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IN THE COMPETITION

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

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 22nd 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.

Friday, 22 November 2024

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(10.00 am)

(Proceedings delayed)

(10.20 am)

Case management discussion

THE CHAIRMAN: So sorry we were late coming in, we were just trying to read some of the materials that had been provided, and so we've looked at two letters, some submissions from Microsoft, for which many thanks, and also a letter from Oxera. And just as a preliminary matter, I think we were most attracted -- obviously this is subject to further discussion -- to Microsoft's option two, which seems to grapple with the issues that we had in mind. But obviously we can discuss that further, and we need to understand what sort of disclosure that would give rise to. There are some headline issues, I think.

MR SCHAEFER: May I check you also have the Charles Fussell documents?

THE CHAIRMAN: I got a letter from Charles Fussell, yes.

MR SCHAEFER: Sir, that is obviously -- ValueLicensing's proposal is -- it's relatively high-level, because we've had to send it through quickly. I wondered if it might be helpful to talk it through a bit?

THE CHAIRMAN: Yes, of course, yes.

1 MR SCHAEFER: There are really two main parts to the
2 proposal. The first concerns UsedSoft. It's clear
3 there are issues between the parties as to the scope of
4 the UsedSoft principle and that those are issues are
5 pure law, indeed, pure IP law, so somewhat removed from
6 the rest of the case. I should say that, reviewing the
7 transcript yesterday, I saw that I had said we had been
8 proceeding on the basis that IP issues would be
9 determined by the court, and I apologise, that was
10 a slip of the tongue, I meant the Tribunal.

11 The UsedSoft issues go to potentially quite a lot
12 depending on the scope of the eventual dispute. It is
13 agreed they go to quantum; they also go to Microsoft's
14 objective justification defence, certainly as
15 Mr O'Donoghue advanced it on Wednesday, which is based
16 on investigating actual alleged infringements by VL, but
17 also on the narrower basis that the Tribunal floated on
18 Microsoft's perceived risk of infringement, because if
19 Microsoft did perceive there was a risk of infringement,
20 which is a question of fact and which is disputed,
21 a fundamental question will be, was that perceived risk
22 actually based on a correct interpretation of the law?
23 If they're wrong on the UsedSoft principles --

24 THE CHAIRMAN: Yes, so I think at the moment, our view is
25 that the UsedSoft issue would be part of the part of

1 this trial, as opposed to parked. It would be part of
2 this trial.

3 MR SCHAEFER: In a sense, sir, the proposal that we have
4 would be that it would be a useful preliminary issue,
5 rather than being part of essentially the phase one
6 trial.

7 THE CHAIRMAN: Yes. Well, preliminary issues weren't really
8 on the agenda to discuss. We weren't proposing we hear
9 a preliminary issue. I think the proposal was that we
10 try and determine liability absent quantum and, subject
11 to further discussion, dominance. Those were --

12 MR SCHAEFER: Sir, I see that. I can briefly explain why we
13 would --

14 THE CHAIRMAN: Well, there's no application. The Tribunal
15 hasn't suggested a preliminary issue and there is no
16 application for a preliminary issue. So if you could
17 deal with it briefly and see if you grab our attention
18 but at the moment it's not on our agenda.

19 MR SCHAEFER: So the proposal is, effectively, that it could
20 potentially cut down the scope both of the first trial,
21 depending on your finding on objective justification,
22 and of the second trial. It's a pure IP law issue. It
23 could be dealt with entirely by submission. It would
24 probably be separate counsel, and if ValueLicensing
25 prevailed on those, then some of the issues and

1 disclosure that would otherwise arise in the first
2 trial, particularly even in respect of perceived risk,
3 would fall away. It would also go to quantum.

4 SPEAKER: Forgive me, the transcript seems to have frozen or
5 not started.

6 THE CHAIRMAN: I'll just see if we can get a message. Just
7 keep going for now, thank you. Thank you for
8 registering it.

9 MR SCHAEFER: There are also, as you've heard, at least
10 threatened other proceedings effectively turning on the
11 same issues. So it's clear that there is a wide
12 potential dispute between the parties which turn on
13 these issues which could be determined in a very short
14 focused hearing with separate counsel by this Tribunal
15 in very short order that would cut down the scope of the
16 dispute quite a lot.

17 THE CHAIRMAN: Right.

18 MR SCHAEFER: So that's the first part. The second part of
19 the proposal is really picking up and running with the
20 Tribunal's comment that liability -- as far as liability
21 is concerned, quite a lot of the facts are common
22 ground. As the Tribunal knows, the crux of
23 ValueLicensing's case is that Microsoft was tying
24 discounts on Microsoft 365 to preventing customers from
25 reselling licences and there are really three pleaded

1 ways in which we say that happened. First, the CAR
2 Terms; secondly, the New From SA Condition; and thirdly,
3 what amounts to imposing the New From SA Condition as
4 a matter of practice before it became a term. That's in
5 paragraph 48.4 of the particulars of claim.

6 Now, there are other broader conduct allegations,
7 but those really don't -- those really go to the extent
8 of the campaign. The crux of the case is this practice
9 of tying.

10 There are then three limbs to Microsoft's defence as
11 far as we can see. Limb one is that this was all just
12 competition on the merits, and not anticompetitive or
13 abusive at all and that plainly needs to be determined.

14 Limb two, they then say, well, the conduct in issue
15 was limited. They admit the existence of the CAR Terms,
16 but they say they only used them a handful of times and
17 they don't admit the practice we have alleged of tying
18 from SA discounts to non-resale before the New From SA
19 Condition came into force.

20 So that's an argument from Microsoft about the
21 extent of their conduct that straddles -- technically
22 straddles liability and quantum. Microsoft say the
23 conduct was so limited that any anticompetitive effect
24 wasn't even appreciable, and that's technically
25 a liability issue. But really it goes to the extent of

1 the conduct, and that's a quantum issue.

2 THE CHAIRMAN: Well, it doesn't necessarily go to the extent
3 of the conduct. I mean, you have to show -- at some
4 point you're going to have to show that there was
5 a material restriction in supply.

6 MR SCHAEFER: Sir, yes.

7 THE CHAIRMAN: That you were short of product. And you're
8 also going to have to show that there was a demand for
9 product which would have been there had you had the
10 material in which to satisfy that demand. So those are
11 going to be central issues. They're not the -- of
12 course it overlaps, but it's not the same as saying how
13 much product could you have sold, extra product could
14 you have sold. That's where it moves into quantum. But
15 I mean, I think whether one calls it a causation issue,
16 or I think Oxera put it slightly differently, but it
17 seems to be a central issue in the case, however one
18 labels it.

19 MR SCHAEFER: It overlaps, if I may submit, quite
20 extensively, because Microsoft's case is, on the one
21 hand, it wasn't carrying out the conduct very much, and
22 on the other hand, in a nutshell, ValueLicensing wasn't
23 very good at finding customers. Now the latter is
24 really a quantum issue because ValueLicensing is only
25 one of the players in the market.

1 THE CHAIRMAN: It's going to be relevant for quantum as well
2 but it's a central issue in the proceedings.

3 MR SCHAEFER: But there is also a very, very confined and
4 important issue which is, was this conduct competition
5 on the merits? Was it, assuming appreciability, you can
6 look at whether there was an anticompetitive effect
7 assuming appreciability, was it anticompetitive?

8 THE CHAIRMAN: One can assume -- I'm going to call it the
9 supply condition and the demand condition, one could say
10 the supply condition and the demand condition could be
11 parked and dealt with later and we deal with the
12 narrower issues. That's obviously one of the options we
13 have to consider, I understand that.

14 MR SCHAEFER: Precisely, sir, and the reason we propose it
15 this way is really, as I say, taking and running with
16 your point that there is an admitted part of this case
17 which doesn't require much disclosure at all, and then
18 there's heavily disputed aspects as to the extent of
19 conduct on one side and the extent of market activity on
20 the other side.

21 THE CHAIRMAN: But how are you going to show that there
22 was -- that the restriction in supply was material and
23 how are you going to show that you had demand? I mean,
24 that isn't necessarily -- you may be able to share that
25 very easily. That isn't necessarily an evidentially

1 heavy area. It may be perfectly plain from your
2 business records that, suddenly, supply dried up and the
3 demand that had previously been there suddenly couldn't
4 be satisfied. That may be a very straightforward thing
5 for you to show, I don't know.

6 MR SCHAEFER: Well, it may or may not. Microsoft says that
7 we need to disclose the entirety of two of our databases
8 in order for that to be investigated.

9 THE CHAIRMAN: Yes, I'm not sure we necessarily agree with
10 Microsoft about that.

11 MR SCHAEFER: It may be -- there are various ways in
12 which -- my primary submission is that appreciability
13 can be assumed for the purposes of the first trial just
14 as dominance --

15 THE CHAIRMAN: Yes, it could be, but that wasn't my
16 question. My question was, how are you going to prove
17 it if it's not assumed?

18 MR SCHAEFER: If it's not assumed? So it may be possible --
19 there may be a presumption of law. This is a tying
20 abuse effectively and there is -- I'm not going to take
21 you to authorities or make this legal submission now,
22 but it may be arguable that as a matter of law there is
23 a presumptive appreciable effect.

24 THE CHAIRMAN: But you're still at some stage, whether we
25 call it liability, whether we call it causation, whether

1 we call it quantum, at some point you're going to have
2 to show that supply dried up, you're going to have to
3 grapple with the supply question, you're going to have
4 to grapple with the demand question. Now, for quantum
5 you need to show the extent of supply and the extent of
6 demand, but for liability and the foothills of
7 causation, let's put it that way, you just have to know
8 that there was some interference with your business, and
9 how are you going -- and maybe you can't answer this
10 yet, but it is the question I'm particularly interested
11 in is how are you going to show that?

12 MR SCHAEFER: To be precise, for liability it's not
13 difficulties for our business. For quantum it's
14 difficulties for our business, for liability it's an
15 effect on the market generally.

16 Now, I'm in a difficult position right now but it
17 may be possible --

18 THE CHAIRMAN: Well, you might be able to go to -- sorry.

19 MR SCHAEFER: You might be able to go to Microsoft's
20 documents. I can't show you Microsoft's documents now
21 because they are restricted and we don't have them all
22 in, but it may be possible even from Microsoft's
23 disclosure to show enough to get to appreciable effect.
24 That is not a submission I really can advance today but
25 it's certainly something we could develop.

1 MR DAVIES: Well, I was just going to say I think the same
2 points apply whether one is thinking about the market as
3 a whole or just the effect on VL, that both the supply
4 and demand conditions identified in Dr Chowdhury's note
5 seem to us to be yes/no propositions. Would there have
6 been an appreciable increase in the supply of licences
7 in the counter-factual? That's a matter of
8 documentation and of course it's dealt with in all sorts
9 of other bits of any trial of liability, as well.

10 Then the second, on demand, isn't for liability, the
11 estimation of a demand curve or anything like that, that
12 you would need for quantum; it's simply this proposition
13 that there is a rather unusual -- that we understand
14 from Microsoft that there is a rather unusual situation
15 in this market that there is excess supply of licences
16 anyway and therefore, if there were to be more of them,
17 there would be no effect on -- well, on anything in
18 a sense. So that is also a yes/no question. It's not
19 to estimate the amount if we decided that there were, an
20 effect on demand would then be for quantum, but that is
21 a simple and slightly unusual proposition, saying that
22 in this market, unlike most markets, there is this
23 situation and, for that reason, there isn't an effect.
24 And that seems to us something that could be addressed
25 with relatively little evidence and certainly not a

1 great deal of data.

2 MR SCHAEFER: Sir, that's very helpful and perhaps we can
3 take it away and think about it.

4 MR DAVIES: Yes, you have to prove this aspect of the case.

5 If you're saying I need to have very large quantities of
6 disclosure to prove that, that there was demand and
7 there was supply, which would seem odd, but if that is
8 your position then obviously you've got to factor that
9 in. If your position is, "No, we're going to show that
10 my clients", or JJH's, "ValueLicensing business fell off
11 a cliff, that's self-evident", then that's a relatively
12 straightforward thing for you to show. Obviously, as
13 you say, you can show it by reference to the market in
14 general, but you can show it specifically by reference
15 to ValueLicensing's business, I would have thought.

16 MR SCHAEFER: Sir, yes, that point is well taken, and it may
17 be -- I think what we were doing, you know, was largely
18 responding to what we saw in Microsoft's submissions,
19 that essentially this required massive disclosure from
20 VL for this point to get off the ground.

21 Now, really, the proposition that -- I accept it's
22 for my clients to prove this, but the proposition, as
23 you say the rather unusual proposition that actually
24 there was an excess of supply -- quite what needs to be
25 done to establish that for liability purposes, that is

1 a good question that we can consider further. The
2 reason, if I may briefly continue to advocate for our
3 proposal?

4 THE CHAIRMAN: Yes, of course, yes.

5 MR SCHAEFER: The reason that we had sought to assume
6 appreciability entirely was that it does seem to us that
7 even assuming an effect on the market, there is an issue
8 between the parties, at least appears to be,
9 a substantial issue between the parties as to whether
10 this was simply competition on the merits. Microsoft
11 say it's absolutely fine, it is the equivalent of paying
12 a scragpage fee, there is no problem with that, and in
13 any event it was objectively justified as long as that
14 stays in.

15 That can be determined, in our submission, very
16 quickly on the basis of very, very little disclosure
17 indeed and ought to be dispositive because we accept
18 that if we can't show that there was an effect that --
19 sorry, if we can't show that this conduct was prima
20 facie anticompetitive and it wasn't normal competition
21 on the merits, that is the case. Microsoft says well
22 any initial trial has to be -- I think they said has to
23 be at least plausibly capable of disposing of the case,
24 but we had been proceeding on the basis that they
25 thought they had a plausible case on this.

1 PROFESSOR LIANOS: I mean, just saying that Microsoft's
2 conduct is anticompetitive as a matter of legal theory
3 almost just seems like -- if indeed Microsoft were not
4 really enforcing these terms and it was only applying to
5 a minority of customers, that seems to strike at the
6 heart of your complaint.

7 MR SCHAEFER: If Microsoft isn't really saying this was
8 perfectly normal, perfectly justified commercial
9 practice, and/or this was something we were entitled to
10 do because of UsedSoft, all of which are very narrow
11 points, if it's not really saying that, then we can move
12 straight into the wider issues.

13 We're not suggesting this is tested in the abstract.
14 What we're doing is we're taking the one part of the
15 conduct that is not only admitted in terms of the facts
16 but admitted in terms of the extent and duration, and
17 that's the New From SA Condition. We know that that
18 applied to all -- to all licences that were used for
19 From SA discounts for a defined period of time and that,
20 in a sense, ought to get us -- you know, that ought to
21 be enough in my submission to test effective
22 appreciability, at least at the supply end.

23 I'm informed that this might be a useful time for
24 break, if that's appropriate. The transcriber would
25 like one.

1 THE CHAIRMAN: Why is this a useful time for a break?

2 MR SCHAEFER: The transcriber has asked for a break, sorry,
3 let me be clearer.

4 THE CHAIRMAN: I think we're going to press on for now,
5 we've only been in here for 20 minutes.

6 MR SCHAEFER: I'm told there is a technical issue with the
7 transcript.

8 THE CHAIRMAN: We can manage without a transcript. That's
9 fine.

10 Mr O'Donoghue.

11 MR O'DONOGHUE: Sir, I won't say more about option two,
12 we've set it out in detail, save to say that actually in
13 split trials and competition law proceedings that would
14 be the conventional way of proceeding. In our
15 submission, it is conventional for a good reason,
16 because it works practically, it leads to a bite-sized
17 chunk that is digestible at trial that stands a very
18 strong likelihood of resolving a substantial part if not
19 indeed all of the proceedings.

20 By contrast, VL's unconventional approach frankly
21 resolves nothing. We remain at abstract foothills at
22 stage one of a complicated series of questions.

23 Now if we go, sir, to paragraph 6 of our submissions
24 this morning, and you've identified these, sir, and
25 Mr Davies, there are, we say, four tectonic plates that

1 are unavoidably necessary to grapple with when it comes
2 to liability. One is how much of the supply was
3 affected. Two is were there other reasons why customers
4 were reluctant to buy these licences. Three, what about
5 the demand side? And then, four, which I will come back
6 to, the IP issues.

7 Now the problem is VL's proposal, frankly, is that
8 none of these issues would either be grappled with at
9 all in trial one or certainly grappled with in a way
10 that is meaningful in terms of the resolution of
11 important issues in the proceedings. And the best that
12 Mr Schaefer could do on the hoof is say, well, we
13 classify this as tying and we think as a matter of legal
14 theory there could be a presumption of harm. I don't
15 accept that for one second, but on any view these four
16 tectonic plates are more than well arguably a necessary
17 part of liability, even if they bleed into causation on
18 quantum to some extent as well.

19 Our proposal is we need to grasp these nettles in
20 trial one. The problem, again, with VL's proposal --
21 I mean, it is bizarre and unprecedented. So they are
22 assuming, in a case that is all about an appreciable
23 effect on the market, that we can assume away in trial
24 one that core ingredient. One is then left to wonder
25 what on earth will trial one actually establish? It

1 would be this legal theory or potential liability. So
2 it isn't even a preliminary issue; it is a preliminary
3 to a preliminary issue, and frankly it resolves nothing.

4 THE CHAIRMAN: Just explain that. A preliminary issue to
5 a preliminary issue?

6 MR O'DONOGHUE: Yes. If we put to one side these four
7 tectonic plates, the most to be decided in trial one is
8 whether, as a matter of legal theory, one could conceive
9 of this conduct as being competition on the merits or
10 something which is potentially anticompetitive. But
11 that finding in isolation is essentially meaningless
12 because without bolting on the other four parts, and in
13 particular the conclusion of appreciable effect on the
14 market, it is a meaningless preliminary, preparatory,
15 preambulatory finding. It takes us nowhere.

16 That is before I even get to CAR because the other
17 part of their proposal is all things CAR gets parked.
18 Now, there is a pragmatic problem with that which is
19 there is a second part of the case which then is kicked
20 into the long grass for many, many years, but there's
21 actually a more fundamental problem with the first trial
22 because, in considering From SA, what assumptions would
23 the Tribunal be asked to make in relation to the CAR
24 period? Because in a world where CAR is not infringing,
25 the starting point in terms of the impact on supply and

1 indeed demand and appreciable effect on the market may
2 be completely different to a world in which CAR is
3 infringing and supply has been constrained.

4 So the trial would be even more abstruse in the
5 sense there would be contingent findings from SA that
6 would be swept completely to one side depending on the
7 impact, if any, of CAR on supply and demand. So it's
8 even more theoretical than the proposal suggests at
9 first sight.

10 THE CHAIRMAN: But as I understand where we are, it's common
11 ground between you that quantum and dominance can be
12 shaved away?

13 MR O'DONOGHUE: Yes.

14 THE CHAIRMAN: Mr O'Donoghue, what's your position on the
15 supply and demand issues? Oxera suggested this would
16 require some economic analysis. As has been indicated,
17 the Tribunal is not entirely persuaded that that's
18 necessary because it is a binary question at this stage.
19 Obviously economic analysis will be potentially more
20 important when one gets to quantum. What sort of scope
21 are you anticipating that would be that inquiry?

22 MR O'DONOGHUE: You're entirely correct, of course, that
23 there is a step one factual question: how much of supply
24 was in fact tied up, and there will be a similar
25 question for demand and so on. But we say there is both

1 then a legal and an economic component, which is
2 whatever that factual position is, does it, as a matter
3 of law and economics, amount to an appreciable effect?
4 And we do think that the economists will need to weigh
5 in on that to some extent. So we see this as
6 a multifactorial question of fact and law.

7 THE CHAIRMAN: Why do the economists have to get involved in
8 deciding whether it's appreciable? Obviously if it's
9 de minimis, it's de minimis. You don't need an
10 economist -- it's for the claimant to show that they
11 were constrained in supply and that there was demand for
12 product. I mean, they have to show that.

13 MR O'DONOGHUE: Yes, I think that's true. It won't be
14 symmetrically, but we would say the antonym of
15 de minimis is not appreciable. So if it is not
16 obviously de minimis it would be a hard fought issue.

17 All I'm saying for today's purposes is that
18 conventionally the question of appreciability and the
19 effect on the market, whether VL's access of the market
20 was blocked, clearly has an economic component. Now,
21 how big or how small that is ultimately may yet be
22 decided. I can see, sir, perfectly well --

23 THE CHAIRMAN: Well, one is obviously thinking ahead of
24 disclosure and so on.

25 MR O'DONOGHUE: Yes. Sir, I would put it no higher than

1 saying in all cases of this kind I have done, the
2 question of appreciability has a distinct and usually
3 important economic component and for these purposes
4 today, in my respectful submission, that should be the
5 working assumption as to how this is likely to play out,
6 or at least that is a realistic possibility.

7 PROFESSOR LIANOS: Actually I would like to ask a question
8 to Mr O'Donoghue. You referred in your submissions to
9 the draft guidelines from article 102 and they were
10 presented a little bit in paragraph 45 and I would like
11 to draw your attention, it says:

12 "To determine whether conduct by dominant
13 undertakings is liable to constitute an exclusionary
14 abuse, it is generally necessary to establish [first]
15 whether the conduct departs from competition on the
16 merits ... and [second] whether the conduct is capable
17 of having exclusionary effects ..."

18 We know that this is a position of the case law in
19 the Unilever case, in Superleague and also in the Intel
20 latest judgment.

21 Don't you think that if it is competition of the
22 merits, wouldn't that be dispositive of the case? So
23 there's no need to basically move to the second aspect,
24 which is to show that it has -- it's capable of having
25 exclusionary effects?

1 MR O'DONOGHUE: Professor, one in a sense could say this
2 about a whole host of issues in this case. You could
3 have a trial market definition of dominance because
4 that's a precondition that's theoretically dispositive.
5 In my submission, one has to take a pragmatic view and
6 in a split trial, in my respectful submission, what one
7 is trying to do on a pragmatic basis is identify
8 a cohort of issues that are reasonably likely to be
9 dispositive of some or all of the proceedings. Now,
10 I can see how that step one point theoretically might do
11 the trick, but given the tectonic plates we've
12 identified, we make the pragmatic point that we actually
13 say it would be quite foolhardy to have an expensive
14 trial on that first step in the analysis and then depart
15 from, maybe for many, many years, all these other
16 issues. We say there are substantial efficiencies for
17 dealing with this in one go, which is why all the splits
18 I'm aware of proceed on the basis of option two.

19 So I accept in theory that's correct. My pragmatic
20 response is that given that these battle lines are very,
21 very clearly drawn already, these four tectonic plates,
22 in my submission it would be potentially quite dangerous
23 to park all of that for many, many years and, of course,
24 a fortiori if we're simply dealing with SA and nothing
25 to do with CAR. So in my submission that runs a very

1 substantial risk of being impractical and leading to
2 very significant inefficiency.

3 So then on -- I'll come back to what this means for
4 disclosure.

5 THE CHAIRMAN: And trial length.

6 MR O'DONOGHUE: Sir, as I hope you picked up from our
7 directions in the second area, so we would envisage on
8 option two the trial comes forward to the summer of next
9 year, and would be of shorter duration. So in parking
10 dominance and quantum, there are already two
11 efficiencies on that front. So we haven't consulted on
12 these directions with my learned friends, but we have
13 brought forward the trial date.

14 THE CHAIRMAN: Would we need expert evidence at all? Just
15 on this one issue, possibly, that you've flagged?

16 MR O'DONOGHUE: Well, I suspect we will and it may be on...

17 So we think that on a number of issues going to the
18 broad area of appreciable effect there would be economic
19 evidence, but we can come back to that at a future
20 point.

21 Sir, on UsedSoft, there seems to be a measure of
22 violent agreement that these are important issues in
23 this case. I don't accept my learned friend's
24 submission that it's primarily anchored in quantum. We
25 think it permeates a number of issues. I think he

1 conceded objective justification as well. So as has
2 been my mantra all week, given the parallel activity in
3 the High Court, we would suggest that, as and when the
4 pleadings in the High Court have surfaced early in the
5 new year we can grapple at the next CMC, which we've
6 suggested might be in February, with how the
7 interrelationship --

8 THE CHAIRMAN: Sorry, I'm not sure I have your directions.

9 MR O'DONOGHUE: It's an annex.

10 THE CHAIRMAN: Apologies, I didn't get as far as the annex.
11 I do apologise.

12 MR O'DONOGHUE: So in paragraph 2 we've suggested a further
13 CMC --

14 THE CHAIRMAN: Sorry, I apologise, I had not looked at this.
15 Okay, well, we can come back to that.

16 MR O'DONOGHUE: So the headline point is there would be
17 a CMC in February at which point the High Court
18 proceedings in relation to intellectual property would
19 have crystallised all the pleadings and we could then
20 take stock at that stage.

21 THE CHAIRMAN: Yes, if you say there are High Court
22 proceedings, I can't stop you making an application to
23 stay those aspects here or do something.

24 MR O'DONOGHUE: Or indeed VL!

25 THE CHAIRMAN: Or indeed, VL.

1 MR O'DONOGHUE: Or the court ex-officio.

2 THE CHAIRMAN: Yes, but we're not dealing with that today.

3 MR O'DONOGHUE: No, but that's my simple point.

4 THE CHAIRMAN: But you are saying we might deal with it in
5 February.

6 MR O'DONOGHUE: We will see in the new year as to what is
7 the shape of things.

8 THE CHAIRMAN: But you've seen our preliminary view is this
9 Tribunal can, of course, deal with it insofar as it
10 arises in the context of a competition --

11 MR O'DONOGHUE: Well, I understand, sir, but I've made the
12 point more than once that, depending what is pleaded by
13 way of counterclaim, there may well be such a question.
14 But I don't put it higher than that.

15 THE CHAIRMAN: No, sure.

16 MR O'DONOGHUE: That's for another day. I just want to lay
17 down a marker that that is something which will be more
18 crystallised by the new year and then we can make more
19 sensible submissions at that stage.

20 THE CHAIRMAN: Yes.

21 MR O'DONOGHUE: But I think it is largely common ground
22 these IP issues, broadly speaking, straddle a number of
23 issues.

24 THE CHAIRMAN: They matter.

25 MR O'DONOGHUE: They matter and they may matter quite a bit;

1 we'll have to see.

2 So that's all for triangulation at a later stage.

3 So I was going to go on to the broad contours of
4 disclosure and what our option would be --

5 THE CHAIRMAN: Yes, we will come to that in a minute. We
6 will just park it for the moment. But at the moment,
7 even if there is some economic evidence, and we're
8 talking about potentially a trial of less than two
9 weeks, aren't we, for this?

10 MR O'DONOGHUE: Sir, we think more like three to four.

11 THE CHAIRMAN: Why? Well, what --

12 MR O'DONOGHUE: But we can think about that and confirm it.

13 THE CHAIRMAN: Yes. They don't seem to, even with this
14 issue of supply and demand -- certainly without supply
15 and demand it's predominantly legal argument, with
16 a little bit of sprinkling of evidence.

17 MR O'DONOGHUE: Well, there may be more than a sprinkling,
18 sir. I mean of course there will be facts and figures,
19 but one obvious piece of factual evidence would be what
20 was VL doing in the real world in terms of actually
21 procuring supply?

22 THE CHAIRMAN: Well, that's the supply and demand point,
23 yes.

24 MR O'DONOGHUE: And to what extent were their sales efforts
25 successful? Now, as we'll develop a bit later this

1 morning, there's already quite a lot of disclosure which
2 suggests that, in terms of selling these licences, VL
3 was particularly inefficient.

4 THE CHAIRMAN: Right, well, I mean, the less opportunity VL
5 have to develop their case, the better for you,
6 Mr O'Donoghue. You say they've got an uphill struggle.

7 MR O'DONOGHUE: Well, sir, that's true, but of course it's
8 not just up to me and what I'm projecting forward is, in
9 terms of cross-examination of factual witnesses, it
10 seems to me a more than realistic prospect that a lot of
11 supply and demand will need to be the subject of
12 cross-examination based on the documents.

13 THE CHAIRMAN: It may need to be, but you are saying the
14 initial trial can include these supply and demand
15 issues. Obviously that becomes less attractive if the
16 trial length is going to go up. Obviously we have to
17 take the correct course and we can't let the trial
18 length dictate everything else. But --

19 MR O'DONOGHUE: Indeed. All I'm saying today is I think
20 it's obvious that supply and demand are fundamental. We
21 think, at this stage, it will be somewhat more involved
22 factually, economically and legally than the Tribunal
23 provisionally seems to think.

24 I would respectfully suggest that we revisit the
25 full contours of that in the February CMC because, of

1 course, one thing the VL needs to tell us double-quick
2 is how many factual witnesses will they have at trial,
3 and to what extent will they be covering issues of
4 demand? So that's obviously one of the building blocks.
5 There will be things on the supply side that we will
6 have to feed in as well.

7 So I think this needs to be unpacked in more detail.
8 As matters presently stand, we think it is more like
9 three to four weeks because there will be some factual
10 evidence, there will be expert evidence on this, and
11 with openings and closings it sounds to be more like
12 three to four weeks than two weeks. But again, we don't
13 need to nail our colours to the mast on that today. We
14 can perhaps build in a somewhat longer trial and if it's
15 shorter then happy days.

16 Sir, I was then going to move on to disclosure and
17 maybe --

18 THE CHAIRMAN: Yes, can I just hear from --

19 MR O'DONOGHUE: -- (overspeaking) to draw stumps on these
20 issues.

21 MR SCHAEFER: Sir, if I can pick up some points that
22 Mr O'Donoghue said. Starting off with UsedSoft, as
23 I understand Microsoft's position now, what it's saying
24 is that the Tribunal should essentially kick off
25 consideration of how to deal with the UsedSoft points

1 pending Microsoft instigating new proceedings in the
2 High Court and think about it again in February.

3 THE CHAIRMAN: Well, UsedSoft is in, it's in these
4 proceedings. This Tribunal is working on the basis that
5 we will be deciding those issues. But I cannot prevent
6 Mr O'Donoghue, or you, making an application on
7 a jurisdictional issue to stay this and say that the
8 appropriate forum to determine those issues is in the
9 High Court. I can't prevent you doing that, you have
10 every right to do so. But no such application has been
11 made today and we've given a provisional view that we
12 consider ourselves competent to deal with this.

13 MR SCHAEFER: Sir, I understand that and I'm not asking you
14 to make a decision today and we have no application. If
15 I can give you two points by way of background to inform
16 the Tribunal's further consideration of this in the
17 future while we're here.

18 THE CHAIRMAN: Oh, but very briefly. I'm not sure it really
19 matters.

20 MR SCHAEFER: The first point is, as I think you've already
21 heard, Microsoft has been aware that ValueLicensing was
22 splitting volume licences since at least 2020 if not
23 long before.

24 THE CHAIRMAN: We heard that yesterday, yes.

25 MR SCHAEFER: Secondly, if I may show you one document in

1 this case, it's in bundle 4.

2 THE CHAIRMAN: Mr Schaefer, why do we need to look at this
3 now?

4 MR SCHAEFER: Then I will pass over it.

5 THE CHAIRMAN: I understand your points on this. Given our
6 indication that we think the Tribunal can deal with
7 this, we've laid the groundwork that obviously we can't
8 stop further applications and we're not seeking to stop
9 further applications --

10 MR SCHAEFER: Understood.

11 THE CHAIRMAN: -- I don't think we need to spend any more
12 time on it.

13 MR SCHAEFER: The next major difference between us appears
14 to be the treatment of the other alleged conduct. So,
15 as I say, we consider that we could have a narrow
16 focused trial on the New From SA Condition which is
17 defined in scope and extent, and we had proposed kicking
18 off consideration of the further extent of the conduct
19 and, in particular, the CAR Terms, partly because
20 Microsoft has effectively taken the position that it has
21 told us about all the CAR Terms that exist, that there
22 are no more and it's not giving us any more disclosure.

23 We don't accept that, but it seems to us that we
24 would be in a much better position to press for further
25 disclosure once we had established a prima facie case

1 that there was a restriction of competition here in the
2 first place.

3 Now, if the Tribunal makes a decision based on the
4 New From SA Condition, either we lose and that's it and
5 a huge amount of money has been saved all round, or we
6 win and then there is, in my submission, a very clear
7 case for a proper investigation of the scope of the
8 conduct and Mr O'Donoghue says, well, it may be
9 different, but of course if Microsoft wants to say that
10 this tying of discounts to non-resale in the CAR Terms
11 was materially different from the one that the Tribunal
12 will by then have addressed, he can do so. But it will
13 give the parties a much firmer framework for that kind
14 of discussion.

15 Likewise the investigation of the extent to which
16 before the New From SA Condition, that was applied as
17 a matter of policy. That will require disclosure, it's
18 heavily factual, but the findings from a narrow trial on
19 New From SA would flow through into that, in our
20 respectful submission, very clearly.

21 On supply and demand, we hear what the Tribunal has
22 said. We respectfully adopt the points made by the
23 Professor. It does appear to us that if Microsoft is
24 seriously running a case that this was normal
25 competition on the merits and/or compliant with UsedSoft

1 and it's all fine, therefore regardless of any effect of
2 the market, if it thinks it can win on that, that is
3 a very narrow plausible way of disposing of the case.
4 If it doesn't think it can win on that, that is entirely
5 different and certainly not what Mr O'Donoghue is
6 saying.

7 Our proposal, we think, is a trial of two weeks.
8 Mr O'Donoghue is proposing, we understand, four. That's
9 much less of a saving from six.

10 THE CHAIRMAN: Well, he suggested three to four and we
11 haven't got anywhere close to agreement with the
12 Tribunal on that.

13 MR SCHAEFER: Yes, understood.

14 THE CHAIRMAN: And obviously it does depend on how you're
15 going to prove your supply and demand points.

16 MR SCHAEFER: Really, I think, subject to my checking, my
17 final point on the supply and demand point is it's not
18 at all unusual in all sorts of claims where some kind of
19 prima facie -- actually I have two points, sorry,
20 I forgot the other one.

21 The first point it's not at all unusual, where you
22 have a claim where you have as part of the cause of
23 action some loss, nevertheless to hive off quantum, have
24 a liability trial and then deal with loss. So you can
25 have a fraud claim. Loss is an element of the claim in

1 fraud. You decide whether there was a fraud, not
2 actually whether there was any effect on the claimant.
3 You then have a quantum trial. If the claimant fails to
4 establish any quantum, technically the cause of action
5 has gone away, but that's never a problem.

6 THE CHAIRMAN: I think Mr O'Donoghue accepts that can be
7 done, as a matter of theory, but just says that's --
8 there are practical disadvantages to doing that.

9 MR SCHAEFER: You've heard my submissions on the practical
10 advantages of doing that. Having said I have two points
11 I've forgotten the other one!

12 THE CHAIRMAN: Can we just talk about the scope of
13 disclosure, at least to get a flavour of it?

14 I've had lots of these versions and I think this is
15 the latest one. We can find out. I think you said
16 items -- Mr O'Donoghue, you had given this some thought.
17 Did you want to kick off with where you thought
18 disclosure would be going? I appreciate this is on the
19 assumption, maybe, of if we were going with your option
20 two.

21 MR O'DONOGHUE: Yes. Well, sir, the headline points were
22 picked up in paragraph 11 of our submission last night.
23 So just to start at the other end of the telescope,
24 depressingly, on both parties' respective JDSs, there
25 are a large number of categories in dispute, and

1 I haven't done a full reckoning, but I think it's about
2 two dozen and, on any view, that is
3 what Lord Justice Laws would call a life-shortening
4 experience to have to go through each and every one of
5 those.

6 So what we'd set out at paragraph 11 was really
7 a way to cut through all this clutter, achieve some
8 meaningful progress today, and then come back in
9 February with a --

10 THE CHAIRMAN: So there's no dispute on the CRM and Verba
11 repositories, as I understand?

12 MR O'DONOGHUE: Well, there's -- there is an issue around
13 what exactly gets handed over. They want a significant
14 filleting of the databases and we say it makes it --

15 THE CHAIRMAN: Right, yes, but if you --

16 MR O'DONOGHUE: -- put in our report. So there are a number
17 of categories that are agreed they can be banked. If we
18 get CRM and Verba in a meaningful form today, we think
19 that can be dealt with extremely quickly indeed.

20 Then the other disputed issues -- so on the
21 claimant's JDS I think there are 13 disputed issues.

22 They can all be put to one side for now.

23 THE CHAIRMAN: So the green is agreed?

24 MR O'DONOGHUE: Green is agreed.

25 THE CHAIRMAN: Of course, some may fall away on the basis

1 that some may relate to issues which we're agreed are
2 dominance or quantum.

3 MR O'DONOGHUE: Three are quantum-related, so we can put
4 those to one side. But there are still, I think, at
5 least ten.

6 As you will have seen, sir, from quickly perusing
7 them, a lot of them go to supply and demand.

8 THE CHAIRMAN: Can you just show me which ones -- I don't
9 expect you to argue them, Mr O'Donoghue, but just show
10 me which ones, if you've got that far. Can we just whiz
11 through them, starting from the beginning? You've got
12 2.1.

13 MR O'DONOGHUE: Yes, so a fair bit of category 2 is agreed,
14 so that is UsedSoft. 2.1 to 2.5 --

15 THE CHAIRMAN: Can you just tell me what they are, just to
16 make sure I'm looking at the right document? 2.1 says,
17 "Documents showing identity and location".

18 MR O'DONOGHUE: Yes, so 2.1-5, that's all UsedSoft and
19 that's agreed.

20 THE CHAIRMAN: Okay, and you would say they would still
21 be -- they would still all be required under option two
22 if we went for option two?

23 MR O'DONOGHUE: It may be that things take a different turn
24 in February, but for the moment, yes.

25 THE CHAIRMAN: But for the moment, yes.

1 MR O'DONOGHUE: But I think, sir, the rest of category 2 is
2 other aspects of UsedSoft. So we can certainly park
3 those for today.

4 THE CHAIRMAN: So your 2.6, the ones in pink?

5 MR O'DONOGHUE: Yes, 2.6 to 2.21.

6 MR SCHAEFER: Sorry, sir, we appear to be looking at
7 different documents. We're trying to sort that out.

8 (Pause)

9 THE CHAIRMAN: Are you there now?

10 MR SCHAEFER: Yes.

11 THE CHAIRMAN: So we looked at, in green, up to 2.5
12 inclusive, and Mr O'Donoghue, I think, was suggesting
13 that those -- at least for now, the assumption would be
14 that it's agreed disclosure and it would still be
15 relevant to the shortened trial. He was on 2.6 and the
16 bits in --

17 MR SCHAEFER: I should say that's not accepted, but I'll
18 come back to that.

19 THE CHAIRMAN: Not accepted, right, fine.

20 MR O'DONOGHUE: I thought it was agreed.

21 THE CHAIRMAN: Well, yes, but obviously things that are
22 agreed can potentially fall away if they're relating to
23 issues. But we may need to come back and discuss these
24 in more detail. 2.6, 2.7 and 2.8 to?

25 MR O'DONOGHUE: 2.20.

1 THE CHAIRMAN: You say they are not necessary?

2 MR O'DONOGHUE: Well, we can park them for now and see where
3 we are in February.

4 THE CHAIRMAN: Okay. Okay, 2.21?

5 MR O'DONOGHUE: That's essentially on the IP side as well,
6 so we can park that as well.

7 THE CHAIRMAN: You are saying you are parking material on
8 the IP side; I thought the IP was going to be in the
9 trial?

10 MR O'DONOGHUE: Well, sir, on the basis that, yes, if 2.1 to
11 2.6 are agreed, that gives us something meaningful. 2.7
12 to 2.20 are other facets of the intellectual property
13 side of things. I would suggest, on that second part,
14 we come back to that in February.

15 THE CHAIRMAN: Why are we coming back in February to that?

16 MR O'DONOGHUE: Well, we will understand more clearly at
17 that stage what exactly are the IP issues in these
18 proceedings, whether and to what extent there are
19 parallel issues in the High Court --

20 THE CHAIRMAN: We're not pushing stuff off on the off chance
21 there might be an application to stay. I know you've
22 mentioned that several times but, to be clear, that is
23 not part of our contemplation at the moment.

24 MR O'DONOGHUE: Well, sir, to be clear, we are fully armed
25 to deal with these categories today if necessary.

1 THE CHAIRMAN: Yes, that's the biggest threat you can
2 possibly make, of course!

3 MR O'DONOGHUE: I was being reserved, which to my credit,
4 wasn't where I started! We do think that 2.1 to 2.6 is
5 a good start.

6 THE CHAIRMAN: Right.

7 MR O'DONOGHUE: And if some of this was parked --

8 THE CHAIRMAN: Well, obviously, if you can reach agreement
9 on that, then fine. But at the moment the -- the shadow
10 of a stay is not relevant at the moment.

11 So when we get to 2.21, is that the same category?

12 MR O'DONOGHUE: Yes, yes.

13 THE CHAIRMAN: Okay. Then we've got 7.1.

14 MR O'DONOGHUE: Yes. Sir, a lot of these next categories
15 are going broadly to demand and supply. Now, we can go
16 through them in more detail, perhaps, but the reason
17 I took you to paragraph 11 of our document last night is
18 that we think, if we can get meaningful access to the
19 CRM and Verba, that we can park most of these categories
20 for now.

21 THE CHAIRMAN: Okay.

22 MR O'DONOGHUE: Because we apprehend, if we get the access
23 that we seek to these databases, which would be the
24 customer-facing side --

25 THE CHAIRMAN: That will short-circuit things, potentially?

1 MR O'DONOGHUE: -- we hope most of what we need is in there.
2 But there is an important issue about the restrictions
3 that VL wants to now put on access to these databases,
4 which I will need to come to. So one way through this,
5 sir, might be we start with the Verba and CRM
6 restrictions that they propose and depending where we
7 get to on that, it may be we can park quite a number of
8 these categories, at least for the purposes of today.

9 I think, sir, those supply and demand issues are the
10 bulk of the categories that remain in dispute.

11 THE CHAIRMAN: 12 would go ahead, you are saying, and 25?

12 MR O'DONOGHUE: 12 is agreed.

13 THE CHAIRMAN: Okay, that's helpful. Mr Schaefer, I'll give
14 you ample opportunity to discuss these categories in due
15 course. I just wanted to get an approximate -- just a
16 flavour for what we've got to hear, that's all. If
17 there's anything you need to add at this stage -- but
18 I'm not --

19 MR O'DONOGHUE: In terms of -- forgive me. In terms of some
20 good news, so for example if you look on page 30 and
21 38.1, that is an example of the quantum-related requests
22 that would fall by the wayside now, and likewise, 40.1
23 and 40.3. There is, as you know, sir, an RFI on quantum
24 which they've agreed to provide, but these are the
25 quantum-related requests which would fall by the

1 wayside.

2 THE CHAIRMAN: So we're going to rise and discuss between
3 ourselves where we think we are.

4 MR O'DONOGHUE: Sir, I wonder, before we do that, would it
5 be useful -- so Mr Grubeck is dealing with Microsoft's
6 disclosure. I wonder if it would be useful to have one
7 minute from him as to the contours of that and
8 Mr Schaefer has a full suite of things that he can go
9 away and think about.

10 MR GRUBECK: Sir, yes, the position on disclosure to be
11 provided by Microsoft is similar. There would, of
12 course, still be some disclosure, but it would be
13 significantly more limited with the split trial
14 proposal.

15 What we're putting forward for present purposes and
16 what you see in our note of last night is that we could
17 focus, in the relatively short time until the next CMC,
18 on two particular categories of search-based
19 disclosure: 12 and 25.

20 THE CHAIRMAN: Where do I find that? I'm not sure I have
21 those.

22 MR GRUBECK: So this is in the JDS document, "All other
23 issues", that deals with the Defendants' disclosure.
24 I can give you a bundle reference, but I think the
25 version in the bundle is almost unreadably small.

1 THE CHAIRMAN: Yes. So I have a large printed out one here
2 which is also unreadable.

3 MR GRUBECK: We have one here, if that would be useful. We
4 have multiple.

5 THE CHAIRMAN: If we could have three, then. (Handed)
6 Oh, this is much better, thank you.

7 MR GRUBECK: So we can, of course, come back to the other
8 categories but, for present purposes, the one that we
9 submit would be a useful exercise to pursue in the
10 interim are categories 12, documents including internal
11 correspondence, etc, evidencing Microsoft's
12 consideration of the reselling of pre-owned licences and
13 the prevention of such reselling.

14 THE CHAIRMAN: Yes.

15 MR GRUBECK: There would need to be some refinement to the
16 custodians and the databases, those are not agreed, but
17 that's a relatively contained point for present
18 purposes.

19 THE CHAIRMAN: Okay, yes, and then 25?

20 MR GRUBECK: And then the second one is 25, exactly. Which
21 is documents in various forms. But Defendants and/or
22 their partners to customers concerning reselling their
23 pre-owned licences. So you can see together these two
24 go to the very heart of the allegations and, again, some
25 refinement on limiting custodians and databases would be

1 required, but, broadly speaking, we're not a world
2 apart.

3 THE CHAIRMAN: Okay.

4 MR GRUBECK: And then in the light of that disclosure, at
5 the next CMC if there is a feeling that there's
6 something in particular that needs to be added, be that
7 custodians, databases or search terms, or indeed
8 categories, that could be done.

9 THE CHAIRMAN: Thank you very much.

10 MR SCHAEFER: Sir, I have a couple of high-level comments if
11 I may?

12 THE CHAIRMAN: Of course.

13 MR SCHAEFER: The first is just, as at a bird's eye level,
14 the proposals that we are seeing from Microsoft are
15 essentially that VL hand over the entirety of its
16 business records to Microsoft and Microsoft provide
17 disclosure in two very narrow categories.

18 The second is, if one actually looks --

19 THE CHAIRMAN: I mean that's not altogether -- it's not
20 necessarily surprising.

21 MR SCHAEFER: It may be surprising in a case where what
22 we're trying to deal with is liability and the effect on
23 a market. And what is crucial is Microsoft's conduct
24 here.

25 THE CHAIRMAN: Yes. Well, Microsoft's conduct is, to

1 a large extent, agreed. You want to see -- I mean,
2 we'll come back to this, but I mean, you want to see
3 what Microsoft's plotting and planning was, which is why
4 you want some emails and records and...

5 MR SCHAEFER: Sir, we had tried -- tried genuinely -- to
6 confine that in our proposal by focusing on the New From
7 SA Condition and then we would only have required
8 disclosure in respect of the New From SA Condition.
9 Now, what my learned friend is proposing, as far as
10 I can see in category 25, is to give disclosure in
11 respect of all of the other aspects of the so-called
12 conduct allegations which will inevitably be much more
13 diffuse.

14 THE CHAIRMAN: Whether they are in or not, yes, yes. Fine.
15 We'll come back to discuss -- I think we have to decide,
16 first of all, the Tribunal needs to decide where it is
17 on the scheduled trial.

18 MR O'DONOGHUE: Sir, I will develop this, but in their EDQ
19 they offer to hand over the two databases.

20 THE CHAIRMAN: Okay, well, we'll come back to all of this.

21 MR O'DONOGHUE: Yes, this is not new.

22 THE CHAIRMAN: So I imagine we'll need -- so if we sit again
23 at 11.30.

24 (11.16 am)

25 (Short break)

1 (11.30 am)

2 THE CHAIRMAN: Right. We'll direct that these proceedings
3 proceed on the basis of option two. Superficially
4 attractive though Mr Schaefer suggestions are as to
5 hearing these what are essentially preliminary issues,
6 we are concerned, first of all, that these things are
7 not always as simple in practice as they appear when one
8 opines on them; at this stage it's better to have a more
9 solid factual basis to any of the decisions we're going
10 to make. And we're also attracted to Mr O'Donoghue's
11 argument that it's more likely to be dispositive of the
12 proceedings if we have more issues determined at an
13 initial trial. So that's the basis on which we're going
14 to proceed.

15 We then need to go to disclosure. Obviously, we do
16 have time today to deal with disclosure matters and it
17 seems -- but we also will potentially have another CMC
18 to deal with others. We think it will be useful to rise
19 now and for you to put your heads together and identify,
20 by reference to the categories of -- obviously we've got
21 agreed disclosure categories and mostly we would expect
22 those to proceed, though you may have good reasons for
23 changing your view on that. Then identify any that need
24 to be determined today, and then any that can be put off
25 to -- or it's appropriate to put off to a CMC. As to

1 when that CMC is going to be scheduled, it's likely to
2 be early January, not February.

3 If you feel it's not productive to have an hour and
4 a half to discuss disclosure categories, please let us
5 know; it's just a suggestion.

6 MR SCHAEFER: Sir, we did have one proposal on disclosure --

7 THE CHAIRMAN: Yes.

8 MR SCHAEFER: -- in the event that that was your decision.

9 So, as I understand it, the core of what's being added
10 here is appreciable effect on the market.

11 THE CHAIRMAN: Yes. So option two, as described in
12 Mr O'Donoghue's skeleton.

13 MR SCHAEFER: Yes, so there are two real parts to that. One
14 is the extent of CAR Terms and so on, and that's
15 a different issue and that may require some debate on
16 disclosure. The other is appreciable effect on the
17 market, and adopting Mr Davies' indication earlier, that
18 is effectively a binary question with a low threshold
19 which could, on Mr O'Donoghue's proposal, be dealt with
20 by expert evidence. It seems to us, rather than trying
21 to finalise disclosure categories for that now, what
22 might be appropriate would be for the Tribunal to direct
23 that the parties' experts meet and agree what disclosure
24 is actually necessary.

25 THE CHAIRMAN: I'm not convinced it is a matter for the

1 parties' experts. I mean, these are mostly factual
2 inquiries and I don't think -- I mean, obviously expert
3 input may be relevant, but I'm not sure that --

4 MR SCHAEFER: Sir, if the proposal, for example, is that it
5 will need to be resolved by reference to all of VL's
6 business records, it's hard to see how that will be done
7 without some kind of...

8 THE CHAIRMAN: Yes, I said, that is a different matter. But
9 if you're trying to decide what data needs to be pulled
10 out of -- sorry, I'll take that back then. If you're
11 trying to determine the extent of the data that needs to
12 be removed from VL's databases, of course the experts
13 can meet to discuss that, yes, I understand. But there
14 are categories beyond that. So on those narrow
15 categories, plainly that needs to be expert-led,
16 I understand that. But then there are a whole load of
17 other categories which are not -- which one would not
18 envisage being expert-led.

19 MR GRUBECK: Sir, very quickly on this proposal, I just
20 thought I could nip that in the bud by quickly showing
21 you just a couple of examples that it is a factual
22 matter and that will help the Tribunal with considering
23 proportionality in due course as well, so it's not time
24 wasted. It shouldn't take more than five minutes.

25 THE CHAIRMAN: Yes, maybe, but first of all you're

1 suggesting just not dealing with disclosure at all
2 today? As I understand -- is that what you just said to
3 me, or not, sorry?

4 MR SCHAEFER: On appreciable effect, yes.

5 THE CHAIRMAN: On appreciable effect.

6 MR SCHAEFER: There remains the extent of the conduct, which
7 we had tried to carve out, but as I understand it the
8 Tribunal is not minded to do that.

9 THE CHAIRMAN: That's why I think you just need to put your
10 heads together and decide where the --

11 MR O'DONOGHUE: My strong impression is that Mr Schaefer is
12 not engaged in that much detail with their JDS, so
13 (inaudible).

14 THE CHAIRMAN: Yes, so I would like counsel sitting in
15 a room and just going through what can be dealt with
16 today. Certainly our preliminary view is the disclosure
17 that you've agreed to -- sorry, I've forgotten what the
18 acronyms are. Anyway, you know what I mean, that the
19 recordings and so forth can be produced. That can be
20 settled today, that can be dealt with today. And then
21 it may be that the agreed categories can proceed as was
22 envisaged and then it's a question of which additional
23 categories we need to deal with today that are in
24 dispute.

25 So is 2.00 convenient?

1 (11.36 am)

2 (The luncheon adjournment)

3 (2.02 pm)

4 THE CHAIRMAN: Right.

5 MR SCHAEFER: Good afternoon. Sir, the parties have
6 conferred, as you directed, and from ValueLicensing's
7 perspective, I say with some regret it would I think be
8 helpful to us to have some further guidance from the
9 Tribunal as to the scope of the trial it is seeking to
10 direct. I say that for one main reason, which is
11 disclosure. So, on disclosure, there are two
12 issues: what are the relevant categories of disclosure
13 for this trial one, and secondly, what further
14 disclosure or disclosure at all should be given in
15 respect of each category?

16 The second issue, I expect, can't be resolved today,
17 or certainly in full detail, and I expect there are
18 issues of -- I mean, potentially it can, but there are
19 issues of detail on custodians' databases and so forth.
20 But the issue of principle is, what are the relevant
21 categories?

22 My understanding from Microsoft is that, in their
23 view of the joint disclosure categories so far ordered,
24 all but one remain in play for the narrowed trial.
25 That, in our view, has obvious consequences for

1 timetabling, and we note that Microsoft's proposal is in
2 fact for a four-week trial in summer 2026, which is not
3 that much sooner than the full trial that was envisaged
4 as a six-week trial in Michaelmas 2026. So, on that
5 basis, and with some regret, we think it would probably
6 be helpful to have some further guidance from you on
7 what you are proposing or directing.

8 THE CHAIRMAN: Well, you need to be a bit more specific in
9 your questions.

10 MR SCHAEFER: So, for example, and importantly,
11 appreciability. Mr Davies had indicated that
12 appreciability could be a relatively confined question
13 dealt with as a sort of binary issue relatively quickly.
14 At the moment, all of the categories going to both
15 sides' conduct on the market in their entirety remain in
16 play, as a matter of principle, only subject to points
17 as to whether sufficient disclosure has already --

18 THE CHAIRMAN: Well, it's -- okay, so we were attracted to
19 Microsoft's proposals, option two, which they set out in
20 some detail in their skeleton. How you choose to prove
21 your case on supply and demand is entirely a matter for
22 you. We can't give you guidance on what will be
23 acceptable evidence.

24 MR SCHAEFER: That is a fair point. As the trial had
25 previously been envisaged, there was a single trial

1 comprising liability and quantum.

2 THE CHAIRMAN: Yes, yes.

3 MR SCHAEFER: And inevitably quantum would have wrapped
4 up --

5 THE CHAIRMAN: Yes, I understand that, I understand that.

6 So quantum goes off, yes. You have to show liability.

7 MR SCHAEFER: It may be that -- and one would need to give
8 this some further thought, it may be that liability
9 could be dealt with in a more confined way. Microsoft
10 doesn't think that any of the categories of disclosure
11 have gone away.

12 THE CHAIRMAN: Right.

13 MR SCHAEFER: What is not, in my submission, going to work
14 is it's not going to be possible to say, on this day the
15 market dropped off, because our case is not that there
16 was a huge market that was suddenly constrained; our
17 case is that the market was stifled as it developed.

18 THE CHAIRMAN: Indeed, and I -- there will be, no doubt,
19 analysis of your documents and there may be some
20 argument about what documents and what disclosure you
21 have to give. But one assumes that your case will be
22 based on your observations of what your business has
23 experienced when it comes to supply and demand. You're
24 looking a little uncertain as I say that.

25 MR SCHAEFER: And potentially expert evidence.

1 THE CHAIRMAN: And potentially expert evidence.

2 MR SCHAEFER: But working backwards, sir, I suppose the
3 point is, when did the Tribunal have in mind that this
4 trial would take place?

5 THE CHAIRMAN: We haven't discussed that yet. The question
6 is getting the disclosure right. In terms of -- I mean,
7 if the disclosure is enormously burdensome and it's
8 going to take you a long time to produce it, the trial
9 will be later rather than earlier. Microsoft mentioned
10 summer of 2026 and you don't have to listen to them,
11 it's not their -- it's not an order of the court, it was
12 just Mr O'Donoghue's suggestion.

13 We're conscious this case has been going for quite
14 a long time.

15 MR SCHAEFER: Indeed, sir.

16 THE CHAIRMAN: And if we're still arguing about disclosure,
17 progress seems to be -- I'm sure there may be very good
18 reasons for it, but progress seems to be slow. And by
19 getting rid of quantum -- well, not getting rid of it,
20 by having other matters proceed ahead of quantum and
21 dominance, it may be possible to speed things up.

22 But we don't start with the trial date and work back
23 from that. Let's start with what the issues are going
24 to be which I thought were reasonably clear, but they
25 may need clarifying, and then what disclosure would be

1 appropriate in the light of those issues.

2 MR SCHAEFER: Sir, as I understand it, this trial would
3 still, as envisaged, include a comprehensive
4 investigation of the extent of the conduct and --

5 THE CHAIRMAN: The extent of the conduct by Microsoft?

6 MR SCHAEFER: The extent of the conduct by Microsoft and, as
7 I understand it on Microsoft's case, in order to test
8 their proposition that effectively ValueLicensing would
9 have suffered no loss anyway because it wasn't very good
10 at selling licences or had no demand, very comprehensive
11 disclosure from ValueLicensing on all of that and
12 factual testing on all of that and it seems to us that
13 such a trial, while there may be some savings from
14 carving out dominance and market definition, would not
15 be very different, it wouldn't come on much sooner.

16 THE CHAIRMAN: Yes, but I mean Microsoft will have to
17 persuade us they need that disclosure and that's why we
18 have to discuss disclosure quantities.

19 MR SCHAEFER: Sir, there is disclosure on both sides. So at
20 the moment, Microsoft is resisting further disclosure in
21 any of the new categories and that's an issue based on
22 proportionality. As a matter of principle, Microsoft
23 accepts that all but one of the categories remain in
24 play. So narrowing down the issues hasn't changed that.

25 THE CHAIRMAN: Right, but this court hasn't made any orders

1 yet. You seem to be surrendering to everything
2 Microsoft says at the moment, with regard to trial
3 dates, disclosure categories and I'm quite interested in
4 your submissions on it, rather than Microsoft's.

5 MR SCHAEFER: Much of the disclosure is sought by us and was
6 ordered as a category in principle by the Tribunal and
7 is, as far as I understand, not disputed that it's still
8 in issue, but it's potentially very extensive. For
9 example, as I say, all of the disclosure that would go
10 to the extent of the CAR Terms and Microsoft's
11 communications with its customers, that is potentially
12 very extensive. Our only point is it's difficult to
13 understand what saving is actually being made.

14 THE CHAIRMAN: Right, well, that's a matter for you.
15 (Pause).

16 Why don't we start off with you just running
17 through -- not getting down to the detail, but the broad
18 heads of disclosure that you require as the case is
19 currently formulated before we get to the categories and
20 subcategories and -- just give me the headlines.

21 MR SCHAEFER: Sir, I wish I had a written list of high-level
22 categories, but effectively, as I say, the starting
23 point is the background to the conduct, so Microsoft's
24 consideration of the second-hand market, and --

25 THE CHAIRMAN: Microsoft's consideration of the second-hand

1 market?

2 MR SCHAEFER: Yes, I mean it may be easier to do this by
3 reference to the list.

4 THE CHAIRMAN: All right, okay, let's do it by reference to
5 the list. I had a marked-up list with lots of crosses
6 and...

7 MR SCHAEFER: It was directed at CMC2 and, as I say, it
8 seems to be Microsoft's position that one of these has
9 fallen away as a matter of principle. Only one.

10 THE CHAIRMAN: So which document am I meant to be looking
11 at? I have two.

12 MR SCHAEFER: It is the document headed -- I think there are
13 two versions of this document headed "Claimant's
14 proposals for the Defendants' disclosure on all issues
15 bar market definition and dominance".

16 THE CHAIRMAN: Yes.

17 MR SCHAEFER: So number 1 is agreed witness statements, so
18 I probably don't need to waste too much time on that.
19 Numbers 2-6 are said to be for VL's disclosure so they
20 don't apply.

21 THE CHAIRMAN: I can't hear you at the moment, we have too
22 much rustling of paper. Speak up a bit please.

23 MR SCHAEFER: Apologies. Numbers 2-6 are said to be for our
24 disclosure so they don't apply. Number 7, documents and
25 data --

1 THE CHAIRMAN: I still can't quite hear you. Number 2, just
2 slow down a little bit. So category number 2?

3 MR SCHAEFER: Categories 2 to 6 are not categories of full
4 disclosure from Microsoft so we don't need to worry
5 about those in terms of disclosure we would be seeking.

6 THE CHAIRMAN: So categories 2 to 6 we don't need to worry
7 about now?

8 MR SCHAEFER: Sir, yes.

9 THE CHAIRMAN: So I'm slightly confused, this is claimant's
10 proposals for Defendants' disclosure.

11 MR SCHAEFER: Sir, this is all of the issues going to
12 everything other than market definition and dominance.

13 THE CHAIRMAN: Right.

14 MR SCHAEFER: And these are the categories, predetermined
15 categories, and then the proposals are the specific
16 searches --

17 THE CHAIRMAN: For documents you're intending to obtain from
18 Microsoft?

19 MR SCHAEFER: Sir, yes.

20 THE CHAIRMAN: Right. And so when you said, "We don't need
21 to worry about categories 2 to 6," why don't we need to
22 worry about categories 2 to 6?

23 MR SCHAEFER: Because the categories were determined
24 generally and some of those categories don't apply to
25 Microsoft.

1 THE CHAIRMAN: So why are they in a document saying,
2 "Disclosure from the Defendants"?

3 MR SCHAEFER: They've been broken out, keeping the
4 categories in order, I suppose, for consistency.

5 THE CHAIRMAN: All right, okay, I'm not really following at
6 all but okay, I don't have to worry about 2 to 6, right,
7 okay.

8 MR SCHAEFER: 7, documents and data relating to the extent
9 and incidence of organisations in their relevant
10 territories purchasing pre-owned licences in place of or
11 in addition to new perpetual licences or subscriptions.

12 THE CHAIRMAN: Let me just read this a bit more carefully.

13 MR SCHAEFER: Sorry. (Pause)

14 THE CHAIRMAN: Right.

15 MR SCHAEFER: So this is agreed in principle as relevant by
16 Microsoft but Microsoft's position is it shouldn't have
17 to give any disclosure or any further disclosure in
18 respect of it. But it's agreed in principle as
19 a relevant category.

20 THE CHAIRMAN: So this is -- so this is purchasing. Why are
21 you getting that from Microsoft? You know who purchases
22 pre-owned licences.

23 MR SCHAEFER: Sir, one of the issues in the case is
24 Microsoft's consideration of the pre-owned market and
25 documents Microsoft has that go to that. Obviously,

1 Microsoft's customers may well have had conversations
2 with Microsoft about reselling pre-owned licences.
3 That's one of the contentions.

4 I don't wish to repeat myself ad nauseum but all of
5 these categories have already been directed as
6 disclosure categories.

7 THE CHAIRMAN: Right. But Microsoft doesn't want to give
8 them now?

9 MR SCHAEFER: Sir, yes, but --

10 THE CHAIRMAN: They were agreed previously as a disclosure
11 category?

12 MR SCHAEFER: It's a question of what further disclosure is
13 appropriate. Microsoft doesn't dispute that the
14 category is relevant to the --

15 THE CHAIRMAN: Right, and you say they've given some
16 disclosure already?

17 MR SCHAEFER: Yes, yes.

18 THE CHAIRMAN: So you need to make out a case as to why you
19 need more. Just explain to me, why do you need this
20 coming from Microsoft?

21 MR SCHAEFER: Sir, my intention at this point is simply to
22 show you all of the issues that remained in the --

23 THE CHAIRMAN: I appreciate that, but just so that I can
24 just keep a grip on what we're arguing about.

25 So as I understand, you know who's buying pre-owned

1 licences, because you're selling them to people.

2 MR SCHAEFER: We know who has bought pre-owned licences from
3 us.

4 THE CHAIRMAN: Yes.

5 MR SCHAEFER: But not what documents Microsoft has going
6 to -- going to its customers attempting to sell
7 pre-owned licences. One of our --

8 THE CHAIRMAN: Just slow down. You drop your voice just
9 when you get to the crucial submission!

10 MR SCHAEFER: Apologies. One of the issues in the case is
11 that we contend Microsoft -- the issue in the case is
12 that we contend Microsoft prevented its customers or
13 sought to prevent its customers from reselling these
14 licences.

15 THE CHAIRMAN: Yes, I understand that, yes. So why do you
16 need to know the incidence? You know the incidence of
17 purchasing of pre-owned licences.

18 MR SCHAEFER: We do not know the incidence of Microsoft
19 preventing customers from selling pre-owned licences
20 that, but for the conduct in issue, we would otherwise
21 have bought, or been able to buy, had an opportunity to
22 buy.

23 THE CHAIRMAN: Okay, that's not quite what the category says
24 here.

25 So what is it? So just -- okay, I have to say,

1 I don't -- you've had some documents in this category,
2 you say, or you say you haven't had any documents in
3 this category?

4 MR SCHAEFER: We haven't had searches for these documents.
5 We've had some known adverse documents and we've had
6 searches for communications with particular customers
7 but we haven't had primary disclosure on this category.

8 THE CHAIRMAN: Okay, all right, so you say you need these.
9 Right. Next?

10 MR SCHAEFER: The next category is agreed both as relevant
11 and as to the disclosure that will be given in respect
12 of it. The same is true of category 10.

13 THE CHAIRMAN: So there's no dispute on 8 and 10?

14 MR SCHAEFER: Correct.

15 MR GRUBECK: Sir, can I just clarify? When my learned
16 friend says it's agreed as to relevance, we agree that
17 in principle these kinds of documents might go to
18 pleaded issues. We don't agree that they necessarily
19 need them and we certainly don't agree that it's
20 proportionate to provide all of this.

21 THE CHAIRMAN: So why are they in green? You didn't put
22 them in green?

23 MR GRUBECK: The agreed simply refers to, if this is to be
24 provided, then the search parameters are agreed. So
25 that was on the basis of the full trial.

1 THE CHAIRMAN: Yes, I appreciate it's on the basis of the
2 full trial.

3 MR GRUBECK: But if we're trying to slim down disclosure --
4 we're happy to provide this for present purposes.
5 I just say this as a clarification now.

6 THE CHAIRMAN: Okay, so -- so I'm putting ticks by 8 and 10
7 at the moment.

8 MR GRUBECK: Very well.

9 THE CHAIRMAN: If we need to go back -- all right. Yes?

10 MR SCHAEFER: So this really goes to the heart of the issue,
11 to an extent. My understanding, and I will be corrected
12 if I'm wrong, is that Microsoft accepts that, as
13 a matter of principle, all of these categories bar one
14 of them, which is 11, remain relevant to the
15 slimmed-down liability trial.

16 THE CHAIRMAN: I thought these are documents you're seeking
17 from Microsoft?

18 MR SCHAEFER: Sir, the categories -- the categories have
19 been long debated --

20 THE CHAIRMAN: Yes, I know, but are these documents you're
21 seeking from Microsoft?

22 MR SCHAEFER: Yes.

23 THE CHAIRMAN: Right. Well, why is it Microsoft --

24 MR SCHAEFER: Microsoft accepts that they are relevant to
25 the issues in the slimmed-down trial.

1 THE CHAIRMAN: Right. Okay. So they're agreed? Subject to
2 tinkering?

3 MR SCHAEFER: Subject to disclosure actually being given in
4 respect of them, yes.

5 THE CHAIRMAN: So what is it -- so disclosure is not agreed?
6 Is it the issue that's agreed but not the disclosure?

7 MR SCHAEFER: That's effectively it, yes, sir.

8 THE CHAIRMAN: But there isn't an issue. Where you said
9 issue for disclosure, it doesn't actually say "issue",
10 it says "documents". Normally one expects, "Issue: did
11 Microsoft sell X, request for documents." You've got
12 "documents" in the first column, so it's a little bit
13 confusing. Are you identifying here an issue or a class
14 of documents?

15 MR SCHAEFER: My apologies, sir. These are the categories
16 as defined and ordered by you in the CMC2 order.

17 THE CHAIRMAN: Right, but -- okay. But they haven't been
18 given yet. Did we have argument on this on the CMC
19 order? I can't remember.

20 MR SCHAEFER: Yes, we went through every single one of these
21 and there were submissions as to whether or not --

22 THE CHAIRMAN: And they were all agreed, right.

23 MR SCHAEFER: They weren't all agreed but they were ordered.

24 THE CHAIRMAN: So all of these have been ordered so why are
25 we having a discussion about it today? Because

1 Microsoft don't want to give it yet, they say they've
2 given a whole bunch and it's disproportionate to provide
3 more?

4 MR SCHAEFER: Yes, the central point I was trying to make
5 was the trial that is now envisaged still contains all
6 of these.

7 THE CHAIRMAN: It might well do. My response to that is so
8 what?

9 MR SCHAEFER: So if you wish to hear submissions on which
10 ones Microsoft should now give disclosure in respect of,
11 I'm not sure what you have in mind --

12 THE CHAIRMAN: Let's keep -- so I have in front of me your
13 proposals for the Defendants' disclosure. So these are
14 proposals at the moment. But you're saying this has
15 already been ordered -- these are not proposals, these
16 have been ordered.

17 MR SCHAEFER: The categories on the left, this side, have
18 been ordered.

19 THE CHAIRMAN: Yes, right.

20 MR SCHAEFER: And it is common ground they are relevant for
21 the new trial, save for one.

22 THE CHAIRMAN: Right.

23 MR SCHAEFER: The proposals for searches, those are the
24 proposals, those have not been ordered and they are
25 agreed where the category is green.

1 THE CHAIRMAN: Right. Keep going then.

2 MR SCHAEFER: Category 12 I understand that my learned
3 friend had actually suggested Microsoft might be willing
4 to provide. It was one of the two you identified,
5 right? No.

6 THE CHAIRMAN: Sorry, I still can't hear you, if you could
7 please speak up.

8 MR SCHAEFER: I apologise. Category 12, as I understand it,
9 Microsoft is willing to provide some disclosure in
10 respect of. I think there may be issues as to detail.

11 THE CHAIRMAN: Right.

12 MR GRUBECK: Yes, we have on a --

13 THE CHAIRMAN: Just let me hear from Mr Schaefer. Keep
14 going.

15 MR SCHAEFER: Category 13 is effectively the same as
16 category 12. Category 14, which is quite important,
17 goes to Microsoft's internal communications concerning
18 the custom anti-resale terms. You will recall that the
19 existence of those terms is common ground but that the
20 extent of them is very much disputed. So this is
21 a question as to proving the scope of the conduct.

22 THE CHAIRMAN: And again, these are categories that have
23 already been ordered?

24 MR SCHAEFER: The categories have been ordered, the
25 disclosure has not, yes.

1 THE CHAIRMAN: The categories have been ordered but the
2 disclosure has not. Can you show me the order?

3 MR SCHAEFER: Yes. I should correct myself. In fact
4 disclosure was ordered, but what was ordered was that
5 the parties would agree the disclosure parameters and
6 then give it and that hasn't happened.

7 THE CHAIRMAN: So it's the search terms that are in issue?

8 MR SCHAEFER: Sir, yes.

9 THE CHAIRMAN: Disclosure has been ordered.

10 MR SCHAEFER: This is the CMC2 order --

11 THE CHAIRMAN: All right, now you've clarified, because it
12 made no sense to me when you said it. Right, now you've
13 clarified.

14 MR SCHAEFER: I apologise. Yes.

15 THE CHAIRMAN: So disclosure has been ordered of all the
16 categories on this piece of paper?

17 MR SCHAEFER: Yes.

18 THE CHAIRMAN: Right. And there are disputes as to the
19 scope of the search terms, as I understand it?

20 MR SCHAEFER: Sir, yes, that's right.

21 THE CHAIRMAN: Right. And then the next issue we have to
22 decide is, do any fall away due to the narrower trial?
23 So if quantum is taken away, do any of these fall away?

24 MR SCHAEFER: Yes, although, as I understand it, Microsoft's
25 position, at least, is that only one falls away.

1 THE CHAIRMAN: Right. But it's your request for disclosure,
2 so... These are documents that you're asking for and
3 you're saying Microsoft's position is they fall away.
4 It's up to you whether they fall away or not.

5 MR SCHAEFER: If everything that was in play in the original
6 trial, including the full scope of the conduct and an
7 extensive test by Microsoft of ValueLicensing's ability
8 to sell its licences, if that all remains in play, very
9 little has changed as far as disclosure goes.

10 THE CHAIRMAN: Right, but you have to decide what's in play
11 and you understand quantum is not in issue but have to
12 prove your case.

13 MR SCHAEFER: Sir, yes.

14 THE CHAIRMAN: We're not giving you a guide to how you prove
15 your case. You've heard our observations. You don't
16 have to prove the extent of abuse, but you do need to
17 have to prove abuse.

18 MR SCHAEFER: Sir, when you say we don't have to prove the
19 extent of abuse, that's very helpful, and it would be
20 helpful to clarify --

21 THE CHAIRMAN: Why we're not doing quantum. Yes, what's
22 your question?

23 MR SCHAEFER: One of the key disputes in the case is the
24 extent to which Microsoft entered into what we have
25 called custom anti-resale terms with particular

1 customers. It accepts it did it, it originally said
2 I think it did it three times, it now says it did it 14
3 times. Plainly one of the things we will seek
4 disclosure on or we are seeking disclosure on is how
5 many more customers it entered into those terms with.

6 THE CHAIRMAN: Fine, right.

7 MR SCHAEFER: And when you say we are not required to prove
8 the scope of abuse, can I clarify, does that mean we are
9 or are not looking at the extent of the custom
10 anti-resale terms?

11 THE CHAIRMAN: It is your case. You have to prove abuse.
12 You don't have to prove quantum at this stage, you have
13 to prove abuse and causation. If you're confident you
14 can show abuse on the basis of one customer, then do it
15 on one customer. If you think you need to know all the
16 customers, then you have to look at all the customers.
17 It's your case.

18 MR SCHAEFER: If all that has been carved out is quantum we
19 surely have to prove all the customers because we can't
20 come along at the quantum stage and --

21 THE CHAIRMAN: If that's your position, that is your
22 position.

23 MR SCHAEFER: In that case, yes, effectively all of these
24 categories remain in.

25 THE CHAIRMAN: You mean you still require all of this

1 disclosure?

2 MR SCHAEFER: Yes.

3 THE CHAIRMAN: Right, okay.

4 MR SCHAEFER: That is 15, sir. 16 is on exactly the same
5 point. It's the actual agreements containing these
6 custom anti-resale terms.

7 17 is data on how many customers were offered these
8 terms and how many agreed to them and what licences they
9 applied to. These all go to the same basic issue. As
10 does category 18.

11 THE CHAIRMAN: And you just said to me you had an idea of
12 how many customers it was?

13 MR SCHAEFER: No, we had no idea.

14 THE CHAIRMAN: Okay, no idea, right, fine.

15 MR SCHAEFER: Categories 19 to 21 I can skip over, as
16 I believe they are agreed both in principle and as to
17 the searches, or the method of disclosure.

18 Category 22 extends the question of the New From SA
19 Condition, so that is another, obviously, of the core
20 allegations that Microsoft entered into this condition,
21 that is agreed and admitted. This is effectively going
22 to the purpose of the condition and what Microsoft said
23 internally and to its partners about it.

24 THE CHAIRMAN: You say all these are agreed?

25 MR SCHAEFER: Relevance is agreed; searches are not agreed.

1 For the white ones, searches are not agreed.

2 THE CHAIRMAN: Yes, fine. Okay, so all these categories --

3 we can cut it short in the sense that all of these

4 categories are agreed?

5 MR SCHAEFER: Sir, yes.

6 THE CHAIRMAN: But the scope of the searches is not agreed?

7 MR SCHAEFER: Exactly, sir, and the only category, as

8 I understand it, that falls away on Microsoft's view is

9 number 11.

10 THE CHAIRMAN: You say Microsoft's view. These are

11 documents -- again, I keep -- I'm finding this

12 extraordinarily strange and confusing that you're saying

13 what Microsoft says falls away when these are documents

14 you're requesting.

15 MR SCHAEFER: Sir, I accept that, and looking at 11, it

16 appears to us to go to the motivation behind the

17 conduct, so we don't see category 11 falling away

18 either. So essentially everything in this table --

19 THE CHAIRMAN: So nothing has changed.

20 MR SCHAEFER: Yes.

21 THE CHAIRMAN: But you want all of these documents in order

22 to prove liability and causation?

23 MR SCHAEFER: Sir, yes.

24 THE CHAIRMAN: Right, fine. So now, in terms of what we

25 have to decide today, we have to decide - you're not

1 asking us to decide search terms today, as I understand
2 it?

3 MR SCHAEFER: Insofar as you're able to, it would enable us
4 to --

5 THE CHAIRMAN: Well, I don't have skeleton arguments on
6 that, do I?

7 MR SCHAEFER: There is a table appended to...

8 Realistically, looking at the extent of the dispute,
9 I do wonder whether you will be able to today.

10 THE CHAIRMAN: Right.

11 MR SCHAEFER: Perhaps I could take instructions. (Pause).

12 Excuse me, one second.

13 THE CHAIRMAN: I mean, when it comes to the scope of
14 disclosure, the skeletons are extremely light. I mean,
15 it's just a sort of couple of pages at the moment and
16 this seems to be like a very extensive disclosure
17 application and at the moment there isn't the evidence
18 or the development in the skeletons as to why and where
19 the dispute is.

20 MR SCHAEFER: Sir, that is fair, and as you will have
21 apprehended from our skeleton argument, what happened
22 was, six weeks before, we had sent Microsoft all of our
23 proposals for Microsoft's disclosure.

24 THE CHAIRMAN: You're talking search terms?

25 MR SCHAEFER: Search terms, and we did not get a response

1 from Microsoft until two days before and its position
2 was none of these are agreed. So there has been no
3 engagement on the detail.

4 THE CHAIRMAN: Well, you then say that you took account of
5 some of their comments?

6 MR SCHAEFER: Well, that's for -- no, that's true, yes, so
7 we cut out some of the custodians and we cut out some
8 search terms based on what they said.

9 THE CHAIRMAN: Yes, right. Okay, but there's a point of
10 principle that Microsoft says, well, the -- they provide
11 a lot of disclosure and it's a question of diminishing
12 returns as to whether you need any more.
13 Proportionality and so forth.

14 MR SCHAEFER: It does say that but, with respect, for
15 example, Microsoft hasn't actually carried out any
16 searches for the wording in the custom anti-resale terms
17 across any of its databases.

18 THE CHAIRMAN: Right.

19 MR SCHAEFER: So Microsoft does assert, firstly, that the
20 disclosure it has already provided is dispositive
21 against our case, secondly that we have no hope on
22 quantum anyway, and thirdly it's all disproportionate.
23 But those are assertions and plainly we wouldn't be
24 pursuing this case if we agreed with them.

25 THE CHAIRMAN: No, sure. But then these classes, I mean

1 they've been ordered, so you've got that in your favour.
2 But looking at it, looking at it as a collection of
3 documents, it does seem extremely broad disclosure for
4 what seem to be relatively circumscribed issues. But if
5 they've been agreed as categories, then there we are.

6 MR SCHAEFER: Sir, with respect, not all of the issues are
7 necessarily circumscribed if we're dealing with the
8 entirety of the conduct. That's effectively our point.
9 If we have to prove --

10 THE CHAIRMAN: Well, you say you need to deal with the
11 entirety of the conduct. The Tribunal is saying nothing
12 about it. Whether you have to show whether Microsoft
13 wrote to 78 customers, 178 or 1 million and 78, I have
14 no idea. Maybe you can make out your case very well on
15 six customers. You have to take a view on that, whether
16 you need to -- just to show liability to develop the
17 entire scope of the case. I mean, that's a matter for
18 you and we're not in a position to give you a guide.

19 MR SCHAEFER: Sir, as I understand it, it's not just to show
20 liability. If what the Tribunal is saying is that we
21 could establish liability and then come back and say,
22 having shown that this conduct was inherently
23 anticompetitive, can we now fully establish how far the
24 conduct went and therefore find out exactly how much the
25 market was affected, that would be a different issue.

1 But that is -- that's not, as I understand it, the trial
2 that you are directing.

3 THE CHAIRMAN: I'm not sure I quite understand you. I mean,
4 the trial we're envisaging is as set out in Microsoft's
5 skeleton that it provided this morning. That's the
6 trial we're -- and we've explained we don't see -- when
7 it's dealing with supply and demand, we're currently
8 sitting here and we don't see that that necessarily
9 calls for an enormously complex analysis of data by
10 economists. It may require some --

11 MR SCHAEFER: If Microsoft entered into custom anti-resale
12 terms with a handful of customers and did not engage in
13 the practice of tying discounts to requirements not to
14 resell otherwise before the New From SA Condition, then
15 we could try --

16 THE CHAIRMAN: Have you asked Microsoft how many customers
17 were tied to these conditions?

18 MR SCHAEFER: It says that it's aware of 14 and there aren't
19 any others.

20 THE CHAIRMAN: 14?

21 MR SCHAEFER: Yes.

22 THE CHAIRMAN: Right.

23 MR SCHAEFER: It originally was three.

24 THE CHAIRMAN: I thought you said 14 and then you said you
25 didn't know and I got confused.

1 MR SCHAEFER: We don't know -- we're not necessarily
2 assuming that what Microsoft says it's aware of is the
3 totality of the conduct.

4 THE CHAIRMAN: Right. I have to say, I find this --

5 MR SCHAEFER: I'm clearly struggling to explain.

6 THE CHAIRMAN: No, no, it's not that, it's just this case
7 has been going on for three years and it's almost as if
8 it started three months ago.

9 MR SCHAEFER: Sir, yes. That's effectively because the
10 parties have been failing to make progress on
11 disclosure. Plainly I'm going to blame Microsoft for
12 that, I'm sure Microsoft will turn round and say it's
13 not its fault.

14 THE CHAIRMAN: Right, okay.

15 MR SCHAEFER: But the fact that we had no responses to our
16 detailed disclosure proposals for six weeks and then
17 stonewalling is a perfect example of why we are still
18 here in this situation.

19 THE CHAIRMAN: Yes, but we're talking about more than six
20 weeks. Anyway, let me hear from Mr O'Donoghue just to
21 get the lay of land.

22 Mr O'Donoghue, it is being said by the Claimant
23 that the disclosure categories haven't changed, they
24 have been agreed. Sorry.

25 MR GRUBECK: In terms of what was actually ordered, can we

1 turn up the CMC2 order, at page 559 of the core bundle.

2 THE CHAIRMAN: CMC2. Sorry, which tab?

3 MR GRUBECK: It's tab 17.

4 THE CHAIRMAN: Yes, okay.

5 MR GRUBECK: Paragraph 1 of that.

6 THE CHAIRMAN: I don't remember a great deal of argument on
7 any of it, I have to say.

8 MR GRUBECK: No, quite. There was a degree of argument
9 about the shape of the categories, but I'll show you now
10 what was actually ordered in relation to that.

11 THE CHAIRMAN: Yes, okay.

12 MR GRUBECK: Paragraph 1, "Disclosure":

13 "The parties are to conduct disclosure searches in
14 accordance with the agreed or ordered searches pursuant
15 to paragraph 6 below for the documents within the
16 categories set out in the Joint Disclosure Schedules
17 annexed hereto and as updated in accordance with
18 paragraph 12 below."

19 If you then go down to paragraph 4:

20 "The parties shall seek to agree the orders that
21 they will invite the Tribunal to make relating to
22 disclosure in respect of each category of documents/data
23 in the Joint Disclosure Schedules ..."

24 And then paragraph 6:

25 "Insofar as agreement is reached, the parties will

1 promptly invite the Tribunal to make orders in the
2 agreed form. Insofar as agreement is not reached any
3 dispute will be determined by the Tribunal at a further
4 hearing [CMC3]."

5 So that's what was ordered at CMC2.

6 THE CHAIRMAN: So the categories weren't settled?

7 MR GRUBECK: No, the categories were set out, but what
8 wasn't ordered was disclosure in respect of each of
9 them. They were the framework for discussions between
10 the parties.

11 THE CHAIRMAN: "The parties are to conduct disclosure
12 searches in accordance with the agreed or ordered
13 searches pursuant to paragraph 6 below ..."

14 "Insofar as agreement is not reached any dispute
15 will be determined by the Tribunal at a further
16 hearing ..."

17 So where are the categories set out?

18 MR GRUBECK: So there is a version of the JDS that was
19 annexed to that order.

20 THE CHAIRMAN: Right, I see.

21 MR GRUBECK: And that was the framework for discussion. So
22 there then was discussion and if you go forward to
23 page 588 of the same bundle, which is tab 21, I believe,
24 the CMC3 order.

25 THE CHAIRMAN: Yes.

1 MR GRUBECK: Sorry, it's 586, actually. And you will see
2 that is a consent order, sir. So a certain level of
3 agreement was reached.

4 THE CHAIRMAN: Sorry, which paragraph are we looking at?

5 MR GRUBECK: Paragraph 1. You can see "Consent Order" in
6 the tramlines, the header, and then paragraph 1,
7 "Disclosure":

8 "The Defendants shall... provide to the Claimant
9 disclosure by way of List of Documents [etc] ... falling
10 within the categories set out in Annex A to this Order."

11 THE CHAIRMAN: Right.

12 MR GRUBECK: And it's annex A where the actual agreement in
13 respect of disclosure that was reached is recorded.

14 THE CHAIRMAN: Yes.

15 MR GRUBECK: And if you turn down to paragraph 7,
16 paragraph 7(a), we continue:

17 "The parties shall seek to agree the orders that
18 they will invite the Tribunal to make relating to
19 disclosure in respect of each category of documents/data
20 in the Joint Disclosure Schedules (as defined by the
21 CMC-2 Order)..."

22 And 7(b):

23 "Insofar as agreement is reached, the parties will
24 promptly invite the Tribunal to make orders in the
25 agreed form. Insofar as agreement is not reached any

1 dispute will be determined by the Tribunal at a further
2 hearing ..."

3 And this is the hearing we're now at.

4 THE CHAIRMAN: Right.

5 MR GRUBECK: So saying every one of these categories has
6 been agreed is a bit ambitious. What we actually say is
7 we've had a discussion in relation to some of these;
8 others, yes, the category was there as a framework for
9 discussion and we have, for various reasons, said no
10 further disclosure is necessary in respect of that,
11 either because we say it overlaps with another category
12 or because we say it has already been provided, we've
13 given you that information, it's properly covered in
14 what has been provided pursuant to CMC3.

15 THE CHAIRMAN: Right.

16 MR GRUBECK: So, with that backdrop, would you like me to
17 take you through where we are agreed?

18 THE CHAIRMAN: Just show me where you deal with this in your
19 skeleton, first of all.

20 MR GRUBECK: It's paragraph 43 of our skeleton where we talk
21 about the categories we have particular concern with.

22 THE CHAIRMAN: Right.

23 MR GRUBECK: So you'll see paragraph 42 goes through the
24 chronology of what has happened on disclosure and then
25 paragraph 43 deals with where we say categories should

1 properly be provided or not, and the parameters that are
2 still appropriate to provide.

3 THE CHAIRMAN: Okay.

4 Right, it's literally just one page to deal with
5 what seems to be a monster disclosure dispute. Is that
6 an unfair description?

7 MR GRUBECK: No, the monster disclosure dispute is entirely
8 appropriate, sir.

9 THE CHAIRMAN: But why is it only a single page in your
10 skeleton?

11 MR GRUBECK: Well, we have provided an annex to it --

12 THE CHAIRMAN: Okay.

13 MR GRUBECK: -- where we cover the issue of custodians and,
14 more pertinently, we've provided Henderson 10 prior to
15 the skeletons in order to try and crystallise this
16 disclosure dispute. So most of Henderson 10 deals with
17 that. I can take you through that if that would be
18 helpful.

19 THE CHAIRMAN: So what -- just cut to the chase. What order
20 are you asking for today?

21 MR GRUBECK: We're asking for an order that reflects what we
22 have proposed in our skeleton argument of this morning,
23 with the options, and we say in paragraph 11(a)(ii) of
24 that, that we propose to provide --

25 THE CHAIRMAN: Sorry, give me a second to get it.

1 MR GRUBECK: This is our note of this morning.

2 THE CHAIRMAN: Sorry, which page?

3 MR GRUBECK: Within the skeleton, internal page 6. (Pause).

4 THE CHAIRMAN: Right. So nothing?

5 MR GRUBECK: No, not nothing. It's category 12 and category
6 25 which we say are the ones that really subsume most of
7 the other categories on the basis of the parameters for
8 searches that we have put forward.

9 THE CHAIRMAN: But these categories have all been -- well,
10 you say they haven't been agreed?

11 MR GRUBECK: Well, they've been agreed as a framework in the
12 sense they've been ordered as a framework, but they
13 haven't been agreed as in we will provide disclosure
14 against each of these. The orders expressly say the
15 parties are to have discussions and invite the Tribunal
16 to order --

17 THE CHAIRMAN: So 12 is really you're plotting with regard
18 to -- sorry, excuse that prejudicial language, but just
19 for simplicity, you're plotting as to how you're going
20 to --

21 MR GRUBECK: Consideration regarding the resale of pre-owned
22 licences.

23 THE CHAIRMAN: Reselling of POLs. Then 25 is the other one?

24 MR GRUBECK: 25 is the other one, exactly.

25 THE CHAIRMAN: "Documents, including correspondence,

1 recordings of telephone discussions, memoranda, reports
2 and minutes of meetings evidencing instructions and/or
3 advice (including advice given orally) by the Defendants
4 and/or their Partners to customers concerning reselling
5 [rights]."

6 Okay. So those categories, it seems clearly there
7 should be disclosure of those and you say that can
8 proceed?

9 MR GRUBECK: Subject to our parameters, so we're agreeing --

10 THE CHAIRMAN: Subject to?

11 MR GRUBECK: Our list of custodians, our list of databases,
12 not the extended list.

13 THE CHAIRMAN: And what about the extent -- the point that
14 you say you only had 14 of these, 14 of what we're not
15 quite clear on, but you only had 14 of something?

16 MR GRUBECK: 14 customers with CAR Terms, yes, we've had
17 extensive investigations, those are detailed in
18 Mr Henderson's evidence, I can take you to it if that
19 would be helpful, but cutting to the chase, extensive
20 investigations over three years, those have resulted in
21 there are 14 customers who had CAR Terms and we have
22 already provided disclosure in respect of those
23 customers.

24 THE CHAIRMAN: Right, and what searching have you done for
25 this?

1 MR GRUBECK: Let me take you to Henderson 7, I believe it
2 is. It's core bundle F12, page 952. Sir, I'm just
3 going to check I didn't give you a duff reference there.

4 THE CHAIRMAN: This is Henderson 7. (Pause)

5 This was filed on 20 June, this one, is that the one
6 you're after?

7 MR GRUBECK: Yes. No, sorry, it is -- yes, sorry, it was
8 a duff reference. It's Henderson 3. There's too many
9 Henderson witness statements! Henderson 3, and that's
10 core bundle F3, page 776, and that provides details on
11 the investigations.

12 THE CHAIRMAN: Sorry, which paragraph again?

13 MR GRUBECK: Sir, it's core bundle, tab F3, page 776.

14 THE CHAIRMAN: Yes. Which paragraph do you want me to read?

15 MR GRUBECK: If you read paragraphs 3.1 onwards, you see
16 a very detailed account all the way through to 6.11
17 which describes what investigations have happened
18 already and the disclosure we've provided on the basis
19 of those.

20 The CAR Terms specifically are in paragraph 4 in
21 that section, but it's worth reading all of that.

22 (Pause).

23 THE CHAIRMAN: Yes, I've read this. It's on the -- yes.

24 So it's in yellow. I can't mention the name of that
25 organisation, that suborganisation.

1 MR GRUBECK: Sir, which paragraph is that?

2 THE CHAIRMAN: I have a lot of this marked up in yellow.

3 Does that mean it's confidential?

4 MR GRUBECK: Not as far as I'm aware. Let me just quickly

5 confirm that. No, it's not confidential, it means

6 something else.

7 THE CHAIRMAN: So you say this will only go on if

8 Microsoft's deal desk was involved?

9 MR GRUBECK: Yes.

10 THE CHAIRMAN: And you say:

11 "Only those on Microsoft's Deal Desk had sufficient

12 empowerment to agree the Custom Anti-Resale Terms ..."

13 And where does Mr Henderson get that information

14 from?

15 MR GRUBECK: So he explains in some detail who he has

16 spoken -- well, who has been spoken to and who has been

17 dealt with. So it's paragraph 3.2, you'll see --

18 THE CHAIRMAN: Sorry, 3.2?

19 MR GRUBECK: 3.2, page 776.

20 THE CHAIRMAN: Right, well, he doesn't say who he has spoken

21 to.

22 MR GRUBECK: There's further evidence on this in the first

23 witness statement of Mr Morgan, which is in the summary

24 judgment bundle. It's tab 3.

25 THE CHAIRMAN: Hold on, give me a second. You mean B3?

1 Mr Morgan, B3?

2 MR GRUBECK: Yes.

3 THE CHAIRMAN: Yes. Yes, which paragraph?

4 MR GRUBECK: Sorry, we're just trying to find that for you.

5 THE CHAIRMAN: Yes, of course, take your time.

6 MR GRUBECK: So paragraph 14 onwards. No, sorry, 6 to 13.

7 That explains the business desk and then paragraph 14

8 specifically explains --

9 THE CHAIRMAN: I'm trying to remind myself who Mr Morgan is.

10 He is commercial business desk director. Is that the

11 same as Microsoft deal desk? Is the business desk the

12 same as the Microsoft deal desk? It seems that it --

13 from that, yes, "previously known as the business desk,"

14 okay.

15 MR GRUBECK: Still referred to as the deal desk now, and

16 it's paragraph 16 is the one you're looking for, sir.

17 (Pause).

18 THE CHAIRMAN: So he says at that stage he has done three,

19 he has found three, yes?

20 MR GRUBECK: Yes. And that, if you look at the date of this

21 statement, was --

22 THE CHAIRMAN: 21.

23 MR GRUBECK: Exactly, and since then there has been --

24 THE CHAIRMAN: And he didn't claim that was everything but

25 you searched further. But what searches have been done

1 to identify the 14? That's through the -- sorry, we're
2 probably going around in circles but that's through --
3 we've got that picked up by Mr Henderson but he hasn't
4 really explained where he has got the information from.

5 MR GRUBECK: So if you go back to Henderson 3, he starts at
6 3.1, but perhaps if you then -- perhaps if we just go
7 through that. (Pause).

8 Sir, you'll see, starting at 3.2, senior members of
9 the relevant Microsoft teams, that's CMS, have discussed
10 this.

11 THE CHAIRMAN: I'm not saying this can't be fixed but just,
12 for present purposes, that's not a named hearsay source.
13 We don't know.

14 MR GRUBECK: So if you then read on, sir, if we're looking
15 specifically at the CAR Terms, 4.1:

16 "In view of the size of the Microsoft organisation
17 and the hundreds of thousands of contracts that have
18 been entered into ... adopted reasonable and
19 proportionate (yet still considerable) approach to these
20 investigations. For the reasons set out below, these
21 investigations focused on [the] Deal Desk ..."

22 Then 4.2:

23 "The role of Microsoft's Deal Desk ..." is explained
24 in Morgan 1.

25 So then he explains what Mr Morgan says.

1 THE CHAIRMAN: I've read through this. What are you trying
2 to point out at the moment?

3 MR GRUBECK: Sir, all I'm trying to say is that there have
4 been very extensive, three years' worth of detailed
5 investigations.

6 THE CHAIRMAN: Yes, but we don't know, because there isn't
7 sufficient detail in there, what those investigations
8 are, how you searched for -- within the deal desk. It
9 may be perfectly satisfactory, I'm not suggesting it
10 isn't, but we don't have the information at the moment.

11 MR GRUBECK: Well, if you want to, for example, look at the
12 inquiries in the UK, paragraphs 4.6 will tell you what
13 Mr Morgan...

14 THE CHAIRMAN: Yes.

15 MR GRUBECK: If you go to 4.8 it says:

16 "[His] enquiries were not limited by any start
17 date ... first step in identifying the potential use of
18 [CAR] Terms was to speak to Deal Managers in his team.
19 There are two ways in which Deal Managers work on
20 customer accounts."

21 It says he has the benefit of a relatively stable
22 and consistent team over recent years. So he was able
23 to speak to most of the relevant individuals.

24 4.11, you see that he went through the emails of the
25 top deals in the UK to look for CAR Terms. He

1 personally reviewed these materials in respect of 30-40
2 customers to supplement his discussions with his team.

3 THE CHAIRMAN: Sorry, I'm reading on now. Sorry, there's
4 a lot more information here, I see. So then we've got
5 the EU... (Pause).

6 Right. So there had been a certain amount of
7 investigation.

8 MR GRUBECK: And have you read, sir, also in relation to the
9 EU 4.13?

10 THE CHAIRMAN: Yes, that's what I'm reading, yes.

11 MR GRUBECK: All of this has cost a very considerable amount
12 of money. Now, that has been supplemented by the
13 disclosure that was ordered at CMC3.

14 Now, that is dealt --

15 THE CHAIRMAN: Right, before we get on to that, can I just
16 ask, what additional information -- in terms of trying
17 to identify other contracts, what additional searching
18 do you require?

19 MR SCHAEFER: Searches, sir. You asked Mr Grubeck what
20 searches had been carried out and you were taken to
21 a witness statement that shows you he went around and he
22 asked some colleagues and he looked at some things in
23 his emails and he looked at 30-40 emails and found --
24 sorry, 30-40 customers and found ten contracts. What
25 we're proposing is Microsoft search its databases of

1 contracts for keywords that we have been able --

2 THE CHAIRMAN: But if everything goes through the deal desk,

3 why is it necessary to search beyond the deal desk?

4 MR SCHAEFER: Sir, this is not a comprehensive search even

5 of the deal desk.

6 THE CHAIRMAN: Right, no, I understand that. You say more

7 searching needs to be done in the deal desk.

8 MR SCHAEFER: And the obvious place to search for contract

9 terms is Microsoft's databases of searches. But we are

10 also proposing custodian searches.

11 THE CHAIRMAN: Custodians are people in the deal desk?

12 MR SCHAEFER: Some of them are in the deal desk, yes.

13 THE CHAIRMAN: Right, some of them are. Why are we going

14 outside the deal desk for this?

15 MR SCHAEFER: Some of them, I understand, are shared. But

16 the fundamental point is that there have been no

17 searches.

18 THE CHAIRMAN: I understand you're saying that and you say

19 this is ad hoc, it's not systematic enough, yes,

20 I understand that.

21 MR SCHAEFER: We're proposing searches and Microsoft's

22 position is, it should not carry out any. That is where

23 we are.

24 THE CHAIRMAN: Well, Microsoft say look we've done quite

25 a bit of searching, there aren't many of these

1 contracts, we found 14, if we do comprehensive searching
2 we might find 15, 16, 17. How important is that to your
3 case?

4 MR SCHAEFER: That is the case.

5 THE CHAIRMAN: Right, but you're not disputing that all
6 these contracts go through the deal desk?

7 MR SCHAEFER: We have no ability to dispute or not dispute.
8 Apparently, no, we do dispute it, in fact.

9 THE CHAIRMAN: Right, well, if you have reason to believe...

10 MR SCHAEFER: Excuse me one second. (Pause).

11 Sir, my understanding is that the disclosure we've
12 seen so far suggests that some relevant communications
13 did not go through the deal desk. Again, if we had
14 had --

15 THE CHAIRMAN: But where is the evidence on this?

16 MR SCHAEFER: If we had had detailed responses to our
17 disclosure proposals, which we sent six weeks --

18 THE CHAIRMAN: We're looking at quite historic witness
19 statements here.

20 MR SCHAEFER: Yes, we made proposals to Microsoft, we found
21 out they were blanket opposing them two days before
22 skeletons were due.

23 THE CHAIRMAN: Right.

24 MR SCHAEFER: Until then, we knew nothing of what the
25 position was.

1 MR GRUBECK: Sir, can I just follow up? It's not quite
2 right to say there have been no searches. May I take
3 you back to the CMC3 order, please? That's back in the
4 core bundle at tab 21.

5 THE CHAIRMAN: Sorry, none of the bundles are properly
6 labelled. Okay, so things are going to be so much
7 easier -- so when you label the -- I know I said this at
8 the beginning, when you label the bundles, the first
9 thing is you need a big letter on, not this writing with
10 which an elderly gentleman like myself has enormous
11 trouble, but also inside, so when they are open I can
12 say, right, that's bundle A, rather than have to close
13 it and look around. This is elementary stuff, really.

14 Right, so I'm going back to?

15 MR GRUBECK: Back to the core bundle.

16 THE CHAIRMAN: Of which there are four versions. I think we
17 are volume 1 are we?

18 MR GRUBECK: Yes, and you are looking at tab 21, the order.

19 THE CHAIRMAN: C21, yes.

20 MR GRUBECK: C21, consent order, that was the order of the
21 third CMC. So paragraph 1, "Disclosure":

22 "The Defendants shall, by ... 3 May 2024 provide to
23 the Claimant disclosure by way of List ... categories
24 set out in Annex A to this Order."

25 If you now turn forward to page 591, you see the

1 categories. Category 1:

2 "Contemporaneous documents uncovered in the course
3 of the Defendants' investigations ..."

4 So that relates to what I've just shown you. And
5 those have all been provided, 260-odd known adverse
6 documents. They have already been given to VL.

7 THE CHAIRMAN: Right.

8 MR GRUBECK: That was not the only category.

9 THE CHAIRMAN: Okay.

10 MR GRUBECK: There were also searches. If you look at
11 paragraph 2 you see:

12 "All communications responsive to the search
13 parameters set out in Annex B and relevant, in respect
14 of each company set out in Annex B, to the following:

15 "... Transition from perpetual licences to
16 subscription licences;

17 "... Renewal ...

18 "... Transition to From SA ...

19 "... Renewal of From SA ...

20 "... Agreements or draft/agreements in which CAR
21 Terms were offered and/or agreed.

22 "... The Company's request to sell its perpetual
23 licences and/or enquiries as to the same."

24 Now if you turn forward to annex B, these are the
25 parameters of the searches. So, first, it identifies

1 various customers --

2 THE CHAIRMAN: It was limited to certain customers, yes.

3 MR GRUBECK: Sorry?

4 THE CHAIRMAN: It was limited to certain customers.

5 I understand why this is considered provisional

6 disclosure as opposed to extensive disclosure.

7 MR GRUBECK: Exactly, and it was limited to search terms.

8 If you scroll down, "Search parameters":

9 "The mailboxes of the individuals identified

10 pursuant to paragraph 2 of the Order."

11 So that's back up in the order.

12 THE CHAIRMAN: But I think -- I think, sorry -- I hesitate

13 to suggest I know anything about what's going on, but as

14 I understand it, the Claimant now requires this to be

15 extended to all customers, or at least a much larger

16 proportion of customers, to get a feel for the --

17 MR GRUBECK: Well, sir, as you pointed out, it's a question

18 of what is sensibly justified on the basis of the

19 evidence.

20 THE CHAIRMAN: So the databases that were searched for this

21 were?

22 MR GRUBECK: So they're different databases.

23 THE CHAIRMAN: I do recall different databases. So why is

24 it -- these are potentially -- at least some of these

25 seem to be quite important categories. What's the

1 problem with broadening out the searches? It's going to
2 reveal too many documents, is it?

3 MR GRUBECK: In a nutshell, sir. So to give you an
4 example --

5 THE CHAIRMAN: You may need to take me to the most recent
6 Henderson witness statement.

7 MR GRUBECK: Yes, I will take you to the most recent
8 Henderson, that's a good place.

9 THE CHAIRMAN: If you remind me where it is.

10 MR GRUBECK: It is core bundle, tab I for India, number one.

11 THE CHAIRMAN: Sorry?

12 MR GRUBECK: Tab I1 and let's start at page 2846. It's the
13 insert, so it will be towards the end. Actually, we can
14 conveniently start, perhaps, the page before, at 2845,
15 because that picks it up exactly from the point I've
16 just taken you to.

17 THE CHAIRMAN: I'm not sure I have that. I'll have to bring
18 it up on the screen.

19 MR GRUBECK: I have a spare bundle here if that would be
20 useful?

21 THE CHAIRMAN: That would be great, yes, thanks.

22 MR GRUBECK: I'm just checking it's not marked up. Yes,
23 sorry. (Handed).

24 Sorry, I'm afraid I only have one here at the
25 moment.

1 THE CHAIRMAN: Right.

2 MR GRUBECK: So let's pick it up -- it's in tab 1 of this
3 bundle, page 2845, paragraph 19.

4 THE CHAIRMAN: Yes. Just show me the bit that says how much
5 work is involved in doing the other...

6 MR GRUBECK: Well, there is a distillation, in a nutshell,
7 which I can take you to.

8 THE CHAIRMAN: So you've got 22,000 documents.

9 MR GRUBECK: Yes, quite.

10 THE CHAIRMAN: And it was quite a rich initial search
11 because it 10,000 were then provided in disclosure.

12 MR GRUBECK: Yes, and the cost of this, you see
13 paragraph 17, 2844, that's the cost in a nutshell.

14 THE CHAIRMAN: Yes.

15 MR GRUBECK: So this is £600,000. This is just relating to
16 the search-based disclosure. So if you go up a bit,
17 paragraph 15, you'll see that the disclosure efforts to
18 date, including known adverse documents and policy
19 disclosure, are actually more £1.2 million.

20 THE CHAIRMAN: Yes.

21 MR GRUBECK: So there has been very extensive disclosure and
22 what we're saying is, if there are specific categories,
23 specific parameters, where further disclosure is needed
24 then, yes, we can't stop VL from applying for that, but
25 it needs to be justified. It needs to be justified by

1 reference to what has happened and it needs to be
2 justified by reference to proportionality.

3 On proportionality, I would just like to make three
4 very quick points. The first of those is that VL
5 itself --

6 THE CHAIRMAN: Sorry, I don't mean to interrupt you, but
7 just so I can get things straight in my head. So the
8 relevance of this is so that we know the extent -- we're
9 just dealing with the extent of these contracts, and at
10 the moment we've -- or these agreements, and at the
11 moment we've looked at 20 customers. That doesn't tell
12 us anything about the frequency.

13 MR GRUBECK: Sir, so, at the moment we have done several
14 different things. We have done the investigation which
15 was not specific to customers, you've seen the evidence
16 on that.

17 THE CHAIRMAN: Yes.

18 MR GRUBECK: This was the whole of the deal desk and the
19 point is --

20 THE CHAIRMAN: And the 14 -- the 14 contracts you
21 identified, how many of those were within the 20?

22 MR GRUBECK: I can check that. (Pause).

23 Three out of the 20 were CAR customers. The
24 parameters for the searches were chosen by VL. So they
25 picked the customers, they picked the custodians in

1 essence, by title, and they picked the search terms
2 subject to some limited negotiation, presumably on the
3 basis that those were the ones they had the strongest
4 indication there was an issue, the ones where they had
5 a lead, and it didn't go to anything. So it wasn't
6 a random selection: it was VL's best foot forward.

7 THE CHAIRMAN: And if this is extended, what sort of -- how
8 large is the scope of disclosure going to -- what's it
9 going to cost to search more generally? Do I have
10 a figure for that?

11 MR GRUBECK: Well, sir, it depends to which extent it is
12 extended. If all of these categories are ordered on our
13 parameters, I emphasise, not on VL's parameters, we're
14 talking about just under half a million documents,
15 470,000, just the search-based disclosure.

16 THE CHAIRMAN: So half a million documents?

17 MR GRUBECK: That is just the search-based --

18 THE CHAIRMAN: And that is in evidence? I'll take your word
19 for it, don't worry about showing me at the moment. So
20 half a million?

21 MR GRUBECK: 470,000. So the half a million is my --

22 THE CHAIRMAN: And then half of those -- is there any reason
23 to believe it'll be less than half? If half ended up
24 getting disclosed last time, 10,000 out of 22, no reason
25 to believe it will be materially different this time?

1 MR GRUBECK: Sir, I don't know.

2 THE CHAIRMAN: You don't know.

3 MR GRUBECK: I can't sensibly ... (Pause)

4 Paragraph 73 of Henderson 10, sir, you should still
5 have it open. Sorry, sir, it's paragraph 40(c) and it's
6 on page 2851.

7 THE CHAIRMAN: I've got it, yes.

8 MR GRUBECK: So given that 20,000-odd documents have cost
9 600,000, it is apparent that is a disclosure exercise in
10 the region of millions and millions.

11 THE CHAIRMAN: Well, you never know, there may be economies
12 of scale.

13 MR GRUBECK: There may be some economies of scale, no doubt,
14 but ultimately somebody still needs to turn these
15 470,000 pages and review them for relevance.

16 Can I give you just two benchmarks in terms of --

17 THE CHAIRMAN: So this is for all the categories sought, as
18 I understand it?

19 MR GRUBECK: No, this is only for the search-based

20 categories. If you look at the disclosure schedule,
21 some of them are dealt with by witness statements.

22 These are only the ones in respect -- sir, you can see
23 that, for example, if you look at issue 7 and issue 8.

24 Issue 7, you can see the various search parameters
25 against whom these searches are to be run.

1 Issue 8, you can see witness evidence with
2 supporting disclosure as appropriate, with relevant
3 documents to be exhibited. So the 470,000 figure is
4 only the nine subcategories of the JDS that are based on
5 custodian-based searches.

6 THE CHAIRMAN: Sorry, it's my fault, not yours. Just say
7 that again?

8 MR GRUBECK: So, sir, if you look at category 7 of the JDS.

9 THE CHAIRMAN: Yes.

10 MR GRUBECK: You'll see that there are various custodians
11 proposed in the third column across and then there are
12 various databases proposed, and then a period and then
13 search terms.

14 THE CHAIRMAN: Yes.

15 MR GRUBECK: Now, with one significant caveat that I'll come
16 to in a minute, if you run searches on that basis, in
17 respect of the nine categories of the JDS that propose
18 these kinds of searches --

19 THE CHAIRMAN: Sorry, the nine categories?

20 MR GRUBECK: Categories, the nine issues in the JDS.

21 THE CHAIRMAN: That we looked at in the order? In the annex
22 to your --

23 MR GRUBECK: No, no, in the JDS now, in the joint disclosure
24 schedule.

25 THE CHAIRMAN: If you just show me where the nine categories

1 are.

2 MR GRUBECK: Yes, certainly. It's category 7.

3 THE CHAIRMAN: I see, right, in that sense, okay. We were

4 looking at 7, so -- so which category?

5 MR GRUBECK: 7, 12, 13, 14, 15, 16, 17, 18, 22, 25, 27.

6 THE CHAIRMAN: Right.

7 MR GRUBECK: Sir, there's a really important caveat to this

8 that I need to give you. This is if we do the searches

9 on the basis of our proposed parameters. What VL wants

10 to do is, they want to add a whole host of other

11 databases to that.

12 THE CHAIRMAN: Which databases are you searching?

13 MR GRUBECK: So we -- and this, too, we can take from

14 Henderson.

15 THE CHAIRMAN: Well, just tell me for now. I've got so many

16 documents open.

17 MR GRUBECK: We're proposing -- I'm just going to give you

18 the --

19 THE CHAIRMAN: Yes, yes, just tell me.

20 MR GRUBECK: We're proposing to search eAgreements, which

21 stores electronically signed agreements; PaperVision,

22 which stores wet ink agreements; and Microsoft Sales,

23 MS Sales.

24 MR SCHAEFER: Sorry, it would be helpful if my learned

25 friend could direct us to where that proposal is,

1 because we're not sure.

2 THE CHAIRMAN: Let's not worry about that because none of
3 this is going to be resolved at the moment, clearly.

4 MR GRUBECK: Yes, so for my learned friend's record, it's
5 Henderson 5, core bundle F10, 906. Paragraph 4.31,
6 Microsoft uses "a vast number of systems", and 4.32 to
7 4.33 reiterates Microsoft is prepared to search three
8 databases, eAgreements, PaperVision, and MS Sales, and
9 then what it does, quite helpfully, is it goes through
10 the technical issues in relation to the other databases
11 that VL seeks.

12 Now, this is Henderson 5, not Henderson 10. VL have
13 been aware of this for a long time.

14 MR SCHAEFER: Yes, and there were no, as far as we saw there
15 were no proposals to search any databases --

16 THE CHAIRMAN: Sorry, it's not a debate between yourselves.

17 MR SCHAEFER: I'm sorry, sir.

18 MR GRUBECK: So back to the databases, sir.

19 THE CHAIRMAN: Let's just -- okay, so I'm just trying to
20 understand the scope of the dispute. I mean, none of
21 this has been dealt with in the skeleton arguments by
22 either side. It's just --

23 MR GRUBECK: Sir, at the end of Henderson --

24 THE CHAIRMAN: -- enormously -- well, sticking it at the end
25 of a witness statement is one thing, but there's an

1 awful lot -- as I reminded you I did have nearly
2 3,000 pages from you in relation to this CMC and this
3 has not been properly set out in a skeleton argument by
4 either side.

5 I get the gist that you say sufficient disclosure
6 has been -- or before the hearing I had understood that
7 you said that sufficient disclosure had been produced
8 and it was very expensive to produce as much as the
9 Claimant requires, and then there were lots of
10 illegible schedules in the bundles which were illegible
11 both electronically and in paper form which we were not
12 in a position to read. This is highly unsatisfactory on
13 both sides.

14 MR GRUBECK: We are ultimately responding to the disclosure
15 VL is requesting.

16 THE CHAIRMAN: Don't try and get out of it that way!

17 Right, how are we going to take this forward
18 practically?

19 MR GRUBECK: Sir, we have made a practical proposal.

20 THE CHAIRMAN: Yes, I'm not going to make an order on the
21 hoof today on the basis of insufficient understanding.

22 I don't think the Claimant has given sufficient
23 careful thought to what they need to prepare for trial,
24 in the light -- when quantum is not in the proceedings.
25 I'm not sure why the extent of these agreements is going

1 to be important, and I think you need to give that
2 careful thought. And we need to have a proper
3 reconstituted disclosure application once that has been
4 done. Obviously the more documents you ask for, the
5 stronger the Defendants' case that it's
6 disproportionate, so you're going to have to keep that
7 in mind.

8 MR SCHAEFER: Sir, yes.

9 THE CHAIRMAN: So I think we need to deal with this in
10 proper evidence, with skeleton arguments, and we're
11 going to have to have another hearing. But it needs to
12 be properly organised this time. I mean, this is just
13 not adequate.

14 MR SCHAEFER: Sir, I know that you have my submission that
15 we made proposals six weeks before.

16 THE CHAIRMAN: But it still doesn't explain why it's not
17 properly dealt with in the skeletons.

18 MR SCHAEFER: Because we didn't know what was in issue until
19 two days before.

20 THE CHAIRMAN: Anyway, okay.

21 MR GRUBECK: My Lord, I've just showed you Henderson 5 which
22 was months before.

23 THE CHAIRMAN: You're blaming each other.

24 So when is this going to be heard and how long is it
25 going to take?

1 MR GRUBECK: Sir, it depends on the scope of the application
2 we're responding to.

3 MR SCHAEFER: Sir, my learned friend is quite right, it
4 depends on the scope and it depends on the engagement.
5 If there is one request that I could make, you will have
6 seen in our skeleton argument there is a large point
7 taken on the searchability of databases. You will have
8 seen in our skeleton argument that there was a great
9 deal of engagement and correspondence on databases
10 leading to a meeting between experts which led to us
11 writing a letter back in August asking about technical
12 abilities to search, to which we never got a response.
13 It would be very helpful if Microsoft could be directed
14 properly to engage with those discussions so that we can
15 be helpful to the Tribunal.

16 THE CHAIRMAN: Well, obviously I expect the parties to
17 engage, both parties to engage, in the next few weeks
18 and I think we clearly need to understand why you need
19 disclosure documents and I appreciate that's not your
20 fault, because things have moved a little bit, but you
21 can take the view that the shape of the case hasn't
22 changed at all as far as disclosure is concerned. But
23 I'm not entirely persuaded that, on reflection, that
24 will be your view. But ultimately it's a question of
25 how you want to prove the case and obviously the more

1 circumscribed disclosure is, the quicker we can get on
2 and hear this action.

3 It's clearly highly unsatisfactory that such a long
4 witness statement, Mr Henderson, whatever number it is,
5 should have been produced so shortly before trial, that
6 is clearly highly unsatisfactory, but you both could
7 have set this out and described this application,
8 I think, in more detail.

9 I think this is potentially up to a day to deal with
10 disclosure, I don't think it's going to be proportionate
11 to deal with it, it needs proper evidence and skeleton
12 arguments and the parties should be much closer to areas
13 of agreement than they have been today.

14 So I'm going to direct that the solicitors meet, or
15 the counsel meet, the legal teams meet to discuss
16 disclosure categories.

17 MR GRUBECK: Sir, can I just make three further points on
18 this? It may help with shaping these discussions.

19 The first is just to quickly answer the point about
20 the engagement. I can deal with that by just showing
21 you two documents. This is fundamentally a question of
22 volume.

23 If I may take you first to a letter --

24 THE CHAIRMAN: Can you tell me what the point is, before you
25 take me to documents?

1 MR GRUBECK: The point is VL says we're struggling to
2 disclose our CRM, it's 25,000 documents, and that,
3 I quote, is, "too large a population on which to run
4 keyword searches ..."

5 THE CHAIRMAN: Yes, I've seen that in your skeleton, that is
6 one of the few things mentioned in your skeleton, yes.

7 MR GRUBECK: But if I now look at what -- and Henderson 10
8 isn't for the most part --

9 THE CHAIRMAN: I don't want to get involved in this at the
10 moment because you're just trying to point score again.

11 MR GRUBECK: No, so the point I make is we're talking
12 about --

13 THE CHAIRMAN: You said this was going to narrow the issues.

14 MR GRUBECK: Yes. Databases that hold 2.2 million documents
15 are a different sphere of difficulty in searching.

16 THE CHAIRMAN: Well, I --

17 MR GRUBECK: So there needs to be some realism on the side
18 of the claimant.

19 THE CHAIRMAN: Anyway.

20 MR SCHAEFER: We are also up against the largest software
21 company in the world. I'm going to stop trading points.

22 THE CHAIRMAN: I know, I read that in your skeleton as well.
23 Unfortunately what I didn't read about is why you need
24 the various categories of documents.

25 So I suggest we have a day in early January. We'll

1 need to reserve an hour for directions through to trial,
2 but the rest of it will be dealing with disclosure
3 categories. For that hearing, we'll need, I think,
4 a bit more detail about what issues you say are going to
5 arise on the application -- on the trial. So you say
6 you have to prove everything and maybe you do, but
7 I think you need to address your mind to whether that's
8 necessary or not.

9 So shall we have some directions for evidence on
10 that so we don't get in this position that we did last
11 time? I think the Claimant should go first and explain
12 what they see the issues are for trial, the subissues
13 for trial, and what documents they need in relation to
14 those issues. Where do we have the issues set out
15 previously? Those should be -- where are the issues in
16 the documents currently?

17 MR SCHAEFER: Sorry, sir, you mean the issues in the trial?

18 THE CHAIRMAN: Yes. So disclosure is normally given as
19 against issues in dispute. Where are the issues in
20 dispute set out at the moment?

21 MR SCHAEFER: The original versions of these disclosure
22 category documents --

23 THE CHAIRMAN: The ones I couldn't read. Could you show me
24 where?

25 MR SCHAEFER: I'm told they're not -- astonishingly not in

1 these large bundles.

2 THE CHAIRMAN: Okay. So we need to start with the issues,
3 and --

4 MR GRUBECK: Sir, there's a list of issues in annex 1 to the
5 document we provided you with this morning. That might
6 be a useful starting point, because that is specific to
7 the option that has now been ordered.

8 THE CHAIRMAN: Yes, but it doesn't -- it doesn't deal with
9 things like, how many contracts did you enter into?

10 MR GRUBECK: No.

11 THE CHAIRMAN: No, so if that needs to be determined, how
12 many contracts you entered into under certain terms,
13 that's why we need a -- you know, and therefore there
14 needs to be disclosure of that, then we consider which
15 databases and so forth. That's really how to -- so it's
16 a level of detail below that. So no disclosure should
17 be ordered unless it's clear what the issue it is going
18 to is and whether it's necessary and proportionate in
19 the light of that issue, and that's what I don't feel
20 I've really got sight of at the moment.

21 So I think that should be -- you should go first on
22 that, the Claimant should go first on that, and
23 presumably that can be done in the next two weeks? And
24 if the defendants respond seven days thereafter.

25 MR GRUBECK: May we also have two weeks, sir?

1 THE CHAIRMAN: Well, you have two weeks to start thinking
2 about it now. Why do you need four weeks to think about
3 it?

4 MR GRUBECK: Well, it depends what we get. If we have at
5 the moment what we have, it's very broad. It will --

6 THE CHAIRMAN: You should already have done -- you say
7 there's a list of issues already up and running, it's
8 just a question of crossing a few out.

9 MR GRUBECK: I'm just trying to build in some scope for what
10 we may get.

11 THE CHAIRMAN: No, you're going to have seven days to
12 respond to the list of issues.

13 Then when are we going to have -- because dates
14 are -- we're getting close to Christmas, aren't we? Let
15 me see if I can find a calendar here somewhere. (Pause)

16 Sorry, this doesn't work, does anyone have
17 a calendar anywhere? (Handed).

18 Thanks. This is just showing me one single day.
19 Can you get it on the screen so I can see it properly?

20 Thanks.

21 MR GRUBECK: Sir, two weeks from today takes us to --

22 THE CHAIRMAN: Sorry, I just need to -- we'll get there
23 eventually, I'm sorry. But thank you very much.

24 Right, so two weeks today takes us to the -- so if
25 we say a list of issues to you by 4 December; you're

1 going to respond seven days thereafter, so you will
2 respond by close of business on 10 December; evidence in
3 support of disclosure by 16 December; and evidence in
4 answer -- you say most of the evidence is already
5 there -- by 23 December; then we'll give further
6 directions thereafter for the hearing. We'll do that by
7 letter and when skeletons are coming in and so forth.

8 MR GRUBECK: Sir, you said seven days. That would mean the
9 response to the list of issues would be 11 December,
10 right?

11 THE CHAIRMAN: Close of business on the 10th, I said.

12 MR GRUBECK: But that's not seven days.

13 THE CHAIRMAN: Oh, all right. 11th then, sorry. Then
14 obviously for skeletons we can work back from the date
15 of the hearing for that sort of thing.

16 MR O'DONOGHUE: May I inject some optimism out of the
17 quagmire?

18 THE CHAIRMAN: Please do!

19 MR O'DONOGHUE: So the poor relation this afternoon, of
20 course, has been VL's disclosure. Now, on that, sir,
21 we've had very helpful discussions with my learned
22 friends and I'm optimistic that the couple of issues
23 that remain can be ironed out in the interim.

24 THE CHAIRMAN: Okay.

25 MR O'DONOGHUE: If in the, hopefully unlikely, event we have

1 to come back, I don't see that taking more than, at this
2 stage, half an hour.

3 THE CHAIRMAN: Yes, okay, that's great.

4 MR O'DONOGHUE: And we have provisionally suggested there
5 should be an inter-lawyer meeting, because candidly,
6 we've made more progress in a short period of time today
7 following your directions, sir, than we had in many,
8 many weeks.

9 THE CHAIRMAN: Yes, and so then the lawyers were going to
10 meeting, weren't they?

11 MR O'DONOGHUE: Yes.

12 THE CHAIRMAN: That's once the -- that can happen,
13 presumably, once the list of issues have been exchanged?

14 MR O'DONOGHUE: Yes, yes. So, on VL's disclosure, there's
15 a particular issue on two databases, which has narrowed
16 to a privilege point.

17 THE CHAIRMAN: No, I'm sorry, I'm going -- sorry, we're
18 jumping around. So going back to the -- once you've got
19 the claimant's list of issues, which you're going to
20 have on, whatever it was, the 6th or something, after
21 that I think a meeting can take place to start
22 discussing this disclosure, it doesn't need to wait for
23 your response to do that?

24 MR O'DONOGHUE: Yes, yes. What I'm suggesting, on VL's
25 disclosure, is to the extent we need to we would track

1 the directions --

2 THE CHAIRMAN: Yes, fine, that's very helpful, yes.

3 MR O'DONOGHUE: So there was a discrete point on known
4 adverse documents which I'm content to pick up with you
5 here (inaudible).

6 THE CHAIRMAN: Right, right.

7 MR O'DONOGHUE: We've had a difficult few days.

8 THE CHAIRMAN: And the major thing is how to -- whether this
9 disclosure gets extended beyond the 20 companies we have
10 at the moment in the list and, if it does get extended,
11 how far, whether you need another 20 -- and that's CAR.
12 Where are we on the other terms?

13 MR SCHAEFER: Sir, there's only really -- as far as
14 contractual terms are concerned, there's the CAR Terms
15 which we have been discussing, the New From SA Condition
16 which is agreed. The other main allegation --

17 THE CHAIRMAN: But the extent of the New From SA Condition?

18 MR SCHAEFER: The extent to which, prior to that becoming
19 a term, Microsoft was in practice imposing the same
20 requirement, which is not a question of looking for
21 contracts, but it is a question of disclosure. Sorry.
22 (Pause).

23 Yes, so in case it's not clear, and I certainly
24 haven't sought to explain it, so it's probably not, From
25 SA was a standard discount offered by Microsoft on

1 a global basis. New From SA Condition applied globally.
2 So, for that, we know quite a lot of the extent.

3 The question is, before the New From SA Condition
4 came in, were they effectively requiring customers who
5 wanted to hold on to their discounts to keep their
6 licences before they formalised that?

7 THE CHAIRMAN: Right, so you're going to need -- your
8 provisional view at the moment is you're going to need
9 disclosure on that, the extent of that?

10 MR SCHAEFER: As we understand the scope of the trial. We
11 will go away and take good account of everything you've
12 said, but as we understand the scope of the trial today,
13 then yes.

14 THE CHAIRMAN: Yes. I mean, there are various ways one can
15 look at it. You can say, well, we looked at 40
16 customers, they all had this term imposed, or
17 a percentage of them did, we can then extrapolate and
18 get some feel for how widespread it was.

19 MR SCHAEFER: Yes. We're not able to look at Microsoft's
20 customers and establish how many of them had the term
21 imposed. We need Microsoft's help in disclosure on that
22 front.

23 THE CHAIRMAN: Yes. But whether one needs to look at --
24 I mean, you know, if you ask for very extensive
25 disclosure, you know you're going to be up against

1 arguments on proportionality, and have to persuade us
2 that it's necessary.

3 MR SCHAEFER: Yes, sir, understood.

4 THE CHAIRMAN: You are going to slow down these proceedings.

5 But equally, as I've made clear, we're not going to tell
6 you how you prove your case; you have to make decisions
7 about that.

8 Obviously, summary judgment is reserved. I'm going
9 to suggest we reserve costs generally of today over to
10 the next hearing. Is there anything else we can
11 usefully deal with today?

12 MR O'DONOGHUE: Sir, no.

13 MR SCHAEFER: No, sir.

14 THE CHAIRMAN: Just give me a minute.

15 (3.35 pm)

16 (The hearing adjourned)

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