well, 60 per cent of that. So 15 hours being attributed
14 to preparation of bundles. It's just not clear why any of these amounts relating to
15 preparation of bundles should have to be paid by Apple in circumstances where all of
16 this material should have been put before the Tribunal in any event. The bundles
17 would have had to have been created. So no explanation is given in relation to that.

18 Then can I give you the figure for the guideline rates, in terms of our calculation.

19 THE CHAIR: Oh yes, please.

20 MS DEMETRIOU: The PCR claims £212,730. At guideline rates, that would be
21 £119,736.

22 THE CHAIR: Thank you, yes.

23 PROF ALASDAIR SMITH: That's without discounts. (Inaudible) that's just a straight --

24 THE CHAIR: Straight conversion.

25 MS DEMETRIOU: Exactly, exactly. Yes. We do say that, if my learned friend is going
26 to seek any uplift, then it is incumbent on them to explain --

1 THE CHAIR: Yes.

2 MS DEMETRIOU: -- why they do and give us a chance to respond to that.

3 THE CHAIR: Yes.

4 MS DEMETRIOU: Those are our submissions.

5 THE CHAIR: Thank you very much.

6 Yes.

7 MR WOOLFE: I'll try and be fairly brief.

8 THE CHAIR: Well, we don't need to hear you on the issue of whether it should be
9 summary or detailed assessment.

10 MR WOOLFE: Thank you, sir. A few short points by way of reply. First of all, it's
11 important to appreciate that the costs of dealing with Apple's oppositional attitude long
12 predated the filing of their response. The correspondence went back several months
13 previously, back to May 2025. It was said by my learned friend that, you know, it was
14 a matter of responding to one letter from them, she referred to funding issues. In fact,
15 by my account in the index to the original bundle B, so bundle B1 now for the CPO
16 hearing, there are ten letters from Covington, Apple's solicitors, to Which? regarding
17 funding between May and November, not just one. That doesn't count the replies
18 going the other way.

19 Now, that reflects the fact that these funding issues were being advanced in a very
20 oppositional way. Now, it's true that the Tribunal would want to understand the position
21 in respect of funding and it's true that, as a responsible class representative who's
22 entered into the funding agreement, Which? would want to investigate the funder's
23 position. However, those inquiries can be made by internal lawyers at Which? who
24 actually have their deal with the funder, as to what the funder's position is to satisfy
25 themselves.

26 What would not be required, absent Apple's, as I say, oppositional attitude, is to have

1 this prolonged process of correspondence that covered not just the funding issues you
2 heard about at the hearing, but the prior issues to do with the investigation in Dubai,
3 which Apple also raised many issues about.

4 Across the piece, the fact that this was dealt with as a way of objecting to certification
5 rather than merely a point on which Which? should be required to satisfy the Tribunal,
6 is responsible for substantially increasing the costs.

7 Now, in the past, you should be aware that in Spottiswoode, the reductions the
8 Tribunal has made to the cost claim, range between about 10 and 35 per cent. Apple,
9 by contrast, wants the cost claim to be reduced by 100 per cent, which is, I think,
10 unprecedented.

11 THE CHAIR: I thought they said 80 per cent?

12 MR WOOLFE: But their primary position there should be simply be costs in the case.
13 Their primary position is --

14 THE CHAIR: All right. Yes, but if we get to the question of assessment then they say
15 it's 80 per cent and that's what Ms Demetriou said. Yes.

16 MR WOOLFE: We would resist that. We think that would be wholly out of line with
17 (inaudible) previous cases and doesn't reflect, the justice of the situation.

18 I just make one point in respect of the way in which the criticisms that are made of the
19 costs which are incurred in responding to Apple. If you just look at Apple's own costs
20 budget that was filed for this hearing. Bundle B3, tab 7. What we don't have is any
21 breakdown from them as to what time was spent on the strike-out versus against the
22 CPO or against other work on these proceedings. But we can see that -- this is
23 page 130 of the bundle -- in a position where no pleading has yet been filed by them,
24 no Defence has been filed, the costs incurred to date: £900,000 in respect of counsel
25 fees, £250,000 of other disbursements and £3 million of time costs, excluding VAT.

26 It is indicative of an overall approach to litigation of taking every single point and doing

1 | so in, as I say, an oppositional way.

2 | The only other point which was raised, I think my learned friend on the fees, is an
3 | application for costs in respect of a limitation issue. I think what that refers to is the
4 | fact that an amendment was made to the claim form. We had adopted one position
5 | limitation at the time of filing. Then the Court of Appeal judgment was handed down
6 | and sometime later we therefore amended the position on limitation. We don't quite
7 | understand what those costs she's seeking would be, in circumstances where we
8 | simply conceded the point following the handed down of a Court of Appeal judgment.

9 | MS DEMETRIOU: Sorry, can I just say --

10 | MR WOOLFE: No schedule of cost has been provided in respect of that.

11 | MS DEMETRIOU: I'll just clarify that point because my learned friend's conceded that
12 | in his skeleton argument. He said that the PCR has agreed to pay our costs of that.

13 | THE CHAIR: Just find that.

14 | MS DEMETRIOU: Yes, so --

15 | MR WOOLFE: Sir, that's fine. I just wasn't understanding -- I thought this was being
16 | brought into the summary assessment of these costs and that's --

17 | THE CHAIR: Well, I think they were saying that there'll be an offset.

18 | MS DEMETRIOU: Yes, exactly.

19 | THE CHAIR: Or it needs to be dealt with somewhere because it needs to be dealt
20 | with. Perhaps it should be dealt with separately.

21 | MS DEMETRIOU: We're not asking for summary assessment.

22 | THE CHAIR: No, no, no, I understand that.

23 | MR WOOLFE: In that case I think the point isn't ...

24 | MS DEMETRIOU: Just one further point in response to something that my learned
25 | friend --

26 | THE CHAIR: Well, let me just see if he's finished yet.

1 MS DEMETRIOU: Sorry, I thought he'd finished.

2 MR WOOLFE: The other final point to make, my learned friend said it would be
3 necessary to offset costs that they incurred in dealing with these funding points,
4 et cetera, on which they say they won. Again, we've had no schedule of those costs.
5 We don't know what those costs would be in those circumstances. It's difficult for them
6 to say that some unparticularised costs would need to be offset.

7 THE CHAIR: Do you want to say anything about uplift?

8 MR WOOLFE: On that, we would simply say the same uplift should be applied and
9 (inaudible) applied on the strike-out.

10 THE CHAIR: Right.

11 Now, Ms Demetriou.

12 MS DEMETRIOU: Yes. I'm so sorry. I thought my learned friend had finished. I didn't
13 mean to be discourteous.

14 THE CHAIR: That's all right.

15 MS DEMETRIOU: One very quick point. He took you to our high level cost budget.

16 THE CHAIR: Yes.

17 MS DEMETRIOU: And asked you to read into the costs already incurred, that we are
18 incurring lots of costs in relation to these issues. Absolutely nothing can be read into
19 this. Obviously, substantial work has had to have been done on the substance of the
20 case, including liaising with Apple on the Defence, on our Defence, taking instructions
21 on the points raised by the claim. So nothing should be read into that at all. You can't
22 read across from that to reach any conclusions as to the reasonableness of the PCR's
23 costs. That's the only point I wanted to make.

24 THE CHAIR: Thanks. We'll take the usual break.

25 (11.47 am)

26 (A short break)

1 (12.01 pm)

2

3 Ruling (submitted to the Tribunal for approval)

4 (12.07 pm)

5 THE CHAIR: Just for the sake of the order, unless there is going to be some request
6 for extra time for payment which I doubt, as these are both summarily assessed costs,
7 the normal date for payment will be 14 days from today, and that's in respect of
8 strike-out and --

9 MS DEMETRIOU: My Lord, we'd like 28 days, please, because there are certain
10 processes that need to be gone through with Apple, and those systemic processes
11 can take some time. So we'd ask for 28 days.

12 MR WOOLFE: Well, we see no reason for of anything other than 14 days is a very -- it
13 has cash at hand of billions of pounds, as I understand it.

14 THE CHAIR: Unless there's something more specific, Ms Demetriou, I don't
15 understand why they can't do it in 14 days, I'm afraid.

16 MS DEMETRIOU: Can I just take instructions?

17 THE CHAIR: Yes. (Pause)

18 MS DEMETRIOU: I'm told that it takes time to onboard payment onto the systems,
19 and there are various authorisations that need to be granted.

20 If not 28 days, could we have 21 days? It's not going to --

21 THE CHAIR: Have your solicitors got monies on account?

22 MS DEMETRIOU: No.

23 THE CHAIR: No money on account at all in this case?

24 MS DEMETRIOU: No.

25 THE CHAIR: I'm sorry, I'm not trying to be difficult, but I just don't understand if, as we
26 often do, traders with assets that are rather more modest than Apple's, we normally

1 require something significant. I can't understand at the moment why --

2 MS DEMETRIOU: It's not, it's --obviously, Apple's good for the money. That isn't the
3 question.

4 THE CHAIR: No.

5 MS DEMETRIOU: The point is -- and so I would say that up until service of my learned
6 friend's skeleton argument, which was late, they weren't seeking summary
7 assessment of costs at all. So we weren't looking at any of these issues. We've had
8 to, at the eleventh hour, think about summary assessment. That's not a point that was
9 even raised in advance of our skeleton. I'm afraid I don't have evidence on the point,
10 but I am told on instructions that 14 days will create practical difficulties. There's
11 obviously no disadvantage to the PCR in having a short delay.

12 THE CHAIR: 21 days.

13 MS DEMETRIOU: Thank you.

14 THE CHAIR: Right. That deals with all aspects of those costs. Turn to permission to
15 appeal.

16

17 Discussion re permission to appeal

18 THE CHAIR: I thank both sides for their helpful submissions. Is there anything you
19 want to add, Ms Demetriou?

20 MS DEMETRIOU: I know we say this is obviously this is an obvious case where
21 permission should be granted. The threshold is real prospect of success. It would,
22 frankly, be irrational, we say, for the Tribunal to find that there was no real prospect of
23 success in circumstances where the Chair has dissented, accepting Apple's points on
24 the law.

25 THE CHAIR: Does this wrap up a point on compelling reason for appeal on the basis
26 of its importance?

1 MS DEMETRIOU: That's a separate branch.

2 THE CHAIR: Yes.

3 MS DEMETRIOU: There's -- well, we say we obviously surmount real prospect of
4 success. There is a compelling reason because it's a novel point of law which will
5 affect other cases.

6 THE CHAIR: Thank you very much. All right.

7 Anything you'd like to add to your written submissions, Mr Woolfe?

8 MR WOOLFE: No -- very briefly, I appreciate it is unusual to ask the Tribunal's
9 permission in circumstances where one member agreed with the party seeking
10 permission. I do say that the submission Apple has to make is not simply whether or
11 not they have an arguable position that foregone consumer surplus is not
12 a recoverable form of loss. For that, they come to the point (inaudible) your judgment,
13 sir.

14 The question is rather whether Apple has real prospects of persuading the
15 Court of Appeal that our position is so unarguably bad it should not go to trial, and that
16 position has to be judged by the fact that the majority found the other way, and also
17 should bear in mind that the majority has decided the issue should be determined in
18 the context of real facts and evidence at trial.

19 If you imagine an ordinary High Court judge sitting alone, if they decided that an issue
20 should be heard at trial, it would be unusual to grant permission against that, just to
21 sort of thwart that decision by sending it off on appeal so it's considered in the abstract.
22 So we do say that permission should be refused.

23 THE CHAIR: Thank you very much.

24 (12.12 pm)

25

26 Ruling (submitted to the Tribunal for approval)

1 (12.12 pm)

2 THE CHAIR: Thank you both for that.

3 Then, is there -- on the question of the next thing we wanted to deal with is permission
4 to amend the claim form.

5 MR WOOLFE: I understand that's now fully agreed.

6 THE CHAIR: Is that now fully agreed? Thank you.

7 We wanted to put in next -- we'd got down on the agenda updated funding information
8 and, of course, we've now been provided with the further announcement, the stock
9 market announcement.

10 Now, first of all, I want to ask Ms Demetriou if there's anything further Apple want to
11 say on that question?

12 MS DEMETRIOU: Not at this stage.

13 THE CHAIR: Not at this stage. Mr Woolfe, we did want to canvass with you this: the
14 position taken by Which? here was that, while they were prepared to say that there
15 had not been any material change, they didn't want this to form some precedent for
16 going forward. But I'm assuming that when your solicitors wrote that originally they
17 weren't aware of this stock market announcement, or perhaps that came afterwards?

18 MR WOOLFE: It came after.

19 THE CHAIR: It came afterwards. Yes.

20 MR WOOLFE: Then having said that, in the light of having appeared, we informed
21 you of it straight away.

22 THE CHAIR: Yes. I mean, it seems to us it would have been obvious you didn't want
23 there to be any doubt about it. Your solicitors very helpfully did come back on that
24 point.

25 MR WOOLFE: Yes.

26 THE CHAIR: They would have had to have done in relation to an announcement of

1 that kind.

2 MR WOOLFE: Yes. And obviously being an AIM-listed company, LCM is under
3 obligations to report such matters to the market, and it can't hand them to other people
4 first. So they will come out, you know, and have to come out as a market
5 announcement.

6 THE CHAIR: Out before telling anybody else.

7 MR WOOLFE: And, and obviously, we have no objection to anything of this nature
8 that comes out we can provide to you so you're aware of it. We're not expecting you
9 to monitor stock market --

10 THE CHAIR: Well, it may go a bit further than that because now that the -- as I recall
11 from the hearing last year, what had happened was they'd negotiated a waiver of debt
12 covenants, I think, for six months or something, because that's what has expired at
13 the end of May.

14 MR WOOLFE: I think they had negotiated -- I think from my memory, it was expiring
15 sometime around the end of the year, and then you see here the reference to expiring
16 in May being extended again. There have been multiple extensions.

17 THE CHAIR: There have been multiple extensions, but this is now -- this looks like it's
18 happening on a month-by-month basis now, because the present extension is going
19 to expire at the end of June, isn't it?

20 MR WOOLFE: That's what it says.

21 THE CHAIR: And if they don't get an extension there, they're probably going to be in
22 default, because they're going to be in breach of one of the covenants, like capital
23 adequacy or something like that.

24 MR WOOLFE: But they do require that -- well, I'm not sure that they breach the
25 covenants as a result, but they do require that level of funding, yes.

26 THE CHAIR: Well, we take the view that there's got to be regular reporting now in

1 relation to this funder. As you've pointed out, they will probably have to keep making
2 stock market announcements if it's going to be on a regular basis, if they're going to
3 be running month by month.

4 MR WOOLFE: What did you have in mind?

5 THE CHAIR: Just a minute. (Pause)

6 Well, we all take the view that if what's happening is that they're seeking rolling
7 extensions on a monthly basis, then the reporting must be on a monthly basis as well.

8 MR WOOLFE: And just -- I may take instructions in a moment, because we're
9 envisioning a letter (inaudible) from my solicitors each month.

10 THE CHAIR: Well, is there any reason why there can't be a letter, at least a letter,
11 directly from LCM? I'd rather put the burden on LCM than your instructing solicitors,
12 frankly. I mean, obviously they will forward the letter, but it seems to us that there
13 ought to be a letter every month from a person in control at LCM to confirm that there's
14 been no material change, or if there has been a material change, to say what it is.

15 MR WOOLFE: I'm conscious -- I think unless --

16 THE CHAIR: If you want to take instructions about the form of that over lunch, then
17 do so.

18 MR WOOLFE: If I could sir, that would be helpful. Then perhaps, we can ...

19 THE CHAIR: All right.

20 Now, can we then turn to directions to trial. There's an issue of principle here, because
21 you say that we should give directions up to trial, or at least substantially beyond
22 disclosure, and Apple say that we shouldn't. I'd like to hear from Ms Demetriou first
23 on that and then you can reply.

24 Discussion re directions to trial

25 MS DEMETRIOU: Thank you.

26 So on that issue we say that there are aspects of the timetable to trial which simply

1 can't be determined sensibly now when Apple hasn't even pleaded its Defence, and
2 the issues in dispute haven't yet crystallised. So we can't think of another case in
3 which directions to trial have been set before the Defence has been served.

4 We say that this is a sprawling claim on behalf of the PCR, which is nonetheless
5 presented -- it's a large, as you know, £3 billion claim; it's sprawling -- but it's been
6 presented on an overly simplistic basis because at root, it's an attack on the design of
7 a cutting-edge technology product. They say that Apple should have designed it
8 differently, but they don't say how, and they just don't engage in their claim with the
9 issues of system design and security that they're putting in issue. So it is, we
10 respectfully submit, essential to wait to see what Apple says about that and also how
11 Which? responds before we can really have a sense of the scale of the issues between
12 the parties, and, therefore, a sense of the scale of disclosure, the nature of witness
13 evidence and how long all of that will take.

14 Now, the PCR says in its skeleton argument that we must know what's in dispute
15 because we've had the claim for 18 months, but respectfully, that's besides the point.
16 It's only just been certified; we haven't filed our Defence, so they don't know what we're
17 disputing, nor does the Tribunal, and once we've filed our Defence, we don't know
18 which of our allegations will be accepted by the PCR. That's the whole point in having
19 pleadings, so that everyone knows what the points of dispute actually are, and so that
20 the parties can prepare their evidence and the claim can be tried accordingly. So we
21 do say that it's impossible at this stage, in advance of identifying the issues in dispute
22 which is so fundamental, that it's impossible to say how long key steps in the
23 proceedings are likely to take, including gathering documents.

24 This is not a case like many other cases in the Tribunal where similar proceedings
25 have already happened in other jurisdictions, such that there are readily available
26 pools of documents that can simply be handed over. So we say that those questions,

1 "How long is it going to take to provide disclosure? What witnesses are required?
2 How many witnesses are required? What's the factual evidence going to go to how
3 long those evidential stages will take?", are not ones which can sensibly be determined
4 now.

5 Now, the fact -- again, contrary to the PCR skeleton argument, they say this at
6 paragraph 35.3 -- the fact that we filed, on the Tribunal's request, an extremely high
7 level cost budget full of caveats and assumptions doesn't mean that we know how
8 long this is going to take. We're simply responding to the Tribunal's request to do what
9 we can at this stage. So we do say that seeking to set detailed deadlines for every
10 further procedural step now would be guesswork, and it would entail a significant risk
11 of having to revisit the directions later on, leading to avoidable grounds of further
12 correspondence, hearings and ultimately increasing costs and wasting the Tribunal's
13 time.

14 Now, the PCR also says that we're -- this is in their skeleton, paragraph 34 -- they say
15 that Apple's dragging its heels and the Tribunal has plenty of experience in class
16 actions and so it can set the timetable now, but that's obviously a bad point because
17 directions are not simply a cookie cutter; they can, and should, correspond to the
18 demands and circumstances of each case. Simply because the Tribunal has
19 previously ordered certain trial directions against Apple doesn't mean that the same
20 directions are appropriate in this case. As I've said, as far as we can tell, it is totally
21 unprecedented for the CAT to set a timetable to trial in a collective claim without
22 proceedings having closed. The obvious, the standard approach, here and elsewhere,
23 as indeed the guide says, is to wait until the close of pleadings once the issues have
24 been identified.

25 You've got the references in our skeleton -- I won't repeat those -- they're in our
26 skeleton at paragraph 30. We say, tellingly, that the class representative has provided

1 no examples of this having happened before. It sought to provide some examples in
2 correspondence which, as we pointed out in our skeleton, are wrong. And it relies in
3 its skeleton on some generalised statements about, "proactive and efficient case
4 management". Well, of course we want efficient and proactive case management, but
5 we say that it's not going to be efficient case management to seek to set out now all
6 of these steps and circumstances where we don't know the parameters of the claim,
7 and there's no need to do that because we can make sensible progress obviously on
8 pleadings, but also on disclosure. Everyone's agreed there should be a further CMC
9 at that stage and that's obviously the appropriate time in order to set down further
10 directions.

11 I don't know if you want me to address you on what we say -- there's a difference,
12 small difference, between us about what the appropriate steps for disclosure should
13 be. I don't know if you want submissions on that now.

14 THE CHAIR: Can I just try and assist in this regard. I accept that you say it's high
15 level, and that's what we asked for, a high level budget and that's full of assumptions.
16 But as it so happens, you're not that far apart on trial length, because Which? say it
17 should be seven weeks and you say it should be eight weeks. We know from our
18 investigations that an eight week trial would be possible, starting from the beginning
19 of June 2028. That's two years from now.

20 We note what you've said about, as it were, the added complexity here because this
21 involves the architecture of the product. It's not a straight excess pricing abuse case,
22 and we do take that point on board, but nonetheless, at the moment, we would find it
23 difficult to see that it would be impossible to have a sensible trial timetable starting
24 now and ending in good time at two years hence. There is an advantage, as we see
25 it, on that basis to getting a trial date done now, rather than leaving it for another
26 six months. I wanted to throw that out.

1 MS DEMETRIOU: Yes.

2 THE CHAIR: I'm not at this stage concerned with the detail of any directions if we
3 were persuaded that we should make those directions. But even taking into account
4 the nature of this case, at the moment, we find it difficult to see why we shouldn't set
5 a trial date two years hence, and if so, make some directions along the way. But I'm
6 just throwing that out.

7 MS DEMETRIOU: Of course. Let me respond.

8 THE CHAIR: Yes.

9 MS DEMETRIOU: From our perspective, the trial estimate is the best we can do in
10 the circumstances. It's based on other similar trials and what we know so far about
11 the pleadings.

12 THE CHAIR: Of course.

13 MS DEMETRIOU: We do think that that would be tight. Thinking about other large
14 cases in this Tribunal that is tight by other standards, I know, for example, that
15 I was instructed personally in the Gormsen v Meta case, which started a long time
16 before this one, which was set down for trial, originally in the summer next year and
17 has been now vacated and postponed simply because it's been difficult to get ready
18 on time, because these cases are large cases, which - this is not a follow on case, so
19 it's complex for that reason too. It raises all sorts of novel issues. We don't yet know
20 what the scope of disclosure is going to be. You can see that the timetable put forward
21 by the class representative depends on disclosure being produced at a very early
22 stage, and that, we think, is not realistic. There's not much between us, but we think
23 that would be too tight and we'd be liable to have to be vacated. We've suggested,
24 sort of, six months after that. So our proposal had been January 2029. We think that
25 that is brisk but manageable. Insofar as the Tribunal is saying, "Well, isn't it sensible
26 to set down the trial now and we can work out the directions perhaps at a further CMC",

1 we see the sense of that so long as it's set down at a realistic time.

2 THE CHAIR: There are two possibilities -- and I appreciate what your general position
3 is here, so this is all just our observations -- it could be possible to set the trial date
4 down. It could also be possible to make some directions on the basis of what you say,
5 what we think, is the manageable time for each stage. But at this stage, I just wanted
6 to throw out the point about telling you about when this could be fixed for a trial, and
7 is this not a case where from now you couldn't get to trial in two years, I suppose, is
8 the broad point that we're making.

9 MS DEMETRIOU: We think that that's difficult. Comparing this case to other cases
10 in the CAT, two years for any case from certification to trial is tight as far as these
11 cases go, and this is particularly complex because it's a standalone case. There aren't
12 ready made pools of disclosure; it's a sprawling claim, so we do think two years is
13 tight. We also say that there's no good reason, in our respectful submission, to set it
14 down now in circumstances where the Tribunal will know, come September time, what
15 the issues - September or October - what the issues in dispute are. (Pause)

16 So, sir, on --

17 THE CHAIR: Sorry. Professor Smith wanted to ask a question.

18 PROF ALASDAIR SMITH: I would just like you to elaborate a bit on what you mean
19 by this being a sprawling claim. It's a claim for excessive pricing of a very specific
20 product, albeit a technological product. What do you mean by the word "sprawling"?

21 MS DEMETRIOU: I think what we can say is that it's an ambitious claim for £3 billion,
22 and so Apple's entitled to defend itself properly. And it's a claim which we consider
23 poorly articulated. So the class representative has not articulated what the proper
24 counterfactual is or counterfactuals. We've got no idea what they're going to say about
25 the counterfactual and what they say about the counterfactual or counterfactuals may
26 have a considerable bearing on the complexity of the trial.

1 | What we see in their proposed order -- so to get to a trial in two years time, they say
2 | that Apple -- of course, Apple is the party that is that the burden of disclosure is going
3 | to fall on, obviously. And they say that Apple will have to provide all disclosure by this
4 | time next year. We say that that looks very tight, but particularly in circumstances
5 | where we don't know yet what the scope of disclosure is going to be.

6 | I come back to the point I made about this at root, being a case about a sophisticated
7 | technological product which they say should have been designed differently, but they
8 | haven't said in what respect. So they are complex points, and we're not yet in
9 | a position to know.

10 | Apple may come back and plead various things in relation to their technology. We
11 | don't know whether those will be accepted or not by the class representative. If they're
12 | not, that will have a bearing on disclosure and factual evidence.

13 | THE CHAIR: Can I just ask you, to remind me on -- you say, all of this should be dealt
14 | with at a separate CMC, a further CMC, however you want to call it. When are you
15 | saying that should happen?

16 | MS DEMETRIOU: Yes. Can I show you the -- can we go to the order, so it's tab 10.

17 | THE CHAIR: I've taken the latest iteration of it.

18 | MS DEMETRIOU: Me too.

19 | THE CHAIR: I don't think it matters much.

20 | MS DEMETRIOU: So the last the latest iteration of it is -- so you can see that the blue
21 | writing is the class representative's position and the green writing is ours. We say
22 | there's a dispute about how this should happen, but we say that the parties should
23 | proceed to make progress on disclosure. We say that there should be, if you look at
24 | paragraph 11, a CMC on or after 1 February 2027.

25 | Now, it may be that that can be brought forward.

26 | THE CHAIR: So your order would include some disclosure directions?

1 MS DEMETRIOU: It would. Can I just take you through that, briefly?

2 THE CHAIR: Yes.

3 MS DEMETRIOU: So what we say is that -- so going back to page 2 of this, you've
4 got section B on pleadings. So that's paragraphs 2, 3 and 4.

5 THE CHAIR: Yes.

6 MS DEMETRIOU: Then going to paragraph 6, it's agreed in paragraph 6 and 8 that
7 the parties should agree a list of issues. That's obviously going to be critical in terms
8 of defining the parameters of the dispute.

9 THE CHAIR: Yes.

10 MS DEMETRIOU: Then, we say, if you go down to paragraph 8 that:
11 "By ... 13 November, the Class Representative and the Defendants shall each send to
12 the other their respective proposals for the disclosure they propose to provide ..."
13 Now, the reason, just to explain, for the gap between the list of issues and this, is that
14 Apple will obviously need to make internal investigations as to what documents it holds
15 and what it can provide that that is relevant to the disputes in the list of issues.
16 Then if you go over the page, paragraph 9, the parties to use -- so the parties have
17 exchanged proposals at this stage and then use reasonable endeavours to agree,
18 have a meeting to seek to resolve any disputes.

19 Then 18 December:
20 "The Class Representative shall file with the Tribunal ... a composite version of the [list
21 of issues] and the Disclosure Proposal(s) identifying ... any points of disagreement."
22 And then any points of disagreement should be considered at a case management
23 conference, which can then, we say, set the remaining directions in the case.
24 Now, if the Tribunal wishes before that date to secure time in the Tribunal's diary, it
25 may be that that can be done by the parties liaising once they've corresponded on the
26 list of issues in September/October time, and we can liaise with the Tribunal in writing

1 | to work out an appropriate date. But at least then we'll have a better idea --

2 | THE CHAIR: A date for the trial, you mean?

3 | MS DEMETRIOU: The trial, yes. At least then we'll have a better idea of what's in

4 | dispute.

5 | THE CHAIR: Can I just ask this, and it may be something else we've got to consider.

6 | But if you're right that there isn't a pleaded counterfactual --

7 | MS DEMETRIOU: Yes.

8 | THE CHAIR: -- you're going to be serving a Defence not knowing what the

9 | counterfactual is. And you may say -- if that's the position, you'll be serving your

10 | Defence, you still know when that is, what that is, and they may or may not put it in

11 | their Reply. But I'm just bearing in mind that there is that outstanding point. But then

12 | what would you be saying then that, quite apart from securing the trial date, your CMC

13 | is still after this sort of round of disclosure requests rather than after the list of issues

14 | which could be done in the autumn of this year?

15 | MS DEMETRIOU: Yes. So the purpose of the CMC in our proposed timetable is really

16 | to resolve disclosure disputes and also lay down remaining steps to trial. But it could

17 | be that we have a short hearing early on in the autumn, once the list of issues has

18 | been determined, to flush out when the trial should be listed, as well as any matters

19 | arising from the pleadings.

20 | THE CHAIR: Can I just ask this? And again, I accept your caveat, it's high level. Both

21 | sides appear to agree that they're going to need three experts technical, economic

22 | and behavioural.

23 | MS DEMETRIOU: No, we haven't agreed to that.

24 | THE CHAIR: I thought you put three experts in your budget?

25 | MS DEMETRIOU: No, that's -- I mean, we made clear that we're not in a position to

26 | say at the moment because the issues are not in dispute. So the budget is -- and I do

1 want to emphasise this -- based on estimates and assumptions. One of the points
2 that we would like to make is that when one looks at the draft directions put forward
3 by -- so if you go back to that order, please. So, we can see here what the class
4 representative says about expert evidence on page 5 of the order, in the blue text.

5 THE CHAIR: Yes.

6 MS DEMETRIOU: They're seeking now to obtain permission from this Tribunal that
7 permission to adduce expert evidence from three named individuals in three fields.
8 And we say that this is obviously premature, given it's contrary to the Tribunal's new
9 Practice Direction on expert evidence. It's impossible at this stage for the Tribunal to
10 determine that experts in these fields are necessary when it doesn't even have Apple's
11 pleaded case. So this is obviously premature.

12 THE CHAIR: Sorry, but have I misunderstood your budget? I thought in your costing
13 you'd put in costing for three experts, as it happens in those particular fields?

14 MS DEMETRIOU: Only because the Tribunal's asked us for a high-level cost budget
15 and we had to make assumptions for the purpose of the cost budget.

16 THE CHAIR: If I may say so, it sounds correct because that's the sort of each
17 individual expert discipline is what you would expect. The only complication here, and
18 I'm drawing to some extent, and I accept, on our experience in the Le Patourel case,
19 which again was a standalone case where there was a trial of substantial length. The
20 complicating factor here is that it is the architecture, the choice architecture, we
21 understand that it's not simply a question of what price you charge.

22 I mean, presumably, has your side consulted experts already?

23 MS DEMETRIOU: I'll take instruction on that.

24 THE CHAIR: Yes, please.

25 MS DEMETRIOU: But can I just show you the letter at page 282 of the bundle. So
26 B3, tab 17, page 282.

1 THE CHAIR: Just a moment. (Pause)

2 MS DEMETRIOU: Just bearing in mind that after the Tribunal wrote to us asking for
3 high-level budgets, we only had a short amount of time to put this together.

4 THE CHAIR: Yes.

5 MS DEMETRIOU: But what my solicitors are saying very clearly is that, they say:
6 "We note this budget has been prepared at a very early stage of the Proceedings
7 before Apple has served its Defence, and so before the issues in dispute have
8 crystallised. The scope of disclosure and the nature and extent of any factual and
9 expert evidence have not been determined, nor the length of the trial. The estimates
10 have therefore been prepared on the assumptions set out in the accompanying
11 assumption sheet and in line with the assumptions set out in Which?'s costs budget ...
12 By adopting this approach, the Defendants do not confirm that these assumptions are
13 appropriate."
14 So what we've done, just to try and be of assistance, is take the same assumptions --

15 THE CHAIR: Yes.

16 MS DEMETRIOU: -- as Which?. But, sir, in terms of these fields of expertise, it's
17 actually highly unusual to have an expert in the field of behavioural economics. And
18 certainly in all the other cases that I've been in, there have been contested, often
19 contested, applications where the Tribunal has wanted to satisfy itself that such
20 evidence is necessary. In a CMC I did recently in front of the President for a case
21 that's next spring -- so very soon -- she's asked us all to come back in July with detailed
22 proposals as to precisely what issues in the field of competition economics the experts
23 will deal with in line with the CAT's Practice Direction. So we say that the idea that
24 this should simply be waved through now before the issues have been defined is
25 wrong.

26 Also, as Mr Schaefer says, to what benefit? To what benefit would it be to grant

1 permission and lay down deadlines for experts in circumstances where now, in
2 circumstances where the Tribunal hasn't heard from us about the substance of the
3 point? So yes.

4 Then just going back to the proposed timetable leading to a trial in two years' time,
5 that is compressed in two respects. It's compressed because it provides for disclosure
6 to be given by Apple this time next year. But then that is only one year out from
7 a June 2028 trial. And so after that, you've got to have a process of factual and expert
8 evidence. One year seems tight for that in the circumstances.

9 Mr Schaefer has reminded me of the CAT's new Practice Direction in relation to expert
10 evidence. What that says at paragraph 12 is that:

11 "The Tribunal will seek to manage cases actively, to move the provision of expert
12 evidence forward in an effective manner, and to ensure that the evidence is strictly
13 confined to the issues for which it's necessary. This may include directions for the
14 parties to submit to the Tribunal for approval a detailed list of the questions to be
15 considered by the experts correlated to the pleaded issues." [as read]

16 And so it is really, in our respectful submission, essential that pleadings have closed
17 and that the issues in the case have been defined before the Tribunal gets on to
18 considering that question.

19 Do you need anything else from me at this stage?

20 THE CHAIR: Well, I've got your points, I think. Can I hear from Mr Woolfe just on this
21 question of principle.

22 MR WOOLFE: Thank you, sir.

23 We'll begin by saying we fully agree with, I think, the concerns been expressed by you,
24 sir, that at the moment if a trial is listed for, say, summer 2028, which is when we were
25 looking for, then it can be in the diary. If we leave matters, as Apple suggests, to
26 a CMC to consider matters beyond disclosure, I think to be listed in February next year

1 or after, that slot will simply go and time slips by.

2 Second point is that it is true that pleadings have not yet closed. However, that doesn't
3 mean you can't set an overall time frame, which is robust and sensible and can
4 accommodate a reasonable amount of uncertainty as to the exact scope of the issues.
5 The fact that issues may be narrowed if they concede some points in the Defence or
6 we concede some points in reply, doesn't mean to say that overall, you can't say at
7 this stage that approximately a trial two years hence is broadly achievable.

8 My learned friend suggested a trial in January 2029, we'd say this claim started in
9 2024, November 2024. So therefore, a claim four and a half to five years after the
10 claim began is not really what we said the Tribunal should be aiming for.

11 THE CHAIR: I understand that, and again, we had a similar issue in Le Patourel where
12 we did allow behavioural expert evidence in the end there. But the question is rather,
13 how long is the trial -- is the timetable to trial fairly to be, regardless of when the claim
14 started, because we've got to look at the fact that pleadings haven't yet closed.

15 MR WOOLFE: Sir, we appreciate that. But we do say that a two-year period - the
16 Defence is going to be filed next month, that's agreed and a Reply in
17 September -- a two-year period from now with those deadlines being closely upon us,
18 should be sufficient to accommodate the scope of the issues.

19 Can I take you to my learned friend's cost budget and the assumptions that are made
20 there. Because I think it was being said that all they did was mirror our assumptions
21 and that's, I think, not quite accurate.

22 This is in bundle B3, tab 7. The budget itself is on page 130. I think for the substantial
23 sums which we understand that they said earlier on that a great deal of work has been
24 done that doesn't relate to the CPO so they have been doing some work on the
25 substantive claim.

26 Now, over the page are the assumptions and you'll see the assumptions that they have

1 inserted, which they did without sight of our cost budget. They asserted information,
2 "Disclosure", a certain amount of assumptions as regards disclosure hearings.
3 "Factual and expert evidence", they have inserted an assumption that they will have
4 four factual witnesses. That comes from somewhere. It didn't come from us. They've
5 also assumed for some reason, two factual witnesses on our side.

6 THE CHAIR: Is it right that in fact, you're not calling any factual witnesses?

7 MR WOOLFE: Well, we don't currently have plans to.

8 THE CHAIR: You don't currently have plans to.

9 MR WOOLFE: And that does go to the directions as well, because given the nature
10 of Which?'s class representative, Apple as defendant, you see the scope for reply
11 (overspeaking).

12 THE CHAIR: Well, I know. I've got that point.

13 MR WOOLFE: And then I think you'll see what is said there about expert reports.
14 You'll see that they do put in there an assumption of three reports on our side. They
15 don't insert an assumption as to their own.

16 THE CHAIR: Yes.

17 MR WOOLFE: So that's a fair point. They've gone through and they've put in an
18 assumption of eight weeks for trial. This is in the context where they spent about
19 £4 million on the claim so far. They do have an idea of what the issues are.

20 Further as to that, it was said that they don't know what the scope of disclosure is
21 potentially going to be. Now, this isn't like a normal High Court case where you have
22 particulars and nothing else goes with it. We've served three expert reports with our
23 claim form, as is usual in collective proceedings. Those expert reports did detail at
24 some length the disclosure which those experts would be interested in obtaining. So
25 Apple does actually have a good idea of the kinds of searches which they would have
26 to do already to look for that kind of information.

1 I can give you some references if you want, sir, but Mr Hunt, the behavioural
2 economist, does at section 7.2.1 of his report -- that's bundle B1, tab 6, pages 271 to
3 273. In respect to Mr Hughes, it's dotted at the end of each section but it goes through.
4 Professor Mickens, who's the technical expert, is at paragraph 57 of his report as
5 bundle B1, tab 7, page 383. They've been given quite a good bit of detail as to what
6 we would be looking for in any event.

7 When they say that, in a sense -- this is a case, we say, where it is possible to crack
8 on. They've had the claim for a long period of time. It is very detailed. We submitted
9 this. It's quite a focused claim, not a sprawling one at all.

10 THE CHAIR: What's the position on the counterfactuals?

11 MR WOOLFE: Well, can I show you that. If you go to the amended claim form.
12 I appreciate the word "counterfactual" is not used, but we have a discrete section
13 where we plead the effect of the anti-competitive conduct --

14 THE CHAIR: Yes.

15 MR WOOLFE: -- which is the same point, by another name. This is in bundle B3,
16 tab 4 and if we go within it to page --

17 THE CHAIR: Which page is it?

18 MR WOOLFE: 88.

19 THE CHAIR: Just a moment.

20 MR WOOLFE: That's 88 of the bundle number.

21 THE CHAIR: Yes. Yes. Paragraph?

22 MR WOOLFE: Well, paragraphs 123 through to 128.

23 THE CHAIR: Right.

24 MR WOOLFE: There we plead the anti-competitive effects of the preferential
25 treatment abuse. So that's the whole collective. Of course, there's the restricted file
26 conduct; the choice architecture conduct. We go on to detail its effects at

1 paragraphs 123 to 128. That's pleading its competitive effects on the market. There's
2 then a separate pleading of causation of loss which is picked up in paragraphs 133
3 through to about 137. There you can see, we plead out, "but for the Preferential
4 Treatment Abuse" and then certain consequences follow. You will recall we spent
5 a good deal of time looking at --

6 THE CHAIR: I think the point is -- I take that and of course we're very familiar with
7 these paragraphs.

8 MR WOOLFE: Yes.

9 THE CHAIR: But --

10 MR WOOLFE: Painfully so.

11 THE CHAIR: But what if, "but for" the upshot when of course, you've got a damages
12 claim, which you've articulated and calculated, "but for" they would have purchased
13 the services, or a competing service, at a lower price and then the non-purchasing
14 customers --and then you've got your loss section, which must be predicated upon
15 what they would have done.

16 MR WOOLFE: Exactly. That's right. The way this works is, as I say, at
17 paragraphs 123 to 128, (inaudible) of the counterfactual in this -- anti-competitive
18 effects counterfactual in the context of saying there's an abuse. Then this is the
19 section on causation and loss. They obviously overlap to a (inaudible) extent.

20 THE CHAIR: Yes, but I'm saying the loss which has been claimed in particular
21 amounts --

22 MR WOOLFE: Yes.

23 THE CHAIR: -- has to be predicated on what would have happened in the
24 counterfactual, ie absent the alleged abuse, which must involve for the principal group,
25 at any rate, what prices they would have ended up paying.

26 MR WOOLFE: Yes. We use the word "counterfactual" a lot in the (inaudible) but I'm

1 just (inaudible) causation.

2 THE CHAIR: I'm just asking where it is in the pleadings. At the moment, that's all I'm
3 asking. Where's the bit that says how much you're claiming because --

4 MR WOOLFE: That comes slightly lower down. The estimates are -- I was calling
5 attention to 133 to 137, but they are sort of the kind of the factors as it were.

6 THE CHAIR: Yes.

7 MR WOOLFE: Then 138 is the assertion of loss and damage, measure, subject to
8 quantification in due course at 139 and the estimates are set out at 140.

9 THE CHAIR: That's it. That's what I was looking at. It's 140. That's what I was looking
10 at. But is there a breakdown anywhere of those sums, including in the expert reports
11 because someone's done a calculation and it's got to be based on something?

12 MR WOOLFE: Yes. That's in Mr Hughes's expert report for the certification, that came
13 with the claim form. I think it was originally bundle B. Now it's been called B1, I think.
14 The original bundle B for the CPO hearing. Mr Hughes's expert report is at tab 5 of
15 that. Do you have --

16 THE CHAIR: The core bundle for the CPO hearing?

17 MR WOOLFE: No, the supplementary bundle for the CPO hearing.

18 THE CHAIR: The supplementary bundle. Yes. What page are we going to?

19 MR WOOLFE: He addresses it as a matter of methodology. He addresses it at
20 page 52 and following. Then (inaudible) methodology, he then goes on at pages 59
21 and following to actually do a preliminary estimate.

22 THE CHAIR: So that's 59 of his report?

23 MR WOOLFE: Yes. 59 of his report, which I think in the bundle starts at page 143.

24 THE CHAIR: Just a moment. That's what I want to look at.

25 MR WOOLFE: He uses two different methodologies. Section 6.2, which begins on
26 page 143, is a cost-based methodology where what he does is in a sense, tries to

1 measure excess revenue over what he thinks will be competitive. Then at section 6.3,
2 which begins on page 146, he has an alternative methodology based on looking at
3 comparable prices of cloud services in competitive markets. So, real world examples
4 of those.

5 THE CHAIR: Does he end up with the figures that you've claimed?

6 MR WOOLFE: He ends up with the figures which -- so I think if you go to page 153,
7 you'll end up with -- sorry, page 155.

8 THE CHAIR: Just a moment. It seems to me that that detailed calculation which
9 arrives at the sum you've claimed based on the counterfactual that he used --

10 MR WOOLFE: Yes.

11 THE CHAIR: -- ought to be in a pleading because in that way Apple will have to
12 respond to it directly rather than in an expert report. I'm not suggesting this is a major
13 exercise. It's probably more a question of cutting and pasting, but I would regard that
14 as further information which has got to be provided at this stage. And I'm sure it can
15 be done in short order.

16 MR WOOLFE: I'm sure it requires (inaudible). I think it can be done in short order. In
17 a sense, because we have set it out as a matter of pleading in the paragraphs I've
18 taken you to, as much as 123 --

19 THE CHAIR: You haven't set out the calculation. You've just said in the absence of
20 the allegedly abusive conduct, they would have done this or that, which would include
21 they would have paid for the same service at a lower price and then you've gone
22 simply to your figures, unless I've missed something.

23 MR WOOLFE: Well, perhaps if I can take you to paragraph 134 because what -- so,
24 for example, what Mr Hughes does at section 6.3 of his report. That's pages 146 to --

25 THE CHAIR: Do you want to take me to 134 of the claim?

26 MR WOOLFE: No. I'm going to continue to (inaudible) Mr Hughes's report first then

1 show you what was done in the claim form.

2 Section 6.3 of Mr Hughes's report, which begins at page 146 of the bundle, tries to
3 work out what comparable prices of cloud services would be in a competitive market.
4 Then it goes ahead and uses that methodology and uses the comparator of iDrive.
5 But if I can show you paragraph 134 of our pleading -- this is page 96 of the bundle for
6 this hearing -- and with the assertion that "but for the Preferential Treatment Abuse" --

7 THE CHAIR: Mr Woolfe, sorry to interrupt, but I follow all of that but the point is where
8 you get to at the end of this is paragraph 139, where you say:
9 "The loss and damage particularised ... will be the subject of quantification in expert
10 evidence in due course."

11 MR WOOLFE: Yes.

12 THE CHAIR: Well, I know that, but that's the point and I've come across this in other
13 cases, you've got to quantify, not the evidence underlying it, but you've got to quantify
14 the basic calculation, the basic particulars in a pleading so that it can be answered
15 because otherwise they would be quite entitled to say in their defence, "We're not
16 making any admissions about this exercise at all. We'll deal with it in our expert report
17 in due course", and that's not a satisfactory way.

18 MR WOOLFE: Just to make sure I'm understanding correctly what is,
19 because -- section 5 of his report, Mr Hughes -- so section 6 is Mr Hughes saying, "I'm
20 asked to give an overall assessment for understanding what this is, this is the best
21 I can do at the moment", whereas section 5 of his report, what he's doing is saying
22 what his proposed methodology would be overall, as in the claim. So section 6 is just
23 a sort of a rough and ready job for the purpose of understanding the value of section 5,
24 I should say, where he sets out his --

25 THE CHAIR: I understand that.

26 MR WOOLFE: Is it methodology as in it should be calculated in this way.

1 THE CHAIR: You've claimed particular sums in your pleading, but you haven't
2 explained how you've arrived at those sums. That's --

3 MS DEMETRIOU: So may I just briefly interrupt to make -- so we agree with that. But
4 there's an even more fundamental point, if I may say so, which is that - this is going
5 back to a point that Professor Smith put to me. This is not a bog-standard excessive
6 pricing case. The basis for saying there's an excessive price is that Apple should have
7 done the technology differently. That's what they've pleaded. So if you look at their
8 pleading, paragraph 116 onwards, for example, talks about the restricted file conduct.
9 So the basis for their claim is that Apple has done things with the technology that it
10 should have done differently. What we don't know is what it is they say we should
11 have done differently, and that's really fundamental.

12 THE CHAIR: Right. Well, we'll come to that if necessary in due course. But the point
13 I'm making is you simply have to give a breakdown. So in a simple case -- I say
14 simple --you would be if, if it was a more conventional, put it this way, excessive pricing
15 case, you would say that the price which has been set is a product of abuse for X, Y,
16 and Z reasons. The competitive price would have been Y. If they'd only paid Y rather
17 than X, they would have saved X amount or Z amount of money, and that's our
18 damages claim. It's slightly more complicated here.

19 But what I'm trying to get to is you've got already an expert report which sets out
20 a calculation. You've been prepared to put a figure in which is accompanied by
21 a statement of truth. That has got a breakdown somewhere. Either it's deducible
22 directly from the expert report, or someone else has done it in a different way, but
23 those particulars need to be provided, and then, Apple can then understand what the
24 position is about how they respond to it because they might say that's not what would
25 have happened, and actually even if they paid less, it wouldn't have been that much
26 less, et cetera, that kind of point. I mean, that's what tends to happen.

1 We need to break shortly, but I'd like you to just perhaps to consider what is said over
2 the lunch adjournment about whether it is the case that you said they should have
3 designed it differently, but you haven't said what they should have done. Putting that
4 to one side, can I just take any further submissions from you now before we break as
5 to why you say, in principle, we should be giving directions to trial that you haven't
6 already covered? (Pause)

7 MR WOOLFE: So I think just two points. First of all, we do submit the nature of the
8 issues is tolerably clear. Apple resist the exact identities, an order being made now
9 for expert evidence. But we do submit it is fairly clear that there are disputes under
10 three heads. One is behavioural economics. One is -- well, if these points have not
11 been disputed, that narrows the issues and makes the trial more achievable, not less.
12 We put in our estimates --

13 THE CHAIR: There are quite often issues about the necessity for or usefulness of
14 behavioural experts. We've all come across that.

15 MR WOOLFE: That's the point I wanted to briefly address, which is -- I understand it's
16 been raised in various cases before, but often the behavioural economics is sort of
17 slightly marginal to the claim in those respects. Here it is pretty central, so it's a slightly
18 different case.

19 THE CHAIR: Yes.

20 MR WOOLFE: But what I was going to say is whether or not you're prepared to make
21 an order for expert evidence at this stage, it doesn't prevent you from having a broad
22 view of the nature of the issues in the case. One point is about consumer behaviour.
23 Whether it requires a separate expert doesn't matter, but on an issue about consumer
24 behaviour, an issue then about how a market works, how it affects the price, which is,
25 I think, competition economics, and then issues about how Apple could or should have
26 designed its systems, technical issues. Those are the points which appear to be an

1 issue.

2 THE CHAIR: Yes.

3 MR WOOLFE: And you get that fairly clear view of the issues. With that view of the
4 issues, you should be able to say "Two years is not an unreasonable period of time to
5 bring this matter to trial". And that's essentially --

6 THE CHAIR: All right. That's very helpful. We'll come back with our ruling on that,
7 that question of principle, after lunch. Thank you.

8 (1.03 pm)

9 (The short adjournment)

10 (2.03 pm)

11 MR WOOLFE: You were going to come in and rule on the -- you had asked about
12 giving particulars in that respect. If I got a response on us doing that, if that's going to
13 make any difference to your ruling, I can deal with it now, and if not, I'll --

14 THE CHAIR: No, I'd like to hear about that.

15 MR WOOLFE: So you want us to give some particulars of the quantification of loss.

16 THE CHAIR: Yes.

17 MR WOOLFE: We do think, having looked at it over the short adjournment, that would
18 be largely a copy-and-paste job of taking what Mr Hughes has done. We can do that
19 by next Friday, Friday the 12th.

20 THE CHAIR: Friday 12 June. Right.

21 MR WOOLFE: And indeed we note -- my learned friend was making two points about
22 the counterfactual, about not necessarily the technical level what --

23 THE CHAIR: What you say they would have done, should have done.

24 MR WOOLFE: Yes, and the behavioural level. Now those matters again are set out
25 in the expert report.

26 THE CHAIR: Right.

1 MR WOOLFE: I can show you that --

2 THE CHAIR: If that's the case then you could provide them by the same date.

3 MR WOOLFE: Exactly. We can do the same. Just so everyone knows what we're
4 talking about --

5 THE CHAIR: Counterfactual design, as it were.

6 MR WOOLFE: Yes. So that's section G of Professor Mickens's report,
7 paragraphs 45 to 53.

8 THE CHAIR: Yes.

9 MR WOOLFE: And it's section 6 of Dr Hunt's report, which is titled "Counterfactual",
10 in fact. So we can reduce those to a pleading and put them by way of amendment.
11 We suggest therefore, at the moment it's a draft amended pleading. We can just pop
12 those into the draft amendment, and then that becomes the amended pleading.

13 THE CHAIR: That would be very helpful.

14 MR WOOLFE: For 12 June.

15 THE CHAIR: That would be very helpful. Right. Thank you

16 (2.05 pm)

17

18 Ruling (submitted to the Tribunal for approval)

19 (2.09 pm)

20 THE CHAIR: Now, on the basis of that, what I would like to hear from the parties, is
21 first of all to deal with the question of a CMC. Our thoughts on that are as follows:

22 As we understand it, the parties are agreed on the timetable for the statements of case
23 which will conclude on 14 September 2026, and our view is that there has got to be at
24 least exchange of proposals, if not agreement, done before the CMC. There seems
25 to be a difference between the parties here because the class representative is
26 proposing disclosure requests in the form of a Redfern schedule, but Apple has

1 suggested that this be simply proposals for disclosure.

2 So if I understand that there is a dispute between the parties here, let me go to

3 Mr Woolfe first. Why do you say it should be a Redfern schedule?

4 MR WOOLFE: Well, can I start slightly -- the other difference is at paragraph 7 and 9

5 of the process, in blue. We say the defendant should serve an EDQ and disclosure

6 report.

7 THE CHAIR: Sorry, where -- oh, I see.

8 MR WOOLFE: Then we file our disclosure request in the form of a Redfern schedule.

9 That's another point of distinction between the two.

10 THE CHAIR: Before we get to that -- oh I see. Just a second. Your 7 is in between

11 the draft list of issues and the final list of issues. That's just a coincidence, as it were?

12 It's not because --

13 MR WOOLFE: That's just coincidence. An EDQ is about a party setting out in broad

14 terms the types of places where relevant documents might exist. It doesn't necessarily

15 require the detailed granular connection.

16 THE CHAIR: No, quite.

17 MR WOOLFE: So it just happened to fall --

18 THE CHAIR: It happens to be because the chronology --

19 MR WOOLFE: (Overspeaking) it will be after the close of pleadings --

20 THE CHAIR: Yes.

21 MR WOOLFE: -- and therefore informed by the pleadings. And, indeed, informed by

22 the disclosure request in our expert reports that we've already put in. So that's why

23 we said that should take place, and I understand that that is being resisted.

24 Then we want Redfern schedules. I emphasise this because the problem is: Apple's

25 approach is simply saying that there should be proposals. We want to get to concrete

26 requests as soon as can be achieved -- it actually gets the process moving -- and it's

1 very hard to make concrete requests without any indication from the other side as to
2 what types of repositories of documents they might have which meet the scope of the
3 claim.

4 Otherwise, you end up playing a game of battleships; you do tight focus requests and
5 they say, "Oh no, we haven't got that", or you do very broad requests that are said to
6 be disproportionate. So we want to get some sense from them in the form of an EDQ
7 and disclosure report as to the types of places they may be able to look. Then we
8 produce proposed searches in the form of a Redfern schedule. We say that should
9 be possible, bearing in mind -- perhaps if I can show you the expert reports on this,
10 you'll see the type of information that they were saying would be relevant to the claim.
11 So that is in bundle B1, the supplementary bundle from the --

12 THE CHAIR: For the CPO.

13 MR WOOLFE: From the CPO, that's right.

14 So perhaps I can deal with it from the technical evidence in order.

15 So Professor Mickens -- it's quite short, that's in that bundle at tab 7, page 383 -- he
16 sets out at paragraph 57 the material which he says he is required to test his initial
17 conclusions on the technical issues. You'll see three documents listed there, "formal
18 specification for iCloud protocol" and so forth.

19 Now, obviously, that may expand (inaudible) technical issues get pleaded, but you can
20 see that it's given an indication of the kind of stuff that he wants.

21 Then Dr Hunt, who we have covering the behavioural economics issues, he deals with
22 what he would want to look at section 7.2.1 of his report. So that's in the same bundle,
23 tab 6. It starts at page 271 and runs over three pages, 271 to 273, so the heading
24 7.2.1, "Requesting Apple data and documents", and he sets out over a series of
25 paragraphs the kind of internal data and documents he is interested in seeing from
26 Apple.

1 Then in respect of Mr Hughes, he deals with it at various places in his report, but he
2 deals with it separately in respect of market definition and abuse, and estimates of
3 damages and so forth. But the paragraph references where he talks about what he
4 wants are paragraphs 2.2.3 and 2.2.7.

5 THE CHAIR: What page is that?

6 MR WOOLFE: Its bundle tab 5, page 105 of the bundle numbering. (Pause)

7 So under, "Methodology for the Primary Market", he sets out the range of factors he
8 would consider, and that includes:

9 "... Apple's internal documents relating to the degree of competitive rivalry between
10 iPhones/iPads and alternatives [to some market definition] ..."

11 So that's on market definition.

12 Then also at 2.27 in relation to the secondary market, bottom of the page, he has a list
13 of items over the page that includes, "Apple internal documents on how it sets iCloud
14 prices".

15 Then he also sets out at paragraph 4.4.21 on page 132 the data that he would require
16 to test his theory of harm. You can see that's on page 132, looking for internal
17 documents as to the matters set out in paragraphs (a) and (b):

18 "(a) Whether, when designing iCloud ... Apple considered the ability to impact rival
19 Cloud Service providers [et cetera] ..."

20 "(b) Whether Apple utilised the design features of iOS ... to maximise uptake of
21 iCloud."

22 Then the final reference to give you is on page 142. You'll see there, if you actually
23 just start on the preceding page, 141, paragraph 5.4.4, he says:

24 "I alluded to various data sources I propose to use to estimate Aggregate Damages.
25 Table 5.1 below is a summary of the data and likely sources."

26 When you turn over the page to table 5.1, that table sets out data he would require

1 direct to estimate damages, and he sets out on the right-hand side the sources from
2 Apple where he would want to get it from.

3 Now, I'm not saying that that is completely exhaustive as to everything that might be
4 required, but you can see that because of having those expert reports, we've done
5 that methodological work. When we get to the close of pleadings and list of issues,
6 we may well be in a position if Apple -- First of all, Apple have an idea of what we're
7 looking for and when someone's doing an EDQ and disclosure report, they can
8 consider that.

9 And point two: when we get some information as to what they may hold, we should be
10 in a position to move towards formulating Redfern type requests relatively swiftly. If
11 we can do that, it's concrete and the Tribunal can get on and rule on it. Whereas
12 a more leisurely process with exchange of proposals is not quite clear on what is
13 envisaged, whether it's something like Practice Direction 57AD where there's an
14 exchange of views as to disclosure models, but we do think it can proceed to ratify
15 requests relatively swiftly.

16 THE CHAIR: Just to be clear, it's agreed that the draft list of issues from you is going
17 to be on 14 September, and by 5 October, there's got to be an agreement, or if not an
18 agreement, a difference between the parties. Those two directions are agreed.

19 MR WOOLFE: Those items in black are agreed, yes. Well, we provide the draft in
20 parallel with the Reply, and then we use reasonable endeavours to agree it.

21 THE CHAIR: Can you, please, add to that last 8/7 that the list of issues must be
22 formulated exclusively by reference to issues which arise on the statements of case.
23 I say that because sometimes parties start to ask for other issues which aren't actually
24 even pleaded, and I say that to both sides.

25 MR WOOLFE: When you say, "formulated", (inaudible) would you also like it to be
26 referenced?

1 THE CHAIR: Sorry, yes, formulated and referred to. So each issue must be able to
2 be referred back to one or more of the statements of case. (Pause)

3 Now then, at this stage, I need to hear from Ms Demetriou, first of all, to the content
4 and the timing of the class representative's paragraph 7 and 9, i.e., EDQ, and serving
5 a request in the form of a Redfern schedule.

6 MS DEMETRIOU: Yes. So our position is that an EDQ is unnecessary in this case
7 and will lead to further delay. Can I explain why we say that is.

8 As you've just said, sir, it is essential indeed we agree that the issues are formulated
9 by reference to the pleadings, and it's on that basis that we'll all be discussing
10 disclosure, what disclosure is appropriate. The pleadings will close on 14 September,
11 and we've agreed to use reasonable endeavours to agree the list of issues by
12 5 October. So that's when the list of issues is going to be in place.

13 THE CHAIR: Yes.

14 MS DEMETRIOU: Now, that's the basis for disclosure, not a wish list by -- with respect
15 to Mr Woolfe -- his experts of documents and data they might like to see, not having
16 seen our Defence. That isn't the way to proceed with disclosure.

17 Thinking about this timetable, what the class representative is positing is that Apple
18 shall file an EDQ on 25 September, so in advance of the list of issues being
19 determined, and that simply doesn't work. It doesn't work for two reasons.

20 The first reason it doesn't work is that you do need to know what the issues are before
21 you can file the EDQ. Apart from anything else, the EDQ requires the party filing it to
22 set out, for example, the key words, the key search terms. You can't do that if you
23 don't know what the issues are. You certainly can't do it by reference to Mr Hughes's
24 wish list of what he might like to see. So there does need to be a period of time after
25 the formulation of the list of issues for Apple to go away and do that if there is to be an
26 EDQ.

1 THE CHAIR: If there is to be an EDQ.

2 MS DEMETRIOU: If there is to be one.

3 Now we say that it's going to lead to delay and is unnecessary, because we say that
4 once you've got the list of issues, what you then need is proposals by the parties.

5 Now, we've suggested a particular way of doing it. If it's by way of Redfern
6 schedule -- I don't think it terribly matters whether it's a proposal or a proposal in
7 a Redfern schedule. But in any event, once we know what the class representative's
8 requests are, in Redfern schedule or otherwise, Apple will then essentially be able to
9 do the work that it would do in an EDQ but in a more focused way. It would be able to
10 look at the requests and tell the class representative whether these documents exist;
11 if so, where, and whether they can be produced proportionately. Apple will, for its part,
12 make its own proposals as to what disclosure it should give. So the Tribunal will have
13 all of that.

14 What we're suggesting is to dispense with an EDQ, which is not regularly ordered in
15 these proceedings, as the Tribunal will know, and really focus on the issues in the
16 case and the disclosure that's being sought, rather than have an EDQ at large, which
17 could not be produced at that time. These things take a long time. As you know,
18 Apple's a large corporation and the claim covers a wide variety of matters, including
19 technical matters, so it's no easy thing to produce an EDQ in the abstract, and we say
20 it's unnecessary in these circumstances.

21 THE CHAIR: Right.

22 MS DEMETRIOU: So that's what we say. Now whether the proposals are in
23 a Redfern schedule or not in Redfern schedule, I think, is of secondary importance.

24 THE CHAIR: Well, if that's the case, and let's just assume there's no EDQ --

25 MS DEMETRIOU: Yes.

26 THE CHAIR: -- we've got the list of issues done by 5 October. The class

1 representative says that it will be in a position by 9 October to serve reasoned
2 disclosure requests in the form of a Redfern schedule.

3 Then if that's how it is to be proceeded with, and you get that on 16 October, then how
4 long are you going to need to respond to that? I note that in your directions -- using
5 slightly different language -- you have a process whereby, "Proposals were sent on
6 13 November ... meet to try and make agreement". But then you've got -- just one
7 moment -- you've got, well, 4 December or 11 December, trying to look at your 8, 9
8 and 10.

9 MS DEMETRIOU: We've got proposals on the 13th, but you're asking me, sir, that if
10 the class representative put in their request by when, by the ...?

11 THE CHAIR: Well, they say they can do this by 5 October.

12 MS DEMETRIOU: 9 October.

13 THE CHAIR: Sorry, just a moment. 9 October, sorry, yes. Your time period, which
14 allows, in fact, for trying to agree things before you put your formal response in your
15 period is about two or three weeks, I think.

16 MS DEMETRIOU: Yes. So would you like me to take instructions on when we could
17 respond to --

18 THE CHAIR: Yes, yes.

19 MS DEMETRIOU: If you just give me a moment. (Pause)

20 So four weeks. We could respond within four weeks because, obviously, we'll need
21 to take instructions from Apple as to what they've got, how difficult it is to produce,
22 where it is and produce the sort of information you would get on an EDQ but in a more
23 focused way. That will take some time. So that takes us through to 6 November.

24 THE CHAIR: Yes. Right.

25 Let's just pause there for a moment. I don't want to go any further than that at the
26 moment. I just want Mr Woolfe to come back on this.

1 MR WOOLFE: The slight difficulty is what's being (inaudible) is that our proposal of
2 putting in detailed Redfern requests by 9 October was premised upon having the
3 EDQs. So in general, EDQs don't require lists of issues to be formulated first before
4 they're filed; it's normal to do them on the base of the pleadings. Chairman of this
5 Tribunal, Mr (inaudible) KC has said that they are very helpful in allowing for the
6 disclosure process to proceed efficiently, and he is a man who knows a great deal
7 about disclosure.

8 The difficulty we have is that if we have an EDQ, we can produce quite focused
9 disclosure requests by reference to types of material we know may be available. If we
10 don't yet know what types of material may be available, we have to frame our
11 disclosure requests more broadly in order to capture the range of possible things that
12 may exist. So therefore you're starting -- we could do it, do something like that, by
13 9 October --

14 THE CHAIR: Just give me an example of what it is that will be helped by the EDQ.

15 MR WOOLFE: Well, for example --

16 THE CHAIR: Because I've seen that what the experts have done, if they were to form
17 all or part of your Redfern requests, are done by reference to sort of classes of
18 documents.

19 MR WOOLFE: Yes.

20 THE CHAIR: Which is how it should be done.

21 MR WOOLFE: Yes. So we could formulate things like that, but you'll see in a number
22 of respects I refer to Apple internal documents, Apple internal consumer research,
23 et cetera. If we have less information as to what documents and data Apple may hold,
24 those requests -- so if show you, perhaps, Dr Hunt's report.

25 THE CHAIR: Yes.

26 MR WOOLFE: So if we go to that's in the supplementary bundle for the provisional

1 hearing tab 6, page 271. On iCloud and iOS decision-making, he said:
2 "I would request internal Apple documentation, including on strategy for iCloud [how
3 Apple plan to grow the number of paying users and KPIs] and other management
4 information on growth, retention rates, cancellations, and reasons for cancellation."
5 [as read]

6 Or if we look at (c):

7 "The design and operation of the various iOS interfaces, changes made to the
8 consumer journey over time [et cetera]."

9 Now those are quite framed quite broadly. If in an EDQ, Apple says, "Right, well, one
10 repository of documents we have is, you know, the minutes of this steering committee
11 for iCloud", for example. That may be relevant to (a), but we could, you know, we
12 could ask for documents related to that. If they say in relation to 225(d), "Changes to
13 consumer journey over time", we have destroyed all sort of previous iterations of our
14 technical material prior to 2019 or something. Again, that will form what we can ask
15 for.

16 At the moment these are fairly broad. They're not unduly broad, but they're fairly broad
17 and an EDQ is saying the kinds of material that Apple may actually hold, concrete
18 repositories of documents they may hold, is what is needed to bridge the gap between
19 this kind of request and a more focused Redfern request. That needs to come at some
20 juncture. What I'm saying is if the EDQs aren't served immediately after the pleadings
21 as we suggest, then when anything we could file on 9 October would necessarily be
22 broader than it could be in circumstances where an EDQ had been served.

23 THE CHAIR: I still don't quite see how you'd be narrowing what you're asking for?
24 You might be informed as to where internal documents are.

25 MR WOOLFE: Well, you might narrow it in respect of date ranges, for example. You
26 might narrow it in terms of whether things are searched for throughout the group, or

1 whether they're search for in more narrowly focused locations. You might narrow it in
2 terms of where in the corporate structure you're looking for documents. There are
3 various ways in which it could be narrowed. And that kind of narrowing is not really
4 possible in the absence of any information at all from the defendants.

5 I'm simply trying to, in a sense, caution the Tribunal that if you go down the route of
6 doing away with the EDQs, then the stage of disclosure requests we would put in
7 would be broader.

8 THE CHAIR: Well, it would be it'd be like what you've got here, this sort of thing?

9 MR WOOLFE: Much more like that.

10 THE CHAIR: Yes. Right.

11 Let me just go back to Ms Demetriou. The point that's being made is that, well, that's
12 fine, but you may run the risk of broader requests than could be done, and you won't
13 be able to complain about that if you -- that's the point that's being made.

14 MS DEMETRIOU: Yes, I understand that point. And that may be. But then we can
15 respond to those requests by explaining what we can give. The problem with this
16 system -- the more I hear, Mr Woolfe, the more I, with respect, realise that this just
17 hasn't been thought through because the EDQ, Mr Woolfe says, "Oh, that can just be
18 done at the same time as the pleadings close", but an EDQ has to be produced by
19 reference to the issues in the case. It can't be at large.

20 THE CHAIR: Mr Woolfe says it doesn't.

21 MS DEMETRIOU: Well, of course it does.

22 MR WOOLFE: (Inaudible) reference to the issues, but not necessarily by reference
23 to -- in a normal case, pleadings close. Somebody does an EDQ. You don't have to
24 interpose the drafting of a list of issues between. That's the only point.

25 MS DEMETRIOU: What we can't do is produce an EDQ this quickly after the close of
26 pleadings. We're just not capable of doing it.

1 THE CHAIR: Just give me a minute. (Pause)

2 We think that in order to preserve the timetable, which we're quite firm about, and
3 having a CMC in late November, we don't think it's necessary to have an EDQ as
4 a precursor. The requests will be made, and if, in relation to any requests, for example,
5 internal documentation and so on and so forth, Apple come back and say, "Well we
6 don't have that" or "We've only got it in one repository" or "It's been destroyed" they
7 will have to say so.

8 Mr Woolfe, one further point on this is though, it's going to be for you to put in your
9 Redfern request's date ranges. They may disagree with it, but you've got to propose
10 the date range that you want it from.

11 On that basis, we would order that your requests come in, as you've offered, on the
12 9 October, and the response comes in on the 4 November. Then we would have
13 a CMC which would take place in the last week of November. I haven't got the date.

14 MR WOOLFE: If I may, just to -- sorry, just so I've understood. You say the response
15 to be served on 4 November.

16 THE CHAIR: Yes.

17 MR WOOLFE: In our directions, we had our Redfern request, their response, our
18 reply. Are you simply talking about their response coming in on the --

19 THE CHAIR: I was talking about their response coming in.

20 MR WOOLFE: I'm sorry for interrupting.

21 THE CHAIR: If you want to make provision for a reply, you could do that by
22 18 November. I just need to check -- (Pause)

23 Just the dates here -- are all these early dates all Fridays? Mr Woolfe?

24 MR WOOLFE: No, I think they're Mondays. Yes. 9 October, for example, is
25 a Monday. 23 October is a Monday -- no, sorry, I apologise, sorry. They're all Fridays.

26 THE CHAIR: They're all Fridays. Just a moment.

1 4 November is a Friday?

2 MS DEMETRIOU: No, that's a Wednesday. And if we could have till the 6th, that
3 would be helpful because there's a lot for us to do, which is a Friday.

4 THE CHAIR: But the thing is, that's actually longer than the period you'd proposed for
5 your responses?

6 MS DEMETRIOU: No, that's for our response. So our response is by the 6th isn't it,
7 I think?

8 THE CHAIR: Well, no, I thought it was -- was it?

9 MS DEMETRIOU: They're going to make their requests by the 9th.

10 THE CHAIR: Oh, the 9th. Yes.

11 MS DEMETRIOU: 9 October. And then if we could have till 6 November, which is
12 also a Friday, for our response, and then they get till the 18th for their reply.

13 THE CHAIR: Yes, the 18th will be a Wednesday. And then -- just a moment if that's
14 right. Then -- (Pause)

15 Yes, and then that's right. Then you could have a CMC, which I would want to do if at
16 all possible on Friday, which would be 27 November. What that then means is that
17 your reply will have gone in the previous week. Parties will have a week and
18 a half -- I'm not going to make another order about it -- but they'll have a week and
19 a half to think about where they are on the disclosure proposals and try to narrow it.
20 Then, hopefully, the CMC can --it's not guaranteed, but hopefully it can resolve any
21 really key issues of disagreement on the disclosure process.

22 At that point, the further disclosure directions can be given, bearing in mind the
23 indicative dates, which we've done already. And the parties will know that shortly after
24 that CMC, on any event, the other disclosure process directions will be made and kick
25 in. (Pause)

26 So far as we are concerned, that's as far as we would go today.

1 MR WOOLFE: Thank you, sir.

2 Well, I think that probably concludes matters on directions, then.

3 MS DEMETRIOU: Just one very small point.

4 So just on the bits which have been agreed on the pleadings.

5 THE CHAIR: Yes.

6 MS DEMETRIOU: So my learned friend asked for 12 June. He's pushed his date out

7 a bit to serve an amended Claim Form. Of course, we don't object to that, but could

8 we have an equivalent extension for our Defence, which I think in terms of weekdays

9 would take us to 30 July?

10 MR WOOLFE: That's fine.

11 THE CHAIR: That's fine, but it can't affect the list of issues agreement.

12 MR WOOLFE: We anticipated you might ask for that week. We're fine with that.

13 We're not asking you for our Reply to be moved.

14 THE CHAIR: No. You're not asking for Reply to be changed. Okay. Well, that's fine.

15 MR WOOLFE: Although if we ask for an extra 24 hours at the last minute, we might

16 expect some.

17 THE CHAIR: Let's cross that particular bridge if and when we come to it.

18

19 Discussion re funding reports

20 THE CHAIR: That there is then the question of funding reports, the monthly reports.

21 MR WOOLFE: Yes, there's that question, and then also you've seen in part 14 of our

22 skeleton about control of Apple's costs as well.

23 THE CHAIR: Oh yes, we're going to come to that. Yes.

24 MR WOOLFE: As we understand, the Tribunal asked for cross (inaudible) to be set,

25 but we filed an update, in effect, of our existing budget showing costs incurred to date.

26 That's what you have in --

1 THE CHAIR: Sorry, what I'm asking for is just the monthly report on LCM.

2 MR WOOLFE: Oh, yes, sorry. Sorry, sir. I should have done that. Yes, LCM will
3 write to you each month.

4 THE CHAIR: Write to the Tribunal each month?

5 MR WOOLFE: Write to the Tribunal directly.

6 THE CHAIR: And, if necessary, if it needs to be revisited or anything flows from that,
7 it will be dealt with at the same the CMC in November?

8 MR WOOLFE: Yes, sir.

9 THE CHAIR: I mean, if there's something urgent crops up or they say -- oh, one thing
10 I wanted to ask you which we just would like to know at this stage: in the stock
11 exchange announcements, they referred to a write-down, effectively, because of the
12 adverse conclusions in two particular cases.

13 MR WOOLFE: Yes, sir.

14 THE CHAIR: Are they the same or different from the ones that they'd referred to in
15 their annual report from last year?

16 MR WOOLFE: I understood there were different ones, but that's simply from the
17 amount stated.

18 THE CHAIR: Right.

19 MR WOOLFE: I'll be corrected if I'm wrong.

20 THE CHAIR: Right.

21 MR WOOLFE: So simply in terms of when you want that, monthly is fine. We're
22 roughly at the start of the month now. You've had an update now, the start of each
23 month.

24 THE CHAIR: Start of each month. Well, say the first of each month, unless it's
25 a weekend, and then do the following Monday.

26 MR WOOLFE: The first working day.

1 THE CHAIR: First working day in each month. Yes. Thank you.
2 Has the CRO yet been agreed?
3 MR WOOLFE: It had been agreed, save for the provision in respect of cost.
4 MS DEMETRIOU: No, the CRO.
5 MR WOOLFE: Sorry, the CRO is not yet agreed, but what is agreed is that we should
6 seek to agree it by the end of June.
7 THE CHAIR: Yes. Well, I'm sure that must be right.
8 MR WOOLFE: That's the agreement.
9 THE CHAIR: I would very much hope you can agree it. I don't see why it shouldn't be
10 agreed. Right.
11 There's two residual costs questions. You've got in your cost schedule, the costs of
12 preparing the cost schedule --
13 MR WOOLFE: Yes.
14 THE CHAIR: -- and the costs of today. They're not encompassed in the costs orders
15 we've already made, and I wasn't sure what you were asking for, if anything, in relation
16 to those?
17 MR WOOLFE: I should (inaudible) all the time -- in the ordinary course, the costs of
18 preparing the cost schedule on an application for costs would be recoverable and to
19 the extent that you had a pure consequential hearing, they would also be part of the
20 costs of whatever the application was. Now, that's different from what we see today
21 as a CMC held for other purposes as well.
22 What you have at sections C and D of our cost schedule are the costs of preparing the
23 cost schedule and the attribution of the costs of today's hearing to the purely
24 consequential matters. So we were seeking our costs in respect of those. Well --
25 THE CHAIR: Well, just a moment then. In relation to the first one, the costs of
26 preparing your costs schedule -- that's your overall cost schedule -- and what's

1 happened is that we have awarded you costs in respect of both the strike-out and the
2 CPO, although at significant discounts.

3 MR WOOLFE: (Inaudible).

4 THE CHAIR: Right. Well, I'd better hear from Ms Demetriou on this one then.

5 MS DEMETRIOU: Yes. Well, we resist that.

6 THE CHAIR: Yes.

7 MS DEMETRIOU: It's a high sum. I made the point earlier. It's a high sum that's
8 claimed for preparing the cost schedule. What you can see is that, if we go to -- in the
9 bundle, it's page 143, page 12 of the cost schedule -- you can see that it's over
10 £46,000 preparing the schedule and 80 hours, 80 hours from fee earners and we
11 apprehend that that is largely because of this need, self-inflicted need, to try and
12 separate out and apportion the costs, which is not something which has been
13 occasioned by anything to do with Apple and so they shouldn't get their costs of
14 preparing the cost schedule, which are excessive in any event. You've got all of the
15 points in terms of the London rates and so on, but we say they shouldn't get them at
16 all.

17 The cost of the consequential hearing, it is, with respect, rather unhelpful for them to
18 try -- this is essentially a CMC. On the elements which are consequential, permission
19 to appeal took about five minutes and the argument on costs went in both directions.
20 They were seeking a lot more than they actually got and this has largely been a CMC
21 so it is rather unhelpful to seek to apportion those costs. We would invite the Tribunal
22 to treat this essentially as a CMC in which costs should be in the case.

23 MR WOOLFE: Similar to those points, in terms of the amount spent on preparing the
24 cost schedule. There's a question of principle first on what such amounts should be
25 given, then the amounts can be assessed at an appropriate level.

26 In terms of the consequential, the cost of (inaudible) consequential. If you look at

1 the time that is allocated for, sort of, professional fees, you'll see two hours, allocated
2 for the relevant fee earners. We started at 10.30. We finished doing costs around
3 about just after 12. So it's not frankly far off. It's a fairly reasonable kind of
4 apportionment. Apple did -- well, on the strike-out until yesterday they had reserved
5 their position on costs. So we had to prepare on the basis that that cost was going to
6 be opposed. Turned out it wasn't, at the last minute. But everything we prepared on
7 the point of principle we had to do in any event. Similarly, they unsuccessfully resisted
8 the making of costs on the CPO front so we do seek our costs in that respect.

9 THE CHAIR: Just one moment. (Pause)

10 (2.49 pm)

11 Ruling (submitted to the Tribunal for approval)

12 (2.50 pm)

13

14 Discussion re costs budgets

15 MR WOOLFE: Thank you, sir.

16 THE CHAIR: On that basis, I think, that then leaves the questions of costs budgets.

17 MR WOOLFE: That's right, sir.

18 THE CHAIR: Can we just say at the beginning, we are very grateful to the parties for
19 providing the cost budgets, which despite all the reservations that have been made,
20 we found helpful.

21 Now, it was up for discussion what, if anything further, should be done, those budgets
22 having been put in. I need to hear from you first because you're asking for a full costs
23 budgeting order in the form that would be in rule 3.12 in the CPR.

24 MR WOOLFE: That's right, sir.

25 THE CHAIR: Right.

26 MR WOOLFE: Sir, the cost budgeting issues, we are seeking that in respect of Apple.

1 Apple are not, in a sense, seeking that in respect of us. The other issue is that raising
2 the Tribunal's letter of either yesterday or the day before, I'm not sure which, sir, in
3 which you asked about whether or not a cost draftsman should be instructed.
4 So -- that's.

5 THE CHAIR: That's a different point. So let's leave that till afterwards.

6 MR WOOLFE: Yes. Okay.

7 Now, our position is that the CAT should direct cost budgeting for Apple. We've looked
8 at Apple's cost budget a number of times. I don't think we need to turn this up, but our
9 points are, first, it is at this stage -- and I understand why my learned friend says it in
10 this way -- but it is rather vague. It is open -- a range between about 40 and 50 million
11 exclusive of VAT.

12 Now, that is a very large amount of cost. It is also subject to various exclusions. It
13 excludes any appeals, interim applications, third-party providers and so forth. It is
14 incurring costs at a considerable rate. They've already spent about £4 million in
15 circumstances where the defence has not yet been filed. And they propose to spend
16 a further 1.3 to 1.85 million by the time of close of pleadings. That would be about
17 six million in total by the close of pleadings, which is very substantial.

18 If I could then just take you to some authorities that deal with what the court should be
19 trying to achieve, particularly ones from the CAT. The first one is case called
20 Belle Lingerie, which is in authorities bundle 3 if it's in hard copy, tab 8.1. So it was
21 an authority that was added late so --

22 THE CHAIR: Just one moment, please. This is AB3, is it?

23 MR WOOLFE: Yes.

24 THE CHAIR: Just a moment. Right.

25 MR WOOLFE: It's page 495.1. Where I wanted to pick it up -- this dealt with cost
26 management and cost capping, so a slightly broader scope. We'll pick it up at

1 paragraph 12, which is on page 495.7 and it's a judgment of the Tribunal. The Tribunal
2 has a broad discretion when it comes to cost management, and it refers to the relevant
3 parts of rule 53. Then refer to High Court authority at paragraph 13 in the
4 Kazakhstan Kagazy case, which was Mr Justice Leggatt as he then was, and adopts
5 that as the approach in the CAT. Just read what he says:
6 "In a case such as this where a very large amounts of money are at stake, it may be
7 entirely reasonable from the point of view of a party incurring costs to spare no
8 expense that might possibly help to influence the result of proceedings. It does not
9 follow, however, that such expense should be regarded as reasonably or
10 proportionately incurred or reasonably proportionate in amount when it comes to
11 determining what costs are recoverable. What is reasonable and proportionate in that
12 context must be judged objectively. The touchstone is not the amount of cost which
13 was in a party's best interest to incur, but the lowest amount which it could reasonably
14 have been expected to spend in order to have its case conducted and presented
15 proficiently, having regard to all the relevant circumstances. Expenditure over and
16 above this level should be for a party's own account and not recoverable from the other
17 party. This approach is first of all, fair. [And he goes on to say] It is fair to distinguish
18 between, on the one hand costs which are reasonably attributable to the other party's
19 conduct in bringing or contesting the proceedings or otherwise causing costs to be
20 incurred and on the other hand, costs which are attributable to a party's own choice
21 about how best to advance his interests. There are also good policy reasons for
22 drawing this distinction, which include discouraging waste and seeking to deter the
23 escalation of costs for the overall benefit." [as read]
24 The Tribunal there is referring to those considerations in the context of cost
25 management and saying they are relevant here and then goes on, in paragraphs 14
26 and 15, to discuss the decision of Mr Justice Birss in a previous case, a competition

1 case, not in the CAT, and at paragraph 16 sets out what his approach was.

2 He refers there to the financial level that came against the cost in the budget and the

3 aspects of paragraph 17, he continues. At paragraph 17, he quotes Mr Justice Birss:

4 "I accept the infringement of competition will have a public aspect. That is a very

5 serious matter. However, the seriousness of competition law infringements, which

6 they undoubtedly are, cannot be used in and of itself as a form of trump card

7 justification for a very high budget. The significance of approving a budget is that the

8 costs are more likely to be recoverable from the losing party. That's a very significant

9 aspect of budgeting is concerned with the other party's cost risk." [as read]

10 Those are some of the considerations which the Tribunal is looking at in the context

11 of considering, in that case, whether to do cost capping or cost management. They

12 are matters the Tribunal should consider and we say in this case, Apple's budget is

13 very high and we are concerned that it's necessary to manage costs in order that these

14 proceedings can be brought efficiently without undue expense. In particular, because

15 they're covered by ATE insurance, and for which, as you know, it's necessary to pay

16 a substantial premium in order to cover costs risk.

17 THE CHAIR: Yes. Although in fact, Apple aren't seeking that you should be increasing

18 your ATE premium if they, for example, think that they're not likely to get a costs order

19 remotely approaching what they think they'll spend on the case. They'll just live with

20 that. That's a matter for them.

21 MR WOOLFE: That is true but it does leave Which? and the funder, in a sense, rather

22 hanging on guessing what the Tribunal may find reasonable some way down the line.

23 If the cost of proceedings are such that further ATE needs to be obtained, then that is

24 one thing. But what we don't want to have to happen is simply because a very high

25 indicative figure is put forward, in terrorem, we're forced into a position of having to go

26 and spend money, which is then, in a sense, when you pay an ATE premium that's

1 money that is gone, you know, even if we're successful. It will increase the overall
2 cost of the action have to purchase ATE insurance that's not actually necessary. So
3 there's good reason from that point of view to try and manage costs and also to ensure
4 that class representatives are not deterred from bringing these kinds of actions in the
5 public interest by very, very high threatened cost bills on the other side.

6 Having said that, we do hear what you say about the fact that Apple has not said that
7 they will be seeking costs in excess of the ATE premium at this stage. Those
8 essentially are reasons why --

9 THE CHAIR: You're asking for what you've put in your draft order.

10 MR WOOLFE: One thing I should just say, we discussed over lunch, and in light of
11 what my learned friend was saying about pleadings not having yet closed --

12 THE CHAIR: Yes.

13 MR WOOLFE: -- and in light, in fact, of the Tribunal's directions that have just been
14 made, which, in a sense accepted, that you can't be certain about expert evidence yet,
15 we would suggest moving the timing of our proposed -- if you're minded to do cost
16 management -- to take place after the close of pleadings, because at that stage the
17 concerns about the issues not being closed fall away, and at that stage it's more
18 possible to do a detailed cost budget. I have some dates in mind, but perhaps if you're
19 not interested in doing it anyway then we needn't worry about that.

20 THE CHAIR: Just give me the dates anyway. Let's just --

21 MR WOOLFE: We would propose 12 October for a detailed cost budget, which is
22 four weeks after the close of pleadings on 14 September, then us to serve the budget
23 discussion reports -- that's our comments, in effect -- on the cost budget by the
24 2 November. Then there'd have to be cost management hearing. We were going to
25 suggest, it goes into the CMC, which we had in December, but if CMC is in November,
26 it could be dealt alongside that. So those are the dates. If you're minded to do it, it

1 | would fit more naturally in the autumn than what we would see.

2 | THE CHAIR: Right.

3 | Let me hear from Ms Demetriou.

4 | MS DEMETRIOU: We say that this is wrong in principle and will actually cause
5 | additional costs to be incurred. Which?'s position is that its own costs should not be
6 | controlled or monitored, but that the Tribunal should direct cost management and
7 | budgeting in Apple's case. It says, for example, that Apple's solicitor-client costs
8 | should not exceed those in Which?'s budget. That's its starter for ten. Obviously,
9 | that's hopeless because the burden on this litigation largely falls on Apple. You've
10 | heard from Mr Woolfe that they're not planning on calling any witnesses, for example.
11 | Now, the starting point here is that which has chosen to sue Apple for £3 billion. The
12 | norm in civil litigation is that parties spend what they think they need to spend, but can
13 | only recover what's reasonable and proportionate. In the High Court, of course, as
14 | you know, sir, cost budgeting applies by default to claims up to £10 million, to much
15 | smaller claims, and this claim is said to be worth 300 times that.

16 | Now, the asymmetry proposed by the class representative, i.e., that its own costs
17 | should not be subject to the same process, but that Apple should, is remarkable
18 | because its costs are costs that could be paid by the class and gives rise to conflicts
19 | of interest. So it's the class representative's costs that actually deserve more scrutiny
20 | by the Tribunal, because they raise points of principle. It's not just about whether
21 | they're reasonable at the end of the day, but whether or not the cost-benefit of the
22 | proceedings is justified. That's part of the Tribunal's ongoing gatekeeper role.

23 | Now, taking Which?'s arguments, you've heard the way Mr Woolfe puts it. He says,
24 | "Well, look at the high-level budget that Apple has put forward. It's disproportionate
25 | compared to Which?'s budget, which you've seen is for £26 million." But crucially, this
26 | comparison is false. It's a false one because Which?'s budget expressly excludes

1 deferred fees for both the piece that the class representative solicitors and counsel,
2 which it will seek to recover from Apple if it succeeds, and success fees, which it will
3 seek to have paid by the class from the recovery.

4 So, in other words, what you have is a position where Mr Woolfe is asking the Tribunal
5 to compare both budgets, but the comparison is a flawed one because, in other words,
6 Which?'s lawyers haven't agreed to act for the fees set out in the budget, which leads
7 to the £26 million figure. They've agreed to act for a minimum of the fees set out, but
8 an unknown, potentially much larger figure if they win. It's meaningless to compare
9 the two budgets.

10 Now, for that reason, we did ask the class representative to produce the deferred rates
11 and also the success fees, because if they're going to come into this hearing saying,
12 "Apple's budget is much higher, you should impose detailed cost-budgeting process
13 on Apple and not on us", you would need to be in a position to compare like with like.
14 But they have refused to produce that information. They've refused to disclose those
15 elements of their fees. And, in our submission, what the class representative cannot
16 do is simultaneously refuse to disclose a significant chunk of the fees and, at the same
17 time, ask the Tribunal to find that the costs incurred by it and the class in funding this
18 litigation are much lower than those that Apple predicts that it will incur.

19 But even leaving that issue aside, if we go to the cost budget -- so if you can pick up,
20 please, bundle B3. In fact, let's go to the cost schedule first. I just want to remind you
21 of the class representative's solicitors fees. So if you go to their cost schedule. So
22 tab 8. They're in the budget too, so let's do it from that. That's easier.

23 THE CHAIR: Just a moment.

24 MS DEMETRIOU: The budget's at tab 6.

25 THE CHAIR: It's the spreadsheet?

26 MS DEMETRIOU: This is what they call the "Simplified CAT cost budget". It's on

1 page 122 of the bundle tab 6.

2 THE CHAIR: Yes. Just give me one moment. This is the class representatives?

3 MS DEMETRIOU: Exactly.

4 THE CHAIR: Yes. Just one moment. (Pause)

5 Yes. Which page are we going to?

6 MS DEMETRIOU: 122.

7 THE CHAIR: And the internal page is?

8 MS DEMETRIOU: I don't have an internal page. This is not the schedule. This is the

9 simplified cost.

10 THE CHAIR: All right. Well, I've got that.

11 MS DEMETRIOU: So it's the first page.

12 THE CHAIR: Yes, I've got that, thank you.

13 MS DEMETRIOU: And do you see at the end of the table at the bottom it says, "This

14 estimate excludes VAT, success fees including deferred and uplifted fees".

15 THE CHAIR: Yes.

16 MS DEMETRIOU: And so that's my point about not comparing like with like, because

17 what's going to happen is that there's obviously a deferred element of the fees which

18 they haven't told us, they refuse to tell us what it is, which they will seek to claim from

19 Apple. There's also a success element of the fee, which they will no doubt take out of

20 any recovery that they get. It's simply not open to them, if I can put it that way, to come

21 to the Tribunal saying, "Don't worry about our costs. You've got to impose cost

22 budgeting on Apple because its budget exceeds ours", when you're not comparing like

23 with like.

24 Then even leaving aside that point, if you go over the page on page 123, so internal

25 page 1, you see the hourly rates and these are the hourly rates excluding the uplift

26 and success fee as we've seen. If you look at the rates after 1 October 2025, you see,

1 for example, senior partner at £1,222.50 an hour. And if you scan down, you can see
2 the associates' rates between £517 and £783. Again, none of that includes the
3 deferred element.

4 Then if you go to the defendant's high-level budget behind the next tab on
5 page 130 -- in fact, if you take it from 131 -- you see the hourly rates at the top of the
6 page, the assumptions. So you see there the hourly rates, and if you just compare
7 those in your mind with the ones that you've seen. What you see is that the difference
8 is not in the hourly rate. So the difference between the cost budgets, even leaving
9 aside this point about deferred fees, is not a matter of the hourly rates, it's hours spent.

10 Of course, hours spent -- the Tribunal does have to bear in mind that the vast burden
11 of this litigation, in terms of disclosure and evidence, is going to fall on the defendant.
12 So we've heard that, presumably as a result of what Mr Woolfe said in terms of them
13 not calling factual witnesses, they're not going to spend anything on factual evidence,
14 and it's difficult to see what they're going to spend on disclosure.

15 Now, the Tribunal, in asking us to provide these cost budgets, no doubt had in mind
16 that they're necessarily before the close of pleadings, extremely high level. And you
17 saw the letter of Covington's that I took you to, which explains that they are based on
18 assumptions which may well change. So, for example, the reason we've said
19 "four factual witness statements" is not because we think there are going to be
20 four factual witnesses, but because that that's the assumption used in the class
21 representative's initial budget. It talked about four factual witnesses, so we've taken
22 the assumptions from there.

23 Of course, thinking about the new proposed order which you've looked at which goes
24 beyond, it must be said, what the class representative was seeking in its skeleton
25 argument, you can see from the new proposed order that Which? now seeks
26 a direction that Apple's costs be subject to formal cost management under the CPR

1 regime, with Apple filing budgets in the form of precedent H. This really underlines the
2 extreme nature of Which?'s position, because it's formally seeking to import a regime
3 usually imposed on claims of below £10 million to a £3 billion claim.
4 It's also entirely contrary to the President's statement in Spottiswoode. The Tribunal,
5 of course, in seeking these cost budgets, referred to the Spottiswoode case. In that
6 case, the President made clear that she was not seeking to import a regime as rigid
7 as the High Court one, and that the purpose of seeking high level cost budgets was to
8 enable overview, if necessary, oversight if necessary, by the Tribunal going forward of
9 costs, and, in particular, to enable comparability between the class representative's
10 costs and the defendants for the purposes of keeping tabs on the class
11 representative's costs because of the issues of conflict and detriment to the class that
12 those costs raise.

13 Now, my learned friend relied on an authority, which is the Belle Lingerie case. Can
14 I ask you to pick that up again? So, it's tab 8.1 of authorities bundle 3, volume 1.
15 If we take it from paragraph 16 on page 495.9 of the bundle, you can see there that
16 the approach that Mr Justice Birss adopted in the case referred to by my learned friend
17 is concerned with comparing the financial level of the claim against the costs in the
18 budget. So it's a proportionality question. You see that again at paragraph 20 over
19 the page. So again, this is all about proportionality.

20 Now in this case, if you go on in the judgment please to paragraph 49 on page 495.22,
21 you can see that the claim was for an amount between £3.5 million and £7.7 million.
22 Do you see that in that paragraph? The costs we can see from paragraph 4.7 were
23 over £1 million. So the ratio, depending on what figure -- that the proportion of the
24 value of the claim that was represented by the cost was between 13 and 30 per cent,
25 depending on which value of the claim you take in paragraph 49.

26 Now, Apple's budget, with all the caveats, which is between £40 million and

1 £50 million, is less than 2 per cent of the allegedly £3 billion value of the claim. So this
2 case has really got nothing to say. The Belle Lingerie case has really got nothing to
3 say about our claim. Indeed, on the contrary, it emphasises that the thing that matters
4 is proportionality, and this is a much, much larger claim.

5 THE CHAIR: Yes.

6 MS DEMETRIOU: So we say that there is no there's no good reason at all to impose
7 cost budgeting. Certainly, one cannot reach such a decision on the basis of this
8 high-level budget, which has been prepared at an early stage before the issues in the
9 case are known. And it would be wrong to impose cost budgeting on Apple whilst not
10 on the PCR. So this is all a distraction.

11 If the Tribunal is concerned to understand what costs are being spent, then it can, of
12 course, ask for updated costs of actual spend, which can be prepared in a much more
13 proportionate way if it wants to maintain some oversight over costs in the proceedings
14 generally. But to go to the extent of applying the CPR provisions to a case of this
15 magnitude would be, we say, disproportionate and unfair.

16 THE CHAIR: Can I just ask you something different, which is, which is about your
17 actual high-level budget?

18 MS DEMETRIOU: Yes.

19 THE CHAIR: I entirely take on board the caveats which have been expressed in your
20 solicitor's letter about it. Nonetheless, on the basis of an eight week trial, which is how
21 you work all of this, I must admit -- and I'm not saying for one moment that Which?'s
22 high-level budget is immune from criticism --

23 MS DEMETRIOU: Yes.

24 THE CHAIR: -- but so far as yours is concerned, how on earth can you get to between
25 £5.5 million and £6 million for the experts alone? I have to say, if that was what your
26 budget ended up at, I find that quite extraordinary. I just don't see how it can be

1 correct?

2 MS DEMETRIOU: Well, one would hope it doesn't end up there. It rather depends
3 on how many experts -- that's, in a sense, a question for another day. We've
4 assumed --

5 THE CHAIR: Well, on your assumption, which is three.

6 MS DEMETRIOU: But our assumption is not -- so Which?'s estimate for expert
7 evidence is £4.7 million.

8 THE CHAIR: I know, but what we've got to get away from -- with respect to you -- is
9 that, "Well my costs are fine because the other side are claiming just as much".

10 MS DEMETRIOU: Yes.

11 THE CHAIR: It simply doesn't work like that.

12 MS DEMETRIOU: No, I understand, sir.

13 THE CHAIR: So forget Which? for the moment. What I'm just interested in, and I know
14 that Professor Smith is particularly interested in this, is how -- not because he's not
15 appearing as an expert, because he is an expert economist -- how you get to those
16 figures. That's what I was asking.

17 MS DEMETRIOU: Yes. Let me make absolutely clear that -- and I think you have this
18 point -- that the assumption of three experts is not because we want three experts. It's
19 because we had to take an assumption.

20 THE CHAIR: Yes.

21 MS DEMETRIOU: That's not assuming that we are going to call three experts; it's
22 because that's what the class representative's done.

23 THE CHAIR: No, but -- this is my last question.

24 MS DEMETRIOU: Yes.

25 THE CHAIR: I'm not saying you're wrong to have three experts. I'm saying: how do
26 you get to £6 million for three experts?

1 MS DEMETRIOU: Oh, I see. Well, that's a question that we ought to ask
2 these -- I mean, expert evidence in these cases, as the Tribunal will know, is
3 expensive. I mean, these are, as I say, very broad estimates; it may well be lower. Of
4 course, having heard what you say we'll endeavour to push it in that direction, but
5 there are very novel points on market definition before you even get on to abuse in
6 this case.

7 THE CHAIR: Are there? Right, okay.

8 Thank you.

9 MR WOOLFE: Briefly by way of reply.

10 That kind of point about the level of costs on expert reports is precisely -- in a sense,
11 when we saw this cost budget come in -- well, we had not previously been pushing for
12 cost budgeting, but when we saw this cost budget land with provision for that level of
13 amount, it causes us concern about the pressure that this kind of cost budget, the
14 indicative level of costs, puts on a class representative.

15 Simply to focus on this for a moment. You focus on the figure of 5.5 million to 6 million.

16 That is a figure for disbursements for expert evidence; the total level of costs for expert
17 evidence they had is 8.1 million to 9 million. I know you're not interested in doing
18 precise comparisons, but when my learned friend said we that allowed 4.7 million, that
19 was total cost of expert evidence; that's not disbursements for experts. The
20 disbursements for experts in our budget is about 2.5 million. So it's about 2.5.

21 THE CHAIR: For the experts themselves.

22 MR WOOLFE: For the --

23 THE CHAIR: I'm sorry, the 5.5 to 6, you say is --

24 MR WOOLFE: 5.5 to 6 is under their column for other disbursements in relation to
25 factual and expert evidence.

26 THE CHAIR: Yes, but isn't that the cost of the expert?

1 MR WOOLFE: That is. That's what I would expect. But their total cost for that entire
2 trial phase on page 130 is 8.1 million to 9 million when adding in some counsel fees
3 and 2.4 million to 3.65 million (inaudible).

4 THE CHAIR: Hang on. That cost of the expert evidence, I'll put it between 5 and
5 6 million, that's the costs of the experts.

6 MR WOOLFE: That's the cost of the experts.

7 THE CHAIR: And your costs of the experts ...?

8 MR WOOLFE: Is in page 122 under, "Disbursements of Expert Reports". It's
9 £2,582,000. So less than half.

10 MS DEMETRIOU: That's what you've spent already.

11 MR WOOLFE: No, that's not what we've spent already.

12 MS DEMETRIOU: You need to add.

13 MR WOOLFE: Oh, sorry, I apologise. Plus what has been spent.

14 THE CHAIR: I thought I heard 4.7.

15 MR WOOLFE: Yes, but the 4.7 includes solicitor time, counsel time, et cetera.

16 THE CHAIR: What's your cost of the experts? Just to make a direct comparison.

17 MR WOOLFE: So the direct comparison -- if you go to page 122, you need to take
18 the figure from the expert reports row, "Other disbursements", which would be expert
19 reports to trial. And what's being said is -- true to some extent, but not entirely
20 true -- you need to add in the figure that has already been incurred under "Other
21 disbursements" of expert reports.

22 Now, that's not an exact comparison, because expert reports of trials still remain to be
23 done because we're a class representative. We have to put in expert reports together
24 with the application. So I think that you can argue about whether or not it's fair to add
25 that back in by way of comparison. (Pause)

26 THE CHAIR: Let me just get to, "Expert trial preparation". No, "Expert reports". 4.7.

1 MR WOOLFE: That's the end of the row, and you can see that includes both --

2 THE CHAIR: I see.

3 MR WOOLFE: So the light yellow columns estimated, that's cost that has not yet been
4 incurred. That would include anything for actual preparation of reports for trial. You'll
5 see that that includes, "element for counsel fees", 2.582 million for other
6 disbursements under that column, and 965,000-odd for solicitor.

7 PROF ALASDAIR SMITH: Just to be clear, what you're agreeing is that this number
8 of 2.5 is not strictly comparable with the 5.5 to 6 million, because you've already spent
9 800,000. So it's --

10 MR WOOLFE: The experts have done some thinking on that already.

11 PROF ALASDAIR SMITH: A fairer comparison with the 5.5 to 5.6 is --

12 MR WOOLFE: I said that up to a point.

13 PROF ALASDAIR SMITH: 2.5 plus 8, so it's about 3 --

14 MR WOOLFE: Yes, it would be about 3.4, I think. But that's not entirely a fair
15 comparison, because the experts had actually drafted three reports for the purpose of
16 certification that the defence experts don't have.

17 PROF ALASDAIR SMITH: Having done work which will continue to be useful to them
18 when it comes to.

19 MR WOOLFE: Exactly. So that would be more the comparison, yes.

20 PROF ALASDAIR SMITH: But can I, essentially, put the same point to both parties
21 that these numbers for expert reports are high, by any standard, if you try and translate
22 them into days of work we're talking about: 6, 7 up to 1000 person days of work.
23 Now, the word, "sprawling", was used earlier in relation to the nature of the claim. I'm
24 worried that if we spend this amount of money on expert reports, we're going to end
25 up with sprawling expert reports that wouldn't be in line with what's indicated in the
26 recent Practice Direction. Spending this amount of money is going to produce

1 evidence that's going to be, frankly, very hard for the Tribunal to deal with.
2 What we need is focused reports that can serve as the basis of concurrent evidence
3 sessions that can be manageable. I'm just concerned that the level of expenditure
4 here is out of line with the objective of having manageable expert reports that will be
5 of use to the Tribunal. I don't see that this level of expenditure is necessary to produce
6 the kind of focused reports that we need.

7 THE CHAIR: Ms Demetriou, could we have Mr Woolfe's response first, and then we'll
8 come to you.

9 MR WOOLFE: Well, we certainly do entirely take what the Tribunal says about the
10 need for expert reports to be focused and shorter, perhaps, than they have historically
11 been, in order that the whole process is workable. We fully endorse that. It also has
12 an ongoing impact, because it's not just the expert reports themselves, but in a sense,
13 if the expert reports are more focused, it brings down other elements of cost in terms
14 of dealing with them. So we would entirely endorse that.

15 In terms of the actual level of cost here, I'm not in a position to assist you today,
16 specifically, on exactly the workstreams that we use to build up that amount, those
17 rates, but however, that would have been done in terms of getting estimates.

18 There is also an element to which -- it was, I understand, that the precedent in the
19 recent Practice Direction's been concerned that you should have an expert report for
20 trial that's relatively short and manageable and readable, and, I think, counsel and the
21 bench would very much appreciate that.

22 However, there can often be significant amounts of quantitative work done behind that,
23 which can be expensive and time consuming. The mere fact that you end up with
24 a short report doesn't necessarily correlate to the amount of time spent. You can see
25 sometimes if people spend just too long writing, the thing gets too long and drives up
26 costs, and we fully accept that. But, if, for example, in this case, and I know it's not

1 (inaudible) yet been made, but there is talk about doing consumer research, for
2 example, as part of the expert evidence. That can be a costly process that requires
3 to be done. Now, the presentation of the results of that may be quite short, but it still
4 is an exercise that has to be done. So the fact that costs on all sides are high is
5 a matter which should cause the Tribunal to think, "We need to grapple with the level
6 of cost".

7 Now on the class representative's side, there is scrutiny at various stages. We've
8 served a detailed, fairly detailed, cost budget -- not a detailed (inaudible), but a fairly
9 full one -- and with fairly specific figures. We will be scrutinised by the Tribunal in
10 terms of both our recovery of costs from Apple, and our recovery of any other costs
11 out of damages that are awarded at the end of the day. So we have a cost budget
12 and we will be subject to scrutiny.

13 Apple has filed a very -- they say for good reason -- but a very vague cost budget, that
14 they say can't be done more specifically yet with some very high amounts in. At the
15 moment, absent any order from the Tribunal, they won't be subject to any of the same
16 scrutiny. Therefore, if the Tribunal is concerned about the level of cost for particular
17 elements, the answer is to adopt the direction we seek. The direction we seek is not,
18 "Oh, simply cap them at ours"; the direction we're seeking is cost management, which
19 is that they have to file a detailed cost budget after pleadings close. Because
20 a detailed cost budget, precedent H in the full form, you have to list out various
21 assumptions behind each stage of work, which we will then be in a position to
22 scrutinise, and apply some control over the work that's being done.

23 THE CHAIR: Following Professor Smith's question about the size of the expert
24 costs --

25 MS DEMETRIOU: Yes. I do understand the point that's being made. I think we hear
26 the concern.

1 The way forward, in my respectful submission, is expert evidence will have to be
2 addressed when the parties seek permission to adduce expert reports. At that stage,
3 as I've said, in other cases what the Tribunal's doing under the Practice Direction is
4 seeking quite granular information as to what topics, by reference to the pleadings, the
5 expert evidence is going to cover. That's an obvious way in which the Tribunal can
6 exert control and supervise the scope of the expert evidence. In my respectful
7 submission, it's much more appropriate to do it that way -- once we know what the
8 expert evidence is going to look like -- for the parties to put forward proposals as to
9 the scope of the expert evidence, quite granular proposals.

10 Now on the basis of high level -- which essentially are finger in the air
11 amounts -- impose a cost budgeting regime, which is just not warranted in a case of
12 this size.

13 One further small point is that my learned friend kept saying, "Oh, Apple's costs are
14 not scrutinised", but of course they are, because if they're not reasonable and
15 proportionate, they can't be recovered.

16 THE CHAIR: Thank you very much.

17 (3.30 pm)

18

19 Ruling (submitted to the Tribunal for approval)

20 (3.39 pm)

21 THE CHAIR: Having done all of that, Mr Woolfe, you will finally, I think, put something
22 in the order about what you're doing with these limitation costs, the limitation argument
23 costs that was --

24 MR WOOLFE: Yes.

25 THE CHAIR: Yes. Right. Is there then anything else from your side?

26 MR WOOLFE: The other thing was the suggestion in the (overspeaking).

1 THE CHAIR: Yes. The cost specialist.

2 MR WOOLFE: Cost specialist.

3 THE CHAIR: Yes.

4 MR WOOLFE: Well, I don't know if you've seen the letter from my solicitors yesterday.

5 THE CHAIR: I have, yes.

6 MR WOOLFE: We do resist that. In a sense what the Tribunal has done in previous
7 cases, there are two forms of control that have been imposed. One is requiring a costs
8 lawyer to review invoices. The other is periodic reporting. Our concern is with the
9 former, with the idea of having a costs reference. Periodic reporting, when you ask us
10 to let you know how much we spend at a given point of time, we can do that, as you
11 would expect.

12 Essentially the issue we have, we know that was directed in Bulk Mail and in the
13 Hammond and Stephan cases. Now, those were very different cases to this because
14 those were, effectively, individuals, albeit incorporated to some extent. In the Bulk
15 Mail case, it was Mr Aaronson who I think is an economist by background. Hammond
16 and Stephan are both individuals as well. They don't have anything like the same
17 resources to control costs and review invoices, et cetera, that Which? have.

18 Which? has a full in-house legal function. It has a general counsel supported by
19 in-house lawyers who have experience of litigation, experience of large competition
20 claims, both as an institution, it has that, but as the individuals doing it have that
21 experience as well, having come from city firms. They are well able to and do review
22 the invoices that are submitted and control whether or not they're fairly incurred.

23 In one sense -- there are two points really -- imposing cost scrutiny by a costs
24 draftsman would impose a layer of cost that we say is unnecessary. But also actually
25 it would be counterproductive, it's not just paying the costs draftsman and that's it. It
26 would then impose more costs beyond that in terms of interacting with them, because

1 the in-house lawyers are well familiar with the case. They know what is reasonably
2 required and they have the class's interests at heart. A costs draftsman, who may be
3 very experienced in cost law, will not have experience of competition litigation and will
4 not be as familiar with the issues in the litigation to know what is or is not reasonable
5 and proportionate to do at a particular point in time. Thus, we're in a very different
6 position in terms of resource from the Stephan and Hammond cases, and there is
7 a real risk of it imposing substantial additional cost, which is simply not warranted and
8 actually could be counterproductive.

9 If you want, I can give you references in the evidence from Charmian Averty's witness
10 statement. She's the general counsel of Which? That was in her witness statement
11 for the original CPO hearing. Bundle B, the supplementary bundle, tab 1, pages 14 to
12 15, paragraphs 31 to 33. If you recall that but you can look it up. That's where she
13 sets out the resources.

14 That is our concern about the costs draftsman. As I say, reporting of costs is
15 a different matter. And we have a budget, we monitor spend against the budget. At
16 any stage, we can give you any update that is required in relation to the actual level of
17 cost spent.

18 But at this stage, in the absence of concerns arising as to the rate at which costs are
19 being spent against the budget, we submit that imposing a costs draftsman would be
20 unnecessary.

21 THE CHAIR: Now, Ms Demetriou, I don't know whether you want to say anything.

22 MS DEMETRIOU: No.

23 THE CHAIR: No, just -- (Pause)

24 Former president, Sir Peter Roth, said that they should become the norm.

25 MR WOOLFE: That, I think, is the Bulk Mail case. So that that is -- if I take you to --

26 THE CHAIR: Because I think I've got that as well.

1 MR WOOLFE: That's in the authorities bundle AB3, tab 18.1.

2 THE CHAIR: That's --

3 MR WOOLFE: That's actually a decision of Mr Hodge Malek, King's Counsel, I think.

4 Is that the right one? The page reference I'm looking for starts at 727.1 and at 727 is

5 paragraph 40 which is I think on -- Sorry, give me a moment, sir. I'm sorry, sir. No,

6 it's in the Hammond and Stephan cases. I'm sorry. That's tab 19.1 I apologise.

7 THE CHAIR: Is that --

8 MR WOOLFE: The relevant reference is on page 741.14 and it's paragraph 45. And

9 he was (inaudible) with Mr Hammond and Professor Stephan and at the end of that

10 paragraph:

11 "Reflecting this position, in Bulk Mail ... the Tribunal recently observed that measures

12 may need to be put in place to ensure that the PCR gets costs specialist advice on

13 legal fees to provide assistance in improving any costs arrangement and fees. As in

14 that case, we indicated that we would wish for Professor Stephan to be assisted by

15 a costs specialist, and we consider that [this] should become the standard approach

16 in collective proceedings."

17 Now the --

18 THE CHAIR: This is 45?

19 MR WOOLFE: Paragraph 45, at the end of the paragraph is I think that's what you

20 were thinking of.

21 Now, I emphasise there that this is a Tribunal judgment and I don't read it like it's

22 a statute. But what the Tribunal is saying is that this should become the standard

23 approach. There are many collective actions before the Tribunal. Indeed, I think the

24 overwhelming majority where they are effectively individuals, some of whom are

25 protected behind a corporate shield for good reasons, but they are individuals, and

26 I think there's nobody else like Which? out there and what he's saying is that that may

1 become the standard approach. He's not saying invariably or it must be in every case.
2 And there are very good reasons to make us an exception from that, even if that is the
3 standard approach in other cases.

4 THE CHAIR: We are persuaded by what you have said, Mr Woolfe, and what has
5 been said by reference to the different position of Which?. So far as we're grateful for
6 what you've said in relation to the Hammond case, it's worth pointing out that what
7 was said there, the then President said it's no disrespect to Professor Stephan to say
8 that for litigation of this scale he is not in a position effectively to review and challenge
9 bills for legal costs without assistance. That's the context there, and so we accept that
10 this case is different.

11 That said, there is the other option, of course, which is the reporting. If you can just
12 stand up for a moment, Mr Woolfe, just to address me on that. Now what's been done
13 there is what, reports at a certain frequency of the actual spend against the budget?

14 MR WOOLFE: There have been a variety of approaches in different cases. What has
15 happened in some cases is whenever a hearing is scheduled, an update is requested.
16 In some other cases, when there's been concern about costs having gone up very
17 fast, very quickly in an unexpected way and budgets being breached, I think the
18 Tribunal has requested more frequent reports, but there's nothing that suggestion of
19 that in our case.

20 THE CHAIR: I think what we'll direct in this case, given that you're going to be doing,
21 first of all, a revised budget seven days before the CMC, is that we will also want
22 a statement as to the actual spend.

23 MR WOOLFE: Together with our budget for the next (overspeaking).

24 THE CHAIR: Together with the budget.

25 Just one moment. (Pause)

26 MR WOOLFE: So I was just going to say, in terms of reporting incurred expenditure,

1 any cost budget, in order to be meaningful about what future expenditure is, needs to
2 include incurred expenditure as well, because you can only say is the planned
3 expenditure reasonable if you know what has already been spent.

4 THE CHAIR: Yes.

5 MR WOOLFE: So for example, if Apple would come back and say, "In November,
6 we're planning to spend £2 million on experts now", but in fact what they've incurred
7 is already 4 million. So in a sense, anything about the incurred costs is probably
8 necessary on both sides for that cost to be --

9 THE CHAIR: In fact, both of those elements are in the precedent Z.

10 MR WOOLFE: Exactly, sir. So if we do the precedent Z --

11 THE CHAIR: Precedent Z will show what the incurred costs are. Bear in mind that
12 we haven't delved too much on the incurred costs here, though they are quite
13 substantial, very substantial. But when we look at the incurred costs, say for which
14 next time at the CMC, if they appear to be unduly large and excessive, it may raise
15 a question as to which whether Which? is in fact exerting sufficient control over the
16 lawyers. So we simply lay down that marker all right.

17 Now, Ms Demetriou, anything else from your side?

18 We're extremely grateful to counsel, as ever, and to the transcriber to whom
19 I personally apologise for not giving the usual afternoon break. But thank you for
20 everything.

21 We'll terminate the hearing now.

22 (3.53 pm)

23 (The hearing concluded)

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