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4 record.

5 **IN THE COMPETITION**

Case No: 1468/7/7/22

6 **APPEAL**

7 **TRIBUNAL**

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

12 Wednesday 28th June 2023

13
14 Before:

15 Justin Turner KC
16 (Chair)

17
18 (Sitting as a Tribunal in England and Wales)

19
20 BETWEEN:

21
22
23
24 **Mr Justin Gutmann**

25 **Applicant/Proposed Class Representative**

26
27 V

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29
30 **Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited**

31
32 _____ **Respondents/Proposed Defendants**

33
34
35 **A P P E A R A N C E S**

36 Anneli Howard KC & Will Perry (Instructed by Charles Lyndon Limited)
37 On Behalf of Justin Gutmann

38
39
40 Daniel Piccinin KC & Lucinda Cunningham (Instructed by Covington & Burling LLP)
41 On behalf of Apple

42
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47
48 **Wednesday 28 June 2023**

49 (10.32 am)

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THE CHAIR: I just wanted to seek some clarity from Mr Piccinin to start with, if that is all right, before I hear you. Really, the clarity I require is what has been offered. It may be my mistake, but I thought there was a slight discrepancy between the witness statement of Ms McLaughlin and what was in your skeleton. Not that that is a problem in itself, but I just wanted to clarify where we are. I wonder if we could just start with A.4. The DGCCRF and the AGCM documents.

MR PICCININ: You mean the requests?

THE CHAIR: Yes.

MR PICCININ: I wanted to ask have you seen the copy of the letter from us this morning.

THE CHAIR: I received the correspondence this morning, yes I have, yes. This is to identify, so I am clear, what it is you are offering and which document I should be working off as the latest version? Is that the one attached to your skeleton.

MR PICCININ: Yes. I think the skeleton is the most updated position, supplemented by the letter this morning.

THE CHAIR: So the letter this morning, yes. It's just one letter, 28th June.

MR PICCININ: That's right.

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THE CHAIR: Point to me -- I have a couple of tables
attached to -- I've got a table which was attached
originally to your skeleton.

MR PICCININ: I don't think so --

THE CHAIR: Then we have a table attached to Ms
McLaughlin's second witness statement. What should
I be working off, just so I understand your
position.

MS HOWARD: I don't think there is any consistency
between that --

THE CHAIR: Nevertheless, tell me which one I should
be working off.

MS HOWARD: Our skeleton is the most up to date combined
with the letter from this morning.

THE CHAIR: Point to me the relevant paragraph in your
skeleton.

MR PICCININ: A.3.

THE CHAIR: Yes.

MR PICCININ: In the bundle it is page 133.15, internal
page 14, subparagraph (3).

THE CHAIR: It was not A.3 then? It was A.4, right.

MR PICCININ: A.4?

THE CHAIR: Yes. You say Apple's proposal is set out
in paragraph 34(2)?

MR PICCININ: Yes.

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THE CHAIR: It has not got a precise class of documents.

MR PICCININ: That's right. We tried to help the Tribunal, rather than just doing a purely line-by-line response to what has been suggested, trying to think what is the best way with providing the information you are really --

THE CHAIR: That's not the point. I am just trying to establish what it is you would like the order to say if I was to order paragraph 34(2).

MR PICCININ: Yes, that is the review of the documents that were submitted by Apple to those regulators that are contemporaneous English-language documents and we put our responses to the PCR's requests, as far as they related to the implementation --

THE CHAIR: You are just reading the paragraph to me, Mr Piccinin. I am trying to identify the class. That's all. You tell me what the class is.

MR PICCININ: The class of contemporaneous English language documents that were provided to those regulators that relate to the implementation and effect of the PMF as implemented in iOS 10.2.1. and 11.2.

THE CHAIR: Any documents, in respect to whether it is

1 a shopping list? Give me an issue that it goes to.

2
3 MR PICCININ: Relating to the implementation and the
4
5 effect of the PMF.

6
7 THE CHAIR: The implementation and effect. That is
8
9 the order.

10
11 MR PICCININ: That's right.

12
13 THE CHAIR: All right.

14
15 MR PICCININ: I think the dispute, sir, is as to whether
16
17 it should be limited to English language documents, that
18
19 is one dispute. The other dispute is whether it
20
21 should be limited to contemporaneous documents, by
22
23 which we mean documents which were produced in the
24
25 ordinary course of business rather than documents
26
27 that were produced for regulators, as in documents
28
29 that were drafted.

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31 THE CHAIR: So "contemporaneous" may be the wrong
32
33 term.

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35 MR PICCININ: We will define what we mean by that.

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37 THE CHAIR: Right. Okay. So that's the class. They
38
39 related to the implementation and effects of the
40
41 PMF?

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43 MR PICCININ: That's right.

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45 THE CHAIR: Is there an issue as to whether it is iOS
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47 10.2.1 and 11.2.

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50 MR PICCININ: I don't think so.
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MS HOWARD: Only in so far as -- I will come to my submission explaining the rationale for why we say this isn't enough. We don't want a snapshot of the time as at implementation of the PMF in 10.2.1, which was January 2017 and 11.2 in December 2017. Because obviously at that point the iPhone 7 was relatively new. It only launched in September 2017. So we need a longer period to show as the phones' age, the batteries degraded.

THE CHAIR: As I understand it, there's not a time limit at all?

MR PICCININ: That's right. The reason we refer to that is we are trying to distinguish what we mean by PMF, as in it is this PMF, it's not the other features that he has listed in other devices.

THE CHAIR: By "contemporaneous" you are excluding submissions to the regulator.

MR PICCININ: Exactly, the oral responses to questions.

THE CHAIR: I understand. On A.1, it's the same answers then. Remind me of your position on that.

MR PICCININ: Our position on that is in paragraph 34(3) of the skeleton.

THE CHAIR: In terms of the class, again, starting with the class. It's the same implementation and effect of the PMF.

MR PICCININ: That's right. What we said there, is documents

1 that are responsive to request A.1, implementation
2
3 of the PMF.

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5 THE CHAIR: It is just that slightly different language
6
7 is being used in all these different classes,
8
9 that's what is confusing me.

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11 MR PICCININ: If you look at the first sentence.

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13 THE CHAIR: Of?

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15 MR PICCININ: Paragraph 34.

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17 THE CHAIR: Yes.

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19 MR PICCININ: It says -- it's a different approach
20
21 because we are dealing with different documents
22
23 there. What we said we are going to do, we were
24
25 going to confer --

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27 THE CHAIR: I am not on that point yet. I am trying
28
29 to identify the class.

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31 MR PICCININ: Technical reports.

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33 THE CHAIR: Technical reports.

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35 MR PICCININ: Or other key summaries that relates to the PMF as
36
37 implemented in iOS 10.2.1 and 11.2. That's the
38
39 difference. We are limiting it to technical
40
41 reports and other key summaries. That is
42
43 clarified in today's correspondence, that will
44
45 include slide decks.

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47 THE CHAIR: Yes, I saw that, yes.

48
49 MR PICCININ: The dispute here is just about the question
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1 of whether Covington, the UK solicitors, ought to
2
3 be involved in identifying and reviewing those
4
5 documents before they are disclosed.
6

7 THE CHAIR: We will come to that. I'm just trying to
8
9 identify the classes.

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11 MR PICCININ: Yes.

12
13 THE CHAIR: Then there is the A.2.

14
15 MR PICCININ: No dispute.

16
17 THE CHAIR: And there is no dispute and I am not
18
19 allowed to say what it is for a reason I don't
20
21 understand, but I will take that on trust.

22
23 MR PICCININ: Yes.

24
25 THE CHAIR: Then there is a dispute on A.3.

26
27 MR PICCININ: That's right.

28
29 THE CHAIR: Then we have B and C. Thank you very
30
31 much, Mr Piccinin. I just needed that clarity.

32
33 Ms Howard, and obviously I am familiar with the
34
35 background to the case so if we could focus on the
36
37 classes and why you need them.

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39 MS HOWARD: First of all, I was just going to give you
40
41 updates to the bundles because we have prepared a
42
43 draft order. I apologise it's late. Things have
44
45 been moving. We have prepared it to reflect the
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47 latest position. This is not agreed so I have
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49 shared a copy with opposing counsel.
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THE CHAIR: This is your draft order.

MS HOWARD: That's right, yes. I think you've got the copy of the latest letter from Apple this morning, and I will try to reflect those positions in my submissions to your Lordship, I am going to try to show the areas of agreement and disagreement between the parties because there has been some cooperation, even since Apple's letter went in. So I am trying to show the latest position. Then the other update is the CMA letter. I don't know whether you have had a chance to see that and the attachments to that. I've got copies of that if you want it. They are on notice. As I say, we haven't shared the disclosure application with them because of the confidentiality restrictions, we were wary of doing that.

How I had intended to address your Lordship this morning was really just to -- if I may, give some preliminary remarks to explain the background of why there are these differences between the parties. You may already have grasped the key points, so please stop me. I thought it was useful to show where the parties are coming up with slightly different perspectives.

THE CHAIR: This was initiated by the tribunal, wasn't it.

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MS HOWARD: I know Apple is frustrated with us, because they say when we put in the schedule, we changed our position, but it really is indicative of the difficulties with the proposed class representatives' experiences because there is no direct --

THE CHAIR: I'm not sure how relevant the journey to get to this point is --

MS HOWARD: We are trying to assist to identify these classes of documents. It is very difficult to find them. We know there is a needle in a haystack, but we cannot frame them, what specific type of needle it is, without seeing the documents.

THE CHAIR: But this is preliminary disclosure. This is not looking for a needle in a haystack.

MS HOWARD: We are well aware of that, and we are trying to identify classes of documents that will assist, but also to keep costs of this exercise proportionate because we are well aware it should not be a standard disclosure process, but we are trying to identify packs of documents which Apple has already prepared. It's already done the searches. It has already reviewed and classified them, and done all the redactions for confidentiality. They have been submitted to regulators and courts around the world. Therefore,

1 there should be minimal cost in reproducing or just
2
3 giving us an access code, is the plan. We are not
4
5 trying to enlarge the scope of this disclosure. We
6
7 are trying to focus on the classes that we think
8
9 will help you and give us, in your words, the
10
11 documents that will inform the PCR of matters that it
12
13 does not have information on at the moment.

14
15 In terms of key themes, the key themes are from
16
17 the hearing we had on 2 May, there are two elements,
18
19 two relevant matters we want disclosure on. The
20
21 first is how the hidden PMF adversely affected the
22
23 performance of the phones. This has been referred
24
25 to by the parties as "substandard performance". What
26
27 is happening is the parties coming at this with
28
29 slightly different definitions of "substandard performance"
30
31 I'm sure my learned friend will correct me if I am
32
33 wrong, but Apple's perspective appears to be one of
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35 a defective product, a product liability
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37 interpretation, whereas the PCR's interpretation is
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39 this is a product that was marketed as a premium
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41 product to consumers. The advertisements and the
42
43 representations at the time gave them expectations
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45 of a premium product for which they paid a premium
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47 price, and the impact to the PMF in slowing down the
48
49 phones reduced its performance and functionality, so
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51

1 they did not have the characteristics of a premium
2
3 product any longer. That's what we mean by
4
5 "substandard performance". It is a slightly
6
7 different definition I think to the approach --
8

9 THE CHAIR: Does that arise on any of the offers that
10
11 have been made.
12

13 MS HOWARD: It's a current theme throughout all of the
14
15 offers that have been made because we need to make
16
17 sure that in terms of the disclosure that is given
18
19 and in particular the witness statement which they
20
21 have offered, which we think is a very constructive
22
23 proposal, that is going to be useful and it is going
24
25 to address the core issues.
26

27 THE CHAIR: The implementation and the effect of PMF.
28
29 There are no qualifications that need to be read
30
31 into that as to -- it is the implementation and
32
33 effect that has been suggested.
34

35 MS HOWARD: Yes. We are not talking about substandard as
36
37 a defective product.
38

39 THE CHAIR: But the sense of the word "substandard" is
40
41 not qualified in the class, as I understand it, so
42
43 we don't need to worry about how you interpret
44
45 "substandard".
46

47 MS HOWARD: We need do think for utility of, particularly
48
49 the witness statement, it's important to lay the
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51

1 ground rules so we know what we are expecting, that
2
3 we need in order to prove our case.
4

5 THE CHAIR: Okay.
6

7 MS HOWARD: So that's the first. Apple has engaged and
8
9 has been helpful in making constructive proposals.

10
11 The second element is what we have referred to as
12
13 "user detriment", showing the impact on users and
14
15 how they have been materially prejudiced by the lack
16
17 of transparency and the introduction of the PMF.
18

19 That may not be just a matter of the phones were
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21 defective and they timed out or
22
23 shut down. It may go wider because of the lack of
24
25 transparency meant they could not make an informed
26
27 decision about upgrading or getting a new battery or
28
29 they did not exercise their legal rights. It is a
30
31 slightly broader concept than just what the impact
32
33 of the PMF was on our pleaded case.
34

35 So we are talking about consumer harm in a
36
37 broad basis of what was the detriment users
38
39 suffered, which of course is an important element of
40
41 the claim for breach of statutory duty to show
42
43 harm.
44

45 The second key point is the timing period, and
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47 your Lordship may have this. We don't want the
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49 disclosure confined to the snapshot period of when
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51

1 the PMF was designed but it's going to be a later
2
3 period.
4

5 Then the third aspect is the scope of the
6
7 disclosure requests made, and maybe now is the best
8
9 point to move to each of the requests.
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11 THE CHAIR: Yes. Should we do them -- let's do -- if

12
13 I hear your submissions on the A ones, then I
14
15 will hear Mr Piccinin.
16

17 MS HOWARD: So what we were trying to do in the
18
19 request for the US production, we never intended to
20
21 have disclosure of the 300,000 documents. That was not
22
23 the aim. Apple criticises and chastises us for
24
25 trying to seek all of the copies of the documents that
26
27 were disclosed in the US. That's not the case. We
28
29 had hoped that along the lines of the Tribunal's
30
31 approach in SCN, there would be a way to apply
32
33 electronic filters and AI over this body of
34
35 documents to extract those documents that were
36
37 relevant to substandard performance and consumer
38
39 detriment. Last week on 20 June, Apple has now
40
41 confirmed that electronic searching and filtering is
42
43 not possible, and the only way they can do this is
44
45 for their US lawyers to locate documents and build a
46
47 sufficient set. There has been further movement on that
48
49
50 this morning and clarifications. We are happy to
51

1 accept the proposal this morning, that Apple has now
2
3 agreed to slide decks, they have also agreed that it
4
5 should cover substandard performance and consumer
6
7 detriment and --

8
9 THE CHAIR: Slow down. So the class we are discussing
10
11 is in your table; is that right?

12
13 MS HOWARD: That's right.

14
15 THE CHAIR: You are saying it's documents relating to
16
17 the impact of the PMF or CPU/GPU performance or
18
19 other metrics of performance and user experience of
20
21 the affected iPhones? Is that the class? All
22
23 agreed that's the class.

24
25 MS HOWARD: Yes.

26
27 THE CHAIR: Right. That would include --

28
29 MS HOWARD: If it helps, it's the order which is at paragraph 1(a).

30
31 THE CHAIR: Give me a second. So 1(a)?

32
33 MS HOWARD: A final schedule.

34
35 THE CHAIR: We will put the class into the order
36
37 rather than attach the schedule?

38
39 MS HOWARD: Yes.

40
41 THE CHAIR: This is subject to argument, but establish
42
43 a baseline. So it's documents from the US
44
45 production relating to the impact to the PMF on
46
47 CPU/GPU, is that --

48
49 MS HOWARD: Yes.
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THE CHAIR: Wouldn't slide decks get caught by documents --

MS HOWARD: The key summaries, yes.

THE CHAIR: You have documents with the additional presentation? Do you mean documents including presentations, slide decks.

MS HOWARD: At the time this was drafted, it was before the letter came in this morning. So they have now clarified the position on the presentation decks.

We can take this away and clarify the drafting.

THE CHAIR: Sure, but do documents need to be qualified. There are some documents that the parties intend to exclude.

MS HOWARD: We can define the documents as far as US production and say what documents are comprised in the US production --

THE CHAIR: Is it all documents --

MS HOWARD: It's the technical reports and key summaries, including slide presentations.

THE CHAIR: So it's the class you've got in there?

MS HOWARD: Yes. Going to those points. We will try to do this over lunch if that helps.

THE CHAIR: It's not going to help because we will not be here after lunch. It's down for half a day, I think.

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MS HOWARD: I think my junior is going to mark up as we go.

THE CHAIR: As long as you both know where you are, that is fine.

MS HOWARD: I understand that the US production is limited on time anyway. It only covers a snapshot of documents as at 2016/2017. So it is by definition defined to a limited time period which is why the other categories remain quite important.

THE CHAIR: So we seemed to be agreed on those?

MS HOWARD: The only point that is outstanding is the no review by UK solicitors because Apple is saying it needs a double review.

THE CHAIR: We will now come back to this.

MR PICCININ: A point I can clarify now. This may not be in agreement, but on the wording here in this draft order we are looking at for the first time, (i) is too broad because it is now slide decks that relate to the PMF, as implemented. Whereas if you go back to the original request it is about the impact of the PMF on performance and user experience. We don't need (i) at all; (ii) does the job.

THE CHAIR: Okay. As long as it is understood that slide decks fall within.

MR PICCININ: It's slide decks, to be clear only to the

1
2 extent that they are technical reports and/or key
3
4 summaries. We are not objecting to technical
5
6 reports and key summaries if they are slide decks,
7
8 but we are not adding a separate category.
9

10 THE CHAIR: You don't exclude a document merely
11
12 because it happens to be a slide deck if it
13
14 otherwise falls within the class.
15

16 MR PICCININ: That's our position. I don't know if that
17
18 leaves Ms Howard with any additional dispute.
19

20 That's our position.
21

22 MS HOWARD: I think that's acceptable because it's
23
24 something that is going to be more user friendly.
25

26 THE CHAIR: There is still an issue on reviewing.
27

28 MS HOWARD: Sir, yes. The point on reviewing is that
29
30 Apple would like a double layer of the US lawyers
31
32 identifying and locating the relevant documents and
33
34 then it wants UK lawyers to conduct a separate
35
36 review.
37

38 THE CHAIR: Why are they not entitled to do that?
39

40 MS HOWARD: Because they already reviewed documents and
41
42 considered them for privilege and redactions in the
43
44 US proceedings. They have been packaged and
45
46 disclosed to regulators and the US courts already.
47
48 We just feel -- cost is another issue that we will
49
50 come on to at some point, but they are already
51

1 saying they exceeded a budget of 1.5 million in the
2 certification proceedings to date. We think they
3 are conducting a double layer review, with partners
4 on both side of the Atlantic, which is just
5 disproportionate when these documents should be
6 ready and able to hand over. We don't understand
7 what a second review is going to add. I mean, they can
8 coordinate and liaise --

9 THE CHAIR: I think it is a matter for them. The UK
10 lawyers are aware of what's relevant in these
11 proceedings by reference to their class, and they
12 are also familiar with UK rules of privilege, and so
13 forth. The idea that UK solicitors should not have
14 an opportunity to review documents, I think is not
15 easy to sustain. I assume we are not envisaging
16 hundreds of thousands of documents from this class.
17 I think you face an uphill struggle on any of these
18 classes that there shouldn't be a review before they
19 are disclosed.

20 MS HOWARD: I will take instruction. It was just to put
21 a marker down.

22 THE CHAIR: I understand the marker on costs of
23 course. That means we are in agreement.

24 MS HOWARD: We are agreed on.

25 THE CHAIR: A.1, we are in agreement on?

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MS HOWARD: So A.1, we are not in agreement on this, as it relates to the Canadian production. There is A.1 as it relates to the US production, and A.1 as it relates to the Canadian production. There are four sets of proceedings in Canada, and they are likely to be more up to date than the US, which as I said is limited to that time period of 2016 to 2017.

THE CHAIR: The US was limited?

MS HOWARD: To 2016 to 2017. It's October 2016 to December 2017. The Canadian proceedings, which are still ongoing, are obviously of direct relevance because we apply the same process test for certification and settlement. So because of the direct parallel and the fact that there may be subsequent documents, which may provide useful material for the PCR to establish its plausible case on material harm. Apple dismisses this as a fishing expedition, it says they have only made disclosure to date in one of the four sets of proceeding, but we don't know what the latest position is with all four sets of proceedings, including those in Ontario and British Columbia. Only Apple has got that information. We consider it unhelpful if you were to proceed with certification in the autumn without a complete picture of what's going on in Canada. We asked for a witness statement supported by a

1 statement of truth -- just updating the Tribunal on
2
3 the status of proceedings in Canada or any
4
5 disclosure that is made or is due to be made
6
7 relating to the impact of the PMF or on consumer
8
9 harm.

10
11 THE CHAIR: You don't want disclosure, you just want a
12
13 witness statement?

14
15 MS HOWARD: We have said in our skeleton we would like
16
17 disclosure, but we are not able to identify
18
19 documents at the moment. It may be a phased
20
21 approach if we can have at least an update.

22
23 THE CHAIR: Sorry, we need an application. When is
24
25 it? It's in September, is it?

26
27 MS HOWARD: Sorry?

28
29 THE CHAIR: You are coming back for certification in
30
31 September. So there isn't going to be an
32
33 opportunity for a further round of disclosure before
34
35 then.

36
37 MS HOWARD: We don't know what the overlap between the
38
39 Canadian production and the US production is. It
40
41 may be that there is a huge extent of overlap, but to the
42
43 extent there are material documents that are clearly
44
45 relevant in the Canadian production, that goes to
46
47 these two issues, then we would like the disclosure
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49 of them.
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THE CHAIR: Mr Piccinin, can I ask you to -- give you
a further opportunity -- ask you the position -- I
have been told you have provided disclosure in one
of the four Canadian proceedings.

MR PICCININ: Yes. We submitted a full answer to these
questions in correspondence already and I don't
understand why a witness statement from a solicitor
is being sought.

THE CHAIR: Right, the witness statement. Why are you
not providing the same disclosure you are giving in
the US?

MR PICCININ: There's nothing to disclose. As we have
already explained to them, it is only a tiny number
of documents that have been provided in Canada.
They are publicly available and/or not on the topic we are addressing
today so
there is no material.

THE CHAIR: That's in Ms McLaughlin's ^ statement, is
it.

MR PICCININ: If I can show you, Covington's letter of 20th June, which is in
the supplemental bundle. If we go to page 451.

THE CHAIR: Hold on. Letter of the 20th June?

MR PICCININ: Yes, page 451.

THE CHAIR: Tab 61.

MR PICCININ: There is a heading towards the bottom of the
page, "Canadian class actions". Paragraph 7:

1
2 "without any waiver of
3
4 privilege... Apple only disclosed documents in
5
6 connection with proceedings in Quebec... Apple only
7
8 disclosed 24 documents, all of which are already
9
10 publicly available and/or not relevant to the PMF."
11

12 There is a footnote 14 where we provide further
13
14 information about what they are.

15 In addition to that, there is our letter from
16
17 today, footnote 1 of which said that we have
18
19 confirmed again with Apple's counsel in the proceedings, that
20
21 this is correct, and they have clarified that two of the
22
23 screenshots that were referred to are actually
24
25 duplicates, so the total number of unique documents disclosed is
26
27 actually 26.
28

29
30 THE CHAIR: Thank you.

31
32 Ms Howard, by reference to this letter, the documents
33
34 are not relevant, and that is what they are. What
35
36 is it you are after?
37

38 MS HOWARD: For the Quebec proceedings, what we wanted was
39
40 an update on the other three, which we cannot find
41
42 anything in the public domain, the progress of those
43
44 proceedings which could be added into the witness
45
46 statement they are going to provide, so we have the
47
48 latest position.

49
50 MR PICCININ: There's nothing. We said that in
51

1
2 correspondence.

3
4 THE CHAIR: Is it really necessary to have a witness
5
6 statement confirming there is nothing? I mean --

7
8 MS HOWARD: My friend said no disclosure has been made
9
10 to date in the other three proceedings, but what we
11
12 wanted to know was the up to date status of those
13
14 proceedings and whether there are decisions about to
15
16 be made in them. Because if things are moving in
17
18 Canada that my Lordship is unaware of, when you come
19
20 to assess the certification in September, in the
21
22 autumn, you would probably want to know the latest
23
24 position in those proceedings.

25
26 THE CHAIR: You can make those points in September,
27
28 but I can't order disclosure. Assuming we are
29
30 putting these 20 something documents to one side for
31
32 the moment, there is nothing you need from there, I
33
34 can't make an order today on a class of documents
35
36 that as yet has not been disclosed. I don't see a
37
38 particular need for a witness statement unless you
39
40 have got reason to put that into question. Of
41
42 course, if this matter proceeds in September, you
43
44 can obviously put Canada in the cross hairs and
45
46 decide what you need at that point, but I am not
47
48 sure there is any more I can do on this today, is
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51 there?

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MS HOWARD: Thank you. I think on A.3, in the light of the letter that we received this morning, A.3 concerns technical reports or internal papers analysing the data and outputs of the analytical tool. We weren't sure exactly what the analytical tool that was referred to meant. But now Apple has clarified in its letter this morning, that this is the same tool that was incorporated in iOS 10.2. So it may be that this request overlaps with B.3 – so we don't need to pursue A.3.

THE CHAIR: Do you have some references to --

MS HOWARD: To the request for the materials requested in B.3, which also refers to analytics, diagnostics and usage information then that would probably cover A.3 as well. I was going to address you in turn and come to B --

THE CHAIR: We will --

MS HOWARD: Now, A.4 is the regulatory materials in Italy and France we have already explored -- I also was confused this morning by the letter which seems to be rowing back from their offer of providing the contemporaneous documents but Mr Piccinin has helpfully clarified that to us. So Apple is prepared to offer documents produced within the business at the relevant time, but it is not

1
2 prepared to give submissions or responses to the
3
4 regulators. I think the key differences are between
5
6 the parties, that this should relate, not just to
7
8 performance, but consumer harm are the two elements.
9

10 We do need to have the ongoing lifetime of the
11
12 iPhones, and we are not prepared to have just those
13
14 documents that are available in English. The legal
15
16 team can read French and Italian. So we can deal
17
18 with the documents in their original language, scan
19
20 them to see if they are relevant and get
21
22 translations if that is necessary.

23
24 THE CHAIR: Sorry, just run through those points
25
26 again. You want different languages; you don't want
27
28 a time limit.

29
30 MS HOWARD: Performance and consumer harm.

31
32 THE CHAIR: In your draft order you say performance and
33
34 user experience?

35
36 MS HOWARD: Yes. The user experience is the user harm,
37
38 the harm that they suffered as a result.

39
40 Then the key area --

41
42 THE CHAIR: Just run through your paragraph. This is paragraph
43
44 1(c).

45
46 MS HOWARD: It is 1(c). We can build in the language --

47
48 THE CHAIR: Sure. With the addition of any documents
49
50 prepared by Apple.
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MS HOWARD: That is the key issue, is whether we should include particularly responses to regulatory authorities. We are not interested in the kind of lawyer-manufactured documents that are submissions. What we are interested in is if there are particular points that the regulators have asked for clarification on about how the PMF operated or how consumers were affected, we would want those answers because they may have a different time value and also a different perspective than the contemporaneous documents that were produced at the time of the design or installation of the PMF.

Why that is material is particularly because the French investigation only concluded last year, in 2022, so obviously there is a time series there from when the PMF was designed and implemented in 2017.

THE CHAIR: I have not got any evidence of whether these sorts of documents are considered to be treated as confidential and not disclosable by these regulatory authorities. I don't have any evidence on that.

MS HOWARD: No, you don't. What we tried to do is to look at the Practice Direction on competition investigation materials. These are consumer law

1
2 investigations so strictly speaking they are not
3
4 covered by schedule 8, the damages directive provisions
5
6 or the Practice Direction. I think that's a useful
7
8 analogy where if investigations are closed, then you
9
10 can get copies of the documents. In both of these
11
12 cases those investigations have been closed and
13
14 finished for some time.

15
16 THE CHAIR: Right.

17
18 MS HOWARD: They --

19
20 THE CHAIR: The position -- you made submissions to
21
22 the CMA. They are restricted, aren't they,
23
24 from subsequent disclosure? Am I wrong about that?

25
26 MS HOWARD: The investigation is closed, if there is
27
28 evidence of the investigation having been closed
29
30 before the tribunal, then you may disclose them,
31
32 provided they are not --

33
34 THE CHAIR: Even if they go to leniency --

35
36 MS HOWARD: There are restrictions on leniency and
37
38 settlement submissions. But the documents can be
39
40 disclosed.

41
42 THE CHAIR: Including responses to requests for
43
44 information.

45
46 MS HOWARD: Yes, like the access to the file arrangements
47
48 in the competition investigations.

49
50
51 MR PICCININ: We do object to this. And in order to

1
2 develop my submissions on it I have a number of
3
4 preliminary observations and general points to make
5
6 about the PCR's approach to this application. It
7
8 will take some time.
9

10 THE CHAIR: Is there anything you want to say on this
11
12 point as to why it should not extend? It is quite a
13
14 narrow point, isn't it?
15

16 MR PICCININ: We say, actually, it's really important
17
18 that we understand what the compass of this exercise
19
20 is, what it is they are looking for and why it is
21
22 necessary therefore to delve into this sort of
23
24 material, submissions that were produced for the
25
26 purpose --
27

28 THE CHAIR: I understand that. To some extent you are
29
30 pushing at an open door saying it should be a
31
32 disclosure exercise with a narrow compass.
33

34 MR PICCININ: I would like to develop my submissions on
35
36 that point. We can do it now or later.
37

38 THE CHAIR: Let's come back to it.
39

40 MR PICCININ: I would also like to say, you have seen the
41
42 correspondence from the CMA in response to the PCR.
43

44 THE CHAIR: This is not the CMA's?
45

46 MS HOWARD: No.
47

48 MR PICCININ: No.
49

50 MS HOWARD: I don't have this in evidence. Just in the
51

1
2 interest of transparency, we did, as part of the
3
4 pre-action process, we did write to the DGCCRF
5
6 but we didn't hear back from them. Just to be
7
8 transparent on that front. I could take you to the
9
10 Practice Direction. I have copies of the Practice
11
12 Direction, if that would assist you, regarding
13
14 access to the regulatory investigatory files.

15
16 THE CHAIR: You have reminded me.

17
18 MS HOWARD: I have got copies here if that would assist
19
20 you. Otherwise I can move on to the next, which is A.5.

21
22 THE CHAIR: Let's move on to A.5.

23
24 MS HOWARD: So A.5, now the CMA materials are important,
25
26 we say, for four respects. Firstly, it shows the
27
28 impact of the PMF on performance and consumers at a
29
30 later date than the US production. So it's not just
31
32 2016 to 2017.

33
34 THE CHAIR: Hold on. Which paragraph?

35
36 MS HOWARD: Sorry, we are on paragraph 2 of the order.

37
38 THE CHAIR: Yes.

39
40 MS HOWARD: We built into the order the mechanism that I
41
42 explained in the letters.

43
44 THE CHAIR: The documents you are seeking --

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46 MS HOWARD: Are A.5 in the table.

47
48
49 THE CHAIR: The documents provided by Apple to the
50
51 CMA.

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MS HOWARD: And then documents produced by the CMA.

THE CHAIR: Right.

MS HOWARD: So Apple has agreed to disclose the documents that it submitted to the CMA relating to the PMF and user harm, but it does not agree to provide documents that were produced by the CMA because of confidentiality restrictions.

THE CHAIR: Yes.

MR PICCININ: We also don't agree to produce documents that were produced in the UK for the CMA.

THE CHAIR: So it's the same, not submissions, not requests, not responses to requests for information.

MR PICCININ: That's right.

THE CHAIR: You are content to provide Apple's documents that Apple supplied to the CMA

MR PICCININ: Yes.

MS HOWARD: So the CMA materials, we say, are relevant because firstly they relate to a later time period. So not just 2016 to 2017 as the US production. But the investigation before the CMA was commenced in 2018 and concluded in 2019. So there is an extra two years where documents which might show the impact as the phones degraded. They are unique because they will contain, we think, primary facts about the impact to the PMF on UK consumers who are

1
2 the proposed members in this class action.
3

4 Thirdly, the part 8 enforcement process under
5 the Enterprise Act will only involve -- the CMA will
6 only open an investigation where it has a belief, a
7 reasonable belief, that there is consumer harm, it
8 sends a consultation letter. In previous practice
9 those letters are quite detailed. They have a
10 detailed summary of the primary facts and they
11 contain lots of exhibits setting out the impact and
12 the evidence, the primary facts the CMA has of the
13 impact on consumers and consumer detriment. That is
14 the basis on which the CMA has opened its
15 investigation and forms the basis of its concern.
16 We think that consultation letter in particular will
17 be very helpful because it will contain primary
18 facts that are relevant to the issues in dispute in
19 these proceedings.
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35 The last reason why we say this is relevant is
36 because Apple will have engaged with the CMA between
37 August 2018 and May 2019, when it ended up giving
38 extensive undertakings on transparency, both about
39 the health of the batteries but also the impact to
40 the PMF, and those undertakings are ongoing. So
41 the CMA, normally in an undertakings process, has to
42 be satisfied that the undertakings have met its
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1
2 concerns before it will accept them. We want to
3
4 understand the full regulatory context for the
5
6 undertakings that have been given and the consumer
7
8 harm that the CMA found in the period from the launch of
9
10 the PMF up until the acceptance of the undertakings
11
12 in May 2019.

13
14 Now Apple has resisted because of
15
16 confidentiality restrictions. So as we forwarded the
17
18 letter, we approached the CMA on 26 June, it is neutral
19
20 at the moment because it has not seen the
21
22 application. We were wary of sending it to the CMA
23
24 because of Apple's confidential information. But it
25
26 has said it would like an opportunity to submit
27
28 observations. It is happy for your Lordship to order
29
30 disclosure today, but then it wants to be able to
31
32 review the application and see if there is any
33
34 reason for intervening to raise objections.

35
36 The drafting we put in the order is standard
37
38 wording. I have taken it from parallel competition
39
40 proceeding orders where there is access to the file,
41
42 where there is an order for disclosure. Then there
43
44 is an opportunity for the regulator to intervene,
45
46 notify the CMA of the intended disclosure materials
47
48 and then the CMA is given a window in which to raise
49
50 any objections or observations.
51

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2 These documents clearly exist. They are
3
4 relevant. They should be able to be disclosed at
5
6 short order because Apple should have them on its
7
8 systems. We don't see why there is not a basis for
9
10 prompt disclosure so that the CMA can engage with
11
12 this process if it considers this necessary. It may
13
14 not because its investigation is closed and the
15
16 undertakings have been accepted.

17 I don't know whether you want me to continue.

18
19 That concludes section A.

20
21 THE CHAIR: Section A. There is one of the classes in
22
23 B that overlapped with A?
24

25
26 MS HOWARD: It might make sense to deal with B together
27
28 because we may find that they overlap between them
29
30 and partly because we are not exactly clear on what
31
32 the dividing lines between them are.

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34 THE CHAIR: To summarise, this is an application for
35
36 pre-action disclosure, which in the circumstances of
37
38 this case might be seen as something of an
39
40 indulgence, as it is not something you originally
41
42 requested. Essentially you are being offered from
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44 Apple documents in an agreed class, or largely
45
46 agreed class, which have been filed with a number of
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48 regulators, including in Italy and France, and the CMA,
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50 that's Apple business documents filed with the
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1
2 CMA. They are also, in an agreed manner, looking at
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4 documents that have been submitted in the US and the
5
6 mechanisms have been -- I mean, at this stage of the
7
8 proceedings we are not dealing with relevance and
9
10 disclosure generally. At this stage of the
11
12 proceedings that seems -- ought to be enough for you
13
14 to be able to plead your case and get you to
15
16 certification, bearing in mind that you came to the
17
18 Tribunal at certification without seeking any documents.

19
20 MS HOWARD: We have been asking for these documents since

21
22 right before the letter before claim and throughout
23
24 since 2021, we have been asking for these documents.

25
26 When we came to Tribunal in November, you will
27
28 remember we had a very large disclosure request at
29
30 that time, which then we focussed on the decision
31
32 and that was because we were facing such resistance
33
34 from Apple. We did maintain our request after that
35
36 hearing.

37
38 THE CHAIR: You did not make an application.

39
40 MS HOWARD: No, we didn't make an application.

41
42 THE CHAIR: Now we are moving on to -- you tell me why
43
44 you additionally need any of the documents --

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46 MS HOWARD: I think the CMA documents for the four

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48 reasons I set out really are material and relevant,
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50 and --
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THE CHAIR: We are not arguing really about relevance.

I appreciate any of these documents could be relevant. That's -- I'm not here deciding disclosure in the proceedings. You will have to do more than submit to me these documents are relevant.

MS HOWARD: I suppose we are facing uncertainty. It may be because at the point of certification when we came, we were applying the tests that had been laid down in Merricks and Le Patourel, where it was a very low bar certification. There wasn't a merits test. It was just a plausible case of harm to the class of some significant harm to the class. Now in the light of McLaren, it seems that the goalposts are shifting and we are not sure what the test is. We find we are facing a merits-based test.

THE CHAIR: To apply for certification, obviously I don't want to repeat what is in my judgment, the concern was, were those set out in the judgment. There was an evidential gap potentially -- we didn't hear full argument on it I appreciate -- a gap on a particular issue, and that was the extent to which the PMF impacted performance and whether that was in any way material to the consumers.

As you go to these broader classes, complex classes, you need to explain to me

1
2 why you need that at this stage. It is no good just
3
4 telling me these are relevant documents.
5

6 MS HOWARD: Because we don't know what standard we are
7
8 expected to achieve for certification, according to
9
10 the merits case it should be a low, strike out,
11
12 plausible case. Due to the Tribunal's doubts as
13
14 expressed at the hearing and in the judgment, we
15
16 want to make sure we can comfortably pass that test.
17
18 We think we can --
19

20 THE CHAIR: Is there anything in the judgment
21
22 applying a higher standard than that? I thought it
23
24 was quite clear in the judgment that you were applying
25
26 that lower standard.
27

28 MS HOWARD: You did say it's a relatively low hurdle to
29
30 overcome which gave us some comfort. We need to be
31
32 clear that we are getting materials particularly to
33
34 show the impact on UK consumers. So the US
35
36 materials will be helpful for the documents about
37
38 the PMF and how it was designed, but the CMA
39
40 materials, we say, have added value because they
41
42 will have primary facts about the impact on UK
43
44 consumers. It's all very well, Mr Piccinin has
45
46 taken you to the summary and the footnote about the
47
48 complaints received from US consumers, but there is
49
50 a disconnect between the number of complaints
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1
2 received in the US to what was going on in the UK at
3
4 the time. I think it will be helpful if there are
5
6 CMA terms. We don't know what initiated its
7
8 investigation, whether it was complaints or whether
9
10 it was its own intelligence, but there may be
11
12 primary facts there about the impact on UK
13
14 consumers, which are obviously of relevant value to
15
16 show the impact in this case for the class members
17
18 that we are representing. In terms of priority,
19
20 yes, we got the US production we are largely agreed
21
22 but the CMA materials, we think we do need and will
23
24 be necessary to inform us about the impact -- we
25
26 have no contact, no direct contact with the proposed class
27
28 members.

29
30 THE CHAIR: We have moved back to A.

31
32 You are getting documents that have been submitted
33
34 to the CMA.

35
36 MS HOWARD: We are getting contemporaneous documents.

37
38 But what we are not getting is Apple's responses to
39
40 any request for information or the CMA's
41
42 consultation notice setting out the CMA's facts on
43
44 which the investigation is based.

45
46 THE CHAIR: Right.

47
48
49 MS HOWARD: So it's a divorced set of corporate
50
51 documentation which we can't actually see in the

1
2 context of the investigation.

3
4 THE CHAIR: Right. We were on B, going back -- I was
5
6 slightly perplexed -- take me through B as to what
7
8 you are envisaging the exercise will be here.

9
10 MS HOWARD: So all the documents in request B closely map with the
11
12 reference in Mr Crumlin's and Mr Coulson's
13
14 witness statements, which refer to the analytics and the
15
16 user feedback and the testing that it carried out at
17
18 the time. So the Tribunal expressly envisaged
19
20 ordering disclosure of documents containing
21
22 information that was referred to in Mr Crumlin's
23
24 statement, that was at the hearing on 2 May, but also in
25
26 your judgment.

27
28 (Audio interrupted) -- has explained, it's
29
30 realistic once the battery ageing has increased over
31
32 time, all devices may be subject to interventions as
33
34 a result of the PMF. So the PMF may be switched on all
35
36 the time.

37
38 THE CHAIR: But as Ms McLaughlin has explained, Mr
39
40 Crumlin hadn't got a document in front of him when
41
42 he prepared his witness statement.

43
44 MS HOWARD: It's not --

45
46 THE CHAIR: So it's not easy to say, "We want that
47
48 document which is not explicitly referred to but is
49
50 implicitly referred to." So this is going to have
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1
2 to be a searching exercise.

3
4 MS HOWARD: It will. We think that can be managed in a
5
6 proportionate manner. It's not realistic that Mr Crumlin
7
8 has all of this information in his head in a large
9
10 global organisation. When he is referring to
11
12 diagnostics and testing it must have been recorded
13
14 in writing, and those documents will be available.

15
16 If you look at the exhibit --

17
18 THE CHAIR: How are you proposing those documents be
19
20 identified?

21
22 MS HOWARD: If you look at the exhibits in Mr Crumlin's
23
24 statement, he is referring to documents there when
25
26 he wants to, but then denies having had documents
27
28 elsewhere. So they have obviously managed to
29
30 locate some documents.

31
32 THE CHAIR: How is this going to work in practise?

33
34 Let's look at your order. You say, responsive to
35
36 requests, B.1 to B.6 and B.9.

37
38 MS HOWARD: What I wanted to try and explore is the
39
40 extent to which some of these requests might overlap
41
42 because I think our particular focus is on B.1 to B.3
43
44 and B.9, but they do tend to overlap.

45
46 THE CHAIR: But -- isn't that what you are getting

47
48 from the US production.

49
50 MS HOWARD: We've already said if there is duplication

1
2 with the US production, then --

3
4 THE CHAIR: I appreciate that. So explain to me, I
5
6 make your order in paragraph 4. What does Apple
7
8 then go off and do?
9

10 MS HOWARD: Mr Crumlin is a director. His role is the
11
12 director of iPhone System Integration. So he would be
13
14 the repository, and they could simply search for the
15
16 documents he will have received in his capacity as a
17
18 director. So it would be a limited search, just the
19
20 documents he has had.

21
22 THE CHAIR: Won't it be a question of asking him if he
23
24 is familiar with any technical reports?
25

26 MS HOWARD: They could do that or they could do a quick
27
28 electronic search of his documents, which if that is
29
30 a quick way of doing it, with search terms of --
31

32 THE CHAIR: I am not attracted to doing any searching.
33
34 Are you asking whether Mr
35
36 Crumlin has -- are there any documents, technical
37
38 reports, known to him which go to the particular
39
40 paragraphs of his expert report -- witness
41
42 statement, I beg your pardon.

43
44 Mr Piccinin?
45

46 MR PICCININ: We are going to produce a witness
47
48 statement from Mr Crumlin that is going to be
49
50 addressing this whole topic in more detail than he
51

1
2 already has, on the implementation of the PMF and its
3
4 impact on performance --

5
6 THE CHAIR: But in terms of --

7
8 MR PICCININ: What I was going to say is that insofar as
9
10 there are documents that are readily available that
11
12 can shed light on these issues, then he can refer to
13
14 them in his statement. The problem with these
15
16 requests --

17
18 THE CHAIR: Hold on, before you go off. If we take
19
20 the key paragraphs from his witness statement and
21
22 say, any known documents, materials in that, any
23
24 known technical reports which support or are adverse
25
26 to the matters in that paragraph.

27
28 MR PICCININ: Any known --

29
30 THE CHAIR: Known technical reports which are
31
32 supportive or adverse -- we need to identify the
33
34 paragraphs because I am not envisaging this for the
35
36 whole witness statement.

37
38 MR PICCININ: Yes.

39
40 THE CHAIR: It has to be known to Mr Crumlin, not
41
42 known to the organisation?

43
44 MR PICCININ: No. I am told that it is envisaged that he
45
46 can address that in his statement, so he will
47
48 address the extent to which he knows --

49
50 THE CHAIR: And if so, the documents will be provided?
51

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MR PICCININ: If so, he will provide the documents, yes.

THE CHAIR: Is there any reason not to make an order
that he will provide --

MR PICCININ: No.

THE CHAIR: Ms Howard, while Mr Piccinin is taking
instructions, do you know which paragraph you are
interested in? Can you just remind me? I will not
do it for the whole --

MR PICCININ: No objection to that provided it is limited
to what he already knows.

THE CHAIR: Indeed. If we can just identify the
paragraphs.

MS HOWARD: In Mr Crumlin's statement. He also has in
the schedule, it's paragraph 11 corresponds to
request B.1, which is at page 246 in bundle A.

THE CHAIR: Paragraph 11?

MS HOWARD: The first one, the A.1, and then for B.2,
paragraph 12.

MR PICCININ: So 11, 12.

MS HOWARD: And B.3, 16. Then it's 39 to 41. That's B.4.

THE CHAIR: 39 to?

MS HOWARD: 41. It's 41 and 55. B.6 is paragraph 47. B.7
and B.8, we are no longer pursuing because we think
those overlap with other categories. Then the last
one is B.9, which is not Mr Crumlin but it is Mr

1
2 Coulson. That's paragraph 6, which refers to the
3
4 field monitoring that was carried out of users'
5
6 reactions to the performance of the Affected
7
8 iPhones.
9

10 THE CHAIR: Just looking at paragraph 11 of his statement, why do you need
11 that,

12
13 that is before each iOS is released?
14

15 MS HOWARD: Paragraph 51 as well.
16

17 THE CHAIR: I am not with you. We are on paragraph 11. I don't
18

19 see why you need paragraph 11. This
20

21 is not testing of performance in the field, this is pre-release testing.
22

23 MS HOWARD: This was in order to perform the
24

25 implementation from iPhone 10 to iOS 11.3. So it
26

27 was checking the impact of each iOS version on the
28

29 iPhone. You may want to narrow it down to the 10.2.1
30

31 and 11.2.
32

33 THE CHAIR: So -- I've got provisional ticks by paragraphs 12 and
34

35 16. Paragraph 39 seems to be about what work is going to be
36

37 done. Paragraph 47 seems to be about testing prior to
38

39 release.
40

41 MS HOWARD: The testing prior to release is part of the
42

43 design process. So obviously you are not going to
44

45 launch it without making sure that it is going to
46

47 work effectively. We also think it is linked to the
48

49 design and what they were trying to achieve through
50
51

1 the PMF and what its anticipated impact would be.

2
3 THE CHAIR: You said there was another paragraph 51?

4
5 MS HOWARD: 51, yes. That's the monitoring -- this is
6
7 linked again to --

8
9 THE CHAIR: On my provisional tick list, Mr Piccinin,
10
11 this was classed as paragraphs 12, 16, 41 and 51,
12
13 and possibly --

14
15 MR PICCININ: All of this should be insofar as it relates
16
17 to the impact of the PMF.

18
19 MS HOWARD: And consumer harm.

20
21 MR PICCININ: And consumer harm caused by the PMF, but
22
23 what we are not interested in is completely
24
25 different iOS updates that had nothing to do with
26
27 the PMF.

28
29 THE CHAIR: Right.

30
31 MR PICCININ: Or the UPO issues before.

32
33 THE CHAIR: No, I think they are common ground, at
34
35 least at this stage.

36
37 MR PICCININ: Subject to provisos and subject to this
38
39 being just what he knows about off the top of his head,
40
41 we are content to address that.

42
43 MS HOWARD: Can I flag two other paragraphs?

44
45 THE CHAIR: What he knows is a term, "knows" is a term
46
47 which goes a little bit beyond "What's off the top
48
49 of your head", in one particular moment, after due
50
51

1 consideration.

2
3 MR PICCININ: Not conducting searches.

4
5 THE CHAIR: Not conducting searches.

6
7 MR PICCININ: Right.

8
9 MS HOWARD: The two other paragraphs. We stopped. One
10 is paragraph 47 that refers to user testing.

11
12 THE CHAIR: I crossed that out of mine. Is this known
13 iPhones? Not the new iPhones. User testing of the
14 impact of the steps -- it is prior to release.

15
16 MS HOWARD: It is prior to release.

17
18 THE CHAIR: I'm not with you -- I mean, as I
19 understand again, at least at this stage,
20 Apple has lots of legitimate caveats, but as I
21 understand it is common ground that one of the
22 impacts of this PMF is that it could slow down the iPhones
23 in certain circumstances. So I am not quite sure
24 why pre-release testing is needed

25
26 MS HOWARD: Because we have to remember that the PMF was
27 not known at the time. Apple designed this as a
28 response to slow down the phones and manage the
29 power consumption. So it is important for us to
30 understand what it was aiming to achieve through the
31 PMF at the time. And the user testing, we say, is
32 important because it gives feedback on what users
33 were experiencing and how Apple then calibrated the
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1 PMF to deal with that.

2
3 THE CHAIR: You are saying this is user testing?

4
5 MS HOWARD: Yes.

6
7 THE CHAIR: I see what you mean. Okay, I perhaps
8
9 under appreciated that.

10
11 Mr Piccinin?

12
13 MR PICCININ: Paragraph 47.

14
15 THE CHAIR: Yes, is that subject to all the same caveats --

16
17 MS HOWARD: The last paragraph was 55. That relates to
18
19 B.5, which again is talking about the use in the
20
21 field and customers being notified.

22
23 THE CHAIR: Okay. Any objection to adding paragraph 55, Mr
24
25 Piccinin, subject to the same caveats.

26
27 MR PICCININ: I am just taking instructions. I am told
28
29 we need to take instructions and ask what the
30
31 position is. I am not sure what is being sought
32
33 here, to be honest.

34
35 THE CHAIR: Any technical documents relating to
36
37 paragraph 55, known to Mr Crumlin which are adverse
38
39 or supportive to the facts and matters?

40
41 MR PICCININ: This is talking about documents relating
42
43 to --

44
45 MS HOWARD: It is technical documents showing how the PMF has
46
47 actually limited the power demands of the phones by
48
49 using static mitigation, that comes out of paragraph 55. It's

50
51

1 really using the anonymised data about the ageing of
2
3 the batteries that were sent from devices in use in
4
5 the field on an opt-in basis by users.

6
7 So that's --

8
9 THE CHAIR: That's the bit that you are --

10
11 MS HOWARD: That's the bit that we are seeking.

12
13 MR PICCININ: We are not talking about disclosing that data, we
14
15 are talking about if Mr Crumlin is aware of any
16
17 technical reports given as to the impact of the PMF. That's the
18
19 whole topic he's addressing in his witness
20
21 statement.

22
23 MS HOWARD: In order for the witness statement to add
24
25 something more than what he has already said in his
26
27 witness statement, we do think he needs to --

28
29 THE CHAIR: Without getting the documents he is no
30
31 closer --

32
33 MR PICCININ: We will ask him if he's clear.

34
35 THE CHAIR: Could you say it back to me?

36
37 MR PICCININ: An order for disclosure of any technical
38
39 reports that Mr Crumlin is aware of, relating to the
40
41 matters referred to in paragraphs 12, 15, 41, 47,
42
43 51, and 55.

44
45 MS HOWARD: The only caveat I would add is summaries
46
47 because --

48
49
50 MR PICCININ: Sorry, technical reports and key summaries, in so far as they
51 relate to the

1
2 impact and effect of the PMF, as implemented in
3
4 10.2.1 and 11.2.

5
6 THE CHAIR: Your point is --

7
8 MS HOWARD: He's a director, he's not a technician, he
9
10 may not remember the technical reports, but he may
11
12 remember, "Yes, we had a slide set or a summary for
13
14 the board that relates to that." That's summary --

15
16 THE CHAIR: Reports including technical summaries?

17
18 MS HOWARD: Yes. We could use the same wording as we had
19
20 for the US documents.

21
22 MR PICCININ: We are a bit concerned about what
23
24 "technical summary" means in this context and that
25
26 it could involve snippets of data or snippets of
27
28 material. "Technical reports" or "key summaries"
29
30 are the words.

31
32 MS HOWARD: Let's use the same language as we did for the
33
34 US productions, "key summaries including slide
35
36 sets".

37
38 THE CHAIR: So does that dispose of B?

39
40 MS HOWARD: It does.

41
42 THE CHAIR: So the only outstanding -- we have got two
43
44 outstanding issues on A. We have a request for
45
46 responses to requests for
47
48 further information with regards to the CMA and indeed
49
50 the overseas regulators.
51

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MS HOWARD: Yes. I think on B.9, which is Mr Coulson, but we can use similar wording on Mr Coulson's statement, which was field monitoring.

MR PICCININ: This is already a lot.

THE CHAIR: I have to say I do agree with Mr Piccinin. You have an awful lot of disclosure by way of pre-action disclosure. I think it was Mr Crumlin's evidence that was of concern to the Tribunal at the last hearing, and I think we would be inclined to focus on Mr Crumlin unless you want to press that.

Now, at the moment I am against you on seeking further disclosure of responses to technical information requests -- sorry, requests for further information and submissions to either the overseas regulators or the CMA. Such things may not be relevant, they may well turn out to be relevant in due course but I don't think it is appropriate to order them at this stage. Do you require judgment on that issue?

MS HOWARD: Can I say just something? I think there's two categories of documents. One is the letter from the CMA, particularly the consultation letter and any exhibits and then we pursue the responses. I think if we can get a copy of the consultation letter from the CMA setting out the facts on which

1
2 it based its investigation, then that will suffice
3
4 for now. It's an isolated identifiable document and
5
6 they clearly have it. And the CMA investigation is
7
8 closed, there shouldn't be an objection to disclosing
9
10 that. Any confidentially issues can be protected by
11
12 disclosing it into the confidentiality ring. If we can have a copy of
13
14 that document --

15
16 THE CHAIR: Subject to the CMA's observations

17
18 MS HOWARD: Yes.

19
20 THE CHAIR: What objection do you have to that?

21
22 MR PICCININ: I do object to this, sir. This is just not
23
24 something that is necessary and meets the test for
25
26 pre-certification disclosure. I have submissions I can make on the
27
28 right approach here, but.

29
30 THE CHAIR: It is a single document.

31
32 MR PICCININ: It is a single document, Sir, but it is a
33
34 single document in a separate regulatory proceeding,
35
36 that the PCR has no right to be digging around in.
37
38 They are going to be given an enormous amount of
39
40 material, not just the material we have discussed,
41
42 but a further witness statement from Mr Crumlin,
43
44 which will be verified by a statement of truth,
45
46 explaining everything that happened with the PMF.
47
48 Perhaps we need to go back to look at what we are
49
50 actually looking for here and why we are looking for
51

1
2 it in order to understand why this is just
3
4 inappropriate.

5 I don't know if now is a convenient time for me
6
7
8 to develop my submissions.
9

10 THE CHAIR: We are on a very narrow point, Mr

11
12 Piccinin, why this document is not necessary to be
13
14 disclosed at this stage, a general approach. I am
15
16 absolutely with you, as you put it in your skeleton,
17
18 as to why it should be a narrow disclosure. I am
19
20 absolutely with you that you are providing a lot of
21
22 documents by agreement. I am completely with you on
23
24 those points. This is a single document. We need
25
26 to decide whether --
27

28 MR PICCININ: Whether it is necessary.

29
30 THE CHAIR: Whether it is necessary at this stage of
31
32 the proceedings.
33

34 MR PICCININ: That's right. The issue, the reason they
35
36 are looking for documents at all -- and I should
37
38 say, we would not normally be agreeing to disclose
39
40 documents at this stage of the proceedings. The
41
42 reason we are proactively making these proposals is
43
44 to address the specific concern that you, or the Tribunal,
45
46 raised in the first round, which concerns the
47
48 hypothesis that something happened in the real world
49
50 during 2017, which caused millions of consumers to
51

1
2 experience substandard performance on their devices,
3
4 on the relevant particular devices. So that's the
5
6 hypothesis that we are working on. The case we are
7
8 trying to explore is whether it really is the case
9
10 that millions of people had that real experience in
11
12 the real world.

13
14 My submission to you is that if that were the
15
16 case, if there were anything to this allegation that
17
18 is now being developed by the PCR, that would be well and truly
19
20 documented in the extensive materials that the PCR
21
22 has. You remember the PCR, in addition to all
23
24 materials discussed today, already has a survey that
25
26 the PCR conducted of UK consumers more than 80
27
28 percent of whom, around 3 quarters of which, did not
29
30 remember experiencing their iPhones from these
31
32 releases, slowing down after downloading the
33
34 software. So that's the context for this
35
36 application. In addition to that, we are --

37
38 THE CHAIR: In fairness, this is not a point that you
39
40 as a party took at the last hearing -- this is a point the
41
42 Tribunal took.

43
44 MR PICCININ: That is true.

45
46 THE CHAIR: Can we just pause for five
47
48 minutes for the transcriber.

49
50 (10.52 am)

51

1
2 (Break)
3

4 (10.58 am)
5

6 MR PICCININ: You were just making the point to me, the
7
8 fair point, that we were not challenging this aspect
9
10 of the PCR's case when it came before you at the end of
11
12 May. I just want to explain, Sir, that that
13
14 might leave you with slightly the wrong impression
15
16 of what our position is.
17

18 THE CHAIR: I understand it. Do we really need to
19
20 discuss that in detail? We are on quite a narrow
21
22 point, which is whether this document produced by
23
24 the CMA, which indicated the basis on which it opened its
25
26 investigation, whether that should be disclosed. It
27
28 is a relatively narrow compass, and in the context
29
30 of you providing a lot of disclosure, which is far
31
32 more burdensome, the question is should you produce
33
34 this single document.

35
36 If we could focus on that.
37

38 MR PICCININ: I will give you my full response to that
39
40 single point. But I do need to show the compass of
41
42 why we say this is not appropriate.
43

44 THE CHAIR: Of course.
45

46 MR PICCININ: The first point, this is not just one
47
48 document. We are currently talking about a single
49
50 document. This disputed document comes at the end
51

1
2 of a long process in which we have already produced
3
4 a wealth of material. We have given the full French report,
5
6 they have seen the undertakings that came out of the
7
8 CMA investigation, we are proposing to give them the
9
10 contemporaneous documents to the extent that they
11
12 are relevant to the PMF issue. They have a witness
13
14 statement on the PMF. They are going to have another witness
15
16 statement. There is already a lot of work being
17
18 done. We don't anticipate that it is going to
19
20 produce a lot of documents and that's because this
21
22 whole aspect of the PCR's case is proceeding on a
23
24 flawed premise. As I said to you, it is
25
26 proceeding on the premise that there was an event
27
28 that happened --

29
30 THE CHAIR: I got that.

31
32 MR PICCININ: The second point, at some point you need to
33
34 draw a line because the PCR can always say, "Here's one
35
36 more document, this one more document, it's just one
37
38 more document." We say it is wrong in principle to
39
40 take that approach where you say, "Why not", it's
41
42 easy to produce, so you can have it.

43
44 The third point, which is really the most
45
46 important, is the point about what the document can
47
48 show. Unlike all of the other material that we have
49
50 been talking about today, this is not a document
51

1
2 that reveals Apple's thinking or anything that Apple
3
4 has experienced in the field through its interactions
5
6 with its customers about the impact of the PMF.
7
8 This document that they are requesting is a document
9
10 produced by the CMA, which can only show you what
11
12 the CMA thinks -- what the person who wrote
13
14 that document at the CMA thought at the time, which
15
16 is not relevant to issues you need to decide even at
17
18 trial, let alone on certification.

19
20 The final point, is the point about timing
21
22 because again everything else is within our control,
23
24 and we can provide it and we proposed we will
25
26 provide the rest of it on the 12th of July at 10
27
28 o'clock in the morning. That then sets us up for a
29
30 process, which we will come on to, as to how we can
31
32 prepare for a certification hearing on 11 September 2023
33
34

35
36 In contrast, this document would require us to
37
38 go to the CMA, and see what CMA will say about it,
39
40 because it is their document. That just adds extra
41
42 delay into the process.

43
44 Those are our four key responses as to why this
45
46 document should not be disclosed.

47
48 THE CHAIR: Can you remind me what the CMA proceedings
49
50 concerned?
51

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MR PICCININ: Yes, they were consumer protection proceedings, not competition proceedings. They concerned questions of transparency on Apple's part.

THE CHAIR: The same period?

MR PICCININ: Same period of time, yes. But not concerning the issue of substandard performance we are looking at today. As I understand it, there has not been any undertakings about substandard performance.

THE CHAIR: Right, but there is a link between substandard performance and communication, isn't there?

MR PICCININ: No, Sir. I think it is helpful if we turn up the claim form very briefly just to look at this.

THE CHAIR: I set out in the judgement here. I am clear in my mind what the allegation is. What I am unclear about is what the scope of the CMA letter is.

MR PICCININ: The letter --

THE CHAIR: You say the CMA investigation was concerned with transparency, not substandard performance, and then you said, I can show you the claim form in this action. That's not the bit I am -- the question mark over it is whether the CMA were interested in substandard performance, and I was

1
2 putting to you that it must be tied up with the
3
4 transparency issues because its performance was
5
6 presumably improved, then there would not be a
7
8 transparency issue.
9

10 MR PICCININ: I am trying to get the undertakings so I can show
11
12 you.
13

14 MS HOWARD: Set out at 119 and 120 of the claim form. It also
15
16 summarises the CMA's investigation. It's the core
17
18 bundle at tab 2 of 144. It's paragraphs 119 and
19
20 120.
21

22 MR PICCININ: That's right, page 144. Paragraph 119, you
23
24 can see what the investigation is about. There were
25
26 concerns that the people were not warned their
27
28 phone performance could slow down following a
29
30 software update to manage the power demands of the
31
32 batteries. It's not said that there were concerns
33
34 about them slowing down to the extent there would
35
36 then be substandard performance. That's the
37
38 distinction the Tribunal drew in the judgement.
39
40 Then you can see the undertakings that Apple was
41
42 required to give. I won't read them out but again,
43
44 they all relate to the provision of information
45
46 about batteries, unexpected shutdowns, and
47
48 performance management. Of course, you have seen
49
50 what Apple did in relation to that. You have seen
51

1
2 the statements that were made in December 2017, and
3
4 the website and the detailed information that's
5
6 provided. That was the basis for our strike-out
7
8 application in relation to the period after December
9
10 2017. We have done all this. We have provided this
11
12 information, but none of that is about substandard
13
14 performance.

15
16 Perhaps if I can show you paragraph 153 as
17
18 well. My concerns about this goes beyond the
19
20 disclosure application. I do have a concern we are
21
22 going to come back in September about the lack of
23
24 clarity about what we are talking about. Paragraph
25
26 153, which is on page 153 of the bundle. After you
27
28 have the deletion at paragraph 153(a), what you are left with is at
29 paragraph 153(b) and
30
31 paragraph 153(c), which is the specific particularisation of the
32
33 abuse, again doesn't talk about standards. It
34
35 doesn't talk about substandard performance. It just
36
37 refers to the harmful effects on the performance and
38
39 functionality of the iPhone.

40
41 THE CHAIR: This was --

42
43 MR PICCININ: I understand it's now said that actually
44
45 there are some representations that have been made,
46
47 and that the PMF caused the relevant iPhones to
48
49 become substandard relative to those
50
51 representations.

1
2
3 I understand that you said that that now seems
4
5 to be their case, if that's right, then we intend to
6
7 apply to strike that out.
8

9 THE CHAIR: I understand that.

10
11 MR PICCININ: And the reason for that, as I said, is it
12
13 never happened. If it did happen, then the place to
14
15 find it is not in what the CMA thought about any of
16
17 this material, the place
18
19 to find that is going to be in the contemporaneous
20
21 documents or in the account that Mr Crumlin provides in his
22
23 witness statement. We say you should not be
24
25 expecting large volumes of disclosure, Sir, because
26
27 it never happened. That's our position. But there
28
29 is no basis to pry into a regulatory investigation
30
31 which was, on its face, about something else, about
32
33 something less than what we are concerned with here
34
35 and to give to the PCR the same ways of thinking
36
37 about a subject matter that it was investigating.
38

39 So those are my submissions.

40
41 THE CHAIR: I am grateful. Okay.

42
43 Ms Howard, you did say the documents you are
44
45 after, you described as the letter produced by the CMA
46
47 indicating the basis upon which they opened the
48
49 investigations; is that right?
50

51 MS HOWARD: Yes. I can't exactly, whether it was section 231, I

1
2
3 can't remember which provision it is, I can give you
4
5 that reference. But it is a consultation letter,
6
7 when they opened the investigation. It is the
8
9 equivalent to the statement of objections in a
10
11 competition case, where it set out the basis for its
12
13 concerns and the primary facts on which it is
14
15 relying in opening the investigation and putting
16
17 those facts to Apple, which they have the opportunity
18
19 to respond to. I am a bit perplexed with my learned
20
21 friend's description of the investigation because my
22
23 understanding is it is different. It did focus on
24
25 the performance of the phones and the impact to the
26
27 PMF in slowing down the phones. Perhaps rather
28
29 than looking at our version in the claim form, I can
30
31 take you to the actual press release, which is a
32
33 very short document, Bundle B, Page 1005.

34
35 THE CHAIR: Which tab, Ms Howard? Tab 6 maybe? I
36
37 think -- it's in the electronic bundle. It's not in
38
39 the hard copy, for some reason.

40
41 MS HOWARD: It's only in the electronic version.

42
43 THE CHAIR: I've got it.

44
45 MS HOWARD: As your Lordship can see it's
46
47 headed: "Apple pledges clear information on iPhone
48
49 performance."

50
51 It is the CMA press's release dated 22 May

1
2
3 2019, after it accepted undertakings.
4

5 The fourth paragraph starts: "CMA raised" --
6

7 THE CHAIR: Hold on. Fourth paragraph starts.
8

9 MS HOWARD: "Competition and Markets Authority (CMA) raised
10

11 consumer concerns with the tech firm last year after finding
12

13 people were not being warned clearly that their
14

15 phone's performance could slow down following a 2017
16

17 software update designed to manage demands on the
18

19 battery.
20

21 The CMA became concerned that people might have
22

23 tried to repair or replace it because they weren't aware the
24

25 software update had caused the handset to slow
26

27 down."
28

29 Then it talks about the battery.
30

31 Over the page: "Since the CMA raised its concerns,
32

33 Apple had already started to be more upfront with
34

35 iPhone users, but today's announcement locks the
36

37 firm into formal commitments always to notify people
38

39 when issuing a planned software update, if it is
40

41 expected to materially change the impact of
42

43 performance management on their phones."
44

45 So we see there is a direct parallel between
46

47 the allegations that we've made --
48

49 THE CHAIR: You place reliance on the word "materially."
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MS HOWARD: Yes. We consider that the CMA's original consultation letter, which won't obviously just depend on Apple's world view -- the documents we are getting from the US production in the contemporaneous documents is Apple's own view, whereas the CMA as the regulator will have the industry-wide view, including probably representation from consumer bodies or other complainants, which would have triggered the investigations and likely to have been triggered by Apple's appreciation of events, but will be a wider perspective of the impact on users, and that's why we think the letter will be helpful and will contain primary facts that we can rely on in support of our case.

It is one document. There may be an exhibit that specifically sets out its theory of harm in that it clearly exists. It's clearly relevant. It's in Apple's possession. We don't understand, now that the investigation has closed and that there is a confidentiality ring in place, why it cannot be disclosed in short order. shall be given seven days. This can all be done by 12th July. The CMA's being incredibly responsive. It responded in less than 24 hours to our letter. It's been notified, we can update it on the order after today's hearing so it is prepared to make

The CMA

1
2 submissions.

3
4 MR PICCININ: Can I just address you on that press

5
6 release. That was new. If you have it there, at

7
8 Page 1006. My Learned Friend relied on the word

9
10 "materially".

11
12 That is relating to the undertaking, which is

13
14 given that was forward-looking, as in, if in the

15
16 future we have a new performance management tool

17
18 that does materially change and/or impact upon performance

19
20 management, then that's something that we need to

21
22 provide information and transparency about.

23
24 The previous page, which dealt with the CMA's

25
26 consumer concerns, which is saying that performance

27
28 could slow down. It doesn't say anything about substandard

29
30 performance.

31
32 Again, I reiterate the CMA's views on these

33
34 subject matters, on this material is not relevant to

35
36 the user experience because it's just a person's views; it's

37
38 not evidence that is admissible in this Tribunal to

39
40 prove the truth of the matters referred to.

41
42 So it really is quite wrong to be prying into

43
44 this investigation. It's just another fishing

45
46
47 expedition.

48
49 THE CHAIR: Thank you. On the 2 May, this

50
51 Tribunal adjourned the PCR's application for a CPO

1
2 pending further formulation of aspects of this case
3
4 and invited it to make an application for
5
6 pre-certification disclosure. In particular, we held:
7
8

9 33. During the course of the hearing we expressed the provisional view
10 that there appeared to be a lack of evidential support for the pleaded
11 proposition that users were required to accept inferior handset quality,
12 reduced technical functionality and substandard performance for the
13 same premium price. The PCR submitted that Apple may hold relevant
14 documents to make good this aspect of its case. It pointed out that there
15 was an inequality of arms in that Apple was aware of the documents
16 which had been submitted to the French and Californian authorities and
17 yet had refused to provide any disclosure in this jurisdiction in advance of
18 certification, notwithstanding that extensive requests in writing had been
19 made. In the circumstances we invited the PCR to consider whether a
20 preferred course might be to apply for disclosure from Apple and for it to
21 resubmit its application for certification after relevant documents had
22 been obtained.

23
24 34. The PCR agreed to this course. It outlined the disclosure it would
25 seek by reference to a schedule to a letter from Charles Lyndon dated 7
26 November 2022, in particular Request No 3 which sought disclosure in
27 Apple's possession of "data" inter alia on the impact that the PMF had on
28 device performance, equivalent to the Geekbench data. In addition
29 reference was made to a letter of 28 March 2023 in which it was said the

1 witness statements of Mr Crumlin and Mr Coulson evidence that Apple is
2 in possession of testing data. After further discussion we indicated that
3 we were not contemplating extensive disclosure of raw data at this stage
4 but the Tribunal was contemplating disclosure of technical reports.

5
6 35. At the hearing Apple did not object in principle to something akin to
7 pre-action disclosure being provided but was not in a position to make
8 submissions as to proportionality or how readily documents could be
9 obtained. We therefore have given the following directions. That the
10 documents in respect of which disclosure is sought by the PCR be
11 identified by 11 May 2023. That any objections to that disclosure be
12 provided by 25 May 2023. That the parties should thereafter seek to
13 narrow any disputes and in the event that a hearing is required to
14 determine remaining disputes that should take place in the week
15 commencing 26 June 2023.

16
17 As to the scope

18 of disclosure to be provided, we indicated it should
19 be akin to pre-action disclosure and left the parties
20 to reach agreements insofar as they were able in
21 relation to those categories.
22

23 We are reminded of Paragraphs 5.89 and 6.28 of
24 the Tribunal's Guide to Proceedings 2015:
25 5.89 An application may be made to the Tribunal for disclosure before
26 any proceedings have started, where the applicant is likely to be a party
27 to such subsequent proceedings and the respondent from whom
28 disclosure is sought is likely to be a defendant: Rule 62. However, such
29
30
31
32
33

1 disclosure will only be ordered if it is desirable to dispose fairly of those
2 anticipated proceedings, assist in avoiding them altogether or otherwise
3 to save costs. Any such application must be supported by evidence. The
4 Tribunal is likely to order pre-action disclosure only of specific
5 documents or a very limited category of documents, and it will be alert
6 to reject any purely speculative disclosure requests. The applicant must
7 satisfy the Tribunal that there is good reason why the disclosure
8 requested should not come in the usual way after proceedings have
9 started and the applicant has set out its full case.

10
11 6.28 The Tribunal does not encourage requests for disclosure as part of
12 the application for a CPO. However, where it appears that specific and
13 limited disclosure or the supply of information (cf Rule 53(2)(d)) is
14 necessary in order to determine whether the claims are suitable to be
15 brought in collective proceedings (see Rule 79(1)), the Tribunal may
16 direct that such disclosure or information be supplied prior to the
17 approval hearing.

18
19 Apple have been cooperative in agreeing to
20 provide disclosure of a number of classes of
21 documents, which I need not go into because those
22 are agreed.
23
24
25
26
27

28 The remaining dispute between the parties
29 concerns a single document which is the letter
30 produced by the CMA indicating the basis upon which it
31 was to open its investigation.
32
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34

1
2 The CMA investigation is referred to in
3
4 paragraph 120 of the draft Amended Collective Proceedings
5

6
7 Claim Form:
8

9 120. The CMA's investigation concluded in May 2019, with Apple giving
10 an undertaking to improve "[t]ransparency about battery health,
11 unexpected shutdowns and Performance Management". As summary of
12 the undertaking given by Apple is available on the CMA's website. It
13 reads [JG1/8]:

14 1. Apple will maintain prominent information about the existence
15 of, and links to, easily accessible webpage(s) that provide clear
16 and comprehensible information to Consumers about lithium-ion
17 batteries, unexpected shutdowns and Performance
18 Management. The webpage(s) will provide guidance to
19 Consumers on steps they can take to maximise battery health.
20 The webpage(s) will also describe the operation of Performance
21 Management and its impact on iPhone battery and performance.

22
23 2. If a future iOS update materially changes the impact of
24 Performance Management when downloaded and installed on an
25 iPhone, Apple will notify Consumers in a clear manner of those
26 changes in the installation notes for the update.

27
28 3. Apple will provide information to Consumers in the iPhone user
29 interface (e.g., Settings > Battery > Battery Health) about the
30 battery, such as the battery's maximum capacity and peak

1 performance capability. Apple's Consumer-facing staff and Third-
2 Party Partners

3
4 4. Apple will use its best endeavours to ensure its Consumer-
5 facing staff and its Third-Party Partners: (a) are sufficiently
6 familiar with the information in the webpage(s) described in
7 paragraph 1 of this undertaking, and the iPhone user interface
8 described in paragraph 3; (b) communicate such information to
9 Consumers wherever relevant; and (c) refer Consumers to such
10 webpages or interface, where appropriate.

11
12 Mr Piccinin drew together four submissions.

13 He submitted, reminding me of the narrow compass of
14 pre-action disclosure, that although this was a single
15 document, it was at the end of a long line of documents
16 that had been agreed to be disclosed.
17

18 He then said that it was necessary to draw a
19 line at some point and this was the appropriate
20 point at which to draw the line.
21

22 He also made the point that the document will
23 not reveal Apple's thinking, it's a document
24 produced by the CMA, and the CMA's opinions are not
25 relevant, and to that extent it was nothing more
26 than a fishing exercise, and then he also raised
27 questions about timing.
28

29 The consumer protection proceedings concerns
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1
2 questions of transparency, but they are plainly
3
4 related at some level to the phone's performance,
5
6 and that's apparent from what's pleaded in paragraph
7
8 120. My attention has also been drawn to a press
9
10 release dated the 22 May 2019, where reference
11
12 is made to the following paragraph which records: "Since
13
14 the CMA raised its concerns, Apple had already started
15
16 to be more upfront with iPhone users, but
17
18
19 today's announcement locks the firm into formal
20
21 commitments always to notify people when issuing a
22
23 planned software update, if it is expected to
24
25 materially change the impact of performance
26
27 management on their phones."

28
29 So I don't accept Mr Piccinin's submission
30
31 that there's no relationship between the matters that
32
33 were before the CMA and the matters potentially before
34
35 this Tribunal if this action is certified.

36
37 I do think there is some force in Mr Piccinin's
38
39 submission that this document does not necessarily
40
41 record Apple's thinking. It is a series of
42
43 conclusions reached by the CMA, which may well
44
45 ultimately not be admissible in these proceedings,
46
47 depending on their contents.

48
49 Nevertheless, I am mindful of the inequality of
50
51 arms in a class action like this, which is why we

1
2 initially contemplated prior to certification, some
3
4 limited disclosure, and apart from querying
5
6 relevance, no good reason has been advanced as to
7
8 why this document should not be disclosed.
9

10 I will therefore order its disclosure,
11
12 as it is potentially useful in the Proposed Class
13
14 Representative being able to formulate his case for
15
16 the next certification hearing, which is currently
17
18
19 due to be heard in September 2023.

20
21 I have a letter from the CMA, which has
22
23 expressed some concerns that disclosure should not
24
25 proceed without the CMA having an opportunity to
26
27 make submissions. So plainly this order should be
28
29 drawn up promptly and communicated to the CMA, and
30
31 the CMA should be given 14 days in which to respond
32
33 and make any submissions they may wish to, as to why
34
35 this document should not be disclosed.
36

37 The timing for disclosure, I see no reason why
38
39 this document cannot be disclosed within three days
40
41 once the position with regards to the CMA has become
42
43 clear. Do I need to deal with anything further?
44

45 MR PICCININ: There is one other topic which is still in
46
47 dispute, which is the topic of local language documents in the Italian and
48
49 French proceedings.

50 THE CHAIR: Yes.
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MR PICCININ: The reason why I rejected those is that they are inherently unlikely to be relevant to the issues in this case. Insofar as documents are produced in French or Italian, they are not going to be Apple Inc. documents concerning the global picture; they are obviously not going to be documents regarding their position specifically in the UK. They are going to be local documents, concerning the local website or other local issues in France and Italy.

So we say that there is no good reason to require us to review them or to produce them.

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

MR PICCININ: It will take time to have --

THE CHAIR: I am not requiring you to provide translations --

MR PICCININ: To review them and see if they meet the description. They are not written in English.

THE CHAIR: For someone who speaks the language, doesn't take any longer to review them than it does an English written document, does it?

MR PICCININ: They need to liaise with people who are working on the team.

THE CHAIR: You said to me that there are going to be very few documents.

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MR PICCININ: That is not to say that there are few documents on the file, just that very few of them meet the description of what we're looking for. There were thousands of documents on these files.

THE CHAIR on the Italian file --

MR PICCININ: Thousands across the French, the Italian, and English files.

THE CHAIR: Anyway, Mr Piccinin, I can't see a good reason for excluding documents mainly because they happen to be written in another language. If you need more time for those documents in another language, I'm sure the PCR will be sympathetic to that view.

MR PICCININ: I'd have to deal with that as it comes.

THE CHAIR: Anything else today?

MS HOWARD: I think really it's just the timing for the various directions in the order and the hearing date for the CPO application, the timetable to that hearing, that proceeding in September 2023.

THE CHAIR: Yes. It's going ahead, as I understand it?

MR PICCININ: We're in this hearing to direct that to go ahead --

MS HOWARD: Yes. So I think there are concerns about the timing of getting the disclosure and having time to

1
2 review it. We have set this out in our skeleton
3
4 that we don't want to be bound in getting this
5
6 documentation shortly before the hearing and not
7
8 having time if we need to assess the case --
9

10 THE CHAIR: I thought you've just told me it's the
11
12 14th of July or something?
13

14 MS HOWARD: But I am not sure whether Mr Crumlin is going
15
16 to able to review the documents, whether he's going
17
18 to be able to prepare the witness statement by 12th
19
20 July.
21

22 MR PICCININ: It's subject to the point just made that
23
24 the additional things, that is what we are working
25
26 toward.
27

28 THE CHAIR: Yes. And that's two months before the
29
30 hearing? I appreciate it's August, which is not
31
32 ideal.
33

34 MS HOWARD: I think I am at risk in August because I've
35
36 got a hearing tomorrow, which is trying to fix an
37
38 urgent hearing either for August or September. So I
39
40 may have problems for August and early September.
41

42 THE CHAIR: What are you asking for, Ms Howard?
43

44 MS HOWARD: I am
45

46 presuming that we will have liberty to apply when we
47
48 get the materials because if there are materials
49
50 that we'd have to consult with experts or we'd have
51

1
2 to amend the claim, we will need time to do that.

3
4 Obviously the 12th of July is two months before the
5
6 hearing.

7
8 THE CHAIR: You may need to amend?

9
10 MS HOWARD: We may need to amend the claim form.

11
12 THE CHAIR: But you will have the documents, so you
13
14 can put them before the Tribunal.

15
16 MS HOWARD: Yes.

17
18 THE CHAIR: I suppose it's not inconceivable you will

19
20
21 need some evidence around it, but it does not seem
22
23 particularly likely on its face, you will just be
24
25 pleading the case. That would be an opportunity for
26
27 you to do that in terms of timing, and you can
28
29 proceed to make an application.

30
31 MR PICCININ: We have dates between the period of the
32
33 12th July and September. It's slightly more
34
35 orderly. We prefer the 27th July for the PCR to
36
37 serve any amended claim form; so that's just two
38
39 weeks from the 12th. Then we would provide any
40
41 response by 11th August. So that's us working
42
43 through. Then skeleton documents and exchange on
44
45 the 6th September.

46
47 Then we turn up on the 11th September to argue.

48
49 MS HOWARD: Obviously Apple's very familiar with these
50
51 materials, having seen them. It's got two weeks in

1
2 which to make the disclosure, whereas we will have
3
4 two weeks to consider this material for the first
5
6 time, consult our experts, may have to develop new
7
8 expert reports. We don't think the two weeks is
9
10 going to be sufficient for the amended -- we need to
11
12 put in an amended claim form.

13
14 THE CHAIR: How long would you like?

15
16 MS HOWARD: I think we'll need four weeks.

17
18 THE CHAIR: Let's say three weeks.

19
20
21 Mr Piccinin, does that place you in difficulty
22
23 in August?

24
25 MR PICCININ: The difficulty is that we are already in
26
27 August with the dates that I've proposed. That's
28
29 the 11th.

30
31 THE CHAIR: The 6th or the 10th for your skeleton?

32
33 You're telling me there's nothing there anyway.

34
35 MR PICCININ: That's right, but we need to respond to
36
37 whatever it is that they've said because every time
38
39 they have an opportunity to say something, they will
40
41 significantly change their case. So already we've
42
43 only been given two weeks to respond to it.

44
45 THE CHAIR: So if they have an extra week, you have an
46
47 extra --

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49 MR PICCININ: That takes it until the 18th.

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51 THE CHAIR: 18th August to respond?

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MR PICCININ: We have great difficulties with availability. I won't be available in that additional week.

THE CHAIR: Important though you are. I am sure there are other people who can deal with this issue of narrow compass.

MR PICCININ: The problem is that, although of narrow compass, it's incredibly important, because already this is a change of case from the case that we understood we were meeting in May. It keeps developing --

THE CHAIR: I am not sure it is a change of case; I think we have not seen it yet.

MR PICCININ: Already what we've got to -- focusing on this question of substandard -- I still don't know what the standard is -- that it is said to be "-sub".

THE CHAIR: That's the issue, yes.

MR PICCININ: I still don't know what that standard is, and that's not something that comes from our side. That's something that comes from them.

THE CHAIR: You are saying to me quite firmly that they will not move that dial.

MR PICCININ: That's right.

THE CHAIR: You don't need a great deal of time. There may be materials and documents that you are not familiar with, standing on your feet today. I

1
2 appreciate that.

3
4 MR PICCININ: It's precisely my time. It's not a

5
6 question of understanding the underlying material.

7
8 It's a question of the pleading that is going to be put in in August

9
10 by my Learned Friends.

11
12 THE CHAIR: A response? The response will be your

13
14 skeleton, wouldn't it?

15
16 MR PICCININ: We are envisaging you would want from us

17
18 something more akin to a CPO response in relation

19
20 to their new case because we will be saying that it

21
22 should be struck out.

23
24
25 THE CHAIR: I think 14 days is -- to be able to review

26
27 the disclosure, the case -- 14 days is quite tight.

28
29 So I am going to give three weeks. Then it's a

30
31 question of what you want to do with the rest of the

32
33 time.

34
35 MR PICCININ: What about 31st July? They have until the

36
37 end of month, and then we put in our response.

38
39 THE CHAIR: I will give them three weeks. Any further

40
41 directions or we'll just stick with the -- when do

42
43 you want your response? If you need longer?

44
45 MR PICCININ: Yes. We might as well have the extra time.

46
47 THE CHAIR: So an extra week for that response? I

48
49 appreciate that August is not ideal, but it's the

50
51 consequence of having a hearing in middle of

1
2 September, I'm afraid.

3
4 MS HOWARD: Just so I am clear. We are talking about the
5
6 3rd August for our response?

7
8 THE CHAIR: Yes. Any submissions or amendments by the
9
10 3rd August.

11
12 MS HOWARD: And their response?

13
14 THE CHAIR: 18th August.

15
16 MR PICCININ: And then skeletons are on the 6th?

17
18 THE CHAIR: Skeletons are on the 6th.

19
20
21 MR PICCININ: Otherwise I think all that remains is for
22
23 us to draw up --

24
25 THE CHAIR: Yes, we will need the order drawn up. I'd
26
27 obviously have to do it fairly promptly because we
28
29 need to get to the CMA. I am tied up the next --
30
31 well, certainly all day tomorrow, but I will look at
32
33 it on Friday, weekend at the latest, if you get it
34
35 to me, see if there is any dispute. If you can,
36
37 very short, single-page submissions on any areas of dispute.

38
39 MS HOWARD: We will liaise, and if we disagree on
40
41 points --

42
43 THE CHAIR: We should be brief.

44
45
46
47 (Ends 12.34 pm)
48

49