

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case No: 1570/5/7/22 (T)

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 20th November 2024

Before:

Justin Turner
(Chair)

John Davies

Ioannis Lianos

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimant

JJH Enterprises Limited (trading as ValueLicensing)

V

Defendants

Microsoft Corporation and Others

A P P E A R A N C E S

Max Schafer, Jon Lawrence & Andris Rudzitis (Instructed by Charles Fussell & Co LLP) on behalf of JJH Enterprises Limited.

Robert O' Donoghue KC, Nikolaus Grubeck, Jaani Riordan & Kristina Lukacova (Instructed by CMS Cameron McKenna Nabarro Olswang LLP) on behalf of Microsoft Corporation and Others.

1 Wednesday, 20 November 2024

2 (10.30 am)

3 (Proceedings delayed)

4 (10.34 am)

5 THE CHAIRMAN: Give me a few minutes, thank you. (Pause)

6 Some people are joining a live stream on our website
7 so I'm going to start with a warning. An official
8 recording is being made and an authorised transcript
9 will be produced but it's strictly prohibited for anyone
10 else to make an unauthorised recording, whether audio or
11 visual, of the proceedings and breach of that provision
12 is punishable as a contempt of court.

13 I just wanted to start with some observations on the
14 bundles. So this is a strikeout application and CMC and
15 we have a core bundle running to 2,700 pages which we
16 don't think is appropriate, and it sort of suggests that
17 no one's really engaged in what papers it's appropriate
18 to provide the Tribunal and does cause practical
19 problems both electronically and physically. The joint
20 disclosure statements, which I was interested in having
21 a look at, I find on page 2601 and page 2717 and they
22 are completely illegible.

23 So in future I'd be grateful if juniors could
24 discuss bundles and be in a position to answer any
25 questions about them if they're not considered

1 satisfactory.

2 Next thing, bundle labelling. It's extremely
3 difficult to work out what's in each bundle, so in
4 future can we have a bundle A, B, C, D, and not some
5 approximation to a title somewhere. Of course they
6 could be A.1, A.2, etc, so sensible tabulation as well.

7 Next, I just wanted to discuss about Opus. So
8 I gather you've arranged to have Opus. In order for me
9 to get an account on Opus, I'm expected to provide
10 personal information, including where I've been born,
11 where I'm brought up and my first job and stuff like
12 that and I do object to that. So, in future, can you
13 make sure that we can get access to Opus without having
14 to jump through those hoops. I don't know why it's not
15 possible for the CAT to have a single password. There's
16 no confidentiality between members of the Tribunal.

17 Then, finally, just to let you know, tomorrow we have
18 to rise at 3 o'clock, so I don't know how we're going to
19 go. Obviously we can sit a little bit early if
20 necessary. I appreciate we have three days, so we'll
21 see how we get on.

22 With that introduction, I assume we're starting with
23 the summary judgment application; is that correct?

24 Application by MS LESTER

25 MS LESTER: Members of the Tribunal, good morning. I appear

1 with Mr Schaefer, Mr Rudzitis and Mr Lawrence for the
2 Claimant, ValueLicensing. Mr O'Donoghue, Mr Grubeck,
3 Jaani Riordan and Ms Lukacova appear for Microsoft.

4 We are dividing labour among our team. I will be
5 making submissions on the summary judgment application
6 with Mr Schaefer and Mr Lawrence on that team, as it
7 were, and Mr Schaefer, Mr Rudzitis and with Mr Lawrence
8 will be making submissions in relation to the board CMC
9 points. I think Microsoft may be dividing labour but
10 I'll leave it to them to explain how they're doing that.

11 We seek an order, as the Tribunal knows, striking
12 out three paragraphs of the defence. The bundles that
13 will be needed and everything that the Tribunal has said
14 has been well understood by the teams. The bundles that
15 will be needed for this application, if it helps, are
16 the core bundle for the pleadings, so there should be
17 a CMC core hearing bundle.

18 THE CHAIRMAN: There are four volumes of core bundle. No,
19 there are, I think, six volumes of core bundle.

20 MS LESTER: Just the first one, for this application.

21 THE CHAIRMAN: Yes. Starts with A/1?

22 MS LESTER: It does. And then there is a summary judgment
23 hearing bundle.

24 THE CHAIRMAN: Yes, I have that, thank you.

25 MS LESTER: And there should be authorities bundles, which

1 are marked summary judgment authorities bundles.

2 THE CHAIRMAN: Right, yes, okay.

3 MS LESTER: I think there are four of those.

4 THE CHAIRMAN: Yes.

5 MS LESTER: As you may have seen, we were seeking an order

6 in relation to a fourth paragraph relating to

7 submissions on foreign law in the defence, but --

8 THE CHAIRMAN: That's gone away.

9 MS LESTER: -- that's gone away now, yes.

10 There's not really any dispute about the test that
11 the Tribunal is applying for strikeout or summary
12 judgment. The basic principles are a matter of common
13 ground. As you know, the basis for our application is
14 that Microsoft has not set out in its defence the
15 essential facts that make up the key elements of what
16 it's described -- we have described as its two
17 alternative defences, and I'll show you that in
18 a moment. That's objective justification and the
19 efficiencies defence.

20 We have asked Microsoft to do so several times in
21 requests for further information, this Tribunal has
22 ordered Microsoft to do so, and it still hasn't. We,
23 therefore, submit that the defences, as pleaded, have no
24 prospect of success and there has been no offer to
25 replead in response to this application.

1 In my submissions, I propose to show you the defence
2 and the parts of it that we say are deficient and
3 explain why, Microsoft's answers to our attempts to
4 obtain further information on these points, and then
5 I will respond to the points made in Microsoft's
6 skeleton argument in response to our application.

7 First, could I ask you to turn up our skeleton
8 argument, which I hope you have at D/1 to the summary
9 judgment bundle. I don't know if you have it
10 separately.

11 THE CHAIRMAN: I have the skeleton, yes.

12 MS LESTER: At section C2 of our skeleton argument we have
13 set out the requirements for proper pleadings, and could
14 I ask you, please, just to turn that up, so this is
15 page 7 of our skeleton argument starting at paragraph 21
16 under the heading of "Pleading requirements", and we've
17 explained in that section why -- and forgive us if this
18 is obvious, but why it is so important that pleadings
19 are done properly.

20 We've referred to the Forrest Fresh Foods case,
21 which I will briefly show you towards the end of my
22 submissions, in which the Tribunal struck out
23 a competition claim, and in doing so emphasised the need
24 for proper particularisation. As we've said, in that
25 judgment the Tribunal cites the much-cited judgment on

1 pleadings of Mrs Justice Cockerill in King v Stiefel,
2 which explains that a pleading serves three purposes,
3 and we do emphasise this.

4 First:

5 "... it enables the other side to know the case it
6 has to meet ..."

7 The second purpose is:

8 "... to ensure that the parties can properly prepare
9 for trial -- and that unnecessary costs are not expended
10 and court time required chasing points which are not in
11 issue and lead nowhere."

12 And third, as that judgment says, it's:

13 "... less well known but no less important. The
14 process of pleading a case operates (or should operate)
15 as a critical audit for the claimant and its legal team
16 that it has a complete cause of action or defence."

17 It follows, as that judgment records, that
18 a particulars of claim should set out the essential
19 facts which go to make up each essential element of the
20 cause of action, in this case the defences.

21 She also cited Towler v Wills, a judgment of
22 Mr Justice Teare on which we also place emphasis and
23 have quoted in our skeleton argument at paragraph 22:

24 "It is necessary that the other party understands
25 the case which is being brought against him so that he

1 may plead to it in response, disclose those of his
2 documents which are relevant to that case and prepare
3 witness statements which support his defence. If the
4 case which is brought against him is vague or incoherent
5 he will not, or may not, be able to do any of those
6 things. Time and costs will, or may, be wasted if the
7 defendant seeks to respond to a vague and incoherent
8 case. It is also necessary for the Court to understand
9 the case which is brought so that it may fairly and
10 expeditiously decide the case and in a manner which
11 saves unnecessary expense. For these reasons it is
12 necessary that a party's pleaded case is a concise and
13 clear statement of the facts on which he relies."

14 And applying those principles, the court set out the
15 elements in that case of the cause of action relied on
16 and held that they were not readily discernible in the
17 pleading despite the claimants there having been invited
18 to remedy their particularisation in a request for
19 further information. And we have said, this isn't
20 contested, that the same principles apply to the
21 pleading of a defence, particularly where, and I will
22 show the Tribunal this, the contested parts of the
23 defence require the Defendants to prove that certain
24 essential elements are made out.

25 Reminding the Tribunal again from my skeleton of the

1 key elements of our claim in order that we can then look
2 at the key elements of the defence, we have summarised
3 these at section B1 of our skeleton argument, starting
4 at paragraph 8.

5 So we've said, and again this will be familiar to
6 the Tribunal, that our claim is brought under articles
7 101 and 102 of the TFEU with analogous Competition Act
8 provisions.

9 Paragraph 9. ValueLicensing, as you know, is
10 a reseller of pre-owned licences for Microsoft software
11 products. Perpetual licences can be resold in the UK
12 and EU pursuant to legislation set out in the
13 pleading --

14 THE CHAIRMAN: We're quite familiar with the background of
15 the case at this level of granularity.

16 MS LESTER: I'm very grateful. Can I in that case just draw
17 your attention to paragraph 11 of our claim, where we
18 have set out the principal ways in which -- again you'll
19 recall this -- we say that Microsoft has engaged in its
20 campaign in this case. And we refer at subsection (1)
21 to the custom anti-resale terms that prevented customers
22 accepting a discount on Microsoft 365 from reselling
23 their old perpetual licences, and at (2) to the new
24 "From SA" condition which did the same, you'll recall,
25 and in (3) two other terms and other conduct that

1 achieved or tried to achieve the same thing.

2 So that in a nutshell and as you well recall is our
3 claim.

4 We have summarised the key defences in section B2 in
5 our skeleton argument and again we can take this
6 briefly. As we record at paragraph 13, Microsoft admits
7 much of the conduct of which we complain, including use
8 of both the CAR Terms and the New From SA Condition.

9 Nevertheless, Microsoft denies liability. It denies
10 that the conduct in issue amounted to a campaign to
11 stifle sale of the pre-owned licences. It says -- and
12 I will be returning to this -- that its use of the
13 CAR Terms was limited and it withdrew the New From SA
14 Condition in response to our claim. Overall, it denies
15 that the conduct in issue had any or any material effect
16 on the supply of pre-owned licences or, therefore, on
17 competition or ValueLicensing's business, and those are
18 issues which Mr Cohen in his witness statement in
19 support of this application described as Microsoft's
20 primary defences and fall to be resolved at trial.

21 This application relates to the two alternative
22 defences which we've summarised in paragraph 15 and we
23 will now look at. So these are the two alternative
24 defences, both to the article 102 and 101 claim,
25 summarised in paragraph 15 of our skeleton. Insofar as

1 Microsoft's conduct would otherwise amount to an abuse
2 of its dominant position contrary to article 102,
3 Microsoft contends in defence paragraph 58, which we
4 will now look at, that such conduct was objectively
5 justified on two grounds: first, because it was
6 a proportionate means of achieving one or more
7 legitimate aims, or because it produced efficiencies
8 that outweighed any appreciable effect.

9 So the defence is at core bundle A/3. Could I ask
10 you, please, first to look at paragraph 39 of the
11 defence which is where Microsoft has said:

12 "There was no organised course of action, or
13 'Campaign' by the Defendants, whose purpose or effect
14 was to keep large numbers of pre-owned licences off the
15 market ..."

16 And then at paragraph 39.2:

17 "Without prejudice to that general denial ... it is
18 averred that:

19 "[First] The Terms in Issue ..."

20 And that is Microsoft's phrase for what we have
21 called the impugned terms, but it's the contract terms
22 in issue.

23 "The Terms in Issue were only offered in respect of
24 two very limited and selective subsets of customers and
25 agreements."

1 So they weren't used very much.

2 "The terms in issue were not imposed: eligible
3 customers (who were typically sophisticated operators
4 well able to understand and decide their own
5 requirements and needs) were free to take them or leave
6 them as they wished.

7 "(c) The Defendants did not have a monitoring system
8 in place [so they weren't checking their use] and in any
9 case did not otherwise keep track of customers'
10 compliance with the Terms in Issue ..."

11 MR O'DONOGHUE: It's not right that there's no checking,
12 there's no system. There's a difference.

13 MS LESTER: "The Defendants at no point sought to enforce
14 the Terms in Issue; and/or

15 "The Defendants, on a pragmatic basis (and without
16 prejudice to their legality), promptly ceased use of the
17 Terms ... upon concerns being raised about them.

18 "In the premises there was no 'Campaign' as alleged
19 by the Claimant or at all."

20 The two alternative defences we have seen are the
21 defences of objective justification and efficiencies.

22 The elements of those are set out most conveniently
23 in our skeleton argument but since we're in the
24 pleading, can I show you the paragraph where they are
25 pleaded and then I will come back and make submissions

1 on that paragraph. But paragraph 58 of the defence is
2 where Microsoft says that:

3 "Such conduct as the Defendants did engage in was,
4 to the extent the issue even arises, objectively
5 justified."

6 And I will come back to this. But if the Tribunal
7 could just read 58.1 and 58.2, please, that would be
8 helpful. (Pause).

9 THE CHAIRMAN: You say that needs to be read in conjunction
10 with the RFI?

11 MS LESTER: Yes. And I will show you the relevant RFI.

12 THE CHAIRMAN: Okay.

13 Yes.

14 MS LESTER: Could you please go back to our skeleton
15 argument where we have summarised the key elements of
16 these defences. The first is at paragraph 26 of our
17 skeleton argument, so this section, C3, sets out the
18 essential elements of the defences, and at paragraph 28
19 of our skeleton argument in relation to objective
20 justification the essential elements are, one,
21 a legitimate aim. These must be factors external to the
22 dominant firm, such as health and safety. Defence:

23 "... does not fall to be applied in terms of
24 benefits which accrue to the dominant undertaking, but
25 in terms of the general interest, and particularly the

1 interests of customers and consumers which the
2 Chapter II prohibition is intended to protect."

3 So that's from Genzyme.

4 THE CHAIRMAN: Can we go to those authorities?

5 MS LESTER: I will take you there.

6 And secondly, why the Defendants contends that the
7 conduct in issue, principally tying discounts to terms
8 preventing customers from reselling old licences, was
9 a proportionate means of achieving that aim, ie (a) the
10 basis on which the conduct is said to have been
11 a suitable or appropriate means of achieving that
12 objective, and (b) the basis on which it is said to have
13 been indispensable for that purpose, and I will show you
14 some authorities on this.

15 But as you can see from the paragraph before,
16 paragraph 27, where we refer to the Supreme Court's
17 judgment in the Lumsdon case, these are features of the
18 principle of proportionality and the Supreme Court said
19 that the principle of proportionality involves:

20 "... consideration of two questions: first, whether
21 the measure in question is suitable or appropriate to
22 achieve the objective pursued; and secondly, whether the
23 measure is necessary [that's indispensable] to achieve
24 that objective, or whether it could be obtained by
25 a less onerous method. There is some debate as to

1 whether there is a third question, [namely]
2 proportionality stricto sensu: namely, whether the
3 burden imposed by the measure is disproportionate to the
4 benefits secured. In practice, the court usually omits
5 this question from its formulation of the
6 proportionality principle. Where the question has been
7 argued, however, the court has often included it in its
8 formulation and addressed it separately ..."

9 So just to show you some authority on this, from the
10 footnotes to our skeleton argument we've referred to
11 Mr O'Donoghue's book on article 102, which contains
12 a helpful summary of the principles. It's in the
13 authorities bundle at tab 49. I think that's probably
14 in your fourth bundle of authorities.

15 THE CHAIRMAN: Yes.

16 MS LESTER: At page 2494 of the bundle, 344 of the book,
17 there is a heading, "Defences of objective necessity":

18 "A dominant firm's conduct may be justified by
19 objective necessity. The issue is whether the conduct
20 in question is indispensable and proportionate to the
21 goal allegedly pursued by the dominant undertaking.
22 This question must be determined on the basis of factors
23 external to the dominant firm."

24 So that's the legitimate aim, external to Microsoft.

25 MR O'DONOGHUE: I hesitate to interrupt, but this is quite

1 misleading. If you look at the previous paragraph,
2 there are three objective justification defences
3 discussed. One is objective necessity --

4 THE CHAIRMAN: Mr O'Donoghue, you'll have your
5 opportunity --

6 MR O'DONOGHUE: This is quite important because this seems
7 to be a central plank in Ms Lester's case. As you will
8 see, sir, in the preceding paragraph, there are three
9 objective justification defences. Ms Lester is showing
10 you the first one, objective necessity. We are not
11 relying on objective necessity. We're relying on the
12 other defences. So if this is her point, she is tilting
13 at a windmill, I'm afraid.

14 MS LESTER: We have, in response to Mr O'Donoghue's point,
15 asked for further information from Microsoft on just
16 that point and confirmed that we are talking about
17 objective justification, and if Mr O'Donoghue disagrees
18 with the relevant principles, I'm sure he will tell us
19 in his submissions.

20 "Exclusionary conduct may, for example, be
21 considered objectively necessary for health or safety
22 reasons related to the nature of the product in
23 question, albeit in Hilti [which is another judgment
24 I will come back to] the Court of Justice made a general
25 statement to the effect that, where there is specific

1 legislation governing health and safety and public
2 bodies entrusted with its supervision, 'it is clearly
3 not the task of an undertaking in a dominant position to
4 take steps on its own initiative to eliminate products
5 which, rightly or wrongly, it regards as dangerous or at
6 least as inferior in quality to its own products.'"

7 That's a point that I will come back to.

8 THE CHAIRMAN: Ms Lester, while we're on this page, can
9 I just ask you about the first paragraph.

10 MS LESTER: This page, or of the --

11 THE CHAIRMAN: Yes, two paragraphs up, where you say this is
12 the relationship under article 102 whether objective
13 justification is a distinct thing or is part of the
14 overall abuse, I'm paraphrasing it horribly, but what do
15 you say about that?

16 MS LESTER: Again, I think this is common ground, that the
17 way this is usually dealt with by courts is that, first
18 of all, there must be some sort of prima facie
19 restriction, and if that is shown, then you come on to
20 whether there could be objective justification or not.
21 So this is normally seen in terms of therefore not abuse
22 and no liability. But I think there has been some
23 discussion about at which stage that defence arises.

24 THE CHAIRMAN: Is it not potentially perilous to try and
25 separate the two, at least for article 102, on the

1 summary judgment application?

2 MS LESTER: It may be in some cases and I will come on to
3 why it isn't in this case, because obviously one of the
4 points Microsoft makes in its skeleton argument is all
5 the issues are up for trial anyway when we're looking at
6 the abuse at stage 1, and therefore you might as well
7 let the defences through, and we say that's simply not
8 right, so I will definitely deal with that.

9 THE CHAIRMAN: I'm sorry, I took you --

10 MS LESTER: No, not at all.

11 Just on the point that Mr O'Donoghue rose to make --

12 THE CHAIRMAN: He says he's not relying on objective
13 necessity.

14 MR O'DONOGHUE: We're relying on 2 and 3.

15 THE CHAIRMAN: You're relying on 2 and 3, so that's
16 a situation where the dominant firm takes a defensive
17 measure to protect its commercial interests, and conduct
18 justified by efficiencies.

19 MS LESTER: In the core bundle, we asked Microsoft about
20 this and that is tab B/5 of the core bundle, which
21 I will be showing you anyway, but this is Microsoft's
22 response in May 2023 --

23 THE CHAIRMAN: Yes, I've looked at this, yes.

24 MS LESTER: -- to a request for further information, and at
25 page 243 of the bundle you will see request 3:

1 "State whether Microsoft contends that its use of
2 the Impugned Terms (and/or any other aspect of the
3 pleaded Campaign):

4 "(1) was indispensable and proportionate to the
5 achievement of any legitimate aim ... and if so:

6 "(a) the specific ... aim ... relied on; and

7 "(b) the factual basis on which Microsoft contends
8 that such conduct was indispensable and proportionate to
9 their achievement."

10 And their response to that is at page 244:

11 "If (contrary to that primary case) [which is
12 constituted normal competition on the merits and anyway
13 no appreciable effect] the Terms in Issue involved
14 a departure from competition on the merits and/or had
15 appreciable anti-competitive effects, the Defendants
16 contend that any such departure and/or effects were
17 objectively justified, in that:

18 "(a) The Terms ... were a proportionate means of
19 achieving any or all of the legitimate aims pleaded ..."

20 And then it goes on with (b) being anti-competitive
21 effects.

22 So proportionate means of achieving any or all
23 legitimate aims, which is how we have been understanding
24 and summarising this. But if something turns on the
25 test --

1 THE CHAIRMAN: But this distinction -- sorry, I probably
2 should be asking Mr O'Donoghue this but I'm not, I'm
3 going to ask you at this stage. Going back to
4 Mr O'Donoghue's textbooks, the 1, 2 and 3, is that the
5 author just conveniently separating things or is that
6 embodied in case law, those distinctions?

7 MS LESTER: No, there are different defences.

8 THE CHAIRMAN: All falling within the objective
9 justification?

10 MS LESTER: Yes, and if you look over the page:

11 "Whilst a plea of objective justification [sorry,
12 still on what Microsoft have said at paragraph 3]
13 involves consideration of ..."

14 THE CHAIRMAN: Sorry, I'm not sure where you are.

15 MS LESTER: Still in their response to our --

16 THE CHAIRMAN: Oh, I beg your pardon, yes.

17 MS LESTER: "Whilst a plea of objective justification
18 involves consideration of the necessity for the alleged
19 restriction(s), the undertaking is not required to
20 consider hypothetical and theoretical alternatives."

21 So we had understood it to be common ground that we
22 were dealing with that defence.

23 THE CHAIRMAN: At any rate, this is necessity in terms of
24 talking about safety or that sort of thing. We're
25 clearly not in that territory.

1 MS LESTER: Factors external to Microsoft. Exactly.

2 THE CHAIRMAN: Anyway, Mr O'Donoghue has clarified his
3 position.

4 MR O'DONOGHUE: We're not running a safety defence.

5 THE CHAIRMAN: No.

6 MS LESTER: And we hadn't understood they were running
7 a safety defence.

8 If you look at what the Commission says about this,
9 which is in its guidelines at tab 43.

10 THE CHAIRMAN: 29?

11 MR O'DONOGHUE: I should clarify that this document has been
12 withdrawn because of the draft guidelines so that does
13 need to be clear.

14 THE CHAIRMAN: I was going to ask what the status of this --

15 MS LESTER: I think that's right, there are more recent
16 guidelines.

17 MR O'DONOGHUE: There are draft guidelines.

18 MS LESTER: More recent draft.

19 THE CHAIRMAN: So this is no longer -- so what --

20 MS LESTER: This goes to the same point and I was going to
21 show you this, which is summarising the factors that are
22 necessary to make the same pleading already referred to
23 in Mr O'Donoghue's --

24 THE CHAIRMAN: Show me anyway.

25 MS LESTER: Paragraph 28 and 29, "Objective necessity and

1 efficiencies". And I will deal with what Mr O'Donoghue
2 says now is the defence that they were running. We had
3 understood from their response to the RFI and from the
4 pleading that they were suggesting a defence of
5 objective necessity because that's what they have said;
6 and we have repeatedly asked for, and this Tribunal has
7 ordered, particulars of that defence. At no point has
8 Microsoft come back and said no, no, you've completely
9 misunderstood.

10 THE CHAIRMAN: I understand that point. This doesn't quite
11 map on to what's in Mr O'Donoghue's text, does it, 28?

12 MS LESTER: This is dealing with a defence of objective
13 necessity and efficiency, so a dominant undertaking may
14 justify by demonstrating its conduct is objectively
15 necessary for producing efficiencies.

16 "In this context, the Commission will assess whether
17 the conduct in question is indispensable and
18 proportionate ..."

19 And that of course goes both to the efficiencies
20 defence and to the objective justification, what we have
21 described as the legitimate aims defence.

22 At 29:

23 "The question of whether conduct is objectively
24 necessary and proportionate must be determined on the
25 basis of factors external to the dominant undertaking."

1 THE CHAIRMAN: Right. But that's just for objective
2 necessity?

3 MS LESTER: Yes, indeed.

4 And footnote 11 of our skeleton argument refers to
5 the Purple Parking case, which is one example of what
6 this defence means in this context and how that has been
7 applied. If you look in the authorities bundle at --

8 THE CHAIRMAN: Sorry, I may be getting confused, but we're
9 not relying on objective necessity.

10 MS LESTER: We have understood that that is exactly what --

11 THE CHAIRMAN: Ms Lester, you don't need to persuade me it's
12 a bad argument. Mr O'Donoghue says he's not relying on
13 it. I appreciate you have a separate submission that
14 they're only really showing their hand on this today,
15 but do we need to -- Mr O'Donoghue says he's -- that's
16 not a reason for not striking out this claim. Do we
17 need to labour it?

18 MS LESTER: Let's go to the defence then, because it may be
19 that they are now withdrawing what they have said in
20 their defence, in which case the hearing might take
21 a bit of a different turn.

22 Back to paragraph 58.1 of the defence in core
23 bundle A/3. The paragraph we've just seen.

24 So we've seen Microsoft already confirming that it
25 needs to establish necessity, and it's making the same

1 point at paragraph 58, which is the pleading --

2 THE CHAIRMAN: You say they're pleading necessary there, and
3 that's objective necessity?

4 MS LESTER: "The Terms in Issue ... were necessary and
5 reasonable having regard to any and/or all of the
6 following facts and matters."

7 And we've asked for clarification on that and they
8 have confirmed the position. We've had no, as I say,
9 application to amend the defence in light of our
10 application today.

11 And you'll bear in mind, of course, the purpose of
12 pleadings is to enable us to try to understand the case
13 that we have to meet, so if it's now being suggested
14 that this is wrong and Microsoft wants to now apply to
15 amend its defence, having seen the word "necessary" in
16 its response to the RFI, I wonder if that's something
17 that should be dealt with --

18 THE CHAIRMAN: I'm getting confused, it's probably my fault.

19 So we have "necessary" written in the pleadings --

20 MR O'DONOGHUE: We do, and of course --

21 THE CHAIRMAN: And "necessity" in the bit you've just said
22 you're not relying on.

23 MR O'DONOGHUE: Yes. It's perfectly straightforward. We
24 have two defences. One in 58.2 is efficiencies, 58.1 is
25 objective justification, which is proportionality. This

1 dancing on a pinhead has been amusing to Microsoft
2 because as a necessary part of each and every one of
3 these defences you need to consider proportionality,
4 that is a factor which is recurrent in these two
5 defences, and part of proportionality is necessity.

6 So when you see "necessity" and "reasonable", that
7 is longhand for proportionality.

8 So I don't understand the confusion. These are
9 perfectly straightforward --

10 THE CHAIRMAN: Sorry, I have confusion at the moment and
11 it's my fault I'm sure, but just going back to your text
12 at 344, which is tab 49, you say:

13 "Objective justification has a number of different
14 facets ..."

15 And then you say:

16 "... situations in which the dominant firm's conduct
17 is objectively necessary because of factors external to
18 the dominant firm's conduct ..."

19 So it's factors external to the dominant firm's
20 conduct that you're not relying on, it's not the word
21 "necessity" that you're not relying on?

22 MR O'DONOGHUE: If you go down to 58.1(b), that is not
23 external to Microsoft, that is appropriate remuneration.
24 In my respectful submission, the taxonomy you saw in
25 that book is simply that. What we have pleaded here are

1 two defences, efficiencies at 58.2 and objective
2 justification for reasons (a), (b), (c) and (d) at 58.1.
3 And --

4 THE CHAIRMAN: Going back to your text, sorry, I'm just
5 trying to reconcile this with your standing up to say
6 it's wrong to rely on 1. Why are you saying it's wrong
7 to rely on 1, because it is --

8 MR O'DONOGHUE: 1 is a narrow essentially concern of public
9 safety or mandatory external requirements. That is not
10 this case. But in my submission, one can take this
11 taxonomy a bit too far. These are straightforward
12 defences, efficiency and objective justification for
13 reasons (a), (b), (c) and (d) and within that we accept
14 proportionality is a recurrent element in both. And in
15 my submission that's what Ms Lester should focus on, not
16 this hair splitting.

17 THE CHAIRMAN: Ms Lester, I don't know but I think you'd
18 better develop your case as you see fit. Sorry, I was
19 trying to shortcut but I think I was wrong to do so.

20 MS LESTER: I think it is common ground that whatever one
21 labels this defence, and I think there's no problem with
22 understanding efficiencies, but whatever one labels
23 whatever Microsoft were trying to say in paragraph 58.1,
24 it seems to be common ground that you need a legitimate
25 aim external to Microsoft, and we accept they are not

1 relying on --

2 MR O'DONOGHUE: That is not common ground.

3 MS LESTER: Mr O'Donoghue will develop that. But secondly,
4 an analysis of proportionality, which includes
5 consideration of necessity, and that's why the pleading
6 says "necessity", and that's why we were outlining the
7 essential elements of the defence requiring necessity.

8 THE CHAIRMAN: I think perhaps you just take your own course
9 and then we'll see where we end up. It's probably not
10 fair to bounce back between you and Mr O'Donoghue, I'm
11 sure.

12 MS LESTER: It's not a very promising start for the
13 comprehensibility of the defence that the Tribunal and
14 the parties can't understand clearly which defence is
15 relied on.

16 MR O'DONOGHUE: The confusion is Ms Lester's.

17 THE CHAIRMAN: Mr O'Donoghue, I think if you could sit
18 quietly for a little while, otherwise we're going to go
19 around in circles.

20 MS LESTER: Just staying on the defence, what the paragraph
21 of the defence does, as you will see, is:

22 "The Terms in Issue ... were necessary and
23 reasonable having regard to any and/or all of the
24 following facts and matters."

25 Now the facts and matters that are set out are,

1 first of all, the ability for customers to use upgraded
2 software products, so that's essentially using Microsoft
3 365.

4 Secondly:

5 "The need for the copyright owner [that's Microsoft]
6 to obtain an appropriate remuneration [responding] to
7 the economic value of the Copyright Works in
8 circumstances where access to those works was being
9 offered on a discounted basis to qualifying customers."

10 So that one is the need for Microsoft to receive
11 remuneration for its software.

12 Thirdly, the need to ensure that licensees comply
13 with requirements for resale, so that's the UsedSoft
14 requirements that you'll have seen referred to.

15 And fourthly, (d) is the cost of the ongoing
16 provision of services.

17 Now, our first point about these is that most of
18 those aims are not aims external to Microsoft and
19 therefore can't be legitimate aims for these purposes.
20 For example, Microsoft's desire for revenue or to move
21 people to the cloud, to Microsoft 365, and I will come
22 back to this issue.

23 But the key problem is that none of those paragraphs
24 explains why the terms that we challenge, namely the
25 tying of discounts to a requirement that customers don't

1 resell their perpetual licences, why that was a suitable
2 way to achieve any of these facts and matters or
3 a necessary way of achieving those aims, ie necessity or
4 indispensability.

5 THE CHAIRMAN: Going back to that guideline, sorry, which
6 I think got interrupted to some extent.

7 MS LESTER: Yes.

8 THE CHAIRMAN: Certainly the Commission guidelines at
9 tab 43, I understand these have been withdrawn in the
10 light of -- may have been withdrawn. Assuming they
11 hadn't been withdrawn, to what extent are they more than
12 guidelines to this Tribunal, or just that --

13 MS LESTER: They set out, and this has been applied in
14 numerous cases, and I can show you some of them, the
15 elements of the defence and that's why I showed them to
16 the Tribunal as a convenient summary.

17 THE CHAIRMAN: Right. But they're not --

18 MR O'DONOGHUE: That is not common ground.

19 THE CHAIRMAN: They're not binding on this Tribunal?

20 MS LESTER: They're not binding on this Tribunal, no.

21 THE CHAIRMAN: And in 29, which I'm not sure whether we
22 got --

23 "The question of whether the conduct is objectively
24 necessary and proportionate must be determined on the
25 basis of factors external to the dominant undertaking."

1 I understand that's an issue that's in dispute.

2 MS LESTER: Apparently so.

3 THE CHAIRMAN: Yes. That seems to be quite important to
4 your -- an important aspect of your case, as
5 I understand.

6 MS LESTER: I will show you authorities where it is
7 abundantly clear and repeatedly applied by the courts --

8 THE CHAIRMAN: Yes.

9 MS LESTER: -- that legitimate aim for objective
10 justification purposes, and I had not understood from
11 any of the pleadings or skeleton argument that this was
12 not -- that this was a matter in dispute, must be
13 a factor which isn't, as it were, a benefit to
14 Microsoft.

15 So (a) in the pleading is about the discount offered
16 to customers to encourage them to upgrade. (b) and (d)
17 are about remuneration for Microsoft.

18 THE CHAIRMAN: Yes.

19 MS LESTER: And (c) is about the need to ensure compliance
20 by licensees, with requirements for second-hand
21 licences, and nowhere in this paragraph or anywhere else
22 in the defence does Microsoft explain, as I said, how
23 preventing second-hand resale as part of obtaining
24 a discount would help with any of those things, let
25 alone be essential or necessary to achieving it, or

1 explaining why there would be no less restrictive means
2 of doing so.

3 And we say this is a real problem for two reasons.
4 First of all, it simply doesn't meet the requirements
5 for proper pleadings which require the essential facts
6 to be pleaded on key parts of the defence for the good
7 reasons that we saw summarised in the cases on pleading
8 requirements.

9 But the second reason is that it isn't just
10 a question of vagueness in the pleadings. We say
11 Microsoft can't plead objective justification on these
12 points because other parts of the defence make it
13 impossible for Microsoft to say that tying discounts to
14 a requirement not to resell old licences could be
15 necessary to achieve any aim, because Microsoft's case,
16 as I've shown you on the pleadings, is the opposite.
17 Microsoft have emphasised repeatedly that customers were
18 free to resell if they wanted to. They don't have to
19 take a discount. And so Microsoft preventing resale
20 wasn't a requirement in order to achieve these aims.
21 And it says, and you've seen this from the pleading, it
22 didn't use the terms very much, it didn't monitor their
23 use, and it withdrew them when we complained about them.
24 So we say --

25 THE CHAIRMAN: We need to be careful how one interprets

1 "necessary", because obviously nothing is necessary in
2 the absolute sense. It's a question of what the
3 consequences are if you don't do it.

4 MS LESTER: That's true. The cases on necessity,
5 indispensability, which I'll show you, make it clear --
6 perhaps I'll show you one of them now -- that it has to
7 be -- these solutions, there has to be no less
8 restrictive means of achieving it. So the requirement
9 is a very important one.

10 THE CHAIRMAN: Yes, but I mean -- but, as I understand what
11 Microsoft says, look, these conditions are necessary in
12 order to fully protect its interests in the copyright
13 works and --

14 MS LESTER: And that is what --

15 THE CHAIRMAN: And then one gets into a secondary question
16 of if they don't do it, is it damaging the copyright
17 works, and then is it necessary or not becomes a little
18 bit --

19 MS LESTER: We have also understood that one of the facts
20 and matters was its interests in protecting its
21 copyright.

22 THE CHAIRMAN: Yes.

23 MS LESTER: And the point we are making is that nowhere has
24 Microsoft explained why tying the discount to
25 a requirement not to resell is necessary to achieve that

1 aim or is even appropriate to achieve that aim.

2 THE CHAIRMAN: That's a different point, yes.

3 MS LESTER: And we say that they can't now make out this
4 case because it's completely inconsistent with the whole
5 of their pleading on those key points, and that we
6 assume is why, when we have been repeatedly asking
7 Microsoft, and this Tribunal has asked in the form of
8 an order requiring answers to further information, to
9 plead this point properly for the last two years, we
10 have got nowhere, because they have repeatedly said that
11 these are matters for evidence and submission in due
12 course, but with great respect, we say that is simply
13 incorrect. These are matters that should form a key
14 part of their pleadings in these proceedings.

15 If I can just show you these briefly, if you go to
16 the core bundle at B/1, that's our request for further
17 information from over two years ago in October 2022, we
18 asked specifically for further information about 58.1,
19 that's the key part of the defence, at page 58 -- sorry,
20 at page 88 of the bundle. So request 49 and 50 asked
21 about this.

22 So 49:

23 "Please state in what respect Microsoft contends
24 that the Impugned Terms were 'necessary' ..."

25 You see that word from the pleading?

1 THE CHAIRMAN: Yes.

2 MS LESTER: "... in circumstances in which ..."

3 And these are all the factors I pointed to:

4 "(1) Microsoft offered From SA terms between at
5 [least] the first half of 2015 and 30 April 2020 without
6 the New From SA Condition being attached to them;

7 "(2) Microsoft ceased use of the New From SA
8 Condition in June 2021, while continuing to offer From
9 SA Terms.

10 "(3) Microsoft claims in ... 39.2 (e) that it
11 'promptly ceased use of' the ... Terms [you've seen
12 this] when [we] complained about them;

13 "(4) Microsoft claims in sub-paragraph 39.2 ... that
14 it has never monitored or sought to enforce customers'
15 compliance with the ... Terms; and

16 "(5) Microsoft claims, in ... 38.1, that its use of
17 the ... Terms had no, or no material, impact on its
18 interests."

19 So we couldn't understand and asked how it could
20 also be saying that it was necessary as a key part of
21 its defence. And then 50:

22 "Please state on what basis (including
23 quantitatively, where applicable) Microsoft contends
24 that the Impugned Terms were ... reasonable and ...
25 necessary, by reference to:

1 "... the functionality referred to in ... 51 ...
2 remuneration ..."

3 So these are the facts and matters that you will
4 have seen in that paragraph of the defence.

5 So we're specifically saying: on what basis, by
6 reference to those aims that you yourself have
7 identified, how are you saying, because you haven't
8 explained it in your defence, that the impugned terms --
9 not the discounts, the terms, the tying of the
10 requirement not to resell perpetual licences to the
11 discount were reasonable and necessary by reference to
12 the parts pleaded.

13 THE CHAIRMAN: Do you want to show us the response?

14 MS LESTER: Yes, please, but just while you're in the
15 request --

16 THE CHAIRMAN: Next tab?

17 MS LESTER: -- can I just ask you to look at one more
18 request to save you going back.

19 THE CHAIRMAN: Yes.

20 MS LESTER: Actually, let's go to the response. B2,
21 response in January 2023, page 126.

22 So in response to 49:

23 "Paragraph 58.1 ... states that the Terms in Issue
24 were 'necessary and reasonable' for the reasons set out
25 in that paragraph. The language used means necessary

1 and reasonable for the effective protection of The
2 defendant's legitimate ..."

3 THE CHAIRMAN: I beg your pardon, I'm slow getting to it.

4 My fault. 49 we're looking at? Starts on 125, yes? Is
5 that right?

6 MS LESTER: You've got response 49?

7 THE CHAIRMAN: Yes, sorry, I beg your pardon.

8 MS LESTER: That's what I was reading out:

9 "Paragraph 58.1 [of the] Defence says that the Terms
10 in Issue were 'necessary and reasonable' for the reasons
11 set out in that paragraph. The language used means
12 necessary and reasonable for the effective protection of
13 the Defendants' legitimate commercial interests. The
14 issues set out at paragraph 58.1(a)-(d) ... evolved over
15 time as ongoing considerations of business. The Terms
16 in Issue were developed as a means of addressing such
17 issues."

18 THE CHAIRMAN: What's wrong with that?

19 MS LESTER: It doesn't explain how, what is the factual
20 basis for that? It simply asserts that the terms in
21 issue were developed as a means of addressing such
22 issues. We have no idea how it is suggested --

23 THE CHAIRMAN: It says "for the effective protection of the
24 Defendants' legitimate commercial interests".

25 MS LESTER: But that, in our submission, is entirely vague.

1 At no point has Microsoft said how, how is it that
2 requiring customers not to sell on their licences,
3 that's what this case is about, how is it that that
4 requirement as the cost of a discount helped, still less
5 actually was necessary, to achieve any of those aims?
6 Simply asserting it was necessary and reasonable and it
7 was a means of addressing it is an assertion without any
8 factual basis. They simply haven't explained it, and
9 that is repeatedly the case.

10 If you look at the next paragraph:

11 "Response 26 above is repeated in relation to the
12 reasons for the introduction of the New From SA
13 Condition. The Defendants believe that the Terms in
14 Issue were an appropriate solution for addressing
15 legitimate concerns ..."

16 Again, we have no idea how that is the case. It's
17 simply not --

18 THE CHAIRMAN: It has been elaborated in the skeleton --

19 MS LESTER: I'll come on to that.

20 THE CHAIRMAN: -- for these proceedings, yes.

21 MS LESTER: I'll come onto that.

22 THE CHAIRMAN: But if there are good reasons in the
23 skeleton, you're not saying we should strike this out
24 anyway?

25 MS LESTER: I certainly am, yes, indeed, and I'll come onto

1 that.

2 THE CHAIRMAN: Okay.

3 MS LESTER: Can I refer the Tribunal back to the important
4 requirements of pleadings?

5 THE CHAIRMAN: Yes, yes, I understand. Pleadings are
6 important, yes. But insofar as it's set out in the
7 skeleton, you now have -- insofar as it required
8 elaboration --

9 MS LESTER: Insofar as it's set out in the skeleton, if that
10 was a good response -- and I'll explain why it simply
11 isn't.

12 THE CHAIRMAN: Yes.

13 MS LESTER: But let's assume it had been and it had been
14 accompanied by an application to plead the points set
15 out in the skeleton --

16 THE CHAIRMAN: Yes.

17 MS LESTER: -- the reason the pleading is so important: it
18 founds the whole of the trial.

19 THE CHAIRMAN: But you're not saying the essential averments
20 aren't there, you're just saying there are not enough
21 particulars to justify the legitimate commercial
22 interest?

23 MS LESTER: No, I'm saying that the requirements are for the
24 pleadings to set out the factual basis for the essential
25 elements of the defence. This does not set out the

1 essential elements of the defence, the factual basis for
2 it. And what I mean by that is nowhere have they
3 explained how it is appropriate or suitable or in any
4 way causally connected. How is it that preventing
5 resale helps with any of the -- that's what --

6 THE CHAIRMAN: No, I understand that point, that's your
7 substantive point, but we're on pleadings at the moment
8 and defects on the pleadings.

9 MS LESTER: Yes, but my point is that nowhere does the
10 pleading explain that. We will come on to what the
11 skeleton argument now tries to --

12 THE CHAIRMAN: You say nowhere in the skeleton is that
13 explained properly either?

14 MS LESTER: Correct.

15 THE CHAIRMAN: I understand that point.

16 MS LESTER: But I will come on to the skeleton because
17 that's obviously a key shift in what they're saying.

18 THE CHAIRMAN: Yes.

19 MS LESTER: But it's certainly not in the pleadings, despite
20 our asking.

21 And then over the page you will recall that there
22 was also request 50, and Microsoft say there:

23 "This is a matter for evidence and submissions in
24 due course."

25 And we say no it's not, it is a matter that needs to

1 be set out in the pleading.

2 We therefore ask the Tribunal for an order that
3 Microsoft should give further information about the key
4 elements of its defence and their factual basis so that
5 we could understand them, and we supported that
6 application by a witness statement of Mr Cohen and that
7 was -- Mr Cohen's third witness statement, which I will
8 show you. There was no hearing in the event on that
9 point, because Microsoft agreed that it would provide
10 further information on the questions which were annexed
11 to Mr Cohen's statement, and it was ordered by this
12 Tribunal to do so on 19 May 2023.

13 THE CHAIRMAN: This is the response at B/5?

14 MS LESTER: Yes, exactly.

15 THE CHAIRMAN: Should we look at that?

16 MS LESTER: Now, the order -- and then I'll show you the
17 basis for this in Mr Cohen's third statement, but the
18 order is at C/14, which I think is the core bundle.

19 THE CHAIRMAN: Yes, I've seen it, 384. I've looked at that.
20 Where do we go next?

21 MS LESTER: The key point about that is it's got to be with
22 sufficient particularity that we can understand the
23 case. That's why we sought this order, and at
24 Mr Cohen's third statement, which is in the summary
25 judgment bundle, at tab B/4, the request -- and then

1 I'll show you its basis -- is at page 40 annexed to this
2 statement, so request 3:

3 "State whether Microsoft contends that its use of
4 the Impugned Terms ...

5 "(1) was indispensable and proportionate to the
6 achievement of any legitimate aim(s), and if so:

7 "(a) the specific legitimate aim(s) relied on; and

8 "(b) the factual basis on which Microsoft contends
9 that such conduct was indispensable and proportionate to
10 their achievement;

11 "and/or

12 "(2) was a reasonable defensive measure to protect
13 its commercial interests when they were attacked, and if
14 so ...

15 "(a) details of [that] ... and

16 "(c) the factual basis on which Microsoft contends
17 that such conduct was necessary for the protection of
18 those interests."

19 Request 4:

20 "State whether Microsoft contends, by way of defence
21 ... that its use of the Impugned Terms (and/or some
22 other aspect of the ... Campaign) was indispensable to
23 the achievement of any relevant efficiencies ..."

24 So the equivalent question in relation to
25 efficiencies.

1 Microsoft's response is at B/5, page 244.

2 THE CHAIRMAN: Yes.

3 MS LESTER: Back to the core bundle. And if you look at
4 2(a), this is -- do you have the page?

5 THE CHAIRMAN: Yes.

6 MS LESTER: "If (contrary to that primary case) the Terms in
7 Issue involved a departure from competition on the
8 merits and/or had appreciable anti-competitive effects,
9 the Defendants contend that any such departure and/or
10 effects are objectively justified ...

11 "(a) The Terms in Issue were a proportionate means
12 of achieving any and all of the legitimate aims pleaded
13 [at various other bits of the defence]. As set out
14 above in relation to Request 1, the First Defendant was
15 entitled to restrain (and, for the avoidance of doubt,
16 objectively justified in restraining) the re-sale of its
17 software in circumstances where the conditions for the
18 exhaustion of distribution right were not satisfied
19 and/or in order to safeguard its exclusive rights as
20 copyright owner ..."

21 Can I just show you the part in Mr Cohen's statement
22 where the basis for the order sought is set out. So
23 it's in the summary judgment bundle, Cohen 3, at B/4.
24 Page 32 in the bundle:

25 "Alleged 'objective justification' (other than

1 efficiencies).

2 "As noted above, Defence 58 pleads that any
3 prima facie abuse was 'objectively justified' on two
4 alternative grounds. The first ground ... is that the
5 Impugned Terms 'were necessary ...'"

6 THE CHAIRMAN: We can read this.

7 MS LESTER: Thank you, I'm grateful.

8 THE CHAIRMAN: What's your submission on this?

9 MS LESTER: I'm showing you, Mr Cohen has put it more
10 eloquently than I did, why it was that Microsoft's case
11 has led us not to understand its essential elements of
12 the defences that it was pleading and that's what led to
13 the Tribunal making an order requiring Microsoft --

14 THE CHAIRMAN: We've got the response.

15 MS LESTER: Yes, indeed. You will have seen this. We
16 specifically asked Microsoft which of the categories
17 they were relying on so that there couldn't be any
18 confusion about which defence this was. Does the
19 Tribunal have that?

20 THE CHAIRMAN: Yes. I've got this in mind and I'm -- I have
21 to say, I'm finding these -- everyone's at
22 cross-purposes talking about different categories at the
23 moment so I'm not getting a great deal out of it.

24 MS LESTER: But that's why --

25 THE CHAIRMAN: We're looking at what the substantive defence

1 is.

2 MS LESTER: Yes, exactly.

3 THE CHAIRMAN: And it's written down here, as I understand
4 your submission.

5 MS LESTER: Exactly. So what Microsoft did in its response
6 to the RFIs was to expand the list of aims that it
7 relied on by reference to different parts of the
8 defence. That's that long list of different paragraphs
9 of the defence it relied on.

10 Mr Cohen in his fifth statement has grouped those
11 together, you have to go to all the different parts of
12 the defence to see which legitimate aims are relied on.
13 We've set those out in our skeleton argument.

14 So there are aims relating to the protection of
15 intellectual property rights, aims relating to
16 Microsoft's desire for revenues, and aims relating to
17 encouraging customers to switch to the cloud. And on
18 those -- and I will come back to the point about their
19 skeleton argument in relation to a new argument on
20 intellectual property rights, but for now the point we
21 seek to make is that this is not a legitimate aim for
22 the purposes of this defence --

23 THE CHAIRMAN: Is this the --

24 MS LESTER: Protection of intellectual property rights.

25 THE CHAIRMAN: Right.

1 MS LESTER: So we're on the point about which if any of the
2 expanded aims that they referred to in that long list of
3 different paragraph numbers --

4 THE CHAIRMAN: But we're not on the response to the request
5 at the moment.

6 MS LESTER: No -- well, yes, sorry. The response to the
7 request --

8 THE CHAIRMAN: Talks about --

9 MS LESTER: -- gave an expanded list of potential legitimate
10 aims. Do you recall --

11 THE CHAIRMAN: Yes, and the -- yes, I mean we read "the
12 re-sale of its software in circumstances where the
13 conditions for the exhaustion of distribution rights
14 were not satisfied".

15 MS LESTER: Yes, exactly.

16 THE CHAIRMAN: That seems to be the core of Mr O'Donoghue's
17 case.

18 MS LESTER: It now is, absolutely.

19 THE CHAIRMAN: And it's pleaded here.

20 MS LESTER: Yes. So we have said, first point about this is
21 that it's not a legitimate aim -- you'll have seen this
22 in our skeleton argument -- because it's not a factor
23 external to Microsoft. And that is at our skeleton
24 argument, paragraph 43.

25 THE CHAIRMAN: Yes.

1 MS LESTER: Now, Microsoft have come back saying --

2 THE CHAIRMAN: Well, it is, because everyone benefits. The
3 world's a better place because of Microsoft's copyright
4 protection.

5 MS LESTER: Exactly. So at skeleton argument 15 --

6 THE CHAIRMAN: You can hold hands.

7 MS LESTER: -- they have cited some cases, and it's worth
8 looking in their skeleton at that paragraph, which is
9 their explanation as to why in fact this is a legitimate
10 aim for the purposes of this defence. This is 15(b).

11 THE CHAIRMAN: Mr O'Donoghue's skeleton?

12 MS LESTER: Yes. But the cases he has cited and quoted in
13 the footnotes to 15(b) don't say that. They show that
14 copyright is important --

15 THE CHAIRMAN: Sorry, I'm not sure I'm in the right place.

16 MS LESTER: 15(b) of Microsoft's skeleton, which is D/2.

17 THE CHAIRMAN: I'm sorry, I've picked up the wrong skeleton
18 argument. Apologies. Yes.

19 MS LESTER: Could you please just read 15(b).

20 THE CHAIRMAN: Yes.

21 MS LESTER: And those cases simply say, and they've been
22 quoted as such, that copyright is important and
23 copyright law promotes competition; and secondly, that
24 a refusal to grant a licence is only rarely an abuse of
25 a dominant position. But what it doesn't say is that --

1 no case is established that it is a legitimate aim for
2 the purposes of the objective justification defence and
3 we say it isn't because it's not a factor external to
4 Microsoft --

5 THE CHAIRMAN: And Mr O'Donoghue would say this is a matter
6 that has to go to trial --

7 MS LESTER: Indeed he would. And we're not asking for that
8 issue to be disposed of on a summary judgment
9 application because --

10 THE CHAIRMAN: Which it (overspeaking) --

11 MS LESTER: -- of our second point about this justification,
12 which is that simply nowhere is it explained how the
13 impugned terms are appropriate or necessary to achieve
14 that aim. I'll come on to that.

15 But just very briefly --

16 THE CHAIRMAN: So what is it that you're not seeking to
17 determine in this summary judgment application? Sorry.

18 MS LESTER: So we say that this is not a legitimate aim for
19 the purposes of their defence and that none of the cases
20 they've cited suggest that it is. That issue does not
21 need to be determined if that's an issue --

22 THE CHAIRMAN: What is it you accept is a legitimate aim for
23 present purposes?

24 MS LESTER: None of the aims pleaded. We do not accept that
25 any of the aims pleaded by Microsoft is a legitimate aim

1 for the purposes of running this defence because they
2 are all aims that are not external to Microsoft.
3 They're Microsoft's desire for revenues, Microsoft's
4 desire to protect --

5 THE CHAIRMAN: I understand that point.

6 MR O'DONOGHUE: Including the protection of copyright.

7 MS LESTER: Including the protection of copyright.

8 Briefly, because the skeleton argument focuses on
9 protection of copyright, which I'll come on to, but we
10 have to look at the other aims that are in the Microsoft
11 pleading.

12 In the response to the request for further
13 information, Microsoft refers to aims relating to its
14 desire for revenues, and obviously --

15 THE CHAIRMAN: Which RFI -- are you back on --

16 MS LESTER: That was (b) and (d) of 58.1 of the defence, if
17 you recall --

18 THE CHAIRMAN: Oh yes, yes.

19 MS LESTER: Obviously that is concerned with Microsoft's own
20 interests and therefore not a legitimate aim for these
21 purposes, but in any case, Microsoft has never explained
22 the factual basis on which it says that a term
23 preventing customers from reselling their licences, if
24 they take a discount, could be appropriate to achieve
25 that aim or could be necessary to achieve this.

1 So we asked them again to clarify this point and
2 there's another RFI on this specifically on how that
3 could happen. And the response again is: it's a matter
4 for evidence and submissions in due course.

5 Again, we say we don't see how they could possibly
6 plead this, and in our submission that's no doubt why
7 they haven't pleaded this, given the other aspects of
8 their claim.

9 This is dealt with in our skeleton argument at
10 paragraph 48, specifically in relation to this aim. So
11 48.2, on the two limbs of the proportionality
12 requirement. The impugned terms did not involve any
13 payments to Microsoft. Rather, they prevented customers
14 reselling their old licences they could only have
15 increased Microsoft's revenues by restricting the supply
16 of licences, so reducing third parties' ability to
17 compete with Microsoft.

18 So we don't see how they could possibly plead
19 a case, and indeed they haven't, as to how these terms
20 could be appropriate to achieving an increase in revenue
21 for Microsoft.

22 (b), Microsoft positively denies any causative link
23 because it's repeatedly denied that its conduct had any
24 material effect on the supply of pre-owned licences.
25 And despite repeated requests it's declined to explain

1 the factual basis for these points.

2 So then aims relating to encouraging customers to
3 migrate to 365 we have dealt with at paragraph 49, the
4 next paragraph of our skeleton argument. Again we asked
5 them for further particulars and they said this will be
6 a matter for evidence and submissions. As we've said in
7 paragraph 49, again this is not a legitimate aim because
8 it's not one external to Microsoft, but in any case --
9 and I'm on 49(2) -- again doesn't satisfy the
10 proportionality requirement. Because while we accept
11 that offering discounted prices is likely to increase up
12 take of 365, the relevant question is how the terms were
13 appropriate and necessary to do so, in other words tying
14 the discount to the resale, which has never been
15 explained.

16 Even if limiting discounts were a relevant aim, the
17 terms cannot have been necessary for that purpose
18 because we have said a simple contractual stipulation to
19 that end would have sufficed and they have simply never
20 explained that.

21 THE CHAIRMAN: Is this a convenient time for five minutes
22 for the shorthand writer?

23 MS LESTER: Certainly.

24 THE CHAIRMAN: Just five minutes.

25 (11.47 am)

(A short break)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(11.56 am)

MS LESTER: We were looking at the intellectual property rights aim.

THE CHAIRMAN: The footnote?

MS LESTER: Yes. That's the point about whether it's a legitimate aim and we submit that it's not.

In our submission, what the defence never does is explain how a term preventing customers from reselling their perpetual licences, if they take a discount on Microsoft 365, can be appropriate or necessary in order to ensure compliance by licensees with the UsedSoft conditions, in circumstances in which the defence makes clear that the impugned terms can't have been necessary to restrain unlawful resale of licences. They can't have been necessary because Microsoft says that customers could take or leave the discount. They could still resell if they wanted to. So Microsoft is emphasising that this is an optional discount and that they barely used the terms, the impugned terms, they didn't monitor them, and they stopped looking at them quickly.

So we say in those circumstances -- this is why we have been repeatedly asking -- how could they possibly now plead, or have pleaded, which they haven't, that the

1 impugned terms were not only appropriate but necessary,
2 as Microsoft accepts they have to show, to achieve that
3 aim? We simply don't understand how they could do so,
4 given the terms of their defence.

5 So we asked them to explain. We requested further
6 information on this exact point two years ago in October
7 2022, and if you look at the core bundle, B/2, and look
8 at the terms in which we asked the question, request 42,
9 B/2, page 117:

10 "Please set out the mechanism by which restrictions
11 on the lawful resale of Microsoft software licences
12 furthered Microsoft's legitimate interests in preventing
13 'unauthorised and/or unlicensed' use of its software:

14 "(1) at all; and

15 "(2) in particular, in circumstances in which
16 Microsoft's case ... is that it has never sought to keep
17 track of customers' compliance with such terms, or to
18 enforce them."

19 And Microsoft's response to this was: these are
20 matters for evidence and submission in due course.

21 We simply say that's not right. This is fundamental
22 to your defence. Not only have you not pleaded it, but
23 you can't plead it, given the core aspect of your case,
24 that this was an optional discount and therefore the
25 terms cannot have been appropriate, still less

1 necessary, to prevent lawful resale.

2 In their skeleton argument they now run an entirely
3 new case on this point. At paragraph 20 of their
4 skeleton argument, Microsoft says -- which is nowhere in
5 its pleading -- that:

6 "There are serious reasons, including based on
7 [ValueLicensing's] own past infringements, to believe
8 that non-compliance with the UsedSoft conditions is rife
9 on the second-hand licence market, resulting in
10 widespread infringements ..."

11 And at paragraph 5 of their skeleton argument,
12 Microsoft described ValueLicensing as serial infringers
13 of Microsoft's intellectual property rights.

14 At paragraph 25(a) of their skeleton, they therefore
15 say for the first time:

16 "... Microsoft needed a policy that could apply to
17 reselling in general (ie both lawful and unlawful,
18 resale activities) ..."

19 41(b) of their skeleton argument is on the same
20 point:

21 "If there is a more general issue of UsedSoft's
22 non-compliance in the [second-hand sales] market,
23 Microsoft needs a policy that can address all
24 potentially affected licences."

25 Now, these new allegations are very strongly denied

1 by ValueLicensing, but the key point for this
2 application is that this case takes Microsoft nowhere.

3 First of all, none of this is in the pleading, and
4 there is no proposed re-pleading before the Tribunal
5 today. There is no reference at all in the pleading to
6 intellectual property breaches by ValueLicensing. There
7 is no counterclaim for copyright infringement. There is
8 nothing in the pleading about how terms which prevent
9 all resale, lawful and unlawful, were an appropriate way
10 or could have been for stopping what is now described as
11 rife copyright infringement in the second-hand market.

12 There is no reference anywhere in the pleading to it
13 being essential, necessary, indispensable, for Microsoft
14 to have had a blanket policy preventing both lawful and
15 unlawful resale of second licences as a way of dealing
16 with this supposedly rife infringement in the
17 second-hand market.

18 And it's very striking, we submit, that in response
19 to this application Microsoft's skeleton argument says
20 virtually nothing about its pleadings to try to defend
21 it before this Tribunal and to show you where in fact it
22 has set out the factual basis for this defence.

23 This isn't, I emphasise, simply a pleading point.
24 There could be no possible basis for Microsoft putting
25 that case now, given that their whole case is the exact

1 opposite: that they weren't trying to prevent all
2 resale, that you could take or leave the discount, that
3 they didn't monitor the terms' use, they barely used
4 these terms and they withdrew them as soon as we
5 complained about them.

6 They have emphasised the point that customers can
7 choose whether to continue to resell if they want to do
8 so, and we say this simply makes this new case in the
9 skeleton argument untenable.

10 Can I show you this. If you look in the defence,
11 which is back to core bundle A/3, at page 61. And if
12 you see paragraph 56.4 of the defence:

13 "(a) Owners of any surplus perpetual licences remain
14 free to sell those as they see fit subject to respecting
15 the intellectual property rights in the Copyright Works:
16 paragraphs ... above are repeated. Insofar as owners
17 may be able to choose accessing discounted prices as an
18 alternative way to any such sales, that is to their
19 benefit, and the offering of a discount for such
20 beneficial purposes cannot be an abuse of a dominant
21 position."

22 Now, we asked them about this. If you look at B/2
23 of the core at page 121, request 47, "Under
24 paragraph 56", which we've just been looking at:

25 "Please identify the 'beneficial purposes' referred

1 to."

2 Because they had said the offering of a discount for
3 such beneficial purposes, which was the choice of the
4 customer, please identify the beneficial purposes. And
5 underneath the response:

6 "The 'beneficial purposes' are those referred to in
7 the second sentence of 56.4(a) ... namely that customers
8 can choose ..."

9 So this is a benefit.

10 "... customers can choose whether to access
11 discounted prices or to sell any of their surplus
12 perpetual licences."

13 Now, if it were true that Microsoft wanted to
14 prevent all sale, as they now suggest in their skeleton
15 argument, lawful and unlawful, why would people remain
16 free to resell if they didn't want the discount on their
17 365 subscription?

18 THE CHAIRMAN: Necessity isn't quite as binary as that, is
19 it? It's -- I mean, it can be -- it's necessary we all
20 use less fossil-based fuels. That's necessary. But the
21 government offers financial incentives to industry and
22 to consumers to move away from fossil fuels to electric
23 cars. That doesn't mean it's not necessary, and could
24 it not be said that in this case -- I mean, there are
25 lots of caveats to be attached, but by offering

1 incentives to their customers to surrender the licence
2 so that there is less copyright infringement, it doesn't
3 mean it's not necessary to stop copyright infringement.

4 MS LESTER: It may be, but there are all sorts of ways in
5 which Microsoft could suggest that this was
6 an appropriate mechanism. We don't understand how they
7 can do so and maintain their current pleading, which is
8 that they barely used these terms at all, didn't monitor
9 them, and withdrew them quickly, and therefore there was
10 no appreciable effect on competition. We simply don't
11 understand how it could be --

12 THE CHAIRMAN: They may have withdrawn them because they
13 were told it was anti-competitive.

14 MS LESTER: Maybe.

15 THE CHAIRMAN: I mean, that may be why they -- or that it
16 might be or that somebody was suggesting it was, and
17 that may be why they were withdrawn.

18 MS LESTER: But it's very hard --

19 THE CHAIRMAN: But lack of enforcement might be a better
20 phrase.

21 MS LESTER: -- we say impossible to see how they could say
22 this was necessary, where their whole case is: we didn't
23 use these terms very much, we didn't monitor their use,
24 and they were optional. Now, if there is a factual
25 basis --

1 THE CHAIRMAN: It's common ground they're optional.

2 MS LESTER: It is.

3 THE CHAIRMAN: And there's a dispute as to how widely they
4 were used.

5 MS LESTER: Correct, but they're now trying to suggest in
6 their skeleton argument for the first time that what
7 they had to do was have a blanket policy across lawful
8 and unlawful resale in order to achieve the same in
9 compliance with UsedSoft.

10 It's clear from all of the cases, and it won't come
11 as a surprise for the Tribunal, that it's not for the
12 Tribunal to speculate about whether there is in fact
13 a foundation that might be consistent with Microsoft's
14 other parts of its pleading and we don't see it, but
15 somehow this was appropriate in the sense of causally
16 connected and necessary to achieve this aim. But it is
17 not set out anywhere in the pleadings so we simply don't
18 know and can't see on the basis of the other parts of
19 their pleading how it can be that this was necessary.

20 And what they have still not explained, which is the
21 key point, is how it is that tying the discount to
22 preventing resale can be appropriate. So you can
23 speculate on fossil fuels and what the government might
24 be trying to achieve. The key --

25 THE CHAIRMAN: As I understand, Mr O'Donoghue will explain

1 it, but as I understand, if there's no licence to
2 resell, then the resale is not going to be illegal.
3 That's the point.

4 MS LESTER: But if Microsoft is going to try to run a case
5 like that and seriously suggest that it is objectively
6 justified that it was necessary and appropriate, in
7 order to protect its copyright interests, to have
8 a complete blanket ban on all resale, lawful and
9 unlawful, then it can apply to this Tribunal and see
10 whether it can replead its case but on the basis of its
11 current pleaded case, we don't see how it can do that.

12 And the reason they have presumably put this new
13 case into their skeleton argument is that in response to
14 this application, they want to suggest that summary
15 disposal of their defence is inappropriate because at
16 trial there will have to be evidence on the rife
17 copyright infringement that they now refer to in the
18 second-hand market, including by my clients, and they've
19 put this in a number of different ways in their skeleton
20 argument. They said you can't assess whether the
21 justification works without knowing the scale --

22 THE CHAIRMAN: They're not asserting any copyright
23 infringements in the usual sense. They're not saying
24 that anyone is illegitimately copying their product.

25 MS LESTER: Correct, it's about the UsedSoft conditions --

1 THE CHAIRMAN: It's about failure to pay royalties, which --
2 and the way the licences are broken up. They haven't,
3 as I understood, alleged that there are more copies and
4 somehow they're -- the essential parts of their
5 copyright estates are being undermined, but maybe that's
6 wrong. We'll see what Mr O'Donoghue says.

7 MS LESTER: Well, the key part is: which issues will there
8 have to be evidence on in the trial? To make this
9 a good point, they have to be able to persuade the
10 Tribunal that the issue of rife infringements of the
11 kind that they have articulated in their skeleton
12 argument is going to be a matter for evidence anyway in
13 these proceedings, and therefore you might as well have
14 the defences through because it's all the same point.

15 Absolutely not, we say. The issue of whether it is
16 correct that ValueLicensing has complied or not with
17 UsedSoft conditions is not a relevant issue in these
18 proceedings at all. It's not been pleaded.

19 It may be when we get to quantum that of course
20 there will have to be a determination of what -- of the
21 scope of the UsedSoft conditions, because in order to
22 determine quantum, the Tribunal will have to know which
23 licences ValueLicensing could lawfully have resold.

24 THE CHAIRMAN: You say it's not pleaded that ValueLicensing
25 is a copyright infringer?

1 MS LESTER: Nowhere.

2 THE CHAIRMAN: It's pointed out there's been some earlier
3 decisions, settlements, I think is referred.

4 MS LESTER: Indeed.

5 THE CHAIRMAN: But you say they've not been pleaded either?

6 MS LESTER: Not pleaded at all, it's simply not an issue in
7 these proceedings.

8 THE CHAIRMAN: But presumably if they were pleaded, you'd be
9 resisting that coming in because you don't want this to
10 turn into a copyright infringement case?

11 MS LESTER: If Microsoft thinks it has a case and can put in
12 a counterclaim for copyright infringement, that will be
13 very strongly denied by my client, but obviously they're
14 entitled to try and put in a counterclaim, if they wish
15 to do so. They haven't done so.

16 So it is absolutely not right to say that we have to
17 get into these factual issues anyway at trial, and so
18 you might as well let the defences stay. It's also not
19 right to suggest that we're seeking some sort of factual
20 analysis or mini trial in relation to any of these
21 points. Because the basis for our application is that
22 even if you accept for these purposes that Microsoft is
23 right on the facts that they have now put into their
24 skeleton argument, let's assume -- and we have said it's
25 entirely appropriate for you to assume for the purposes

1 of summary judgment application that ValueLicensing is
2 a serial infringer in the respects that they have
3 mentioned, and indeed that the second-hand licensing
4 market is rife with similar breaches of the UsedSoft
5 conditions, let's assume that that's true, we're not
6 asking for facts to be determined on that issue at all.
7 That cannot save Microsoft's defence. Because the key
8 point -- and I'm sorry to repeat it -- is that Microsoft
9 have still not explained and cannot in our submission
10 explain how it can have been necessary, in order to
11 prevent unlawful resale, to have a term which prevents
12 all resale. There is no factual basis for that at all.

13 Now, it obviously can't show that such a term is the
14 least restrictive way of achieving this, and that is
15 presumably why they haven't tried to do so in the
16 pleading because if unlawful resale really were the
17 problem, there were plainly less restrictive ways that
18 Microsoft could have prevented unlawful resale, other
19 than simply shutting down the second-hand market.

20 They could bring proceedings, exactly as we've just
21 been discussing, against the companies they say are
22 infringers, including ValueLicensing, alleged
23 infringers, as they have done in the past.

24 Their skeleton argument refers at paragraph 33 to
25 measures designed to address copyright infringements,

1 requirements to notify Microsoft in the event of
2 a licence transfer event, audit rights and so on. And
3 they have also referred in their response to our
4 requests for further information in May 2023 to these
5 intellectual property remedies and the law is very clear
6 on this point, that you cannot, as a dominant
7 undertaking, simply stifle supply as an alternative to
8 pursuing a proper legal remedy for violation of, here,
9 intellectual property rights.

10 I can show you that from our skeleton argument at
11 paragraph 43. This is the Hilti judgment that we
12 referred to there. You simply cannot say without
13 bringing proper intellectual property infringement
14 proceedings that banning all resale is the answer.

15 So 43 of our skeleton.

16 THE CHAIRMAN: Yes, I've read that, yes.

17 MS LESTER: This is the Hilti case. Stifling supply is not
18 a legitimate alternative to pursuing the proper legal
19 remedy.

20 THE CHAIRMAN: Yes.

21 MS LESTER: You've read that paragraph, I'm grateful.

22 So many of the points that we make about the
23 objective justification defence are exactly the same for
24 the efficiencies defence, so this can be much shorter.
25 There is still the same requirement of indispensability

1 in that defence.

2 In defence both to 101 and 102, Microsoft says
3 insofar as it's abused its dominant position or entered
4 into anti-competitive agreements, the terms produced
5 efficiencies that outweigh their anti-competitive
6 effect.

7 At paragraph 31 of our skeleton argument we have set
8 out the conditions for this defence, the essential
9 elements, and we can take them from the skeleton and
10 they applied both in relation to 101 and 102.

11 THE CHAIRMAN: Yes.

12 MS LESTER: You've seen those. They're the "must be
13 benefits which aren't benefits", the parties and so on.

14 THE CHAIRMAN: Yes.

15 MS LESTER: And you'll see there that the conduct must be
16 indispensable to achieving those benefits.

17 Their pleading on this point is at 58.2, that's the
18 paragraph after the objective justification point in
19 their defence. If you could have a look at that to see
20 the way it's pleaded, please, I would be grateful.

21 THE CHAIRMAN: Back into the defence?

22 MS LESTER: Core bundle A/3, yes, back into the defence.

23 THE CHAIRMAN: 58.2, we've had a look at it.

24 MS LESTER: 58.2 and you've seen it. You've read that.

25 THE CHAIRMAN: Yes.

1 MS LESTER: Now, we asked about that, we asked for the
2 respect in which the efficiencies defence was pleaded
3 and that's B/2 of the core bundle, RFI request 51 this
4 time.

5 THE CHAIRMAN: They say it's adequately pleaded, yes?

6 MS LESTER: No, they say it's a matter for submissions and
7 evidence.

8 THE CHAIRMAN: Sorry, I'm looking at the wrong -- my fault.

9 MS LESTER: Request 51, so paragraph --

10 THE CHAIRMAN: Matter of evidence and submissions.

11 MS LESTER: Yes. But importantly we had asked:

12 "Please set out with particularity any alleged
13 pro-competitive benefits of the Impugned Terms ..."

14 Again, the terms tying the discount to a requirement
15 not to resell -- or not to sell.

16 "... which are not or were not available in their
17 absence ..."

18 So very specifically: how is it that the impugned
19 terms can be appropriate or necessary for the
20 efficiencies defence.

21 "... which are not ... available in their absence,
22 and the basis of Microsoft's claim that such benefits
23 outweighed ..."

24 In other words, we're trying to get a pleading in
25 line with pleading requirements of the factual basis for

1 this pleading and we get none: it's a matter for
2 evidence.

3 Again we say this is not right. The basis on which
4 Microsoft says the terms were indispensable to achieving
5 the alleged benefits to consumers is a fact that
6 Microsoft must identify in order for us to understand
7 its case.

8 So again in March 2023 we asked for further
9 information. The Tribunal ordered Microsoft to provide
10 a response sufficient for us to understand our case on
11 this point.

12 And if you could just look at the response to that
13 which is B/5 of the core bundle at 245. So at
14 paragraph 2 of the response on page 246, in response to
15 a request for the specific benefits relied on, to whom
16 such benefits accrued and the factual basis on which
17 Microsoft contend that the impugned terms were
18 indispensable, at paragraph 2 of the response, the
19 Defendants rely on "the same matters on which they rely
20 for their defence of objective justification".

21 "The specific 'benefits' relied on are those
22 referred to at paragraphs 25.2 and 31.2 of the Defence,
23 ie the benefits associated with cloud-based subscription
24 services that are not available to the holders of
25 perpetual licences. The direct recipients of those

1 benefits are those of the Defendants' customers who move
2 from perpetual licences to subscription-based services,
3 but those benefits can be expected to be passed on to
4 those customers' own customers (including
5 end-consumers).

6 "The necessity of the Terms in Issue to the
7 achievement of the aforesaid benefits will be a matter
8 for evidence in due course ..."

9 There are two problems with this. First of all,
10 benefits from migration to Microsoft 365 do not result
11 from the impugned terms, they result from the discounts,
12 and they don't result from the tying of the discount to
13 the requirement which we object to not to sell on the
14 licence. Microsoft has never explained and has refused
15 to explain how the terms themselves could cause
16 an increase in cloud uptake.

17 But secondly, the case on the benefits relied on
18 does not comply with the basic pre-conditions for this
19 defence.

20 Now, the terms in which Microsoft answered that
21 question suggest that it recognised that it can't rely
22 on benefits for the customers who were the parties to
23 the anti-competitive agreements, in other words the
24 customers who switched to Microsoft 365. So instead it
25 says the benefits can be expected to be passed on to end

1 users, ie their customers' customers. But we say it's
2 simply not good enough to say benefits can be expected
3 to be passed on. It is extremely clear from the case
4 law -- we've set this out in paragraphs 31 and 32 of our
5 skeleton argument, principally the Mastercard judgment
6 in the Court of Appeal, upheld by the Supreme Court --
7 that you cannot rely on entirely theoretical pass-on;
8 you have to have very cogent specific evidence of this.

9 If you look at our skeleton argument at
10 paragraph 31 --

11 THE CHAIRMAN: 31?

12 MS LESTER: Yes. We have quoted the relevant parts of the
13 Sainsbury's and Mastercard judgment. So this starts at
14 31, paragraph 31:

15 "The elements of the ... efficiencies defence ...
16 were explained by the Court of Appeal in Sainsbury's v
17 Mastercard ... four cumulative conditions must be
18 satisfied ..." and they are then set out:

19 "The agreement must contribute to improving the
20 production or distribution of goods ..."

21 That's the benefits requirement.

22 "The defendant must establish not only that such
23 benefits exist, but also that they are "causally linked
24 to the relevant restriction". The benefits must result
25 from the restriction itself, and not merely from some

1 wider aspect of the arrangements at issue."

2 As I said, never explained by Microsoft.

3 And importantly, for the point I've just made about
4 pass-on, where Microsoft says "can be expected to be
5 passed on":

6 "That causal link must "be established by facts and
7 evidence supported by empirical analysis and data and
8 not just economic theory"; and be "sufficiently direct
9 to be capable of proof ... an indirect effect will not
10 generally be sufficient, precisely because cogent
11 evidence of the link based on empiric analysis and data
12 and not merely economic theory is required."

13 That conclusion was appealed unsuccessfully to the
14 Supreme Court and both Court of Appeal and Supreme Court
15 judgments are very clear on the cogent evidence point.
16 It's simply not good enough for Microsoft to say "can be
17 expected to be passed on".

18 The same point in relation to the 102 efficiencies
19 defence in our skeleton argument at 32 requires the same
20 cumulative criteria satisfied and, as with 101.3, the
21 empirical nature of the balancing requirements means the
22 undertaking, quoting generics there, "has to do more
23 than put forward vague and theoretical arguments on that
24 point or rely exclusively on its own commercial
25 interests."

1 Turning then to a few other points that Microsoft
2 make in its skeleton argument. So they say that we are
3 inconsistent in accepting that the primary defences go
4 to trial but not the alternative defences, and we say
5 there is nothing inconsistent about this at all.
6 Microsoft's primary defence, as I've said, is that it
7 barely used the terms, withdrew them quickly, and the
8 effect on competition is tiny because no one wanted
9 second-hand licences anyway, is essentially what they
10 are saying. Obviously that is an issue for trial, has
11 been properly pleaded, and we know exactly what case it
12 is that we are meeting.

13 That is not true in relation to the alternative
14 defences and that's why we're here.

15 Next they say that granting summary judgment or
16 a strikeout would delay the trial. We don't see how
17 that can be the case. The trial is now set for I think
18 it's November 2026, two years from now, so the fact that
19 they might appeal against a judgment today is obviously
20 not a reason not to grant summary judgment, otherwise it
21 would apply of course in every case seeking a strikeout
22 or summary judgment. And if their defence has no
23 prospect of success for all the reasons we have
24 canvassed, it's a bit hard to see how they could get far
25 with an appeal anyway, but there's simply no reason to

1 think this would delay the trial.

2 Microsoft refer to a wealth of authority for cases
3 which are not suitable for summary determination and we
4 agree with the list of those kinds of cases: points that
5 turn on expert evidence, points that turn on developing
6 areas of law, cases that can't be resolved without mini
7 trials of the facts, points about value judgments that
8 require a full examination of the facts to be properly
9 resolved. None of that applies here and I have
10 explained why.

11 Of course, if Microsoft had put in a pleading on
12 objective justification or efficiencies, if they had
13 pleaded a factual basis for those two defences, then the
14 court would have to consider evidence on it and there
15 would be an issue about weighing up the evidence that
16 might be inappropriate for a strikeout, but they simply
17 haven't, and trying to run an entirely new case in
18 a skeleton argument accompanied by a witness statement
19 from Mr Gringras making entirely unpleaded allegations
20 will simply not do.

21 So this is not one of those cases, in our
22 submission, involving a mini trial, which is unsuitable
23 for summary disposal. It's one of the cases, of which
24 there are many, where points in competition cases are
25 struck out because they are incoherent or have not been

1 properly pleaded.

2 One example of that is the Stellantis case referred
3 to in our skeleton argument at paragraph 18 where one of
4 the defences, a plea of mitigation, was struck out for
5 being insufficiently pleaded.

6 There are many. Another is the Forrest Fresh Foods
7 case at tab 38, which I will briefly show you, please.
8 Tab 38 of the authorities, which is, I think, the third
9 volume. It's a judgment of this tribunal striking
10 out -- it was also a strikeout and summary judgment
11 application in an abuse of dominance claim. If you
12 could read paragraphs 1 and 2 of the judgment, you'll
13 see the issue. (Pause).

14 THE CHAIRMAN: Okay.

15 MS LESTER: At paragraph 4, recording that the tribunal
16 accepted the claim should be struck out. The
17 problematic particulars are at paragraphs 13 and 14 of
18 the judgment. And the complaint, much like the one
19 today, is set out at paragraph 18. It was a failure to
20 set out the basic factual allegations necessary to
21 understand the claim.

22 In the second half of paragraph 18:

23 "... Mr Henderson said that the objections set out
24 in that paragraph failed to set out the basic factual
25 allegations necessary for CCEP to understand and respond

1 to [the] case ..."

2 THE CHAIRMAN: But the claim was struck out in its entirety.

3 MS LESTER: It was in this case. In Stellantis, it was one

4 part of it.

5 THE CHAIRMAN: Yes.

6 MS LESTER: Then there was a witness evidence put in in

7 response and --

8 THE CHAIRMAN: How much one gets out of the facts, really.

9 MS LESTER: Not on the facts, it's on the principle, that

10 there is nothing surprising or new about this --

11 THE CHAIRMAN: What's the principle?

12 MS LESTER: That pleadings have to properly set out the

13 essential facts, and if they don't --

14 THE CHAIRMAN: -- (overspeaking) --

15 MS LESTER: -- you can't simply --

16 THE CHAIRMAN: It's just an example, as I understand.

17 MS LESTER: It's just an example of that happening, but

18 there is a suggestion in Microsoft's skeleton argument

19 that this is somehow an unusual situation, an unusual

20 thing to do, for competition defences to be struck out

21 either in part or in their entirety, and it's simply not

22 right.

23 There is also a relevant passage at paragraph 32,

24 which I referred to earlier, about it not being

25 appropriate to speculate about what the case might be.

1 So the proper requirement for pleadings are set out
2 and emphasised from paragraph 26 to 28. Paragraph 30,
3 the onus on here Microsoft to identify the primary facts
4 which found the defence and how those facts there
5 infringed competition law, and at paragraph 32:

6 "That effectively invites the Tribunal to speculate
7 as to what case might potentially be advanced if it were
8 to be repleaded. But that is not the function of this
9 Tribunal or any court. The Tribunal's role is to assess
10 the case on the materials before it. It is not for the
11 Tribunal to suggest to a claimant how its case might
12 properly be pleaded ..."

13 And at 43:

14 "[The party] has failed to set out the primary
15 factual matters relied upon ..."

16 And we say this is just such a case for the reasons
17 that I have given.

18 Unless I can assist you further.

19 THE CHAIRMAN: So the proposition in the guidelines, 29:

20 "The question of whether conduct is objectively
21 necessary and proportionate must be determined on the
22 basis of factors external to the dominant undertaking."

23 You said you were going to go to cases on that. You
24 mentioned Genzyme, but I thought you were going to go
25 back to it. I have looked at the paragraph you referred

1 to.

2 MS LESTER: Yes, we can do that.

3 THE CHAIRMAN: Is there anything else that you wish to --

4 MS LESTER: There isn't. It might be helpful to see what
5 submissions Mr O'Donoghue develops on that point and
6 then respond in reply, if that's convenient.

7 THE CHAIRMAN: But there are no other authorities you rely
8 on? Just Genzyme? I have looked at the paragraph in
9 Genzyme so I have that in mind.

10 MS LESTER: Genzyme is the one we refer to in our skeleton
11 argument.

12 THE CHAIRMAN: Thank you very much.

13 Submissions by MR O'DONOGHUE

14 MR O'DONOGHUE: Sir, I want to divide my submissions into
15 five parts. Can I start by showing the tribunal
16 a couple of authorities which looked at objective
17 justification and efficiency defences. I want to give
18 the tribunal a sense as to how in practice these
19 defences are analysed. And the punchline is these are
20 matters of factual evidence, expert evidence,
21 cross-examination and submissions. They are trial
22 matters par excellence.

23 Of course, I will deal with this case, but how these
24 defences are dealt with in general terms is, we say, an
25 important starting point.

1 I then want to move to how the question of objective
2 justification and efficiency in this case is intimately
3 bound up with issues of intellectual property
4 principles.

5 Now, VL accepts that the question of UsedSoft
6 compliance is for trial, but then incoherently says that
7 one can give summary judgment now on an objective
8 justification and efficiency defence without any
9 determination or indeed any understanding of how the
10 issue of intellectual property compliance arises in this
11 case. We say that is a confused approach to say the
12 least.

13 It is all the more curious because, as I will show
14 the tribunal, there is overwhelming and thus far
15 uncontested evidence that VL is a serial infringer of
16 Microsoft's intellectual property rights.

17 The third point is that it is completely
18 inappropriate, we say, to grant summary judgment because
19 you cannot begin to consider questions of objective
20 justification and efficiency without first understanding
21 the scale and the scope of the anti-competitive effect
22 that needs to be justified under objective justification
23 and efficiency. VL accepts the former issues for trial,
24 but if you have no clue about the scale and the scope of
25 the anti-competitive effects, how can you say that the

1 counterbalancing factors under summary judgment to those
2 effects can be dealt with summarily? It is like, we
3 say, trying to clap with one hand. And again this is
4 all rather confused.

5 The further part is to deal head on with the points
6 Ms Lester raised. VL's main argument is the tribunal
7 can simply sidestep the issues of intellectual property,
8 the size and scale of the anti-competitive effect, and
9 simply assume that Microsoft is at this stage correct in
10 everything it says in its evidence and simply proceed to
11 dismiss the objective justification and efficiency
12 defences in toto.

13 But as I will explain to the tribunal, these
14 concessions make VL's summary judgment application even
15 more unrealistic. In a world where for these purposes
16 there is serial infringement of Microsoft's intellectual
17 property rights, and litigation and other preventive
18 measures have failed to prevent such infringements, then
19 Microsoft is in principle entitled to adopt much more
20 stringent countermeasures by way of a defence. Whether
21 those measures ultimately cross the line in
22 proportionality terms is patently an issue for trial.

23 And then finally we say in any event there are
24 multiple other compelling reasons why these issues
25 should go to trial. There are several points here.

1 They include, for example, summary judgment would not
2 dispose of the entirety of the claim. There are no
3 major efficiency savings, essentially the same material
4 will be covered at trial in any event. It concerns
5 developing areas of law that should be decided based on
6 what emerges at trial and not based on assumptions or
7 abbreviated procedures. There are parallel intellectual
8 property proceedings about to commence between Microsoft
9 and VL in the High Court that would bear on the issues
10 in this case. Those are the common proceedings referred
11 to in Mr Gringras' evidence. And the interrelationship
12 between these two sets of proceedings would need to be
13 considered in due course and summary judgment is not
14 remotely a suitable surrogate for this.

15 For example, it is conceivable and somewhat the
16 centre of gravity on the objective justification and
17 efficiency issues, insofar as they interrelate with
18 intellectual property, to shift or at least be shared
19 between these two sets of proceedings.

20 We say, sir, at base, that for some or all of these
21 reasons we really are a million miles away from summary
22 judgment territory. In *Three Rivers*, Lord Hope said
23 that summary judgment is to deal with cases that are not
24 fit for trial at all. That is emphatically untrue, we
25 say, of the application in this case. There is a real

1 defence and it will involve complex, multi-factorial
2 issues of fact, law, including intellectual property,
3 and economics, leading to an evaluative judgment. That
4 is an issue for trial, without doubt, and VL's forensic
5 excitement should not obscure this point.

6 THE CHAIRMAN: What do you say about the "necessary" point?
7 What do you say about that? One thing put against you
8 is on the one hand you say this is a necessary way of
9 dealing with a copyright matter, but then on the other
10 hand you're saying you're not using it much, you're not
11 enforcing it. How are you squaring that circle?

12 MR O'DONOGHUE: I deal with that in my third part, but in
13 a nutshell -- what's very odd about Ms Lester's
14 submission on that is that by the time we get to
15 objective justification and efficiency, the hypothesis
16 has to be that these measures were prevalent on the
17 market, because VL, to establish a prima facie abuse,
18 has to show an appreciable effect on competition. That
19 will involve prevalence. It is therefore very odd for
20 Ms Lester to say when it comes to objective
21 justification she is in effect assuming against herself
22 that she has failed to establish an appreciable effect
23 on the market.

24 So we say by the time one gets to objective
25 justification, in effect Microsoft has lost on the

1 question of the impact on the market, and at that stage
2 we will be faced with a situation --

3 THE CHAIRMAN: They're not opposite sides of the same coin,
4 quite, are they? Your attitude is you're not enforcing
5 this. Just explain what your position is on this,
6 assuming that it's a minority of contracts, but
7 nevertheless it is taking place in the marketplace --

8 MR O'DONOGHUE: That's why I rose to my feet on the question
9 of monitoring system. It is not the case, and I'll show
10 you in Mr Gringras, that there's no enforcement whatsoever;
11 it is that there are severe limitations on the Microsoft
12 side as to what it can do. It has limited visibility on
13 many aspects of resale, it has some contractual audit
14 requirements that I will show you, it has a perpetual
15 licence transfer system, which unfortunately customers
16 and resellers do not use as widely as they should. That
17 is why, for example, there have been multiple
18 infringement proceedings, including against VL, because
19 of these deficiencies.

20 We say, sir, at base, again whether and to what
21 extent these were in fact enforced and whether and to
22 what extent these measures were prevalent, those are
23 trial matters.

24 THE CHAIRMAN: Okay. So what are we starting with?

25 MR O'DONOGHUE: Just to sketch out the broad terrain in

1 terms of how these defences operate in practice at
2 trial.

3 We would suggest as a starting point the question of
4 objective justification and efficiencies is not natural
5 summary judgment territory, and we say this is hardly
6 surprising because with these defences the tribunal is
7 ultimately weighing up good things and bad things under
8 the lens of proportionality and considering what
9 alternatives were realistically open to the Defendants in
10 the real commercial world. We say that is instinctively
11 not summary judgment territory, certainly at first
12 blush.

13 I want to show you three cases just to make this
14 case good. One is Interchange which Ms Lester took you
15 to briefly, although she glossed over a number of
16 important points. Authorities bundle, tab 27. In our
17 submission, what Interchange tells you is it shows the
18 inherently multi-factorial evidence-based nature of
19 efficiency and objective justification defences. The
20 backdrop will be, I think, well known to many people in
21 this room. It concerned banks that collectively set
22 a common interchange fee, which was found to be akin to
23 a form of price-fixing, but they sought to justify that
24 common scheme on the basis that it enabled card issuers
25 to offer incentives to card holders, which increased

1 card usage, which in turn produced benefits for
2 merchants in the form of a card network.

3 We can pick this up at paragraph 116, which is at
4 page 1717.

5 I should note that this was an article 101(3)
6 defence, but I think it is common ground that that is
7 reasonably proximate to the question of objective
8 justification under article 102.

9 Then we see at 116 in the middle, so they set out
10 the gist of the defence:

11 "This is an inherently empirical proposition and
12 necessarily requires the authority or court addressing
13 the issue to carry out a balancing exercise --
14 a 'complex assessment' ..." you see reference to the GSK
15 case "... involving weighing the pro-competitive effect
16 against the anti-competitive effect of the conduct in
17 question. Cogent empirical evidence is necessary in
18 order to carry out the required evaluation of the
19 claimed efficiencies and benefits."

20 And then further down where it starts "This
21 procedure requires ...", the next sentence:

22 "There is a requirement for detailed, empirical
23 evidence and analysis in order that this evaluative
24 exercise can be carried out."

25 Then at 236 -- forgive me, it's still in 116 and

1 118, you see where it says, "Such an examination"?

2 THE CHAIRMAN: Are we in 118? 116?

3 MR O'DONOGHUE: Yes, you'll see the quotation, it's on
4 page 1724.

5 THE CHAIRMAN: Yes.

6 MR O'DONOGHUE: It's a quote from the GSK case.

7 THE CHAIRMAN: Yes, sure.

8 MR O'DONOGHUE: You see 236 of the GSK judgment:

9 "Such an examination may require the nature and
10 specific features of the sector concerned ... to be
11 taken into account if its nature and those specific
12 features are decisive for the outcome of the analysis
13 ..."

14 And then 129 further down that page -- next page,
15 forgive me, you can see:

16 "Visa submits that, while in some cases it may be
17 difficult to prove that a causal link is real ... it
18 will depend on the particular circumstances of the
19 case."

20 And so on. Then the second half:

21 "This submission, however, grossly underestimates
22 the complexity and subtlety of the balancing exercise
23 required under article 101(3). In particular ... an
24 assessment of any benefits accruing to customers and
25 merchants from MIFs will depend on a range of factors

1 including 'issuer pass-through' (the extent to which
2 issuing banks decide to recycle MIF revenues into
3 promotional behaviour) ..."

4 And so on. And then at the end:

5 "Such factors must necessarily be taken into account
6 in assessing whether appreciable objective advantages
7 for consumers arise from the restriction in question so
8 as to compensate for its competitive disadvantages.
9 This process necessarily requires empirical evidence."

10 So that is my point. This is complicated,
11 evaluative, value-based judgments, factual evidence,
12 expert evidence, empirical evidence, and of course the
13 point that Ms Lester conveniently ignored is all of
14 these -- these two appeals arose following trials in
15 Mastercard and Visa.

16 So it is in that context the court is highlighting
17 the complexity, and to graft that onto a summary
18 judgment context, never mind strikeout, in my
19 submission, is completely and utterly unrealistic.

20 Parenthetically on Interchange, the tribunal has my
21 point, these issues were only considered at trial, they
22 were not interlocutory points. In fact, in Visa and
23 Mastercard two High Court judges reached different
24 conclusions on the question of exemption under 101(3) in
25 two closely-related cases. Mr Justice Popplewell found

1 the exemption defence was made out and
2 Mr Justice Phillips found it was not. And the Court of
3 Appeal and Supreme Court disagreed with the High Court,
4 Mr Justice Popplewell, on these issues.

5 What this underscores, in my submission, is that
6 these are both issues for trial and value-based
7 judgments on which reasonable decision-makers can
8 differ, and again emphatically not summary judgment
9 territory.

10 THE CHAIRMAN: Yes, but complex cases can be suitable for
11 summary judgment too, if they're hopeless.

12 MR O'DONOGHUE: I will come onto that. We say we're also
13 not in that territory.

14 The second case is Streetmap at tab 22. We start at
15 page 1295. Again, just to give the tribunal the
16 backdrop, historically, at least at this point, Google
17 showed various competing online maps in its search
18 results but then introduced something called the One-Box
19 in response to a search query, and as you will see, sir,
20 from the figures under paragraph -- or paragraph 27 is
21 the historic situation, whereby you could choose from
22 a range of maps.

23 THE CHAIRMAN: Yes.

24 MR O'DONOGHUE: And then 29, over the page, following the
25 One-Box change, you were stuck with the Google map.

1 The abuse was based on the allegation that the new
2 maps, One-Box, offered automatically and exclusively
3 a thumbnail map from Google Maps, and of course one can
4 see the exclusionary potential of this straight away.
5 If you were one of the mapping companies previously
6 displayed, users could choose, and once that shifted to
7 automatic display of Google Maps, your business was
8 devastated because in practice no one really navigates
9 away from the default, at least in general.

10 Now, that this practice was found to be objectively
11 justified technically was an obiter finding because
12 there was an anterior finding of no appreciable
13 effect --

14 THE CHAIRMAN: Because of the benefits to the consumer.

15 MR O'DONOGHUE: -- on the market.

16 I want again to focus on the court's approach, again
17 following a trial, following factual evidence, expert
18 evidence, cross-examination, evaluative (inaudible) and
19 so on. If we can start at 1329, please -- 1325, forgive
20 me. Mr Justice Roth, he started by saying an important
21 point:

22 "... the full scope of objective justification has
23 not been conclusively determined ..."

24 I'll come back to that when we come to other
25 compelling reasons, but we do say that both the

1 questions of UsedSoft compliance and the full contours
2 of objective justification under article 102, they are
3 novel and undeveloped points.

4 Again parenthetically, until 2009, the existence of
5 an objective justification defence hadn't even been
6 recognised. The first mention, at least formally, of
7 this defence is in the guidance paper Ms Lester showed
8 you.

9 THE CHAIRMAN: In the guidelines? That's when it first
10 appeared?

11 MR O'DONOGHUE: As an objective justification defence.

12 THE CHAIRMAN: Okay.

13 MR O'DONOGHUE: There had been some historic cases saying
14 you could react in a proportionate manner if your
15 commercial interests were challenged and we saw, for
16 example, the Hilti case --

17 THE CHAIRMAN: But is it a distinct -- objective
18 justification, it's convenient to analyse it as
19 a distinct thing, but is it not bound up under
20 article 82 as a single question of whether there's
21 abuse?

22 MR O'DONOGHUE: There is, which is my second point, which is
23 if the abuse is going to trial, it makes no sense to
24 decouple a key component of the findings.

25 THE CHAIRMAN: The tribunal will have one hand tied behind

1 its back a bit.

2 MR O'DONOGHUE: Of course. I come onto this, but again, if
3 you're balancing two parties, you need to first
4 understand the scale and scope of the anti-competitive
5 effect before you get to the balancing of the
6 pro-competitive effects. The suggestion that you can
7 excise the pro-competitive effects in toto without
8 having any understanding of the scale and scope of the
9 anti-competitive effect, in my submission, is completely
10 misconceived. They go hand in glove. One is balancing
11 the other. And, of course, without understanding what
12 is the --

13 THE CHAIRMAN: One can be unarguable.

14 MR O'DONOGHUE: Indeed.

15 THE CHAIRMAN: In those circumstances.

16 MR O'DONOGHUE: That is the problem Ms Lester faces because
17 they concede the abuse question must go to trial, they
18 concede the UsedSoft issues and other IP issues are for
19 trial, and yet they want to excise the third corner of
20 that triangle at this stage. We say that makes no
21 sense.

22 THE CHAIRMAN: Okay, what else do you want to talk about?

23 MR O'DONOGHUE: We then go down to 149. Mr Justice Roth
24 says -- if we look at what Mr Hoskins said above that,
25 this is to respond to Ms Lester's point.

1 If you see at 148, Mr Hoskins for the claimant --

2 THE CHAIRMAN: Yes, I've read that.

3 MR O'DONOGHUE: He says:

4 "... 'Was there a less distortive alternative that
5 could have been adopted? That is really what this case
6 is about at the end of day.'"

7 And then Mr Justice Roth picks up on that and he
8 says:

9 "Proportionality is inherently a matter of fact and
10 degree."

11 And so on. So that is in response to Ms Lester's
12 point. This taxonomy of are there two, three, four
13 categories of objective justification -- there's
14 objective justification, interest and different
15 efficiencies -- in my submission, that's at that
16 completely sterile debate and I'll come back to the
17 point about objective necessity, but the common
18 denominator on all these defences is: is the reaction by
19 the defendant a reasonable and proportionate reaction
20 that reflects some legitimate consideration?

21 In my submission, that is the key point to
22 understand and the taxonomy and the semantics beyond
23 that, in my submission, at this stage really are really
24 here nor there, but I'll come back to that. It's a
25 proportionality assessment, and of course I do make the

1 point that when one thinks instinctively about
2 proportionality, in essentially any area of law, it is
3 something which instinctively is not summary judgment
4 material, it is again evaluative, multi-factorial, based
5 on the evidence in the particular case.

6 Now, again, just to wrap up on Streetmap, if we then
7 go over the page, to 150, Streetmap put forward a number
8 of alternative ways in which it says Google could have
9 achieved the legitimate objective. It was then for
10 Google to show that those alternatives were impractical
11 or failed to provide the same benefits or would have
12 involved significantly greater complexity.

13 So there we have the point that again this is
14 a question for trial. What will happen at trial is
15 there will be a tennis match of sorts whereby Google
16 says, well, these are the measures we proposed, and then
17 the burden shifts to VL to say, well, that went too far,
18 this countermeasure would have been sufficient. So
19 there'll be a backwards and forwards, a shifting of the
20 burden at trial based on the countermeasures put forward
21 and the response to those countermeasures, and again
22 that is the territory of trial.

23 One final trial point if we scroll down to 151 and
24 152, you see where it starts:

25 "As regards the question ..."

1 Then the second sentence:

2 "The trial was opened on the basis that Streetmap
3 relied on the various alternatives put forward and
4 discussed in the reports of Dr Emmerich ..." who was
5 their expert.

6 And then:

7 "Those proposed solutions were the subject of
8 detailed evidence in response from Mr Menzel, and
9 Mr Turner [not you, sir, the other Mr Turner KC]
10 cross-examined [the expert] in some detail regarding his
11 various proposals."

12 So again this underscores the point that at trial
13 there'll be factual and expert evidence
14 cross-examination in the usual way.

15 And then at 152, again this goes to my point about
16 these being trial issues:

17 "The Links Alternative had never been raised by
18 Streetmap in its pleading or evidence prior to the
19 trial. Indeed, Google suggested that it was not open to
20 Streetmap to advance this alternative at all."

21 In the event the court said it did consider that
22 alternative but it underscores my point that these are
23 matters which can and do evolve at trial, depending how
24 the evidence --

25 THE CHAIRMAN: I don't think I understand Ms Lester would

1 disagree with you when it gets to the proportionality
2 assessment. The question is she says you don't get to
3 that. She chops you off before you get to that --

4 MR O'DONOGHUE: She does say that, but again I make the
5 point that as a starting point, when one looks at the
6 cases in which this has been considered, it is very much
7 instinctively not in the summary judgment territory.
8 That's the point I make. In my submission, it is
9 an important starting point or framing point or perhaps
10 even rule of thumb. That's all I'm saying at this
11 stage.

12 I'll come on to what she says, I'm not running away
13 from that, but one has to put this in context. To put
14 it another way --

15 THE CHAIRMAN: Is that not the case -- I'm not sure how much
16 we get out of looking at -- (overspeaking) --

17 MR O'DONOGHUE: -- (overspeaking) --

18 THE CHAIRMAN: -- (overspeaking) -- assessment and plainly
19 it is once you get to that stage --

20 MR O'DONOGHUE: Just to be fair, I'll give you the other
21 cases I wanted to mention, I won't go into the detail.

22 There's Purple Parking, which is in authorities 15.

23 THE CHAIRMAN: Give me the paragraph numbers you're thinking
24 of.

25 MR O'DONOGHUE: So 179 -- so the defences in that case

1 concerned congestion, safety, security and
2 environment --

3 THE CHAIRMAN: I'm familiar with the case.

4 MR O'DONOGHUE: Yes. Again I make the point: factual
5 evidence, cross-examination, evaluative judgments. We
6 see that at 187, at 220, and 203.

7 Now, in Purple Parking itself, of course the abuse
8 was made out and in the end the tribunal, or the High
9 Court, took a rather jaundiced view of the defences put
10 forward, but the critical point was that was following
11 factual evidence and expert evidence on these issues.

12 THE CHAIRMAN: Sure.

13 MR O'DONOGHUE: So it is not something which one can
14 instinctively form a view at interlocutory stage.

15 I'm about to move on to my second topic. Would that
16 be a convenient moment?

17 THE CHAIRMAN: Yes, it seems sensible.

18 (12.59 pm)

19 (The luncheon adjournment)

20 (2.03 pm)

21 MR O'DONOGHUE: I'd like to move on to my second topic.

22 There's one very discrete point I can deal with very
23 quickly at the outset. You recall before the lunch
24 break I made the submission about the angels dancing on
25 a pinhead on the taxonomy of objective justification at

1 least at this stage is a pretty sterile exercise.

2 I just want to give one reference. If we look at
3 footnote 13 of VL's skeleton, they say in brackets:

4 "While VL ..."

5 THE CHAIRMAN: Sorry, just give me a second. Footnote 13 of
6 the Claimant's case?

7 MR O'DONOGHUE: Yes. They say:

8 "While VL refers to Microsoft's objective
9 justification and efficiencies defences separately,
10 an efficiencies defence to an article 102 claim is often
11 treated as a form of objective justification."

12 That in a way makes the point even more simply,
13 which is there is a broad category for objective
14 justification. Whether one semantically calls that some
15 subcategory of efficiencies or objective necessity, it
16 doesn't really matter, at least at this stage.

17 I'll come back to Ms Lester's point that protecting
18 intellectual property is not a legitimate aim and that
19 Microsoft in any event can only rely on considerations
20 which are external to Microsoft and not internal
21 benefits, I'll come back to that.

22 The second topic, we say it is wrong to separate the
23 issue of intellectual property compliance, specifically
24 copyright, from the question of objective justification
25 and efficiency defence.

1 There is a major issue in this case as to whether
2 and to what extent VL and indeed some of Microsoft's
3 customers complied with the requirements of intellectual
4 property law in reselling second-hand licences, and
5 Mr Cohen in his fifth statement, in the summary judgment
6 bundle at tab 5, page 52, at paragraph 31 --

7 THE CHAIRMAN: Sorry, remind me, where do I find Mr Cohen 5?

8 MR O'DONOGHUE: In the summary judgment bundle, tab 5,
9 page 52.

10 THE CHAIRMAN: Yes.

11 MR O'DONOGHUE: Mr Cohen says at 31(1):

12 "There is an issue between the parties as to the
13 precise conditions [under] which, as a matter of UK and
14 EU law, the so-called distribution right becomes
15 exhausted, such that perpetual licences may lawfully
16 ..."

17 THE CHAIRMAN: Sorry, for some reason I have --

18 MR O'DONOGHUE: 31(1). Internal page 52, sir.

19 THE CHAIRMAN: Okay.

20 MR O'DONOGHUE: So there is an issue for trial on whether
21 and to what extent the conditions for lawful second-hand
22 resale were complied with and it is common ground, that
23 is not for today.

24 Microsoft in this context has pleaded in some detail
25 to the conditions in relation to compliance that it

1 relies upon. This is in the request for information
2 which you were not shown. It's in the core bundle,
3 tab 5.

4 THE CHAIRMAN: Which 5? A5? B5? Yes, we looked at this
5 but it was an answer we weren't shown.

6 MR O'DONOGHUE: Yes, were you not shown all six and a half
7 pages of pleading on the conditions for copyright
8 compliance. It starts, sir, at 237, and so you'll see,
9 paragraph 1, we say:

10 "The propositions advanced by the Claimant in
11 paragraphs 20 and 21 are matters of law that ought to be
12 addressed in submissions rather than pleadings."

13 So one of the points made by Ms Lester is we've been
14 rather coy in terms of setting out our stall, and here
15 we say, on an unnecessary basis, we have I think more
16 than six pages of pleadings in relation to the aspects
17 of copyright compliance that we rely upon.

18 My impression is you, at least, have perused some of
19 this, so I'm not proposing to go line by line.

20 THE CHAIRMAN: Okay, yes.

21 MR O'DONOGHUE: But what we've done is we've set out by
22 reference to UsedSoft, obviously, and subsequent case
23 law such as Ranks, a well-known case, what we say are
24 the conditions that need to be complied with by VL and
25 customers from whom VL is acquiring second-hand

1 licences:

2 I showed you the reference in paragraph 1 to the
3 Claimant's own pleading at paragraphs 20 and 21, and
4 of course there they make the point that it is incumbent
5 on the reseller to show that they comply with the
6 relevant conditions for second-hand resale. So that is
7 not a ball at least exclusively on our side of the
8 court. They have to show their activities were
9 compliant.

10 One further reference at page 242, paragraph 12.
11 This is an important point. We say:

12 "... details of the Claimant's business are not
13 within the Defendants' knowledge and they are
14 accordingly unable to plead to those matters ..."

15 So there is an asymmetry of information of whether
16 and to what extent VL was indeed compliant, as we'll get
17 to, there are disclosure questions surrounding that
18 issue.

19 So again, on the topic of coyness, one of the
20 reasons why we are constrained at this stage in terms of
21 what we can say is we have not had disclosure on the
22 compliance issues.

23 THE CHAIRMAN: You're not anticipating this turning into
24 a copyright dispute?

25 MR O'DONOGHUE: No, of course, jurisdictionally the tribunal

1 cannot deal with copyright counterclaims.

2 THE CHAIRMAN: No, but you're not -- in respect of whether
3 it's a counterclaim or not, we're not going to be
4 invited to decide whether or not there were copyright
5 infringements?

6 MR O'DONOGHUE: We will have to consider based on VL's own
7 pleaded case the question of compliance with the
8 requirements of UsedSoft.

9 THE CHAIRMAN: Okay, we're going to have to -- you're going
10 to have to persuade us of that. We don't -- it seems to
11 be a sub-issue of -- the idea of we're going to audit
12 the Claimant's activities.

13 MR O'DONOGHUE: Sir, I'll come on to this. It relates to,
14 in part, the common proceedings, which I'm about to come
15 to, because there is a second action in the High Court
16 which is about to commence against VL --

17 THE CHAIRMAN: Have we been told about that or not?

18 MR O'DONOGHUE: Yes, it's in our skeleton. I'll take you to
19 it.

20 THE CHAIRMAN: Okay.

21 MR O'DONOGHUE: In terms of today, the starting point is
22 there is overwhelming and currently uncontradicted
23 evidence that VL is a serial infringer of intellectual
24 property rights in carrying out its second-hand
25 licensing activities, and that is the witness evidence

1 of Mr Gringras. As I'll show you, sir, in a moment --

2 THE CHAIRMAN: It sounds conclusory, not --

3 MR O'DONOGHUE: It is accepted in --

4 THE CHAIRMAN: I doubt it's common ground. Serial, more
5 than once there's been copyright infringement. Is that
6 what you say?

7 MR O'DONOGHUE: As I'll show you in Ms Lester's skeleton,
8 she's prepared to assume for purposes of today's
9 application that everything said in Mr Gringras is true.
10 I'll show you that.

11 THE CHAIRMAN: Up to a point. Let's not turn that into
12 a sub-argument, but --

13 MR O'DONOGHUE: Yes.

14 THE CHAIRMAN: What have you pleaded on this?

15 MR O'DONOGHUE: Let's look at Mr Gringras and then I'll show
16 you a concession and then we'll see where --

17 THE CHAIRMAN: Let's look in your pleading first. Where
18 have you pleaded this issue?

19 MR O'DONOGHUE: Sir, as you saw in Cohen 5, 31.1, it is
20 common ground that whether and to what extent VL is
21 compliant with the relevant requirements is an issue for
22 trial. That's point 1.

23 MS LESTER: I hesitate to rise, but that's not what either
24 Mr Cohen or I said.

25 MR O'DONOGHUE: And I'll also show in Ms Lester's skeleton

1 where she concedes for the purpose of today that what is
2 set out in Gringras 1 should be assumed to be true.

3 THE CHAIRMAN: I'm not overly impressed by that. As
4 I understand, the point is made against you that it's
5 all very well coming along today and saying that VL are,
6 as you put it, serial infringers and that consequently
7 your actions are justified even if they're a prima facie
8 abuse if they're justified for that reason. Coming to
9 today, that's not actually been pleaded, that's the
10 point that's being said.

11 MR O'DONOGHUE: We take this in stages. Of course we cannot
12 jurisdictionally plead an IP counterclaim in this --

13 THE CHAIRMAN: It doesn't have to be a counterclaim.

14 MR O'DONOGHUE: That is point one. Point two is there are
15 proceedings in the High Court on the cusp of being
16 reactivated which will ventilate the issues of
17 infringement of intellectual property right, including
18 questions of damages, and I'll show you those.

19 If we can please turn up Gringras 1, it's in tab 8
20 of the summary judgment bundle. If we start at
21 paragraph 36, just under section E, "Claimant's history
22 of copyright infringement" --

23 THE CHAIRMAN: Yes, we've read that. What's the -- tell me
24 what your submissions are on this passage.

25 MR O'DONOGHUE: Yes. You can see at 37 an earlier company

1 in which Mr Horley was director admitted, see 39, its
2 importation and resale infringed Microsoft's copyright
3 and there was a settlement. Then in the Comet
4 proceedings there was a first audit and there was
5 a copyright infringement action by Microsoft.

6 THE CHAIRMAN: I see. The Comet proceedings.

7 MR O'DONOGHUE: Yes. And then you see 44 they were stayed
8 and there was a settlement agreement.

9 Over the page, you see at 46 there was a --

10 THE CHAIRMAN: Audit, yes.

11 MR O'DONOGHUE: -- contractual right to audit. In the
12 second sentence, the Claimant refused to comply with
13 this request, necessitating a High Court application,
14 and an order was made requiring the Claimant to permit
15 the audit to be carried out, to take copies or extracts
16 of emails and records.

17 THE CHAIRMAN: Mm-hmm.

18 MR O'DONOGHUE: Then at 48:

19 "The auditors could not confirm whether the
20 Claimant's records were complete and accurate, ie
21 whether the Claimant's records correctly recorded all
22 sales made by the Claimant of the Defendant's software
23 or whether the relevant transactions complied with the
24 UsedSoft requirements or not."

25 In 49:

1 "The above examples are illustrative of the
2 difficulties faced by the Defendants in identifying
3 non-compliance with the essential conditions for
4 software licence resale, and the procedural and
5 financial hurdles they face in trying to enforce their
6 rights as copyright owners."

7 Then if we go back to the core bundle at 2726 --

8 THE CHAIRMAN: Does he deal with the new proceedings in
9 here?

10 MR O'DONOGHUE: Yes.

11 THE CHAIRMAN: Whilst we have it open, do you want to show
12 me?

13 MR O'DONOGHUE: The letter before action served is in the
14 core bundle at 2726.

15 THE CHAIRMAN: 2726. I don't have that with me. Hold on,
16 I should be able to find it. Give me a second. Yes.
17 5 November?

18 MR O'DONOGHUE: Yes.

19 THE CHAIRMAN: Right.

20 MR O'DONOGHUE: It's over a number of pages, I can invite
21 the tribunal to read the summary at the start and then
22 the next steps at the end. (Pause).

23 THE CHAIRMAN: Somewhat opportunistic timing, one feels.

24 MR O'DONOGHUE: Sorry? With respect, we say no, because of
25 course VL refused to agree to the second audit, leading

1 to a High Court application late last year. We only
2 received the audit material after that hearing, so in
3 the course of this year. It takes time, of course, to
4 review that material and a letter before action we say
5 in November is perfectly consistent with that timeline.

6 THE CHAIRMAN: So what are the scope of the infringements
7 you're identifying?

8 MR O'DONOGHUE: Sir, if we then go back to Gringras 1, you
9 will see, sir, if we go to for example paragraph 92,
10 there are five categories of infringement set out. At
11 92, "Subdivision of licences":

12 "The Claimant had no right to divide and sell part
13 of the multi-user licence."

14 In 94, "Resale of part-paid licences":

15 "As the Comet proceedings demonstrate, the Claimant
16 has a substantial history of reselling licences that are
17 not perpetual licences, and which could not lawfully be
18 resold under UsedSoft. The Defendants were entitled to
19 restrain such dealings as copyright owner insofar as
20 they have occurred ..."

21 THE CHAIRMAN: That's just lack of revenue, isn't it, for
22 you? It's not striking at the heart of the nature of
23 your copyright. It's just you were owed some money and
24 it was sold before you got the money.

25 MR O'DONOGHUE: I'll come on to that in my third topic.

1 THE CHAIRMAN: All right. And subdivision of licences, just
2 again, what's the nature of the damage to you if
3 licences are subdivided?

4 MR O'DONOGHUE: We'll come to UsedSoft. Of course the core
5 tenet of UsedSoft is that the licensor can realise the
6 full economic value of the licence before exhaustion can
7 be achieved, and the circumstances where there is
8 a discounted bulk licence that is then subdivided, the
9 economic value of that licence is not fully achieved and
10 (inaudible).

11 THE CHAIRMAN: When you put it that you're protecting your
12 copyright, you really just mean you're protecting your
13 revenues?

14 MR O'DONOGHUE: And distribution.

15 THE CHAIRMAN: Right, but it's protecting revenues. You're
16 not complaining that multiple copies are being made of
17 your software?

18 MR O'DONOGHUE: Well, sir, the realisation of the economic
19 value is part of the essential subject matter of the
20 copyright. And true it is there is a direct financial
21 benefit to Microsoft, but --

22 THE CHAIRMAN: Is that the essential subject matter of the
23 copyright?

24 MR O'DONOGHUE: To put it another way, the achievement of
25 the full economic value is a legitimate general interest

1 even if the financial benefits of that accrue in the
2 first instance to Microsoft.

3 Then if we look at 96, sir, there is a separation of
4 discounted SA licences.

5 Then over the page:

6 "Resale of licences to software which has not been
7 rendered inoperable."

8 And as you'll be aware, sir, there was a requirement
9 under UsedSoft that the licences first be rendered
10 unusable.

11 THE CHAIRMAN: It jumps into this -- this is just assertion.

12 You've not -- it says these are examples. These aren't
13 actually examples, these are just claims.

14 MR O'DONOGHUE: Well, these are the claims including the
15 letter before action that --

16 THE CHAIRMAN: Right, but unpleaded in these proceedings?

17 MR O'DONOGHUE: We in the usual manner have sent a letter
18 before action and we've had a holding response from VL,
19 they have said they will respond substantively on
20 15 December, and if and when we receive that response,
21 we will take a view as to what then needs to be pleaded.

22 But as matters stand, it seems inevitable, barring
23 admissions, that there will be a new action in the High
24 Court to breach of the settlement terms against VL.

25 THE CHAIRMAN: None of this is before the tribunal at the

1 moment, except you're just putting some evidence on it.

2 None of this is pleaded.

3 MR O'DONOGHUE: Sir, it is in evidence in Gringras 1. We
4 can't plead --

5 THE CHAIRMAN: But it remains unpleaded. It's not as if
6 you've just got these documents. You said you've had
7 these documents since the beginning of the year; is that
8 right?

9 MR O'DONOGHUE: We've been reviewing them for the last
10 several months and it takes time, and of course one of
11 the restrictions that VL insisted upon was that we could
12 not use the material in these proceedings.

13 MR SCHAEFER: Sir, I hesitate to rise, but on the issue of
14 how long they have had these documents, if you could
15 look at page 65 of Gringras 1, this is the main
16 allegation subdivision.

17 That allegation is made by reference to Mr Horley's
18 affidavit at paragraph 134(?) of Gringras 1. That is
19 at --

20 THE CHAIRMAN: We'll get to that later.

21 MR SCHAEFER: -- (overspeaking) 2020.

22 MR O'DONOGHUE: That isn't right. If one looks at
23 paragraph 55 of Gringras 1, we've had the totality of
24 one example from the Claimant's recent disclosure of
25 a software licence pack in relation to one of its

1 customers. And as Mr Gringras then develops at 61,
2 based on that single item of disclosure, which is
3 recent, there appear to be a litany of further
4 infringements which arise in relation to Rabobank
5 licences, you see at 61.1, again, subdivision; transfer
6 of licences which included non-computer programs which
7 the Claimant has no right to resell, and purported
8 resales --

9 THE CHAIRMAN: But how is this going to work in practice?

10 You said you've not pleaded any of this in these
11 proceedings. You say -- I'm not sure it's a point we
12 agree with, but you say it's not appropriate to bring
13 a counterclaim in these proceedings, but I'm not sure
14 that's -- anyway. So then you say you go off to the
15 High Court. When are we going to get a judgment from
16 the High Court on any of this?

17 MR O'DONOGHUE: Sir, we've all seen the (inaudible) of this,
18 we've sent a letter before action, there's a response on
19 15 December, we'll have to take stock then.

20 As matters stand, it is virtually certain barring
21 admissions there will be a new claim following the
22 second audit breach, we say. We say it's a breach of
23 the settlement agreement. There's an exclusive
24 jurisdiction clause in the settlement in favour of the
25 High Court, so it can only be (inaudible). And we will

1 have to take stock once the claim is up and running in
2 terms of where we are and timing and so on.

3 But the point I'm making today is --

4 THE CHAIRMAN: But you've not applied for -- as I understand
5 your submission, you're saying this is central to the
6 case.

7 MR O'DONOGHUE: Yes.

8 THE CHAIRMAN: Is what happens in the copyright action in
9 the High Court, but none of the directions you're
10 seeking seem to have any regard to that.

11 MR O'DONOGHUE: Yes, sir, because the claim is still at the
12 letter before action stage. What we've said on
13 Gringras 1 is what seems to us overwhelming evidence of
14 infringement, which is conceded for the purposes of the
15 application. Even when the claim is up and running, and
16 again I don't want to get too far ahead of myself, but
17 they will be important questions as to the
18 interrelationship between the two sets of proceedings.
19 I don't want to --

20 THE CHAIRMAN: When are we going to be in a position to find
21 out what you're doing in the copyright claim?

22 MR O'DONOGHUE: Well, obviously once the claim is issued,
23 and all this has been pleaded.

24 THE CHAIRMAN: How long is it going to take you to plead it?

25 MR O'DONOGHUE: I'll have to take instructions, but

1 I imagine --

2 THE CHAIRMAN: If you could take instructions on that.

3 MR O'DONOGHUE: Sir, the point for today's purposes is that
4 it is virtually certain that this vista is in sight.

5 THE CHAIRMAN: And you're not pleading it in these
6 proceedings, you're going to plead it and possibly
7 cross-refer to it -- what you're saying is you're going
8 to plead it in the High Court?

9 MR O'DONOGHUE: Yes.

10 THE CHAIRMAN: And then you'll be relying on the findings of
11 the High Court in this case.

12 MR O'DONOGHUE: Again, I don't want to get ahead of myself.
13 All I'm saying at this stage is that there is a racing
14 certainty that an issue of VL's infringements of the
15 UsedSoft requirements will be the subject of imminent
16 High Court proceedings. There is then an important
17 question, sir, which you rightly raise, as to how does
18 that interrelate with these proceedings.

19 THE CHAIRMAN: But these are VL's infringements over what
20 period?

21 MR O'DONOGHUE: The same period as we're dealing with here.

22 THE CHAIRMAN: Right.

23 MR O'DONOGHUE: Again, sir, think about this through the
24 prism of summary judgment. Again --

25 THE CHAIRMAN: Why does it matter whether they've infringed

1 or not for these proceedings?

2 MR O'DONOGHUE: Well, because -- I'll develop my submissions
3 in a moment, sir, but in a nutshell, if we're in
4 a scenario where there is serial infringement, the
5 proportionality assessment in terms of my client's
6 defence --

7 THE CHAIRMAN: If we don't assess proportionality as of
8 today or as of a year from now in the High Court, surely
9 proportionality has to be assessed at the time you
10 introduced this policy, and at that time you had a state
11 of knowledge which may be serial infringement, it may be
12 you had no idea, but I can't see why what happens, what
13 you discover today has got any bearing on
14 proportionality when you introduce this policy. Am
15 I wrong about that?

16 MR O'DONOGHUE: It is an objective test. Of course VL is
17 one of many resellers, but if it is the case that there
18 was an objective apprehension, a violation of these
19 copyright requirements, that in our submission bears
20 very directly and very heavily --

21 THE CHAIRMAN: If there was that apprehension --

22 MR O'DONOGHUE: -- on the countermeasures that you could
23 take to respond to that risk.

24 THE CHAIRMAN: But --

25 MR O'DONOGHUE: In other terms, if hypothetically there is

1 serial infringement by VL and other resellers, all else
2 equal the objective justification countermeasures it
3 would take to deal with that situation would be much
4 more stringent than in a world where infringement is
5 a non-issue.

6 So the point I'm making is that the scale and scope
7 of the intellectual property compliance is fundamental
8 to understanding the contours of the objective
9 justification defence because the countermeasures you
10 can take must, by necessity, be proportionate to the
11 risks you are facing.

12 THE CHAIRMAN: Yes, the risks you are facing as opposed to
13 the risks determined many years later.

14 MR O'DONOGHUE: Sir, we say no. If, for example, one goes
15 to the summary judgment bundle at 148 --

16 THE CHAIRMAN: Sorry, I'm taking you out of your way,
17 Mr O'Donoghue, I apologise, but maybe these questions
18 are for later but yes, sorry.

19 MR O'DONOGHUE: That's all right. On the contemporaneous
20 point, just give you one reference sir, it's 148.

21 THE CHAIRMAN: 148 of?

22 MR O'DONOGHUE: The summary judgment bundle.

23 THE CHAIRMAN: Yes.

24 MR O'DONOGHUE: This is a letter from 2015 which is the
25 start of the relevant period where Microsoft is

1 communicating with partners and customers on the need
2 for copyright compliance.

3 THE CHAIRMAN: Yes.

4 MR O'DONOGHUE: And it sets out the requirements and so on.

5 So this has been a continuous issue within Microsoft
6 contemporaneously and indeed today.

7 THE CHAIRMAN: Just because you're paranoid doesn't mean
8 they're not out to get you?

9 MR O'DONOGHUE: That's true, sir. Of course, the first part
10 of the proceedings resulted in a settlement by VL and
11 one can draw whatever inferences one wants from that,
12 and there are now a second set of audit proceedings.
13 The conclusion is set out in paragraph 91 of Gringras.
14 It says:

15 "The limited material received so far from the
16 Claimant (both in these proceedings and in the Second
17 Audit) suggests that the Claimant may have been
18 systematically infringing the distribution right in
19 relation to Microsoft Products ... this is important
20 context for the Claimant's assertion that there is no
21 realistically arguable case that the Terms In Issue were
22 justified to prevent transactions being entered into
23 with or by the Claimant ..."

24 THE CHAIRMAN: This is conclusory. This is not evidence.

25 This is -- Mr Gringras hasn't given any examples.

1 MR O'DONOGHUE: Sir, with respect, he has.

2 THE CHAIRMAN: Has he? Oh. Where?

3 MR O'DONOGHUE: At 75, highlighting the specific
4 infringements based on Mr Horley's own affidavit.
5 You'll see the parts highlighted in yellow.

6 76:
7 "As can be seen above, the Claimant purported to
8 have resold a significant quantity of 'User CAL'
9 contractual entitlements ..."

10 THE CHAIRMAN: Why is that an infringement?

11 MR O'DONOGHUE: Same at 66.

12 THE CHAIRMAN: Can you just explain why that's
13 an infringement, sorry?

14 MR O'DONOGHUE: They're not computer program licences.

15 THE CHAIRMAN: Right. So which category does that fall
16 under?

17 MR O'DONOGHUE: That's not within UsedSoft at all. This is
18 the point. Likewise at 66 --

19 THE CHAIRMAN: Sorry, I'm not following you at the moment.
20 I don't know if it's important, but ... okay, anyway,
21 you say there's an example at 66?

22 MR O'DONOGHUE: Yes. And I've shown you the summary at 61
23 which summarises the -- the main types of infringement.
24 Again, this is based on analysis to date.

25 We've had very limited disclosure on this. What we

1 have had is recent. There are new proceedings, which
2 are about to commence. They will, one way or another,
3 bear on these issues in these proceedings.

4 The point I'm making today for summary judgment
5 purposes is a simple one, which is the authorities are
6 clear that one has to have regard, for summary judgment
7 purposes, to the evidence which is yet to come. And in
8 this context, there is a wealth of evidence yet to come,
9 both in terms of disclosure in these proceedings and in
10 the High Court proceedings, which would bear on the
11 question --

12 THE CHAIRMAN: Yes, but again I don't think that's
13 Ms Lester's point. She doesn't say -- she's not
14 standing up and saying it's unarguable, there's no
15 copyright infringement. What she's saying is that (a)
16 it's not pleaded, and (b) it doesn't explain your --
17 what she would call abusive actions.

18 MR O'DONOGHUE: I'll come to the second point shortly, but
19 it certainly is in evidence, as best we can at this
20 stage, given that we haven't had proper disclosure.

21 THE CHAIRMAN: Right.

22 MR O'DONOGHUE: We say today that is something you can and
23 we respectfully say should take into account when it
24 comes to --

25 THE CHAIRMAN: But it seems the relevant question, if it is

1 a relevant question, a relevant factor, the relevant
2 question is: did you have a bona fide rational fear of
3 copyright infringement at the time you introduced your
4 policy? That would seem to be the relevant question.

5 MR O'DONOGHUE: Yes --

6 THE CHAIRMAN: Not whether in fact there was copyright
7 infringement going on as discovered many years later
8 after the policy has been withdrawn.

9 MR O'DONOGHUE: Sir, you'll be well aware of course on the
10 back of UsedSoft the question of compliance with
11 UsedSoft was uppermost in the minds of licensors.

12 THE CHAIRMAN: Yes.

13 MR O'DONOGHUE: And I showed you the letter in 2015, which
14 is one of a series of communications from Microsoft to
15 its customers --

16 THE CHAIRMAN: Yes.

17 MR O'DONOGHUE: -- on this very point. So there is no
18 doubt, as indeed one would expect with
19 an innovation-based company who relies on copyright,
20 that compliance with these requirements was the meat and
21 drink of the company contemporaneously and today.

22 THE CHAIRMAN: Where do we go next?

23 MR O'DONOGHUE: I just want to unpack, sir, where we say
24 this takes us for purposes of summary judgment and
25 objective justification and efficiency defences. I will

1 come on next to Ms Lester's points, which you've
2 mentioned, but I want to make four short points at this
3 stage.

4 First of all, we say given what we have evidenced as
5 a significant incidence of serial infringement, both
6 historically and still today, Microsoft was entitled to
7 have in place a reasonable system that seeks to ensure
8 respect for its intellectual property rights and to
9 avoid or minimise infringements of those rights, and to
10 place reasonable demands on resellers like VL and those
11 from whom they purchase second-hand licences to
12 demonstrate compliance with the requirements of
13 intellectual property law.

14 Second, we say it is fundamental to understand the
15 scale and scope of potential IP infringement when
16 considering the objective justification defence intended
17 to deal with the risks of such infringement.

18 To state the obvious, if there was serial
19 infringement, it would be highly relevant in assessing
20 proportionality of any responsive measures put in place
21 by Microsoft, and if the infringement was as rare as
22 hen's teeth, by contrast, that would likely lead to
23 a very different assessment of objective justification.

24 THE CHAIRMAN: The obvious point, Mr O'Donoghue, is if
25 Microsoft thinks its copyright is being infringed, it

1 has the opportunity of suing for copyright infringement.
2 It doesn't have to shut down the market in second-hand
3 licences. That's the point you need to grapple with.
4 What is it that -- why is this essential to close the
5 market rather than just to police your copyright and
6 your copyrights?

7 MR O'DONOGHUE: Sir, what the first and second audits have
8 shown, and indeed the Rabobank example, is that
9 litigation, settlements and other measures such as these
10 contractual audit rights have been ineffective to
11 prevent widespread copyright infringement, and in that
12 context, again the countermeasures one can take are
13 very, very different in a proportionality assessment to
14 a world in which those measures -- (overspeaking)

15 THE CHAIRMAN: Again, you are entering into a completely
16 unpleaded domain now. You're saying that the courts
17 cannot give you the assistance that you require, the IP
18 courts can't give you the assistance you require in
19 order to deal with copyright infringements. You have to
20 close the market.

21 MR O'DONOGHUE: Well, we do say that, or at least
22 potentially so, because of course the consequences in
23 the Comet case of conducting the same audit is that even
24 following a settlement, there is still ongoing
25 violations --

1 THE CHAIRMAN: That's not what the second audit says.

2 MR O'DONOGHUE: Well, that is our case on what the second
3 audit shows.

4 THE CHAIRMAN: Just show me your evidence on that again.
5 I may have misread it.

6 MR O'DONOGHUE: Sir, it is the letter before action.

7 THE CHAIRMAN: You said the Comet.

8 MR O'DONOGHUE: Yes.

9 THE CHAIRMAN: You said the second audit shows.

10 MR O'DONOGHUE: Yes. These were licences originally
11 licensed by Comet, which went into administration, and
12 then purchased by VL.

13 THE CHAIRMAN: Yes, but I thought the Comet audit said they
14 couldn't tell.

15 MR O'DONOGHUE: 66 in Gringras 1.

16 THE CHAIRMAN: I was looking at 48. That was the second
17 audit.

18 MR O'DONOGHUE: Yes.

19 THE CHAIRMAN: You want me to look at 66 as well?

20 MR O'DONOGHUE: In terms of where this is pleaded, and I'll
21 pause -- we can plead certain matters until we have
22 disclosure and response from VL, but in terms of the
23 issue, it is pleaded in the amended defence at 58.1,
24 subparagraph (c).

25 THE CHAIRMAN: Mm.

1 MR O'DONOGHUE: We have pleaded from the outset that
2 ensuring compliance with resale requirements is
3 a critical part of the objective justification defence,
4 and secondly in the RFI response at core bundle
5 page 241, paragraphs 9 and 10, and paragraph 11 on 242.

6 I entirely accept that there are things which are
7 not yet crystallised in the second audit proceedings
8 which will need to be part of a pleading in due course,
9 but in circumstances where we've sent a letter before
10 action, we've not had a response, we've not had
11 a response until 15 December, there isn't much at this
12 stage we can plead in concrete terms.

13 THE CHAIRMAN: I don't understand why you can't plead this
14 because you're waiting for a response from a letter.
15 Why couldn't it have been pleaded months ago?

16 MR O'DONOGHUE: Well, again, sir, we had the audit materials
17 relatively recently, they take time to digest, the
18 letter before action was a distillation of that.

19 I repeat, it is responsible to wait for a response from
20 VL, we were told that (inaudible) --

21 THE CHAIRMAN: It's also responsible to get your case
22 properly pleaded before you try and resist a strikeout
23 application. It's not just saying that you're obliged
24 to wait for a response to a letter before action when
25 you've had these materials for months. It seems

1 a stretch.

2 MR O'DONOGHUE: Certainly the nature of the infringements is
3 set out in as much detail as we can in Gringras 1 and,
4 in my submission, it is entirely appropriate to have
5 regard to that at the summary judgment stage.

6 In terms of VL's disclosure in these proceedings, as
7 I showed you, sir, we have had a single document in
8 I think June or July this year in terms of their
9 activities, so we have not had disclosure at least yet
10 in these proceedings.

11 THE CHAIRMAN: We'll discuss disclosure in due course, but
12 at the moment I'm not -- it's not entirely clear to us
13 what disclosure either of the parties need to determine
14 these issues of liability.

15 MR O'DONOGHUE: Can we quickly look at the RFI response at
16 241, please.

17 THE CHAIRMAN: Look at the RFI? Yes. Sorry, just remind
18 me, where do you want to go? B/5?

19 MR O'DONOGHUE: 241 and 242.

20 You will see at 11 we tee off the issue, albeit in
21 conditional terms, and then at 12 we say, well, we
22 haven't yet had full disclosure that would enable us to
23 go beyond what is set out in 11.

24 But no doubt, sir, in due course this can be
25 amplified and certainly will be set out in detail in the

1 High Court proceedings.

2 THE CHAIRMAN: Just to be clear, Mr O'Donoghue, you may be
3 right, but we're going to need some persuasion that
4 actually any of this is relevant to these proceedings.
5 What seems to be relevant is your bona fide perceived
6 risk of copyright infringement. If that, assuming
7 you're successful in resisting the strikeout
8 application -- don't read anything into that -- but the
9 highest can seem to be your perceived risk and whether
10 this is an appropriate response to that risk rather than
11 10 years later auditing all the major and minor
12 incidences of copyright infringement.

13 MR O'DONOGHUE: We say that will be a major issue for trial.

14 THE CHAIRMAN: At the moment it's not pleaded. I'm just
15 putting a marker down that you will have to -- if you
16 are going to plead it, you have to persuade this
17 tribunal that it's going to be relevant.

18 MR O'DONOGHUE: Sir, what is pleaded is common ground. The
19 question of UsedSoft compliance is an issue for trial
20 and VL on its own pleaded case has to demonstrate that
21 in conducting its resale activities it acted in a manner
22 compliant with UsedSoft and other aspects of copyright.

23 MS LESTER: Just to repeat my earlier submission, that is
24 not a matter that's common ground.

25 MR O'DONOGHUE: To put it another way, if it is the case

1 hypothetically that none of VL's resales were compliant
2 with UsedSoft then it doesn't have a case. It doesn't
3 matter what Microsoft did or didn't do, if in fact these
4 sales could not lawfully have been made, there is no
5 case.

6 THE CHAIRMAN: Maybe, maybe not. It's the subject of
7 further argument.

8 MR O'DONOGHUE: My point, sir, is those are issues for
9 trial. There is an interrelationship with the second
10 audit proceedings which will have to be ventilated in
11 due course. At this stage, given the limited disclosure
12 we've had and the disclosure yet to come, we are not in
13 a position today to do more than is set out in
14 Gringras 1 and the letter before action. But again,
15 when projecting forward to trial and considering summary
16 judgment today, it is, we say, appropriate and indeed
17 necessary to have regard to the evidence yet to come.
18 That is a basic principle of summary judgment
19 assessment.

20 The final point I make on this before I move on to
21 the next topic is that the nature of the enquiry into
22 compliance with these requirements is difficult and one
23 that is likely to be highly individuated according to
24 the customers from whom VL purchased licences. Because
25 the way in which these requirements work is that it is

1 for VL to show for each particular licence acquisition
2 that VL and the seller of the licence in question were
3 compliant with the various requirements under UsedSoft.

4 We give examples in our skeleton of some of these
5 requirements, and if we can quickly look at those, it's
6 paragraph 25.

7 THE CHAIRMAN: We're familiar with those, yes. You say it's
8 a requirement for them to show. In what context?

9 MR O'DONOGHUE: Again, it's (inaudible) after reselling it.

10 THE CHAIRMAN: But not in these proceedings. There's no
11 requirement for them to show that in these proceedings.

12 MR O'DONOGHUE: It is a pre-condition of any claim that
13 whatever sales were made were lawful sales. If they
14 were not lawful sales, there is no claim.

15 If we look at the skeleton at paragraph 25, it's at
16 (c) and (d), sir, so one of the conditions is that
17 before the licence can be resold, the first user must
18 have paid all fees due under the licence, thus enabling
19 the economic value of the copyright to be fully realised
20 by the copyright owner prior to resale. And we say
21 establishing this requires a close examination of the
22 circumstances in which the original copy was sold, the
23 sums payable under the licence, any discounted or
24 partially paid features of the licence and the timing of
25 resale, among other matters.

1 We say on its own, that analysis would often be
2 enough to occupy a full trial of infringement in the
3 Chancery Division, as we saw with the first Comet audit.

4 Then we say another restriction on the lawful resale
5 of software under UsedSoft is where first user obtains
6 a multi-user licence --

7 THE CHAIRMAN: We've covered these points, haven't we?

8 MR O'DONOGHUE: Yes.

9 THE CHAIRMAN: Yes.

10 MR O'DONOGHUE: The point I'm making here, sir, is that that
11 assessment will be a granular and individual issue, and
12 that again is a question for trial and not a question
13 for summary judgment today.

14 The final example I want to give you, sir, is one
15 which is in UsedSoft itself. If we turn to the
16 judgment, it's in the authorities bundle for the summary
17 judgment application at tab 16. If we go to
18 paragraph 70 at page 1096, you will recall, sir, that
19 there is a requirement to make his own copy unusable at
20 the time of resale.

21 THE CHAIRMAN: Where are you reading?

22 MR O'DONOGHUE: Paragraph 70. Sir, at 69 you will see the
23 subdivision issue which goes to the Rabobank part of
24 Mr Gringras' first statement at paragraph 61 of that
25 statement. You'll see that reference at 69.

1 Then, sir, you'll see page 1097, 79, the Court of
2 Justice says:

3 "... ascertaining whether such a copy has been made
4 unusable may prove difficult."

5 So again we make the point that these conditions and
6 compliance with them are not straightforward matters.
7 There will be questions to be ventilated at trial on
8 a granular level.

9 THE CHAIRMAN: I don't want to keep repeating it,
10 Mr O'Donoghue. We're not anticipating at the moment --
11 our provisional view is that we're not anticipating that
12 this trial will be looking at those sorts of matters.
13 You keep saying "we will be", but just so that you're
14 clear, you're going to have to persuade us that that's
15 going to be what this trial is about.

16 MR O'DONOGHUE: I'm not saying for a moment that's what the
17 trial will be entirely about, but --

18 THE CHAIRMAN: Or at all. Or at all.

19 MR O'DONOGHUE: Well, sir, we simply do not understand if it
20 is the case that the particular licences that VL had
21 acquired and was interested in were being acquired and
22 resold in a manner that was in flagrant breach of
23 UsedSoft, they are simply not lawful sales to begin
24 with, and it cannot be an abuse of a dominant position,
25 otherwise anti-competitive, to do anything in connection

1 with unlawful resales. It is as simple as that.

2 THE CHAIRMAN: I don't understand your case is that all
3 resales are unlawful.

4 MR O'DONOGHUE: For purposes of the application today, that
5 is the working assumption, or at least a substantial
6 proportion.

7 THE CHAIRMAN: It may be a proportion, but --

8 MR O'DONOGHUE: That is the concession Ms Lester has made in
9 her skeleton.

10 If we go to their skeleton at paragraph 44, please,
11 VL says:

12 "Insofar as Mr Gringras' legal and factual claims
13 are pursued at trial, they will be disputed. But the
14 arguments above assume those claims in Microsoft's
15 favour."

16 And you have the same point at 57. So they are
17 certainly prepared to assume for purposes of today that
18 what is set out in Gringras 1 is true.

19 THE CHAIRMAN: But the point that's been put to you is it's
20 not -- maybe I've not read it carefully enough, but
21 I don't understand Mr Gringras is suggesting that all
22 sales by VL are infringing.

23 MR O'DONOGHUE: We don't actually know but the working
24 assumption for the purpose of today is that all of those
25 are infringing. That's what the first audit has shown,

1 that's what we say the second audit has shown, and that,
2 we say, should be the assumption for the purposes of
3 today.

4 Indeed, Mr Gringras and Mr Baker, as I will show
5 you, they go further. It's not that VL is an outlier,
6 it is commonplace, we say, for resellers to be
7 infringing in this manner because these UsedSoft
8 requirements are demanding.

9 Q. Now, sir, the UsedSoft issues, if I can call them that,
10 they also bear on the summary judgment issue in
11 a somewhat different way. It's not just the objective
12 justification, efficiency issues are linked to the
13 questions of abuse and IP infringement, but it is also
14 the case that IP compliance issues will inform the
15 question of abuse and therefore the nature of the
16 objective justification and efficiency defences.

17 Just to give you a couple of examples of what we
18 mean by this, if one looks at VL's particulars at
19 paragraph 48, it's in core 5, page 22.

20 THE CHAIRMAN: Mm-hmm.

21 MR O'DONOGHUE: You will see, sir, there's a number of
22 subparagraphs which complain about efforts to dissuade
23 customers from reselling their licences and questions of
24 legal threats and so on, but under UsedSoft, Microsoft
25 is perfectly entitled to correspond with customers and

1 I showed you one of these letters on whether or not they
2 have complied with their obligations under intellectual
3 property law.

4 Given that Microsoft is entitled to insist that the
5 conditions for lawful resale are respected, and to have
6 a reasonable system in place for this purpose, whether
7 Microsoft's measures in this regard were proportionate
8 is a complex question which is completely unsuitable for
9 summary determination.

10 In paragraph 48 before you, there isn't a hint of
11 a recognition from VL that Microsoft is entitled to
12 verify and ensure compliance with the UsedSoft
13 requirements, and those communications, even if they are
14 dissuasive, are lawful, and yet they treat essentially
15 all dissuasion as being potentially abusive.

16 You see, for example, subparagraphs (2) and (3),
17 they say:

18 "... Microsoft simply advising such customers that
19 ... licences could not be resold."

20 That may have been an entirely accurate and lawful
21 thing to say.

22 "(3) Microsoft seeking to dissuade customers from
23 reselling ... including by express or implied legal
24 threats."

25 Again, that may have been an entirely justified

1 thing for Microsoft to do.

2 THE CHAIRMAN: I understand that but I'm not sure what this
3 has to do with today's application.

4 MR O'DONOGHUE: Sir, one of the questions you put to me is:
5 why will we need to consider, at all, the question of
6 UsedSoft compliance? One of the reasons is that our
7 response to these allegations will be that Microsoft was
8 perfectly entitled to verify compliance and to put in
9 place a system of countermeasures --

10 THE CHAIRMAN: Okay. You can do that by reference to the
11 case law.

12 MR O'DONOGHUE: Yes. That is the second topic. I'm then
13 going to move to one further topic and then I'll deal
14 with Ms Lester's points and then I'll finish up on the
15 compelling reason why this should proceed to trial and
16 not be determined summarily.

17 The third topic -- I've taken you, sir, through the
18 question that the issue of, we say, IP compliance is
19 bound up in the defence of objective justification and
20 efficiency.

21 We also say, as a second limb to this, that it is
22 wrong to separate the issue of prima facie abuse from
23 objective justification and the efficiency defence.

24 Given that this issue on any case is going to trial,
25 to decouple the defence to the prima facie abuse from

1 the question of abuse we say is wrong and is a reason in
2 itself to refuse summary judgment.

3 The tribunal has the point I made at the outset
4 which is that these valuations of objective
5 justification are complex and multi-factorial, balancing
6 up pro-competitive and anti-competitive effects to see
7 the net position, and that in this context it would be
8 necessary to consider whether there were realistic
9 alternatives open to the Defendants under
10 proportionality.

11 At its most basic, what one is doing with these
12 defences is quantifying two cardinals of two different
13 things. There is the size of the anti-competitive
14 effect on the market, and on the other side of the
15 scales there's the offsetting benefits, and you are
16 netting off the two under objective justification.

17 Again as a starting point, we say that balancing
18 exercise is emphatically not the territory of summary
19 judgment.

20 Just to give you one example of something we say is
21 closely analogous is the LCD case which is in
22 authorities bundle 20. By way of context, this was
23 a cartel damages action and the defendants sought to
24 strike out the claim on two alternative bases. First,
25 they said that EU competition law did not apply as

1 a matter of territorial application, they said the harm
2 was suffered in Asia where the purchases were made and
3 importing something into Europe did not engage EU
4 competition law. Secondly, they said that the
5 applicable law was not English law or the law of any
6 other EU member state and therefore EU competition law
7 did not apply.

8 The appeal concerned two separate cases. One was
9 a judgment of Mr Justice Mann concerning the CRT cartel
10 and the other was a judgment of Mr Justice Morgan
11 concerning the LCD cartel. And you'll see at
12 paragraph 17 that Mr Justice Mann actually did grant
13 summary judgment on the territoriality point and as we
14 shall see, his conclusion was overturned by the Court of
15 Appeal.

16 Can we just start with the issue of applicable law.
17 It starts at paragraph 54, page 1216. And you'll see
18 the defendants were arguing that the market affected by
19 the cartel for the purposes of the claim was not England
20 or the EU but one or more Asian markets with the result
21 that they said English law did not apply.

22 At 57 the Court of Appeal says that in general,
23 an evaluative judgment such as identifying the effect on
24 the market for competition law purposes is not suitable
25 for summary judgment.

1 And they also emphasised that disclosure had not
2 been completed.

3 They say:

4 "... we have reached the firm conclusion that it
5 would be wrong to determine this issue adversely to the
6 claimants on an application for summary disposal of
7 their claims, whether by strikeout or reverse summary
8 judgment. Except in a very clear case, the court cannot
9 safely make the value judgment required by ... the 1995
10 Act without a full examination of all the facts at
11 trial."

12 Pausing there, the words "value judgment" you'll
13 recall, sir, that is the words used in Streetmap and in
14 Interchange to describe the consideration of objective
15 justification and efficiency defences.

16 Then, sir, you'll see at 58 there's a reference to
17 disclosure, further information, and they say such
18 a conclusion could only safely be reached after the full
19 facts that have been established have been found at
20 trial.

21 So on applicable law, where one is considering
22 an effect on the market, the Court of Appeal says except
23 in the very clear case, that is a question for trial.

24 Then on territorial application, if we jump forward
25 to paragraph 72 at 1223, you see a reference to what is

1 called the qualified effects test for territoriality,
2 and you will see that the test is:

3 "... where it is reasonably foreseeable that
4 a foreign cartel will have effects in the EU which are
5 both immediate and substantial."

6 So again it is concerned with an effect on the EU
7 market that one must meet certain conditions.

8 Then, sir, you'll see at 95, the Court of Appeal
9 again says in general this type of effect analysis is
10 not suitable for summary judgment. It says, and
11 I quote:

12 "Whether or not the test is satisfied will depend on
13 a full examination of the intended and actual operation
14 of the cartel as a whole. Such an examination can only
15 take place in light of the full facts as they emerge and
16 are assessed at trial. The exercise is not one suitable
17 for summary determination on the basis of assumed
18 facts."

19 So we make the same essential point here. The first
20 and essential step in considering objective
21 justification and efficiency is to calibrate the scale
22 and scope of the anti-competitive effect. It is that
23 effect which will be placed on the scales when it comes
24 to considering the issue of offsetting benefits.

25 VL accepts that the issue of appreciable effect on

1 competition is a question for trial. That's at Cohen 5,
2 paragraph 13. But if that concession is correct, then
3 we say there are obvious problems for VL. It makes no
4 sense, we say, to suggest that the issue of effect on
5 the market is for trial, because it is factual, legal,
6 economic and complex, but that the pro-competitive
7 effect on the market can be determined in a factual and
8 contextual vacuum. The same is true, we say, of both
9 effects. If one is for trial, so is the other. They go
10 hand in glove.

11 To look at the question at the other end of the
12 telescope, how, in the absence of quantification of the
13 scale and scope of the anti-competitive effect, can the
14 issue of counterbalancing defences to that effect be
15 a summary judgment matter? You cannot logically
16 consider the offsetting benefit without first
17 understanding the scale and scope in the first place of
18 what it's being offset against.

19 One can think of this as balancing two cardinals,
20 the anti-competitive effects and the offsetting
21 benefits. If you have no idea of the scale and scope of
22 the bad stuff, how can you dismiss the offsetting good
23 stuff out of hand?

24 It isn't just that without knowing what is on one
25 side of the scales, you cannot consider the

1 counterbalance; it is even more problematic than that.
2 One of the conditions that needs to be assessed under
3 objective justification is that the conduct does not
4 eliminate effective competition, and that point simply
5 cannot be considered without first understanding the
6 impact of the alleged conduct and competition. How much
7 competition remained in the market as a result of the
8 conduct? That is a critical first question that needs
9 to be decided before the question of the objective
10 justification defence can be considered.

11 Of course in this context, it would be important to
12 understand the relevant product, geographic markets and
13 scale and scope of dominance issues that are clearly for
14 trial.

15 So even within objective justification of those
16 conditions, there is a serious problem when it comes to
17 summary judgment because the effect on the market, if
18 any, is unknown at this stage.

19 I move to my penultimate topic, which is responding
20 to Ms Lester's main points.

21 I'm in your hands as to whether you want me to --

22 THE CHAIRMAN: Let's make a start, do 10 minutes on this.

23 MR O'DONOGHUE: The starting point, we say, of Ms Lester's

24 application are the concessions I showed you in her

25 skeleton, that everything set out in Gringras 1 in terms

1 of legal and factual contentions is to be assumed in
2 Microsoft's favour.

3 Now, VL of course would have been alive to the
4 difficulty because had they come along and cavilled with
5 Gringras 1, that would be the nature of a mini trial,
6 but the attempt to sidestep what is set out in the
7 evidence by way of these concessions we say is quite
8 problematic for VL because it is not just Gringras 1,
9 there are five witness statements before the tribunal.
10 There's Morgan 1 and 2, Baker 1, Levitt 1 and
11 Gringras 1. And for the purpose of summary judgment, we
12 say the tribunal should approach this on the basis that
13 everything set out in those five statements should be
14 assumed to be true for the purposes of the summary judgment
15 application, and in particular we say that given that
16 there is no evidence whatsoever from VL contesting
17 anything set out in any of these five witness
18 statements, and indeed the concession is that certainly
19 Gringras 1 should be assumed to be correct in everything
20 it says for purposes of today.

21 What we've done is we have gone through the five
22 statements and put into a table what we say are the
23 concessions that follow from the witness evidence.
24 I just want to quickly take the tribunal through some of
25 these. If I can hand up the table (Handed).

1 THE CHAIRMAN: Have the Claimants seen this?

2 MR O'DONOGHUE: No, they haven't.

3 THE CHAIRMAN: They should really have a --

4 MR O'DONOGHUE: The concession has been made for the first
5 time in Ms Lester's skeleton.

6 THE CHAIRMAN: But this was prepared presumably --

7 MR O'DONOGHUE: This morning.

8 THE CHAIRMAN: Right. Okay.

9 MR O'DONOGHUE: It's the sentence at the end which has been
10 in the Claimant's possession for quite a long time.

11 THE CHAIRMAN: I see you may need an opportunity to consider
12 this overnight. I appreciate it's not easy to pick it
13 up straight away.

14 MR O'DONOGHUE: Sir, it's four pages and it goes through the
15 five statements and extracts what we say are the key
16 points and the assumptions and concessions which should
17 be made for the purpose of this application. I'm not
18 going to go through it line by line, just to give you
19 a flavour of some of the points.

20 You see in the first row from Levitt 1 we say that
21 the assumption must be that UsedSoft does not apply at
22 all to software issue entitlements.

23 In the second row UsedSoft does not apply to From SA
24 inscriptions.

25 You can see in the third row Microsoft's aim was to

1 infer a benefit on customers.

2 Fifth column, which I will come to in more detail
3 shortly, Microsoft was not receiving full value for new
4 upgraded software, thereby taking the transaction
5 outside of Microsoft.

6 The sixth row, customers obtained a benefit from
7 keeping their licence during the initial cloud
8 migration.

9 The next row. Without that condition, VL's case is
10 that a proportion of customers would have resold
11 perpetual licences and should not be assumed to have
12 (inaudible) dispensable to the condition in order to
13 prevent transactions that would have accrued to
14 UsedSoft.

15 Over the page you'll see, for example, Morgan 2,
16 paragraph 7. The scale of the adverse effect to be
17 justified is low. All else equal, that makes the
18 objective justification defence easier.

19 You see on Morgan 2, 15 to 16, again reasons why the
20 licences fell outside UsedSoft. Morgan 2 at 17,
21 Microsoft was not obtaining full value for licences and
22 software as a result of the discount. Morgan 2, 18, 22,
23 the customer derived a fair share of the benefits from
24 the CAR Terms in addition to the discount itself.

25 Then under the third section, assumed scale of the

1 infringement problem, we see reference to Baker 1.
2 There was a genuine and widespread problem that the
3 impugned terms sought to address.

4 And then over the page we say based on Gringras 1,
5 the assumption should be that all or certainly most of
6 VL's sales or broker transactions failed to comply with
7 one or more UsedSoft requirements, and we give examples.

8 And then in the middle column, VL accepts that
9 whether or not any given transaction was lawful is a
10 matter for trial, and so must assume for purposes of the
11 application that all the transactions in question fall
12 outside UsedSoft. This means there was no exhaustion of
13 the distribution right for the copies to which the
14 impugned terms attach such that Microsoft could have
15 restrained those transactions, had it known about them,
16 by injunction.

17 And then:

18 "Litigation has accordingly failed to stop
19 infringement of distribution right despite two claims
20 being brought against Mr Horley [as read]."

21 Bottom of the page:

22 "Microsoft had no ex-ante means of intervening to
23 stop more transactions. Microsoft's prior attempts to
24 prevent infringements have entirely failed [as read]."

25 Sir, the reason for this distillation of these five

1 witness statements is we say there are a whole series of
2 hurdles, or at least assumptions, that VL needs to
3 overcome for summary judgment to be granted, and we say
4 each and every one of these points is itself an involved
5 issue for trial and for each and every one of them to be
6 assumed against Microsoft at the summary judgment stage,
7 given that all of this is currently uncontested, we say
8 is untenable.

9 So that is why we say, sir, these are granular,
10 detailed, complex trial issues and you get a flavour
11 from the five statements to date of the evidence that
12 would be ventilated at trial and we say that if one
13 takes a step back from this and thinks of this in
14 summary judgment terms, the suggestion that all of these
15 five witness statements can be brushed aside at this
16 stage and that the entirety of Microsoft's defence on
17 objective justification can be put to one side on
18 an interlocutory basis we say is very far-fetched
19 indeed.

20 Would that be a convenient moment?

21 THE CHAIRMAN: Yes. How are you getting on?

22 MR O'DONOGHUE: I think I'll have another 45 minutes.

23 (3.14 pm)

24 (A short break)

25 (3.25 pm)

1 MR O'DONOGHUE: Before I move on to my penultimate topic,
2 can I just give one reference to come back on a point
3 which you raised with me, sir. One of the points you
4 put to me is well surely it's critical to understand
5 that at the time Microsoft perceived a certain risk, and
6 perceiving a risk many years later doesn't really
7 assist.

8 The first point is one I made to you already, which
9 is one of fact contemporaneously. This was very much
10 under active consideration and vigilance.

11 The second is a legal point, which we can pick up in
12 our skeleton at paragraph 15(c).

13 THE CHAIRMAN: Five zero?

14 MR O'DONOGHUE: One five. Where we say:

15 "... it is open to a dominant undertaking to show
16 that any anti-competitive effects are ... outweighed by
17 pro-competitive effects ... the conduct in question must
18 be proportionate."

19 And then we give a further citation of Post Danmark.

20 "This holds good whether or not any such efficiency
21 was explicitly mentioned at the time -- what matters is
22 the existence of the efficiency and its extent."

23 And you'll see the reference in the footnote to Post
24 Danmark.

25 We say that it is an objective test in any event, so

1 we say that subjectively at the time this was perceived
2 as a significant issue, and in any event, objectively,
3 that is the question.

4 Again, sir, just to round this off before I move on,
5 the degree of risk of infringement we say is fundamental
6 because the question ultimately for objective
7 justification is: was Microsoft's reaction proportionate
8 to that risk? In a world where there is serial
9 infringement, that's one thing; where it's non-existent
10 that's obviously something very different. But it is
11 a matter of fact and degree, and that we say is a trial
12 question.

13 Then moving on to Ms Lester's points on the pleading
14 and the evidence, we can go back, sir, to our pleading
15 at 58.1(b), it's core 3, page 63. 58.1(b), page 63. So
16 we plead that appropriate remuneration corresponding to
17 the economic value of the copyright works, that is one
18 of the legitimate aims.

19 Sir, as you will of course know, the economic value
20 of the copyright works is a specific term which comes
21 from UsedSoft, and the resale of software is only
22 possible if the copyright owners' distribution right
23 hasn't exhausted by the first sale in the EEA.

24 In terms of what constitutes the first sale, the
25 courts consider a number of criteria, one of which is

1 whether the fee charged corresponded to the economic
2 value of the copy being sold, and only if these criteria
3 are met is there an act giving rise to exhaustion. In
4 other words, if the copy is not sold for its full
5 economic value, there will not be a first sale and
6 therefore no right of exhaustion arises.

7 We can pick this up at UsedSoft itself --

8 THE CHAIRMAN: That's horribly technical, isn't it? If this
9 is envisaging a business has paid one of three
10 instalments it has to pay, or whatever, don't you just
11 pursue the business for the other two instalments?
12 What's the -- I mean if they owe you money they haven't
13 paid you, why are we going through the legal complexity
14 of copyright infringement and exhaustion of rights?
15 I mean, it's just a debt.

16 MR O'DONOGHUE: Because it is one of many requirements of
17 UsedSoft.

18 THE CHAIRMAN: But is that the only reason -- I mean that's
19 just ... so it's technically not exhausted, I understand
20 that, it's technically not exhausted, but insofar as
21 you're trying to protect some damage and have a bona
22 fide interest in doing -- the damage is someone owes you
23 money and they've not paid it. That's the problem.

24 MR O'DONOGHUE: Yes, but it leads to the discount point
25 which is Ms Lester's main point.

1 THE CHAIRMAN: Okay.

2 MR O'DONOGHUE: Which I'll come to.

3 If we could deal with UsedSoft --

4 THE CHAIRMAN: Just remind me --

5 MR O'DONOGHUE: Tab 16 of the authorities.

6 THE CHAIRMAN: Yes.

7 MR O'DONOGHUE: We can start, sir, at paragraph 49 at 1093.

8 You will see at 49 at 1093 that the key rationale for
9 exhaustion is that the rightholder has granted
10 a perpetual licence in return for payment of a fee
11 designed to enable the copyright holder to obtain
12 remuneration corresponding to the economic value of the
13 copy.

14 And then at 63, two pages on, the principle of
15 exhaustion is premised on the first sale already
16 enabling the right-holder to obtain an appropriate
17 remuneration.

18 And then we see the court's answer at 88 where they
19 ultimately say that exhaustion arises only in the event
20 of resale of a licence that was originally granted in
21 return for the payment of a fee intended to enable the
22 right-holder to obtain remuneration corresponding to the
23 economic value of a copy of this work.

24 It's only if this is true will the second acquirer
25 be able to rely on exhaustion.

1 So what UsedSoft contemplates is an enquiry into
2 whether the alleged first sale, so here the licence by
3 Microsoft to the original licensee, was one intended to
4 enable Microsoft to obtain remuneration corresponding to
5 the economic value of the work being licensed or
6 something less than that.

7 THE CHAIRMAN: So what happens -- so if VL purchase
8 a second-hand licence and a fee hasn't been paid and
9 then your accounts department write to these people and
10 go, "Oy, you owe us some money, you haven't paid your
11 third instalment", and it gets paid, what happens then?
12 Now you've got all your money. Now it's -- now it's
13 exhausted.

14 MR O'DONOGHUE: (Overspeaking) that payment, that is a clear
15 breach of UsedSoft. It is not retroactive --

16 THE CHAIRMAN: You say breach -- I mean, UsedSoft is not
17 a statute, it's --

18 MR O'DONOGHUE: It's an infringement.

19 THE CHAIRMAN: So it's an infringement of copyright but it's
20 been expunged by you getting your last bit of money.

21 MR O'DONOGHUE: That doesn't reset the dial.

22 CHAIRMAN: Why not?

23 MR O'DONOGHUE: We say -- (overspeaking) -- transfer. That
24 was a non-compliant transfer.

25 THE CHAIRMAN: Okay, so the sale, but that's an infringement

1 by the parties selling the software.

2 MR O'DONOGHUE: And by the acquirer.

3 THE CHAIRMAN: And it is by the acquirer -- just remind me

4 why it's by the acquirer.

5 MR O'DONOGHUE: Because it's a reproduction of the

6 transferred licence.

7 THE CHAIRMAN: By -- presumably the person selling it

8 reproduces it, sends them a copy, and it only becomes

9 an act of infringement by VL once they sell it on to

10 somebody else. Take a copy and sell it on to somebody

11 else.

12 MR O'DONOGHUE: Yes, (inaudible) reproduction of the

13 software. But that goes on to the -- (overspeaking) --

14 THE CHAIRMAN: And it remains an infringing copy even if

15 you've been paid?

16 MR O'DONOGHUE: Yes.

17 THE CHAIRMAN: Right, okay.

18 MR O'DONOGHUE: Now, in terms of the discount -- so that's

19 the economic value requirement.

20 In terms of the evidence in this case, the From SA

21 customers benefitted from a 15% discount, that's in

22 Baker 1, 15.2. And if they sold the underlying

23 perpetual licence in addition to claiming that discount

24 of 15% they would be engaging what he calls

25 double-dipping. We say it is clearly arguable that

1 Microsoft was not receiving full value for the licence
2 upgrades under the From SA programme. Likewise for
3 CAR Terms, there was a 20% discount of the value of the
4 upgraded software, that's in Morgan 2, paragraph 17, and
5 again we say it was clearly arguable that Microsoft was
6 not obtaining the full economic value for the licence
7 copy of the software as a result of the discount.

8 In both cases, Microsoft is therefore licensing
9 a copy of the new and upgraded version of the cloud
10 software and the Court of Justice in UsedSoft has
11 clearly explained that Microsoft as copyright owner has
12 a legitimate expectation of obtaining remuneration
13 corresponding to the full economic value of the copy of
14 the licence.

15 THE CHAIRMAN: This would be in circumstances where you've
16 had your fees?

17 MR O'DONOGHUE: This is the discount. And an intrinsic
18 part --

19 THE CHAIRMAN: So even if you've been paid, so you've been
20 paid, you've had your fees, so it's exhausted, the
21 rights are exhausted, and now you're talking about a
22 discount? Sorry, this is probably my fault but I'm not
23 quite following this.

24 MR O'DONOGHUE: Sir, an intrinsic part of the bargain is
25 that the customer has already invested in the perpetual

1 licence at a higher value, which qualifies them to
2 receive the discount. If you remove that, the customer
3 is receiving something for nothing, or as Mr Baker calls
4 it, double dipping.

5 In fact, it is more complex than that --

6 THE CHAIRMAN: Okay, so you say you paid up, it's
7 an exhausted licence, but you then give them a discount
8 saying you can't sell it on, but they sell it on anyway.
9 Is that what you're talking it?

10 MR O'DONOGHUE: No, the original sale was discounted.

11 THE CHAIRMAN: Oh, the original, sorry.

12 MR O'DONOGHUE: There isn't any exhaustion to begin with.

13 THE CHAIRMAN: Okay.

14 MR O'DONOGHUE: In fact, it is more complex than that,
15 because, as VL has pleaded at paragraph 20 of its
16 particulars of claim -- sorry, 22, you see, sir, at 22
17 they say VL specialised in acquiring software licences
18 in bulk, and while we have it open, you'll see at 20
19 they say:

20 "Purchasers of perpetual software licences ... have
21 ... been entitled to resell those licences ..."

22 And at 21:

23 "... at all material times, perpetual licences
24 purchased in the Relevant Territories could be lawfully
25 resold notwithstanding any purported restriction in the

1 licence agreement."

2 So that is part of their positive case.

3 We're focusing on paragraph 22, which is the bulk
4 licensing. If we go back to Gringras 1 -- so this is
5 VL's core business. Paragraph 22 of Gringras 1,
6 page 87, he has a whole section setting out the basis on
7 which substantial discounts are granted for larger
8 customers with these bulk licences and you'll see, sir,
9 at 24:

10 "... a significant proportion of those customers
11 will be benefitting from prices which are significantly
12 lower than those paid by individuals or small
13 businesses."

14 Then at 26:

15 "If a volume licensing customer were to subdivide
16 such a bulk purchase and sell perpetual licences on in
17 smaller quantities this would undermine the Defendants'
18 pricing mechanism and mean that the Defendants no longer
19 realise full economic value for the Microsoft Products."

20 So to resell a subdivided licence to a retail
21 customer would involve exactly the kind of harm to the
22 copyright owner as the Court of Justice in UsedSoft was
23 concerned to prevent by way of licence splitting.

24 Now, sir, all we say for today's purposes is that
25 the court cannot in a summary judgment context,

1 particularly bearing in mind what is set out in
2 Gringras, cannot resolve the question whether Microsoft
3 did in fact receive remuneration corresponding to the
4 full economic value of the works being licensed. It
5 also cannot resolve today, we submit, that question in
6 isolation from the detailed factual material concerning
7 the levels of discounting terms, and it would be
8 a matter for factual and potential expert evidence in
9 due course.

10 THE CHAIRMAN: Yes, I don't think there's any dispute about
11 that.

12 Just on the -- whether the fees have been paid, the
13 licence fees have been paid, I mean you have all that
14 information, whether your customers are paid up or not,
15 have you given disclosure of that? Is that one of the
16 things ...

17 MR O'DONOGHUE: Sir, there's a chicken egg issue. Of course
18 stage 1 is we don't actually know what licences VL has
19 obtained --

20 THE CHAIRMAN: But you know as a general matter which of
21 your licences are paid and remain unpaid? I mean,
22 presumably you have a policy of pursuing people for
23 money if they haven't paid their licence fee. You'll
24 have a proportion of bad debts. I'm not thinking of
25 an answer today but just as we go forward to disclosure

1 and things, what's going to happen around that.

2 MR O'DONOGHUE: At the very least, yes, it would have to be
3 subject to evidence.

4 THE CHAIRMAN: Yes.

5 MR O'DONOGHUE: In terms of the objective justification
6 effects, point one is all these questions are
7 complicated and will require evidence and possibly
8 disclosure on both sides and we have not reached
9 (inaudible) on that today and therefore that is not
10 summary judgment territory on any view.

11 But then in terms of the objective justification
12 defence and proportionality, we say it is at least well
13 arguable that offering a discount is a suitable way to
14 secure a customer for a new software product and using
15 a contractual term to ensure that that customer
16 continues to qualify for the discount.

17 We also say it is clear, based on Gringras 1 --

18 THE CHAIRMAN: A contractual term not to resell?

19 MR O'DONOGHUE: Yes. We also say it is clear, at least for
20 the purpose of today, based on VL's concessions, that
21 alternative measures have failed to prevent resale
22 transactions that are contrary to UsedSoft. The
23 litigation and audits involving VL has failed to stop
24 even VL itself from continuing --

25 THE CHAIRMAN: Where is that -- sorry to keep going on about

1 the pleadings, but where is that pleaded, that
2 alternative measures have failed?

3 MR O'DONOGHUE: That is the Comet 2 litigation, which is
4 about to kick off.

5 THE CHAIRMAN: Is it pleaded at the moment?

6 MR O'DONOGHUE: Given that we've just sent a letter before
7 action --

8 THE CHAIRMAN: But this is going back -- you introduced this
9 policy in 2015 saying -- and you say a justification for
10 that is that alternative methods had failed, and we
11 understood or didn't believe they were effective, or
12 something. Is that pleaded at all or not at the moment?

13 MR O'DONOGHUE: Sir, it is evidenced in Baker and Gringras,
14 there is the evidence of Mr Horley's earlier company,
15 there's the Comet 1 first audit, and there is the
16 proceedings which are about to kick off.

17 THE CHAIRMAN: So I'm taking that as a no then in terms of
18 pleading.

19 MR O'DONOGHUE: Sir, it is in evidence.

20 THE CHAIRMAN: Yes, it's in evidence, yes, I understand.

21 MR O'DONOGHUE: And there is evidence in Baker that these
22 issues are not confined just to VL.

23 THE CHAIRMAN: Mm.

24 MR O'DONOGHUE: So our case is, for summary judgment
25 purposes, that it is at least well-arguable today that

1 the alternative means have failed to prevent resale
2 constructions contrary to UsedSoft.

3 I've made the point about the litigation audits.

4 Microsoft was not notified of and hence had no way
5 of knowing that infringing sales would take place.

6 The number of sales and the disparate identities and
7 locations of purchasers would make it impractical to
8 recover or bring to an end the use of a licence copy.
9 It would effectively require Microsoft to sue end users
10 all over Europe. There was a figure, I think, in
11 Gringras 1 of 345 million users.

12 No viable alternative to the impugned terms has been
13 identified by VL.

14 And, fundamentally, we say this is not a hard-edged
15 summary judgment point.

16 The evidence shows that the impugned terms were
17 among a suite of tools that a copyright owner, such as
18 Microsoft, would legitimately use to prevent
19 infringements by licensees and resellers. But the
20 fundamental point for summary judgment purposes is that
21 the proportionality assessment in this context is
22 a classic multi-factorial analysis which cannot be made
23 in isolation, still less --

24 THE CHAIRMAN: I think we've covered that point.

25 MR O'DONOGHUE: Yes.

1 Now what is pleaded, as we see in paragraph 58, is
2 that the measure is proportionate. Alternative measures
3 have not been identified by VL, so there is no need to
4 plead a positive case that there is no less restrictive
5 alternative measure. We have set out our stall in terms
6 of what we say is proportionate. They have not put in
7 a reply saying, well, you didn't say X, Y or Z. So we
8 say as a matter of pleading we have discharged any
9 obligation on our side. If they want to try and shift
10 the burden back to us, they have to plead back to some
11 alternative that they say was less restrictive and
12 realistic.

13 Finally wrapping up on cloud migration before I move
14 on to my final point, the other legitimate aim that we
15 pleaded -- it's at the amended defence, 32.1(a) and
16 58.1 -- is that customers were being incentivised to
17 migrate to cloud subscriptions, which offered benefits
18 to customers.

19 Now, the evidence on the benefits to customers is,
20 we say, overwhelming, and again uncontested. We go to
21 Morgan 2 --

22 THE CHAIRMAN: I don't think there's any point arising
23 there. For present purposes, plainly there are benefits
24 going to cloud migration --

25 MR O'DONOGHUE: It is said against me, well, these are all

1 just benefits for Microsoft, you can't (overspeaking) --

2 THE CHAIRMAN: I think what's said against you is you could
3 do that just with a discount; you don't have to tie in
4 an obligation not to resell the old licences.

5 MR O'DONOGHUE: Yes, yes, I'll come to that. But just
6 for --

7 THE CHAIRMAN: Yes, yes.

8 MR O'DONOGHUE: It's Morgan 2, paragraphs 18 to 22. He
9 lists, I think, a dozen distinct benefits, most of which
10 arise (inaudible).

11 Where the requirement was to retain a perpetual
12 licence it was to also give customers a further benefit,
13 which was the ability to move back from the cloud to
14 on-premises licensing models if the cloud migration went
15 badly for them or they decided after a trial period that
16 they preferred on-premises software.

17 Again this is in evidence. It's at Baker 1,
18 paragraph 15.3.3. He makes the point there was, at
19 least for some period, some scepticism as to the
20 security of cloud migration, which will have been
21 a reason why at least some customers would have wanted
22 the possibility of reverting to their previous From SA
23 licence or obviously they could not do this if they had
24 resold their perpetual licence in the meantime.

25 We say it is self-evident, and certainly

1 realistically arguable, that offering a substantial
2 discount up to 20% of the price of cloud subscription
3 would operate to incentivise customers to take up these
4 benefits, allowing the customer to give up an existing
5 product sooner so they can transition to a newer and
6 better product. Again, this is in evidence and indeed
7 VL accepts that.

8 The only question, therefore, is whether the terms
9 seeking to enforce the basis for qualifying for the
10 discount were appropriate and necessary.

11 However, first of all, that again involves
12 a detailed multi-factorial assessment of benefits, costs
13 and potential alternatives. It requires a proper
14 assessment of the nature of the negotiations with
15 customers, what concerns were operative in encouraging
16 them to move to the cloud and what the sticking points
17 were. It is certainly realistic to argue that it is
18 appropriate to limit a discount to those who qualify for
19 them, and the only way to do that with a qualification
20 criterion that's based on holding an existing licence is
21 to ensure that the customer continues to hold a licence.

22 Ms Lester asserts, well, a simple contractual
23 stipulation would have sufficed. It is unclear what she
24 means by that. That is what we say the impugned terms
25 were. They say to customers: in order to qualify for

1 this level of pricing, you have to keep your qualifying
2 licence.

3 The New From SA Condition was, of course,
4 a time-limited restriction. When the primary enrolment
5 expired so did the restriction and at that stage the
6 customer was free to resell. We have pleaded that the
7 customers were not required to accept the terms in
8 issue. There was a degree of freedom of choice. That's
9 at the defence, 54, subparagraph 2. So it is not even
10 as blunt as VL suggests. In any case, this will need to
11 be looked at on a granular level at trial, which is
12 a matter of evidence.

13 The fact that the impugned terms were coterminous
14 with the duration of the discounted subscription
15 strongly suggests they were an appropriate means of
16 tying the discount to the qualification criterion.

17 Again, sir, this is another way of (inaudible)
18 today, which is these issues will need to be looked at
19 on quite a granular level, and it is certainly
20 conceivable, if not likely, that there will be the
21 treatment of these issues on a customer-by-customer
22 basis in evidence. That is, again, not the stuff for
23 summary judgment.

24 A couple of short points before I then move very,
25 very quickly to the final topic, which is extremely

1 brief. I want to pick up on a couple of disparate
2 points raised by Ms Lester.

3 Ms Lester said in rather stark terms that the
4 protection of copyright is not a legitimate interest for
5 the purposes of objective justification because it is
6 not something external to Microsoft and not a general
7 interest.

8 What was conspicuous in her submission is she
9 couldn't show you a single authority for that rather
10 surprising proposition.

11 By contrast, we have set out, I think, five
12 authorities -- Magill, Volvo v Veng, Intel v VIA --
13 where it is said emphatically that the protection of IP
14 is a legitimate general interest and the fact that the
15 copyright fees may inure to the benefit of a licensor
16 does not detract from the nature of that general
17 interest.

18 THE CHAIRMAN: So what do you say about the guidelines?

19 Isn't that the point? Paragraph 29 of the guidelines:

20 "... [It] must be determined on the basis of factors
21 external to the dominant undertaking."

22 MR O'DONOGHUE: Sir, first of all, that is not the defence
23 we're putting forward. I've made that point. Second of
24 all, that is dealing with a very narrow question, which
25 is --

1 THE CHAIRMAN: But this is objective necessity and
2 efficiency, which is --

3 MR O'DONOGHUE: It's objective necessity and not
4 efficiencies.

5 THE CHAIRMAN: No, it's titled, "Objective necessity and
6 efficiencies".

7 MR O'DONOGHUE: Sorry, sir, where are you?

8 THE CHAIRMAN: In the guidance, paragraphs 28 and 29. The
9 2009 guidance. And I think you may want to address us
10 on the draft guidance that ... (Pause)

11 You rightly point out one has to be a little bit
12 cautious about salami slicing these categories of
13 objective necessity and efficiencies and I don't think
14 they have in this passage.

15 MR O'DONOGHUE: Sir, they're -- first of all, if you go to
16 paragraph 3, there's an important starting point, which
17 is the guidance paper is not a statement of law --

18 THE CHAIRMAN: No, I appreciate that, yes.

19 MR O'DONOGHUE: -- and it is not, therefore, binding on you.

20 Second in that context, paragraph 95 of Purple
21 Parking, the High Court found it derived no assistance
22 whatsoever from the guidance paper.

23 Third, you have my point that we're not actually
24 relying on objective necessity.

25 Fourth, you have my point that the correct way to

1 look at this is a straightforward proportionality
2 requirement. There's atomisation into objective
3 necessity --

4 THE CHAIRMAN: You submitted you didn't agree with this as
5 a proposition of law --

6 MR O'DONOGHUE: No, that's my --

7 THE CHAIRMAN: -- and my learned friend refers to Genzyme,
8 paragraph 538 or whatever it is, where something similar
9 is said.

10 MR O'DONOGHUE: I think Genzyme is doing something
11 different. The objective necessity, in my submission,
12 is dealing with quite a narrow point, which is where one
13 is asserting a defence, for example, that is
14 safety-related, you cannot have separate differential
15 criteria. There must be some objective public health or
16 safety standard.

17 In our case, of course -- in the Hilti case, which
18 is really the high watermark of Ms Lester's submission,
19 there were public safety authorities to whom complaints
20 could and should have been made --

21 THE CHAIRMAN: This is also substantial efficiencies. It's
22 not just your narrow definition of objective necessity.
23 We're going around in an absurd -- it's not a circle,
24 it's a pentagon or something, because we keep jarring
25 each time we turn a corner. You pleaded objective

1 necessity or something very similar to that, and then
2 you said -- and you make the point: look, don't read too
3 much into objective necessity. Then when we get to
4 this, you say: oh no, that's about objective necessity.

5 MR O'DONOGHUE: Yes.

6 THE CHAIRMAN: But it's not, it's also about substantial
7 efficiencies so I'm -- I understand your point you say
8 this is not binding, it's not -- I understand --

9 MR O'DONOGHUE: I'm saying more than that.

10 THE CHAIRMAN: Okay.

11 MR O'DONOGHUE: What I'm saying, when it comes to objective
12 justification or efficiency, call it what you will,
13 there is absolutely nothing wrong in principle with
14 having regard to a commercial benefit to Microsoft such
15 as realising the full economic
16 value -- (overspeaking) --

17 THE CHAIRMAN: Right. It's where you get the authority for
18 that proposition that I'm looking for, other than your
19 book. What I'm looking for in the case law because
20 Ms Lester just says that's not the law, you say it is
21 the law, and --

22 MR O'DONOGHUE: One sees a very --

23 THE CHAIRMAN: It seems to be quite a central point,
24 potentially, for the strikeout summary judgment.

25 MR O'DONOGHUE: First of all, sir, I would say that is also

1 not summary judgment territory, but secondly, in any
2 event, it is --

3 THE CHAIRMAN: You say it's not; you are principally saying
4 you, Microsoft, have a right to protect your IP in
5 cases -- it's a valuable thing --

6 MR O'DONOGHUE: Which is a general interest.

7 THE CHAIRMAN: Yes, but if you -- that's not a factor
8 external to you; that is a factor that strikes at the
9 heart of your valuable asset, you say.

10 MR O'DONOGHUE: Both external and internal because there is
11 a general public interest in respect for intellectual
12 property and the economic value in that intellectual
13 property being realised. Now, the fact that those --

14 THE CHAIRMAN: That's a bit of a stretch, isn't it, really,
15 that the public are benefiting from you taking more
16 money off them for protecting your intellectual
17 property? It's like saying that if you're abusing
18 dominant position, you're paying more taxes and everyone
19 gets better hospitals. It's sort of ...

20 MR O'DONOGHUE: It would be akin to saying that there is no
21 public general interest in a patentee realising the full
22 economic value of the patents for the patented period.
23 These are manifestly general interest. The other
24 reason, of course, why --

25 THE CHAIRMAN: My question -- it's my fault, I've digressed,

1 but my question is: is there any authority that you rely
2 on for the fact that it be factors or acts internal to
3 the dominant undertaking? Is there any authority you
4 rely on?

5 MR O'DONOGHUE: Yes. The new draft guidance at 168 -- it's
6 at 44 of the authorities, 2434 --

7 THE CHAIRMAN: You just said this one's not binding. You're
8 now going to tell me that draft is?

9 MR O'DONOGHUE: It is draft rule when it's adopted.

10 Of course, the paper you were shown are not guidelines,
11 it is a guidance paper. The draft in front of you is
12 actually a set of guidelines.

13 THE CHAIRMAN: Let's have a look at the draft guidance.

14 MR O'DONOGHUE: It's at 168.

15 THE CHAIRMAN: Sorry, which ... tab 44, paragraph 168.

16 MR O'DONOGHUE: You see in the second sentence:

17 "The objective necessity may stem from objective
18 commercial considerations, for example, the protection
19 of the dominant undertaking against unfair
20 competition ..."

21 And some reference to the case law."

22 Finally, sir, of course --

23 THE CHAIRMAN: And 351 is -- it relies on the

24 Google v Alphabet --

25 MR O'DONOGHUE: That was the Google shopping case --

1 THE CHAIRMAN: Do we need to see the proposition? Have we
2 got that in the bundles?

3 MR O'DONOGHUE: The final point, sir, of course, is that one
4 of the requirements of objective justification is that
5 consumers obtain a fair share of the benefits. So the
6 consumer interests, even insofar as there is
7 a commercial interest from Microsoft, that is
8 a requirement of the test. So it is not the case that
9 simply Microsoft's commercial considerations win the
10 day. There is a requirement that consumers have a fair
11 share of those benefits and the general
12 interest -- (overspeaking) --

13 THE CHAIRMAN: -- (overspeaking) --

14 MR O'DONOGHUE: -- to that extent.

15 THE CHAIRMAN: Right. So what's the benefit to the
16 consumers of you stopping them selling their licence?

17 MR O'DONOGHUE: Well, they get cloud migration benefits.

18 THE CHAIRMAN: They get that anyway.

19 MR O'DONOGHUE: They get a discount of 20%. They may be
20 able to migrate to the cloud sooner than they would
21 otherwise.

22 We're going to it to say in this stage in the
23 summary judgment context --

24 THE CHAIRMAN: But you say this is a difficult area of law
25 and we shouldn't -- a developing area of law, we

1 shouldn't be -- you've got two different guidelines
2 saying opposite things. We have very little authority
3 on the point.

4 MR O'DONOGHUE: If nothing else, the document in front of
5 you is draft guidelines. They are up for consultation.
6 We'll have to see what the final guidelines say.

7 THE CHAIRMAN: We may not have the luxury of waiting for the
8 final guidelines, but to say it needs further
9 argument -- (overspeaking) --

10 MR O'DONOGHUE: But no -- (overspeaking) --

11 THE CHAIRMAN: -- the evidence.

12 MR O'DONOGHUE: Yes. Yes. We say it's actually a very
13 simple point. It's not that the --

14 THE CHAIRMAN: Can you just give me a second. (Pause)
15 Sorry, Mr O'Donoghue, please carry on.

16 MR O'DONOGHUE: We say it's actually much more
17 straightforward, which is Microsoft has to show
18 a reasonable and proportionate defence. As part of
19 that, it is entitled to rely on legitimate commercial
20 considerations and it does have to show that a fair
21 share of the benefits flow to consumers. And we say
22 that beyond that, the discussion of factors external to
23 the dominant undertaking is neither here nor there.

24 THE CHAIRMAN: Article 102 -- if you're right on the law,
25 article 102, there's no requirement to show benefits

1 flowing to the consumers. If you're right on the law
2 that it can be your commercial considerations, your
3 legitimate commercial considerations, why does the
4 benefit have to flow to the consumers at all?

5 MR O'DONOGHUE: Sir, that's correct. It may be refracted
6 through the conditions that there must not be
7 an elimination of effective competition (inaudible) --

8 THE CHAIRMAN: You say this is the only efficient way you
9 can -- you say you have a serial infringer, it's very
10 difficult to police this sort of business, this is
11 an appropriate response, it's to incentivise people not
12 to go down that route; you're not stopping them but you
13 say you're incentivising them to go down that route.

14 MR O'DONOGHUE: (inaudible). One can see how this is not
15 a straightforward question. The idea that with five
16 witness statements and a day of argument and with expert
17 evidence to come, one can resolve this essentially on
18 the papers we say is completely and utterly unrealistic.

19 Finally before I move to the last topic, just to
20 pick up a point that you raised earlier with Ms Lester.

21 On necessity, it is the case that the perfect is the
22 enemy of the good. One is not required to have
23 a foolproof or perfect system. One is required to do no
24 more than have a reasonable and proportionate system
25 that is a legitimate response to the scale of the

1 problem perceived.

2 If in trawling that net unwittingly some lawful
3 resale licences get swept up, that does not make the
4 system suddenly disproportionate. One has to look at
5 these things in the round.

6 THE CHAIRMAN: Of course.

7 MR O'DONOGHUE: Whereas Ms Lester, by contrast, says, well,
8 there is a sort of very hard-edged division between what
9 you can legitimately stop and what you cannot stop. One
10 has to have one system. It has to be efficient,
11 interesting and proper. That is why we say the scale of
12 infringing activities is an important input into that
13 assessment.

14 Now, Ms Lester makes the point: well, you
15 discontinued these conditions. We have pleaded in the
16 RFI response -- I can just show you this quickly before
17 I then sit down in about two minutes -- it's at
18 paragraph 49 in core bundle --

19 THE CHAIRMAN: Sorry, paragraph 49 of what document?

20 MR O'DONOGHUE: The core bundle. It's a response to
21 a request for information.

22 THE CHAIRMAN: Which tab are you looking at?

23 MR O'DONOGHUE: Tab 2. Page 125.

24 THE CHAIRMAN: Sorry, can we just ... page 125. Yes.

25 MR O'DONOGHUE: If you read 49, the bit I'm interested in is

1 actually over the page (inaudible). We say:

2 "In doing so, the Defendants have chosen to accept
3 a lower level of protection for their legitimate
4 business interests."

5 That, with respect, is not a trump card for
6 Ms Lester. In a sense, the point proves too much
7 because, on her logic, unless they've always had the
8 measures in question and never discontinued them, you
9 can always turn around and say: well, because you no
10 longer need them, therefore they were never necessary,
11 but that, with respect, is a bootstraps point. One has
12 to have a degree of commercial realism in dealing with
13 these issues. Microsoft is required to have realistic,
14 commercial, proportionate measures, not more.

15 As you alluded to, sir, there may be all kinds of
16 reasons of mitigation risk why something on balance is
17 no longer maintained. That doesn't cut the legs of what
18 is otherwise a valid defence.

19 The other point, of course, is that things may have
20 changed. It may be that the cloud migration has now
21 reached such a point of saturation that these measures
22 are no longer necessary.

23 Again, these are trial points to be considered in
24 detail.

25 You have my point on the compelling reasons. Just

1 to list them very quickly, we say, first of all, summary
2 judgment would not only dispose of the defence but the
3 very closely related issues of anti-competitive effect,
4 and the question of IP compliance will in any event
5 proceed to trial, so we say the efficiency savings are
6 non-existent.

7 That is, itself, a reason why summary judgment can
8 be refused.

9 Secondly, you have my point that both the questions
10 of objective justification and the question of UsedSoft
11 compliance are developing areas of law. To Microsoft's
12 knowledge, there are no English cases dealing directly
13 with UsedSoft. For some reason, most of them seem to be
14 German cases. In any event, these are evolving topics.

15 I showed you 143 of Streetmap where Mr Justice Roth
16 said the full scope of objective justification has not
17 been conclusively determined.

18 You have my point, sir, that there is a need to
19 consider the potential interaction between these
20 proceedings and the Comet proceedings.

21 You have my point that the court should be slow to
22 deal with single issues of cases when the summary
23 disposal of a single issue may well delay because of
24 appeals the ultimate trial of the action or at least
25 lead to some disorderly preparation for the trial.

1 Two final points, sir.

2 Ms Lester made a considerable deal of what she said
3 were deficiencies in the pleading. First of all, she
4 evidently has no difficulty understanding what
5 Microsoft's case is because she was able to make her
6 submissions on the basis of understanding the case as
7 is.

8 The real point, of course, is the point you get from
9 Getty Images at paragraph 37, that where the court at
10 the summary judgment stage has before it evidence, it is
11 required to take into account that evidence as part of
12 the overall assessment of the summary judgment issue.
13 It is not restricted to what is pleaded.

14 We say if one looks at the pleading, the RFIs and
15 the witness evidence, and indeed the skeleton, the case
16 that we are seeking to run for objective justification
17 is more than adequately pleaded.

18 We don't exclude that when disclosure is complete
19 and the contours, for example, of the UsedSoft issues
20 become clearer, that both sides might at that stage wish
21 to give further information on their respective cases.
22 We can see the case management sense in that.

23 But that underscores that the way forward in these
24 proceedings is not the draconian tool of strikeout, but
25 it is active case management of these kinds of issues

1 through disclosure and other case management measures.

2 Finally, there was a reference to Forrest Foods. As
3 you noted, that was the case where the claim was
4 described as unintelligible, where the entire claim was
5 struck out, and there is no serious suggestion that what
6 was pleaded in Forrest Foods is remotely close to what
7 is pleaded in this case, so we say that point takes
8 Ms Lester nowhere.

9 If you could just give me one minute. (Pause)

10 Yes, sir, you asked where Google (inaudible) is. In
11 fact it is in the bundle. Just to give you the
12 reference, it's at tab 23, and the cross-reference in
13 the draft guidelines to the case is at page 1481. It's
14 paragraphs 551 and 552.

15 552, sir, I quote:

16 "The objective necessity may stem from legitimate
17 commercial consideration, for example to protect against
18 unfair competition or to take account of negotiations
19 with customers ..."

20 And we say actually the latter in particular is
21 quite close to the facts of this case, so it is not
22 wishful thinking on the part of the draft guidelines.
23 It comes directly from a recent case. To suggest that
24 my point is unarguable on a summary judgment case, we
25 say, is simply wrong.

1 Those are my submissions.

2 THE CHAIRMAN: Ms Lester, I'm not going to ask you to start
3 now, but roughly how long will you need in reply?

4 MS LESTER: I don't know whether we need to reply to this
5 new document, I simply haven't had a change to look at
6 it --

7 THE CHAIRMAN: Okay.

8 MS LESTER: But not very long. Under an hour.

9 THE CHAIRMAN: Under an hour, right. Because I need to
10 finish early tomorrow, do you want to start --

11 MS LESTER: I may be, particularly if I have overnight, more
12 like half an hour because I'll be able to be relatively
13 succinct.

14 THE CHAIRMAN: It could go either way.

15 Shall we start at 10 o'clock tomorrow? Is that
16 convenient to everybody?

17 I wanted to raise a couple of other things. We're
18 going to get on to case management, and this is entirely
19 neutral to what happens in this application, so please
20 don't read anything into it at all. It seems that on
21 liability, there are a lot of issues not in dispute,
22 like the particular contractual arrangements and
23 policies being pursued by Microsoft are admitted on the
24 pleading.

25 It's unclear -- if we were to hear liability on its

1 own, and it's the dominance for the moment, irrespective
2 of quantum, it's not clear why there would need to be
3 extensive disclosure.

4 Obviously that raises the question as to how
5 relevant it is as to how much contracts are impacted for
6 the purpose or how many potential customers are impacted
7 for the purpose of liability. It's not clear to us that
8 that matters.

9 So we've got a very complicated disclosure
10 application, which is not properly dealt with in the
11 skeleton arguments at the moment, and I think we will
12 need addressing on what issues can be efficiently tried
13 sooner rather than later, and what disclosure is
14 necessary to determine liability on the assumption that
15 there's dominance, and I appreciate that we've revisited
16 that before.

17 Then quantum could be dealt with separately, and
18 then of course we have the copyright action floating
19 around, so could you address your minds from first
20 principles as to how this matter can be brought
21 efficiently to trial, because it has been going for
22 quite a while and some areas are poorly developed where
23 other areas are well developed.

24 If you could just give some thought to that and we
25 can pick that up at some point.

1 So just on the list of issues which I had, I think
2 the restricted documents application, it would be
3 convenient to hear that next tomorrow, and then where
4 obviously directions to trial and disclosure seem to be
5 potentially related, for the reasons I've just
6 explained, so -- really, point 5 seems to be important.
7 I'm not sure how much there is in points 3 and 4. Are
8 they going to occupy us for long? Points 3 and 4, this
9 is your disclosure.

10 MR O'DONOGHUE: No, sir, we can park(?) the CMC, it won't
11 take long, but it's quite important.

12 THE CHAIRMAN: How long is it going to take?

13 MR O'DONOGHUE: Half an hour.

14 THE CHAIRMAN: Half an hour, yes.

15 MR O'DONOGHUE: We did think that the restricted documents
16 issue was not a burning one, but it's just one that has
17 to be dealt with.

18 THE CHAIRMAN: Yes. I think we'd like to hear that next.

19 MR O'DONOGHUE: Yes.

20 THE CHAIRMAN: And then -- yes, then I think we need to
21 really talk about the shape of the trial and what
22 disclosure is necessary.

23 MR O'DONOGHUE: The restricted documents --

24 THE CHAIRMAN: We can then do the MS disclosure.

25 MR O'DONOGHUE: Yes.

1 THE CHAIRMAN: It may be, if we're going to hear liability
2 first -- it's not a settled view by any means -- what
3 issues need to be determined at that trial? That may be
4 we can't answer all those questions today, maybe we need
5 a follow-up CMC if we're going down that route, shortly,
6 because I appreciate we're springing this on you
7 a little bit. But if we could at least dip our toe in
8 the water.

9 MR O'DONOGHUE: Back to the future.

10 THE CHAIRMAN: Oh, A little bit, yes. Fair point, fair
11 point.

12 (4.16 pm)

13 (The hearing adjourned until 10.00 am
14 on Thursday, 21 November 2024)

15

16

17

18

19

20

21

22

23

24

25