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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 7th October 2026

Before:
Justin Turner KC
Jane Burgess
Derek Ridyard
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mr Justin Gutmann

Class Representative

V

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

Defendants

A P P E A R A N C E S

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

Niranjan Venkatesan KC, Daniel Benedyk, Ella Higgs-Sharrock (Instructed by Covington & Burling LLP) on behalf of Apple Inc., Apple Distribution International Limited and Apple Retail UK Limited.

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Tel No: 020 7404 1400

Wednesday, 7 October 2026

(10.00 am)

Housekeeping

THE CHAIR: Some of you are joining us on the live stream on our website, so I'm going to start with a warning: an official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court. Just give me a second.

Mr Moser, good morning.

MR MOSER: Sir, good morning. Good morning, panel. I'm appearing for the Class Representative leading my learned friends, Mr Suterwalla KC and Ms Nguyen, and my learned friend, Mr Venkatesan KC, is leading Mr Benedyk and Ms Higgs-Sharrock for Apple. There is an agenda for today. It's in one of the bundles. You should have had, by the way, electronically or in hard copy, bundles A to G.

THE CHAIR: Yes.

MR MOSER: G is the supplemental bundle that was done yesterday.

THE CHAIR: Oh right, I've not looked in G, but ...

MR MOSER: Well, I don't plan to go to G. Well --

THE CHAIR: I've read the skeletons carefully indeed.

MR MOSER: I'm grateful. At bundle A, tab 1, page 4 is the composite draft agenda. The first item on the agenda is going to be the re-pleading/strike out application my learned friend is going to make.

THE CHAIR: So that's the point on the CPUTR and the Hollington v Hewthorn complaints?

MR MOSER: Yes, the pleading complaints, and also they want us to re-plead

causation and loss.

THE CHAIR: Right. Okay. So, the order I'd like to do things is first of all, not re-pleading causation and loss; I'd like to leave that to the end if that's all right. So, if we can do the other aspects of the strike out first of all.

MR MOSER: Yes.

THE CHAIR: Which I think doesn't do too much damage to your agenda.

MR MOSER: Not at all.

THE CHAIR: And then we can deal with the list of issues for disclosure. And then --

MR MOSER: Issues for trial?

THE CHAIR: Yes, which I --

MR MOSER: And then directions.

THE CHAIR: I might pause on list of issues for trial, but for reasons I'll explain in due course, but we'll certainly do list of issues for disclosure, and then we'll deal with the other aspect of the strike out, or just how the causation case is going to develop.

MR MOSER: Yes. Loss, causation, trial.

THE CHAIR: We have some questions about that, maybe this afternoon, I expect.

MR MOSER: I expect so, yes.

The way that we're going to divide the advocacy is that I'm going to address you on the CPUTR and the Hollington v Hewthorn points.

THE CHAIR: Yes.

MR MOSER: Then my learned friend Mr Suterwalla will address you on items two and three of the agenda, and then I'll come back for loss and distribution.

THE CHAIR: You've managed to escape disclosure, have you? How did you do that?

MR MOSER: I don't know, it's --

THE CHAIR: The big picture is very important.

MR MOSER: Mr Suterwalla is a man for the detail.

THE CHAIR: Good. Right.

MR MOSER: I don't know whether you want at this point me to sit down and hear my learned friend's application.

THE CHAIR: I think that that would be best.

MR MOSER: Thank you very much.

Re-pleading application

Submissions by MR VENKATESAN

MR VENKATESAN: I'm grateful, sir. So, you will have seen that the re-pleading application raises three distinct issues for your determination. I'm going to focus on issues one and two in light of your indication.

THE CHAIR: Yes.

MR VENKATESAN: But we've identified the three issues at para 20 of our skeleton. That's at page 4. Issue 1 is the CPUTR allegation.

THE CHAIR: Yes, you say you need some particulars.

MR VENKATESAN: Well, we say we need particulars, we also say there are other defects in the pleading, both the existing pleading and the proposed amended pleading. But in a way, the starting point, sir -- and I'm not sure the starting point is controversial -- is that any allegation that the CPUTR was infringed is a serious allegation, because it amounts to an allegation of a criminal offence --

THE CHAIR: Yes, we've read that in your skeleton. Serious or not, it needs to be properly pleaded.

MR VENKATESAN: Absolutely, and the fact that it's serious, reinforces the need to -- and again, I won't go to it because you have the point, but that's what the Tribunal said in the Trains case, para 71 to 73 where they said it's a serious offence.

So, if we then turn to whether in fact it's properly pleaded, the pleading is at

paragraphs 102 to 104 of the claim form, which is bundle E, tab 5, page 372.

THE CHAIR: Yes.

MR VENKATESAN: You've probably looked at this.

THE CHAIR: Yes.

MR VENKATESAN: I won't read it out, but as you'll see, 102 alleges or submits that Apple infringed the CPUTR; then at 103 you get the text quoted of three regulations; and then at 104, which is at page 374, what they say is that:

"... the Class Representative relies on the evidence before the CMA."

Now, that is the entirety of the pleaded case on the CPUTR infringement, and we respectfully submit that there are a number of distinct reasons why that is defective, and I'll just address them in turn as quickly as I can.

THE CHAIR: Well, yes. Can I get the gist of where we're going? Mr Moser, why aren't you in a position to plead this?

MR MOSER: We thought, perhaps hopefully, that we took to heart the Tribunal's order, which was to plead concisely. This it will be remembered is the helper point around the CPUTR which has also been breached, which can be a vital clue --

THE CHAIR: Indeed. Yes, I think you refer to that.

MR MOSER: And so we pleaded it by essentially saying we will say exactly, mutatis mutandis, what the CMA letter says, the letter that's now no longer confidential. The other side could have asked for further and better particulars; they've chosen to try and strike it out. What we have done to demonstrate what we're saying is we've extracted all of the points, as it were neutrally, from the CMA letter and shown them in an annex to our skeleton argument. That's what it would look like if it were pleaded that way. That's Annex --

THE CHAIR: Where's that, sorry?

MR MOSER: Wherever you have our skeleton.

THE CHAIR: I've looked at the Annex and --

MR MOSER: It has an Annex 2 attached to it.

THE CHAIR: Yes, sorry. The version of the skeleton I printed off didn't, so is it in bundle G or --

MR VENKATESAN: Yes, it's G2, tab 19, page 827.

MR MOSER: Yes, I'm grateful. G2, tab 19.

THE CHAIR: 827 so.

MR MOSER: It would make the pleading about seven pages longer. That is our rendering of what it says in the CMA letter, as it were, in print. We've adapted it to some of the language of the case, so instead of saying "UPO problems", we say "battery issues", but otherwise we have sought to cleave as closely as possible to what the letter says.

Really, what we say is: the question of pleading -- bearing in mind that we are in the CAT and not in the Chancery Division of blessed memory -- the question of pleading is about fairness and whether Apple can possibly understand what we're saying. Now, we've been talking about the CMA letter in this case for years.

THE CHAIR: Yes, anyway, we know you can't rely on the CMA letter at trial; this has to be properly pleaded. You say, as I understand it, Mr Moser, you've now done that. Your Annex 2 can be cross-referred to or copied and pasted into your pleading?

MR MOSER: It can, or we can excise the pleading that refers to the CMA letter.

THE CHAIR: Yes, yes. Thank you. That's helpful just to lay the land.

MR VENKATESAN: That's very helpful, sir. So, I'm going to be submitting that Annex 2, while it's a welcome development in that it's better than what we currently have, itself contains defects. I'm going to address you on that; it still doesn't comply with court requirements.

THE CHAIR: Right, so yeah, let's have a look.

MR VENKATESAN: But I don't know whether you'd be assisted by my submissions on the existing pleading, because --

THE CHAIR: I don't think so, I think we've moved on to Annex 2 now.

MR VENKATESAN: Because in their skeleton they say their primary case is that the existing pleading is adequate, and if I need to meet that, I can do --

THE CHAIR: Don't worry, I'll give you an opportunity if you need to meet that. I'm going to come back to that.

MR VENKATESAN: I'm grateful. Can we turn then, please, to Annex 2? We say there are a number of different problems with it and I'll take them in turn. If we start with paragraph 3 of Annex 2 at page 827, the opening sentence says:

"It is alleged that Apple's failure, from at least autumn 2016, adequately and proactively to disclose the existence, nature and investigation of the battery issues constituted a misleading omission contrary to Regulation 6."

Pausing there, what's important about that sentence is the time period where they say "at least autumn 2016". That period, of course, predates the introduction of the PMF, which is January 2017, and the Class Representative has abandoned the case, which had previously been advanced, that the occurrence of the UPOs was itself an abuse and that the batteries were defective. So, any alleged infringement of regulation 6 in the autumn of 2016, some months before the introduction of the PMF, which is the subject matter of this case, is not only irrelevant, but it goes beyond the certified case, so it's --

THE CHAIR: Remind me, when was the PMF first introduced?

MR VENKATESAN: 23 January 2017.

THE CHAIR: Right.

MR VENKATESAN: That's the first difficulty in para 3.

THE CHAIR: Yeah.

MR VENKATESAN: Then if you look at para 3, subparagraph a, the second sentence which contains some confidential material, so I won't read it out, but you'll see the second sentence, it begins with the words:

"The CMA referred to evidence suggesting that" et cetera.

Now, that's inadmissible. You have my submissions on that. It infringes the rule in Hollington v Hewthorn. So, one of the defects we've identified in our application persists --

THE CHAIR: Yes, that's a topic we're going to come to. You say it applies as much as it --

MR VENKATESAN: Applies as much to the proposed annex.

Then paragraph 4, the final sentence. If you look at the words:

"The CR further alleges that Apple's omission of that information caused the average consumer to take a transactional decision which they would not otherwise have taken, including decisions concerning the investigation, repair, retention or replacement of their Affected iPhone and/or the exercise of contractual or statutory rights."

That phrase is objectionable because that's what they abandoned in the Court of Appeal, the suggestion that class members have contractual or statutory rights which were infringed following the introduction of the PMF. I mean, we can look at it if it were --

THE CHAIR: No, I remember.

MR VENKATESAN: -- but you probably remember.

In fact, what happened, sir, is that in the pleading as it was before they went to the Court of Appeal, there was something which was materially identical to this. After the Court of Appeal, they introduced the word "any" before "contractual and statutory rights" to disclaim any case that in fact there were contractual or statutory rights which were infringed. But it's come back in Annex 2, which again, we say is not a case that's

open to them. It's abandoned and uncertified.

One can actually see it -- I don't know if it would help -- maybe I can just give you the reference. Footnote 1 of the previous claim form explains that this point has been abandoned. That is in bundle E.

THE CHAIR: We'll look at it if we need to. I have a clear recollection. We will look at it if we need to. If this is disputed, we'll need to go through everything (overspeaking).

MR VENKATESAN: Yes. Then paragraph 12, page 830. (Pause)

Again, the second sentence refers to inadmissible material, as recorded in -- (Pause) The second sentence refers to the inadmissible CMA letter, so again, you get that difficulty.

THE CHAIR: Yes.

MR VENKATESAN: In paragraph 13, about three lines from the bottom, it says, "The CR alleges that the omission, lack of clarity and/or timing ..."

The "and/or timing" is objectionable, because it forms no part of the statutory test under regulation 6 of the CPUTR. So, it's unclear to us what point is being made about timing there. It's either unclear or it's irrelevant to what the statute requires. That's paragraph 13.

Then if you look, finally, at paragraph 15, which is halfway down page 831, (a) to (d) are all irrelevant to the alleged abuse, and indeed to the alleged infringement of regulation 3. I mean, it's unclear what it is about 15 (a) to (d) that is said to demonstrate that Apple's conduct fell below the standard of professional diligence, which is the umbrella allegation, as it were.

THE CHAIR: Sorry, you're saying this -- what's the ground here?

MR VENKATESAN: It's unclear. I mean, we don't know what 15 (a) to (d) is doing. It doesn't go to the alleged infringement of regulation 3.

THE CHAIR: (A) to (d).

MR VENKATESAN: Yes, (a) to (d); and it doesn't go to the alleged abuse.

THE CHAIR: Okay.

MR VENKATESAN: Then 15(j), page 832 at the bottom of the page. There is a reference to something the CMA recorded. Now, perhaps anticipating our objection --

THE CHAIR: Sorry.

MR VENKATESAN: I'm so sorry.

THE CHAIR: Is it the sentence, "For the avoidance of doubt, the CR does not allege which ..."

MR VENKATESAN: I was going to go to that. Just before that, the previous sentence, which begins with the CMA record.

THE CHAIR: Yes. Sorry.

MR VENKATESAN: The sentence you identified, sir, it appears to anticipate our objection that this is all inadmissible. Then they say, "We don't rely on it as affirmative evidence. We rely on the fact that the CMA asked for something". But, with respect, the fact that the CMA asked for something is neither here nor there. It's not material to anything they need to prove in this case, and it shouldn't be in the pleading.

THE CHAIR: Okay.

MR VENKATESAN: Those are some defects which we submit we have already identified in Annex 2. We have had it for two working days.

Our suggestion as to the way forward is: if you're persuaded by my submission that the existing pleading is defective, then that should be struck out. They can put forward draft amendments to us in the light, I hope, of the constructive comments I have made about some defects, and we will either consent to it or if we don't, they can apply for permission.

THE CHAIR: Mr Moser, some of these points are perhaps a little bit too nuanced to

deal with today, but there are some points: particularly, paragraph 3, why you're going back to autumn 2016; and paragraph 4, the reference to contractual or statutory rights. Certainly this Tribunal had understood you had abandoned that case. Then obviously we have got various references to the CMA, subject to the one at 15(j). The others seem to be good points.

What do you want to do? Do you want to address me on those now, or do you want to go away and tinker with this in the light of those comments?

MR MOSER: I'm happy to go away and tinker with the things that say, "The CMA said", or whatever. We just put a line through it.

THE CHAIR: That's easy, yes.

Submissions by MR MOSER

MR MOSER: I do need to address you for a couple of minutes, if I may, on my learned friend's opening point --

THE CHAIR: Yes, of course.

MR MOSER: -- because it may seem that he has a good point when he says, "Why are you addressing autumn 2016? That's not part of your abuse period".

But this shades into what my learned friend Mr Suterwalla is going to say about disclosure, and there are echoes of it in the pleadings where we've said, "Failure to distinguish between what's an abuse now and what is pleading of facts that lead up to it". Because in this rather innocent strike-out point, you can't mention autumn 2016, is wrapped up a destructive strategy, with respect, whereby they will seek not to give disclosure of their earlier appreciation of what the problem was, what they thought they were going to do about it. This is going to be fundamental to all of the points, including loss; because we're going to say, if there are emails as early as 2016, "Oh, my God, these UPOs; what are we going to do about it? Could slow down the phones. It could do that". Who knows what we're going to find on disclosure.

It's important -- although they purport to be baffled by why we say this, but it's important, if I may, just to set out very briefly what our case is; because I know the Tribunal is aware, but I'd just like to reiterate, because I submit our case is very straightforward now, but it does all need to be pleaded and then evidenced with disclosure.

So it has five elements. The first element of our case is dominance. Apple produces the iPhone; world's leading brand. Fantastic product. We say it's dominant in the relevant market.

Second point: UPOs. About ten years ago, the iPhone started shutting off suddenly, experiencing unexpected power-offs, UPOs. That wasn't an abuse of a dominant position. When we first came to this case, we thought, "Well, what's going on here? Why is it now?" But it is the origin of the problem.

THE CHAIR: Yes, yes, of course.

MR MOSER: So that needs to be understood and pleaded. Apple was aware of UPOs by autumn 2016 at the latest. That much we already know.

THE CHAIR: Right.

MR MOSER: And they started investigating.

Third point --

THE CHAIR: That's not an issue. When we're going to get to disclosure, yes --

MR MOSER: We're going to get to --

THE CHAIR: -- there's no dispute about the fact that UPOs arose or what their effect was.

MR MOSER: Well, there is to some extent, maybe, unless they're just going to admit all of the effects of the --

THE CHAIR: It was explained in Mr Crumlin.

MR MOSER: But when we come to the PMF -- well, first of all, when we're looking at

the helper pleading to do with the CPUTR, this is entirely relevant background, when we're looking at failing to provide information to consumers, because otherwise you can't explain what information it is they failed to provide.

But when we come to the PMF, which is my third point, that's when we reach January 2017, plainly within the claim period. In January 2017, Apple deployed an update called 10.2.1, a sub-dot update, which was in fact done mainly to address the UPO problem, and so can't be explained without understanding that.

The update contained a feature called the power management feature, or PMF, the effect of which was to cut the number of UPOs, but it had the effect of slowing down or throttling the iPhones. This still isn't an abuse, on our evolved case, but that's how Apple elected technically to fix the problem, and it created a different problem, which can happen.

Then we get to 4, the abuse as certified by you. Insofar as Apple said anything about the PMF at the time, Apple presented the update as wholly benign and beneficial. Neither informed customers about the throttling effect of the PMF, nor how it was dealing with the UPOs, nor gave any sort of choice. It didn't say that the issue was with batteries discharging more quickly and/or more frequently, even with normal ageing. It didn't say, "Oh, by the way, a new battery would fix it". But here's where we get the abuse elements: the failure to inform or to be transparent.

Even when the apology was issued in December 2017, as we call it, the crucial explanation of the reasons for the problem, how the PMF worked, the battery issues, were not explained. They should have been, and therefore consumers were left making a number of choices they shouldn't have been having to make. Some suffered in silence. Some tried to get their phone fixed. Some got a new battery. Some got an upgrade to a new iPhone. That's what's been certified.

THE CHAIR: I think the point is that in this paragraph, paragraph 3 and 4 --

MR MOSER: Yes.

THE CHAIR: -- you're not focusing on your fourth point, the failure to communicate. You now seem to be saying there was a breach of regulation 6 arising from the events in 2016 actually failing to communicate the cause of the UPO.

MR MOSER: Yes.

THE CHAIR: So, you're saying that that's actionable in itself, which seems to be a reversal of position, and then you sort of bind in the contractual or statutory rights.

MR MOSER: The way that we see the CPUTR pleading is, importantly, not that it's actionable in itself. We're not bringing a CPUTR claim in this court. It's a helper claim. We have to show that the CPUTR were breached. What we intend to show is that regulations 3 and/or 5 and/or 6 were breached in the way we have set out, and we're --

THE CHAIR: We're not having you expand your case through the back door by saying, "This is not part of our abuse case, but I'm just going to tell you that there was a relevant breach of the CPUTR". That's just --

MR MOSER: A relevant breach of the CPUTR is what the ECJ calls a vital clue to a breach of competition law. If you're telling me --

THE CHAIR: It has to be arising from the same facts. The fact that you breached the CPUTR when you sold a table 20 years ago isn't going to be relevant to the issues in this case. Similarly, having abandoned any suggestion in the competition claim that UPOs themselves are the abuse, or the PMF is the abuse, having abandoned that case, you can't then say that this aspect of a breach of the CPUTR is relevant to your competition claim.

MR MOSER: Well, if my learned friend is saying through you, sir, that what he objects to here is that this is irrelevant to the main claim, I can see he's got the beginnings of an argument. But I say that it is misplaced, because the failure to inform people around the UPOs is still active and operative in the certified abuse; because we say

that in the apology or in the earlier update notes to 10.2.1, as I say, what they should have explained is the fact that they were dealing with the UPOs, that they were doing it through the (overspeaking) --

THE CHAIR: I understand.

MR MOSER: It's going to slow down your phones, et cetera.

THE CHAIR: Mr Moser, what I am minded to do -- and we will have to tie all the ends of this together at the end, but we're anticipating for various reasons another hearing in the new year, probably quite early in the new year -- I suggest we order today that you are to produce a pleading with further better particulars of your current pleading, properly re-pleaded, within the next three weeks. A warning shot across your bow that if 3 and 4 appear again in this form, you may have an uphill struggle to persuade us to allow you to introduce those further and better particulars.

MR MOSER: Sir, yes.

THE CHAIR: But as I say, we can come back to all the various orders at the end of the hearing today. But that's the way I'm suggesting; so it gives you an opportunity, in the light of the discussion today, to finesse your pleading. If you want to press ahead with 3 and 4, you're fully entitled to do so, but we will have a fuller discussion and debate about it at the next hearing, and obviously you've heard our provisional views that you may face difficulty persuading us that this (overspeaking).

MR MOSER: Sir, yes --

THE CHAIR: I understand going back to 2016 as background, of course, but this seems to be going a little bit further at the moment.

MR MOSER: I understand, and it's very helpful for my learned friend to point it out, and I've made a careful note of the points that he objects to. We will deal with them.

THE CHAIR: Okay, is that satisfactory for you?

Submissions by MR VENKATESAN

MR VENKATESAN: Indeed it is, sir. I mean, I've identified what we've been able to in the time available, and already in the draft order they've suggested they provide the draft pleading to us. I'm not saying there won't be further points, but we've --

THE CHAIR: Of course there may be. There may be further points on this text, maybe further points on the new text. Of course, I appreciate you ...

MR VENKATESAN: Can I then turn to issue 2, which is the Hollington v Hewthorn --

THE CHAIR: Yes.

MR VENKATESAN: -- aspect of the strikeout. Again, I'm going to take it quite quickly. Now, I need to say something very briefly about the legal principles, because I apprehend, having looked at my learned friend's skeleton, there's actually a dispute about it, which I hadn't anticipated there would be, because the law is actually quite settled now.

THE CHAIR: I think it is quite settled, yes.

MR VENKATESAN: Maybe the way to do this quickly is if I can ask you, please, to go to para 39 of our skeleton.

THE CHAIR: Yes. I mean, you do paraphrase a little bit in 39. I wasn't entirely sure whether it was an accurate rendition of the case law, but --

MR VENKATESAN: Right.

THE CHAIR: Might it be worth -- I don't know, let's make the point. We can go to the authority if necessary.

MR VENKATESAN: Certainly. So, I was just going to say that I think proposition --

SP01: Can you give me a page number?

MR VENKATESAN: I'm so sorry, sir. It's internal page 9, bundle G2, page 845. I'm grateful to my learned junior. (Pause)

If you have that, I was going to begin by saying that I think proposition (1) is common ground.

THE CHAIR: Yes.

MR VENKATESAN: Proposition (2), I'm not sure if it's common ground or not, but we say that's been endorsed by the Supreme Court, and I can take you to the authority if that would assist.

Proposition (2) is that what the rule in Hollington v Hewthorn renders inadmissible is any evaluation or opinion.

THE CHAIR: Yes, yes.

MR VENKATESAN: I'm very grateful. Proposition (3) is common ground. Proposition (4), subject to one point, is also common ground. There is, however, a dispute about whether it is legitimate to use the claim form or particulars of claim as a mechanism for identifying what evidence may reasonably be available at trial. In other words, there is no dispute that the rule in Hollington v Hewthorn does not prevent a claimant from saying at an interlocutory stage – or to demonstrate at that stage -- what evidence may be available at trial. You can look at the judgment or report of some other decision-maker, but what is in dispute about it is: can you plead it? Can you put that in your claim form?

THE CHAIR: I mean, it's not as crisp as that. I mean, obviously it's not objectionable to put it in the claim form for the purposes of certification, there's no rule of law saying you can't do that, of which I'm aware. But I take your point, we're not in that territory.

MR VENKATESAN: No.

THE CHAIR: And it certainly shouldn't be in the pleading at this stage.

MR VENKATESAN: Precisely.

THE CHAIR: It's going to serve absolutely no purpose, so it might just as well come out.

MR VENKATESAN: Precisely, and there is actually authority on that, which I think --

THE CHAIR: Is there?

MR VENKATESAN: Yes.

THE CHAIR: Okay, why don't you take me to that.

MR VENKATESAN: I will do that, just to finish off proposition (5), I understand to be common ground. I don't know if (6) is common ground or not, but we've identified an authority that says that if you put in a particulars of claim material that infringes the rule in Hollington v Hewthorn, then those passages should be struck out.

THE CHAIR: Yes.

MR VENKATESAN: Now, I don't know if I should take you to Evans, which is where we --

THE CHAIR: Just show me the authority that says it mustn't appear in the pleading.

MR VENKATESAN: Yes, so there are two of them. The first is the AXA case.

THE CHAIR: Do you need to look at two?

MR VENKATESAN: Maybe not. Let me take you to AXA. And it may be --

THE CHAIR: Which page?

MR VENKATESAN: AXA is authorities volume 1, tab 8.

THE CHAIR: Yes, page number?

MR VENKATESAN: 651. The case starts at 613. It's a commercial court decision of Sir Richard Field. Just to tell you very briefly what had happened in that case, AXA, the claimant had pleaded in its particulars of claim findings made by the FSA, the predecessor to the FCA, in a final notice, and the defendant applied to strike out those passages on the ground that it infringes the rule in Hollington v Hewthorn.

If you look at para 87 at page 653, please. The learned judge says:

"In my judgment, the Final Report does not constitute admissible expert evidence and I accept [counsel's] submission that it is a decision maker's determination and within the Hollington v Hewthorn rule. It therefore cannot be adduced as evidence in support of the Claimants' pleaded causes of action against the Defendants founded on the

mis-selling of PPI policies. I deal below with the question whether the Claimants' proposed amendments ... are sufficient to save those parts of the current POC, which plead reliance on the Final Report from being struck out."

Then if you look over the page at subparagraph (3) under, "Conclusions", he says:

"The Final Report is inadmissible and cannot be relied on ...

"(4) The ... application to amend ... is refused and those paragraphs will be struck out unless the Claimants amend them so as not to rely expressly or by implication on findings in the Final Report as proof of their allegations of mis-selling of PPI."

So that's one case we've been --

THE CHAIR: Sorry, I just lost --

MR VENKATESAN: Sorry, sir, it's page 654.

THE CHAIR: Conclusion (3): "... struck out unless the Claimants amend them ..." Okay, so I think that was the point I was making. I'm not sure that any of this matters, particularly, but there's nothing in principle which says you cannot have a reference to an earlier decision in a pleading to say, "This is indicative of the sort of evidence I'll be able to adduce at trial".

He seems to be saying that you can have it.

MR VENKATESAN: Well, I'm not sure --

THE CHAIR: "This application ... will be struck out unless the Claimants amend them so as not to rely expressly or by implication ..."

So, you can make reference to it in the pleading, what you can't do is rely on it for an evaluative decision.

MR VENKATESAN: Sir, unless I'm misreading --

THE CHAIR: Am I misreading it? I beg your pardon.

MR VENKATESAN: I read this as the judge saying that the offending passages will be struck out unless there's an amendment which removes any reliance on the content

of the final report.

THE CHAIR: Okay.

MR VENKATESAN: And the reason for that is that --

THE CHAIR: I don't think it's quite dealing with the point I was putting to you, but anyway. You can refer to decisions, but you have to make clear that you're not going to rely on them.

MR VENKATESAN: Well, but then the question would be why are you referring --

THE CHAIR: I don't know, well, what was the judge getting at in (4)?

MR VENKATESAN: What the judge is getting at in (4) in my submission is that the passages which presently rely on what the FCA's saying will be struck out unless you provide a suitable amendment which removes any reference to the decision of the FCA. So, if you want to advance the underlying allegation as your own allegation, and there's a proper basis for doing it, fine. But what you can't say is that, "I allege X because the FCA found X."

THE CHAIR: I'm not sure I'm getting all that out of this paragraph. I think this is probably a sterile debate.

MR VENKATESAN: Okay.

THE CHAIR: I mean --

MR VENKATESAN: The only point I'd make is this, sir: Hollington v Hewthorn is a rule that renders certain evidence inadmissible. Now, if you think of other rules which render evidence inadmissible, say something that's privileged, it is, in our submission, pretty straightforward that you can't plead privileged material.

THE CHAIR: The Supreme Court has said, "Look, in certain circumstances you can rely on this as evidence to support submission if that evidence will be available at trial". So you can rely on it. You say you can only do that in a witness statement.

MR VENKATESAN: Yes.

THE CHAIR: And you can't do it in a pleading. You haven't shown me authority for that.

MR VENKATESAN: I'm going to take you to some authority on that.

THE CHAIR: All right, but just briefly, because as I say, I think this is a rather sterile debate in the end.

MR VENKATESAN: No, I --

THE CHAIR: Anyway, you take me to that, where that point's nailed.

MR VENKATESAN: Can I take you first to what the Supreme Court actually said? Because I think I do need to show you that. Two passages, and then --

THE CHAIR: Very good, yes.

MR VENKATESAN: So Evans is at authorities volume 2.

THE CHAIR: Tab seven?

MR VENKATESAN: Yes. The page number is 1136. Now, if we pick it up at para 158, what is said is:

"The argument that counsel for Mr Evans ..."

THE CHAIR: No need to read it out. Yes, I've got this in mind.

MR VENKATESAN: No, sir, the submission that was being put to the Supreme Court is the point you were just putting to me, which is:

"... the rule in Hollington v Hewthorn ... does not ... preclude reliance on findings made by another decision-maker for the purpose of defeating a strike-out of summary judgment application or otherwise demonstrating the strength of the claims at an interlocutory stage."

Pausing there, that is the only purpose for which you can rely on the report of some other.

THE CHAIR: That's the point we're discussing.

MR VENKATESAN: No, no, I just want to establish if you're relying on it --

THE CHAIR: Yes, I know, but that's common ground.

MR VENKATESAN: So, then the next question is: is it legitimate to put in your statement of case something that doesn't form part of your substantive case, but --

THE CHAIR: You say, I rely on decision X in support of the type of evidence that I'll be able to produce at trial.

MR VENKATESAN: But a statement --

THE CHAIR: If that's right, you say it's always strikeable.

MR VENKATESAN: But a statement of case -- and this is the Mr Justice Leggatt authority -- you can only plead --

THE CHAIR: But I don't get an answer to that out of this case you've just taken me to.

MR VENKATESAN: This case doesn't deal with whether you can put it in.

THE CHAIR: Take me to the case that does deal with that.

MR VENKATESAN: Yes. It's the Tchenguiz case, which is authorities --

THE CHAIR: Bundle of authorities?

MR VENKATESAN: Tchenguiz is authorities volume 1, page 315; and for those in hard copy, it's tab 3.

THE CHAIR: So this is pre-Barclays.

MR VENKATESAN: This is pre-Barclays but it contains guidance about what you can put in a statement of case.

THE CHAIR: I'm not sure where this is in the judgment.

MR VENKATESAN: Paragraph 1, Mr Justice Leggatt, as he then was; paragraph 1 at page 316:

"Statements of case must ... plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence."

What the learned judge is saying, then, is you can only put in your statement of case --

THE CHAIR: Would you like me to point out where your defence doesn't comply with that instruction? I mean, I'm sure I will be able to, within a short space of time, or invite Mr Moser within a short space of time, to find out lots of examples where you have referred to background facts.

MR VENKATESAN: Or evidence. No, I'm not going to pretend we don't, and the truth is, many litigants do. But this is a case in which the Court of Appeal has said, and you have said that they have to re-plead their case to plead only concise facts, not plead evidence. The question is: have they done that?

THE CHAIR: Should we go to the specifics?

MR VENKATESAN: Yes, certainly.

THE CHAIR: As I say, I think this is --

MR VENKATESAN: Going to the specifics, the first passage --

THE CHAIR: You have set them out in your skeleton, hopefully.

MR VENKATESAN: We have. Paragraph 43 of our skeleton; that's at internal page 11, bundle G page 847.

THE CHAIR: Right. Let's take them one by one. If we go to --

MR VENKATESAN: 36.

MR MOSER: Forgive me for rising. It is in an effort to help, although my learned friend may not like it.

If you're going to go through it, there is a point I was going to ask, but then matters moved on, but I was going to ask my friend to read on in Evans. Because the point that we make about most of these hasn't been made, although it is common ground in the skeleton argument. That is that in Evans at paragraph 159, Lord Sales and the others say:

"Likewise, it is not inconsistent with the principle underlying that case to rely on prior judgments or reports et cetera in so far as they record evidence of relevant facts:

see Rogers v Hoyle ..."

Only if it's opinion, is it inadmissible. So our point that we make in the skeleton argument --

THE CHAIR: But I think that's taking that sentence out of context. I think it has to be read with 158. So, it's all governed by the type of evidence that will be available at trial. This was the point which I said I wasn't sure we quite agreed on (overspeaking).

MR MOSER: I simply wanted to read on, but the moment had passed.

THE CHAIR: We can come back and look at that if we need to. As I understand it, there's not a lot between you. You say, "Look, you're not going to be relying on evaluative decisions".

MR MOSER: There isn't.

THE CHAIR: I think, out of an abundance of caution, these things should come out of the pleading, mostly. Should we just go through and see if there's really any disputes?

MR MOSER: Indeed. I mean, now I'm abusing my time on my feet, but it is an interesting question, I venture to submit as to whether these things are to be airbrushed out of history, like Trotsky on the steps of the Kremlin; or whether one can refer to them on the basis of, "Well, they mentioned there's some evidence". This being possibly the first time it's been tested, we have put it in. I would say, perhaps revealingly, but perhaps helpfully, we're not going to die in a ditch over whether we mention these things. There are one or two that have plainly gone too far, like the reference to a commission decision. But, yes. I mean, we're not relying on it anyway, so I agree we should not spend too long on it.

THE CHAIR: Right. So, 36.

MR VENKATESAN: 36 is at bundle E.

THE CHAIR: Yes. Mr Moser, can you look at 36? Why can't this come out from, for example --

MR MOSER: 36; we, on our reading of Evans, consider that 36 was an instance of the CMA having recorded some evidence. We know that Apple is particularly touchy about this evidence, and what is still confidential are the numbers, but I can say that it's evidence that Apple received complaints about batteries from consumers. It received battery-related service requests, and you can see the numbers. The CMA has made a relevant finding of evidence, which is --

THE CHAIR: They made an evaluative judgment of the number of complaints and the number of -- anyway, I won't say any more, but --

MR MOSER: I suppose --

THE CHAIR: -- it's not a record of something on a public register. That's an evaluative judgment, and it may be very easily reached. It may be reached after considerable head-scratching. We don't know. But the fact is, it's open for you to prove those things, open for you to show it, but you can't show it by reference to pointing to the CMA consultation letter.

MR MOSER: I hear what you say, in the time-honoured phrase, and we're clearly going to disagree on what that bit of evidence means, insofar as they record evidence of relevant facts. Admissible insofar as they record --

THE CHAIR: Should we just have a look at -- we had better -- sorry to rush this. We had better go back to Evans, and you can make proper submissions on that.

MR MOSER: Yes. It's F2, page 1136.

They talk about what they said in paragraph 158. They endorsed the analysis of Mr Justice Mellor in Tulip Trading v Bitcoin, and they say:

"... reliance on findings ... for the purpose of identifying evidence which can reasonably be expected to be available at trial is not inconsistent with the rule in Hollington v Hewthorn ... not strictly an exception to it."

It's not inconsistent. Hence, with respect, you're absolutely right to say that there's no

rule in principle to say that it can't be pleaded in a claim form, particularly at the beginning of a collective action.

THE CHAIR: It's a little bit of a difficult passage, isn't it? It's all crystal clear until one gets to the "likewise", and it says "likewise", so it seems to be part of the same train of thought inasmuch as there's a "likewise".

MR MOSER: Yes.

THE CHAIR: "Likewise, it is not inconsistent with the principle underlying that case to rely on prior judgments or reports in so far as they record evidence of relevant facts ... It is only in so far as such material contains opinions on matters of facts (as opposed to recording evidence) ..."

So you can say, well, this evidence was put before a Tribunal, but you can't rely on any evaluation of that evidence or any conclusions of fact.

MR MOSER: Yes.

THE CHAIR: They could say, look, Apple made this submission to the CMA, or Apple produces documents to the CMA. That's designed as a -- sorry, not the CMA, but anyway. Yes, it was CMA. You can --

MR MOSER: We have taken that passage from Evans, and if you look at 36, we have used the words of Lord Sales.

THE CHAIR: Yes, but that could be an evaluative judgment.

MR MOSER: It records -- well, I suppose the last two-and-a-half lines, everything after the word "period", I'll accept could be an evaluative judgment.

THE CHAIR: Sorry. After the word --

MR MOSER: Paragraph 36, page 351:

"For example, the CMA Consultation Letter records [word from Evans] at Annex B that Apple received [x] complaints about batteries and UPOs from consumers over the period September 2014 to December 2017, as well as [x] battery-related service

requests over the same period ..."

Full stop. That is no more than recording what the CMA consultation letter says.

So although it may well be actually a sterile debate, we thought that the correct reading of Evans is that it is permissible to identify the source of that recorded evidence, because it's not inadmissible, when all it's doing is recording evidence of relevant facts; and these are very relevant facts, because they go to consumer experience.

Of course, the whole thing could equally say, "for example", "Apple received". I don't actually care. But our reading of Evans is that it's not objectionable to say at least all those things from "for example" to "over the same period".

Before you embark on this, I wanted to explain to you that we haven't gone completely mad by mentioning the CMA letter in a pleading; that we have done it, we submit, grounded in Supreme Court authority.

THE CHAIR: Yes. So, I'm going to strike this out. I've been referred to the authority of Barclays Bank v Evans. The important passage is really from 158 through to 159. The Court says, this in the end of 159:

"Likewise, it is not inconsistent with the principle underlying that case to rely on prior judgments or reports in so far as they record evidence of relevant facts and then cites Rogers v Hoyle is only in so far as such material contains opinions on matters of fact (as opposed to recording evidence) that the material is inadmissible ..."

Our understanding of this passage is that, insofar as the determination of facts has involved an evaluative judgment, it's not permissible to rely on the earlier authority - in this case, the letter from the CMA. The particular passage we are concerned with, paragraph 36, says, "For example, the CMA Consultation Letter records at Annex B that Apple received [X] complaints..."

MR MOSER: That's confidential.

THE CHAIR: Oh, sorry. Yes:

"... Annex B that Apple received can I refer to the word if I don't refer to the number? Yes complaints about batteries and UPOs over a particular period."

And certain other matters which I won't read out.

Mr Moser for the Class Representative submits that this passage is doing no more than what was envisaged by the Supreme Court; that's recording evidence of relevant facts. I don't accept that. We're not in a position to say whether this was merely recording a fact, or whether this was evaluative judgment. Of course, it's open for the Class Representative to adduce evidence in relation to complaints that have been received, but I do not consider the appropriate way to do that is simply to rely on data in the CMA consultation letter. Therefore, I am going to strike out this paragraph from the word "replacements" to the end.

The next one is --

MR VENKATESAN: 46(b); that's at E354. (Pause)

The same point.

THE CHAIR: Same point.

MR MOSER: If you're against me on the first, you must be against me on this one.

THE CHAIR: Thank you, Mr Moser. Sorry. Thank you in the sense that it speeds it up.

57; I'm not sure 57 was quite as straightforward. Let me just have a look.

MR VENKATESAN: 57 is page 358.

THE CHAIR: Yes. It's really just deletion of the material after the colon, isn't it?

MR VENKATESAN: Yes.

THE CHAIR: The rest of the paragraph can stand.

MR VENKATESAN: Yes.

THE CHAIR: Mr Moser, following our theme, does that --

MR MOSER: Well, following our theme, yes, because this is, we say, a recorded

relevant fact.

THE CHAIR: Then 65.

MR VENKATESAN: (ii); that's page 361.

THE CHAIR: Yes. Again, it's relying on the Italian AGCM decision in the footnote.

MR VENKATESAN: Yes.

MR MOSER: It's a little complicated, because this is BRG talking, and they have taken note of something that isn't an opinion. So, this is two steps removed from being an expression of a decision-maker evaluating facts.

Sir, I'm not going to concede, I'm afraid, 65(ii).

THE CHAIR: I'm minded to let -- although you may have further submissions in due course once the expert reports develop, I'm going to leave 65 in at the moment.

At 71 --

MR MOSER: 71, I've already said has to go.

THE CHAIR: 71 has to go.

72. Why can't 72 -- this is just a recitation of what happened.

MR VENKATESAN: Yes. I mean, 72 may just require some adjustment to the drafting, because our difficulty with it is it's unclear to us whether what is being relied upon is the CMA's belief, which would be inadmissible, or --

THE CHAIR: The CMA's what?

MR VENKATESAN: Belief or opinion.

THE CHAIR: Belief.

MR VENKATESAN: Yes. If you look at the second sentence, "The CMA undertakings were given by Apple in lieu of enforcement action, on the basis that the CMA believed that". That is a reference to the CMA's belief or opinion, which is inadmissible. It's unclear if that's --

THE CHAIR: If that's as stated, you wouldn't object, to "believed". I don't know what

"believed" really means in this context.

MR VENKATESAN: I'm not sure what it means either. I'm not even sure whether they're relying on the CMA's belief or Apple's belief about the CMA's belief, because there's a reference earlier in that sentence.

THE CHAIR: Well, I'm minded to leave this in for now. It may be the subject of further argument in due course.

MR VENKATESAN: I understand. 85, which I think my learned friend accepted should go. That's page 367.

THE CHAIR: Yes.

MR VENKATESAN: Oh, did you not? I'm sorry, I thought you did.

THE CHAIR: 85. Okay. I mean, I think that second sentence should go, Mr Moser. I mean, this is a judgment of the CMA final report in another case.

MR MOSER: Well, I won't stand in the way of that. Necessarily conceding the relevance of the European commission decision, but we don't have to --

THE CHAIR: We can have that argument again if you need.

MR VENKATESAN: Then 104 --

THE CHAIR: 104, I think you've said goes, Mr Moser?

MR MOSER: Changed to (overspeaking).

THE CHAIR: Changed, yes. Okay.

MR VENKATESAN: Then there are two further passages which I identified in paragraph 45 of our skeleton, because the analysis is slightly different there, which is why we've treated them separately. Para 28 of the pleading.

THE CHAIR: Yes.

MR VENKATESAN: So, the reason why para 28 is on a slightly different footing, as you'll see it refers in the second sentence to the "Yonder Survey" and:

"The decision of the Italian competition authority ... recording by way of example,

et cetera."

Now, we have gone and looked at the decision of the Italian competition authority and the passage on which my learned friends are relying in fact records evidence given by Apple, so it's not an evaluative finding of the Italian competition authority that is being pleaded here. We say it's inadmissible and should be struck out for different reasons, which is that you're not allowed to plead evidence in a statement of case in the Competition Appeal Tribunal, any more than you are in the Chancery Division. And we've cited authority to that effect.

I mean, the Forest Foods case, where Mrs Justice Bacon points out that you can't plead evidence in your particulars of claim in a competition case, because the same principles apply: you've got to plead material facts, and then the evidence will be addressed in the usual way in witness evidence in due course. I can take you to Forest Foods if that would assist, but it makes the same point.

THE CHAIR: Which bits of this do you want to -- you say this is fine to go in the skeleton argument and in the evidence, but it just shouldn't be in the pleading?

MR VENKATESAN: Shouldn't be in the pleading.

THE CHAIR: Why do we care?

MR VENKATESAN: Well, there are three reasons why we care, sir. The first reason is that you and the Court of Appeal have both ordered them to re-plead, which is why we are here today --

THE CHAIR: Right.

MR VENKATESAN: -- in a way that complies with the rules, one of which is you cannot plead evidence. So in a sense, I don't need anything beyond that. If you plead --

THE CHAIR: Right, well, maybe you do, because you've got to persuade me. A counsel of perfection on the -- you know, if I get my red pen out and go through everybody's pleadings and sort of tick, cross, tick, cross, we're going to be -- I don't

see the point of that.

MR VENKATESAN: I understand, but there are also practical consequences.

THE CHAIR: You're experienced pleaders and you --

MR VENKATESAN: But there are also practical consequences.

THE CHAIR: Right.

MR VENKATESAN: Which is when we come on to talk about disclosure, when we come on to talk about expert evidence, probably at the next hearing, all of that is going to be conducted by reference to the pleadings. They're going to re-plead, in any event, in the light of the decisions you've already made at this hearing. It seems to us that if that exercise is going to be undertaken, it's better for everybody --

THE CHAIR: Maybe, but that's in due course.

MR VENKATESAN: It's better for evidence to come out because it shouldn't be in there.

THE CHAIR: I'm afraid I'm not with you on this.

MR VENKATESAN: In which event, you wouldn't be with me on the other paragraph either, so para 51.

THE CHAIR: Just have a look at it.

MR VENKATESAN: That's page 356. It's another AGCM point.

THE CHAIR: Yes, okay.

MR VENKATESAN: This is why we treated it differently: in fairness, that's not an evaluative decision. That's just recording evidence.

THE CHAIR: Right. Anything else you want to add to that, Mr Moser? I'm with you on those points.

MR MOSER: No, no.

THE CHAIR: Is now a good time to -- we've sort of finished all that and we're on to --

MR VENKATESAN: I think we've broken the back of the application. There is a costs

point, but maybe we can park that until we address the remainder of this application for causation and loss.

THE CHAIR: Yes. I'm grateful.

You can take ten minutes. We started early, so that's no more than ten minutes for us.

(11.02 am)

(A short break)

(11.14 am)

THE CHAIR: Right.

Disclosure

Submissions by MR SUTERWALLA

MR SUTERWALLA: Good morning, sir. Good morning, members of the panel. It falls to me to address you on disclosure. What I propose to do, with your permission, is to make some brief introductory points on the disclosure issues. Then I propose to address the issues by reference to the composite list of issues for disclosure, which you should have, sir, at core bundle at tab 6 beginning at page 71.

THE CHAIR: Core bundle?

MR SUTERWALLA: Sorry, bundle A is the core bundle.

THE CHAIR: Yes.

MR SUTERWALLA: Sorry, I refer to bundle A as the core bundle.

THE CHAIR: No, that's fine.

MR SUTERWALLA: There is obviously, as you'll be aware, sir, an Apple list of issues for disclosure. That is actually within the composite list, but we can turn to the Apple list.

THE CHAIR: Yeah.

MR SUTERWALLA: If we need to as well.

THE CHAIR: Yes, I've got the Apple list in front of me.

MR SUTERWALLA: I'm grateful. So on the introductory points, just to respond to a number of high-level points taken by Apple in its skeleton criticising the approach of the Class Representative's disclosure.

THE CHAIR: Yes.

MR SUTERWALLA: First, sir, the point is taken that there's been an increase in the number of categories for disclosure being sought.

THE CHAIR: You don't need to trouble me with that.

MR SUTERWALLA: I'm grateful. Second, there's a criticism that the approach being put forward by the Class Representative is granular and a complex exercise.

THE CHAIR: Yes.

MR SUTERWALLA: We don't accept that, and obviously I'll address you on each of the issues in turn. We say, sir, that we have focused on the issues in dispute, or -- and this is important, sir -- where Apple has sought to rely on evidence which the Class Representative is entitled to challenge or test, not to take at face value as a matter of fairness. I'll take you to Crumlin 4 in that respect, because of course, that's the evidence that Apple repeatedly relies upon in response to the categories to say, "Well, you don't need disclosure, you don't need disclosure".

Third -- and again, this is a short point, but an important point, sir -- that Apple prays in aid of the fact that it's already given what it terms as "substantial disclosure". That's at 68 of its skeleton. We say that's to overstate the matter, and for your reference, this issue about how much disclosure has been provided to date was analysed in the witness statement of Ms Antzoulatos of Charles Lyndon, and that's in the core bundle, tab 17, page 274. I can take you to it if it assists, it's paragraphs 23, 24, 25. So it's tab 17 of the core bundle.

THE CHAIR: Sorry, what's the point?

MR SUTERWALLA: Just, just to respond to the point being raised by my learned friend that there's been significant disclosure to date.

THE CHAIR: Right?

MR SUTERWALLA: And actually, if you have a look at the analysis of the disclosure, January 2026. It's just a useful place to have it, sir, beginning at page 274.

THE CHAIR: It's the number of documents.

MR SUTERWALLA: Yes.

THE CHAIR: Right. Okay. I'm not sure what I get out of the number.

MR SUTERWALLA: Well, only to respond to the point, sir, and to make the point that -- obviously, I don't know how far Mr Venkatesan seeks to take the point -- but I don't think Apple is suggesting that there wasn't going to be a disclosure exercise in this case. We say it's unfair to rely upon the disclosure to date, because obviously it wasn't intended to supplement the disclosure exercise we're discussing now.

THE CHAIR: And just remind me, what have you had in qualitative terms, you've had the --

MR SUTERWALLA: We've obviously had the --

THE CHAIR: What are the technical reports that you've had? There was reference to technical reports. CMA file, as I understand --

MR SUTERWALLA: The CMA file, the French regulatory report, the Italian regulatory report, and.

THE CHAIR: I've got A9, sorry, bad memory. Give me a second. (Pause) Yes.

MR SUTERWALLA: Yes, so it's on page 154 of tab 9.

THE CHAIR: Yes.

MR SUTERWALLA: Pre-certification disclosure.

THE CHAIR: Yes.

MR SUTERWALLA: Two decisions.

THE CHAIR: Okay.

MR SUTERWALLA: All we say, sir, is it's --

THE CHAIR: Sorry, I do apologise for interrupting. There are seven confidential technical reports.

MR SUTERWALLA: Yes.

THE CHAIR: The sort of things they're talking about are presumably the CMA?

MR SUTERWALLA: Yes, as I understand it. Yes.

THE CHAIR: Right, sorry. And then just while I've interrupted you, the Defendants' skeleton at 69 --

MR SUTERWALLA: Yes.

THE CHAIR: -- makes reference to the key passages in the practice direction at 7.6; do you have anything you want to say about that?

MR SUTERWALLA: With respect, sir, not particularly. We don't disagree --

THE CHAIR: You don't disagree with that.

MR SUTERWALLA: We don't disagree with that. That's our position. We've obviously sought to have that in mind in seeking to put forward the list of issues.

In respect to the technical reports, just to clarify, sir, my instructions are these are brief tables showing the impact of the PMF on the CPU, so we've had some information.

THE CHAIR: We've looked at those. We saw some ...

MR SUTERWALLA: That was the third point. My fourth point is: there is a complaint by Apple -- this is significant, sir -- that the Class Representative has not pleaded a positive case about what they term as "background matters". Those are the matters addressed in Crumlin 4. So this is: the fact of the UPOs; the reports of the UPOs and how Apple reached the decision to introduce the PMF and the technical reasons why

it understood this ameliorated the problem of the UPOs. Now, we don't understand that criticism. That's for two key reasons, sir, and I'll take you to the relevant passages. First, the pleading does set out and pleads to the fact of the UPOs and the reports of the UPOs in a little bit of detail. The second point is: how and why Apple introduced the PMF is obviously at the heart of the Class Representative's claim, and its pleading on this is a key issue in dispute. And we'll see that from the pleading. So if I can take you to --

THE CHAIR: Just for context, before we get to that, I mean, there's no active dispute as to the reasons for the UPOs, or whether the PMF was an appropriate way of addressing that issue? There's no --

MR SUTERWALLA: Well, on the latter first, sir, it's not admitted that the PMF was, from the Class Representative's perspective, the appropriate method of dealing with the problem. It's simply --

THE CHAIR: It's not part of your case -- that's the point -- to dispute the reasons for the UPOs or that the PMF was an appropriate way of addressing that issue?

MR SUTERWALLA: Well, yes, I was dealing with the PMF, sir. On the causes of the UPOs, there's no dispute as to the causes of the UPOs. As to your point, sir, as to whether the PMF was the appropriate solution for the amelioration of the problem, that is not admitted by the Class Representative.

THE CHAIR: We've heard it's not part of your abuse, and you don't have a positive case as to what Apple should have done in the alternative?

MR SUTERWALLA: Well, we don't have a positive case in the sense that we, as you say, sir, have not pleaded, "They should have done this", but that's in the absence of disclosure. Our case, sir, and we say it's apparent on the pleading, is that there was, as you know, a lack of transparency --

THE CHAIR: Yes, I understand that.

MR SUTERWALLA: -- in the installation of the PMF. And in those circumstances, where Mr Crumlin has given some evidence in the fourth witness statement as to why the PMF was alighted upon by Apple, we're not able to put forward a positive case in respect of that at the moment because we have not had sufficient disclosure.

THE CHAIR: But going back to the practice direction, it says it does not extend to every issue which is disputed in the statements of case by denial or non-admission. So fishing around to fully investigate whether the PMF was appropriate, i.e. whether another company would have reached the same solution, or whether they might have gone for another solution or a different variation of the PMF. I mean, that's potentially a very chunky argument to have. At the moment, you've got no positive case to say that the PMF wasn't appropriate, or that -- I mean, I'm sure there are always alternatives, of course there are alternatives -- but you've got no positive case to say that the PMF was not a reasonable solution to this problem?

MR SUTERWALLA: Well, sir, what we say --

THE CHAIR: And having disclosure just to fish around on the off-chance you can alight upon another aspect of this case -- it's not clear to me that that chimes with 7.6.

MR SUTERWALLA: Well, sir, so the first point is we certainly don't seek to fish around. Obviously, we accept that we should not be engaging on a fishing expedition. We don't say we are.

The Class Representative's case is that the PMF had significant adverse impacts on user experience. That is an issue in dispute; that's what the Class Representative says, Apple disputes that. I can take you to the relevant passages.

MR RIDYARD: But the PMF is not -- is it part of the abuse, the PMF?

MR SUTERWALLA: Not the fact of the PMF itself, no, but the fact that it had negative impacts.

MR RIDYARD: But presumably it had negative and positive impacts, because it was

there to fix the problem of the UPOs, but in the process it might have slowed down phones.

MR SUTERWALLA: Yes, but the extent of that is in dispute, sir. The actual key facts around the extent of negative impact is not accepted, and there's obviously many issues in respect of that. Again, I'll take you to the pleadings on this which are in dispute between the parties.

That fact of the negative impact that the Class Representative puts forward, coupled with the fact that the PMF was not in any sense notified --

MR RIDYARD: Right, I understand what you're saying about the lack of disclosure and the so-called concealment, but if they'd been completely open about the PMF, are you still saying that the PMF might have been an abuse? Because I didn't understand that to be your case.

MR SUTERWALLA: That's not our case.

MR RIDYARD: No, so you're saying the PMF is not an abuse; it's just the fact that it wasn't properly explained or transparent to the consumer.

MR SUTERWALLA: Yes, that is the thrust of our case. Obviously, relevant to that, we say, is whether Apple considered alternatives to the PMF.

MR RIDYARD: Why?

MR SUTERWALLA: Because, sir, it may -- we don't know because we haven't had the disclosure -- but the Class Representative's case is that there's been concealment. That's pleaded in terms.

THE CHAIR: Concealment of the PMF. Alternative options to the PMF is a new front.

MR SUTERWALLA: Well, sir, we say it's not a new front in terms of -- it's about the evidence we potentially need to make good on concealment. I can put it this way, sir: if there are documents -- we don't know -- that Apple hold showing that they considered alternatives to the PMF, and a reason why they alighted upon the PMF

was so that the solution was not transparent to users, that's relevant evidence going to non-transparency.

MR RIDYARD: That doesn't make any sense at all. Sorry, it doesn't make any sense at all.

MR SUTERWALLA: I'll try again. The Class Representative's case is that there's been concealment in terms of not only the design, but the installation and operation of the PMF. If there is evidence that there were alternatives -- and sorry, the Class Representative's case, of course, is that the PMF had negative impacts on consumers. If there's disclosure or evidence showing that Apple was considering different options to the PMF, and a reason why it alighted upon the PMF was so that it could put forward a solution to a problem in a way that was non-transparent -- consumers didn't know what was going on --

THE CHAIR: So, okay --

MR SUTERWALLA: It's relevant in that --

THE CHAIR: So Apple might have had a Rolls-Royce alternative to the PMF, which it decided not to deploy because that would have been more transparent, or perhaps more expensive. That's the sort of thing you're looking for; is that right?

MR SUTERWALLA: Well, you used the term "Rolls-Royce", sir. We know that they were considering at least a battery replacement programme. That's clear from Crumlin 4. What we don't know is whether other solutions were considered; we simply don't know. But we say it's clearly relevant to the overall case on transparency to understand, on the evidence --

THE CHAIR: As I understand your case, as explained by Mr Moser --

By the way, Mr Moser, we never got your fifth point.

MR MOSER: The fifth point was the loss and damage.

THE CHAIR: The loss and damage, right. Sorry, we didn't get that far, I think we

interrupted you.

Right, as I understand it, Apple accept that, "What impact did Apple expect the PMF to have on the relevant iPhone series?" is an issue, and, "What impact did the PMF as implemented have on the relevant iPhone series?" So that gives you the background from which you can then deal with your lack of transparency case.

MR SUTERWALLA: Yes.

THE CHAIR: What I'm struggling with at the moment is why you need to go further back and say, "What alternatives to the PMF were considered?" Because Apple may well have considered lots of different ways of tackling this problem -- maybe they did, maybe they didn't, or different variations of the PMF. We don't know.

But I just don't at the moment see why that's a necessary part of your case.

MR SUTERWALLA: Well, the alternatives that they may have considered -- and we don't know -- may have not been possible to conceal in the way that the PMF was on the Class Representative's case.

THE CHAIR: Maybe.

MR SUTERWALLA: Maybe. And we say that knowing that is relevant to the overall case that the Class Representative is putting forward on transparency. That's the point, sir.

THE CHAIR: But, but there's no dispute, as I understand it, that Apple could -- as a matter whether it's practical is a separate issue -- have been more transparent. At least that's your case; you say they could have been more transparent. So why do you need an alternative mechanism by which to achieve the transparency?

MR SUTERWALLA: Well --

THE CHAIR: They could have made a statement at the time they installed the PMF. So you don't need to go looking for ways of being more transparent; you have one -- it's at the forefront of your case, you say, "You could have explained this".

MR SUTERWALLA: Yes, I see that. But when one is looking at the overall case on transparency, and analysing whether that amounts to or is a key reason for abuse in this case, it's relevant to understand the motives for why Apple decided to adopt the PMF, and did it in the way that it did, which was we say non-transparent. Relevant to that, we say, is whether there were alternatives and why they were rejected. That's the point, sir. We say that is all relevant material going to the overall decision to implement the PMF and to the case on transparency.

MR RIDYARD: But if the alternative to the PMF was replacing all the batteries of the affected phones.

MR SUTERWALLA: One alternative, sir.

MR RIDYARD: But let's take that one because it's a nice concrete example. And you're saying they should have done that rather than the PMF, then that's saying that the PMF was part of the abuse. It's not about transparency, is it? That would be saying that the PMF, because it slowed down phones whilst fixing the UPOs to some extent was an abuse, compared to what they should have done, which was to replace the battery.

MR SUTERWALLA: Well, that may be relevant, sir, to the counterfactual.

MR RIDYARD: But it's only relevant to the counterfactual if the PMF itself is part of the abuse.

MR SUTERWALLA: No, sir --

MR RIDYARD: Because if the PMF is non-abusive, but it's the lack of explanation for the PMF which is the abuse, which is why I sort of understood your case to be --

MR SUTERWALLA: Yes.

MR RIDYARD: -- then I don't really see how Apple can be criticised or damages can arise from the fact of the PMF. I can see how they might arise from the concealment of the PMF in its reasons, but they're different things.

MR SUTERWALLA: Well, there are two separate issues. At the moment, we're focused on abuse.

MR RIDYARD: Yes.

MR SUTERWALLA: And the key point, and the thrust of the Class Representative's case is the non-transparency. Our case is -- and we do say this follows -- in assessing whether Apple has been non-transparent, and whether that amounts to abuse, you're looking at: the extent of the non-transparency; you're considering the background to the non-transparency; the reasons for the non-transparency. All of that is relevant, we say, to this Tribunal's determination as to whether the non-transparency amounts to an abuse.

MR RIDYARD: But you're also saying had they introduced the PMF and been transparent about it, then that would not have been an abuse?

MR SUTERWALLA: Well, yes, the thrust of the abuse case is transparency, yes, sir.

MR RIDYARD: Right, so had they been transparent and introduced the PMF as it was -- even though they could have done other things such as replace batteries and all sorts of stuff -- they chose to do the PMF, and in this counterfactual, they were transparent about it; they said, "We're introducing the PMF because we think it's the best way to fix this UPO problem, which is causing all sorts of difficulties". That would not have been an abuse, in your view?

MR SUTERWALLA: I'm not understanding, sir, in terms of is this relevant to, to you asking me in terms of the counterfactual?

MR RIDYARD: Well, yes, because, obviously, the abuse is defined by the counterfactual, isn't it?

MR SUTERWALLA: Yes. The way we put the counterfactual, sir, is that it's obviously a world in which you do not have the non-transparency. We accept that.

MR RIDYARD: Yes, but you do have the PMF, still?

MR SUTERWALLA: Yes. In that world, it's still obviously relevant to understand the negative impacts of the PMF -- that's obviously key -- and to understand alternatives as well, in seeking to ascertain how consumers would have reacted in that counterfactual.

So we say it's relevant to the counterfactual, but the thrust of this point is actually on abuse. We say it's relevant evidence to abuse. As I said, it goes to how one assesses the level of non-transparency, if I can put it that way, and how the non-transparency eventuated.

THE CHAIR: May I interrupt you. You were about to show us the pleadings.

MR SUTERWALLA: Yes.

THE CHAIR: Do you still ... if appropriate?

MR SUTERWALLA: Yes. If I can take you, then, to bundle --

Submissions of MR MOSER (continued)

MR MOSER: Sorry. I don't want to steal my learned friend's thunder, but because we took the last part of the first thing out of order -- loss of causation -- I never reached the points that I was meant to cover on this.

So, in fairness, can I just say one thing?

THE CHAIR: Yes, of course. Yes, yes.

MR MOSER: And remind the Tribunal -- if I can ask you to look at bundle C, tab 23, page 688. I hope this will bring clarity. That is your judgment on 10 February 2026. It very helpfully summarises the point at paragraph 7. The second part of paragraph 7 on page 688 says:

"It is the negative impact of the PMF, coupled with the failure properly to explain to users this impact of the PMF and giving them an informed choice whether or not to install it, which lies at the heart of this complaint."

So the heart of this complaint: 1, the negative impact of the PMF; 2, the failure properly

to explain. So at the heart of disclosure, we say, is: 1, what was the negative impact of the PMF? Because that is not entirely ad idem. We are not completely agreed on that; obviously, Apple has not admitted that.

And 2: what's happened around the failure, why was there a failure properly to explain? That includes disclosure, obviously, before the date of the PMF, because we want to see all the planning that Apple made. What did they know at the time? What did they intend? So I was going to cover this bit before my learned friend rose. I didn't, and he's kindly allowed me to supplement it. That's all I wanted to say.

THE CHAIR: No, that was very helpful, thank you.

Submissions by MR SUTERWALLA (continued)

MR SUTERWALLA: Sir, I was going to take you to the pleadings. This is relevant to this issue about the background matters that we were discussing.

THE CHAIR: Just before you do --

MR SUTERWALLA: Yes.

THE CHAIR: -- Have we got the order that was made in July 2025? I remember Mr Crumlin 4 arises from a hearing and there was an order; where's that order, do you know?

MR SUTERWALLA: Let me find it.

THE CHAIR: Perhaps if someone could look it up for you and then come back to you.

MR SUTERWALLA: It's in the supplementary bundle. (Pause)

THE CHAIR: Perhaps somebody could look for it, and then.

MR SUTERWALLA: I'm told tab 22 in the supplementary bundle.

THE CHAIR: Yeah.

MR SUTERWALLA: Okay, page 680.

THE CHAIR: And may I just remind myself. The order was for Crumlin 4, that was --

MR SUTERWALLA: It's paragraph 4, sir, page 681.

THE CHAIR: Yes, okay. Thank you. That's very helpful, thank you.

MR SUTERWALLA: Sir, we were going to look at the pleadings on the background matters. We're in bundle E, and if we go first to tab 5 please. If I can take you first to the outline points, you can have a look at page 14, paragraph 4(b). Sorry.

MS BURGESS: Sorry, what was the page number?

MR SUTERWALLA: Madam, it's page 340, paragraph 4(b). (Pause)

And also 4(c), please.

THE CHAIR: Which paragraph again?

MR SUTERWALLA: Paragraph 4, page 340 in bundle E, tab 5, paragraph 4, subparagraphs (b) and (c). (Pause)

Obviously, you have this anyway, it's E, but we have alleged a single continuous abuse. So this is all part, we say, of the single continuous abuse in terms of factual developments. Then if I can take you forward, please, to page 350. If you have a look at paragraph 35, 36, 37, and 38. (Pause)

THE CHAIR: Yes.

MR SUTERWALLA: And can I take you to the amended defence, which should be in the next tab, begins at page 388. And can I take you, please to page 415. If you have a look at 45.3, this is obviously Apple pleading back to the allegations that we've just had a look at in the claim form. (Pause)

This is in relation to the UPOs and the background facts that we had to look at.

THE CHAIR: It says they provided an explanation in Crumlin 4.

MR SUTERWALLA: Then could I take you please to the Amended Reply.

THE CHAIR: Yes.

MR SUTERWALLA: Which is the next tab, tab 7.

THE CHAIR: Yes.

MR SUTERWALLA: And it's at page 460.

THE CHAIR: Yes.

MR SUTERWALLA: And if you could have a look, please, at paragraph 10, and towards the bottom of that paragraph, "The fact of the UPOs ..."

THE CHAIR: Right.

MR SUTERWALLA: If you can have a look at paragraph 11 as well, please.

THE CHAIR: What do I get out of this?

MR SUTERWALLA: Well, what you should get, sir --

THE CHAIR: I've just been told we're not allowed to plead background facts, but let's park that for the moment. But anyway --

MR SUTERWALLA: Yes. What you should have from this is that the manner in which the UPOs arose, the scale of the UPOs, the averment by the Class Representative that the problem was happening in new phones with new batteries -- all of that is in dispute as between the Class Representative and the Defendants.

THE CHAIR: Sorry, the fact that there were UPOs?

MR SUTERWALLA: The fact of there being UPOs is obviously not disputed, but the scale of the problem is in dispute: on what phones it was occurring; i.e. new phones with new batteries or --

THE CHAIR: This is a genuine question: why does that matter? Because they all get the PMF.

MR SUTERWALLA: Yes.

THE CHAIR: So, you'll have some people who aren't getting UPOs, but they get the PMF.

MR SUTERWALLA: Yes.

THE CHAIR: There are some people who are getting UPOs. I can see possibly when one gets to how one's quantifying loss, which is a big separate topic, those sorts of questions could start being relevant. But at this stage we're dealing with, why does it

matter?

MR SUTERWALLA: It matters, sir, because the only evidence that we have at the moment on these matters is in Crumlin 4.

THE CHAIR: Right.

MR SUTERWALLA: That poses a difficulty for the Class Representative.

THE CHAIR: But why does it matter whether it was 1 in 100 or 1 in 1,000?

MR SUTERWALLA: It matters because it will be relevant background for you, sir, in the Tribunal at Trial 1 in understanding the background to the PMF, the scale of the problem that was facing Apple, and why it chose to take the decisions that it took. We say it's clearly relevant.

If you can't establish those background facts, sir, it's very difficult, we say, for the Tribunal to then adjudicate upon the central issues relating to the PMF.

THE CHAIR: Just show me what Crumlin 4 said about this.

MR SUTERWALLA: Yes, of course. Crumlin 4 is at bundle A, tab 16.

THE CHAIR: Yes.

MR SUTERWALLA: So --

MR RIDYARD: Page number, please?

MR SUTERWALLA: Yes, of course, sir, page 248. It begins at 246, I was going to take you to 248.

MR RIDYARD: Thank you.

MR SUTERWALLA: So at 248, we see under the heading, "REPORTS OF UNEXPECTED POWER OFFS". I'm conscious that -- it's not marked. I don't believe any of this is --

THE CHAIR: You don't have to read it out anyway, but he doesn't give the frequency of --

MR SUTERWALLA: I don't believe so, but I was going to take issue with the first

sentence of paragraph 9, which is: there's a reference there to the number, and how it's described. We're not in a position to admit that.

THE CHAIR: Right.

MR SUTERWALLA: We haven't had disclosure in relation to it and that's --

THE CHAIR: I'm still not at the moment entirely clear why it's relevant. I mean, have you asked for what the number is? We've drifted onto a narrow topic now about whether you need to know the number of UPOs. He's referred to "a small number". I mean, you could, presumably, have asked those questions -- still could ask those questions?

MR SUTERWALLA: Yes, sir. I think I'm just addressing your point as to how this is dealt with in Crumlin 4 and what we do with it.

THE CHAIR: Yes, I know.

MR SUTERWALLA: And my submission is --

THE CHAIR: You said this was an issue. You grasped my attention when you said you don't know the incidence of UPOs, which is part of the background.

MR SUTERWALLA: The point, sir --

THE CHAIR: You said that arose from the pleadings, so I was asked to look at what Crumlin says, and then we've got there.

MR SUTERWALLA: The short point on this, sir, is that without appropriate disclosure in relation to Crumlin 4, which obviously covers some of these background issues that we're talking about, we're not in a position to --

THE CHAIR: You don't get disclosure on background issues. That's the point. Ordinarily.

MR SUTERWALLA: Yes, sir -- I see the --

THE CHAIR: If a company says, "We started selling product b in 1972", you don't then go, "Right, well, I'm not admitting that because I don't know when you started. I need

disclosure". I mean, it has to be relevant to the issues in dispute.

MR SUTERWALLA: Of course, sir, but we say that Crumlin 4 is relevant. That's the reason why it was ordered, we say, sir.

THE CHAIR: Well, it was put in in order to avoid unnecessarily broad disclosure.

MR SUTERWALLA: Yes, and I read the transcripts of the earlier rulings, sir, and I understand that. But the difficulty we have is that these matters addressed in Crumlin 4 are key background issues. They may not be --

THE CHAIR: It's the background that's troubling me.

MR SUTERWALLA: Yes, but --

THE CHAIR: We'll have to discuss, but it's not clear whether we should be ordering disclosure on background issues.

MR SUTERWALLA: The way we put it, sir, is that in order for you the Tribunal to make the findings you're going to need to at the end of Trial 1, you're going to need to make findings on the issues in Crumlin 4. We say it will be necessary for the Tribunal in its judgment to make findings on these issues, such as when the UPOs began, how frequent they were, how many iPhone users were affected.

THE CHAIR: Right.

MR SUTERWALLA: So those are crucial factual issues that will need to be determined by --

THE CHAIR: There is a whole host of background issues in the case that will be referred to in the opening pages of the judgment: element of Apple's phones; what Apple is going to do; when you have problems with UPOs and things. But it doesn't follow from that that these are appropriate topics for disclosure.

MR SUTERWALLA: Well, of course I accept, sir, I accept that not every background fact will require disclosure, but these facts are directly, if you like, in the slipstream leading up to the design, installation, operation of the PMF.

THE CHAIR: So are there more general points, or should we start looking at the --

MR SUTERWALLA: We can start looking at the issues, sir.

If we go to the composite list of issues, that's at tab 6 of the core bundle. I keep calling it core bundle, sorry. Bundle A. We start with issue 1. Page 71, 72.

The first issue is, as you can see, the specs in the performance. We say, well, two key points really, sir.

The first is that this is not an onerous request. It should readily be available to Apple, for obvious reasons. We say that given that the impact of the PMF is very much an issue -- how negative, if I can put it that way, the impact was on users -- it's necessary for the Tribunal to understand how the phones were performing before the PMF was installed. That's the purpose, really, of issue 1.

THE CHAIR: So if we go to, while we're doing it, look at Apple's disclosure classes.

MR SUTERWALLA: Yes. I have that. It will be in bundle G, sir, but I don't have a reference to the Defendants' list of issues for disclosure.

THE CHAIR: I had a loose copy somewhere here. I've got it here.

MR SUTERWALLA: Tab 12, page 742 in bundle G.

THE CHAIR: As an issue, broadly stated, what's wrong with issue 2?

MR SUTERWALLA: If Apple's position is, sir, that that encompasses the details of how the iPhone operated before the PMF was installed, then we don't have an issue with that.

THE CHAIR: But we're dealing with what the issue is, as opposed to what disclosure Apple needs to give in relation to this issue; and it seems you're potentially encroaching onto the -- what disclosure do you need, what technical detail do you need, et cetera, et cetera, what should be done rather than actually identifying the issue. As I understand, the issue -- it may be a misunderstanding, but there's not a lot between you on the issue.

MR SUTERWALLA: No.

THE CHAIR: You're just trying to anticipate what the disclosure should be.

MR SUTERWALLA: Well, yes, sir. The reason why we want disclosure of our category 1 is we say it's necessary in order to understand the impact of the PMF. It's really that simple. We say that it's not clear from Apple issue 2 that that will encompass what we have in our issue 1. If it does, and Mr Venkatesan can confirm that, that's --

THE CHAIR: It's not so much -- at the moment, I -- Apple have offered issue 1 and issue 2.

MR SUTERWALLA: Yes.

THE CHAIR: What is wrong with their characterisation, at a slightly higher level, of those issues?

MR SUTERWALLA: Our concern is it doesn't capture what's in our issue 1, which is the specs and performance of the iPhones prior to the installation of the PMF.

THE CHAIR: It's implicit in what the impact of the PMF (inaudible) it gets into.

MR SUTERWALLA: We may.

THE CHAIR: There may be grubby detail about how much you need to know about before and after (overspeaking).

MR SUTERWALLA: Sir, we didn't think it was implicit. But if it is implicit that in giving disclosure in respect to Apple's issue 2, it will encompass what we have in our issue 1, then of course that's absolutely --

THE CHAIR: You're going to go on and discuss disclosure categories once these issues are defined.

MR SUTERWALLA: Well, what we're intending to seek from the Tribunal today is a direction in respect of these issues.

THE CHAIR: Right. How is disclosure going to progress? How are the parties envisaging -- once we've got the list of issues, what happens next?

MR SUTERWALLA: Yes. Well, our proposal, sir, is that once we have a finalised list of issues for disclosure, Apple should update their disclosure reports in the light of that list of issues. Parties will seek to agree relevant repository search terms, and if there's any issues on that, we can come back and have that resolved or do it on the papers, and then obviously move through to disclosure.

I don't know if you want to hear from my learned friend in respect of whether that's agreed as a sensible way forward.

MR VENKATESAN: That's right. So in fact, that part of the draft order is agreed. It's paragraphs 10 to 13 of my learned friend's (overspeaking).

THE CHAIR: But when you give disclosure in relation to the impact of the PMF, that's going to be relative performance; performance before, performance after.

MR VENKATESAN: Yes, subject only to this qualification. I mean, one has got to look at an individual document to work out if it's disclosable or not. What we've now put forward is issues for disclosure. But I can't say, if there's a hypothetical document which says X, Y, and Z, it will fall within issue 1 or not. I mean, that's something for individual disclosure reviewers to look at. But we certainly accept anything that's responsive to the issue as drafted, which you've drafted in broad terms, the impact of the PMF would be covered.

THE CHAIR: Yes. But let's say you've got some documents that say the PMF is really impacting the performance of some (inaudible) statements and (inaudible) relevant context will be (inaudible) part of the installation. I think the Class Representative is concerned that if you have a document saying this is the performance of the phone, absent the PMF, that might not get caught on a disclosure search. That's the concern, as I understand it.

MR VENKATESAN: Yes. I mean, I can address this perhaps by reference to their issue 1, which is they want a separate issue in respect of: what were the specifications

of the relevant iPhones before the PMF was introduced, which we say isn't a pleaded issue. That's not in dispute.

I accept that there may be some documents which relate to what happened before, which are disclosable if they reveal what the impact is. I just can't say now what that document will be, hypothetically. I mean, it depends on the content of the document, and whoever is looking at it will have to form a view about whether it goes to the impact of the PMF. I'm certainly not seeking as a category to exclude it, and if there's a problem about that, they can come back and re-address it.

MR RIDYARD: I mean, the PMF was a solution to a problem, and the problem was UPOs; and you're saying you want to know how prevalent the UPOs were.

MR SUTERWALLA: That's one aspect, sir, but of course, our case extends to obviously the negative impacts of the PMF. Therefore, we say it's -- and the Chair, I think, put this succinctly: we say in order to understand the performance-related issues post-PMF, you have to understand the performance of the iPhones pre-PMF. That's all that issue 1 is seeking to capture. We don't understand why it's controversial, with respect. If we have a commitment from Apple, if I can turn it that way, that issue 1 is captured by the impact of the PMF, then we don't see a difficulty.

THE CHAIR: But the issue is properly defined, is it not? The issue -- and I can't believe you're going to disagree with this -- is what was the impact of the PMF?

MR SUTERWALLA: I don't disagree with that, sir. Of course not.

THE CHAIR: Then we're into: what documents are relevant to that issue? And that's not what we're dealing with today. We're dealing with the issues.

MR SUTERWALLA: Yes. I accept that, sir, but it would be -- we don't want to be back here, sir, with respect, arguing about whether issue 2 from Apple is an issue which captures what we say is obvious in issue 1, and they've objected to issue 1. So we're concerned.

THE CHAIR: Your issue 1.

MR SUTERWALLA: My issue 1.

THE CHAIR: But I think the objection is that it's just not an issue. It's a wish list for disclosure.

MR SUTERWALLA: Well, with respect, sir, we say it's not a wish list.

MR VENKATESAN: With respect, it is.

THE CHAIR: I mean, that is your point, I suppose.

MR VENKATESAN: It is indeed.

MR SUTERWALLA: If the position is that the issue for disclosure that Apple puts forward in respect of the impact of the PMF is going to capture the sorts of documents we refer to in issue 1 --

THE CHAIR: There's no question of what Apple does. We're just today --

MR SUTERWALLA: I understand.

THE CHAIR: We're not backing anyone into any corners to make concessions. You are just identifying the issues today.

MR SUTERWALLA: We say -- yes.

THE CHAIR: You agree that this is a relevant issue, issue 2.

MR SUTERWALLA: Absolutely, and we say relevant to that issue is issue 1; our issue 1.

You have my point on issue 1, so I'll move on. We can swiftly move past 2, because I think that's really the same point.

THE CHAIR: You're going to talk about 3.

MR SUTERWALLA: So we're on to 3.

We have had some discussion already in relation to 3, sir, as I've taken you to the pleadings on this issue, and we've had a discussion about the relevance of this.

You had my submissions on why we say that those -- it's been termed background

issues. I think that to some extent does it a disservice, sir. We say that it's crucial information, factual information that the Tribunal will need to make findings on in order to make its findings on the abuse.

Therefore, and we've seen,; we've had very limited disclosure, sir, in respect of Crumlin 4. We've had an exhibit which is limited and some supporting documents. There are a number of factual assertions made in Crumlin 4 on these issues which we simply aren't in a position to test or challenge if we wish to, because we haven't had the disclosure to see whether we can agree to them. And we say it is crucially relevant to the immediate period, to the design, installation, operation of the PMF. That's why we say it is a relevant disclosure issue.

THE CHAIR: Fine. And then 4? How did Apple become aware --

MR SUTERWALLA: Yes. This again is in a similar fashion, sir. The point is that the PMF wasn't created in a vacuum. We've had some evidence in Crumlin 4, but we say that's not good enough.

THE CHAIR: Why is it not good enough?

MR SUTERWALLA: It's not good enough, sir, because --

THE CHAIR: Sorry, just remind me again where Crumlin 4 --

MR SUTERWALLA: Yes, Crumlin 4 is at tab 16 of bundle A.

THE CHAIR: Why is this not good enough?

MR SUTERWALLA: So what we have is at page 248, we have paragraphs -- the extensive evidence on this is paragraph 9 through to 14 or so.

THE CHAIR: Why does it matter? Why does this matter?

MR SUTERWALLA: So --

THE CHAIR: Let's assume you get a disclosure document, and you discover, "Ah! It wasn't actually in the fall of 2016, it was in August 2016, and August is the summer". I mean, what difference is that going to make to the case?

MR SUTERWALLA: Well, when you put it like that, sir, that one particular fact may not make a difference.

THE CHAIR: (Overspeaking).

MR RIDYARD: But if the UPOs affected 1 in 1 million phones as opposed to 1 in 10 phones, I mean, are you saying that's important?

MR SUTERWALLA: That is important, of course, sir, as again, it goes to the extent of the problem. It may go to why Apple decided upon a particular solution, namely the PMF. And we obviously discussed the relevance of alternatives.

THE CHAIR: And the how?

MR SUTERWALLA: And the how in terms of how did they find out about the problem?

THE CHAIR: Yeah.

MR SUTERWALLA: Well, that goes to consumer knowledge, and the extent of consumers reporting the problem, which again is relevant to why Apple may have taken the decision it took in settling upon the PMF. It all is part of a chain, sir, an important narrative as to the story behind the PMF.

THE CHAIR: Yes, you made that submission, but in terms of these matters, you could interrogate Mr Crumlin -- Apple may want to supplement Mr Crumlin -- but he said "a small number". He could enumerate, potentially, that number.

MR SUTERWALLA: And any enumeration, sir, would have to be supported.

THE CHAIR: Why does it have to be supported?

MR SUTERWALLA: Because otherwise --

THE CHAIR: Subject to a major disclosure exercise.

MR SUTERWALLA: Well, that's not the purpose, sir. We say, sir, it's with respect to a matter of fairness. If Mr Crumlin's evidence before this Tribunal is, "Oh, well, it was only a small number that was affected", the Class Representative is, we say with respect, entitled to decide whether he wishes to challenge whether it was a small

number or a larger number. And we say that's relevant because of the reasons I've given in terms of --

THE CHAIR: But you're not saying it wasn't a small number. Your case is it was a large number, or is it just a fishing expedition to find out what the number was? You may be able to say it's too big or too small.

MR SUTERWALLA: It's not a fishing expedition, sir, but we're not in a position without -- the purpose of the order from you, sir, was that this was relevant background information, relevant evidence, and evidence was given on it to see whether (inaudible) -- and for the Class Representative then to scrutinise it and to take a decision as to what to do with it.

The difficulty is it hasn't been supported in many instances. So very limited supporting information is being given for a number of the factual propositions. These are important factual propositions the Class Representative is simply not in a position to agree with or disagree with. That's not a fishing expedition, sir; that's a decision that the Class Representative has to make as to whether it can challenge this evidence.

Otherwise, it will stand at Trial 1 -- Mr Crumlin's evidence will stand, and the Tribunal will proceed on the basis that only a small number of iPhone users were impacted. We simply are not in a position to accept that. We say there needs to be disclosure -- and we say it's clearly relevant, the extent of the problem, to the Tribunal's determination. That's the difficulty.

Were Crumlin 4 supported by the necessary documentation on these factual propositions -- we heard you loud and clear on the last occasion, and we may not be seeking disclosure on these categories. The difficulty is Crumlin 4 has been put forward in the way it has, and it's very difficult.

We've been placed in an invidious position. We understand the rules before the Tribunal; we don't seek to engage in some disproportionate disclosure exercise, and

the Class Representative is aware that this case has been going on for some time, and it wants to proceed as quickly as possible. But it can't be forced, sir, we say respectfully, into a position where it has to accept findings in Crumlin 4 because it is unable to challenge them.

THE CHAIR: Should we -- I was going to deal with those classes first?

MR SUTERWALLA: Of course. I was just wondering whether there was -- I mean, do we wish to deal with 5 and 6?

THE CHAIR: No, I think we'll -- let's have a quick look. (Pause)

Okay, do you want to pick up 5 and 6? We've kind of discussed that.

MR SUTERWALLA: We've kind of discussed that, sir, yes.

THE CHAIR: You hit choppy water on 5, what about 6?

MR SUTERWALLA: I tried to sail over that choppy water as best as I could, sir. 6 is going to the choices. I mean, you've got the point, sir. Obviously, we're not saying the PMF itself is an abuse; that's not our case. That's clear. But we said it's clearly relevant to understand, at the time that the PMF was being set up, what else was Apple thinking of as alternatives, because that may explain the "how", as to how the PMF was implemented; and the "why", as to why the PMF was implemented. That, we say, goes to the transparency point.

THE CHAIR: I'd like to hear you on category 4. Particularly the frequency.

Submissions by MR VENKATESAN

MR VENKATESAN: Yes, indeed, sir. May I just, with your permission, make three general observations before I deal with that issue, very quickly?

First, we respectfully adopt what you put to my learned friend, which is one doesn't get disclosure in respect of background issues; it's got to be a key issue in dispute. So the test isn't, "Is it in the pleading?" It's, "Is it a key issue in dispute?"

THE CHAIR: Yes, I've read your skeleton on that.

MR VENKATESAN: Second, one of the points we make and the authorities make is that the list of issues for disclosure should be concise and avoid overlap. The overlap point is quite important, because if you think about someone actually doing the disclosure exercise, if a single issue is fragmented across separate issues -- if you have the same broad topic distributed across issues 1 to 4, they look at a document and they say, "Well, this isn't responsive to issue 1", they then have to ask themselves, materially, the same question all over again. It just gives rise to an increased risk of errors.

That's why our overarching point -- and this is my third general point -- is that the list we've put together contains eight broad issues, which between them are more than adequate to identify disclosable documents. That's what we invite the Tribunal to adopt as the working document.

Having said that, can I then turn to the particular issue. I detected I don't need to deal with issues 1 to 3 in their list, but just with 4.

THE CHAIR: 4, yes.

MR VENKATESAN: Yes, indeed, the when and how. (Pause)

There are two reasons why we resist this. First, what is now issue 4 was issue A(3) in the list of issues that the parties had produced for the July 2025 CMC.

THE CHAIR: I'm not very interested in the history of all this.

MR VENKATESAN: Can I give you the punchline, as it were. I wasn't there, so I'm reliant on the transcript as well. The reason why the Chair ordered us to put in a witness statement which became Crumlin 4 was not only that it would reduce the scope for disclosure --

THE CHAIR: Yes.

MR VENKATESAN: -- but because you said, "These issues only go to the background and are not in dispute, so it is sufficient for it to be addressed in the form of witness

evidence. If you then dispute it subsequently by pleading some case, you can come along and ask for disclosure". But they haven't done that. You did say that if that remains the position, they would face an uphill battle in seeking disclosure on those matters. That's the basis on which the parties --

THE CHAIR: Okay, but in terms of is it relevant. Why is the frequency of UPOs not a relevant matter?

MR VENKATESAN: Well, it's not relevant because it doesn't form part of, nor is it material to, the alleged abuse as it now is, which concerns only the "how", if I can put it like that. In other words, the complaint is not about either the occurrence of UPOs or about the introduction of the PMF in and of itself. The complaint is about what was said or not said when the PMF was introduced, and it's hard to see why documents about the rate of UPOs goes to that, because they're not going to be saying at trial that the PMF was itself an abuse and Apple should have done something different.

THE CHAIR: Mr Crumlin has raised it. We can debate whether anything will turn on it ultimately, but it is quite a key background fact, the fact there are UPOs and then, consequently, how common they are. And Mr Crumlin said "a small number". He hasn't -- not a criticism of him at this stage -- evidenced that with documents as to how many iPhone users are experiencing UPOs. That is a matter that could be elaborated upon in accordance with category 4. So, "How did you become aware? What was the frequency?" And you could produce documents to evidence that.

MR VENKATESAN: Sir, actually, he has provided a document. It's a confidential document, so I won't read it out, but can I show you where it is.

THE CHAIR: Does it have the number of incidents?

MR VENKATESAN: It has a percentage. It does. Can I show you that?

THE CHAIR: Yes.

MR VENKATESAN: It's under C, tab 3, page 34. This is an exhibit to a previous

witness statement of Mr Crumlin.

THE CHAIR: Okay. He's not picked it up in -- all right.

MR VENKATESAN: I won't read it out, but it's page 35.

THE CHAIR: Yes. (Pause)

I see.

MR VENKATESAN: They haven't said that's wrong; they haven't, as I understand it, got any basis --

THE CHAIR: It's obviously in a different statement, so it may be that the Class Representative didn't have this document in mind, I don't know.

MR VENKATESAN: Sorry sir, I apologise, is that not what you're looking for? Bundle C, tab 3.

MR SUTERWALLA: With respect, sir, it's something, but it doesn't answer the number of iPhone users that were impacted, which is the point that Mr Crumlin's making.

THE CHAIR: Right, it gives you a percentage, doesn't it? The percentage rate of UPOs.

MR RIDYARD: It says reduction of the UPOs.

MR SUTERWALLA: It's reduction.

THE CHAIR: Yes, I beg your pardon. Right. I'm with you. Sorry.

MR VENKATESAN: Sir. I should say -- I mean, again, I need to be careful what I read out -- the first row is pre-PMF, because it's concerned with 10.2 not 10.2.1. Those numbers are about what happened before --

THE CHAIR: Is this a contemporaneous document? This is not a document evidence, this is something that's been produced for --

MR VENKATESAN: May I just check that? (Pause)

I'm grateful to you for giving me the opportunity to check that point. This document was prepared for the witness statement, but I'm told there are other documents which

have been disclosed to the Class Representative, and I'll try and get you the references on this point.

THE CHAIR: Right. But I mean, obviously, the order:

"by 5pm on 17 October, the Defendants shall file and serve a signed witness statement(s) supported by a statement of truth and appropriate proportionate contemporaneous documents."

So the incidence of UPOs is alluded to -- we don't have a figure and we don't have any documents in support. Whether they are out there somewhere or not ... Do you have any objection to -- you'll need to take instructions -- the number being provided and documentary evidence?

MR VENKATESAN: Can I take instructions on that and come back to you? Perhaps I can deal with the other points and we'll come back to that. The other issues, I think you wanted me to address 5 as well, or I can take --

THE CHAIR: No, no, I didn't. I just wanted you to -- I think we might need to discuss one or two matters. We might rise for five or so minutes, and then that will give you an opportunity to take instructions.

Submissions by MR SUTERWALLA (continued)

MR SUTERWALLA: Sir, before you do, can I just finish off on 5 and 6? I'm grateful to my learned friend --

THE CHAIR: Yes, yes.

MR SUTERWALLA: -- for reminding me of this. We're dealing with Crumlin 4, could I take you to Mr Crumlin's witness statement, paragraph 21 and 22.

MR RIDYARD: Give us the reference again, sorry.

MR SUTERWALLA: Yes, I'm so sorry, sir. It's page 251. And if you're on the hard copy, tab 16 of bundle A. (Pause)

We say this is obviously key in terms of issues 5 and 6.

THE CHAIR: Right.

MR SUTERWALLA: Yes. It's page 251. This is Crumlin 4, it's behind tab 16 in bundle A, and we're looking at paragraphs 21 and 22, please.

THE CHAIR: Sorry, I just need to remind myself --

MR SUTERWALLA: 5 and 6 are broadly dealing with the alternative solutions for PMF, why specifically --

THE CHAIR: Yes, yes. (Pause)

Right, so you've got a document.

MR SUTERWALLA: Yes, and again, sir, we say in terms of testing any of this or challenging it or what we do with it -- and we say it's obviously relevant to the PMF -- we're, with respect, sir, if I can put it this way, stuck. We have Mr Crumlin's evidence, but not the supporting information that we could decide whether to admit any of this or ...

It's also key evidence or key facts, we say, going to the counterfactual as well. (Pause)

Yes, because we say, sir, that a replacement battery solution would have been a fine solution.

MR RIDYARD: Solution to the lack of transparency?

MR SUTERWALLA: Yes, well, a solution to the problems obviously arising from the UPOs and the impact of the UPOs, but then to be transparent instead of having a software solution.

MR RIDYARD: I don't understand this, because if you're saying the PMF was an abuse --

MR SUTERWALLA: Yes.

MR RIDYARD: -- and they should have replaced the batteries instead of doing the PMF, then I can see that. But you're not saying that; you're saying the PMF is fine, it was just the lack of transparency about it.

MR SUTERWALLA: Yes, but if there's a lack of transparency in relation to the PMF in the counterfactual, a solution to that lack of transparency in Apple -- actual transparency, maybe not to use the PMF, but to have a battery replacement programme instead.

MR RIDYARD: Well, I just don't follow that, but maybe ...

MR SUTERWALLA: Sorry, Mr Moser's just going to come in.

MR MOSER: I'm sorry, that's not right. I'm sorry to disagree with my own co-counsel. The way this works is this: in the counterfactual, there would have been transparency.

MR RIDYARD: Yes.

MR MOSER: There would have been the PMF, which is not in itself an abuse. There would have been transparency. As a consequence of transparency, there would have been a consumer uprising of considerable proportions, and Apple would have had to react to it.

MR RIDYARD: Yes.

MR MOSER: It could have reacted in a number of ways, as Mr Harman says, and one of those ways is a battery replacement.

Now, Mr Crumlin in Crumlin 4 asserts that a battery replacement wouldn't have worked, so it's going to matter to loss and damage to know whether or not a battery replacement was in fact a consequence that would have eventuated in the counterfactual. If we're stuck with Mr Crumlin's assertion that it wouldn't have eventuated because we were absolutely convinced it wouldn't work, we have to be able to challenge that. And of course, we haven't, I think, got on to experts and so on. But one of our experts is going to be a technical expert. He may well wish to say: a battery replacement, as you did for some, would have been a fine way, as my learned friend puts it, of resolving the issue.

MR RIDYARD: Well, it depends which issue you're talking about, doesn't it? If you're

talking about phones that don't work very well, then I can see a new battery may or may not temporarily or permanently have worked, but that isn't the abuse -- the abuse is the lack of transparency. You resolve the lack of transparency by being transparent.

MR MOSER: You do, you do. But again, we haven't reached loss and causation. I know we're going to discuss it a bit more this afternoon, or whenever we reach it, but the way it works is that you've got the UPOs, the PMF, the lack of transparency and the negative experience.

MR RIDYARD: Negative experience of what, though? You can't say the negative experience of the UPOs -- obviously that's negative.

MR MOSER: Yes, so the negative experience of the PMF.

THE CHAIR: I think we'll come back to this this afternoon, Mr Moser.

MR MOSER: Indeed. In the counterfactual, there would have been transparency, and Apple would have had to do something. That's the key for how we formulate the methodology for our loss. One of the things it might have had to do is replace batteries. If Crumlin is going to stand in our way because we've got to accept some passages that say, "No, no, that wouldn't have worked", then we lose.

THE CHAIR: We'll be five or ten minutes.

(12.26 pm)

(A short break)

(12.40 pm)

THE CHAIR: How did you get on with your instructions?

MR VENKATESAN: We're still taking instructions, unfortunately California needs to come online before we're able to give you an answer about what data that table was prepared in the light of. But we're doing it as quickly as we can.

THE CHAIR: What data --

MR VENKATESAN: The table I showed you with the percentages.

THE CHAIR: Well, you said you had another document somewhere.

MR VENKATESAN: That's what we're trying to find out. I don't know at the moment what that document is.

THE CHAIR: Right.

MR VENKATESAN: But we will provide it to you as soon as we have it.

THE CHAIR: Okay. Fine. Let me deal with the other categories first, then.

Ruling on categories

THE CHAIR: There was a hearing in July 2025 following which an order was made on 7 August 2025. It provided that:

"... the Defendants shall file and serve witness statement(s) supported by a statement of truth and appropriate proportionate contemporaneous documents, which will stand as evidence-in-chief at Trial 1 and which addresses the following issues:

"(a) Apple's understanding as to the cause(s) of “Unexpected Power Offs” at the relevant dates and how UPOs impacted consumers;

"(b) how Apple reached a decision to introduce the Performance Management Feature and the technical reasons why it understood this ameliorated the problems of UPOs;

"(c) the effectiveness of the PMF in reducing UPOs; and

"(d) the manner by which the PMF was implemented."

Pursuant to that, the fourth statement of Mr Crumlin was served addressing these matters. This statement was ordered to make the disclosure exercise more efficient. It did not preclude applications for disclosure in relation to the matters dealt with in his fourth statement, but it was hoped that by setting out in more detail some background issues, matters could be effectively narrowed for trial.

It is common ground that I should apply the principles recited in paragraph 7.6 of Practice Direction 57AD in the High Court. In particular:

"The List of Issues for Disclosure should be as short and concise as possible. 'Issues

for Disclosure' means for the purpose of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission."

We bear in mind the rest of that paragraph and paragraph 7.7 as well. We intend to apply those principles to the dispute over the list of issues for disclosure in this case. The purpose of identifying issues for disclosure is not to provide a party with a foundation from which it is able to challenge any position the opposing party assumes.

We have in mind that the principal issue between the parties is the failure to inform consumers that the PMF may impact phone performance and the consequences of that failure. In addition to the information in Crumlin 4 and the documents he provided, various other documents have already been provided in these proceedings in preliminary disclosure. Again, that was not intended to preclude further disclosure orders.

The other matter that is background to this application is that the allegation that the phones with the PMF failed to meet a promised standard of performance has been abandoned.

We start with that which Apple has put forward as a list of issues for disclosure. In particular, we focus on three of those issues. I will read issue 2, first:

"What impact did the PMF as implemented in iOS 10.2.1, 11.2 have on the relevant iPhone series, and under what circumstances in terms of (a) hardware components, (b) technical performance, which is then detailed, (c) technical capability and (d) functionality?"

Issue 1 is similar, but it is about what impact did Apple expect as opposed to what

impact did the PMF have. And then issue 3 is:

"During the relevant period, what knowledge did Apple have of user responses or feedback regarding the performance of relevant phone series relating to the effects of the PMF?"

The class representative says that this is inadequate and has put forward some more detailed issues.

The CR issues are more granular and detailed than the issues identified by Apple, but there is considerable overlap. The class representative's first issue is:

"What are the affected iPhones' specifications and performance at launch?"

In other words what was the performance of an "untainted" iPhone? Issue 2 is similar, and then issue 3 is:

"How and in what circumstances did the battery and/or UPOs impact the hardware components, technical performance, capabilities and/or functionality of the affected iPhones?"

Our current view is that the key issue is the impact of the PMF on the relevant iPhones, and it is that issue to which disclosure should be directed. The point has been made that there may need to be disclosure around what performance a normal iPhone has in order to understand the performance of the affected phones. That may or may not be the case, and we certainly would not wish to preclude the ability of the class representative to make sure he has sufficient information to understand the impact of the PMF on the affected iPhones.

We are of the view, however, that Apple's encapsulation of issues 1 and 2 is at the right level of generality. The trouble with these detailed issues identified by the class representative is they are bleeding into the question of what disclosure should be provided as opposed to identifying an issue between the parties.

Regarding the class representative's issue 3, information in relation to this has been

already provided; Mr Crumlin's fourth witness statement and indeed his earlier witness statements. We do not at the moment see this as a key area of dispute requiring identification as an issue for further disclosure.

With regard to the class representative's issue 4, which is:

"When and how did Apple become aware of the battery issues, including their cause and frequency, and/or the UPOs, and their cause and frequency, impacting the affected iPhones?"

We are of the view that the frequency of the UPOs is a relevant background matter. At the moment, it is dealt with by Mr Crumlin only briefly. In paragraph 9, he explains: "In the fall of 2016, Apple began to receive reports about a small number of iPhone Users experiencing UPOs."

He does not provide a number or any documents to support how that information came into Apple's knowledge, and indeed the frequency of the UPOs. We consider that this is a matter that should be further explained. At the moment, we do not see why that needs to be an issue for disclosure; that would seem to be able to be dealt with by interrogating Mr Crumlin, with a request for further information in relation to that issue, and with appropriate provision of documents evidencing when matters came to light and their frequency.

Counsel for Apple submitted that there may be documents already in the case which do that job, and is in the process of taking instructions. So that is a matter which we would expect to be dealt with in an appropriate way. We say no more about it at the moment.

The class representative's issue 5, concerns the development of the PMF, and reads: "Other than the PMF, what (if any) alternative solutions to the battery issues and/or UPOs were identified, considered or available to Apple for addressing the battery issues and/or UPOs."

We do not consider this to be a key issue in relation to this case. The idea that this Tribunal should be investigating whether alternatives to the PMF could have been advanced is potentially a major question, and it would be considered to be a new front in this litigation.

It is correct that Mr Crumlin does allude to other matters that were considered, and I have no doubt Apple would have considered a variety of options in order to deal with the UPOs. But again, it comes back to what is the dispute in this case. The key dispute in this case is whether the failure to be transparent about the PMF was abusive. No complaint is made of the installation of the PMF per se.

Then the class representative's issue 6 is very similar: "Why did Apple decide that a software solution and specifically the PMF was an appropriate response to the battery issues and/or UPOs (including over any alternative solutions), and when did Apple take that decision?"

Therefore, we prefer Apple's issues, subject to the clarification in relation to issue 4.

If we could then move on to further issues, it may be that given the theme, some of these will fall quicker than others.

Submissions by MR SUTERWALLA (continued)

MR SUTERWALLA: Yes, sir, they may do. We were up to issue 7, I believe.

THE CHAIR: Yes.

MR SUTERWALLA: If we're looking at the composite list, that's at tab 6 of the core bundle, bundle A, page 80.

THE CHAIR: Yeah.

MR SUTERWALLA: We have issue 7, which is what specifically was the PMF intended or expected to do.

THE CHAIR: That seems to be covered by Apple issue 1.

MR SUTERWALLA: On first glance, yes, sir; but we say the distinction in our formulation is that our wording at 7 encompasses Apple's motivations for the PMF, what it was seeking to achieve, specifically through the PMF. That is relevant, we say, to the central issue of transparency; because the case put forward by the Class Representative is Apple decidedly chose to conceal the installation of the PMF, and documents going to that would be captured, we say, by what the PMF was intended or expected to do; whereas the impact, which is Apple's issue, the impact of the PMF, would not capture documents going to the motivation of installing the PMF. That's the distinction.

THE CHAIR: Right. We know what the PMF was intended to do.

MR SUTERWALLA: Well --

THE CHAIR: It was intended to do what it does. It wasn't like they thought it would do one thing and it did another.

MR SUTERWALLA: No, of course, sir; but intention in terms of whether consumers would be aware of the issues of UPOs and batteries and whether they would be aware of their phones misbehaving a little bit that way, we don't know. The case as put forward by the Class Representative is that Apple chose this particular solution in order to avoid consumers understanding that there was these negative impacts and problems with their phone as a result of the UPOs and so by installing the PMF itself. Therefore, documents which may go to that motivation are clearly relevant to the case on transparency.

THE CHAIR: Sorry, that's a nuance that's lost on me. What impact did Apple expect the PMF to have on the Relevant iPhone Series, and what specifically was the PMF intended and/or expected to do, seem so close to one another. I can barely get a cigarette paper between them.

MR SUTERWALLA: It may be, sir, that if the latter formulation from Apple captures

documents which go to motivations and so forth, then that's fine.

THE CHAIR: They go to intentions.

MR SUTERWALLA: Intentions.

THE CHAIR: Yes.

MR SUTERWALLA: Intention, motivations.

THE CHAIR: Okay. Well, I think we probably agree then.

MR SUTERWALLA: Yes, yes. I think you've got the point, sir, but we can accept Apple's issues 1 and 2 if the formulation captures how Apple expected --

THE CHAIR: Well, it does say -- it uses the word "expects" there.

MR SUTERWALLA: How users -- exactly, yes.

Then we're on to issue 8, which is determining the level of mitigations to be applied by the PMF, and what considerations. Again, sir, this goes specifically to why Apple settled upon the PMF as, if you like, installed and operational, and the documents going to --

THE CHAIR: It's another version of, "Why did you choose the PMF and not something else?"

MR SUTERWALLA: Yes, but it's a version which goes a bit deeper than, "Why did you choose the PMF?" "Why did you choose the PMF as it was implemented?"

THE CHAIR: The PMF is not abusive.

MR SUTERWALLA: Yes, but --

THE CHAIR: This Tribunal will not be investigating whether the PMF was appropriate or not.

MR SUTERWALLA: No, sir, but decisions taken by Apple to adopt certain mitigations for certain components rather than other mitigations --

THE CHAIR: I mean, we're going round in a circle. We're back to: are there other ways of cracking this nut? There are other ways that don't involve a PMF, or there are

other types of PMF, or variations on the PMF. It's all amounting to the same thing, and you heard our ruling on that.

MR SUTERWALLA: I see that, sir. I just say, the submission I make is that it does go directly to the issue of transparency; because, sir, it would show -- possibly depending on whether there are documents -- motivation for picking a particular course of design and installation. That's relevant to the case on transparency.

THE CHAIR: Well, I'm afraid you've not persuaded us on that one.

Should we draw stumps there for lunch. Perhaps --

MR SUTERWALLA: I'll have a look. Yes. I'll have a look.

THE CHAIR: There are a lot of points that we're going to be having the same debate, so if you can narrow it, obviously. If you can't, I'm quite happy to hear you on these

All right. 2.00 pm.

(1.00 pm)

(The short adjournment)

(2.02 pm)

MR SUTERWALLA: Sir, I believe we have got up to the end of issue 8.

THE CHAIR: Yeah.

MR SUTERWALLA: We've been looking at the different categories over lunch, as you'd expect in (inaudible) discussions.

There are a number which we think, on further reflection, are capable of being encapsulated in the Apple issues, and I'll explain which ones those are. There are some which remain live and which I'd like to address you on and seek your decision on those. I'll try and take you through those in order.

If we go to 9 and 10, we have reflected and consider they are capable of being encapsulated in Apple's issues 1 and 2.

If I turn to 11 next. 11 is one which we do press for, and this really goes to disclosure

as to how the PMF, if you like, was activated; so how, if I can use the colloquial, it kicked in in respect of being operational on an affected phone.

THE CHAIR: Okay. Is it covered by an Apple category or not?

MR SUTERWALLA: We don't think it is, which is why we continue to pursue it.

THE CHAIR: Does Apple say it is?

MR SUTERWALLA: They say it is covered in the factual evidence of Mr Crumlin. That's their answer to this.

THE CHAIR: Okay. Should we have a look at that?

MR SUTERWALLA: Yes. We are back into tab 16 of bundle A, and if we pick it up at paragraph 25. If you have a look, please, at paragraphs 25 and 26, first of all.

THE CHAIR: Okay. Yes.

MR SUTERWALLA: Then if we have a look at paragraph 53.

There's a section, obviously, the manner by which the PMF was implemented. If we could have a look in particular at 53(a), please.

THE CHAIR: Okay. Yes. I won't read it line by line at the moment.

MR SUTERWALLA: Yes. So the point here, sir, is that there are a number of points that Mr Crumlin makes where we simply don't have the supporting material to take a view on whether any of this can be --

THE CHAIR: This is technical stuff.

MR SUTERWALLA: Yes. It is technical, and that's all the more --

THE CHAIR: What sort of disclosure is going to help you?

MR SUTERWALLA: Well, sir, if I take some of the examples --

THE CHAIR: If Apple produce a bunch of circuits, a bunch of data points, how is that going to help? You need a narrative explanation of how it works, don't you?

MR SUTERWALLA: That's one way, yes, sir. But we would also have the ability, sir, to have an expert look at that material and to the extent that we don't understand it

ourselves, to explain it.

THE CHAIR: Yes. Well, if an expert needs to see something, an expert can come along and say something, and that's why I need to see it. Are you saying that there needs to be massive disclosure of all this?

MR SUTERWALLA: Well, we don't say there needs to be massive disclosure. What we have is we have an explanation from Mr Crumlin, which is over these paragraphs that I've taken you to, but without the necessary supporting information. So we ask for, in relation to this specific matter, that, we say, a sort of proportionate closed category of information as specified in the category for disclosure. We don't see why it would have to be a huge --

THE CHAIR: What is the additional information you need?

MR SUTERWALLA: In order to answer that, sir, I'd have to take you through each of the paragraphs, and I can point you --

THE CHAIR: We know. Yes. We've got an explanation here.

MR SUTERWALLA: We've got an explanation. There's mitigation tables referred to. We understand there are selected tables that Mr Crumlin has put forward. We don't have all the relevant mitigation tables. We don't believe we have all the relevant mitigation tables.

THE CHAIR: Okay. Well, obviously that can be dealt with in correspondence by further interrogation to say there needs to be disclosure. I appreciate we're not in the Patents Court --

MR SUTERWALLA: Yes.

THE CHAIR: -- but in a patent action where we need to know how the alleged infringement works, no disclosure. That's done by a witness statement; and why it's a useful parallel here, experience has suggested that where you just get tonnes of lab books and computer printouts and stuff, you're actually – not clear how it works, even

when you've got all that stuff, unless you spend tonnes of time trying to reconstruct it. It's much better actually to have an explanation.

If the explanation is inadequate, then of course you say, "Well, we need to understand a bit more about paragraph whatever, or we need to know the data points". That of course is something that can take place. But to suggest that we should park doing it this way and now go to disclosure seems to be a jump, coupled with the fact that again this seems to be of marginal relevance to the issues in the case.

MR SUTERWALLA: Well, on that particular point, I mean, we say it's actually central to understand how the PMF actually worked in practice; in other words, how it --

THE CHAIR: You need to know what the user experience is.

MR SUTERWALLA: Yes.

THE CHAIR: Whether it's because this diode is attached to that diode -- not that they really have diodes, but you know. You need to know like what's the user experience? That's a background fact for your case.

MR SUTERWALLA: That's part of it, sir, yes, of course, that's crucial.

THE CHAIR: Why do you need to dig into the detailed technology?

MR SUTERWALLA: Well, because the mitigations, and the level of mitigations, potentially goes to how Apple chose to potentially conceal the effects of the PMF, because it could decide, "Well, we'll have a mitigation in respect of the screen and how that dims, and it may come on at a certain time and not kick in at a certain time because that means that users won't know about it". That's in relation to other hardware components for the phone scrolling and speakers and volume and so forth. So how those mitigations, those levels were set, what considerations went into the setting of those mitigations is relevant to the case on transparency.

THE CHAIR: Again, this is going to the "How did the PMF operate?" And obviously how it operates -- there's the user experience --

MR SUTERWALLA: Yes.

THE CHAIR: That's obviously relevant. I appreciate that. Understanding aspects of the technology, giving some colour -- well, we've got a bit of that in Crumlin 4 already explaining how it works.

"What circumstances was the PMF activated on the affected iPhones?" Is that not covered by Apple's issue 2? Why is that not covered? "In what circumstances was the PMF activated? What was the impact of the PMF ... under what circumstances?" That seems to be --

MR SUTERWALLA: Sorry, sir, I'm just having a look. Sorry, issue 2. You say Apple issue 2 -- "what impact, if any, did the PMF ... what circumstances?"

It's a question of precision, sir. What we don't want to do is come back to the Tribunal because there's been.

THE CHAIR: You say that that should be written explicitly into issue 2?

MR SUTERWALLA: Yes.

THE CHAIR: Would there be any objection to that?

MR VENKATESAN: May I just take instructions, sir?

THE CHAIR: Let's look at, "How did the PMF operate?" Let's put square brackets around that, because I think it's:

"In what circumstances would the PMF be activated on affected phones? What parameters govern the operation of the PMF?"

MR VENKATESAN: Yes. I mean insofar as what they want is documents about the impact of the PMF, that's covered anyway.

THE CHAIR: Well, if it's covered, you'd have no objection to this being explicit in issue 2?

MR VENKATESAN: That's right. I'm just conscious about not making the job of the reviewer more complicated by having to consider various sub-issues. In a nutshell,

I've got two points: one is that insofar as what we are concerned with is the impact of the PMF, that's covered already; insofar as they want to know about the PMF going beyond its impact -- so its technical operation -- that is essentially a technical question.

THE CHAIR: Let's just have a look at the class. You said, "what's the impact of the PMF and under what circumstances ..." So you could say, "In terms of the circumstances under which the PMF was activated on affected iPhones, what parameters govern the operation of the PMF?"

MR VENKATESAN: May I have a moment to take instructions?

THE CHAIR: It seems to be an unimportant point.

MR VENKATESAN: The concerns are we've already disclosed the mitigation tables, which are annexed or exhibited to Mr Crumlin's statement. So the concern is simply, if we add this into issue 2, it's not clear to us what --

THE CHAIR: You said it was covered by issue 2.

MR VENKATESAN: It is covered by issue 2 in principle, but if one writes it in, then the implication is almost, having answered issue 2 as it stands, one's got to ask a further question: is a particular document responsive to this bit of issue 2? And for our part, it's just not clear to us what they are getting at.

THE CHAIR: Okay, well, I'm going to suggest we put it in without prejudice to you saying that they've already got the material they require.

MR VENKATESAN: I understand.

THE CHAIR: Then we can come back and argue that maybe. Is that satisfactory? I don't know whether you get any more documents as a result of this, it'll be written into issue 2 as an issue for disclosure. That's without prejudice to Apple being able to say, "Well, Crumlin has dealt with this". You can interrogate them and say give us a bit more and/or you ask for documents -- that's all for another day.

MR SUTERWALLA: Yes, just to be clear, when we finalise the list of issues for

disclosure, it will be written into --

THE CHAIR: (a) and (b) will be written into issue 2.

MR SUTERWALLA: Yes, that's fine. I'm grateful, and I've understood, sir.

THE CHAIR: It doesn't mean you're necessarily going to get more documents; it may be a further explanation from Mr Crumlin; it may be they're sufficiently there already.

MR SUTERWALLA: Understood. Thank you. That takes us to composite list of issues for disclosure 12. This is obviously an issue 2.

THE CHAIR: Yes.

MR SUTERWALLA: There's only a couple of issues with this.

THE CHAIR: It was on the wording, yes?

MR SUTERWALLA: It's on the wording; it's very minor. Apple seek to limit this to iOS 10.2.1, which is obviously when the PMF was first implemented, and then 11.2. But of course the relevant period goes up to and including 11.3. It's a question of having the updates in between covered.

THE CHAIR: I see.

MR SUTERWALLA: Yes, we don't have the intervening updates.

MR VENKATESAN: Sir, if it helps, that's agreed.

THE CHAIR: That's agreed. Very good.

MR SUTERWALLA: Thank you, just one minute. (Pause)

Sorry, sir. The patch updates, I'm grateful to my learned friend for confirmation on that. We do see that the period that this covers is up to the end of the relevant period, so that it goes up to 11.3.

THE CHAIR: Up to and including 11.3?

MR SUTERWALLA: No, up to.

MR VENKATESAN: That's all satisfactory.

MR SUTERWALLA: Okay. 13, we don't need to trouble you with. 14, we do pursue.

It's an issue in dispute and part of the Class Representative's pleaded case that there's an issue as to what extent the PMF actually prevented UPOs once it was installed.

THE CHAIR: Right, to prevent -- so it's just UPOs? I don't know what the battery issues are. "What extent did PMF effectively mitigate UPOs?"

MR SUTERWALLA: Yes.

THE CHAIR: Yes, and we've seen a document --

MR SUTERWALLA: We use the words "battery issues".

THE CHAIR: You've showed me a document which seems to show that.

MR VENKATESAN: No, indeed. I mean, I don't know if my learned friend has finished, or ...

THE CHAIR: No, carry on.

MR VENKATESAN: The simple point is that: (a) there are already documents; (b) there's no allegation in these proceedings that the PMF was an abuse because it didn't solve the problem that it set out to solve.

THE CHAIR: It is part of the context. It may be a point in your favour. I don't --

MR VENKATESAN: Indeed.

THE CHAIR: You know, you needed to act, you needed the PMF and all this, and you did it quite properly, and there was no need to tell anyone about it. So I think it is relevant background and it ought to be dealt with.

MR VENKATESAN: Yes. That I don't dispute, sir, but it's not a key issue for disclosure.

THE CHAIR: Well, I think it is an issue. Whether it requires further disclosure, again, is a separate conversation; whether it can be adequately dealt with by Mr Crumlin, whether you need -- that's for another day, but I think it ought to go in the list of issues unless you have anything?

MR VENKATESAN: Well, the only point I'd make -- it's not a big point -- is insofar as

this is intended to encompass the impact of the PMF on user experience, it's covered anyway. So this only has utility as an independent issue if what it's going after is documents which are not about the impact of the PMF, but about the success of the PMF as a solution to the problem that it set out to solve. That doesn't go to any issue the Tribunal will need to decide. I'm not even sure it's --

THE CHAIR: Maybe it would be an issue.

MR SUTERWALLA: Thank you, sir. That takes us to 15. This is obviously an Apple issue. I think the only issue between us here is whether it's relevant or affected -- obviously we say affected.

THE CHAIR: Same point as before?

MR SUTERWALLA: I think it's even narrower than that, sir, in terms of just --

THE CHAIR: In terms of which phones?

MR SUTERWALLA: It's the same thing.

THE CHAIR: Yes. Are we arguing about anything here?

MR VENKATESAN: I don't want to take up any time arguing about it. Whatever the Tribunal prefers. It's just that we say you shouldn't have tendentious terminology in the list of issues, but I don't want to take up time arguing.

THE CHAIR: Right.

MR SUTERWALLA: There is one other issue, which is --

THE CHAIR: Sorry, one other issue on 15?

MR SUTERWALLA: On 15, yes, which is obviously that Apple have inserted the wording "during the relevant period". That's their red text. We submit that that's not appropriate because what this category --

THE CHAIR: Matters to the phones rather than the period; is that right?

MR SUTERWALLA: Yes. There may be knowledge that Apple acquired after the relevant period, but that's obviously still relevant in the proceedings to the matters to

be determined, and that would not fall within issue 3 as formulated if there were things kept during the relevant period.

MR VENKATESAN: But what Apple knew outside the relevant period can't be relevant to the alleged infringement, because the allegation of infringement is constrained --

THE CHAIR: It can throw light on the case.

MR VENKATESAN: But that's not a key issue for disclosure, sir. The test is: is this a key issue for disclosure? What Apple knew outside the relevant period, when there is no allegation of abuse or infringement, isn't a key issue for disclosure. It's a very short point.

MR SUTERWALLA: Sir, what we would say is: if there is evidence or material which postdates the relevant period that sheds light on what Apple --

THE CHAIR: We need some time limit on Apple's having to search ad infinitum. If it was 12 months after the relevant period, would that --

MR SUTERWALLA: May I just take instructions? (Pause)

Can we come back to this? I'll take proper instructions.

THE CHAIR: Right. You're not really saying "knowledge", you want documents relating to it. The issue is user responses or feedback regarding performance of affected iPhones.

MR SUTERWALLA: Yes.

THE CHAIR: So, it's not Apple's knowledge. If it's Apple's knowledge, I can see Apple's point that it ought to be limited to the relevant period. If you're saying: no, you want just evidence of user experience, user responses, then you want to lose what knowledge did Apple have? You just want -- the issue is -- user responses.

MR SUTERWALLA: Yes, I see that, sir. We'll circle back to it with some appropriate wording, but I take your point, sir. I think it should be reformulated in the fashion that you suggest, sir.

16. We do pursue sixteen. This is relevant, 16, sir, to the overall impact of the PMF, which is obviously an issue in dispute -- impacts on user experience -- and also may be relevant to the counterfactual as well. So we do pursue 16. This goes to the Class Representative's case on the consumer behaviour and the likelihood that consumers would have sought to obtain redress from Apple in the counterfactual. This is all information in the factual that would be useful evidence for the counterfactual. That's obviously a matter that's in issue for Trial 1, because Apple's position is somehow this is irrelevant to Trial 1 if you see on the right-hand side --

THE CHAIR: Sorry, there are two paragraphs here. It's the second paragraph. The first paragraph is just laying the groundwork for the second paragraph. iPhone -- I'm sorry. I beg your pardon. I misread it. "What was the number of affected iPhone upgrades?" From the date of their launch until discontinuation.

So that means when somebody -- it's the euphemism "upgrade" that gets me. That's when somebody buys another phone.

MR SUTERWALLA: Yes, exactly. Yes, precisely, sir.

THE CHAIR: What was the rate at which users upgraded their device? What's the difference between 1 and 2? Number of upgrades, and time to upgrade.

MR SUTERWALLA: Yes. Exactly.

THE CHAIR: Yes. You say that's evidence that people might be unhappy.

MR SUTERWALLA: Exactly, sir. It's evidence that people might be unhappy, which is relevant to, firstly, abuse in terms of negative impact on consumers, which is clearly an issue in dispute, and also goes to the counterfactual, as to what consumers may have done in the counterfactual.

THE CHAIR: Right.

Submissions by MR VENKATESAN

MR VENKATESAN: Three points, sir.

First, if it's relevant only to the counterfactual, then presumably they want this information because they want to use it for some expert-driven analysis. But it hasn't been explained what that analysis is.

THE CHAIR: Well, they want to put to you, when your expert comes along and says, "This wasn't such a big deal", and they go, "Right, what do you mean it wasn't such a big deal? Look at all these people. They're changing their phones twice as often, and that's what they want. That's why they want to have it".

MR VENKATESAN: Well, yes. I mean, it's peripheral, we would say. But we've already given data, and I should show you that. It's in Coulson 1; bundle A, tab 10, page 176. (Pause)

Page 181, paragraph 24.

THE CHAIR: Yes.

MR VENKATESAN: He says that the battery replacement programme was successful; communication was very effective. The company was able to take care of its customers.

Then:

"Data on the number of battery replacements in the UK in 2017 (before the program), 2018 (during the program) and 2019 (after the program) ... are attached in a confidential exhibit which they have."

THE CHAIR: All right. Well, it's still an issue. You say it's an issue that's been dealt with.

MR VENKATESAN: I say it's an issue that's been dealt with, and we also say we haven't got any further documents about upgrades.

THE CHAIR: That's for another day. Again, same point. It can be an issue without you necessarily having documents or -- we can come back, yes? Satisfactory?

MR VENKATESAN: Sorry, sir, I --

THE CHAIR: So this is an issue, but you've been told you probably have everything there is in AAC1. That one may need further sorting out between the two of you.

MR SUTERWALLA: (Inaudible)

THE CHAIR: Fine, fine. But that's for another day. I'm not determining that today, but it is an issue in the case.

MR SUTERWALLA: Yes. I'm grateful.

That takes us to 17, which is the same point, essentially.

MR VENKATESAN: I think it's just governed by the ruling you've just made.

THE CHAIR: Yes. Thank you.

MR SUTERWALLA: 18: we're happy to leave 18 on further reflection.

THE CHAIR: Right. 19?

MR SUTERWALLA: One moment.

MR VENKATESAN: Actually, 19 and 20 raised the same points, so my learned friend may want to take them together.

MR SUTERWALLA: Yes. On further reflection, we think issue 5, Apple issue 5 is potentially capable of covering this, and I'll just explain what I mean by --

THE CHAIR: Before you get to that, I thought your position was that Apple didn't tell people about this. Why do you want evidence that they did, in fact?

MR SUTERWALLA: Well, we're not seeking evidence that they did in fact tell people. What we are seeking to meet is Apple's case, which is that they acted transparently; they provided sufficient information, which is their case. That's how they pleaded their position. Therefore --

THE CHAIR: Well, there's no dispute as to the information they provided to the users unless I'm misunderstanding. Whether that's adequate or not is a debate to be had. But actually, what they said in their download notes is common ground, and you don't want them to have said anything more, because that's only going to undermine your

case.

MR SUTERWALLA: I suppose it depends what they said and to whom.

I see the point, sir. Issue 5 from Apple in any event is their suggestion for disclosure on this topic, so we're to that extent agreed; this is the relevant subject, subject to the points that we do wish to raise.

THE CHAIR: Okay. Let's have a look at 5, then.

MR SUTERWALLA: The first issue is: we don't understand why the period has been cut to December 2017. Obviously, the relevant period runs up until March 2018. So we would ask that it runs to March 2018.

THE CHAIR: Is there any objection to that?

MR VENKATESAN: Just to be clear, are we still on issue --

THE CHAIR: Your issue 5. We're on your issue 5, and why is it not March 2018.

MR VENKATESAN: Yes, that should be March 2018.

THE CHAIR: Very good.

MR SUTERWALLA: The next change that we see, sir, is we seek to remove "public" from "public communication strategy". It should be "Apple's communication strategy", because "public" is too limiting in terms of Apple's communications with mobile network operators or B2B.

THE CHAIR: They may be considered not public. Yes.

MR SUTERWALLA: Yes, exactly.

THE CHAIR: That seems a reasonable point.

MR VENKATESAN: Yes.

THE CHAIR: Good. Anything else?

MR SUTERWALLA: Yes, sir. Then in terms of communications referred to, we don't follow why it should be a closed list as put forward by Apple. We would suggest instead that it should read, "and why did Apple decide to make

communications" -- sorry.

Yes. "Why did Apple make the communications" in relation to the PMF in the form it did, and then remove the rest.

Sorry, delete (a) to (c), but we can leave in the wording, "including discussions and decision-making about such communications", et cetera.

THE CHAIR: So the Read Me notes are obviously the crucial ones (inaudible). Then the TechCrunch media statement. Are there any other communications that are relevant to the case?

MR SUTERWALLA: We don't know, sir. But from --

THE CHAIR: But if you're taking out -- right. If you're taking out -- yes, I see.

MR SUTERWALLA: Because we don't know about communications to operators or B2B or any other such communications. So that's why we seek to take out the closed list and --

THE CHAIR: So you're not asking for the communications? You're asking for documents evidencing the communication strategy and the reasons for it.

MR SUTERWALLA: Yes. I mean, that may in turn result in Apple giving disclosure of communication. The issue is: what was the strategy?

MR VENKATESAN: I confess I'm not following exactly what the difference is, because the first part of our issue 5 is what was Apple's communication strategy, so that covers anything responsive to that. What was Apple's communication strategy in relation to the PMF? So we've agreed to that already, and that's going to cover any document that's responsive to that.

THE CHAIR: Right.

MR VENKATESAN: We have identified these particular communications, because those are the only pleaded communications.

THE CHAIR: Right, but you may have made other communications.

MR VENKATESAN: Yes.

THE CHAIR: You're in a better position to know about them than the Class Representative.

MR VENKATESAN: But that would be covered by the first part anyway, so I'm not sure we want --

THE CHAIR: We can take (a) to (c) out?

MR VENKATESAN: We can. I'm just --

MR SUTERWALLA: I'm grateful, sir. That takes us to 24.

THE CHAIR: Okay. Right.

MR SUTERWALLA: Sorry. I skipped -- my mistake. Sorry, jumping ahead too fast. My apologies, sir.

THE CHAIR: You can't go back.

MR SUTERWALLA: 19 to 21 (inaudible).

THE CHAIR: Okay.

MR SUTERWALLA: We're on to 22, which is one that we pursue, and it's (inaudible) in any event. I think there's again some issue on the wording.

So, what was Apple's contemporaneous knowledge? Again, we seek to remove the word "contemporaneous", on the same basis as the other issue that we dealt with some moments ago asking you, sir, about the time period, and I said I'd come back to you.

THE CHAIR: Maybe we don't need to deal with time period today, but maybe that can come when it comes to searching.

MR SUTERWALLA: Yes.

THE CHAIR: We'll have to search for -- yes.

MR SUTERWALLA: We do seek the issue in the second sentence: "How widely was the apology disseminated and/or what was its reach? How did the reaction vary across

consumer segments?"

Again, this goes to our point as to impact, how successful the apology was in mitigating any impact, bringing the abuse to an end. That's all we say in dispute. The point that you recall, sir, was picked up explicitly by the Court of Appeal in its judgment; I can take you to it --

THE CHAIR: Just remind me.

MR SUTERWALLA: Yes.

THE CHAIR: Just tell me what it said.

MR SUTERWALLA: So the Court of Appeal rejected Apple's position on this in terms of the --

THE CHAIR: Need to go to it.

MR SUTERWALLA: -- the end point of -- yes. I'll take you to it.

It's in the authorities, which is bundle F. (Pause)

Sorry, it's actually in the main bundles, I believe in the supplementary bundle. Tab 21, which is page 662, and we pick it up at -- (Pause)

56, but if you have a look -- perhaps if you pick it up in paragraph 50 and read through to 56. You'll see, sir, particularly in 56, that Lord Justice Green.

THE CHAIR: Right. Dissemination (inaudible).

Going back to your class: how widely was the apology disseminated? (Pause)

Okay. Very good. What do we say about that?

MR VENKATESAN: It's a sub-point. We say it's already covered by our issue 5. We don't resist it in principle.

THE CHAIR: Fine. Let's have that expressly in -- I think it could go with your version 22 rather than issue 5.

MR SUTERWALLA: I'm grateful.

That then takes us all to 23. Now, 23, on further reflection and consideration over the

short adjournment --

THE CHAIR: It's the same point (inaudible).

MR SUTERWALLA: -- we think it can be encompassed in 7(c) of issue 7, which if you go forward, sir, is at 104 of the bundle.

THE CHAIR: 27(c)?

MR SUTERWALLA: Exactly.

If I can just have one moment, sir. I'm just checking.

Yes. Mr Moser reminded me, sir, and it's important that we make this clear: we expect -- and if there's an issue about it, then we should deal with it now -- we expect 27(c) to encompass battery replacement programme. 27(c), page 104.

MR VENKATESAN: If it helps, what my learned friend is calling 27 --

THE CHAIR: Let me just -- oh, yes. Go on.

MR VENKATESAN: It's actually Apple issue 7. You may have --

THE CHAIR: Are you saying it needs to be -- some concern over the wording, or are you happy?

MR MOSER: Is it easier if I say it? I'm sorry, but we don't have the time --

THE CHAIR: Yes, fine.

MR MOSER: When I said before the short adjournment that we want to be able to challenge Mr Crumlin on whether battery replacement works or not, on reflection, it's not the be-all and end-all, because I see Mr Coulson says that they would have considered batteries even if they didn't work. But on 7(c), we would rather that it were clear now, rather than argue about it later. But the issue, "Why did Apple not offer any other form of redress (including partial refunds)" includes both the forms of other redress that so far we've cited as possible examples. One is free batteries and the other one is partial refunds.

Perhaps "any and including" must be said -- well, that must include that already, in

which case I'm perfectly happy, as long as we realise that that --

THE CHAIR: You've made your position clear.

MR VENKATESAN: "Any" means any, so I think --

MR MOSER: I'm extremely happy.

THE CHAIR: All right.

MR MOSER: I apologise to my learned friend.

MR SUTERWALLA: That takes us, I believe, sir, to 24, which is Apple issue 4. I think the only potential point of dispute between myself and Mr Venkatesan is on the word "operation". I believe --

MR VENKATESAN: It's agreed, if it helps.

MR SUTERWALLA: I'm grateful.

That takes us to 25. We do pursue issue 25, sir, "Did Apple take any steps to conceal the reasons for, and the existence, operation and impact(s) of the PMF and if so, what steps were taken?"

Apple's issue 6 is a very narrow attempt at dealing with the issue, we say. Stepping back from this, sir, the Apple --

THE CHAIR: I can see that. What's wrong with that?

MR VENKATESAN: We say it's duplicative, because it's covered by 24; that is to say, Apple issue 4, and one doesn't want duplication in a list of issues.

Just to explain that: under 24, which we have consented to, there's going to be disclosure about why Apple did not provide more information. One has to ask: what is 25 adding to that? 25 is: did Apple take any steps to conceal the reasons for and existence, operation, et cetera. Obviously, we say we didn't, but if we did, then that's covered by 24.

THE CHAIR: Well, a little bit of duplication we can live with, so I think we'll keep that one in 25, if that's the only concern.

MR SUTERWALLA: Thank you, sir.

26 we can do away with.

THE CHAIR: Yes. 27 we've done.

MR SUTERWALLA: 27 we've done.

We do pursue 28 and 29, but it may be that the wording can be improved and the two issues amalgamated, and we can certainly do that. But in principle, we say it is relevant. These are relevant matters, namely how Apple communicated the introduction and existence of the battery replacement programme and what information did it --

THE CHAIR: Why so?

MR SUTERWALLA: Well, sir, again, it goes to the sufficiency of the redress.

THE CHAIR: Sorry, maybe I've got an incorrect memory. I thought that some users had their batteries replaced because they had faulty batteries.

MR SUTERWALLA: Well --

THE CHAIR: Is that what we're talking about?

MR SUTERWALLA: No. We're talking about the battery replacement programme that comes in light of the PMF.

THE CHAIR: Right. Does Mr Crumlin deal with this? Sorry, I've maybe --

MR SUTERWALLA: Yes. If we go back to -- we're in the core bundle. Same bundle, tab 16. It's dealt with very pithily towards the end of his statement. (Pause)

Sorry. It's Mr Coulson's statement we'll go to. Page 179. (Pause)

It's right at the end of the statement.

THE CHAIR: Yes. 179 is not the end of the statement.

MR SUTERWALLA: Sorry, 181. Apologies.

179, paragraph 11.

THE CHAIR: "On 29 December ..."

I see. Then did you want me to look at 21 as well?

MR SUTERWALLA: Yes. That's Mr Coulson's views as to the success of the battery replacement programme. He says from his perspective, it was hugely successful.

THE CHAIR: Yes.

MR SUTERWALLA: So, if we go back to the -- sorry. It's at page 104. Obviously, it's an issue as to how successful this programme was; and you've seen that there's evidence from Apple saying it's hugely successful. We don't accept that. We say that these issues go to the take-up of that programme; its success, the sufficiency of that programme as a form of redress.

THE CHAIR: How does this fit into your case?

MR SUTERWALLA: Well, this is useful evidence in the factual, we say, going to the counterfactual. That's the point, really.

THE CHAIR: What does Apple say about this?

MR VENKATESAN: Two points. The first: we say it doesn't go to any pleaded issue, because not only is it not alleged that the battery replacement programme was an abuse, they confirmed in their amended CPO reply, paragraph 24, that they don't allege that the failure to offer some other form of redress was an abuse either. So it's irrelevant to the abuse case.

What is now said, I think, is it's relevant to the counterfactual issue.

THE CHAIR: Yeah.

MR VENKATESAN: But, I mean, the first point is that's not pleaded either. If you look at the pleaded case on the counterfactual, which I know we're going to come on to when we talk about causation --

THE CHAIR: Yes. It would be helpful to look at the pleading now.

MR VENKATESAN: Yes. It's paragraph 111. (Pause)

In the claim form; bundle E, tab 5. (Pause)

Paragraph 111, page 376.

THE CHAIR: Yeah.

MR VENKATESAN: Here they plead that Apple failed to take adequate and timely action to remedy the harm caused to customers. The only reference you get to the battery replacement programme is in (b), and the allegation is it did not provide an effective and comprehensive resolution of the battery issues, but they haven't pleaded anything about how that bears upon what Apple would have done in the counterfactual. So it just doesn't go to any pleaded issue. That's our first point.

The second point is: even if you're against us on that, if it's somehow relevant to the pleaded issues, it's at the periphery of what the Tribunal will need to determine at Trial 1, at any rate, and it's not a key issue for disclosure. I mean, I've got various other points about causation and loss, but I'll park those for now.

THE CHAIR: Can we park this one for the moment? We're going to have a discussion about causation and loss.

MR SUTERWALLA: Sir, yes. Whilst you're in the pleading, can I just ask you to have a look at paragraph 65, page 361, if that helps. (Pause)

And 66, sir.

THE CHAIR: Again, can we just come back to this class in a moment?

Is there anything else, just to not forget it.

MR SUTERWALLA: From the list of issues for disclosure, I don't believe so.

Causation and loss

THE CHAIR: It may be that we need to move over to Mr Moser for this.

Mr Moser, as we alerted to you in our letter, just understanding what your case is and how loss is going to be -- obviously, we have an ongoing duty with regards to certification.

Submissions by MR MOSER

MR MOSER: Yes.

THE CHAIR: We need to understand how this claim is going to be valued, and -- perhaps can I just, with that introduction, get you to recap the position as to how loss is going to be measured in this case?

MR MOSER: Yes, absolutely; and it is, as my learned friend has identified, that part of the pleading we've just been looking at, which is paragraphs 109 to 116.

THE CHAIR: Right.

MR MOSER: Bundle E, page 375 and following.

I'll come to the individual paragraphs in a moment, but as I said earlier this morning when I took you to the spring judgment on what has been certified, as the Tribunal said, what goes to the heart of this case is the negative impact, and then the question of what would have happened if there had been transparency.

We have sought to cleave closely to what has been certified, as I also say; and the theory of harm in this case, again, it's not dissimilar to the points I made this morning. It can be relatively easily described, if I may.

From about the iPhone 6 version, Apple's iPhone suddenly experienced UPOs. To meet the problem, they introduced iOS 10.2.1. Simplest form, this managed the problem by throttling the speed of the iPhone when necessary. Users of affected iPhones experienced, we say, slower speeds and other problems. That's the negative impact, the negative experience. Many will have suffered in silence. Others will have done a number of things; tried to upgrade and so on. We just heard about that.

(Inaudible) did this happen, because Apple, we say, did not explain in its update what was going on, nor in due course in the apology. In the counterfactual, we say, Apple would have said, "This is to fix the UPOs. You don't have to download it. It will slow down your phone, but if you don't, UPOs will continue". Also, batteries discharging

more often, and ageing faster, we say.

We also said --

THE CHAIR: So the batteries were ageing faster? Or was it a problem with ageing batteries?

MR MOSER: It was both. As the batteries aged, they became more prone to UPOs, but -- and this is a matter of evidence in due course -- what we're going to say is one of the effects on the battery is that -- and we've had this, I think somewhere before, the evidence in the public domain that these batteries have about 500 charges.

THE CHAIR: Yes. Cycles.

MR MOSER: The cycles. Obviously, if you go through those cycles more quickly, then you get through the 500 more quickly.

THE CHAIR: You're going through the cycles more quickly, because the apps are consuming more power.

MR MOSER: Consuming, yes. Snapchat and other apps are consuming more power, and so you're going through --

THE CHAIR: It's not Apple's fault.

MR MOSER: Which is not Apple's fault. We're not saying that this is part of the abuse, but this is what was happening. That's what they didn't say to the consumers.

Now, one of the things that we say would have happened is that the solution would have been a new battery. There's got to be an argument between us as to whether that would have been the right solution. What we have just seen is that they ran a sort of battery replacement programme.

THE CHAIR: Sorry, I think you've got a step before that. You say there was a lack of transparency, and then there would be a hue and cry, you say.

MR MOSER: There would, and the hue and cry would have led to Apple doing something, and that would have been -- even if people tried to use their warranties,

but they'd already expired. As we've seen Mr Coulson say --

THE CHAIR: So it is not a warranty issue. So there's a hue and cry, and you say Apple would voluntarily have responded to that.

MR MOSER: Would voluntarily have responded.

THE CHAIR: They are under no obligation to respond?

MR MOSER: As in fact they did in the actual, in a limited way, with, for instance, the battery replacement programme, which we say was sufficiently hidden away and anyway inadequate, because it was (overspeaking).

THE CHAIR: In broad terms, how are you going to show that Apple would have responded? I'm guessing that Apple might say no, they wouldn't, because that's not what they did.

MR MOSER: What they in fact did, in relation to other issues -- we've got that in the evidence -- is that where there were faulty batteries, they replaced them for free.

THE CHAIR: Of course.

MR MOSER: What they also in fact did was for those who were sufficiently savvy to find the information after the apology, they in fact did, and in this country, give a reduced new battery for the price of -- I can't remember whether it was £29, or a reduction of £29. It's in Mr Coulson's statement.

THE CHAIR: You're going to leverage that later action and say, "Look, if you'd been transparent, you would've brought that forward and it would have been more widespread". That's going to be how you approach this aspect?

MR MOSER: We are, and Mr Coulson says quite openly - We're very responsive to this stuff. Even though their warranties had expired, we were willing to do this, and it was a fantastic success. In fact -- and we saw this in paragraph 65 to 67 of the claim form we just looked at -- we say it wasn't nearly good enough, because hardly anyone knew about it. Anyway, even the limited, not free but reduced battery replacement

couldn't have been carried out because --

THE CHAIR: Are you saying they'd have replaced everyone's battery, so they're transparent; they then send a message saying, "Look, there's a problem with phones, it's not our fault, due to updated apps, these hungry apps. We caution against using those apps if you're concerned about battery health, but if you choose to use them, one option is to install our PMF". But then you're saying: No, they'd have done something else as well, they'd have then said, "You can have a free battery or a reduced price battery". Who would have been offered that battery?

MR MOSER: Well, one of our alternatives is they would have had to do something because the PR damage would have been considerable, and people would have been in danger of wandering off to Samsung or wherever. One of the things they could have done is offered a free battery replacement for customers.

THE CHAIR: For everybody. So if I buy a phone on Tuesday, on Wednesday, I can claim a new battery?

MR MOSER: If they couldn't do that, or in your case, it makes no sense.

THE CHAIR: Makes no sense.

MR MOSER: They would have done what it took for this huge company to save its most important product. Of course, our other posited counterfactual is compensation of some sort, but they would have done something.

THE CHAIR: Let's just stick with the batteries at the moment.

MR MOSER: Yes.

THE CHAIR: Because as I understand, that's your primary case (inaudible).

MR MOSER: We've been using it, as we said this morning, as it's the easiest.

THE CHAIR: Right, so who would have been offered a new battery?

MR MOSER: All those --

THE CHAIR: I gave you a silly example, but that doesn't mean you don't get to answer

the question. You may not be able to answer it today, I accept that, but I think an important question is who would have been offered --

MR MOSER: Everybody who had the affected iPhone, and we see that again in Mr Coulson's statement.

THE CHAIR: You accept it would make no sense to offer it if the phones are a week old; it would be effectively an identical battery. So you'd only be offering it to certain members of the class.

MR MOSER: What Mr Coulson said in paragraph 11 of his statement was:

"The program was a goodwill gesture which was available to anyone who had one of the above models of iPhone. It was put in place so that our customers could be reassured that Apple stood behind our products and their longevity, whether or not a warranty still applied and whether or not they really needed a new battery."

That's what he says.

THE CHAIR: You're saying it would be everybody?

MR MOSER: And I say it would be everybody, except this wasn't adequate for the reasons we've pleaded, and it wasn't nearly as widespread or successful as Mr Coulson claims. And we'll get disclosure on that. And also, it wasn't free as it should have been, we say. He gives some reasons at paragraph 15 ‘we considered whether it should be free, but we said it might encourage theft’.

THE CHAIR: What was the charge for the battery?

MR MOSER: It was $29 reduced from $79. In the United Kingdom, the price was £25, reduced from £79.

THE CHAIR: No doubt cash neutral for --

MR MOSER: Anyway, at this price, each replacement has been carried out, he says, at a significant loss.

THE CHAIR: Okay, characterising this as cash neutral is therefore not right.

MR MOSER: Well, he might have to be challenged.

THE CHAIR: Okay. At the moment -- and it may be you say you're not in a position to answer these questions today, but there are some questions as to -- because we have to consider the proportionality of these proceedings: so who would be getting refunds? How many people would be getting the batteries?

MR MOSER: Sure.

THE CHAIR: Bearing in mind a lot of people are going to be unaffected by these issues. I'm sure members of the people in court probably don't have Snapchat on their phone, at least a portion of them. So let's assume --

MR MOSER: Apple's ...

THE CHAIR: I mean, if you take them as individual claims, who is entitled to claim against Apple?

MR MOSER: All our class members, because in the counterfactual we posit, Apple would have done whatever it could to avoid the reputational damage of widespread awareness of what was going on -- widespread fear that the iPhones were not functioning properly.

THE CHAIR: Let's say --

MR MOSER: And they would have done that by saying, "You can have a free battery", or if that were impossible, they would say, "Have a cash credit".

THE CHAIR: A class action, you can analyse it as individual claims.

MR MOSER: Yes.

THE CHAIR: So if Mr A buys his phone --

MR MOSER: Yes.

THE CHAIR: -- and is unaffected by the UPOs and is unaffected by the PMF because (inaudible) and he wrote to Apple and said, "I think I am entitled to compensation".

MR MOSER: He's not an individual claimant in our counterfactual; you would have

swathes of customers who were protesting, became aware of what was going on. Even the information being out there -- and really Mr Coulson is very revealing in that -- quite, quite open.

THE CHAIR: So is that the entire class, or is it a subset of the entire class?

MR MOSER: The entire class. Apple would have been super sensitive to this information being out there. That's why --

THE CHAIR: Sorry, we may be at cross purposes. I'm positing to you an example of a person who has a relatively new iPhone, doesn't use these apps, is unaffected by the UPOs, unaffected by the PMF, never engages. Analysed as an individual claim, what claim would that person have against Apple?

MR MOSER: Sir, that --

THE CHAIR: He'd have no claim.

MR MOSER: No, the point you're making to me is a sort of point Mr Ridyard was making to my learned friend, which is: you're not claiming for the actual harm. So this person has no negative effects.

THE CHAIR: Has not suffered the loss.

MR MOSER: Has not suffered the negative effects, but what are we claiming for? This is, as it were, the kicker: because Apple was not transparent, didn't offer any form of redress we say was adequate, and customers have lost the value of the monetary or non-monetary redress that they should have had -- absent the abuse.

That's why the theory of harm has two stages to it: you've got the negative effects on the phones; you've got the non-transparency. Had they been transparent, there would have been general knowledge of what was going on of these negative effects; would have had the extremely detrimental PR effect that we say they were deliberately avoiding by means of the non-transparency, by means of the way that they communicated, (inaudible) the apology, so that only a relatively small number of

people could work out what was going on, if at all.

In the counterfactual where this became known, and it became notorious, Apple would have acted to save its product and its reputation. It would have been a version of what it did in the actual, only more so, because now the transparency means it was all out there. We say, if sufficient redress by way of, for example, compensation or a free battery replacement, and the categories are not necessarily closed --

THE CHAIR: I think it's been very helpful, thank you very much. I think you understand aspects of our concern.

MR MOSER: I do.

THE CHAIR: There are two things: first of all, how are you going to show that Apple would have engaged in this voluntary activity? At the moment, that will of course be a matter for evidence, but in broad terms, and you would seek to draw comparisons with what they did for their limited replacement programme.

MR MOSER: Yes, and what they did in the States, we would leverage their actual.

THE CHAIR: Also there was a charge for that.

MR MOSER: Yes.

THE CHAIR: So that's an aspect, as I understand, of how you're going to --

MR MOSER: That was in the actual with the abuse present. I'd say if we take the abuse away, there would be no charge. If they couldn't replace all the batteries, there would have been some other compensation.

THE CHAIR: So that's one subject we're interested in. Next subject is: when analysed individually, is this truly a class of that breadth? Because you'll have, within that class, people who are completely unaffected by what's going on. So, you've answered that, I'm just saying this, as it's the area that concerns it:

The person who bought the phone yesterday, the person who doesn't use their phone very heavily, or doesn't have these power-hungry apps, the person who doesn't use

games on their phone. You've got those people who are unaffected by the PMF and are unaffected by the UPOs, whether or not they actually have individual -- I'm asking you to respond to this; this is the areas of concern -- whether they have a claim, and query: is it right to say the whole class has a claim, or is it a subset, and if it is a subset, how do we define that subset and what are the total damages?

Then the third question, which I've not raised yet with you: what is the legal basis for the claim to loss where you say Apple would have done something voluntarily? So there's no obligation on Apple to do anything. Now, companies can of course give away money. It's legal, but it doesn't mean whether that can form the basis that you would have done something voluntarily that you don't have to do, whether that can form a basis of a claim. Now, it may be that it can, but we require addressing on authorities on that.

MR MOSER: I understand. I'm going to try and answer the second.

THE CHAIR: No, I don't want you to answer anything today, Mr Moser.

MR MOSER: Okay.

THE CHAIR: What we want to do is we want to see something in writing on this, the matters that you've been covering today, and we want to hear further argument on it at the next CMC, which is likely to be in January.

MR MOSER: Right.

THE CHAIR: Of course, you are taking these points very eloquently, and your answers may well be accurate, but it's unfair to expect you to do it all today. We do want to see something in writing in order to give Apple a chance to make observations on it.

MR MOSER: Yes.

THE CHAIR: I think you've got the transcript; you've got the gist of the three points, and you very helpfully provided a further letter from your economist on this, but the problem isn't really doing the maths; it's the step before that, I think. How one properly

formulates the class, and whether there's a legal basis for claiming a loss where the payment will be voluntary.

MR MOSER: On the third question -- I know you don't want me to answer it now, but I'm sort of itching just to say --

THE CHAIR: Oh, go on, by all means, short answer.

MR MOSER: The legal basis is because it's the abuse; that the voluntary or otherwise reaction is a question of causation.

THE CHAIR: Well, I see that, but is there anything in the authorities that can assist?

MR MOSER: The overarching point on this is the Court of Appeal statement agreeing with this Tribunal. The detail of causation may only emerge after disclosure.

THE CHAIR: Indeed, but things are moving on in this case.

You were itching to say something.

MR VENKATESAN: Oh no, it was simply to say, sir, that may be a convenient segue. Of course, I wasn't intending to interrupt my friend.

The third aspect of my pleading application, which we had parked in the morning. It goes to this point. Is this a convenient moment for me to --

THE CHAIR: Well, it sort of goes to, but it's not quite the same point.

MR VENKATESAN: In the same area, if I can put it that way.

THE CHAIR: Yes, but isn't that better dealt with in January when we come back and argue all this? I think this needs to be in a pleading or it needs to be in a document, exactly what the ...

MR VENKATESAN: It does. May I have a moment to take instructions on that? The only reason I raise it, is that that aspect of our application, if it did succeed, would require re-pleading, and I don't know if the Tribunal would then be assisted by that pleading to take place before --

THE CHAIR: I think we'd like to start with this, because this is fundamental to whether

this case should be certified.

MR VENKATESAN: Yes, indeed.

THE CHAIR: I think we need to start with that, and then once we know what the position is and we're persuaded, which we may well be, then we just need to then work backwards to any adjustments that need to be made to the pleadings.

MR VENKATESAN: So then we could just adjourn that aspect of the application --

THE CHAIR: Yes, yes.

MR VENKATESAN: Yes, we're content with that, sir.

MR MOSER: Indeed. I mean, in the best of all possible worlds, our explanation which goes to certification not pleading will satisfy, in which case it may be that it will be pleaded in a way that reflects it --

THE CHAIR: Yes, of course.

MR MOSER: And then that's also dealing with that, but we'll see about that.

THE CHAIR: But we do need to see it formally written down in addition to any --

MR MOSER: Sure.

THE CHAIR: And then we need to go back to one category of disclosure, which I said let's not forget.

MR MOSER: Oh yes.

THE CHAIR: Which I've now forgotten -- which I think was somewhat dependent on this. This is the battery issue, isn't it? Which was the aspect of disclosure ...

Was it 29? Which was the one we left?

MR MOSER: One instance where one might have needed live notes, if ever.

THE CHAIR: Well, with nobody concentrating ever. You're all daydreaming about what you're doing this evening. I can't imagine why. It's such a riveting topic.

MR VENKATESAN: 28 or 29.

MR SUTERWALLA: Sir, was it the time period?

THE CHAIR: No, no, no, there was one -- there was that, but there was one I said we parked.

MR VENKATESAN: 28 to 29.

THE CHAIR: Yes, it was 28/29. So you hadn't made a decision on 28/29. I think, given the way Mr Moser is putting his case, 28 and 29 are issues.

MR MOSER: Well, I'd certainly say so, yes.

THE CHAIR: Because he's going to be saying that's relevant to the counterfactual.

MR VENKATESAN: Yes, I mean, our position at the moment is none of that's pleaded. I mean, it may be that one could adjourn those two issues to the next hearing when you're going to deal with it.

THE CHAIR: Well, it depends how far -- I think we're going to include it at the moment. If we adjourn it to January, then all the disclosure is going to get out of sync, isn't it? I'll have it in at the moment because you've got to do disclosure statements, and then we can revisit it, obviously depending on what we do in January.

MR VENKATESAN: I understand, I understand.

MR MOSER: It's pleaded at 111(b), my learned friend said he didn't understand it was relevant. I hope it's now understood. I'm grateful.

THE CHAIR: Right. Someone wants to say something on costs?

MR MOSER: Well, we've got a few bits and bobs. There's the list --

THE CHAIR: List of issues for trial.

MR MOSER: List of issues for trial, of course. I don't know what you're planning to do on those, given the time.

THE CHAIR: Yes, I think we'll probably not tackle it today. I think if you can --

MR SUTERWALLA: What we could do, sir, is we could look at it again in the light of your decision on this, as you say, that they track each other.

THE CHAIR: You did say they track each other.

MR SUTERWALLA: I think that's accepted on the other side. We can --

THE CHAIR: Obviously, at the moment, issues for trial need to be broadly stated. They could be refined as we get to trial, which is a very long way away, and then it would be partly dependent on what happens in January as well. We can start narrowing that.

MR SUTERWALLA: Yes, we can narrow and open up correspondence.

MR VENKATESAN: We are content with that, sir.

Distribution

MR MOSER: There is then under the sort of general issues in paragraph 4 of the agenda, distribution. There's a rare outbreak of agreement, at least between the parties. A letter sent yesterday afternoon agreed to our proposal on how to discuss distribution between the parties, provided we give them some extra time to provide the information we seek. I think this is probably a letter that hasn't made its way into the bundle. It is addressed to the Competition Appeal Tribunal, a letter on 6 October. They say they're prepared to agree to the CR's proposal in section (d) of the draft order.

THE CHAIR: Well, distribution should be part of the discussion in January. Sorry, I failed to mention that. Once we've decided the size of the class, how you're going to go about distributing is something --

MR MOSER: Absolutely, but they're being more helpful. I don't want to lose that agreement. They're going to provide us with the information we seek as long as we give them until 6 November 2026.

THE CHAIR: Sorry, where are you reading?

MR MOSER: I'm reading from the letter of yesterday. Yes. Have you a reference for it?

Should be in the G bundle.

Have you got a copy of the correspondence --

THE CHAIR: I'm sorry.

MR MOSER: It's the one that's in blue, black and green.

THE CHAIR: Yeah.

MR MOSER: What page is this?

THE CHAIR: It's not in the draft order?

MR MOSER: It's not in the bundle list.

THE CHAIR: Yes, sorry, I'm with you. I do have it. I do have it. (Pause)

Which paragraph are we looking at?

MR MOSER: It's paragraph --

MR SUTERWALLA: This should be 14.

MR MOSER: 14 and 14/15. There's some dates in November. I think my learned friend is about to say --

THE CHAIR: That seems very sensible, that should go ahead.

MR MOSER: I think he's about to say, if we're coming back in January, can you have a bit more time?

THE CHAIR: You can have a bit more time; do you want to the end of the month?

MR VENKATESAN: Yes, sir. Early December, I'm told. In paragraph 15.

MR MOSER: 15. Well, that depends on when they want our response, because it won't be on Christmas day.

MR VENKATESAN: No.

THE CHAIR: And you're still okay to do 14 October?

MR MOSER: By my draft, yes. 14 October, yes, set out in writing. Can we ask for 23 October then?

THE CHAIR: Right, and then you have --

MR VENKATESAN: I'm told we can do 20 November.

THE CHAIR: I'm going to give you a month to do this, all right? If you need more time, you're going to have --

MR VENKATESAN: Yes.

MR MOSER: So if we do 23 October, they have a month, and then we come back I suppose early in January.

THE CHAIR: You need to make sure you've done it in time for the hearing in January.

MR MOSER: Yes.

THE CHAIR: It's early January.

MR MOSER: Yes. Early January. We'll find a date. So that's distribution, sorry, that's not quite as smoothly agreed as I advertised.

Then my learned friend's clients have raised the question of class size in a letter dated 1 October. It's not really for today, but I see that they've put it a single word "class" in the agenda. It's referred to in their skeleton. We have written back saying, "Well, we've spotted at least one error in what you say", and we're not in a position to respond substantively until they explain to us how they've calculated this.

In short, what they're saying is, "We've looked at the class and we think it's smaller than you say it is". And they say, "If it's as small as we think it is, there's a mid point where this case may only be worth £200 million".

THE CHAIR: Yes, yes, that's the issue that's not being dealt with today, so we're going to look at that again in January.

MR MOSER: Very well. So that, I think, leaves whatever my learned friend's point is on cost issues.

Costs

THE CHAIR: A lot of these other things we're not going to deal with today.

MR VENKATESAN: Yes. I was going to suggest, sir, just to cut through this, the costs of the re-pleading application can simply be adjourned to January, since we haven't dealt with the third aspect.

THE CHAIR: The costs of the --

MR VENKATESAN: Yes, because we would be seeking our costs on the basis that what you've heard today has succeeded. But I'm happy to park that for now, because the third aspect of the application has been held over to January. So we could just leave the costs issue.

THE CHAIR: What are the costs of your amended defence?

MR VENKATESAN: The cost of making the application and succeeding, and then the costs of any re-pleading exercise that is consequential.

THE CHAIR: The re-pleading application?

MR VENKATESAN: Yes. The re-pleading application dated 9 September, which was heard this morning.

THE CHAIR: Yes. Okay. It was really initiated by the Tribunal.

MR VENKATESAN: Well, we wrote a letter to them on 21 May saying, "There are problems with your case which you need to correct".

THE CHAIR: (inaudible the Court of Appeal judgment.

MR VENKATESAN: Yes.

THE CHAIR: We referred to it, and the Court of Appeal said it needs to be re-pleaded.

MR VENKATESAN: Yes. But anyway, that's all -- content to leave it for --

THE CHAIR: (Overspeaking)

MR VENKATESAN: Yes. So if you have the composite draft order, page 1.

THE CHAIR: Yes.

MR VENKATESAN: Paragraph 1 concerns the disposition of the re-pleading application, which we will tweak in the light of your ruling this morning, and we will

make provision that the third aspect of it is adjourned to the January hearing.
Paragraph 7 and 8, which concern costs, will also be adjourned to January.
THE CHAIR: Yes.
MR VENKATESAN: Paragraph 9, there is a small dispute about that. We say that in the usual way, the parties should simply file an updated LOID and LOIT, reflecting the directions that you have given, but that it shouldn't be annexed to the order, as the Class Representative is proposing. It's a small point.
THE CHAIR: I agree. Probably better not to.
MR VENKATESAN: I'm grateful.
Then we've addressed distribution. That's 14 to 16. Anything in black is agreed. 14 to 16.
THE CHAIR: Reports. Yes.
MR SUTERWALLA: Sorry to interrupt my learned friend. Could I just check: on paragraph 10, I don't think that works, does it, if we're not filing the updated --
THE CHAIR: All those dates (inaudible).
MR SUTERWALLA: All the dates (inaudible). We would anticipate that the updated disclosure report needs to be after the updated list of issues.
THE CHAIR: I leave you to try and --
MR VENKATESAN: I'm sure we can work that out. (Pause)
14 to 16 we have addressed. 17, there's a drafting infelicity which I won't trouble you with. We can address that.
THE CHAIR: Right. What are we going to do about expert evidence? We're going to deal with that in January?
MR VENKATESAN: Well, in the light of the indication you've given, it may be that it should be addressed after the January hearing, in the light of whatever judgment you give.

THE CHAIR: Yes.

MR VENKATESAN: The same probably goes for 20 onwards, which is an application by the Class Representative for costs budgeting. But that doesn't arise now, we would suggest, until after the January hearing. That should all come out.

MR MOSER: I do want to say something about that, because it's not on the agenda for decision today, but we've put it on the agenda because we're looking a little way ahead, and we anticipate whatever it is Apple is going to say next.

Apple has said, "Oh, well, we may spend £30 million", and they've also said, "You know now that we may spend £30 million pounds, and so your ATE cover of £15 million isn't enough", presumably teeing up some application at some point for decertification because we haven't got enough ATE.

We wish to be able to interrogate Apple's costs, and we've asked for detail of their budget along the lines of precedent H. It doesn't have to be a precedent, but that sort of granularity. So far, we've got precedent Z, which is the summary version of precedent H.

We --

THE CHAIR: Yes, I agree with you. What's wrong with doing this?

MR VENKATESAN: Our position has been that if any update is required for that purpose, it can be provided in correspondence, but you don't need cost budgeting, which would be very unusual for a collective action of this type.

THE CHAIR: I'm not sure it's unusual.

MR VENKATESAN: Well, can I put it this way? Even in the High Court for individual claims, if it's --

THE CHAIR: We're not in the High Court.

MR VENKATESAN: No, but --

THE CHAIR: But we are doing more on cost budgeting and --

MR VENKATESAN: Well, in which event we would suggest they should apply for that, we would resist it. But it's all premature, because if we're going to have that hearing in January to deal with some quite fundamental points, if they did wish to make the application, they could make it then and the Tribunal can give direction.

THE CHAIR: (Overspeaking) be quite busy. I think that these steps will be extremely useful, and will be useful when considering proportionality in January as well.

MR VENKATESAN: May I have a moment, sir, just on that?

We are content with that, subject only to this submission: it should be bilateral, then. Both sides should be providing costs budgets, which the drafting -- yes, which is what it provides.

MR MOSER: Yes. It's agreed.

THE CHAIR: Is that everything that we need to do?

MR MOSER: I think so. Can I just check, because I may have misheard; did I hear my learned friend say, and did the Tribunal agree or not agree, that experts should be dealt with after January? Because we think they should certainly not be dealt with any later than January? It won't take long.

THE CHAIR: Right. We'll deal with it in January.

MR MOSER: I'm grateful.

THE CHAIR: Anything else?

Subject to the other costs, there's costs in the case.

MR VENKATESAN: Sorry, sir. May I just raise one point? In the draft order, at paragraph 34 and following, there are some indicative directions to trial and --

THE CHAIR: I'm not going to make those today.

MR VENKATESAN: No, that is our submission.

THE CHAIR: Helpful to see the way the wind is blowing. Right.

(3.29 pm)

(The hearing adjourned)

Key to punctuation used in transcript

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