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5 **IN THE COMPETITION**

Case No: 1527/7/7/22

6 **APPEAL**

7 **TRIBUNAL**

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

12 Wednesday 10th July 2024

13
14 Before:

15
16 Ben Tidswell
17 (Sitting as a Tribunal in England and Wales)

18
19
20 BETWEEN:

21 **Class Representative**

22
23 **Alex Neill Class Representative Limited**

24 **V**

25 **Defendants**

26 **(1) Sony Interactive Entertainment Europe Limited; and**
27 **(2) Sony Interactive Entertainment Network Europe**
28 **Limited**

29
30 -and-

31 **Interveners**

32
33 **Competition Markets Authority**

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

36
37 Robert Palmer KC & Antonia Fitzpatrick for Alex Neill Class Representative Limited
38 (Instructed by Milberg London LLP)

39
40 Daniel Beard KC & Charlotte Thomas for Sony Interactive Entertainment Europe Limited
41 and Others (Instructed by Linklaters LLP)

42
43
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1 **Wednesday, 10 July 2024**

2 **Proceedings**

3 **(2.04 pm)**

4 **THE CHAIRMAN:** [Audio starts here] -- I have looked at one or two other items in the
5 supplemental bundles, but I am not really up to speed, for example, with the disclosure
6 table, the updated disclosure table or indeed the correspondence about that or
7 confidentiality protections. I don't know if that has been the subject of correspondence.
8 So just so you know, I am relatively cold on those subjects, but I am reasonably warm
9 on the Redfern and the rolling disclosure, and of course the timetable.

10 **MR BEARD:** Well, I think on the confidentiality issues, I think we can probably park
11 those for the moment. There is correspondence about them. We can come back to it
12 if Mr Palmer has issues. But there is an exchange going on about that at the moment
13 and we will seek to resolve it between the parties.

14 In relation to the disclosure issues, I think as anticipated most of the issues that arise
15 on the updated disclosure schedule get effectively swept up by material covered in the
16 Redfern schedule and in relation to the Redfern schedule, as I say, what we have been
17 trying to do is either give indications of where we have got to and when we can update
18 or, by reference to this letter, what we can actually do by when.

19 **THE CHAIRMAN:** Yes. I think that is helpful. I should say straightaway that it is clear
20 that the parties have made good progress and there has been a sensible and
21 cooperative approach and I am very grateful for that. Thank you very much.

22 I think just on that point about the disclosure table, I have no objection however you
23 want to run the discussions between you about that. I do however have a distinct
24 preference for having one source of analysis when it comes here. So, if we are going
25 to have any other items floating around, they need to find their way into the Redfern
26 schedule in some way. I don't really want to be working off --

1 **MR PALMER:** Yes. Sir, can I just clarify what we have done on that approach
2 because it is not right to say that everything has been swept up into the Redfern.
3 Everything we were proposing to deal with today has been swept up into the Redfern.
4 There are other items of disclosure in the updated disclosure table which will need to
5 be dealt with in due course and no doubt could be the subject of a Redfern schedule
6 in advance of the next CMC to deal with them.

7 But what we have tried to do is isolate the economic disclosure which could be more
8 easily dealt with sooner rather than later and include that, as it were, in the agenda
9 today. So, to that extent, that much has been included in today's Redfern.

10 **THE CHAIRMAN:** Yes. That is helpful, Mr Palmer. In a way, that is really a matter
11 for you as to how you keep track of what the issues are between you and how you
12 want to do it. What I would find most helpful is what you have done actually, so thank
13 you. But to have before me where there are disputes, a Redfern style table that sets
14 them out and actually to have that as clean as possible. So if there are things that
15 have been resolved then they can come out of it. I appreciate there are reasons why
16 they are in there now and it is helpful to see them. But for the next round, I don't want
17 the Redfern schedule to turn into 100 pages because actually, it should only be the
18 things that are live that need to be discussed here.

19 So how you keep track of the rest of the disclosure discussions between you is entirely
20 a matter for you and I don't want to try and (inaudible) that, but it would be helpful to
21 have that focus when we have disputes.

22 Shall we jump into the Redfern straightaway then? What I would really like to do is
23 just to get an overview and work out what we do need to do today. As I think we have
24 established, it has obviously made a lot of progress which is very good. I had to get a
25 fair way into it before I found anything that suggested that there was any difference of
26 approach, let alone disagreement. So how is the best way of doing it? Mr Palmer, do

1 | you want to --

2 | **MR PALMER:** Sir, shall we start with request 1 and then work our way through it?

3 | Obviously, request 1 deals with technical descriptions relating to the process of digital
4 | distribution and we have split that down into a number of categories. Here, as with
5 | many of the categories section 2, which relates to technical requests, there can be
6 | a difference between DevNet materials -- that is the materials which are routinely
7 | made available to publishers and developers and gamers for their purposes -- and
8 | Sony's internal documents.

9 | One of our consistent themes is that we need the internal materials as well as the
10 | external facing materials as well, because insofar as we are going to develop our
11 | counterfactual to explain how in the counterfactual digital distribution from third parties
12 | would have been achieved, we need to know about Sony's internal processes, not just
13 | that part of it which they need to disclose to developers and publishers.

14 | So we anticipate that the material which is available on DevNet can be readily easily
15 | identified and disclosed relatively soon. It may well be that the main debate for today
16 | on that is what is contained in the letter which we received about 40, 45 minutes ago,
17 | indicating that some of the DevNet materials could be disclosed in two months' time,
18 | but the rest only by December and no indication that any internal materials can be
19 | disclosed before December.

20 | We are frankly surprised by that, because these materials are routinely made available
21 | to developers and publishers and our first suggestion was to simply give our expert
22 | access to DevNet. That was resisted by Sony, because there will be other irrelevant
23 | materials on DevNet as well. We take that point, but we reserved our position if
24 | disclosure was not timely.

25 | At the moment, we don't begin to understand the distinction that Sony have drawn
26 | between categories 1A to B and D to I, on the one hand, and 1C, and 2A to B and E

1 and 2C, D and 2F through to K, which are excluded until December, it seems. So
2 although there is broad agreement that all of this is going to have to be disclosed
3 eventually, we see no reason why those DevNet materials should not be disclosed this
4 month, along with many of the other things which are currently proposed to be
5 disclosed in two months' time by September.

6 **THE CHAIRMAN:** Just before we drift into timing -- that is helpful, Mr Palmer. Just
7 before we drift too far into timing, I am conscious I have put Mr Beard off his
8 explanation of the letter and I think it would be helpful to get to that when we get to the
9 timing. But before we do timing, I just want to understand what is not a timing issue,
10 if one can put it that way. I think, broadly speaking, almost everything is subject to
11 a fairly standard response from Sony and I am looking -- I think the first time this comes
12 up is at 2A and then it repeats itself in quite a number of places.

13 I think here particularly we are getting into the response that Sony says: well, the
14 material you want, sure you can have what is in DevNet, but if you want material
15 beyond that there are difficulties both in terms of the scope of it, the location of it and
16 the likely language of it. Actually it might be better for us to give you a statement plus
17 the easy to reach documents, which are DevNet and possibly some other brands.

18 Now, I suppose that clearly gives rise to a timing and sequencing issue in its own right.
19 But I took from the CR's response in relation to those points that you are broadly
20 accepting of that approach, subject to a clearly repeated mantra that you maintain your
21 request for documents. I would just like to explore with you, are you saying that you
22 are accepting what they are offering but you are pursuing some form of order now or
23 are you saying that you accept what they are offering and when you have seen it, you
24 may resurrect specific requests if it turns out not to give you what you need.

25 **MR PALMER:** Yes. Well, the devil is in the detail, as you will readily understand, sir.
26 What concerned us about those offers of information statements, disclosure

1 statements, was in each case there is said to be high level information, without any
2 indication of what that actually means. It is difficult to judge in advance whether those
3 statements, when they are produced, will contain sufficient information, which is why
4 each time we have indicated: well, they have to be sufficiently specific to tell us what
5 we need to know. Each time we have also indicated that we are going to need the
6 internal documents, in essence, because we are going to need the detail.

7 But what Professor Pietzuch wants to do is to be able to, in effect, replicate the
8 systems and understand how -- well, not actually replicate, but understand and have
9 enough information so that it could be replicated, so he could then identify what can
10 and can't be done, what further work would need to be done in order to facilitate third
11 party distribution, if any, and precisely what access that would require and how such
12 arrangements need to be made to preserve standards of security and anti-piracy and
13 so forth.

14 We don't think that will likely be able to be done simply by information statement,
15 knowing that the information statement which we, as you may recall, pressed for last
16 time is likely to save an awful lot of time in finding our way into all this and
17 understanding the structures and frameworks. But it may well be no substitute for the
18 detail for Professor Pietzuch's purposes.

19 **THE CHAIRMAN:** So just in terms of how we actually chop this up into a manageable
20 process. If we were to say yes, thank you, we will have the high level documents I
21 think is the first thing or -- well, if we were to have the documents that are being
22 suggested which I think are probably mostly DevNet, but possibly some internal, we
23 were to say, yes, we will have the statement and actually I would assume that their
24 statement would come with the key documents that substantiated the key points in the
25 statement.

26 It may be Mr Beard may have something to say about that, but it seems to me that

1 inevitably if someone produces a statement, someone is going to say, "Well, where
2 are the documents that precisely support what you have said?" So we are just going
3 to go through that, so it would be quite helpful to have them upfront rather than later.

4 **MR PALMER:** Yes.

5 **THE CHAIRMAN:** Then if at the same time we encourage Sony to continue the
6 enquiries they are making in relation to location and language and the best way, if you
7 like, to provide the further documents, at that stage there would be an opportunity for
8 you to come back and say: we have seen the documents we have got, we have read
9 the statement which has been helpful but here are the gaps.

10 **MR PALMER:** Yes.

11 **THE CHAIRMAN:** Now, would that be a sensible process, provided the timeframe
12 allowed you to do that and to, in other words, if the turn of that happened sufficiently
13 fast so you could then come back and ask for material in a sensible timeframe so you
14 do get it in a sensible timeframe. Does that work? That is, I think, the sharp point of
15 the question.

16 **MR PALMER:** Yes. Sir, from my point of view that sounds eminently sensible. Can
17 I just issue a general caveat now: unfortunately, I am in a different place from my team
18 because I tested positive for Covid yesterday. So I will just wait, just in case there is
19 any contrary instruction that pops up on WhatsApp to tell me there is an issue. But
20 subject to that, if you will allow me that indulgence, that certainly sounds like
21 a workable way forward.

22 **THE CHAIRMAN:** Absolutely. Why don't I explore it with Mr Beard and you can come
23 back and tell me if you have any violently different objections to it.

24 Mr Beard, I read that as being more or less the common ground between the parties.
25 It may be that I am reading too much into it. Is that broadly where you are?

26 **MR BEARD:** Broadly, yes, is the short answer. But can I just deal with a couple of

1 issues, because they go to process and they will go to timing and I am going to need
2 to go back to timing because, you know --

3 **THE CHAIRMAN:** Just to tell you, obviously just to be clear that the whole timing point
4 is at large and I am certainly expecting you to deal with it.

5 **MR BEARD:** Fine. Okay. I will park that for the moment. I will need to be relevantly
6 militant about those sorts of issues in due course. But let's leave that for the moment.
7 So let's take it in stages. In relation to the DevNet PS Partners material. So this is all
8 the sorts of material that is available to developers, but for a whole range of issues. It
9 is very extensive material. It will take time to process and I will come back to that in
10 timing. We will provide all of that in the first tranche of disclosure.

11 What is then being asked about are materials that are not actually held by the
12 defendants. So one of the issues that is arising is that the sorts of materials that they
13 are talking about in relation to security and so on, they are not actually held by the
14 defendants. Strictly speaking -- and I am not going to stand on ceremony at this stage
15 about it -- there is no disclosure obligation in relation to those issues. But we also
16 recognise that it will be useful if we can get hold of some of that relevant material,
17 potentially to be providing that by way of disclosure, but because of the difficulties of
18 actually clarifying what there is, we have also said we think it is going to be sensible
19 to provide a statement in relation to these issues.

20 But the process of working out what should be in a statement, what might be in
21 documentary disclosure, is something that we are still exploring. I think one of the
22 things we have not said in the letter, but I think I should make clear now, is that in
23 relation to all of these issues we are very happy and we are working towards providing
24 a proper and detailed update on where we are with these issues by 31 July. Because
25 we don't think it is sensible just to be pushing this backwards.

26 So what we are doing is we are exploring what we can identify as would be relevant

1 here, what we can get hold of from overseas, and providing a statement. But the
2 statement obviously we will have to talk about when the timing for that would be and
3 that will depend in part on what materials we can get.

4 **THE CHAIRMAN:** Yes.

5 **MR BEARD:** Please, go ahead. This is a long way of saying yes, in broad terms.

6 **THE CHAIRMAN:** Sorry. I didn't mean to interrupt you. I suppose the difficulty with
7 this is that obviously the timetable -- and without getting into the timetabling issues -- if
8 one assumes we are going to try and have disclosure done by December and within
9 that period there has to be a sufficient process to allow you to make some selections
10 about the things you think are helpful and for the class representative to challenge
11 those to the extent they are not sufficiently specific and clearly there is room for
12 argument about that on a sensible basis. We have to be able to turn this thing in
13 a reasonably short timeframe if we are going down the route that I am suggesting.

14 So in a way, I know this cuts absolutely across -- I am not sure it is inconsistent with,
15 but it does cut across some of the things in the Linklaters letter just now. I think the
16 point I am making to you is if we give you the luxury of time to go and have a look at
17 the documents, including reaching some of the more difficult documents, and then
18 making a decision about whether it should be documents or statement, then producing
19 the statement, and if you are telling me that is all going to take a bit of time -- which I
20 completely understand -- so you produce some statement well into the autumn, what
21 do we do if the class representative says it is not sufficient and what do we do if I agree
22 with that, and how does that affect the timetable? That is the problem we have, isn't
23 it?

24 **MR BEARD:** Yes. I completely see that.

25 **THE CHAIRMAN:** There is a little bit of a fork in the road here, isn't there? We either
26 go down a, sort of, iterative process where we give you the ability to, you know, to

1 create some flexibility which will benefit everybody, one would hope. But we can't do
2 that at the risk of pulling the timetable out of kilter. Or we have to make some firm
3 orders that we are just getting on with things by some dates that you have to produce
4 them and that runs the risk of asking you to do things that turn out to be less efficient,
5 less proportionate and generally less helpful for everybody. I would much rather not
6 do that but I don't think I can default to a more flexible process, unless we are confident
7 it is actually going to deliver on time. That is the dilemma, I think.

8 **MR BEARD:** Let's be clear. We will be providing statements in relation to this in
9 advance of witness statements unless we are able to get hold of, you know, a screed
10 of documentary material. We completely see that. We think though the process that
11 this will take will mean that those statements will come at the earliest at the end
12 of October. We are not going to be able to provide them sooner than that. So when
13 we are thinking about the process that you are talking about, sir, I think we have to
14 look at that as the sensible date when you will get any statements that are answering
15 to these points.

16 In relation to disclosure in relation to those materials, obviously if the process that we
17 have been going through has picked up material that is germane, then as you were
18 anticipating, if that is being identified and effectively relied upon in those statements
19 then obviously the natural thing would be for disclosure to occur of that material at the
20 same time as the statement is being provided. That will give us time for there to be
21 an argument about the adequacy of these sorts of issues, but the reason why we have
22 talked about giving an update at the end of July is so that we actually bring some of
23 this discussion forward. Because what we are anticipating is that by the end of July,
24 we will be able to give a better outline of what we think we will be able to get by way
25 of documentary material and what we will be doing by way of statements.

26 I do just want to emphasise one thing in relation to statements. The content of the

1 statements is not fixed by reference to what Mr Palmer wants in them. He has to prove
2 his case. He might have all sorts of wishes about this material. Using statements in
3 the disclosure we completely understand, and as we have made clear in the Redfern
4 schedule, we are amenable to doing. But that does not mean that it guarantees
5 Mr Palmer the answers he wants in relation to this sort of material and therefore I do
6 want to make clear the fact that the class representative might have all sorts of
7 objections to what is in statements does not make them valid.

8 There is a massive asymmetry of activity here. At the moment, the class
9 representative is sitting there going, "Well I want this, I want it sooner, I want it now."
10 That is not feasible in relation to a multinational company that does not hold this
11 material in the forms and in the places where Mr Palmer's clients would like it to be
12 conveniently held. In those circumstances, there is an awful lot of work for us to be
13 getting on with in relation to this.

14 That is precisely why we have come forward with concrete proposals in relation to the
15 tranche disclosure, because what we are trying to do is identify categories of material
16 that is highly relevant to what they are doing and want to do that will assist them in
17 developing their case so that they are not wasting time but that we can sensibly provide
18 on that schedule and that we can offer within those timeframes and be confident that
19 we can hit those timeframes.

20 If we start playing a game of saying, "Oh, we want to move forward two weeks or
21 a month" we do not have any confidence that we can sensibly get those timeframes
22 and that means actually doing the audit and identifying what material there is there
23 and reviewing it and checking it for redactions and confidentiality and relevance, all of
24 which is going to be needed to be done in relation to all of these categories of
25 documents.

26 **THE CHAIRMAN:** That is all understood. Of course, that is the character of the piece

1 of litigation we have got, isn't it?

2 **MR BEARD:** Of course.

3 **THE CHAIRMAN:** We all have to work with it. Just a couple of points that have come
4 out of what you have said. Just assume for argument's sake we said statements at
5 the end of October. You say then there is time to have an argument about it but it is
6 not really a question of time to have an argument about it, it is a question of time to
7 have an argument about it and if you turn out to be in the wrong place for you to
8 produce the material that is available in time for Professor Pietzuch to produce his
9 report.

10 So I just want to be clear. That is the sharp point. It is not about finding out whether
11 you are right or not, it is about him being able to complete the process in the timeframe
12 we are anticipating.

13 **MR BEARD:** Yes. I understand that. But the reason why we are talking about actually
14 updating in advance is because there needs to be a degree of realism about what we
15 can actually do and what we can actually gather and what there actually is. The reason
16 I made the point about what the disclosure scope is here is that insofar as this is
17 material held by Japanese companies, for example -- leave aside translation
18 difficulties, if it is actually in Japanese -- but those are not documents or materials in
19 our possession and control.

20 Now, if the Japanese entities were not wishing to provide that material, that is not
21 something that we can simply overcome in these circumstances. Professor Pietzuch
22 can wish all he likes, but that is not material that would then be relevant for a disclosure
23 application.

24 Now, as I say, we are not just standing on ceremony about that. We are making
25 enquiries, we are trying to get hold of this material because we can see why it is
26 relevant to the way that the class representative is putting his case. But what we are

1 not doing is we are not playing some sort of game of just drip feeding this sort of
2 material, because we recognise what it is that the class representative is seeking to
3 identify here. I am just stressing the limitations.

4 That is not to disagree at all, sir, with how you characterise an issue that could arise
5 down the line, but I am also being realistic about how quickly we can actually gather
6 this material as the defendants and provide this material in the forms of statements
7 and in the form of relevant disclosure. The end of October is going to be that date: we
8 can't do that sooner. But obviously we are providing a vast amount of other material
9 before that.

10 **THE CHAIRMAN:** Yes. Yes. I understand. So I mean, just to restate the problem
11 a bit. The alternative is to say to you: that is all fine, we understand all the difficulties
12 you have got, but I am making an order that you have to go away and do what you
13 can. Actually, if I were to say the end of October to produce all the documents they
14 have asked for that are in your possession and control, then of course they would
15 know they can have them all by then. They might not be perfect, that might not be the
16 best way to try the case, but if that is the only viable alternative then of course that is
17 really what we have to do.

18 So I think we do need to have, if we are going to go down the path of saying some
19 documents, statements, further enquiries and then assess where we are, there has to
20 be plenty of space and time for that to wash itself out if it turns out not to be
21 satisfactory -- [overspeaking].

22 **MR BEARD:** No. No. I completely understand. I understand the dilemma. Equally,
23 what the danger is with this is -- I mean, in effect, what we are talking about is a form
24 of fact evidence and I am not going to go back to the authorities that we picked up at
25 the last CMC. But it is obviously clear that although you can require statements in lieu
26 of disclosure, one has to be careful about requiring a defendant to be providing its

1 factual evidence early.

2 We are offering -- yes, we are obviously offering to cooperate in relation to these
3 statements so we are not, again, standing on ceremony about that sort of issue. But
4 there has to be recognition that there can be limitations to what can be done here.
5 Insofar as Mr Palmer saying, "I want what I want, I want all of it, no matter whether or
6 not it is within possession and control of the defendants, no matter whether they
7 actually know about these sorts of things" unfortunately that is not the way this will
8 work.

9 **THE CHAIRMAN:** No. And I think that really was my second point actually, about the
10 nature of these statements. Because what obviously we can and frequently do is ask
11 for further information which could be characterised. You know, we could quite easily
12 compel you to provide information about this. I think it is easiest for you and easiest
13 for us if it done by some people who know about it, who are prepared to put their
14 names on the bottom of it.

15 There is, I think, a need for the statements to be very disciplined and be purely
16 descriptive of the matters in the way to be the substitute for the documents. In other
17 words, they are sort of witness statements and, of course, we would all like to think
18 that all witness statements are really just purely statements of fact, but we know they
19 are not. What we don't want to have here, what would be profoundly unhelpful, would
20 be to have a set of witness statements in the normal form where people try their best
21 to position the facts in a way that -- clearly that is not what you are suggesting. I know
22 that.

23 **MR BEARD:** Just to be really clear, we are not doing that. The point I was making
24 was a slightly different one. If you take the paradigm idea of what a factual witness
25 statement should be, what you are actually asking for is a version of one of those
26 paradigms. We know in reality that witness statements in practice drift away from the

1 absolute path of truth and righteousness in terms of presentation: that is the way these
2 things go. Obviously, the tribunal is keen to make sure that we stay as close as
3 possible to that when we come to witness statements.

4 But that is not the point we are dealing with here. We are accepting that we can try to
5 provide these statements and provide information that assists both the class
6 representative and the tribunal and explains the position factually in relation to these
7 matters. But there is a limit to what we can do in relation to that and the reason why
8 we keep coming back to the idea of updating once we have got more information about
9 what is available by way of documentation and so on is the more documentation that
10 is relevantly and proportionately available to us that we can actually get from
11 potentially non-defendant parties within the group, that we can then provide to the
12 class representative, effectively the less will be the need for these statements. We
13 completely see that. The less --

14 **THE CHAIRMAN:** Yes.

15 **MR BEARD:** The more -- [overspeaking]

16 **THE CHAIRMAN:** Sorry. Absolutely. I absolutely see that and I understand the point.
17 I suppose one other point just on this, you know, I hope this really is a thought. I am
18 not sure how it fits into all the things we have been talking about. But in the ordinary
19 course we would have two experts here, one for each party. Actually what I would be
20 expecting them to do at this stage would be to have a conversation about what they
21 needed and obviously the expert who would be instructed by Sony would have the
22 benefit of being able to go away and have a free hand to understand and engage and
23 report back on what was available. In other words, it would be much easier to get all
24 of this on the table.

25 Now, there is no criticism of Sony, because you are absolutely entitled to be in the
26 position you are in. However, what we are getting, I think, is effectively a sort of a

1 slightly more formal engagement from one or more people who are experts, if you like,
2 in their knowledge, in their field here, but are really being presented as witnesses of
3 fact.

4 I do wonder whether at some stage -- and it is probably premature, but I throw it to you
5 to have a think about -- I wonder at some stage, it depends on your intentions in
6 relation to instructing an expert, whether some form of dialogue between
7 Professor Pietzuch and those personnel persons might be productive. Anyway, I
8 leave that with you as a thought.

9 **MR BEARD:** Yes. There is obviously an issue here where what used to be called, I
10 think, before the RPC trade witnesses who are crossing over between, you know,
11 an expertise which they actually have and whether you categorise that as a matter of
12 fact or a matter of opinion becomes rather difficult to call, because they are the ones
13 that are operating the company and the business.

14 The difficulty comes when actually some of the material that Mr Palmer is referring to
15 and Professor Pietzuch is referring to is material that is held elsewhere and with other
16 people, because obviously there is an enormous sensitivity about a lot of this material.

17 **THE CHAIRMAN:** I absolutely get that point. I understand.

18 **MR BEARD:** It is not -- [overspeaking] Sony is the point. You know, it is not physically
19 available within Sony, it is kept extremely tightly confined, a lot of this material,
20 because of its sensitivity, because of the importance of it.

21 **THE CHAIRMAN:** Yes. I understand that.

22 **MR PALMER:** I don't understand --

23 **THE CHAIRMAN:** Mr Palmer, just before you get there, I will come back to you in
24 a minute, if I may. I just want to finish this, I am just about done I think, then I will come
25 back to you.

26 I suppose I am making a slightly different point, I think. I absolutely understand the

1 point you are making there, but I think I am saying if one steps back -- and I think, you
2 know, we would all agree that what we need in order for these issues to be properly
3 dealt with at trial is we need a solid objective platform of fact and that may be difficult
4 to get through in advance because there may be some gaps in it. I understand that
5 and we will all have to live with that, depending on where you get to.

6 But to the extent that there aren't gaps in it, you know, you would ordinarily expect
7 there to be an onus on the experts working together to try and make sure that that
8 platform was reasonably clearly articulated and agreed, because there should not be
9 any argument about the basic objective facts. What there might well be is a lot of
10 arguments about the needs. I completely understand that is where we are going. But
11 in terms of things like, you know, what is the architecture, what are the cyber
12 protections, how does that actually work as a matter of objective fact then we should
13 not really be in the position where that is going to be a problem. Subject to the points
14 you make.

15 I would normally expect the experts to be helping us resolve that by making sure that
16 was all out on the table and clear. Actually, we don't have the luxury of that here. I am
17 just saying to you that I would like to think there might be some mechanism at some
18 stage maybe just to put the point in a different way. If we get the statements and
19 Professor Pietzuch is not sure about whether he needs one (inaudible) or not, might it
20 be helpful for him to be able to have a without prejudice discussion with some of the
21 makers of the statements so he can understand better what they understand, as
22 a matter of the factual background. That is the point I am putting down.

23 **MR BEARD:** I understand the point. I think I need to go away and take instructions
24 about it. But I entirely see the concern that the tribunal is identifying. I mean, part of
25 the problem here is you are essentially having a claim that is coming along and saying:
26 well, your system has never operated like this, but we would like to test whether it

1 | could operate completely differently. Part of the difficulty is that the way in which the
2 | system has been built and when one talks about the architecture of the system, has
3 | a certain sort of internal integrity to it. Therefore, breaking out how all those bits fit
4 | together is not actually, as I understand it, completely straightforward. Nevermind the
5 | distance, language, other issues that you have. That is particularly true in relation to
6 | security and cyber protection issues.

7 | But, look, I am not the expert in relation to these things. I am not the witness in relation
8 | to it. I am just setting out my understanding that means that we are conscientiously
9 | trying to find a way to fulfil what you as a tribunal are identifying now, which is a way
10 | of providing this factual base that can then be used by the parties in this litigation and
11 | can be considered by the tribunal. Because we completely understand that that is
12 | necessary and appropriate. It is how we best go about it and we are saying what we
13 | are able to do in relation to it.

14 | But I really don't want to lose sight of the fact that an enormous amount of material to
15 | do with the way in which these systems work and what their architecture is in terms of
16 | how developers can get access to things will be provided through all the PS Partners
17 | and DevNet material. Now, it is not getting into the background details on cyber
18 | security, I completely see that, but it is actually providing an awful lot of information
19 | about that architecture. It will be a large piece of disclosure that is being provided
20 | in September.

21 | **THE CHAIRMAN:** Okay. That is helpful.

22 | Mr Palmer, where I think we are getting to is, I mean, you have heard me put to
23 | Mr Beard there is a hard way of doing this and an easy way of doing it, but the easy
24 | way needs to work in a way that actually delivers you the opportunity to test it, because
25 | it is effectively a self-selection exercise by the defendants.

26 | **MR PALMER:** Yes.

1 **THE CHAIRMAN:** Hopefully you have had a chance to get any feedback on that from
2 your instructing parties. So I suppose just to test the proposition with you again, and
3 Mr Beard has put his marker down to say end of October, if you like. I think is a, sort
4 of, composite process by which you have, as he says, a bunch of stuff from DevNet.
5 I think it's that (several inaudible words) about that tranche, but there or thereabouts.
6 Actually you get that in September, a lot of that in September, and the rest of it by the
7 end of October.

8 So you are going to be given this parcel in late October which is going to be
9 a composite of some documents and some statements and possibly some other
10 material supporting that. If you are not happy with it then, you are going to have
11 effectively two months -- this is my concern about all of this -- you are going to have
12 effectively two months to turn that around, tell us that you don't think it is satisfactory
13 and for Sony to have to deliver some suitable alternative.

14 At that stage, presumably, you are going to say -- and I think I would have a great deal
15 of sympathy for -- there not being any flexibility in the timetable to allow them to have
16 extra time for that. We would be saying, "You just have to get on with it."

17 So I don't know where you end up on that. I do think it is a more attractive ridge to go
18 down than just making a bunch of orders now that may produce some quite limited
19 information and leave you in a worse -- actually leave us all in a worse -- position
20 by October. But there is an element of risk in this, I think.

21 **MR PALMER:** Yes. So let me take that in stages. The first point is we are entirely
22 content with the broad framework, what you have referred to as "the easy route", sir.
23 I have instructions on that which accord with my initial reaction. We are content with
24 that approach.

25 But timing is going to give real difficulty. The second matter which is going to give real
26 difficulty is what I am beginning to apprehend from Mr Beard is the attitude to material

1 | which he says is not in the defendant's possession or control, but in the possession or
2 | control of a parent company in Japan who may not be willing to provide it without, at
3 | this stage, any indication of what they may or may not be willing to provide and,
4 | therefore, whether it would be necessary for us to apply for third party disclosure
5 | orders or apply for them to be added as a party. A course which we have resisted
6 | taking so far in the interests of proportionality and an expectation there would be
7 | voluntary cooperation from Sony in response to all of these matters.

8 | This is of particular concern because, of course, as you will have well in mind, sir, a lot
9 | of these issues -- particularly under heading number 2, the security related
10 | requests -- arise principally out of Sony's defence where they say in their defence that
11 | all of these closed system benefits, particularly in relation to security, are only
12 | achievable if the closed nature of the distribution system is maintained. That has been
13 | put squarely in dispute.

14 | They advance that defence by way of objective justification and for them it is, therefore,
15 | in the first instance, for them to produce the evidence on which they rely to make good
16 | their proposition that, firstly, there are such benefits which are uniquely attributable to
17 | the closed distribution system and, secondly, that any form of third party distribution
18 | would undermine those levels of security, whether that be security against viruses or
19 | security against piracy or counterfeit copying or anything of that kind.

20 | So to hear from Mr Beard that he is not sure how much or what evidence in support of
21 | those security justifications and the evidence of how the system works might be willing
22 | to be provided for the parent company in Japan is of deep, deep concern to us.
23 | Because what Sony can't do is just advance those propositions in the abstract and
24 | say, "Well, we don't have permission from the parent company to produce the detail
25 | on this so you can't interrogate it. Your case to prove class representative, oh dear,
26 | you can't because we have not given you the wherewithal to engage with a defence

1 that we are relying on."

2 So all that fills me with deep concern as to Sony's current attitude to its disclosure
3 obligations and it may need to be revisited by way of third party disclosure orders if
4 what is produced by Sony is inadequate.

5 So that is the first marker. The second marker is in relation to timings and there we
6 do have to engage with the detail of what is provided in this letter of an hour or two
7 ago. Because what Mr Beard is now saying, I think, is different again from what was
8 said even as recently as that. There is no mention that I see of those disclosure
9 statements being produced in October and instead a limited class of DevNet materials
10 promised by mid-September with no other indication that those materials will be
11 provided even before December.

12 When one interrogates these categories and takes them individually, you can see that
13 actually these broadbrush disclosure deadlines which Sony have so recently
14 advanced, whilst purporting to be helpful, in fact, may be taken to be pushing things
15 back as long as possible without any justification. When you look, for example -- let's
16 take them item by item. The first item is submissions made to the CMA in relation to
17 the Microsoft/Activision Blizzard merger. That will be a discrete set of materials. Sony
18 knows what was submitted to the CMA. It could be produced, we don't need to wait
19 two months for that.

20 The [redacted], that is what appears at the Redfern schedule 4A and --

21 **MR BEARD:** Sorry. Excuse me. Could I just interrupt? Red in the letter is
22 confidential, please.

23 **MR PALMER:** I don't think I said anything which is confidential, but I will be careful
24 not to.

25 4A, you will see there is a request, and you can see the terms of those requests and
26 that is being agreed. But without justification it is said we can't have those for another

1 two months. In 1.1.3, there is a reference to further materials, which one would have
2 thought would be readily identifiable, a discrete category, but not produced for another
3 couple of months.

4 Fourthly, materials from DevNet and that excludes 1C and 1J. I think it is 1K. It
5 includes 2C, 2D and 2F through to K, but no justification has been advanced. It
6 excludes 3A, B and E. Now, none of this is reasoned; we don't understand it. The
7 DevNet materials ought to be readily accessible. We understand they may well be
8 voluminous, but there is real difficulty identifying on Sony's side which ones are in fact
9 responsive to these requests.

10 We are happy to help. Professor Pietzuch can simply be given access to the materials
11 and he can sift through it himself. If that is objectionable on grounds of relevance,
12 then Sony need to do better by way of timetable and response than two months hence
13 from now, more than two months, when they have been on notice of these requests
14 for some time.

15 At 1.1.5 there is reference to another confidential category of materials. Again, they
16 know already what there is. It is very difficult to understand why it would take two
17 months to identify it.

18 At 6, versions of software, usage terms, licence agreements, PSN terms of service.
19 Again, these are standard agreements. One would think it would be very quick to
20 provide them without a trawl through.

21 The separate material which is promised by 25 October is not in fact responsive to the
22 Redfern categories at all, apart from what you see at 1.2.4. Then under the numbered
23 points, request 6A in the Redfern schedule, prioritising the review of documents
24 responsive to search terms are intended to identify what is said there. Again, it is very
25 limited, very narrow. Although it is asserted by Mr Beard that what they are seeking
26 to do is be very helpful, in fact the bulk of the material that Professor Pietzuch will need

1 to be able to engage with the materials relevant to our pleaded counterfactual in due
2 course are not promised to be provided before December.

3 If these disclosure statements are only produced at the end of October, that left us
4 time to work out at that point with recent disclosure of the DevNet materials and so
5 forth which are said to be voluminous what is missing, what is not there, what is likely
6 to be held internally by Sony rather than distributed to distributors and publishers, then
7 the timetable towards trial is going to be threatened. We think Sony can do a lot better,
8 a lot more easily.

9 **THE CHAIRMAN:** Just trying to keep a little bit of focus on the Redfern schedule
10 items. I understand the points you have made and I am sure Mr Beard has things to
11 say about them as well. But I think if you just step back from that for a moment, step
12 back from all the detail of it. Broadly what I think we are saying is if you go down the
13 so-called easy route -- I am sure it is not easy, particularly for the people who have to
14 do it -- but just sticking with that as a label for a moment. If you go down the easy
15 route, Mr Beard is saying realistically in order to make that work we are looking
16 towards the end of October. I take from that that what you get in relation to those
17 items in the Redfern schedule which are covered by this, which there are numerous
18 entries, 2A, 2B, 2C and D and E.

19 **MR PALMER:** Not C and D, no. Which includes high level technical descriptions and
20 overview of the security architecture.

21 **THE CHAIRMAN:** Sorry, but I think they are offering statements in relation to C and
22 D, aren't they?

23 **MR PALMER:** Well, if that is now being said. It is not clear.

24 **THE CHAIRMAN:** Well, I think that's the proposition that I am putting to you. It may
25 be that Mr Beard is not offering that, but it just seems to me, just to step back a minute
26 from the letter which is helpful in some respects but actually I think is cutting across

1 the discussion we are having in a way that is slightly unhelpful. What I am exploring,
2 what I am trying to explore with you, Mr Beard, is whether if we go down the easy route
3 and we fix a date by which a number of things are done in relation to these contested
4 areas -- forget about the rest of the Redfern for the minute -- but just assuming we are
5 dealing with the ones where they had promised information, they had promised
6 documents and information.

7 If we say in order for there to be a sensible testing of that by you, it has to arrive by
8 a date that gives you time to make an application for further documents if you are not
9 satisfied by what turns up in the composite, however it is presented, whenever it is
10 presented: you get a bundle of documents, you get a statement on a particular subject,
11 whether it is 2A or B or whatever it is. Then you have to make a decision about
12 whether it is good enough and you would have to have time to make the application,
13 for it to be heard if it requires an oral hearing and then for Sony, if you are successful,
14 to produce the documents.

15 That is the thing I am gnawing away at. Mr Beard may have some things to say about
16 aspects of bits of this that can't be done but he has broadly said: look, end of October
17 is actually the only sensible time, he says, the earliest for the production of the
18 composite. I am exploring with you if that is the case, does that give you enough time
19 to get back to us and say "this isn't good enough". I know you don't know the answer
20 to this because you don't know how much there is going to be to deal with. But we
21 have to try and anticipate that and timetable it.

22 So do you think this might work, is the short point? If you are getting all the stuff at
23 the end of October, broadly speaking, that involves -- there are the documents they
24 want to give you and a statement, you are then going to have to turn that around. You
25 would have disclosure done by the end of the year and you are going to have to come
26 and make an application so (inaudible) deliver anything you specifically ask for that

1 they have and they are obliged to give. That is the proposition that is being put.

2 **MR PALMER:** It is not going to be enough time, is the short answer, in any realistic
3 world, to review all that material, identify what further material is needed and then have
4 any dispute about that resolved and then the disclosure provided by the end
5 of December. It is going to slow things down, in all honesty.

6 **THE CHAIRMAN:** What is the alternative then, Mr Palmer? Because at the moment
7 the only alternative is -- Mr Beard says he can't do it any earlier and I can see why he
8 is saying that. So the alternative is I make an order today that he just goes away and
9 produces what he can of what is in his control and you are going to get a very partial
10 picture and no statements. Is that what you want? I am afraid I am putting you to a
11 bit of a choice on this because, just as I put Mr Beard to it, I think there really are only
12 two options here, aren't there?

13 **MR PALMER:** Well, I think the third option would be --

14 **MR BEARD:** Could I just -- there may be a way of assisting slightly with this because
15 I don't think Mr Palmer is fairly representing our position. The reason I kept talking
16 about updating Mr Palmer, and indeed the tribunal, by end of July is because we are
17 not sitting on ceremony, as I clearly said, about the availability of documents from
18 other entities within Sony. We are looking at what we can obtain and how we can
19 obtain it.

20 The whole intention of updating at the end of July is to explain what we think we will
21 be able to provide so they have an early indication of this to inform them about what
22 concerns they might have about what it is that we are coming forward with. We are
23 trying to engage with this in an iterative process, because we cannot do it any other
24 way, effectively.

25 Now, we think that is --

26 **THE CHAIRMAN:** Mr Beard, Mr Beard, just to be clear, are you anticipating that that

1 | would inform Mr Palmer not only of what he is getting, but what he is not getting, if one
2 | can put it that way?

3 | **MR BEARD:** Yes. Obviously, I -- [overspeaking]

4 | **THE CHAIRMAN:** Is it going to give him a reasonable basis on which to make
5 | an application for disclosure if he thinks you are not going to stump up and --

6 | **MR BEARD:** That is exactly what we are envisaging, that is exactly right. That we
7 | would give him enough information that if he then wants to say, "Well, I want to make
8 | a third party disclosure application" he can go and do that. We don't think that is going
9 | to be necessary or sensible. We don't think that is going to be the course that is going
10 | to serve the proceedings or the class representative, frankly, best in relation to it.

11 | But it is for that reason we are not saying we are just going to give these tranches, we
12 | are not going to talk to you until September/October, it is all going to be silence. The
13 | whole reason why we are talking about a continuing process of engagement is so that
14 | the class representative does understand earlier what is going on. Because it is frankly
15 | just a misnomer to call this the easy route: it is not easy in any way for us.

16 | **THE CHAIRMAN:** Let's not dwell on that. I am sure it is the wrong word (inaudible)
17 | but look, Mr Beard, that is all fine but it does not work, does it, if Mr Palmer does not
18 | know what you are going to cover in the statements. He does not know what he is
19 | getting until he gets the statements, does he? So in a way, you are telling him what
20 | is coming from Japan is only part of the picture and only helps him partially. Sure it
21 | allows him to make his third party disclosure application if he wants to, but he still has
22 | to wait until the end of October, on your timetable, to say: okay, I now see that there
23 | are a whole bunch of gaps, I have been given things at this level of detail, I need this
24 | level of detail, because my expert can't deal without it and therefore I need to make
25 | my application.

26 | **MR BEARD:** I see that. We have set disclosure to be done by the end of December.

1 What we are trying to do is sensibly engage with what can be provided sooner and
2 how quickly we can provide it and where there can be substitutes for the provision of
3 disclosure by way of statements before we get through to that final disclosure date
4 which is, we think, the sensible way of dealing with all of this.

5 We can't do first tranche of disclosure with all of the review, redaction, assessment
6 before September when we are doing it in relation to a whole range of materials over
7 the summer. That will give a lot of time for Mr Palmer to look at all of those materials.
8 We are of course going to deal with the concerns that are being articulated here about
9 what would be in statements and what would be by way of disclosure, which is why
10 we think the constructive thing to do is provide these updates.

11 But in terms of us actually having that material that we will be obtaining and providing
12 statements to cover other material, that will take time. We cannot do it before the end
13 of October. So we are trying to find ways that we can essentially provide information
14 both to the class representative and the tribunal, not just leaving it as a, kind of, black
15 box until September or October but recognising the limitations of that. We think that
16 these issues will give enough room because, I mean, Professor Pietzuch's report on
17 any timetable is not due until July 2025.

18 **THE CHAIRMAN:** Hang on a minute. As you well know, Mr Beard, they have to
19 replead their case to cover all this stuff. So that is not really --

20 **MR BEARD:** I understand that.

21 **THE CHAIRMAN:** He is going to have to have the material to deal with it. So,
22 Mr Beard, just to be clear, what are you saying you could deliver by 31 July? I
23 appreciate again it is not going to be absolute because no doubt there will be some
24 loose ends. But are you saying you are going to come along and say, "These are the
25 documents we think we are going to get and this is the material we are going to cover
26 in a statement." Is that what you are going to be able to do?

1 **MR BEARD:** Yes, is the broad answer. I mean, obviously it is not going to be
2 particular documents, because it is going to be more categories of documents
3 obviously at that stage. But that is exactly the enquiry that we are carrying out. So,
4 yes, the idea is that we would provide that sort of update and, yes, we would provide
5 an indication of what it was that we are intending to cover in the statement. That, we
6 think, is the best way of doing it because we are trying to bring these things forward.
7 Obviously, we can't provide the statement then: it is going to take time to do that. But
8 in terms of the topics we would be intending to cover, then that is exactly the sort of
9 account we can give by way of update in July and that is why we are emphasising that
10 as an interim step in this. If Mr Palmer then says, "Well, look, you are not covering the
11 right topics" or, "What about these alternative categories of document, you seem to be
12 missing things" then we are giving ourselves the opportunity to engage in that process
13 so that we can be providing what is appropriate by the end of October or indeed having
14 a fight about it.
15 Because I am not going to just sit here saying, "Oh no, we will accede to whatever
16 Mr Palmer suggests should be in there" but it will bring that decision point earlier, so
17 that Mr Palmer can interrogate those things. But that seems to us to be the most
18 sensible, practical way of trying to deal with exactly the sorts of problem, sir, that you
19 are identifying whilst recognising the limitations on timing if we are going to be
20 providing this statement.

21 **THE CHAIRMAN:** Mr Palmer, you heard all that. Does it make any difference?

22 **MR PALMER:** Well, we welcome the commitment to provide greater clarification by
23 the end of this month. That was not mentioned before Mr Beard opened his mouth
24 during the CMC, it was not even in today's letter. So, we welcome the clarification
25 which you have adduced from him.

26 Nor was there any prior indication of these statements being produced by the end

1 of October. What you don't have is any written or evidence basis upon which to accept
2 Mr Beard's assertion it can't be done before the end of October rather than, as we
3 would seek, by the end of September. Or, indeed, by a middle course if there is some
4 reason for that. We have had nothing in writing. This is the first that has been said of
5 it and, if I may say so, it is utterly unsatisfactory to come to a hearing like this and
6 announce these intentions for the very first time, without any supporting evidence or
7 explanation whatsoever.

8 So what I would suggest is that the 31 July statement produces more detail about
9 precisely what is to be produced, precisely what cannot be produced, and that any
10 disclosure statements which are to be produced are to be produced in advance of the
11 end of October. I would say the end of September, if that is difficult then mid-October
12 at the latest, accompanied by any documents which are fed into the preparation of
13 those statements.

14 **THE CHAIRMAN:** Yes. So just exploring that for a minute. So one thing we could
15 do, of course, is we could say you are going to get an outline on the 31st, as you have
16 just suggested, of what they are going to cover and then we could set a date, couldn't
17 we, where it is going to be a more detailed outline. A proper summary of what the
18 statement is actually going to cover. In other words, what you would expect parties,
19 the person preparing it, to have done by working out what they are going to put in it.
20 Would that be helpful?

21 **MR PALMER:** Indeed it would, sir.

22 **THE CHAIRMAN:** So, Mr Beard, just coming back to you in a minute. We are just
23 inching towards something that might be workable, trying to give you as much notice
24 as possible of things you might want to complain about and the ability, therefore, to
25 get that process going so we are comfortable it can be done. I think it is still going to
26 be left to some extent with, you know, some wash up problems if things turn out not to

1 be as you expect in the statements, so what we are trying to do is anticipate those.
2 I am not sure it completely deals with the problem that you may be expecting a level
3 of detail that does not appear in the statement, but presumably some sort of clearer
4 roadmap about what the statement covers would be helpful.

5 **MR PALMER:** Indeed.

6 **THE CHAIRMAN:** And therefore would allow the [overspeaking] to work. I am just
7 trying to find a way to see if it works or not.

8 **MR PALMER:** Because we have had no detail as to this whatsoever. So Mr Beard
9 is inviting the class representative just to accede to this suggestion without any detail
10 as to what we are going to end up with and any roadmap as to how we are going to
11 know whether that is going to be adequate. So if we can come back --

12 **THE CHAIRMAN:** I appreciate that. Yes. I think we are definitely in a difficult
13 situation. I don't think it is necessarily anyone's fault, Mr Palmer. I think everybody is
14 just trying to find a way to make this work, given the difficulties.

15 It just seems to me if we give you more opportunity than you presently have to put up
16 your hand and say, "I am not happy with where this is going and we need to be more
17 specific about what we are getting" then that does take some of the pressure off
18 the October deadline, or whenever it is that we say. A composite package has to be
19 delivered.

20 **MR PALMER:** Yes.

21 **THE CHAIRMAN:** Yes. Mr Beard, are you able to help us with that a bit as well? I
22 don't think I am asking for anything that you would not be doing in the statement.

23 **MR BEARD:** No. Look, so let's take this in stages. First of all, I am going to put down
24 a marker that I think the position Mr Palmer is taking in relation to what we are
25 providing today is wholly unreasonable. We received the Redfern schedule two weeks
26 ago, we have been vigorously engaging. This is a totally asymmetric process and for

1 him to be criticising Sony for trying to deal with these problems as we come to the
2 CMC, when it was clear that we would only ever have partial --

3 **THE CHAIRMAN:** Mr Beard, I am going to cut you off because you have heard what
4 I said about that. We are an hour into this and I know you both have things to say
5 about that. I am not actually interested in the slightest about it. All I really want to
6 know is what is the answer.

7 **MR BEARD:** So the answer is yes, in the sense that we will provide the statement or
8 the update in July, which will indicate what we expect to be able to provide by way of
9 disclosure and what we expect to be able to provide by way of statement.

10 Now, if Mr Palmer says, "Well, I would like clarity on aspects of this, I would like other
11 material or I would like more clarity on what you are intending to cover in the statement"
12 of course we will respond to that. I am not sure we necessarily need a formal process,
13 but the whole idea of bringing this forward was exactly to try and smoke those issues
14 out and alleviate some of the points of pressure that you are talking about, sir.

15 So that is why we are suggesting it. That is why we are articulating it. We are trying
16 to anticipate some of the problems that the tribunal is identifying here and deal with
17 the requests that are being made by the class representative.

18 So the reason why we are doing it in this way is to recognise the difficulties we have,
19 but also what Mr Palmer wants to engage with. We think that's a sensible way of
20 proceeding and at the same time providing a lot of disclosure.

21 **THE CHAIRMAN:** Yes. If we were to say to you: look, by the middle of September,
22 say, we would like to have from you more detail about what is going to be in the
23 statements -- now, I am not getting into the question of drafting but just what is
24 the -- something that will indicate to Mr Palmer what the level of detail is you are getting
25 into. In other words, what are the subject headings for the paragraphs, effectively: you
26 are going to deal with these things. I would assume you are going to be doing that in

1 the course of preparing the statements anyway. Is that something you could commit
2 to provide?

3 **MR BEARD:** We can certainly commit to provide something in outline in September
4 as to what we intend to be covering in statements at the end of October. Quite how
5 precise that will be, obviously I just can't commit to that now. Because I don't know.

6 **THE CHAIRMAN:** I understand that. You see where I am coming from, don't you?

7 **MR BEARD:** There is no objection to that. If that is what the tribunal would like --

8 **THE CHAIRMAN:** Just to be clear about the point of it. I want to be able to shift some
9 of the timing backwards as I want to give Mr Palmer a window of opportunity to put his
10 hand up if he sees something that is not going where he thinks it is. So that does
11 require a degree of constructive engagement obviously in this exercise, I am sure
12 (inaudible) the persons acting will do. There is no point giving a solicitor headings that
13 don't give us any sense of the level of detail that is going to be gone into. I have even
14 less knowledge than you have, Mr Beard, about what that actually means --

15 **MR BEARD:** I completely understand.

16 **THE CHAIRMAN:** But, in short, if Mr Palmer gets them and he doesn't like them, he
17 is going to have plenty to say about them at the time. So you, know, there is a point
18 of pressure there --

19 **MR BEARD:** We have no issue with that. We are not trying to stop that sort of
20 process. We are trying to anticipate these problems. Because it is not in our interest
21 for -- as we will come onto when we're dealing with timing -- the timetable in relation
22 to disclosure to slip and for any issues in relation to the repleading to slip, because we
23 think that the repleading should happen much more quickly than Mr Palmer now seeks
24 to want in the timetable. We think we should be back at the previous timing for these
25 things.

26 So we have an incentive to try and smoke these issues out so that we can deal with

1 | them in a sensible manner and, yes, we are fine with that.

2 | As I say, we will try and update in July which is actually bringing these issues further
3 | forward, but if the tribunal wants also an indication that we will provide a more specific
4 | outline in relation to what we anticipate to be in the statements for the end of October
5 | by mid September, I don't see any difficulty with that. I will confirm with instructions
6 | but given that there will be a process of preparation in relation to these matters, giving
7 | that sort of outline at that point does not seem problematic.

8 | **THE CHAIRMAN:** That is very helpful. Thank you.

9 | So I think just where we have got to then, Mr Palmer -- and, obviously, we will just wait
10 | and see whether Mr Beard gets any further instructions on it -- but I would propose we
11 | have an order, and I think it is probably going to need a little bit of careful wording, but
12 | there will be a letter from the defendant by the end of July which sets out what
13 | disclosure, what categories of disclosure of documents, are going to be provided by
14 | way of disclosure following the enquiries they have made and that, I would expect, to
15 | be full subject only to exceptions to good reasons as to responses to the requests you
16 | have made.

17 | Also, that July correspondence would also set out clearly what the subjects were,
18 | again by reference to the Redfern schedule, which are going to be dealt with by way
19 | of statement. When we talk about the end of July, then I think we are talking probably,
20 | yes, sometime the week of the 29th, aren't we, Mr Beard? 29th, 30th, 31st. Maybe
21 | the 29th is a convenient date, because there might still be a few people around to have
22 | a look at it before they go on holiday.

23 | **MR BEARD:** I think we had said the 31st. I think that was what we were intending to
24 | work towards.

25 | **THE CHAIRMAN:** I don't know whether Mr Palmer cares whether it is the 29th or the
26 | 31st.

1 **MR BEARD:** No. I imagine those two dates are not going to trouble him unduly.

2 **MR PALMER:** Well, they do slightly. The 29th if possible, sir, because that is the
3 Monday and that week ends on Friday, 2 August after which one can expect people
4 to be away. So it does --

5 **MR BEARD:** We will do our best --

6 **THE CHAIRMAN:** In time honoured fashion, let's say the 30th. If you can do it any
7 earlier, Mr Beard, then obviously that would be helpful.

8 **MR BEARD:** Those alongside me here, we understand that Monday would be
9 preferable to Tuesday. Yes.

10 **THE CHAIRMAN:** Right. Okay. Then we would set a date which, again, I think would
11 probably be, say, Monday, 16th or Tuesday, 17 September by which the defendants
12 will provide a fuller outline of both statements. Not drafts, but just outlines, but outlines
13 that give the class representative a reasonable understanding of the level of detail that
14 the statements are going to cover. That is the point of the exercise.

15 **MR BEARD:** Could that include an indication of the documents which are held or
16 controlled by Sony Corporation which feed into the content of those statements?

17 **THE CHAIRMAN:** I think if it is possible to provide a provisional list of documents,
18 Mr Beard, that would be helpful but I don't think I can commit you to the documents
19 until the statement is concluded.

20 **MR BEARD:** We hear the point. We will bear it in mind. I mean, what we might be
21 able to do is if we have identified categories of documents in July, that we can sort of
22 confirm whether or not those are documents that, in fact, we will be referring to in any
23 statement or relying upon in any statement or not. So I think we can probably go that
24 far. We hear what is being asked for, but I don't think it would ever be appropriate to
25 make any order as to some provisional list at that stage.

26 **MR PALMER:** An indication is what I asked for. An indications document.

1 **THE CHAIRMAN:** I think an indication would be very helpful and I think Mr Beard said
2 he would certainly be prepared to go down that path.

3 Then I think we are looking at a sort of omnibus provision of the statements, plus all
4 the documents. Again, I think, Mr Beard, if we can do it a little bit earlier before the
5 last week in October that would be really helpful and just buy us a bit of extra time. I
6 don't know whether I can squeeze you back to 21 October?

7 **MR BEARD:** Well, my instructions are that we are going to struggle to get it done
8 before the end of October. We are providing the second tranche of disclosure we
9 have said we can do on 25 October, so there is going to be quite a lot going on. I think
10 that is why we have said the end of October for the statements.

11 So the class representative will be getting the second tranche of disclosure, which will
12 be extensive, and we don't want to hold things up. That is why we have said the end
13 of October. We are just conscious there is going to be an awful lot of work on our side
14 going on at that time.

15 **THE CHAIRMAN:** Could we say the 25th, which would coincide with the disclosure?
16 That would make sense.

17 **MR PALMER:** That was going to be my request.

18 **MR BEARD:** Yes. Fine. Let's go with the 25th. If for any reason we are encountering
19 difficulties, we will communicate. But if the order says the 25th that is what we will
20 focus on. Yes.

21 **THE CHAIRMAN:** Thank you. So just one other thing, I think, before I just want to go
22 through the Redfern and just make sure we know which categories this applies to.
23 Just before we get to that, coming back to your letter, Mr Beard. I am afraid we have
24 slightly driven a coach and horses through bits of it, not entirely, but I suppose there
25 are two points that occur.

26 One is that to the extent you were offering things earlier, if for example tranche one

1 and all the materials set out in 1.1.4, I assume you are still going to be able to do that.
2 This does not stop you doing the things you said you were going to do.

3 **MR BEARD:** No. No. We set these timetables for the disclosure process. These are
4 nonetheless ambitious timetables but it is for the extraction process review, redaction,
5 et cetera. We will hit these deadlines for these categories of documents. That is what
6 we have been checking on our ability to do over the last few days and that is why we
7 were able to make the offer we are doing. So, yes, what we have been discussing in
8 relation to statements and the updates is not cutting across this -- [overspeaking].

9 **THE CHAIRMAN:** Possibly it is cutting across the -- I have not had the opportunity to
10 reconcile the Redfern with rolling disclosure. I am not sure whether tranche 3, which
11 is actually 23 December, would have included material which you now effectively
12 committed to provide by the end of October. I don't know to what extent that is the
13 position. But I just wanted to be absolutely clear that 25 October is, as far as I am
14 concerned, dealing with all of the disclosure that is associated with any of the Redfern
15 items which fall into this category.

16 So, to take an example, I don't know whether it is a good example. I think Mr Palmer
17 gave us an example of things that aren't in 1.1.4 and don't appear in 1.2 at all. Maybe
18 because you are actually not agreeing to give disclosure, but maybe we could just turn
19 those up. When you get to C for example, 2C. This is another example isn't it? 2C
20 is, if you like, a sort of replica of 2A. I think I am saying, as far as I am concerned, you
21 have agreed to deal with that in the way we have described rather than waiting
22 until December to deal with it.

23 **MR BEARD:** I think this is different because training materials and workflows and
24 engineering roadmaps are not necessarily the same as any of the materials in relation
25 to security. The other issue here --

26 **THE CHAIRMAN:** Sorry, I am looking at the wrong paragraphs. 1C. I am sorry. Yes.

1 **MR BEARD:** 1C is just different and here we are looking at a different cohort of
2 documents and we are looking at the materials being extracted from custodians.
3 Really one of the things that is going to take time and we can come back to the
4 methodologies and the process for agreeing search terms and all that sort of things.
5 But we are going to be doing a custodian review for materials but that is where a lot of
6 this material is going to come from. It is a different process. So, if Mr Palmer is trying
7 to suggest that all of this needs to be brought forward, we would strongly object.

8 **THE CHAIRMAN:** I don't think he is. I think it is my error, actually. I have got my
9 numbers muddled up. I think I was talking about 2C. If you go back to 1.1.4, you see
10 you are offering by 13 September 2A and B, then you go to 2E.

11 **MR BEARD:** Yes.

12 **THE CHAIRMAN:** If you look at the Redfern, 2C I think falls absolutely bang smack
13 into the category of things that we are asking you to do on a composite basis by the
14 end of October and I don't see 2C in tranche 2, unless I have missed something. So
15 therefore, presumably, it is sitting in tranche 3. What we are doing effectively by the
16 discussion we have just had is accelerating 2C to a 25 October delivery. That is what
17 we are doing.

18 **MR BEARD:** Well, yes. Accelerating, sure. What you see is the response in relation
19 to 2C is similar to the responses in relation to other parts of the Redfern schedule
20 dealing with these sorts of security issues. So, yes, that is all being swept up. We are
21 not demurring about that.

22 So that is part of what we were thinking about updating in July as to what disclosure
23 we could provide by when. Now, we completely understand that is now being covered
24 by this process and so, yes, that will be the case for 2C as well as those other elements
25 where we respond in the same terms as we do in 2C and the rest of the Redfern
26 schedule.

1 **THE CHAIRMAN:** That is very helpful. Just to whistle through the -- I think this does
2 not start until you get to, I think, the first time this comes out is actually 2A. I think this
3 sort of formula where you are offering some documents and a statement and I think
4 we are ticking off -- just shout if I have missed something or I get something
5 wrong -- we are ticking off 2A, 2B, 2C, 2D, 2E, 2F and you probably have to come
6 back to 2G which is different. 2H. I think 2I might be different as well; you might have
7 to deal with separately. That then covers 2J and 2K, they are swept up with that as
8 well. Then we come back to it at 3E. Is that right? Have I got the list right? Have I
9 missed anything?

10 **MR BEARD:** I will double check. I mean, I think that is broadly right. I think the one
11 thing to highlight though is that there are some parts of some of these responses that
12 are actually dealing with slightly different issues and may concern other categories of
13 documents beyond those that we are talking about in relation to some of the security
14 material and some of that we will need to just double check, how that is to be dealt
15 with.

16 So broadly speaking, the answer is insofar as we are talking about these sorts of
17 security issues, cyber security issues and access to platform issues and so on, yes, it
18 does not particularly matter which row they arise in. That is what we are intending to
19 cover through this process. But some of these categories I think actually touch on
20 some other categories of documents and I just can't commit now that those are all
21 going to be swept up in this process.

22 I am not going to be able to deal with that now, on the hoof. I think that is one of the
23 things we will just have to confirm on 31 July if there are any other categories of
24 documents here.

25 It is actually to do with who might hold them or where they might be accessed. So, for
26 instance, if they were being held by custodians that we were searching, that might be

1 part of a different strand of our disclosure activity. That is all I am saying. That is the
2 only caveat in relation to that.

3 **THE CHAIRMAN:** Well, I think we do need to probably bottom that out today,
4 Mr Beard. I say that because we need to resolve the Redfern schedule and to the
5 extent that they don't fall within the regime you have just described, we are going to
6 have to deal with them separately. Just to be clear, the reason I have picked those
7 ones out is they are all the ones where you have said you are considering providing
8 information statements and it seems to me the regime applies whether it is cyber
9 security or anything else.

10 Now, you may come back and say you are not going to do an information statement
11 on 31 July and obviously then Mr Palmer knows he is getting what is in the letter on
12 31 July. So I don't think I am asking you to commit to anything beyond a process and
13 there are clearly two or three things in the Redfern which we have not yet got to we
14 need to come back to that don't fall into the regime, if I can call it that. I am not going
15 to call it the easy path anymore. But I think we have to be absolutely clear what is
16 fitting into the regime we have just constructed.

17 **MR BEARD:** I have very helpfully been passed the note and I think it covers the same
18 areas that, sir, you were covering. So 2A to 2F, inclusive. 2H and 3E which I think --

19 **THE CHAIRMAN:** So 2G we need to come back to?

20 **MR BEARD:** Yes. 2G we come back to.

21 **THE CHAIRMAN:** 2H is fine and 2I onwards we need to come back to.

22 **MR BEARD:** Yes.

23 **THE CHAIRMAN:** Then what was the next one, sorry?

24 **MR BEARD:** 3E. Yes.

25 **THE CHAIRMAN:** That is exactly where I was as well. Mr Palmer, are you happy
26 with that?

1 **MR PALMER:** Yes, I am happy with that.

2 **THE CHAIRMAN:** So Mr Palmer, that leaves us -- I think we are done with the regime,
3 unless there is anything else you want to say about that. Obviously we need an order
4 on that so someone will have to produce some wording on that. But unless there is
5 anything else, I plan to move on and deal with the rest of the matter. Is that
6 convenient?

7 **MR PALMER:** Yes.

8 **THE CHAIRMAN:** So I think when we go to those ones which Mr Beard has just
9 picked out, so if we go to 2G, do you want to just point me through that?

10 **MR PALMER:** Sorry, 2?

11 **THE CHAIRMAN:** 2G.

12 **MR PALMER:** 2G.

13 **THE CHAIRMAN:** Yes.

14 **MR PALMER:** Yes. Sir, you see from what has been said and particularly in our latest
15 response that our concern is the need to understand how the counterfactual affects
16 overall platform security. Our purpose is to identify really whether there is anything
17 which we haven't captured in request 2A to 2F. So, if you like, this is our
18 known/unknown request.

19 We would expect there to be documents within Sony's possession which concern the
20 integration of different security features. In other words, there may be a number of
21 different security features, each of which may well have been developed by different
22 teams of people but which still need to work together, that still need to be integrated.
23 So what we are after is any documents explaining how this security system, how the
24 security features, exist across all the layers of the PlayStation beyond anything which
25 we have covered already in 2A to 2F.

26 Our expectation is that the easiest way to identify whether there are any such features

1 would be by reference to documentation concerning the integration of the different
2 features and how the different features are connected using interfaces or APIs, i.e.,
3 the software which allows different features to talk to each other, in other words, and
4 share data across those features.

5 **THE CHAIRMAN:** Yes. Mr Beard, if the proposition is, is there anything else, I
6 suppose there are two options, aren't there? One is you can say there isn't, or you
7 can produce it and as a sub option to producing it, you can give us a statement. I
8 mean, if there is something else, don't you have to produce it or at least explain it?

9 **MR BEARD:** I think it is important to emphasise that we should not lose sight of the
10 basic proposition that we are dealing with disclosure applications here. There are
11 questions of proportionality as well as relevance. You can see from the answer that
12 is being given in 2G that the point we are raising here is a question of proportionality
13 about how we go about this, sort of, generalised is there anything else analysis.
14 Because we think we will be picking up most of the issues that will be covered in 2G
15 in relation to the remainder of it. So our principal concern in relation to 2G is actually
16 just a proportionality issue here.

17 **THE CHAIRMAN:** I understand that. That is really why I put it to you -- I mean, let's
18 assume for argument's sake there is something else and it may be it is very difficult to
19 produce the material for that, because of the way it is recorded, presented, however it
20 is. In which case, one way of dealing with it is for you to tell us, yes, there is something
21 else and this is it. In other words, provide a statement.

22 I am slightly curious as to why you have treated this differently. If proportionality in all
23 the other aspects of this has been dealt with you by saying, "Well, actually the easiest
24 way is to just explain it to you." Now, if there is nothing left, there isn't anything material
25 else, then of course you would just say that. There is nothing to disclose. I sort of
26 read much of what you say in your response as being, well, we don't think there is

1 anything else.

2 I think we are asking you whether you are able to confirm is there anything else that
3 sits across all of this at a more network level and, if so, could you tell us what it is.
4 That is really the sharp point of the matter.

5 **MR BEARD:** Well, let me take an instruction. The problem is that if one just reads
6 2G, it is obviously a massively broad request.

7 **THE CHAIRMAN:** Yes. I completely understand that.

8 **MR BEARD:** But I see the point -- yes. So let me just take instructions. Because if
9 what you are saying is when you are providing this statement, can you provide
10 an indication about the existence or nature of any further security integrated features
11 within the architecture that aren't covered by all of the other topics. If that is really
12 what is being identified here. Can you just give me a couple of moments and I will
13 take instructions? I think that might be a very different beast to try and tether than the
14 one --

15 **THE CHAIRMAN:** I understand the point you are making. Thank you.

16 **MR BEARD:** If you could just give me two minutes.

17 **THE CHAIRMAN:** Yes, of course. I think what we might do actually, if you are still
18 there, Mr Beard, we might just take a short break for the transcriber, if you are going
19 to do that.

20 While you are doing that, I mean, we are going to go on and talk about 2I. I must
21 confess, I had to remind myself what 2I is about.

22 **MR BEARD:** 2I is different because it is asking for all sorts of hacker and intervention
23 reports. That one is very different because that is looking at stuff much more broadly
24 and we don't see the proportionality and relevance of that and so that would be a very
25 different debate.

26 **THE CHAIRMAN:** Yes. So 2I and following is about the stuff that is in the public

1 domain as to --

2 **MR BEARD:** It is very much not in --

3 **THE CHAIRMAN:** Well, yes. Exactly. It is requiring you to give things that are not in
4 the public domain. I understand the point.

5 **MR BEARD:** Yes. It is very extensive and intrusive and going well beyond what we
6 see is relevant. If this is going to be pursued, we are going to need an awful lot more
7 justification for 2I. We don't think that is in any way proportionate or relevant to what
8 Professor Pietzuch is suggesting he wants to do in order to construct this
9 counterfactual. So 2I is very, very different in relation to this. 2G I can take away but
10 2I I can't deal with in the same way.

11 **THE CHAIRMAN:** Fine. We will have to get Mr Palmer to explain all that to us in a
12 minute.

13 Why don't we take a short break. Shall we start again at 3.35?

14 **MR BEARD:** I am grateful.

15 **MR PALMER:** Grateful, sir.

16 **THE CHAIRMAN:** Thank you.

17 **(3.27 pm)**

18 **(A short adjournment)**

19 **(3.36 pm)**

20 **MR BEARD:** Good afternoon. Parties are ready to resume. Thank you.

21 **THE CHAIRMAN:** Yes. Mr Beard, I think you were taking instructions.

22 **MR BEARD:** Right. So in relation to 2G, going with what the tribunal was indicating,
23 whether or not there is sort of anything else beyond what is covered in, sort of, 2A to
24 2F and I think possibly also 2H. Covering that in the statement, I think it is something
25 that we can do. I think the big issue was to do with the proportionality of the disclosure
26 that was being sought.

1 So I think that way we can deal with it, as per the tribunal's suggestion just before the
2 short break. So I can confirm that. So I think that probably deals with 2G for the
3 moment.

4 **THE CHAIRMAN:** Yes.

5 **MR BEARD:** 2I is very different.

6 **THE CHAIRMAN:** Yes. Of course. 2I, we will come on to 2I. Just in relation to that,
7 if you are able at the end of July in your outline (inaudible) to say what the position is
8 it may take the point away. You may be able to say there is nothing more or there is
9 very little but we will give it to you. I will leave that with you. You can make that
10 decision as to --

11 **MR BEARD:** Yes. Yes. I mean, look, the problem is it is very unlikely we will be able
12 to say there is nothing more, because the very problem with this category is that it is
13 so broad that, you know, just in terms of what is being sought to say there is nothing
14 more in documentary terms would not be possible. If it is nothing more in terms of
15 security architecture, then I am sure that is the sort of thing that can be covered in the
16 statement.

17 **THE CHAIRMAN:** Thank you. Mr Palmer, that is where we have got to. Does that
18 satisfy you?

19 **MR PALMER:** Yes. If there is a clear statement there is nothing more in terms of
20 security architecture we need to worry about, that would certainly satisfy us. If there
21 is something more, then we would need to identify what it is and provide sufficient
22 detail so that Professor Pietzuch could understand what it is and how it plays in and
23 how it might be affected by third party distribution or not, as the case may be.

24 **THE CHAIRMAN:** He has accepted that is the path we are going down. Good.

25 So, Mr Palmer, 2I which I think rolls over into J and K.

26 **MR PALMER:** Yes.

1 **THE CHAIRMAN:** Do you want to just introduce that?

2 **MR PALMER:** Yes. So far from being irrelevant or disproportionate this seems to us
3 to be very, very important, because Sony extol the virtues of the security of their closed
4 platform as it exists but, as we know, at least from the HackerOne website whereby in
5 effect Sony encourages self-styled hackers to report flaws in Sony's security which
6 they have identified and gives them credit and accreditation and respect within the
7 community for having helped Sony cover any flaws.

8 So we know there are flaws and there can be flaws in the closed security system.
9 What we don't know from that, of course, is their significance in terms of the cyber
10 security benefits of the closed system which Sony extols. What we don't know is
11 whether or not those problems would be exacerbated by the introduction of third party
12 distribution and to what extent and in what way.

13 So if you look at the third column on the schedule, that is CR's reason for request, the
14 original request, reason for the request, 2I. What Professor Pietzuch seeks is material
15 which will enable him to gauge the importance of different attack vectors and the
16 effectiveness of different security mechanisms as part of the overall security
17 architecture and that in turn allows him to understand and assess any alteration in the
18 security architecture that would take effect in the counterfactual with third party
19 distribution.

20 In terms of our response to what Sony said in response to that is, again, we say we
21 can't do that, we can't assess whether it would be materially less secure without
22 an understanding of how secure the closed distribution model actually is. So hacking
23 attempts using attack vectors which are unaffected by the presence or absence of
24 third party distribution would be directly relevant.

25 Now, what Sony have offered us, I think it is over the top of the next page in the fourth
26 column, they say they are content to provide the class representative with copies of

1 reports that have previously been approved for public disclosure via the HackerOne
2 website. So the relevance of this request is acknowledged to a degree, but what is
3 being offered is only that which has been publicly disclosed.

4 Of course, what would be publicly disclosed won't be the detail of the security intrusion
5 and exactly how it happened or what has happened. It is limited to the HackerOne,
6 whereas the original request includes internal incident reports which are not actually
7 identified in the first place by self-appointed hackers but are identified instead as
8 a matter of internal security. It is very difficult to see why disclosure should be limited
9 only to those flaws which have been identified by outsiders, rather than those flaws
10 which had been identified by insiders.

11 So what we have sought is reports, statistics and post-mortem reports and cyber
12 security analysis to allow that to happen. To allow us to test the claims which are
13 being made for security of the closed system against the differences which would exist
14 in the counterfactual. It is very difficult to see how the objective justification claimed
15 by Sony in terms of the security of the platform without third party distribution can be
16 tested in any other way.

17 **THE CHAIRMAN:** Yes. Mr Beard?

18 **MR BEARD:** First of all, we don't accept relevance of any of this material. It is very
19 clear from the Redfern schedule response, the HackerOne material will be provided
20 without prejudice to that. So we don't accept the relevance. Mr Palmer's position is
21 that the system will be as secure with third party stores on it as it is now. It is to do
22 with the delta in relation to security now versus security in the future if there were to
23 be alternative stores. This material is not showing that.

24 Professor Pietzuch has provided no indication as to how that informs him as to why it
25 is you would find that there was at least the same level of security with the store on it
26 as otherwise. It is a different question you are grappling with here. Attack vectors and

1 jargon of that sort does not improve his position. What we have said is you can have
2 this material. If he can specify, of course, that there are particular incidents that would
3 particularly inform, then he needs to provide proper reasons for that. Otherwise, what
4 you are dealing with is potentially a very large amount of material which is
5 extraordinarily sensitive, and it is disproportionate and unnecessary to provide it as
6 part of this disclosure exercise.

7 So we say no to 2I. It is not necessary, it is not proportionate and it is, in fact, not
8 relevant. If Professor Pietzuch is going to give a proper account of precisely why it is
9 that these materials are needed then we need a proper account to be provided. The
10 statement in here saying evidence as to hacking accounts using attack vectors which
11 are unaffected by the presence or absence of third party distributions is not telling you
12 anything about whether or not the system is more or less secure if you have this
13 notional third party store on it. He has not provided any reasoning why that is the
14 case.

15 **THE CHAIRMAN:** Mr Beard, if Professor Pietzuch turns up with in his counterfactual
16 a construct of what the architecture might look like for third party distribution and then
17 you were to say, "Oh, but this is vulnerable" your expert or your witnesses, technical
18 witnesses, say, "This is vulnerable to hacking because of the following
19 considerations", I think Mr Palmer is saying: well, I should be entitled to say it is no
20 more vulnerable than the original system was. In order to do that, he needs details of
21 how vulnerable the original system is. That is the logic.

22 Now, it may be you are not going to say that. I think if you are going to resist the
23 material you have to foreclose yourself the opportunity of making any points that could
24 be taken --

25 **MR BEARD:** No. It is not - it is the delta. It is undoubtedly the delta.

26 **THE CHAIRMAN:** You say the delta, I don't think that is right though. You say it is

1 the delta, but I don't think it can be the delta. If you are at liberty to make points which
2 are against an undefined base, that is the problem. The delta is fine but if we don't
3 know what the baseline is, then you can't establish the delta and the point you might
4 make about the vulnerability which you would attribute to delta may not be delta points
5 at all. That is the point Mr Palmer is making.

6 **MR BEARD:** Yes. So Mr Palmer is saying, well, actually what you need is you need
7 to set the baseline because otherwise we could say there was a delta and in fact there
8 is not any delta here. I think that is what is being said.

9 **THE CHAIRMAN:** Yes.

10 **MR BEARD:** Obviously, we are alive to the fact that what has to be dealt with here is
11 the delta. Is it becoming less secure? Is there a problem created by the existence of
12 this putative third party store being put on the PlayStation? Not whether or not the
13 PlayStation is entirely invulnerable: we do understand that. But having all of the
14 material about all of the possible incursions that have occurred in relation to the
15 PlayStation and all of the private material may be just simply completely irrelevant to
16 that debate about what the delta actually is and, therefore, this is just disproportionate.

17 **THE CHAIRMAN:** Well, I can see there might be a proportionality point. Actually I
18 think you were taking this on a point of principle. I have to say, I don't think that that
19 is sustainable. I think you are going to have to provide something here to help us
20 understand what the baseline is and the question really is what is the proportionate
21 way of doing that.

22 So, for example, you know, I think what Mr Palmer is saying, we don't think we are
23 going to get enough from the public material, which one can understand because it is
24 unlikely to give a true sense of the significance of the violations or problems that have
25 happened. So he is saying we want to see something in the internal material that
26 gives a sense of that. I think that is, for the reasons we have discussed, something

1 | which is in issue or could be in issue unless you are going to foreclose any point that
2 | could be taken about the delta that comes from this. So we need to know what the
3 | baseline is.

4 | So somehow I think you are going to need to come up with a formulation that gives us
5 | a sense of where the baseline is. That could be some sort of summary material, but I
6 | think you are going to have to do it.

7 | What I suggest is I give you more time to go away and come back to Mr Palmer with
8 | a formulation of some summary material that gives him that baseline, but allows you
9 | to, A, maintain some proportionality and, B, also I hope will help in managing security.

10 | Obviously if --

11 | **MR BEARD:** Yes.

12 | **THE CHAIRMAN:** -- security concerns are very high then you can talk to him and
13 | come back to me about any additional protection you might need.

14 | **MR BEARD:** Well, I appreciate the opportunity. We do maintain the position that
15 | obviously incident reports that we are talking about, even taking the hypothesis that
16 | somehow the submissions that we would make about delta would be somehow
17 | concealing where the baseline was and you needed to know what the baseline was in
18 | relation to it, incident reports, we are struggling to understand how that sets that
19 | baseline as well, or the volumes of incident reports. Because you could have a single
20 | incident with lots and lots of reports, but it might actually be a minor point, for example.

21 | **THE CHAIRMAN:** I think really what he is asking for -- it may not have been
22 | articulated -- I think really what he is asking for is an internal assessment of the
23 | significance of the things that we know exist externally from the HackerOne and,
24 | indeed, anything else that is done internally. So it is about the, if you like, a summary
25 | of the weaknesses or the frailties of the current system that helps us assess the
26 | baseline. That is what we need, I think.

1 **MR BEARD:** I am not going to repeat my points in relation to it. I think given the
2 tribunal's indication, I think the sensible thing is for me to go away and talk to my client
3 and see what we can sensibly do.

4 The request as it stands is plainly disproportionate and unjustified. We understand
5 better from the tribunal's articulation of it what it is that might be useful here. Whether
6 or not it is actually relevant in due course is something that we can just hold over, but
7 I am happy to take it away on that basis.

8 **THE CHAIRMAN:** Yes.

9 Mr Palmer, would you be content to proceed in that way? It seems to me that is the
10 easiest way to deal with it.

11 **MR PALMER:** I am certainly content for Mr Beard to take further instructions and
12 report back further as to what can be provided by way of statement. I am not content
13 for what he said in his last few words that relevance be held over. It seems to me, sir,
14 you have captured the point about relevance. It is a point that extends to 2J and 2K
15 as well. It is analysis reports and post-mortem reports of attacks and successful
16 compromises and what mitigation measures they have adopted in response.

17 Much or all of which may well have been collated in high level reports. One would
18 expect that to be the subject of upward reporting in terms of anything of significance
19 and one would expect that to be capable, those sorts of reports, of being identified,
20 disclosed and that can be within the confidentiality arrangements that I know that Sony
21 seek.

22 **THE CHAIRMAN:** Just to be clear, I think you said something about statements. I
23 don't think he is offering a statement. I think we are talking about documents here,
24 summary documents, that exist.

25 **MR PALMER:** Yes, summary documents. It can be summary documents. There
26 must be some level of upward reporting to someone within Sony as to the significance

1 of any particular security compromise that has been threatened or which had occurred
2 and the mitigation which had been adopted to deal with it.

3 **THE CHAIRMAN:** So what we do is we say to Mr Beard you have to come back within
4 two weeks with a proposal as to what sort of material you might be able to provide on
5 this. In fact, actually what we might do, Mr Beard, is include it in your end of July list.
6 That might be the way to deal with it.

7 **MR BEARD:** I think that's the sensible thing to do. Let's add it to the list of things to
8 be covered by the 30th or, if possible, the 29th. Yes.

9 **THE CHAIRMAN:** Mr Palmer, if you are not satisfied with that, then I will deal with
10 any further request you want to refresh on the papers.

11 **MR PALMER:** I am grateful.

12 **THE CHAIRMAN:** I will be able to deal with that in early August.

13 **MR PALMER:** That is extremely helpful, sir. Thank you.

14 **THE CHAIRMAN:** I hope that does not create inconvenience for anyone else. I would
15 like to get it resolved. So I hope between you, you can resolve it, but if there is any
16 issue that comes back. I have given my indication of what I think the relevance position
17 is. If it is refreshed, then Mr Beard and his solicitors may have something to say about
18 that as well. But you certainly know where I am coming from, Mr Beard, on that.

19 **MR BEARD:** I hear you. Yes.

20 **THE CHAIRMAN:** Good. Thank you.

21 Mr Palmer, is there anything else in here we need to deal with today? I think we have
22 swept up most things? Is there anything that is outstanding you want to deal with
23 now?

24 **MR PALMER:** I think the requests under section 3 have been dealt with along the
25 way. I will be corrected by anyone sitting notionally behind me if there is anything else
26 under section 3.

1 Under section 4 --

2 **MR BEARD:** Before we move on to section 4. Obviously in relation to section 3 we
3 said we would provide updates. Just to be clear, we will provide those updates with
4 the other updates on 30 July. I just don't think that had been confirmed.

5 **MR PALMER:** Yes.

6 **THE CHAIRMAN:** Thank you.

7 Mr Palmer?

8 **MR PALMER:** That takes us to section 4. Now, section 4 has been incorporated and
9 extracted from the disclosure table relating essentially to the economic reports. The
10 material which Mr Harman and Mr Colley have requested.

11 **THE CHAIRMAN:** Yes.

12 **MR PALMER:** 4A you can see is a confidential item.

13 **THE CHAIRMAN:** Most of 4 has been agreed, hasn't it?

14 **MR PALMER:** Well, 4A is said to have been provided by 13 September --

15 **THE CHAIRMAN:** 4D as well.

16 **MR PALMER:** Yes, 4D as well. But 4B and 4C, I think they are both items which the
17 defendants are content to provide. But it is not clear why they don't feature in any of
18 the disclosure to be offered by 13 September or, indeed, by 25 October.

19 **MR BEARD:** Shall I deal with that?

20 **THE CHAIRMAN:** I think you should, Mr Beard. I think one thing that is clear is that
21 we now have -- it is not a mismatch, but we certainly have several different things
22 going on here, haven't we? I am conscious of the time as well. We do need to come
23 back into this letter and just work out what we are doing with it. I think it is helpful to
24 have it, but it is a bit unhelpful that nobody has really had time to absorb it properly.
25 We also now have changed it, because of the way in which we have dealt with that
26 formulation we have spent a lot of time discussing.

1 I am just wondering if the best way of doing this is to say to you can we have another
2 go at tidying this up and providing it and, again, we could deal with it on the papers. I
3 would like to emphasise to you that I would like to see more things come earlier,
4 obviously. I can understand why 13 September for most of this is sensible because
5 you have things to do. But we have not got things to do. I don't know whether you do
6 have lots of things to do with the CMA material and maybe you do have redactions,
7 maybe you don't. I don't know.

8 But I think the message is quite clearly as much as you can do, as soon as you can
9 do it. If there are things you can do sooner than the 13th, please do. Otherwise, what
10 I think we need is clarity about precisely the things we are going to talk about. Feel
11 free to tell me about 4B and 4C. But we don't want to wait until December for those, I
12 don't think, is the short answer.

13 **MR BEARD:** I think we may struggle with 4B and 4C. That is going back to the points
14 about these materials being held by custodians. So it is a process point in relation to
15 disclosure. So what we need to do is go through the process that obviously, sir, you
16 are well familiar with. We have been identifying custodians. That was all set out
17 previously. What we are doing is identifying the cohorts of documents that might be
18 responsive so we need to have a discussion about search terms, which we are going
19 to do. Then we need to test those search terms to see what volume of materials we
20 get back from these people, see whether or not we need to refine the search terms,
21 then of course we need to do the review of the materials themselves.

22 The reality of that is that those sorts of disclosure exercises take some time. It is for
23 that reason that these are categories of documents that we can't be committing to
24 providing sooner. Obviously, the process of getting to them and discussing, you know,
25 relevant search terms and so on with the class representative are things that will be
26 going on. But the actual output, we can't commit to getting that done sooner, just

1 because we know what the logistics of that sort of exercise are with this range of
2 custodians and this potential volume of material that we are talking about. So that is
3 the issue on those.

4 **THE CHAIRMAN:** Were you planning -- is this part of the subject matter of the end
5 of July matter? Are you going to come back on all of this as well? Because I don't
6 think you have given any dates in relation to this, other than the letter that came in
7 from Linklaters. Are we taking that as being this is 23 December or are you planning
8 to give us a full update on these items in July as well?

9 **MR BEARD:** I think in relation to these items, I don't think we anticipate we are going
10 to be able to do those before the backstop deadline because of the process that we
11 are dealing with. We are very helpful, if it is useful to indicate where we have got to in
12 relation to this process in July, but we will be engaging with a class representative in
13 relation in particular to the search terms exercise. But it was not envisaged that these
14 categories, where you are dealing with custodian searches, that was not what we were
15 focusing on in terms of update in July. We can explain where we are with it in July if
16 that assists.

17 **THE CHAIRMAN:** I understand. I think what would be helpful and what is not as clear
18 as it might be, that is partly because I think a lot of the Linklaters letter from (inaudible)
19 today focuses on the disclosure table which I am less familiar with. But what I don't
20 get a sense of, looking at that -- particularly since we have made all the adjustments
21 we have made -- is how it fits with the schedule. I don't know whether that would be
22 helpful for Mr Palmer -- certainly, I would find it helpful for there to be more clarity about
23 precisely what is in tranche 1, 2 and 3, which probably means building up tranche 3
24 more extensively, with specific reference to the different jargon.

25 **MR BEARD:** I am sure we can do that. We can certainly do that, to spell out what
26 would be in tranche 3 for the purposes of reference to the Redfern schedule. I don't

1 think that is a problem.

2 I am just explaining generically why it is those categories of material are effectively on
3 a different timeline from others, because they involve this different process. That is
4 the issue in relation to them.

5 I mean, even in relation to 4A, I am not going to read out what the three sub-categories
6 are. But the first two sub-categories should be fully provided in September. The third
7 sub-category, we can deal with for the period post 2020 by September but, as you will
8 see in the letter that was provided for the pre-2020 period, that will just take longer to
9 gather that material. So it will be in the second tranche.

10 So we are very happy to spell -- that is actually in the letter, but I am very happy to
11 ensure that we spell that out more clearly, more specifically, by reference to the
12 Redfern schedule, not just the updated disclosure schedule, so that you have it
13 essentially in one place, sir.

14 **THE CHAIRMAN:** Okay. I think that would be really helpful, thank you.

15 Mr Palmer, there is a point at which, I mean, some of this is going to come at the end
16 of the year I'm afraid. That is just how it is and that is what the timetable does.

17 Mr Beard says they have a whole lot of things to do so I think your assumption that
18 actually there is not a lot to do which the table reports is probably not right. Quite how
19 quickly they can do it, I don't know. I don't really think we have the time or the material
20 in front of us to have that discussion.

21 What I suggest is that if once we get all this packaged up and you have a much better
22 sense of everything you have been promised today, if you think there is anything that
23 should be coming sooner than it is and you think it makes a difference to the timetable
24 later, you should be pushing that.

25 **MR PALMER:** Thank you, sir. That is noted and understood. So we will take that
26 approach and see what comes on 30 July and engage with that at that point.

1 **THE CHAIRMAN:** Good. Thank you.

2 Anything else on the schedule?

3 **MR PALMER:** No. I think 5 and 6 are dealt with in the Linklaters letter of today so I
4 don't need to pursue those.

5 **MR BEARD:** I think they are covered. They are going to be coming, sir.

6 **MR PALMER:** They are coming. So that takes us, before we get to the timetable
7 issues, can I just indicate in terms of further CMCs and in terms of managing this
8 process.

9 **THE CHAIRMAN:** Yes.

10 **MR PALMER:** It seems to us, following discussion in the short adjournment we had
11 a moment ago, that it would be advisable to set aside two further dates for CMCs
12 which can always be vacated if not required. But so that there can be an opportunity
13 to make such further applications before the tribunal as necessary following receipt of
14 the information which has today been promised.

15 It seems to us that the first occasion should be on or around the last week
16 of September, so that would be following the 30 July, obviously, but also following the
17 first tranche of disclosure and also the disclosure report and EDQ which was agreed
18 to be provided on 9 September. That is a sort of way mark by which we might raise
19 any concerns that there are in respect of what is being promised or what is being done.

20 **THE CHAIRMAN:** Yes. Just on that. So you are going to get these outlines on
21 16 September as well, so all of that does make some sense. I am just wondering, I
22 am available in the last week of September, subject to a hearing I have on the Monday.
23 I am just wondering actually whether you might be better to be doing it in the next
24 week, the beginning of the next week, to give you a bit more time to absorb what is in
25 the 16 September outline.

26 **MR PALMER:** That would create a difficulty for me, because of another commitment.

1 The last week of September would be much more preferable, from that point of view.

2 **THE CHAIRMAN:** Mr Beard?

3 **MR BEARD:** I am the other way around. As per the letter we sent at the back end,
4 we don't disagree with the idea of having a CMC, but we said during the first two weeks
5 of October so there has been proper time to digest what has come through
6 in September. That would obviously be with bells on in relation to any outlines that
7 Mr Palmer may want to raise points in relation to. But we have counsel availability
8 issues through to the end of September. We are happy any time in the first two weeks
9 of October, so well in advance of the end of October dates we are talking about.

10 **THE CHAIRMAN:** Are we contemplating that this is just me sitting alone or are there
11 likely to be any issues that engage the whole tribunal? If we are just talking about
12 disclosure, I don't think we need anybody else.

13 **MR PALMER:** I had imagined it would be you sitting alone, sir. As today, effectively.

14 **MR BEARD:** We were not envisaging anything else. In a way, this is a staging post
15 CMC. I think Mr Palmer is seeing it in the same way. We don't have any issue with
16 it. It is better to make sure there is a date in there so that if things need ventilating,
17 they can be.

18 **THE CHAIRMAN:** What I might do, Mr Palmer, it depends really how keen you are to
19 get on with this. It seems to me that the options are either to try and do
20 something -- well, I have a few things. I am not available on the 3rd, 4th or
21 7th October, or probably the 8th. But I could do the 9th. I could do the beginning of
22 the week before: 31st, the 2nd. I can do 24th, 25th, 26th, 27th.

23 There are two options as well as to format. We can either do it on the basis that we
24 give the informal hearing before we did the last CMC and I am very happy to do that
25 with junior counsel, if you just want some guidance. If you actually want some orders
26 and some things done, then we need to constitute as a formal hearing.

1 If you could do the 9th then obviously that would suit Mr Beard and his team. If you
2 think that is too late and you want to get on with it, then we have to find some way of
3 making it work.

4 **MR PALMER:** I am not available the first two weeks of October: I am in Manchester
5 in admin court for two weeks. So it would need to be at the end of September which,
6 from our point of view, given this is an opportunity to raise concerns if there are any
7 as to how the disclosure process is going and what is being promised will be done,
8 needs to be sufficiently in advance of the 25 October date for that to be remedied in
9 time. So leaving this into October --

10 **THE CHAIRMAN:** Well, I don't think that is right, is it? I doubt there is anything we
11 are going to do three weeks before that stuff is supposed to arrive that will change the
12 course of history very much. It may be it comes soon after that but I don't think that's
13 really a valid consideration.

14 Mr Palmer, I understand exactly the difficulty but obviously Mr Beard has difficulties as
15 well. I don't think just to accommodate entirely your diary -- what I suggest you do is
16 try and have a conversation about trying to find a time that would work and a basis
17 that would work. As I say, I am not fixed on how we do it. It may be that you can find
18 a time when you can do it or a date you can do it that does not clash with your existing
19 commitments. Maybe you can find someone else to --

20 **MR PALMER:** That might be the week beginning the 14th. Yes.

21 **THE CHAIRMAN:** I don't think it has to be leading counsel or, indeed, you specifically.
22 So I am going to leave it with you to come back and see if you can agree a date. If
23 you don't, I am going to choose the date which suits me best which may not suit either
24 of you. So there we are: that is the challenge. But in principle, yes, let's have
25 something in that window and we can vacate it or proceed as required.

26 **MR PALMER:** The second way mark, which you may wish to leave until that CMC

1 because it may not happen, would be mid-November which would be following the
2 disclosure on 25 October but soon enough in advance of the ultimate deadline of
3 23 December. To the extent that we have identified any additional(inaudible)
4 documents which need to be disclosed, which Sony have not disclosed. You indicated
5 earlier, sir, and we respectfully agree, that at that point it would just be for Sony to get
6 on with it and produce those documents. But some sort of window needs to be made
7 available for them to do that and it needs to be a sufficient time after 20 October for
8 us to have been able to analyse what has been produced so far and sufficiently in
9 advance of the 23 December deadline for that to be practical. So it seems to us that
10 mid-November is about right.

11 **THE CHAIRMAN:** So I will be starting a trial either on the 11th or the 18th, running
12 through to Christmas. So I think it is more likely the 18th. I wonder if maybe we might
13 leave this until September. What you might want to do, at least in terms of availability
14 if you can, try and keep some space available in the week of the 11th I think is probably
15 the safest. I think it is quite possible for the trial to start a week later. But after that, it
16 is going to be a bit more difficult. It may have to be for a Friday, if it is possible to do
17 the 22nd, it is possible, or the 29th. But I am going to be a lot less available I am
18 afraid.

19 Why don't we pick that up in September?

20 **MR BEARD:** Yes. We have no objection to that. The only thing I would say is there
21 tends to be benefit in if we were to make the assumption which may be with some
22 temerity that your trial, Mr Chairman, does not start until the 18th, I wonder whether it
23 is actually better to fix a day, whether it is the 11th or 12th, rather than --

24 **THE CHAIRMAN:** I am perfectly happy to pencil it in on the basis that I may not be
25 available, so as long as you are comfortable with that. It actually would suit me best
26 to do it on Wednesday 13th, if you are both available. So if you are happy to put that

1 in your diary, then let's see what happens.

2 **MR PALMER:** I am not --

3 **THE CHAIRMAN:** How about the 12th in the afternoon?

4 **MR PALMER:** The same again: I am in the admin court in Leeds. You indicated there
5 might be a possibility for a Friday slot, for example, on 22 November. That would
6 work.

7 **THE CHAIRMAN:** Yes. The difficulty with that is I don't know what the trial
8 configuration looks like at the moment. I don't think we will start on sitting Fridays, but
9 of course one never knows.

10 Mr Beard, are you clear on the 22nd?

11 **MR BEARD:** At the moment I don't care at all, honestly. The only reason I suggested
12 we actually put a date in, because experience tells that when you try and say, "Oh,
13 well, can we hang on for a week" then stuff gets scattered across it --

14 **THE CHAIRMAN:** That is entirely fair. Mr Palmer, I do actually think 22nd is leaving
15 it pretty late if you want it done by Christmas. I have to say I think you might be better
16 trying to find an earlier time to do it. But if that is what you want to do, I am happy to
17 pencil it in. No assurances I am going to be available then though.

18 **MR PALMER:** Yes. Perhaps as you suggested earlier, sir, we can take those dates
19 away and see what we can agree with the tribunal subsequently.

20 **THE CHAIRMAN:** Just so you know at the moment, the week of 4 November I am
21 free except for the Friday. As I say, the week of the 11th, Tuesday morning is difficult
22 for me and I have a PTR on the Friday 15th. But otherwise, subject to my trial starting
23 a week later, which it may or may not do, I am available.

24 So, anyway, I will leave that with you. I do think it would be helpful, I think Mr Beard
25 is absolutely right, we should get them in the diary.

26 **MR PALMER:** Thank you. So I think that takes us to the timetabling issues.

1 **THE CHAIRMAN:** Yes. Now, just on this, I mean, I think I get the gist of what the
2 battle has been about all this and about the reference points for it. I was going to
3 suggest to you, shuffling through it all, I don't think I need to hear from you, I have
4 seen the correspondence and understand the dispute about how long class
5 representative gets after disclosure. I do think, Mr Palmer, you are going to have to
6 move a bit quicker than you would like. It seemed to me, just to put a proposition to
7 you and see how much you pushback, that if we were to -- I am on page 18 of the
8 bundle, so it is the February dates of the re-amended claim form -- instead of
9 24 March, I was going to say 3 March. It seemed to me to be giving you sufficient time
10 from 23 December.

11 Then if it is helpful, I can just give you a list of other dates that seem to me to flow from
12 that. Really then we can see whether you have any violent objections. So if you did
13 3 March, I think defendants would then file its defence on 7 April. Reply, 2 May, then
14 rejoinder 12 May. Common ground list of issues: 13 May. Then factual witnesses
15 would go on 26 May: that is the indication of factual witnesses. 11 June for the actual
16 factual witness statements and Professor Pietzuch's factual material.

17 Have not dealt with the CMA observations because I don't know how (inaudible) they
18 are to other things.

19 Then you have the reply factual evidence on 9 July. Professor Pietzuch's primary
20 report on 8 August. 15 September for technical expert evidence in reply. 10 October
21 for first round economic and accounting, and 28 November for second round economic
22 and accounting.

23 Now, there is an element of not quite splitting the difference, because you would be
24 starting in a slightly worse position than you would like, Mr Palmer. But it does seem
25 to me that is a timetable. What I would like to know is that we had dealt with all the
26 really heavy lifting by the end of November. It seems to me that gives us both a little

1 bit of space for slippage if need be and also a reasonable time for a trial that starts on
2 2 March.

3 Can you live with that, Mr Palmer? Am I pushing you too hard or are you happy to
4 accept that?

5 **MR PALMER:** Well, I am going to push for a little more, sir, if I may. Whilst
6 understanding the points you have made, there has been a change in one respect
7 since last time which is that we have had it confirmed from Sony that they anticipate
8 that the total sum of the disclosure will be measured in the tens of thousands of
9 documents.

10 That enquiry from us was provoked by the fact that in the US, where as you may know
11 the Caccuri litigation raises similar but not identical questions about Sony's digital
12 distribution at PlayStation Games, what is being said there is that Sony's documents
13 will run into the hundreds of thousands. The claimants there, the plaintiffs, anticipated
14 between 500,000 and a million and Sony said, no, closer to 200,000.

15 That led us to enquire with the defendant in this litigation what they expected and their
16 answer is they anticipate in the tens of thousands, rather than the hundreds of
17 thousands.

18 Now, of course, to the extent that disclosure is provided sooner rather than later, our
19 concern is ameliorated. But there remains an awful lot of flexibility and an awful lot of
20 doubt as to exactly how much detail is going to be provided in fact in September
21 and October, and how much is going to follow on in December and how many tens of
22 thousands of documents that might be.

23 It seems to us that to be pretty clear that we are going to need time to review that
24 disclosure, in order to formulate our counterfactual case, so that it is properly informed
25 and in particular by Professor Pietzuch's analysis of that material. There are lots, as
26 you have seen already, sir, today that he has requested which we are told cannot be

1 provided until December and may only be provided in the form of information
2 statements in October, which are accompanying documents which generate further
3 requests.

4 So for that reason, sir, and bearing in mind that the end date for this disclosure, the
5 long stop date, is 23 December -- it is before Christmas -- realistically, one might think
6 the response to that might not begin on 24 December, but after Christmas. It seems
7 to us that every week does matter here because, on any view, thousands of
8 documents are going to have to be reviewed every day. Realistically, it will take some
9 time to prioritise what the core documents are, to identify them, to review them, to
10 understand them.

11 So although we appreciate the extra week beyond Sony's latest proposal that you
12 have afforded, us, we would say every week counts. Even if you are unwilling to go
13 to the date which we propose -- which is 24 March -- the 3 March is some three weeks
14 off, which really will make a very substantial difference to our ability to review that,
15 distill it and plead a case which properly reflects it.

16 We think it is unhelpful to set up a date which is not going to be realistic or is going to
17 require further amendment later as we continue to read into the detail of these
18 documents. Better to have the right start from the outset. That is --

19 **THE CHAIRMAN:** Sorry to interrupt you. Am I right in thinking that is the date that
20 really matters to you, because the rest of them are not really contentious and once
21 you have got that, everything flows.

22 **MR PALMER:** There is no substantial dispute between us as to the intervals. There
23 is one or two points of detail but no hill we are going to die on in terms of the dates. I
24 think the only other dispute relates to skeleton arguments right at the other end of the
25 process.

26 **THE CHAIRMAN:** I had not actually got to that. I don't think we need to deal with that

1 today, unless you feel very strongly about it.

2 **MR PALMER:** The only question is whether sequential or simultaneous exchange of
3 skeleton arguments. We have taken note of the tribunal's view of the value of
4 simultaneous exchange in relation to all other steps leading to that. We thought
5 skeleton arguments should be treated in the same way. Sony contend that sequential
6 skeleton arguments should be ordered. That has an affect on us, because it means
7 we have to do our skeleton four weeks before trial rather than two weeks before trial.

8 **THE CHAIRMAN:** Yes. I understand. Let's park that.

9 **MR PALMER:** That is the extent of that dispute.

10 **THE CHAIRMAN:** I don't think we need to deal with that today.

11 Mr Beard, I mean, I think I would rather -- you heard what Mr Palmer says -- just to
12 save you having to say an awful lot about it. I am still inclined, I think, to hold him in
13 the meantime to 3 March. Largely because of what I am hoping you are going to
14 produce on 25 October, which actually does give him plenty of time. Because really
15 the (inaudible) about Professor Pietzuch, that is what the amendments are about.

16 So I don't think I need to address all those points, unless you have anything you would
17 particularly like to say. I think what I would say to you is that if we find that Mr Palmer
18 comes back in October and says actually this is a mess and I have not got what I need,
19 and he turns out to be right, then I am going to have to find some more time and that
20 is inevitably going to put some quite serious pressure on you, I think. I am not going
21 to adjust this timetable so it ends up with a squeeze at the back end: it is going to have
22 to have a squeeze at the front end and that is probably going to put some pressure on
23 you.

24 So I think you need to be alert to that possibility. But is there anything else you wanted
25 to add?

26 **MR BEARD:** No. We think it shouldn't shift it at all because the idea that you need

1 months to replead in these circumstances, because that is really the driving force here.
2 I mean, this isn't starting from scratch. This is one aspect of their case. The idea that
3 it should take months to replead, I think the timetable was already incredibly generous
4 to the class representative in relation to this. There should not actually be any
5 movement in relation to it, because it is actually later stages. For instance, in relation
6 to factual reply evidence where we will need more space. At the moment, we are
7 going to get less than a month for that.

8 Those are the problems that really arise. We are very much with you that everything
9 needs to be done by the end of November but, quite frankly, the idea that you need
10 more than two months to replead a case which supposedly you had extensively
11 pleaded already in relation to expertise which of course was only admitted relatively
12 recently. It was not a focus of the way in which the case was being brought to begin
13 with and that somehow this is a radical transformation we just feel is a little outlandish
14 and Mr Palmer is overselling these issues.

15 I also think the idea that he was somehow shocked there might be tens of thousands
16 of documents disclosed, given the nature of the requests that were being put forward,
17 it betrays -- well, an admirable degree of chutzpah on the part of Mr Palmer and his
18 clients in relation to this. What did he think he was going to be getting when he raised
19 these issues and put forward a timetable previously? It was obvious there were going
20 to be tens of thousands of documents here.

21 We say there should be no movement, but if the tribunal is minded to move for a week,
22 so be it. But I do put down the marker that even if there were to be contentions
23 in October, there is plenty of room within that period for repleading for that period to
24 be compressed if there is any pressure in due course.

25 **THE CHAIRMAN:** Yes. Thank you.

26 Mr Palmer, I think I am still fixated on 3 March. Is there anything else you wanted to

1 say? I don't think you are going to change my mind on this. I certainly accept that if
2 things change in October, we may need to look at it again. I don't think it is going to
3 be an awful lot.

4 **MR PALMER:** I am content --

5 **THE CHAIRMAN:** To that extent?

6 **MR PALMER:** I am content with that, if there is that opportunity. Obviously if we do
7 get what we need that much sooner, in October rather than December, then my
8 concern is much mitigated. But if we don't, my concern will be real. Contrary to what
9 Mr Beard says, the entire premise of this putative amendment pleadings is entirely
10 dependent on the detail of what is now disclosed by way of explanation: the way the
11 PlayStation system works which at the moment, in terms of asymmetry, is entirely
12 within Sony's knowledge and not in ours.

13 **THE CHAIRMAN:** I absolutely understand that. I think what I think feeds into my
14 fixation on 3 March is that you are getting some material in September that goes to
15 those points. You are getting hopefully the very great bulk of it by 25 October. I do
16 think that gives you enough time by 3 March, possibly argue 24 Feb but certainly
17 3 March --

18 **MR PALMER:** If we get what we need, that's right.

19 **THE CHAIRMAN:** That is the basis on which I am working. If for some reason that
20 turns out not to be the case, we will have to manage it. But that is the reason why.

21 **MR PALMER:** Yes.

22 **THE CHAIRMAN:** Thank you. Good. That is helpful. Thank you.

23 Can I leave it with you to go away and come back with anything that you think -- I don't
24 know if it is helpful to have those dates read out again or whether you have them. It
25 will be in the transcript. You can work them out. They are broadly I think following the
26 intervals that you had set in there and I don't mind terribly if you want to adjust them.

1 | Could we have an agreed order that works.

2 | What I think, as I say, is important is that they end up more or less at the end
3 | of November with the second round of expert reports. As I say, I have not adjusted
4 | anything to do with the CMA. You may feel that is appropriate and you may want to
5 | consult the CMA before you do that.

6 | **MR PALMER:** The CMA date was relatively straightforward. It was essentially a
7 | couple of months after the close of pleadings, I think. We can maintain whatever that
8 | interval was.

9 | **THE CHAIRMAN:** Yes. As long as they are happy with that. I don't know if they are
10 | listening, but if they have any observations then clearly they should be entitled to feed
11 | those in.

12 | I will leave that with you to tidy that up and produce a final version of it. Some of it at
13 | least I think should go into the order, not all of it needs to but certainly the dates of the
14 | pleadings and the evidence should go into the order. I think probably once we get to
15 | things like the experts' meetings and then the PTR and skeletons, we can probably
16 | leave that out of the order for now and deal with those later. You have done all that;
17 | you know how it works.

18 | Is there anything else we need to deal with today?

19 | **MR PALMER:** The only other item on the agenda for today was further confidentiality
20 | protections which Sony seek. We need not deal with the detail of that now, because
21 | as Mr Beard said there is correspondence about that.

22 | All that I would say and wish to place on record is none of that should threaten the
23 | timetable which the tribunal has laid down and approved today, we are willing to work
24 | with Sony about that. We have written back indicating what we would need if there
25 | were to be a further tighter confidentiality ring, in fairness to be able to take instruction
26 | from our experts. Provided that can be agreed in good time, then there should be no

1 difficulty. But we would certainly be very resistant to any attempt to draw that process
2 out, so as to threaten any of these dates.

3 **THE CHAIRMAN:** Of course. I am sure Mr Beard will agree with that. If you get stuck
4 on anything again, I am very happy to receive written material and deal with it on the
5 papers. But I would hope this is something you can sort out between you.

6 **MR BEARD:** This is not intended to drag anything out. I am sure we can resolve it
7 and if we can't, we are grateful for the indication we could come back to you
8 Mr Chairman.

9 **THE CHAIRMAN:** Thank you.

10 Thank you both very much and to your teams. I think we have made some good
11 progress; that was really helpful. I will just say again, I was pleasantly surprised to
12 find the number of things that were in dispute in the Redfern schedule quite limited,
13 albeit important, and I think it does show the benefit of that process.

14 So you do have an open invitation if you want to continue to resolve things. I would
15 much rather you resolve them yourselves, but if you find you need to come back then
16 of course I have indicated my availability and please do.

17 **MR PALMER:** Thank you very much, sir.

18 **THE CHAIRMAN:** Thank you. I will now end the hearing. Thank you very much.

19 **MR BEARD:** Thank you.

20 **(The hearing adjourned)**

21 **(4.27 pm)**

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