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7 **IN THE COMPETITION**

Case No: 1468/7/7/22

8 **APPEAL**

9 **TRIBUNAL**

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

14 Tuesday 29<sup>th</sup> August 2023

15  
16 Before:

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18  
19 Justin Turner KC

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

23  
24  
25 BETWEEN:

26  
27 **Representative**

28 **Mr Justin Gutmann**

29  
30 **Applicant/Proposed Class Representative**

31 **V**

32  
33 **Apple Inc., Apple Distribution International Limited,  
34 and Apple Retail UK Limited**

35 **Respondents/Proposed Defendants**

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

39  
40  
41 Anneli Howard KC and Stefan Kuppen (instructed by Charles Lyndon Limited) on  
42 behalf of Justin Gutmann.

43  
44 Lord Wolfson KC, Gayatri Sarathy & Lucinda Cunningham (instructed by Covington  
45 & Burling LLP) on behalf of Apple.

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Tuesday, 29 August 2023

(10.30 am)

(Proceedings delayed)

(10.43 am)

**THE CHAIR:** Apologies for a slightly chaotic start. I don't know if you can hear me? I can't hear you, Ms Howard, at the moment. I don't know if you are on mute or if you have a technical issue.

**LORD WOLFSON:** Sir, I can hear you. I hope you can hear me, but I also can't hear Ms Howard. Perhaps I can just use this moment to apologise for the fact I am travelling, so therefore I appear jacket-less but no discourtesy is intended.

**THE CHAIR:** Don't worry about that.

**MS HOWARD:** Are you able to hear me now?

**THE CHAIR:** Yes, Ms Howard, I can. Thank you. I had better read out the livestream warning.

**CAT STAFF MEMBER:** Could the portable VC please be muted, we are getting some feedback.

**THE CHAIR:** Apologies, we are just trying to sort out a problem at this end. I think we might have lost the echo. Can you both hear me still?

**MS HOWARD:** I can hear you, yes.

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

Ms Howard.

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**Submissions by MS HOWARD**

**MS HOWARD:** Is that working? We were having a relay. Is that working now? Can you hear me clearly, sir?

**THE CHAIR:** Yes.

**MS HOWARD:** I apologise for the noise interruptions at our end. So this hearing follows on from the PCR's amended application for pre-certification disclosure. Appearing on behalf of the PCR, Mr Justin Gutmann, are myself and Mr Stefan Kuppen; and on behalf of the respondents, it's Lord Wolfson KC, Gayatri Sarathy and Lucinda Cunningham. I understand that Mr Fredricksen from the CMA wrote to the Tribunal at the end of last week also asking to appear, but I don't know whether he's been admitted.

**CAT STAFF MEMBER:** I am not sure. I don't remember that ...

**THE CHAIR:** That doesn't bring anything to mind at the moment. Is he there?

**MS HOWARD:** Or it may be he is just attending as an observer on the livestream rather than actually appearing.

**CAT STAFF MEMBER:** It was as an observer, not to appear.

**MS HOWARD:** Okay. Thank you.

So on the Order of 4 July the tribunal ordered Apple to make certain pre-certification disclosure pursuant to the PCR's amended disclosure application. The PCR's solicitors wrote to Covington, Apple's solicitors, on 19 July to complain about the disclosure that had been given. On receiving no substantive response, the PCR's solicitors then wrote to the tribunal on 27 July setting out its concerns that Apple had not fully complied with the terms of the Order.

The background is that the disclosure Order was made following the adjourned CPO hearing about the factual basis for the two allegations of abuse, first, that the hidden

1 PMF had adversely affected the performance of various components and metrics of  
2 the affected iPhones so that they were no longer consistent with the premium product  
3 that had been advertised to users; and secondly that users had been materially  
4 prejudiced by the non-transparent introduction of the PMF and the impact on user  
5 experience.

6 Now, as your Lordship will recall, the terms of that Order were hotly contested between  
7 the parties, both at the June hearing and subsequently in the composite draft of the  
8 Order. The PCR is aware that pre-certification disclosure is exceptional. It has been  
9 very careful to limit the scope of the disclosure to proportionate limits and that this is  
10 not the same as a full search and disclosure exercise. That was made very clear in  
11 the transcript of the June hearing.

12 But at the same time Apple is expecting the PCR to make specific requests for  
13 documents in circumstances where the PCR doesn't know what documents are held  
14 by Apple, and both the PCR and the Tribunal are heavily dependent upon Apple's  
15 superior knowledge and the characterisations of its documents.

16 It now appears that Apple has not complied with the Order in several respects or has  
17 adopted a very narrow framing and construction of the Order, which we submit  
18 frustrates the Tribunal's aims of ensuring equality of arms and fairness.

19 Now in many respects the terms and precise wording of the Order were suggested  
20 and framed by Apple at the June hearing, only for it now to turn around and say that  
21 no documents fall within its scope or that its witnesses or its lawyers can't recall any  
22 such documents. The limited disclosure that has been made is so replete with  
23 acronyms and technical data that it's not very easily understood. This is very  
24 unsatisfactory, given that we are only two weeks away from the CPO hearing, and  
25 belatedly now the PCR also has to respond to Apple's strike-out application at that  
26 hearing.

1 So the PCR is faced with this dilemma of what to do. We maintain our position that  
2 the merits of our case are strong. We clearly meet the Pro-Sys test for certification as  
3 set out by the Supreme Court in Merricks, both as regards the evidential basis for the  
4 allegations and the economic methodology, and we are very reluctant to see any delay  
5 to the CPO hearing, which has been set for 11 to 13 September, having already been  
6 adjourned from May.

7 So we are prepared to proceed, but we want to put a marker down about Apple's  
8 failure to comply with the Order and its lack of cooperation. And if the Tribunal  
9 considers it appropriate, we ask for adverse inferences to be drawn in the PCR's  
10 favour at the CPO hearing and in considering Apple's strike-out application.

11 Now, what I want to do is just lead the Tribunal through the various categories where  
12 we say there has been deficient disclosure, but before I do that I want to just make two  
13 headline points.

14 Firstly, Apple has imposed blanket confidentiality restrictions over its witness  
15 statements and exhibits, which make it very difficult for me to make arguments. I can't,  
16 for instance, reveal the number of documents that have been disclosed, or the total  
17 documents that were responsive or address the reasons that have been given for the  
18 lack of disclosure because they are both protected by confidentiality. We can't see  
19 why the reasons or the number of documents are commercially sensitive and merit  
20 protection.

21 Secondly, I would like to just show your Lordship some examples of why we say it's  
22 quite difficult to understand these documents. In Mr Crumlin's second witness  
23 statement he has defined nine acronyms and terms, but we counted there are 18 that  
24 remain unaccounted for in the exhibits to his statement. And it might be illustrative for  
25 me to just turn to a couple of these exhibits to show your Lordship the difficulties that  
26 we are working under.

1 The first page would be volume 1, tab 12, page 392. These documents are on their  
2 side, so it's quite difficult to read unless you are able to turn them around.

3 **THE CHAIR:** I have them. Thank you.

4 **MS HOWARD:** There are a number of undefined terms there that we don't understand  
5 the acronyms. So there's "D2x"; there's the "CLTM", which I think has been defined  
6 but isn't quite clear. Again, we don't understand what the "VDROOP thresholds" refer  
7 to; I think "SMC" is not defined clearly; "PMP". Throughout these exhibits there are  
8 these acronyms that are obviously internal Apple linguistics that we don't understand.  
9 Another example would be at page 396 of the bundle, which again we have -- we know  
10 what "Dubois" means, that's the iOS 10.2.1. But again there are references in that  
11 document to "Whitetail", which we don't understand; "GG SOC"; "UI SOC" -- we are  
12 trying to make educated guesses as to what "UI SOC" means, but we don't know  
13 exactly.

14 Then we also have again "UI", "OTA" and "maximum of 3% in Whitetail", for  
15 example -- these documents are confidential so I am reluctant to sort of reveal any  
16 detail --

17 **THE CHAIR:** You've requested assistance with these acronyms, have you, in  
18 correspondence?

19 **MS HOWARD:** We have not set out these specific acronyms in request because  
20 we've been trying to deal with everything at very short notice. Mr Sinclair has tried to  
21 make educated guesses in his third witness statement. But this forms part of our  
22 general request under paragraph 3 of the Order, where we say that Mr Crumlin was  
23 expected to give an explanation of any detailed technical information or language that  
24 had been provided. It's section 3(b) of the Order, if your Lordship has that.

25 **THE CHAIR:** Yes.

26 **MS HOWARD:** Which included highly technical information, specialist engineering or

1 other internal terminology specific to Apple. So I am just trying to flag these points  
2 generally as an example of the difficulties that we are working under. We have  
3 two weeks to prepare for the CPO hearing. We obviously don't want to waste time  
4 trying to construct arguments on the basis of incomplete information and we are  
5 seeking assistance from Apple to clarify what those terms and information mean.

6 Would it help now if I take you to each of the categories of the Order where we say it  
7 has been deficient?

8 **THE CHAIR:** Yes, of course, I am sure it would, but I have read the skeletons and the  
9 evidence so I have got the outline. Just assist me, what is it you are asking for today,  
10 Ms Howard? What order are you asking for? Because your skeleton seems to  
11 suggest that, subject to drawing inferences, you accept there's little that can be done  
12 at this stage.

13 **MS HOWARD:** What we are wary of -- there are areas where we feel there are  
14 documents that have not been provided which should have been provided. We don't  
15 know what the work is involved in pulling those together. We don't want to re-run a  
16 whole disclosure exercise all over again with searches. We are not asking for that.  
17 We are not seeking all documents, as Apple says, but there are specific categories of  
18 documents that have not been provided.

19 We remain in your hands, to some degree, because we don't want to de-rail the  
20 hearing, nor do we want a deluge of materials right at the last moment which  
21 compromise our ability to prepare. But if there are documents that are defined  
22 categories that are readily available and can be provided, that would assist us.

23 **THE CHAIR:** Right. So, these are documents that you say should have been provided  
24 under the Order and were not?

25 **MS HOWARD:** We tried to highlight examples of documents that we say must exist  
26 and have not been provided, but we don't know what work is involved in pulling those

1 together. We are conscious Apple has already conducted a disclosure exercise, as  
2 Ms McLaughlin set out.

3 **THE CHAIR:** Right. So obviously if you are submitting that there are documents that  
4 haven't been disclosed which fall within the scope of the Order, you will need to  
5 address me in some detail as to what those documents are if I am to make an order  
6 in respect of them, if that's what you are asking.

7 I am not quite sure what you mean by you are in my hands. It's your application and  
8 I will deal with it as fairly as I can. But it is your application, it's not the Tribunal who  
9 are requesting anything at this stage.

10 **MS HOWARD:** Shall I run you through -- I am conscious you have read the skeleton,  
11 so I won't try and repeat those -- the headline points under each category to identify  
12 where we think there are documents that should be readily available and not too  
13 onerous to produce and then I will give you the conclusions on where we are?

14 **THE CHAIR:** Okay, thank you.

15 First of all, on acronyms, Lord Wolfson, subject to details, is there any objection in  
16 principle if acronyms from the documents already provided are identified as to why  
17 Apple could not explain what those are?

18 **LORD WOLFSON:** We are very happy to explain acronyms. We said so in our letter  
19 of 28 July, paragraph 24, so if there are any acronyms and they want to know what  
20 the acronym stands for, they should just ask us and we'll reply in correspondence.

21 **THE CHAIR:** I am grateful. Okay.

22 **MS HOWARD:** Let's turn to the US Production.

23 **THE CHAIR:** Yes.

24 **MS HOWARD:** Your Lordship will recall that there was some debate over the  
25 provision of technical reports and key summaries, which included slide presentations.  
26 Apple was quite resistant to disclosing those at the June hearing, but we had based

1 that terminology on its own description of the key documents in the US proceedings.  
2 There's no magic to that terminology. In the docket 217 document in the US, they said  
3 the technical reports and key summaries were the lion's share of the core documents  
4 related to the PMF --

5 **THE CHAIR:** Sorry, just repeat that -- I apologise, just repeat that.

6 **MS HOWARD:** So Apple itself in docket 217 -- if you want a bundle reference, that's  
7 at hearing bundle 1 at pages 182 and --

8 **THE CHAIR:** 1 -- which tab in the bundle?

9 **MS HOWARD:** I think it's one of the exhibits. I have it as hearing bundle 1, page 182  
10 and 202. It's tab 5, I think. I think the quote about the lion's share is at page 179.

11 **THE CHAIR:** Sorry, tab 5, 18 -- 179?

12 **MS HOWARD:** Page 179. The first paragraph of that document Apple -- I can't tell  
13 what's confidential here and what is not. Perhaps it's safest for you to read it.

14 **THE CHAIR:** Yes, okay. I see. So ... right.

15 **MS HOWARD:** Sir, you will recall --

16 **THE CHAIR:** Right. Yes, sorry, I have that now.

17 **MS HOWARD:** You will recall that the US proceedings, although in a different context,  
18 related to the impact of the PMF and Apple accepted that its disclosure should extend  
19 to technical reports and key summaries in its letter of the morning of the June hearing  
20 and during the hearing itself. A transcript reference, if that helps you, is bundle 2,  
21 tab 49, page 682.

22 **THE CHAIR:** We've got the Order, haven't we? We don't need to go back to the  
23 transcript.

24 **MS HOWARD:** We have, yes. I would like to be able to give your Lordship the number  
25 of documents that Apple has actually disclosed but --

26 **THE CHAIR:** I know what that is, yes. I know what that is.

1 **MS HOWARD:** Yes, but it's just disclosed a handful of documents and the rationale  
2 again is given by Mr Crumlin in his Second Witness Statement, but that's also  
3 confidential as to why those documents have had such a low return. But if that  
4 rationale is correct, then that only begs the question why Apple undertook to carry out  
5 searches for technical reports and key summaries, if the practice was such that there  
6 would be no documents falling within that category.

7 **THE CHAIR:** Well, there aren't no documents, as you point out. There is a small  
8 number of documents and I don't know whether those documents make good your  
9 case or not. I haven't looked that far.

10 **MS HOWARD:** We say the small number of documents is surprising and implausible  
11 when the US proceedings related to the impact of PMF, in reality it works out as a hit  
12 rate of 0.001%.

13 **THE CHAIR:** Yes, but I can't -- I mean, the Tribunal is not in a position to say because  
14 the number is small, that documents within the class have not been disclosed,  
15 particularly given the limitations to the class. There's a cross reference, isn't there, to  
16 paragraph 17.3 of Ms McLaughlin's second witness statement which narrows the  
17 class? And there's also obviously the way the class is drawn, and whereas  
18 I understand the submission one might have -- particularly if you are right in your case,  
19 one might have expected more documents, one can't really go further than that. The  
20 fact there haven't been more documents doesn't mean the Order has not been  
21 complied with. There's no basis upon which I can draw that conclusion, is there?

22 **MS HOWARD:** Well, I think the rationale in paragraph 20 of Mr Crumlin's second  
23 statement, which is --

24 **THE CHAIR:** Let's look at that.

25 **MS HOWARD:** -- hearing bundle 1, tab 12, at page 318.

26 **THE CHAIR:** Yes. Which paragraph?

1 **MS HOWARD:** I've got -- sorry, I am just trying to locate it on my ... paragraph 20.  
2 I am trying to find the page number.

3 **THE CHAIR:** I have it, don't worry. I've got it.

4 **MS HOWARD:** If you are halfway down that page, "Other than the mitigation tables".

5 **THE CHAIR:** Yes.

6 **MS HOWARD:** And see the reason he gives why there are no technical reports or  
7 summaries there. It does look disingenuous they should have put forward those  
8 categories of documents if that was the working practice within the group. We say it's  
9 evidence of lack of cooperation with the Tribunal in formulating the request.

10 **THE CHAIR:** Are we sure it was Apple who put forward technical reports and not the  
11 Tribunal?

12 **MS HOWARD:** No, this came from the wording they used in that docket 217 document  
13 in the US proceedings.

14 **THE CHAIR:** I see.

15 **MS HOWARD:** Perhaps it's best if I take you to that. You will see they created a list  
16 of the relevant key documents in the US proceedings.

17 **THE CHAIR:** Show me that.

18 **MS HOWARD:** Which included -- we didn't include all of them. That's at bundle 1,  
19 tab 5, 196. So three lines down it describes the US Production.

20 **THE CHAIR:** Sorry, so this is correspondence written in the context of the US  
21 proceedings, I take it?

22 **MS HOWARD:** Yes, that's right.

23 **THE CHAIR:** Am I meant to be looking at -- the period that consists of ... yes. I mean,  
24 it's a broader category than the one we are -- it's technical documents relating to  
25 performance management feature, whereas the Order -- sorry, maybe I am wrong.  
26 It's the impact of the performance management feature on the performance of the

1 central processing unit, graphics processing units and other components and other  
2 metrics of performance.

3 Just -- sorry to interrupt you, but I will forget otherwise -- going back to Mr Crumlin's  
4 evidence, and particularly the figure 3 on page 320, do you have the disclosure  
5 relating to that? I understand the mitigation tables -- or I am not saying I understand  
6 them, but I understand they exist -- but there are what might be said to be hard data  
7 in figure 3; do you know where that comes from or how that fits into the picture?

8 **MS HOWARD:** Those tables are taken -- so the references therefore, you'll see the  
9 code names in the two columns to the N61 and the N56.

10 **THE CHAIR:** Yes.

11 **MS HOWARD:** That's to iPhone 6 and the iPhone 6 Plus. Those tables do  
12 come -- there are exhibits which set out the mitigation tables which have various tables  
13 in them --

14 **THE CHAIR:** So that's part of the mitigation tables?

15 **MS HOWARD:** Yes. We didn't have -- I think this is taken out of an email actually,  
16 which your Lordship will find on page 371 of the exhibits to his statement.

17 **THE CHAIR:** I see, yes.

18 **MS HOWARD:** I think we are missing tables for other models of iPhone. We have  
19 now got mitigation tables for the iPhone 6 and 6 Plus because we requested them.

20 **THE CHAIR:** I see, so that's part of that. Okay, that's clarified that. So you do have  
21 technical information?

22 **MS HOWARD:** Yes, we do have some technical information, but, as I said, because  
23 of the acronyms and the codes it's quite difficult to understand the impacts and the  
24 mitigations that have been applied.

25 **THE CHAIR:** I understand that, yes. Sorry, just the email -- sorry, could you give me  
26 the page number of the email again? I closed it.

1 **MS HOWARD:** 371.

2 **THE CHAIR:** 371. Thank you. Sorry.

3 **MS HOWARD:** I think we were missing what are called the "mitigation tables" for the  
4 6 and the 6 Plus. They now were provided on 23 August. They are at tab 45 of the  
5 bundle.

6 **THE CHAIR:** Yes. Yes. I have them in mine. Right. So what else is it -- so you've  
7 got -- again there may be many other documents of course because full disclosure  
8 has not taken place, but what is it in particular that you are chomping at the bit to get  
9 at if you've got some technical information as to the performance with and without the  
10 PMF?

11 **MS HOWARD:** So from the -- it's difficult -- because we've been given the documents  
12 as exhibits to the witness statement and handfuls of documents, it's difficult to match  
13 which documents correspond to which categories of the Order. We've just been given  
14 a dump of documents. So yes, we have the number of documents from the US  
15 Production, which do contain technical information which might shed light on the  
16 performance of the impact on performance. It's not clear to us if there are any  
17 documents that respond to the impact on user experience from the US Production at  
18 all.

19 In fact, user experience is a leitmotif through each of the paragraphs of the Order and  
20 yet there's no actual mention at all of documents that correspond to that category. Our  
21 concerns were that the Order, which was very closely contested, does not refer to  
22 sub-standard performance, it refers to the impact on substantive performance, which  
23 is a very neutral terminology.

24 **THE CHAIR:** Yes, I understand that point, but as I understand Apple's position, they  
25 are not saying they wrote words into the Order. They don't accept that they did that.  
26 They just say, "Look, there isn't much and these are the ones that we are aware of",

1 not wishing to paraphrase paragraph 17.3 of McLaughlin 2, "And here it is." I am not  
2 quite sure why you say it's implausible that that is all there is.

3 **MS HOWARD:** I think the mechanics are that it's not just the documents that might  
4 be in the US Production because we didn't want to carry out a full search, it's the  
5 recollection of the lawyers is. And so the UK lawyers have asked the US lawyers in  
6 accordance with the approach set out in paragraph 17.3 of Ms McLaughlin's second  
7 statement. And it's that --

8 **THE CHAIR:** They've asked Mr Crumlin as well?

9 **MS HOWARD:** Yes.

10 **THE CHAIR:** Who is giving evidence on behalf of Apple?

11 **MS HOWARD:** That's right.

12 **THE CHAIR:** So he's not a random person, he's a person they've put in the seat to  
13 give evidence on this?

14 **MS HOWARD:** Yes, but that process -- I mean, I think it's illustrative that the  
15 mitigation tables for the iPhone 6 and iPhone 6 Plus were not gathered as a result of  
16 that process. They said they didn't fall within the US Production and the lawyers only  
17 recalled them because they were in a privileged document and they extracted them  
18 from the privileged document for us.

19 **THE CHAIR:** Yes.

20 **MS HOWARD:** But it does show that that process set out in paragraph 17.3 has  
21 missed relevant documents.

22 **THE CHAIR:** But there was never any suggestion it wouldn't miss relevant  
23 documents, documents that might ultimately be relevant to the proceedings. It  
24 was -- of course if this matter progresses, you will be entitled to much broader  
25 disclosure. And it would be astonishing if it didn't produce documents that hadn't been  
26 produced at this stage. I am sure you would be complaining vigorously if all you got

1 was the same documents back based on this order.

2 Should we just focus on what you want me to do today? I understand the background  
3 to that and you've made these points well, but did you want to go to the other  
4 categories or did you want to explain what you need?

5 **MS HOWARD:** That was the first category, the US Production and why we say that's  
6 deficient; the second category was the user experience of which the US Production is  
7 only, obviously, one source of documents. But there are clear references in the other  
8 documents to user complaints and yet Apple has refused to provide any details of user  
9 complaints. We say --

10 **THE CHAIR:** I mean, I just -- sorry, if someone complains about their phone and says,  
11 "Look, my phone is rubbish, Apple, I want a refund," I mean that doesn't fall within the  
12 scope at least of 1(a) the Order, does it? That's not a technical report. That's just  
13 a complaint. It's unclear to me at the moment -- I mean, Apple are saying at least they  
14 are not aware, the relevant people aren't aware of any technical reports relating to  
15 experience of users. But we are not -- the Order didn't seek complaints, did it?

16 **MS HOWARD:** It did. I mean, if you look at --

17 **THE CHAIR:** Show me -- sorry.

18 **MS HOWARD:** -- for example, paragraph 1(d) of the Order. Now, do you remember  
19 there was a confidential schedule to the Order? That's not included in the bundle, but  
20 we have sent an email, I think, this morning to the Tribunal to explain that we will be  
21 relying on that confidential schedule, where we expressly incorporated the matters  
22 falling within Mr Crumlin's first statement. And if you look at the first subparagraph,  
23 1.1, which refers to paragraph 12 of his first statement, that refers specifically to user  
24 complaints and feedback or pre-release feedback.

25 **THE CHAIR:** But it's still limited by summaries and technical reports, isn't it -- any  
26 technical reports and/or key summaries that Mr Crumlin knows or otherwise is aware

1 of which relate to matters in paragraph 12. So presumably an internal memorandum  
2 saying, "Look, we are getting a lot of complaints because of the slow performance of  
3 apps following installation of the PMF", would be a key summary.

4 **MS HOWARD:** Yes.

5 **THE CHAIR:** But a letter from someone in --

6 **MS HOWARD:** Perhaps we just say that as part of the user experience documents,  
7 there are references throughout the documents to complaints having been heard. If  
8 I can perhaps just take you to one of those. In one of the exhibits to Mr Crumlin's  
9 second witness statement, so that's bundle 1, tab 12, page 374, there's a list of work  
10 streams and you'll see there is a heading halfway down the page, saying "Actions"  
11 and --

12 **THE CHAIR:** Yes.

13 **MS HOWARD:** -- there is a name of an Apple employee no doubt given responsibility.

14 [X]

15 So you can see there they are analysing complaints that come in through the  
16 Genius Bar. The Genius Bar is the part of the Apple Store that deals with customer  
17 complaints, where people come back with problems with their devices.

18 **THE CHAIR:** Yes. I am familiar with it, yes. But what is the relation to PMF and this?  
19 It doesn't say PMF, does it?

20 **MS HOWARD:** It doesn't say PMF, but they are -- as we know from Mr Crumlin's First  
21 Witness Statement, they are analysing user complaints about the impacts, and  
22 Mr Crumlin himself refers to the fact in his Second Witness Statement that [X]. That's  
23 at paragraphs 12 and 51 of his second statement, if I just pull that up --

24 **THE CHAIR:** Okay. But I mean it seems inconceivable with any mass -produced  
25 product, even of the highest standards, that there won't be a whole string of complaints  
26 about all sorts of things.

1 **MS HOWARD:** Yes, but if there are --

2 **THE CHAIR:** Let's assume for the moment that is common ground that there are  
3 complaints and the question is whether those complaints have been organised in  
4 a summary, which suggests that there is a pattern of complaints associated with the  
5 PMF, for example. It just seems a little bit of a jump to go from the fact that people  
6 are looking at this to suggest there's necessarily a summary document or a technical  
7 report of which Mr Crumlin is aware. As I understand Mr Crumlin's evidence, he says  
8 he's not aware of anything which falls within this category.

9 **MS HOWARD:** There are complaints both from US -- both in the French and the  
10 Italian proceedings there have been references to complaints there, which Mr Crumlin  
11 has acknowledged. We've asked for copies of those complaints, but Apple have said  
12 they won't hand those over until we explain why they are necessary. We want to show  
13 there has been some impact on user experience.

14 **THE CHAIR:** Yes.

15 **MS HOWARD:** Where there are complaints specifically related to app launch speeds  
16 or scrolling problems within that time period immediately before and after the  
17 implementation of the PMF, we say those are closely defined and relevant, and they  
18 are easily accessible and they should be disclosed. They fall within something  
19 relevant to user experience.

20 **THE CHAIR:** Certainly at this stage of the proceedings, I think the Tribunal was not  
21 concerned with the fact that there may be -- and I think it's common ground that  
22 phones perform less well under certain circumstances, in particular as the batteries  
23 get overused or have been used for a long time, or to do with environmental  
24 conditions -- and Lord Wolfson will correct me if I have any of this wrong -- I thought  
25 that was common ground that there's an impact on battery performance due to  
26 environmental conditions and battery age.

1 But the question we are on is a much narrower one, as to whether the PMF is causing  
2 the phone to behave as a sub-standard phone or fail to live up to the representations  
3 that have been made by Apple.

4 I think of course if this matter goes forward, I understand why you will be asking for  
5 broader disclosure, but at this stage I am not sure why, even if this debate had taken  
6 place, why there would have been an Order for consumer complaints, generally.

7 **MS HOWARD:** Well, perhaps -- there was evidence before the French DGCCRF  
8 where [REDACTED] gave evidence -- [REDACTED] evidence that [REDACTED] gave orally was recorded in the  
9 minutes, and part of the question which the DGCCRF asked was about the [REDACTED].

10 **THE CHAIR:** Where is this?

11 **MS HOWARD:** This is at bundle 1, tab 26, page 456.

12 **THE CHAIR:** Hold on. Just give me a second while I get hold of this. Tab 26, page  
13 456. Yes.

14 **MS HOWARD:** Just at the bottom of that page --

15 **LORD WOLFSON:** I am sorry to interrupt, but can we just do this by reference to the  
16 page number because this is a confidential document, rather than read it out. Sorry  
17 to interrupt.

18 **MS HOWARD:** Of course. So it's page 456 and you'll see the last heading.

19 **THE CHAIR:** Which starts -- the third word is "knowledge".

20 **MS HOWARD:** Yes. That's the question that has been asked and then there's  
21 a summary of [REDACTED] response, which I will ask your Lordship to read. But the takeaway  
22 point ... is in the first sentence.

23 **THE CHAIR:** Right.

24 **MS HOWARD:** Then in the second --

25 **THE CHAIR:** So you are saying there must be something -- there was feedback in  
26 December 2017?

1 **MS HOWARD:** Yes, and you'll see in the second sentence there are very specific  
2 implications of the PMF on particular activities and yet Apple --

3 **THE CHAIR:** Yes, well, I don't think that second sentence -- and I stand to be  
4 corrected at a later stage -- but reading it, at the moment I don't see that there is  
5 anything in that inconsistent with the evidence Mr Crumlin is giving in these  
6 proceedings.

7 **MS HOWARD:** No, but obviously there's a different perspective from the technical  
8 side of Apple's -- and the user experience and what we want from the complaints, it's  
9 actually the user perspective of how this is actually impacting their use and enjoyment  
10 of the device and those complaints will add colour to --

11 **THE CHAIR:** So there are the documents in the French proceedings -- are of relatively  
12 narrow compass and --

13 **MS HOWARD:** Yes.

14 **THE CHAIR:** -- you say that the documents that have been produced don't include  
15 anything that supports that sentence?

16 **MS HOWARD:** That's right.

17 **THE CHAIR:** Okay, but you --

18 **MS HOWARD:** In our correspondence we've asked for them and Apple to  
19 acknowledge they exist, but they refuse to provide them on the basis those are not  
20 documents created by Apple and they don't contain any summary or discussion by  
21 Apple employees.

22 **THE CHAIR:** But -- right. Sorry, this is from -- I am just trying to see what this  
23 document is. This is not from Mr Crumlin, this document.

24 **MS HOWARD:** No, this document is from the French authority, the competition and  
25 consumer authority, and this is their minute of basically the witness interview with [X].

26 **THE CHAIR:** Sorry, just show me where I get that from.

1 **MS HOWARD:** In the title it's got a strange translation title, "Report of statement and  
2 taking copies of documents". If your Lordship scrolls further up to the French title,  
3 which is on page 448, the "Procès-verbal de déclaration et de prise de copie de  
4 documents".

5 **THE CHAIR:** Sorry, page 448 --

6 **MS HOWARD:** 448.

7 **THE CHAIR:** -- going back.

8 **MS HOWARD:** It's basically the minutes of the declaration of [§<] evidence.

9 **THE CHAIR:** Yes, I see. I see.

10 **MS HOWARD:** And the inspection --

11 **THE CHAIR:** Sorry, where does it say [§<], just to put it -- yes, I see it in there. I can  
12 see it, yes. Right. Well, you presumably will be saying on the application, "Well, look,  
13 there you have a statement which prima facie seems that the matters in this paragraph  
14 have given rise to complaints in December 2017."

15 **MS HOWARD:** That's right.

16 **THE CHAIR:** So there you go, you can bag that and if Apple choose not to produce  
17 the documents underlying it or are not able to produce the documents underlying it,  
18 you say it should be taken on its face at this stage.

19 **MS HOWARD:** It should be taken on its face. I suppose the position we are coming  
20 from is, at the moment, we think we have sufficient material to meet the Pro-Sys test  
21 on the merits standard. From the comments at the earlier May hearing, we are not  
22 clear precisely what standard is expected of us in terms of demonstrating the evidential  
23 basis for the claim and so --

24 **THE CHAIR:** I think -- sorry, without wishing to sound defensive, I think the Tribunal  
25 was of the view you hadn't reached the hurdle -- applying the low strike-out standard,  
26 nothing different, but you hadn't provided any evidence -- it's obviously written in the

1 judgment. But you hadn't provided any evidence to support the matters relied on  
2 relating to, the sub-standard behaviour. Not that you hadn't produced enough  
3 evidence, you hadn't produced any evidence. I think -- this was all without finally  
4 determining the issue, but that's the Tribunal's concern. So it's not that you have to  
5 hit a high hurdle or higher than any other strike-out, we are well aware of the authorities  
6 in that respect, but you would say, "Well, look, here is something that at least shows  
7 that this is real and impacts users."

8 This isn't addressed in Mr Crumlin's evidence, this statement?

9 **MS HOWARD:** No, not specifically.

10 **THE CHAIR:** Okay.

11 **MS HOWARD:** So I mean this is why we --

12 **THE CHAIR:** But in terms -- obviously how you want to play this is another matter,  
13 but there's nothing I can specifically order because this is not a reference per se to  
14 a document. This may well -- you may well draw an inference there must be  
15 documents underlying this statement, I understand that, but this is not of itself  
16 a reference to the documents. So if there are documents to support this out there, it's  
17 not clear how one could articulate an order without expecting Apple to do further  
18 searching, unless Apple know the documents that underlie this statement.

19 **MS HOWARD:** In correspondence Apple has accepted that these documents exist,  
20 but it's just refused to hand them because it says we have to make a specific request  
21 and we have to justify why they are necessary --

22 **THE CHAIR:** Okay, so you say these fall within 1(d) of the Order; yes?

23 **MS HOWARD:** Yes, and they also fall within the category of user experience  
24 generally, which is covered by 1(a); 1(c); 1(d); and 2(a).

25 **THE CHAIR:** Just show me the correspondence on this -- sorry, Apple's refusal to  
26 comply.

1 **MS HOWARD:** That will be in their letter of -- sorry, I'll just come back on that in  
2 a moment.

3 **THE CHAIR:** We can come back to it, Ms Howard, if that's easier.

4 **MS HOWARD:** Yes, there's been quite a lot of correspondence in the last week. But  
5 in passing as well, I would also record that the CMA consultation letter refers to there  
6 being [§]. Now, Apple says it didn't disclose --

7 **THE CHAIR:** Show me that -- sorry, I need to take this in a little bit more care than ...

8 **MS HOWARD:** Yes. I think we set this out in paragraph 16 of our skeleton. I am  
9 wary of confidentiality.

10 **THE CHAIR:** Just show me the document and I can read it.

11 **MS HOWARD:** It's at -- the CMA is at tab 43 and it's paragraph 22 of that document.  
12 I will just give you the precise reference. It's paragraph 22 and it's page 566, tab 43  
13 of bundle 2.

14 **THE CHAIR:** 566. There's a title, "[§]" Which paragraph?

15 **MS HOWARD:** Paragraph 22. This document is confidential, so I am not going to  
16 read it out. If your Lordship looks at the time period in the penultimate --

17 **THE CHAIR:** Okay, sorry, but this is about UPOs, a complaint about UPOs.

18 **MS HOWARD:** Yes, but if you look at --

19 **THE CHAIR:** This is --

20 **MS HOWARD:** -- it overlaps with the design and the implementation of the PMF so  
21 the --

22 **THE CHAIR:** This is -- I mean, sorry, again people will correct me if I am wrong, but  
23 my understanding is that it's common ground between the parties that UPOs were  
24 a problem and that the PMF was being introduced to address this. But paragraph 22  
25 is elaborating on why -- or at least re-emphasising why UPOs were a problem that  
26 required addressing, and this is about -- am I misreading this -- information provided

1 to the CMA which shows that Apple received [X] complaints about batteries and  
2 UPOs, not about PMFs, or the impact of PMFs or the slow operation of apps, the slow  
3 opening of apps -- so I am not with you so far. And you seem to be undermining your  
4 own potentially better point on --

5 **MS HOWARD:** But if you look at the time period of the period that is being considered,  
6 that overlaps with the design, and the implementation and the testing of the PMF. So

7 **THE CHAIR:** It might well do --

8 **MS HOWARD:** This paragraph is evidence that Apple was monitoring these  
9 complaints and [X], and that it was gathering and monitoring them and yet under that  
10 category in 1 Apple has not provided any documents to the tribunal.

11 **THE CHAIR:** Okay. Well, I am afraid you have not persuaded me on paragraph 22,  
12 Ms Howard, at all. But when was the PMF introduced, remind me?

13 **MS HOWARD:** It was started to be developed, I think, in September 2016 and it was  
14 introduced in January 2017, so this period overlaps over 11 months the period when  
15 the PMF had been implemented.

16 **THE CHAIR:** Right.

17 **MS HOWARD:** Which suggests that UPOs were continuing to happen after the PMF  
18 had been implemented.

19 **THE CHAIR:** Well, but that's not what this case is about. The case isn't about  
20 UPOs -- it's about the impact of PMF.

21 **MS HOWARD:** Yes, but the impact of the PMF did not completely resolve the UPOs --

22 **THE CHAIR:** Is that a pleaded issue?

23 **MS HOWARD:** Yes, it is a pleaded issue because it didn't completely resolve -- it  
24 reduced them, but it didn't completely resolve the UPOs and so consumers continued  
25 to suffer UPOs, notwithstanding the fact the PMF had been implemented.

26 **THE CHAIR:** Going back to my question as to where Apple has said there are

1 documents relating to the feedback, which as I understand starts in December 2017.  
2 At least broadly speaking that seems to be what this sentence -- we've not received  
3 any feedback until -- this is about before, so just focusing on the 'until', is there  
4 anything else you want to point to that suggests that Apple have --

5 **MS HOWARD:** So this was obviously related to the UK whereas the previous quote  
6 was in relation to France, but we would say from the period January 2017 to December  
7 2017 there were complaints being raised in the UK about UPOs, which continued even  
8 after the PMF had been implemented --

9 **THE CHAIR:** Ms Howard, you are pressing ahead with this. You've not said you want  
10 disclosure relating to UPOs; the Order doesn't require disclosure relating to UPOs.  
11 Had you said you wanted disclosure relating to UPOs, I doubt whether it would have  
12 been ordered at this stage.

13 The Orders relate to the PMF and the PMF is not mentioned in this paragraph. But  
14 you have made a potentially far better point in relation to the document at tab 26 where  
15 there is a reference to the PMF and complaints, which may or may not be associated  
16 with that, so that seems a far better point and I feel you are in danger of undermining  
17 it by focusing on paragraph 22 of this letter.

18 **MS HOWARD:** I think -- so putting the French complaints to one side, what we were  
19 seeking was the impact of the PMF on user experience.

20 Now, we have pleaded what we think were various manifestations that the PMF  
21 affected user experience. One was on launch times; one was scrolling; one was use  
22 of high energy gaming and other applications. There's the list in their apology. But  
23 the UPOs also continued, so that was still an impact of the PMF that it didn't actually  
24 mitigate -- fully mitigate the risk of UPOs. And that affected the user experience.  
25 That's the short point we are trying to make, that there is evidence here of complaints  
26 in the UK about ongoing UPOs that continued after the implementation of the PMF

1 and that shows the impact on consumer and user experience.

2 **THE CHAIR:** Okay.

3 **MS HOWARD:** Okay. I think you -- this is the correspondence. I have just been given  
4 a note, you referenced the correspondence that you wanted about -- from Apple's  
5 other complaints. This is at hearing bundle 2, tab 60 at page 791.

6 **THE CHAIR:** Yes.

7 **MS HOWARD:** This is a letter from Covington of 11 August.

8 **THE CHAIR:** Which paragraph?

9 **MS HOWARD:** It's paragraph 7. Again, I won't read it just because of confidentiality --

10 **THE CHAIR:** Let me just read it now. **(Pause)**  
11 Right. Just what were you asking for, sorry?

12 **MS HOWARD:** This was asking for complaints in France or Italy relating to the impact  
13 of the PMF.

14 **THE CHAIR:** But you didn't draw Apple's attention to this statement explicitly?

15 **MS HOWARD:** Are you talking about the UK complaints here?

16 **THE CHAIR:** I know you are talking about UK complaints and I appreciate this is  
17 a document that emanates from France, but assuming that the phones don't change  
18 their behaviour when they are in a different part of Europe, did you raise this specific  
19 issue; did you draw this to Apple's attention --

20 **MS HOWARD:** We did --

21 **THE CHAIR:** -- show me where you did.

22 **MS HOWARD:** Yes, I will need to get our previous letter to this one. I think it's tab 57,  
23 which was our letter of 2 August, page 782, where we refer to user experience.

24 **THE CHAIR:** Paragraph 5, yes. You didn't quite ... I mean, it's not a criticism, but you  
25 didn't quite focus on that passage.

26 **MS HOWARD:** I think it's paragraph 4 of that letter, we do refer to the UK there.

1 **THE CHAIR:** You know, I am not talking about the UK, I am talking about the fact that  
2 you haven't said, "Hey, look, [X] made reference to a change in customer feedback",  
3 or it might be suggested there is a change in customer feedback in December 2017,  
4 which is when the PMF was being introduced. So this is consistent with there being  
5 an increase in customers noticing a difference and by reference to the matters in the  
6 next paragraph, which I won't read out, he must have been in possession of summary  
7 documents in order to give this evidence. You haven't raised that as of yet.

8 **MS HOWARD:** Of course in this letter and the previous letters we were responding  
9 by reference to the disclosure statement that Apple had provided where they referred  
10 generally to --

11 **THE CHAIR:** I understand --

12 **MS HOWARD:** -- a forensic analysis of --

13 **THE CHAIR:** As I say, it's not a criticism, these things have developed, but the way  
14 you put it to me now is not the way it was put in this letter. That's all I am saying, and  
15 so it may be that Apple would wish to address that or come on to that. Okay.

16 **MS HOWARD:** Yes. I just think the key point of the Order is that obviously user  
17 experience applies to the various elements, not just paragraph 1(d) of technical reports  
18 and key summaries, but also pre-existing documents in 1(c) of the Order. And in that  
19 letter we did refer at page 3 of the French report, which sets out that passage, and we  
20 refer to the passage immediately below about the app scrolling and the impact on  
21 games.

22 **THE CHAIR:** In ...?

23 **MS HOWARD:** In that letter of our -- our 2 August letter.

24 **THE CHAIR:** Yes, you have just not referred to Mr Crumlin's statement. You've not  
25 referred to the first sentence of that -- that's all I am --

26 **MS HOWARD:** No, I am just trying to look back --

1 **THE CHAIR:** You haven't referred to it here and you are not saying you've referred to  
2 it elsewhere. I don't think there's --

3 **MS HOWARD:** No, I am just trying to see if we referred to it in our original letter to the  
4 Tribunal or the earlier letter of 19 July. One second, I will just check those. You see  
5 in paragraph 11 of our letter to the Tribunal, we say there's clear reference in  
6 Mr Crumlin's second statement and other documents provided, including the CMA  
7 consultation letter, that there have been complaints. And that's at page 767. If you  
8 look at the footnote, we have referred to those paragraphs there, and specifically  
9 paragraph 22.

10 **THE CHAIR:** 767.

11 **MS HOWARD:** That's paragraph 11 of our letter of 27 July to the Tribunal under the  
12 heading of "User Experience", we set out all of those paragraphs there.

13 **THE CHAIR:** Yes, I think the distinction in my mind, and it may be a bad one, is that  
14 of course there are going to be a whole host of complaints coming from -- and no  
15 disrespect meant to Apple -- for any product -- there are going to be a whole host of  
16 complaints particularly if millions of units are being sold. But what you need, or  
17 potentially need, to support your case is an understanding insofar as how user  
18 experience is impacted by the PMF, by the installation of the PMF. And I think some  
19 of the correspondence and some of the documents you are referring to are far more  
20 general in their description of complaints, but you say here that there is not  
21 any -- there's not room for serious argument that the complaints being talked about on  
22 page 456 of tab 26 are complaints arising from the introduction of the PMF.

23 **MS HOWARD:** That's right, and specifically they seem to -- in the case of the French  
24 complaints -- they seem to be relating to app launch times and scrolling, which Apple  
25 have acknowledged were the two key side effects of --

26 **THE CHAIR:** Indeed.

1 **MS HOWARD:** -- the PMF.

2 **THE CHAIR:** The question is, on the one hand -- I am putting it how you might put it  
3 to me, I'm not putting it to you as the Tribunal's view -- you might say, "Well, look, this  
4 is good enough at this stage for certification because it's reasonable to draw the  
5 inference that consumer experience in the UK is going to be the same as consumer  
6 experience in France."

7 **MS HOWARD:** Yes.

8 **THE CHAIR:** There's nothing about the French market which would expect it to be  
9 different. And Apple simply haven't addressed what Mr Crumlin has said and he hasn't  
10 addressed it in his evidence. So that's one view you might take.

11 The other view -- the other submission you might make is that you need further  
12 documents. This doesn't get you -- it's not sufficient or may not be sufficient at this  
13 stage and you need the documents that underlie this. And insofar as you are pressing  
14 that, what is it that you are requesting? Is it that Mr Crumlin should readdress his mind  
15 to this answer and provide any documents that supported this evidence or relate to  
16 this evidence? I am putting words in your mouth, Ms Howard.

17 **MS HOWARD:** Yes, I am just trying to fast-forward to the CPO hearing where we are  
18 going to be able to show you some tables in pretty colours about the impact on  
19 performance and what this meant for the throttle of this, or that or the other. But we  
20 anticipate the Tribunal is going to say, "Well, what does all this mean in real life? Look  
21 at abstract percentages of X and Y, but what does this actually mean in terms of the  
22 impact on users and theory of harm?" We say that by having copies of these  
23 complaints, whether it's from 1 January to December 2017, will add colour to show  
24 this is an example of how this has affected this particular user, whether they're in the  
25 UK or in France, and this shows the impact and the disappointment --

26 **THE CHAIR:** Ms Howard, to be clear I am not going to order disclosure of complaints.

1 That's just not going to happen at this stage. That would not be appropriate. That  
2 was never contemplated. What was contemplated was summary documents, but if  
3 they are -- I mean, I have not heard from Lord Wolfson yet of course, but if there were  
4 summary documents of which Mr Crumlin is aware, which underpin his evidence ...

5 **MS HOWARD:** That's the category in 1(d) of the Order, but we also say the category  
6 of 1(c) of the Order goes broader than that. It's not just documents --

7 **THE CHAIR:** What do you expect Apple to do? You say Apple says it's complied with  
8 1(c); what order do you want me to make --

9 **MS HOWARD:** It would be --

10 **THE CHAIR:** -- in respect of 1(c)?

11 **MS HOWARD:** It would be for the pre-existing complaints from users relating to the  
12 impact of the PMF that were received by Apple between January and December 2017.

13 **THE CHAIR:** But I am not going to order complaints. That's just not appropriate at  
14 this stage. It could be, I don't know, 100,000 documents of Mr Smith from  
15 Tunbridge Wells saying he's appalled at the state of his phone, it came in a cracked  
16 box, you know. No disrespect to Apple for the quality of their phones, but that's  
17 inevitable there are going to be complaints like that.

18 **MS HOWARD:** Well, no, it would be ones specifically relating to the app launch times,  
19 scrolling and the games, that are recorded either that Apple has --

20 **THE CHAIR:** That's going to be extremely difficult.

21 **MS HOWARD:** DGCCRF that existed or --

22 **THE CHAIR:** That's going to be extremely difficult. Consumers will not be aware  
23 of -- they are not going to write to say, "Look, since the installation of PMF I am  
24 concerned opening this app is too slow." They are not going to be -- there are going  
25 to be much more diffuse documents than that because the consumers don't know  
26 about the PMF, it's your case, and they don't -- and if a consumer writes in and says,

1 "Look, my phone is operating too slowly", I mean, that may be because the battery is  
2 old, it may be because they have been operating it in inappropriate conditions. There  
3 are all sorts of explanations. So one really could only be interested certainly at this  
4 stage in Apple's -- the conclusion that Apple had drawn from the complaints -- or  
5 technical people have drawn from the complaints.

6 **MS HOWARD:** Yes. Well, there are statements within Mr Crumlin's first statement  
7 that they were analysing these complaints and monitoring, and the reference I took  
8 you to, the Genius Bar, also suggests they were monitoring those complaints.  
9 Mr Crumlin now says he can't recall any specific documents. So that may be as far  
10 as we can take it today, which is why we posed this in the alternative, in saying, "Well,  
11 if you aren't prepared to grant further disclosure or it's too onerous at this late stage",  
12 then we'd seek to rely on any adverse inferences that are appropriate for certification,  
13 that there is evidence here of complaints being made that postdate the implementation  
14 of the PMF and for the Tribunal to give appropriate weight to that in circumstances  
15 where we can't present specific complaints at this stage.

16 That's probably about as far as I can take it, if you are content that there has not been  
17 a breach of the Order in that respect.

18 **THE CHAIR:** I am not saying there has been a breach of the Order, Ms Howard, I am  
19 not saying that.

20 Okay, was there anything else -- so we've got documents underlying this statement in  
21 tab 26; we've got acronyms, which I gather there isn't going to be an issue about,  
22 although -- is there anything else, any other orders -- you have your inference  
23 order -- you are requesting me to make today?

24 **MS HOWARD:** Just under paragraph 1(d) of the Order, obviously you will recall that  
25 this was based on Mr Crumlin's recollection of documents hitting each of those  
26 categories in the confidential schedule to the Order. Mr Crumlin has stated he can't

1 recall any of those documents. There was an alternative in paragraph 3 of the Order  
2 that for a statement from another appropriate person within Apple.

3 Now, Mr Crumlin was obviously -- he's a senior executive; he's involved on the  
4 hardware side of the business, if I can explain that about components, it becomes  
5 clear from his witness statement, he's an engineer. It may be he's not the most  
6 appropriate person that had direct knowledge of these various testing user monitoring  
7 and user testing categories within the Order, and whether there is scope for Apple to  
8 be providing a statement from another appropriate person who may have more direct  
9 knowledge, if he's unable to recall any of these categories. We've set that out in our  
10 application.

11 **THE CHAIR:** Okay.

12 **MS HOWARD:** Because it seems -- you know, given his statement, and the amount  
13 of detail that he can recall from those testing phases and the various coordination that  
14 happened across the various teams, it seems implausible that there were no  
15 documents whatsoever falling within any of those categories. And so we have asked  
16 for a statement from another appropriate person, who may not be operating at such  
17 a high bird's eye level that may have closer knowledge of the various categories.

18 I think probably I have made my points on that. There are further points I could make  
19 about the technical language, but I think I have probably made those points and we've  
20 set them out in our skeleton. Unless I can help you further, those are my submissions.

21 **THE CHAIR:** Thank you, Ms Howard.

22 Lord Wolfson, obviously I've read your skeleton argument and the evidence. For my  
23 part, the only point I wanted addressing is the following one, so it's in relation to the  
24 document at tab 26 from the French authority, and in particular on page 456, the  
25 passage we've been looking at.

26 Without drawing any conclusions as to whether Mr Crumlin has complied with the

1 order or not, I am not interested in that at this stage, but given this has now been drawn  
2 to Mr Crumlin's attention and notwithstanding it relates, one imagines, principally to  
3 complaints in France, is there any reason why Mr Crumlin should not reconsider  
4 whether any documents within category 1(d) of the Order may exist in the light of what  
5 he stated in these last three paragraphs, and if there aren't, provide in a witness  
6 statement a short explanation as to why there aren't any documents falling within that  
7 category?

8 **LORD WOLFSON:** I am grateful.

9 **THE CHAIR:** I am sorry, while you are thinking about that, Lord Wolfson, we need  
10 a five-minute break for the transcript writer, if that's okay.

11 **LORD WOLFSON:** Good. Thank you very much, sir.

12 **(11.57 am)**

13 **(A short break)**

14 **(12.02 pm)**

15 **LORD WOLFSON:** Sir, yes, I can hear you.

16 **THE CHAIR:** Good. Let's just check the shorthand writer is there. Have we got  
17 Lord Wolfson?

18 **LORD WOLFSON:** Yes, sorry, my camera was off. Forgive me. Sorry, thank you.

19 **THE CHAIR:** Lord Wolfson, I don't know if my question was clear, the issue I wanted  
20 addressing on was clear?

21

22 **Submissions by LORD WOLFSON**

23 **LORD WOLFSON:** Yes, it was, and I hope you can now see and hear me.

24 The point we are on is not actually a new point. This point has been canvassed in  
25 correspondence between the parties already. Can I just take the Tribunal to where  
26 we have this. We can pick it up at tab 54 in Charles Lyndon's letter of 19 July. The

1 Tribunal will --

2 **THE CHAIR:** Sorry, that doesn't quite --

3 **LORD WOLFSON:** Page 764 --

4 **THE CHAIR:** Sorry, Lord Wolfson, that doesn't quite -- have you got a page number,  
5 a bundle number? That tab may not be right, on my copy at least. Tab 53 possibly  
6 on mine.

7 **MS HOWARD:** 760.

8 **THE CHAIR:** Yes.

9 **LORD WOLFSON:** Okay, I may have a different --

10 **THE CHAIR:** I am with you now anyway.

11 **LORD WOLFSON:** So you should have a table on this page.

12 **THE CHAIR:** Mm-hmm.

13 **LORD WOLFSON:** And if you look at the last row of the table you'll see that that goes  
14 back to the document we've been looking at.

15 **THE CHAIR:** So how do I know that, just by reference to being AJC-2?

16 **LORD WOLFSON:** Yes, and the last line in that table is APLIOSUKCAT00000062;  
17 yes?

18 **THE CHAIR:** Yes, that's -- sorry, how do I tie that in? Yes, okay, I can see that on  
19 the bottom of the page. Yes, absolutely.

20 **LORD WOLFSON:** Now, we've (audio distortion) and if I could invite you to look at  
21 our letter of 28 July, which at least in my tab was tab 56, but it might be something  
22 else --

23 **THE CHAIR:** Yes, I've got that. No, I have it, yes.

24 **LORD WOLFSON:** And if you go, please, to 779 in the bundle, which should have  
25 a paragraph with a small Roman d.

26 **THE CHAIR:** Yes.

1 **LORD WOLFSON:** Now, I am not going to read it out because you'll see that some  
2 of it is confidential, but we've asked Mr Crumlin --

3 **THE CHAIR:** Sorry, how do I know that --

4 **LORD WOLFSON:** We have --

5 **THE CHAIR:** How do I know that's the same passage, that's all? Because this is  
6 three of six, so if we go back --

7 **LORD WOLFSON:** If you go to page back to 26 --

8 **THE CHAIR:** There seems to be different page numbers, Lord Wolfson, that's all.

9 **LORD WOLFSON:** Sorry, I think one of the problems is we got a bundle -- I am going  
10 to come to bundles for the certification hearing -- we got a bundle from  
11 Charles Lyndon's (audio distortion) --

12 **THE CHAIR:** Sorry, I'm having trouble -- Lord Wolfson, you are cutting in and out at  
13 the moment. Sorry if I am interrupting you, I don't mean to, but you are cutting in and  
14 out. But just to clarify what I mean, looking at the internal pages of the letter, on 764  
15 I see the reference to 0062, but that's pages 5 and 6. The statement that we are  
16 looking at is page 3 of 6.

17 **LORD WOLFSON:** Yes. Can I check I have the right reference for a second?

18 **THE CHAIR:** Lord Wolfson, we are having trouble --

19 **LORD WOLFSON:** What I am going to do is I am going to dial in on a different line.  
20 If you just bear with me for a moment.

21 **THE CHAIR:** Of course, yes. **(Pause)**

22 **LORD WOLFSON:** I do apologise. As usual, the tech works until it's my turn to speak  
23 and then it decides to collapse on me, so I am extremely sorry.  
24 I was going to take you to our letter at tab 56.

25 **THE CHAIR:** Yes, I've got that.

26 **LORD WOLFSON:** What I hope was tab 56 and at page 779 where -- let me start -- it

1 should be under paragraph 26 of the letter.

2 **THE CHAIR:** Yes.

3 **LORD WOLFSON:** Where we respond to that table and I was going to take you to  
4 paragraph small Roman d.

5 **THE CHAIR:** Yes.

6 **LORD WOLFSON:** Now, what I understood before my comms failed was that you  
7 were saying to me that that responds to part of the table which is a different bit of the  
8 DGCCRF material than the bit we are now on.

9 **THE CHAIR:** Mm-hmm.

10 **LORD WOLFSON:** What we have confirmed is there are no complaints to us on the  
11 French file. But if -- I mean, if the only point which -- where we get to at the end of this  
12 hearing today is we should write because -- frankly I don't think, if I may say, we should  
13 be having to file witness statements at this stage, but we are very happy to write to  
14 deal with this point, if that is where we get to and you would invite us to write on this  
15 point -- and obviously if we don't, then no doubt Ms Howard will make appropriate  
16 submissions in a couple of weeks' time -- well, we'll have a look at the point and we'll  
17 write. I think know what the answer will be, but we are very happy to look at that point  
18 again.

19 But --

20 **THE CHAIR:** Why couldn't that be dealt with in a short statement from Mr Crumlin  
21 saying that he is not aware of any -- so the Order I was contemplating will be effectively  
22 taking 1(d) from the Order as we've got it, any technical reports and/or key summaries,  
23 the language you've got already that Mr Crumlin knows or otherwise is aware of which  
24 relate to the matters referred to in those three paragraphs under ... or which relate to  
25 the feedback referred to in those three paragraphs. That will essentially be the Order  
26 and insofar as he's not aware of any, he should confirm that in a witness statement. Is

1 | there any difficulty with that?

2 | **LORD WOLFSON:** The difficulty with that is this -- let me put it this way. This is not  
3 | --the easiest time because one of our products is about to be launched -- at least there  
4 | are reports in the press to that effect -- and therefore Mr Crumlin does have a rather  
5 | busy schedule. So I would invite you to allow us to do it by way of a letter, provided  
6 | we confirm specifically in the letter that we've spoken to Mr Crumlin and we are doing  
7 | it on his behalf in the circumstances given there's now two weeks before the  
8 | certification hearing, I'd invite you to allow us to do it by way of a letter --

9 | **THE CHAIR:** Why is it going to be -- in either event you are going to have to speak to  
10 | Mr Crumlin, and we are literally talking about a paragraph or two from Mr Crumlin,  
11 | which will be the same as the contents of any letter. He should already have  
12 | addressed his mind to such matters. If he -- he can either confirm there isn't anything  
13 | and give a brief explanation as to why there isn't anything, notwithstanding his  
14 | reference to feedback in this sentence, or alternatively, if on reflection he does have  
15 | a document in mind, then he can refer to that. Or he may say, "Look, there are  
16 | documents, but I can't lay my hands on them at the moment without carrying out  
17 | searching", any of those possibilities. But I think it would be more satisfactory, given  
18 | that the Order required Mr Crumlin to set out details in his evidence anyway, that he  
19 | should do that.

20 | **LORD WOLFSON:** Well, I have made my submission on that. I mean ultimately it's  
21 | a matter for the Tribunal, so I don't want to repeat what I have previously said.  
22 | But can I -- so that I hope would be the way to deal with what seems to be the main  
23 | understanding point. Can I just pick up a couple of other points though, but I will be  
24 | brief because I am not going to rehearse what we've set out in writing.

25 | **THE CHAIR:** Of course.

26 | **LORD WOLFSON:** There was one other point which my learned friend made to

1 identify which paragraph -- which documents are responsive to which paragraphs of  
2 the Order. In principle -- if that's something that's really needed -- I'm not really sure  
3 I understand why it's needed -- if it's really needed we'll do it, but I didn't really  
4 understand why it's needed. The issue to me seems to be the documents -- the  
5 number of documents which have been provided rather than whether they are  
6 responsive to this paragraph or that paragraph of the Order. But that's my response  
7 to that.

8 The other point though is a suggestion was made that -- if we look at the Order at  
9 tab -- at least my tab 48 -- that we should be having a witness statement now from  
10 somebody other than Mr Crumlin.

11 **THE CHAIR:** You don't need to address me on that, Lord Wolfson.

12 **LORD WOLFSON:** I am grateful. Thank you.

13 Now, because I am now on my, appropriately of course iPhone, I just need to look at  
14 my iPad just to check if I may with my team that there is nothing else I should say.

15 Yes, I think this may go to the point as to whether we should have a letter or a witness  
16 statement and I should just make this point. Having looked at it, we were responding  
17 at that paragraph (d) -- that Roman (d) on our letter which I showed you, we were  
18 responding to the point that Apple acted "to respond to user requests".

19 Now, that is the end of the quote at the last row of the table on page 771. That is not  
20 quite the same point as the point we are now on, although it is a very similar point.

21 What I would say is that my learned friend's solicitors didn't raise the page 3 point, if  
22 I can call it that, until now. So whether one is looking at a letter or a witness  
23 statement -- my learned friend shakes her head; no doubt she'll have the reference as  
24 to where that particular point was referred to. But one of the problems this morning is  
25 we have been jumping from Italy to France and France to Italy, and actually this  
26 particular point, so far as we understand it, has not been raised squarely until now.

1 That ultimately may go nowhere because the Tribunal may think even if it was just  
2 raised squarely for the first time this morning, it should still be responded into a witness  
3 statement rather than a letter. But that is a factor, I would suggest, which goes to the  
4 question of whether it should be responded to in a witness statement or a letter.

5 Can I, with the Tribunal's indulgence, just make two very, very short other points. First,  
6 anything to do with adverse inferences -- there has been a lot spoken this morning  
7 about adverse inferences. I was proposing to respond to all of that insofar as  
8 necessary on 11 to 13 September, so the fact I am not saying anything about it today  
9 doesn't mean there won't be a big issue between the parties on it. There will be. Point  
10 one.

11 **THE CHAIR:** Of course. Of course.

12 **LORD WOLFSON:** Yes. Point two. Without wishing to raise the temperature, words  
13 like "implausible" when referring to Mr Crumlin's witness statement were used, I think,  
14 twice this morning and the word "disingenuous" was used once. Now, those words  
15 are dangerous words, may I suggest, in a public hearing. And it is fair for me to say  
16 Mr Crumlin is a very senior person. He has made a witness statement. That sort of  
17 language of disingenuousness is an attack, we say, on him personally and his  
18 personal honesty. And if this wasn't a public hearing I wouldn't respond to it, but that  
19 sort of term on reflection perhaps should be reconsidered.

20 I won't say any more about it now, but we are concerned as to some of the language  
21 in the witness statement and, to a lesser extent, in the skeleton, but certainly that word  
22 "disingenuous", which really means, "You are saying A when you know the position is  
23 B", that is an attack on his personal honesty.

24 Subject to that, I wasn't going to say any more, unless there is anything I can help the  
25 Tribunal with.

26 **THE CHAIR:** No. I am grateful, Lord Wolfson.

1 So, Ms Howard, I don't know if there is anything -- I was inclined to order the following  
2 just so that you can have something to bat against, so to say -- to order disclosure of  
3 any technical reports, so this is taking the language from 1(d) of the Order at this stage  
4 and/or key summaries, including where in the form of slide presentations, and Mr  
5 Crumlin knows or is otherwise aware of, which relates to the feedback to which  
6 reference is made -- and we'll have to find a way of identifying this passage, the  
7 three paragraphs on the bottom of page 3.

8 And secondly, that Mr Crumlin should provide a witness statement confirming that he  
9 has identified any such technical reports and/or key summaries and to explain briefly  
10 the basis upon which the statement made -- the basis upon which that statement was  
11 made, that's the statement to which we've identified in the letter, so explain briefly the  
12 basis upon which that statement was made.

13 I don't know how long he requires -- of course bearing in mind we are talking about  
14 documents he knows or is otherwise aware of, I don't know how long he requires to  
15 do that.

16 Lord Wolfson, I would hope it could be done swiftly. Where are we? We are on  
17 Tuesday, so by close of business on Friday, and the witness statement --

18 **LORD WOLFSON:** Yes, I mean it's going to depend -- I am sorry to interrupt -- it's  
19 going to depend on his availability and I just don't know, We've heard what has been  
20 said. We'll make enquiries as to his availability. We will contact Charles Lyndon as  
21 soon as we know with a proposed date. Can we leave it this way, if the parties can  
22 agree a time for the witness statement, we'll do it to that and we'll inform the Tribunal;  
23 if we can't agree, we'll inform the Tribunal and no doubt the Tribunal will then impose  
24 a date. But can we do it that way round, once we've found out what his availability is?

25 **THE CHAIR:** Ms Howard, are you content with that?

26 **MS HOWARD:** Sorry, that seems sensible, we can pursue that cooperation and we'll

1 | come back if there's no agreement, but hopefully we'll agree.

2 | Just for the record, we do think a witness statement would be helpful. Apple has

3 | addressed this point already in correspondence in their letter of 11 August that I took

4 | your Lordship to it at page 791, so they've obviously spoken to Mr Crumlin already,

5 | but we do think to have a witness statement with a statement of truth will

6 | support -- give us the necessary support we need.

7 | **THE CHAIR:** In terms of acronyms, do I need to make an order? Lord Wolfson,

8 | you've indicated Apple will cooperate promptly with the identification of relevant

9 | acronyms; Ms Howard, is there a need for an order?

10 | **MS HOWARD:** Shall we follow this up in correspondence because what I don't want

11 | to be doing is tilting at windmills at the hearing where we say -- I think we can try and

12 | take this forward consensually with cooperation between the parties.

13 | **THE CHAIR:** That seems very sensible. Was there anything else from the parties'

14 | perspective that you wish to raise? I had a couple of matters I wanted to raise.

15 | **LORD WOLFSON:** I have a point about bundles for the certification hearing, but I am

16 | very happy obviously to take that after the Tribunal's point.

17 | **THE CHAIR:** Yes. So we may be overlapping. First of all, a request. We had a letter

18 | this morning -- I am certainly very appreciative of the bundles provided -- suggesting

19 | all the tabs get moved the day of the hearing, so please can we avoid moving tabs. If

20 | there's a need to add anything, just use a sub tab or something sensible.

21 | The other thing I wanted to mention, so you have made an application to strike out,

22 | Lord Wolfson; is that right? Apple have made an application or have you indicated

23 | you are going to?

24 | **LORD WOLFSON:** Well, it was on the table last time.

25 | **THE CHAIR:** It was but ... I wasn't sure if it was formally made or whether it needed

26 | to be ...

1 **LORD WOLFSON:** I didn't understand that it needed to be amended in any way, but  
2 if it does, then we'll do it, but we should proceed on the basis there will be an  
3 application to strike out.

4 **THE CHAIR:** Right. Confidentiality, I have to say I am alarmed at the -- I share  
5 Ms Howard's concerns -- I am alarmed at what seems to be confidential. This is old  
6 technology. I appreciate there may be one or two isolated nuggets which are  
7 confidential, but certainly the reason for confidentiality shouldn't be because it is  
8 advantageous from a litigation tactics point of view to keep things separate between  
9 tribunals. I hoped that wouldn't be the reason. We are clearly going to have to look at  
10 this technical material for the purpose of the next hearing and it's going to be highly  
11 unsatisfactory if we have to write a judgment that is not in the public domain.

12 This is obviously an important matter which either affects or doesn't affect tens of  
13 millions of users in the UK and I would invite you to really take a firm view on what is  
14 confidential with Apple if possible, otherwise we may have to deal with this as a matter  
15 of argument at the next hearing.

16 **LORD WOLFSON:** Yes. We will obviously look at that again in the light of what has  
17 been said. However, some things which were said to be confidential, for example, are  
18 not. This morning, for example, I think at one point it was said the number of  
19 documents which we've produced is confidential. Well, that's actually in our skeleton  
20 in unredacted form. So it may be that some things are thought to be confidential which  
21 are not, but we are very happy obviously to look at that.

22 **THE CHAIR:** The whole of Crumlin 2 is confidential and I have to say I can't really  
23 think of anything that's confidential in it. Even the performance of an iPhone 6,  
24 presumably anyone can measure the performance of an iPhone 6, leaving aside the  
25 fact it's not exactly the cutting edge of technology these days, so I would have thought  
26 there's very little information that needs to be confidential. Obviously that's just an

1 off-the-top-of-the-head observation and there may be technical reasons I am unaware  
2 of, but that needs looking at.

3 **LORD WOLFSON:** Sure, we are very happy to review that.

4 **THE CHAIR:** Okay. In terms of materials for the hearing on whenever it is, the 10th or  
5 11th, presumably subject to new material emerging there are going to be no additional  
6 witness statements or ... everything is in place and when do we have -- have we got  
7 an order for bundles, and skeletons and so forth? I think we have.

8 **LORD WOLFSON:** We've got an order for bundles in the sense of the final bundle  
9 being produced and also for skeletons. But what I wanted to raise was whether we  
10 could put in place a timetable because in the past there's been a little bit of difficulty  
11 with providing indexes in advance agreeing them, et cetera.

12 We wrote to Charles Lyndon on 24 August. I don't need to go through the details of  
13 the letter, but what we proposed was the following timetable, which is that they would  
14 share draft indices for the bundles by 4pm on the 30th, which is tomorrow; we would  
15 share amendments to these indices on a rolling basis by 4pm on the 31st; we would  
16 get drafts of the bundles, i.e. confidential and non-confidential, by 10am on the 4th,  
17 that's Monday; we would respond by 4pm the following day, that's Tuesday, the 5th.

18 If we requested, amended bundles would be shared by 4pm on the following day,  
19 that's the 6th, and we'd obviously respond pronto, but subject to any final amendments  
20 the filing of the hard copies and the electronic versions would be done by 10am on the  
21 7th.

22 And that's the bit that's already in the Order. So the 10am on the 7th is in your Order  
23 of 4 July at paragraph 8. What I was suggesting was --

24 **THE CHAIR:** Sorry, can I just pull that up -- so where do I find that Order?

25 **LORD WOLFSON:** It's in volume 2, I think. Yes, it's at page 601 in my bundle, under  
26 "Further Directions".

1 **THE CHAIR:** One second. Yes. Yes, I've got that.

2 **LORD WOLFSON:** So what the Order actually deals with in a hard sense are the  
3 skeletons at paragraph 7 for 6 September and the bundles at paragraph 8. What I was  
4 suggesting -- and it may be that having looked at our letter as Ms Howard can agree  
5 what we've suggested, but what I was suggesting was a lead-in to make sure that we  
6 hit 7 September and it's not all, you know, a complete bun fight on the afternoon of the  
7 6th, i.e. we get things in good time.

8 None of this is meant to be controversial or difficult --

9 **THE CHAIR:** No.

10 **LORD WOLFSON:** -- but we just want to make sure we have it in good time so we  
11 get a draft and we can comment.

12 **THE CHAIR:** Ms Howard, that seems sensible, have you any objection to that?

13 **MS HOWARD:** I think that is sensible. The one caveat is authorities because  
14 obviously you don't necessarily know the authorities bundle until the skeletons.

15 **THE CHAIR:** Yes.

16 **MS HOWARD:** But if there's a way of coordinating those in advance, we will, but  
17 hopefully we can reuse much of the bundles we have at the moment.

18 **THE CHAIR:** Okay, I will take that as agreed between the parties and I won't make  
19 an order to that effect. I think that -- but it's helpful to have ventilated that.

20 **LORD WOLFSON:** I should just say that my learned friend may not have the letter to  
21 hand and I am not complaining that she doesn't, but at paragraph 3, which I haven't  
22 read out, we've made a similar suggestion for the authorities bundle. So again, having  
23 listened to what my learned friend has said, I am sure we can agree it and if the  
24 Tribunal leaves it to us. I just wanted to raise it to make sure there was no  
25 disagreement in principle as to this and how it can all work.

26 **THE CHAIR:** Yes, okay. What are we doing? Are they all hard copy bundles or are

1 | some electronic? How is it? Authorities are electronic, are they, or are we having  
2 | hard copy authorities? It would be useful to have, I think, hard copies of any principal  
3 | authorities that we are going to crawl over in some detail. If it's just the odd paragraph,  
4 | then --

5 | **MS HOWARD:** I think if we do double and then that caters for everybody's personal  
6 | preferences, hard and soft, and then people can use whichever one they prefer.

7 | **THE CHAIR:** Okay. Very good.

8 | **MS HOWARD:** Just to clarify one point. Obviously we've not responded to the  
9 | strike-out application with a witness statement or anything. We were proposing to do  
10 | that in our skeleton. We've also received these new mitigation tables which came after  
11 | the deadline for our responsive evidence. We are not proposing to put in a new  
12 | witness statement on those mitigation tables. We were proposing to deal with that in  
13 | argument, if that's permitted.

14 | **THE CHAIR:** Yes. Yes, of course. Of course. Yes.

15 | **MS HOWARD:** Thank you. Anything else?

16 | **THE CHAIR:** No, thank you, everybody. Sorry for the technical hitches.

17 | **LORD WOLFSON:** Yes, I am sorry for my end.

18 | **THE CHAIR:** Costs. Are we reserving costs on this, or costs in the case or what are  
19 | we --

20 | **MS HOWARD:** I assume it's costs in the case.

21 | **LORD WOLFSON:** Well, I actually thought -- if we are going to have a discussion  
22 | about costs, I think can we order today, please, costs reserved? Of course that doesn't  
23 | prevent my learned friend at the end asking for the costs to be costs in the case, but  
24 | in my submission it wouldn't necessarily follow that the costs of today would be costs  
25 | in the case. I think that's all I want to say today.

26 | **THE CHAIR:** We'll reserve them to the strike-out application or beyond that?

1 **LORD WOLFSON:** Well, I think reserve them to be dealt with together with the costs  
2 of the certification hearing, which include the costs of the strike-out --  
3 **THE CHAIR:** Yes, sorry, you are quite right to correct me.  
4 **LORD WOLFSON:** -- reserve the ability for both sides to make any arguments they  
5 wanted, that's all I am seeking to do.  
6 **THE CHAIR:** Very good.  
7 Ms Howard, are you content with that? That seems an appropriate order to me.  
8 **MS HOWARD:** Yes.  
9 **THE CHAIR:** Okay. Thank you, everybody.  
10 **LORD WOLFSON:** Thank you.  
11 **(12.36 pm)**  
12 **(The hearing adjourned)**  
13