IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1527/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 24th January 2025

Before:

Ben Tidswell

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

Alex Neill Class Representative Limited

V

Defendants

(1) Sony Interactive Entertainment Europe Limited; and
(2) Sony Interactive Entertainment Network Europe Limited

A P P E A R AN C E S

Robert Palmer KC, Nikolaus Grubeck & Margherita Cornaglia for Alex Neill Class Representative Limited (Instructed by Milberg London LLP)

Daniel Beard KC, Charlotte Thomas & Gayatri Sarathy for Sony Interactive Entertainment Europe Limited and Others (Instructed by Linklaters LLP)

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Friday, 24 January 2025

(10.30 am)

THE CHAIRMAN: Yes, good morning everybody. We are being live-streamed so I should read the usual warning. Some of you are joining us by live stream on our website. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

I should check, can you hear me?

MR PALMER: Yes, indeed.

MR BEARD: Yes.

Housekeeping

THE CHAIRMAN: Good. Thank you.

Mr Palmer, Mr Beard, good morning. Just to get started, I have a couple of housekeeping points and then it would be useful just to work out what is in play. I think there were a couple of things you were getting closer on and possibly a new application, I think.

Just the housekeeping points. Mr Beard, I'm sorry to start on a negative note, but your skeleton was beyond the 20 pages and I know that you did apply but it was a very late application and it really doesn't work if you apply an hour before the time it is due. Can I please just mark your card on it. I do understand sometimes you need to go beyond them, but if you are going to do then I think it needs to be a proper application in good time.

MR BEARD: I apologise and card duly marked, sir.

THE CHAIRMAN: Thank you. Just one other point, and this is really unrelated to anything today but it is partly based on the experience of Kent v Apple which, as you know, I'm sitting in at the moment. I have been thinking about the trial window. I think we have eight weeks starting in March 2026 and I would like you both, please, to just have a think about whether that is going to be adequate.

The reason I say that is that I have a strong preference not to sit on Fridays during the trial. I think, particularly for a trial of that length, that does get very difficult. Also, of course, if you plan for that then you have no redundancy. I assume you are going to want to have some prep time because we are going to do the closings within that eight weeks, in which case there is obviously going to be some time off and I imagine that is probably the best part of a week by the time you take into account our reading time. Then reading time for the beginning of the trial, I'm assuming it doesn't take that into account because obviously there would only be seven weeks of live evidence and argument. But it just seemed to me it would be worthwhile as the witnesses become clearer, which I think they probably are now, you giving some thought as to whether that is the right length and how the timetable might look. I know it is very early because it is miles away, but I'm just conscious if you thought we might need extra time then it would be prudent to be adding that on now rather than waiting for a PTR in November or December or January to make that decision.

Is that something I can -- if you have any thoughts, of course, do say -- but is that something I can leave with you?

MR BEARD: Yes. I think just as an initial reaction, I think not sitting Fridays -- although it extends things -- my experience with these long trials is that having that break at the end of the week is good for all concerned. I entirely agree

that it is sensible to leave a gap of some sort in relation to closings, because experience tells that trying to digest transcripts, insert relevant references, even if there can be some prior preparation, means that those exercises are extensive and then the Tribunal does need proper reading time.

I know that the pressure in, for instance, the *Le Patourel* case on those sorts of matters meant that, I think, many involved thought having a bit more time would have been nicer. Indeed, it may be that we can get to that happy place/ situation: if we had more time it would be shorter. But I don't want to promise, obviously, particularly given the admonition I have already received.

THE CHAIRMAN: Right. Thank you. Mr Palmer, anything to add?

MR PALMER: No, nothing to add. We will work out a schedule and revert to you once we have done that.

THE CHAIRMAN: Just to be clear, I'm not asking you for any form of committed timetable and I'm not expecting you to do that now. There is no way you could do it because you have not given any thought to length of cross-examination and so on, so this is very much back of the envelope. I just wanted to make sure we weren't in the awkward situation that we all realised that there is not quite enough time and we end up doing five days and then they are five very full days and it is all just a bit uncomfortable. I would just rather avoid that. Good. Thank you.

So moving on to the agenda for today. Mr Palmer, would you mind just letting me know what is live and what's not?

MR PALMER: Yes. Certainly, sir. There are live applications in relation to three custodians which are dealt with in two groups: Gio Corsi and Brian Silva are dealt with together and then Lin Tao is the third custodian. There is a live issue as to that.

The issue as to the date range has gone: we have reached agreement on that so we

don't need to trouble the Tribunal with that.

THE CHAIRMAN: Good. Thank you.

MR PALMER: The issue on the proximity parameter, that is within 10 words or within 20 words in the same document. That is live.

THE CHAIRMAN: Yes.

MR PALMER: There's an issue as to the selection made in the top 50 publishers.

THE CHAIRMAN: Yes.

MR PALMER: That is live. And a sub-issue that has been separated out now, that relates to the disclosure of GDPAs --

THE CHAIRMAN: Yes.

MR PALMER: -- that is live. There is no issue we are going to trouble the Tribunal with today on search terms. There are outstanding issues relating to that, but it is still the subject of correspondence and, indeed, the latest proposal from Sony came yesterday on that. So we are considering that and we don't propose to raise that for you today. We are hopeful that could be resolved by agreement.

Those are the issues on disclosure. There is also an application to add four economists from BRG, including Mr Harman to the Extended Confidentiality Ring or Enhanced Confidentiality Ring. That continues to be resisted. But Sony no longer resists the addition of Mr James Oldnall the Managing Partner of this firm. That is now agreed so that is no longer live.

There is also -- in effect, this is any other business -- but in effect will be wrapped up with my submissions on the admission of BRG concerned and expressed on behalf of the Class Representative about the over-inclusion of material in that Enhanced Confidentiality Ring.

THE CHAIRMAN: Yes.

MR PALMER: So I will deal with that together insofar as I need to. There is also now a new application made yesterday. I am hopeful that we won't get on to that until after lunch. Because that application was made late yesterday with some proposals as late as 4pm, an extension of time for further disclosure. We had asked for further detail on that and in particular the proposals as to what knock-on consequences that would have for the rest of the timetable towards trial. I would like an opportunity still to discuss that with those instructing me and hopefully we can get on to that application this afternoon.

THE CHAIRMAN: Yes. Thank you.

MR PALMER: [Start of audio missing] -- that application this afternoon.

THE CHAIRMAN: Yes. Thank you. I haven't had a chance to look in any detail: I have seen the letter and I have had a quick look at Williams 5, but I haven't really had a proper chance to look at it. So why don't we put that -- unless, Mr Beard, you object -- we might put that at the back. It probably makes sense to put it at the back because it will give more context of anything else you have to do as well which, no doubt, may have implications.

MR BEARD: Well, I don't mind. I have to say, I think Mr Palmer is overdoing the difficulty in dealing with this application. It is to do with a timing issue in relation to an enormous volume of disclosure and the exercise we have gone through. We thought we would be able to meet a certain tranche of disclosure by 23 January; we need some more time.

This is in the context of a huge amount of disclosure having been done. Williams 5 is instructive in that it provides an update on the extent of the disclosure for tens of thousands of documents that have been provided. The £5 million that has been spent

so far on disclosure and the efforts that have been made, both by my clients and those instructing me, in this regard and, honestly, for Mr Palmer and his team to be quibbling about this timing and forcing us to make an application -- which is what has been done -- is just not sensible.

Mr Palmer can obviously have lunchtime to review this, but it reflects a broader problem that does shape many of these applications: that there is an unrealistic and unfair approach being adopted.

So I do think it could be dealt with now. If, sir, you want to deal with it after lunch and Mr Palmer wants that time I have no objection to that, but I do think it is overblown to suggest that there is a problem with it.

The other thing I just wanted to cover, if I may, sir --

THE CHAIRMAN: Yes. Just before you move on from that, just a couple of observations. I haven't read it, so I'm not in the business of giving you a view on it. The reality, of course, is we are where we are and it is the 24th and I think the hope was that you would have delivered the last tranche yesterday. Obviously, it hasn't happened and I'm sure it is for perfectly good reasons.

So actually the real discussion, I think, is not whether you get an extension, it is when can this sensibly be done by. It seems to me that ought to be discussed in the context of whether there is anything else that you have to do and when we are expecting you to do that.

As Mr Palmer said, I think it is right we do need to have a conversation about whether it has any consequential impact, which you may say it doesn't and we can have that discussion. So I am viewing it as a point of pragmatism, really, rather than a hard edged point about whether you get it or not. But I don't think Mr Palmer is going to be asking me -- [overspeaking].

MR PALMER: To be clear --

MR BEARD: Sorry. It is 14 February. That is when the extension is sought to.

THE CHAIRMAN: Yes.

MR BEARD: So it is somewhat unrealistic to suggest that this is having any substantial knock-on effect.

Now, in those circumstances, it was a matter that was raised on 17 January. It is, of course, within the power of Mr Palmer and his team not to accede to those requests but, frankly, it is unreasonable not to have done so in these circumstances when we are talking about 14 February.

THE CHAIRMAN: Yes. Well, you have made your point on that Mr Beard and I'm sure we can deal with it. I think we should deal with it later, not for any reason other than --

MR BEARD: That's fine. That's fine.

THE CHAIRMAN: -- it makes more sense.

MR PALMER: [Overspeaking] that I was careful to say that what was concerning was the knock-on consequences. There is obviously going to have to be some extension given that the disclosure hasn't been provided on time. The question is: what knock-on consequence does that have? Now, in Williams 5 there are some very specific and concrete proposals as to what the consequences should be and I just want to discuss those with those instructing me. I don't think it is unreasonable in the slightest, they are new proposals.

THE CHAIRMAN: Sorry. Sorry. Sorry. Mr Palmer, sorry to interrupt you. I don't want to have an argument about the argument and we have decided we are going to deal with it later. So all these points, if they are relevant, can come out later. But let's not have an argument about the argument.

Mr Beard, was there something else you wanted to raise?

MR BEARD: I just want to check that we all have the same bundles. I am sorry to be so mundane about these things. Because I think there are four sets of bundles, so there is a main bundle which comes in a Non-Confidential and an Inner Confidentiality Ring form. I assume the Tribunal just has it in a single form with the mark up.

THE CHAIRMAN: Well, shall I tell you what I have got?

MR BEARD: Yes, please.

THE CHAIRMAN: So I have something which is hearing bundle inner and outer confidentiality. I have a supplementary bundle which is inner.

MR BEARD: Excellent. Yes.

THE ARBITRATOR: I have an ECR hearing bundle, which is ECR, then I have the supplementary ECR hearing bundle.

MR BEARD: Yes.

THE CHAIRMAN: I have Harman 2 open, because we were told that was important, and I also have the authorities bundle.

MR BEARD: I'm not sure Harman 2 is important. It is one of those things that is not in the bundle, so in case it needed to be referred to.

THE CHAIRMAN: I have -- yes.

MR BEARD: Yes. I think that, unless Mr Palmer tells me otherwise, I think that means we are all in the same place. But I just wanted to check because some of that material, in particular the material in the supplementary ECR bundle, only came in yesterday. I just wanted to make sure the Tribunal had all of that material.

THE CHAIRMAN: Mr Palmer, does that sound right to you?

MR PALMER: Yes, it does. Thank you, sir.

THE CHAIRMAN: Okay.

MR BEARD: Thank you.

THE CHAIRMAN: Right. I think probably, Mr Palmer, the best way to do this is to do it subject by subject, isn't it?

MR PALMER: Yes.

THE CHAIRMAN: And we can give you directions as we go along.

MR PALMER: That would be my proposal. I propose to deal with them in the order set out in our skeleton arguments, which means beginning with the custodians, if that is convenient to you, sir.

THE CHAIRMAN: Yes. Thank you.

Submissions by MR PALMER

MR PALMER: Can I just preface my submissions on the custodians with some, I hope, familiar points of law in relation to the exercise which the Tribunal is now engaged in. In the authorities bundle at tab 10, page 141 -- does it help to give tabs, sir, or is it convenient just to go straight to the page numbers?

THE CHAIRMAN: Page numbers are fine. Thank you.

MR PALMER: So this is *Digicel (St Lucia).* It begins at page 123, you will note, but we are interested in paragraph 51:

"The exercise we are engaged in is not a review of the reasonableness of the exercise which the solicitor who is the disclosing party has settled upon, but it is the court who will decide what is required by a reasonable search."

If you look at the top of page 142, running on from the previous line, bottom of 141:

"The task of deciding what is required by reasonable search is a task given to the Court by the wording of the Rules. This task can be carried out by the Court either in advance of the search being done or with hindsight, where a search has been carried

out and its extent is challenged by the other party."

In other words --

THE CHAIRMAN: Mr Palmer, just as a preliminary point, or two points really. One is obviously this is all useful and helpful: I'm not suggesting it is not. But we are under the CAT rules and in a way, I think probably the practice ends up being more or less the same but just to be clear, I don't consider this to be an authority on the CAT Rules of course. It is guidance no doubt about what we are trying to achieve and I understand that, but just so we are clear about that.

MR PALMER: Indeed, that's right, sir. I fully accept that. I think both parties proceed on the basis that the principles which apply under the CPR apply equally in the CAT in terms of the search parameters.

THE CHAIRMAN: Well, I think that's the point I'm making. I don't think that the principles apply -- well, I mean, I think perhaps to be more accurate, the principles may be the same or similar, but it is not because they have been decided under the CPR. That's the point I'm making.

MR PALMER: That I can accept.

THE CHAIRMAN: The route into this, I think, is summarised in *Ryder*, for example, where you see, you know, what I think is probably a different approach actually, but I think it probably ends up more or less going to the same place. I'm not saying this because I'm pushing back on the point you are making generally, which is obviously a perfectly sensible point and I have no problem at all with going through these authorities. I just don't want us to be under a misunderstanding about the nature of them. They are giving us guidance about disclosure as a subject rather than providing any guidance on the construction and the approach under the CAT Rules.

MR PALMER: I fully accept all of that, sir. I wouldn't dispute any of that.

THE CHAIRMAN: Just the other point -- sorry, again, just to frame this discussion -- could you just remind me of the nature of the Order that has actually been made? I'm afraid I have not been back to check this. But obviously I think the way this played out was that I invited you to go off and work on a Redfern schedule basis and to end up with disclosure, but I'm not sure we have ever had a discussion in this case about what test we are applying here. In other words, are we actually applying what is effectively a standard disclosure test or are we working on some other basis. Is that something that you can help --

MR PALMER: Well, you invited us to come up with a Redfern schedule and that was done. There are various categories of disclosure which have been agreed upon, which are set out in part in what is referred to as the Updated Disclosure Table and in part in the Redfern schedule. Both identify categories referring to classes of documents which are the subject of the Order. So it is not standard disclosure in the sense of search through everything and find anything relevant. These are targeted searches which have been ordered in respect of specific subject matter, which are to be found by reference to specific custodians and specific categories, search terms and specific search parameters.

THE CHAIRMAN: Yes.

MR PALMER: That is the exercise which we are engaged in. The application I'm making under the custodians application is in respect of certain of those categories, to which I will come, that certain custodians should be added to the list, whose mailboxes should be searched or documents which answer that description, which fall within the relevant categories which have the relevant search terms and so forth.

THE CHAIRMAN: Because you say in order for there to be what can be considered a proper search, they need to be included?

MR PALMER: Exactly so. That is a matter which the Tribunal is able to review and my first point and it is not simply where these matters are not agreed, but decided upon by the disclosing party. The matter for the Tribunal to say: well, that sounds reasonable to me, the question is whether it is right and whether it is the appropriate disclosure.

THE CHAIRMAN: Yes.

MR PALMER: That can be done both before a search is carried out -- as made clear in this authority, it suggests staying in the CAT -- or where a search has been carried out and the extent is challenged by the other party. That is important, because these points are raised and indeed have been raised in the case of the first custodians right back in June last year, when the discussion was still as to what the search parameters should be, what the search terms should be, who the custodians should be. The Class Representative has made it clear throughout that these custodians ought to be included in that search.

The central theme of Sony's submissions in response, has been: oh, but you haven't reviewed what we have given you to come up with these submissions. This is beside the point. The point is: are these people likely to have documents which are unique to them as custodians and relevant to the proceedings, and it falls within identified categories.

And that is not a (inaudible) question, just as it was in (inaudible) upon any other custodian, any other search terms right from the beginning. It's particularly inappropriate to make that suggestion in circumstances where the application for this CMC had to be made before we received that disclosure which has been the outcome of the search terms which Sony has applied. So what is recommended is a completely impossible approach.

It's also odd for Sony to be saying on the one hand this is all very premature to be making this application, what you need to do is review all the disclosure you do have and then make a more targeted application and on the other hand say there's no time for further disclosure exercises to be undertaken, this is going to push back the trial and jeopardise the progress of the case.

What we have been saying since June is those custodians ought to have been included and we say it's not open to Sony simply to dig their heels, and say we are not going do it then when it gets to the application stage to say it's too late or indeed it's premature, you should do it even later, as they say in both respects. So that's the first point to make.

If I could turn to my skeleton argument for ease, you can see at paragraph 5 we've set out the material part of Rule 4 which is familiar territory, no doubt. But then another theme of Sony's submissions is to focus on what they term proportionality, focusing on the number of documents they have already reviewed or are reviewing, and the amount of money they have spent in doing so, so far. But ignoring in that proportionality balance, the question of the importance of the case, the complexity of the issues and the financial position of each party.

Indeed, although they readily accept the applicable Practice Directions under the CPR can read across to the question of proportionality, and indeed positively aver that. If one looks in the authorities bundle at page 73 where you find Practice Direction 31B, and then move within that to paragraph 21 on page 74.

THE CHAIRMAN: Yes.

MR PALMER: The fact is it may be relevant in deciding the reasonableness of the search for electronic documents in particular including, but not limited to, the following: there is emphasis from Sony on (1) the number of documents involved,

and(2) , the costs. But not on (1) the nature and complexity of the proceedings; (2)the likelihood of locating relevant data; and indeed(3) , the significance of any document which is likely to be located during the search. All these matters have to be taken into account in an assessment of proportionality.

At paragraph 6 of the skeleton argument, there is reference to *Pyrrho*, which is particularly helpful, in my submission, because it is a leading authority on the specific question of electronic searches where Technology Assisted Review, sometimes known as predictive coding, is used -- Technology Assisted Review often abbreviated to TAR. And again one of the themes of Sony's submissions is look at the thousands of documents that your search terms or the addition of these custodians will add to the pool but rather less emphasis on as to how TAR can be used to whittle that down to a more targeted search, and rather less emphasis about how TAR is a learning process with lessons acquired during previous searches, is able to be fed back to, to inform subsequent review, including not least the ready identification of duplicates and documents which have already been reviewed.

I need not read out what is said there at 17, but of course it doesn't double the cost, it just doubles the number of documents. It's a far more sophisticated process than that and over the page 247 at (5), even huge document sets can be analysed in that, and in that case we recall that there were over 3 million documents, and that was proportionate given that the value of the claims made in the litigation was in the tens of millions of pounds, where in this claim we're in the millions of pounds, up to billions of pounds, on the top estimate provided by Mr Harman. A search of over 3 million documents we will see was discounted **ipso facto** by Sony as being necessarily -- and they said obviously -- disproportionate. All we are asking for now is to seek substantially less than that. We've summarised that at paragraph 8 and paragraph 9

as well. Again I won't read those out, you will have those points.

So that is the background to some of the matters which run right through these disclosure issues. Let me turn to the custodians. Mr Corsi and Mr Silva.

It is right to say at the outset that there's no dispute as to the relevance of the documents which they may have and which in particular the Class Representative seeks. One of the issues which arises from the pleadings is the significance or otherwise, of what is known as cross-platform features. I'm not sure, sir, whether you'll instantly recall the nature of cross-platform features. There is a handy summary in the hearing bundle at page 258, which is part of Mr Harman's original report -- which is fine for these purposes, we don't need his updated one. At the top of that page, 4.3.13, we will see there are three different cross-platform features available as defined by Sony. They comprise: cross-play where PlayStation players can play at the same time on the same game with players on one platform; cross-progression where can you share your user data between one platform and another; and cross-commerce where you can use content when -- what you have bought inside a game, in-game content, you have bought that on one platform, you can share that and use that content on another platform on one PlayStation platform within that game. Those are cross-platform features.

They are limited in scope, their use has grown over time, it's fair to say. But you can see on that same page Mr Harman's estimate as at 2022, this is only 15 per cent of titles support cross-play, and of these not all support the (inaudible) features. First, you see at 435 was Fortnite, a game published by Epic, you'll remember -- you will hear more about. It's unusual in that it features cross-platform features across Xbox Nintendo, PC and mobile. That is described as unusual. You'll see at the top of the next page, Mr Harman, for reasons which he explains later in his report, does not

consider that cross-platform features are an especially material consideration for question of substitution. That is in issue on the pleadings.

THE CHAIRMAN: So this goes to the other devices or consoles that are not Sony consoles, and the question of substitutions are therefore regarding market definition and no doubt other issues in the case as well, but basically where it's going is -- **(overspeaking)** --

MR PALMER: That's precisely right. There is no dispute between the parties that it is a relevant issue. And indeed, we want to understand what the Defendant's reaction to these changes -- the introduction of those features over time has been: where they've resisted them, why they are resisting them, where they've accepted them, why they've accepted them, what the trade-offs have been for them, and includes following the course of negotiations with third party publishers and Epic in particular, given that Fortnite has been a trailblazer here and a disrupter in more ways than one across the market.

So we sought -- sorry, Mr Harman identified in his short report the need for disclosure of negotiations between Sony and third party publishers, and Epic in particular.

THE CHAIRMAN: Just so I understand, Mr Palmer, just to make sure I'm absolutely clear. Negotiations will show the commercial response from Sony to whatever has been put to them by, say, Epic, and the point is that is going to be evidence of the extent of the constraint, and that was whether Sony was able to say, "No, we're not doing that, get lost", or whether they feel they have to agree to it. Is that the point?

MR PALMER: Exactly right. It's relevant to market definition, it's also relevant to dominance, it may also be relevant to abuse. I can show you that very briefly in terms so you have it. If you go to hearing bundle page 368, this is Mr Harman's short report on methodology at the bottom of the page. You see there is the heading

"Cross-platform features".

THE CHAIRMAN: Yes.

MR PALMER: You will see on the next page, at 2.5.13, a list of things he will consider in relation to cross-commerce there, which I need not read out ... also in relation to dominance at page 376.

THE CHAIRMAN: Yes.

MR PALMER: So 377, and it's dealt with as a matter of constraints outside the market. So on page 399, which was an appendix in which he articulated the disclosure which he'll seek, and again there's no resistance on this --

THE CHAIRMAN: Give me that page number again, would you?

MR PALMER: Sorry. 399 is what I said -- I will check that's what I meant. Yes, it's at the bottom of 399 under A.6.1(i), "Any internal documents produced during the course of negotiations with Epic". You can see that.

THE CHAIRMAN: Yes.

MR PALMER: I said that was agreed to be relevant. If you go to page 408, which you may have to rotate to make sense of, you can see, for example, topic 4, which is "Negotiations with third-party publishers". The item is: Other documents including correspondence relating to and/or produced during the course of SIE's negotiations with publishers, including Epic.

And the first bullet point is:

"SIE agrees these documents are likely to be relevant to the issues in the proceedings".

What appears in red is confidential --

THE CHAIRMAN: Yes.

MR PALMER: -- but SIE had it (inaudible) relevant documents would have been

prepared on an ad-hoc basis.

And you can see in the next bullet point, in order to identify those documents, it proposes to conduct custodian mailbox searches on email data between Sony and third parties using appropriate search terms to be agreed between the parties.

And there is a list of custodians. You will notice in particular Phil Rosenberg, Senior Vice President, put by Sony for inclusion in the list, I'll come back to that. But it doesn't include the two individuals who are the subject of this application and that has always been the problem identified by the Class Representative.

THE CHAIRMAN: Yes.

MR PALMER: Now we seek the addition of these custodians, not only for 4 but also for categories 2 and 3, which you can see is just above, relates to negotiation on non-pricing points and contracts to third-party publishers that's the outcome of these negotiations in other words. And also item 16 and 20 which relates specifically to cross-commerce and cross-purchase.

Now it's right to say that we initially sought also categories 1 and 15 and the Redfern Schedule 4B to G. Sony in their skeleton argument, paragraph 40 have pushed back on that, their final line of defence, even if you are against them on everything else, they say you don't need it for those categories. I'm content to limit my application to categories 2, 3, 4, 16 and 20 for present purposes.

THE CHAIRMAN: Yes.

MR PALMER: We say the roles of Mr Silva and Corsi and their involvement in negotiating cross-play and cross-commerce arrangements with Epic games in particular was significant. When we initially raised this with Sony we only had one document which was a chain of four emails which we'd obtained in the course of disclosure in US proceedings between Epic and Apple but that was enough to put us

on notice that they were going to be significant custodians. Because what they showed was that Mr Corsi and Mr Silva were at the coalface of those negotiations, being the point of contact, in particular Mr Silva's case and Mr Corsi as direct line manager to Silva, Mr Silva's case being the point of contact on a working day-to-day basis between Sony and Epic, we say it is not enough simply to go up several tiers in the line of management to Mr Rosenberg and say: oh well, anything of significance that came out of that will be referred to him. It's a broad assertion made by Mr Beard. It's necessary to go to that original email that we have, we now have rather more following disclosure, but this was what we initially had through our own resources. If you go to the bottom of the three-page email chain -- the bottom of 791, is where it starts. None of this document has been marked as confidential, I think because it was described in US proceedings as being "marked as confidential", so unless I'm stoppled by Mr Beard ... I understand it not to be confidential in its content hence our ability to find it in the first place.

On March 2, 2018, which you recall I earlier said was when Fortnite wanted to introduce these cross-platform features in relation to Fortnite, you will see the first line of this email, which is from Mr Brian Silva:

"As discussed in person we are willing to move forward with adding cross-play with mobile in Fortnite with the following elements implemented in exchange."

With mobile support because that didn't include obviously Xbox, but allowing cross-play with mobile phones.

Then there are a series of negotiating points set out, I don't need to read it out, but then the final paragraph with full email signature:

"Please let me know your thoughts. Once agreed upon I will spin up an amendment to the existing Fortnite contract."

So you have Mr Silva directly negotiating these points with his counterpart who is Joe Kreiner at Epic Games.

You then see Mr Kreiner's response starts at the bottom of page 790, beginning:

"Hey guys.

"Glad we're making progress."

And you see he expands the negotiations, saying in the second line:

"I want to bring up cross-play/progression for all platforms. We don't seem to be making any headway there, and your timeline just doesn't work for us."

He goes on, serious negotiating points, making clear that Epic were not going to give way on that. And some proposals numbered 1 to 7. You see "It's time to make it attractive to Epic", and ends:

"Let's make this a huge win for us all. Epic's not changing its mind on the issue, so let's just agree on it now."

It's Mr Corsi, in the middle of 790 in the third email who responds to that. Mr Corsi is one up from Mr Silva in the line management chain and he takes over there and says:

"Sorry that you feel things are moving too slowly."

He refers to Microsoft and the Xbox, makes some points of substance about that negotiation and says -- and this is heavily relied on by Mr Beard in his final line:

"In the meantime, I will forward your mail to our executives and will get their thoughts and responses asap."

And Mr Kreiner responds in the last email at the top of 790, making some further points direct to Mr Corsi. Those last two emails are in fact never forwarded to those executives, but the first two emails are; again Mr Beard relies heavily on that.

It was only on the third email it was suggested that anything will be escalated. Sony's response to this is to say: look, we you have provided you after we have made this

application with some disclosure which shows there are all sorts of relevant discussions amongst higher-ups following on from this which supersedes all of this and shows none of its relevant. But that's not supported by documents; in fact quite the reverse.

If I can take you first to page 1242, where you can see at the bottom of that page, this is the forwarding email -- if you look on the next page what he's forwarding is those first two emails I've shown you, Mr Corsi's response.

THE CHAIRMAN: Yes.

MR PALMER: At the bottom of 1242, you can see that email when he forwards it. He forwards it on Sunday evening, 4 March, so a whole day after the most recent -- 24 hours after the most recent email. He says this to Mr Rosenberg -- I think that may be confidential, so I'm just going to ask you to read that.

THE CHAIRMAN: Yes, I've read that.

MR PALMER: You see he waited, and what he refers to is "two-pronged", if I might describe it as senior level and working level. He is conscious that high level negotiations between Mr Rosenberg and his counterpart through Epic may continue, but other discussions are happening at a granular level as well. We only have one prong in the disclosure provided by Sony.

We say what these documents suggest is that Mr Corsi was the first point of contact, where he's the common link between two separate discussions, the other here with Mr Corsi, and we can see at 1819 what Mr Rosenberg is receiving.

THE CHAIRMAN: Sorry, give me that number again.

MR PALMER: 1819.

THE CHAIRMAN: Thank you.

MR PALMER: This is going back in time to again to February 2018, so a few weeks

before that exchange, where Mr Silva is emailing Mr Rosenberg, copying Mr Corsi. You can see what follows is a summary of the discussions. Not the discussion themselves, but a summary of where people have got to. You can see that continuing on 1818 at the top of the page: Mr Corsi pushes back on something Mr Rosenberg has said, explaining the point of a meeting which he seeks to be holding on Wednesday -- I think it's confidential, (inaudible) know what it is. And 1817, you can see that Brian Silva -- his email begins just at the bottom of 1816 -- says in the second paragraph on 1817:

"I would like to get a response very quickly and will be seeing them again next week at DICE."

So it goes on at the top of 1816, saying what they will push for in their working level negotiations.

Even when there are high level discussions as well further up the management chain, you can see at 1216 an email in which Mr Corsi is copied, which he's specifically asked for input. You can see in the third line of that email there's an email to Gio Corsi had been forwarded, with a request for consideration. It says:

"We welcome your own perspectives."

In the fourth paragraph, last line, referring to whether some of the advantages ... I won't read it out, "May be important in the wider context that you'd seen."

There is nothing here suggesting that either Mr Corsi or Mr Silva have what so many have characterised as a tangential involvement. It's fundamental working level. And we know this sort of relationship is not uncommon at all by reference to another publisher, which you can see at 1822.

THE CHAIRMAN: Yes.

MR PALMER: It's a three-page email starting halfway down the page to

Mr Rosenberg from Mr Corsi, copied to Mr Silva. You can see it begins -- this is not concerning with Epic, it's a different third-party publisher:

"I won't go into what's happened up to this point because that's not as important as deciding where we go from here."

And then an explanation.

So there had been working level -- there's a (inaudible words) which is worth a quick look over but the detail, it doesn't matter. There's a working level silo concerning a negotiation with a third-party publisher which is clear up to this point Mr Corsi and/or Mr Silva have been handling themselves before escalating it at this point.

THE CHAIRMAN: Yes.

MR PALMER: None of this is surprising, we say, when you look at the organogram, which we now have in the disclosure. At page 1782, this is an organogram dated November 2016. But Mr Silva and Mr Corsi didn't change role business March 2018 when those emails I showed you, (inaudible) change that document as well. And you can see that this is an SIEA, that's Sony Interactive Entertainment America organisational structure, and you see Mr Rosenberg at the top, the top bar. Beneath him at this point in November 2016 was an open position, and beneath him was Mr Corsi in the fourth column along, and you can see directly underneath Mr Corsi is Mr Silva.

That's also to be viewed in the context of the previous page 1781 where we can see SIEE, the European equivalent, where Michael Pattison is at the top of that organogram, and he's a custodian. But if you look down -- if you go left on that tree to Mr Foote, who's not a custodian, but then right along from there to the last column and then down to the bottom, you see Simon X Brown, who is a custodian, and he was the author of that email I showed you a moment ago at 1260. You can see he is a similar

working level to Mr Corsi and/or Mr Silva. At this point again he's in that post still, March 2018, which is when he wrote that email which I've just shown you.

What this does is show you the breadth of Mr Rosenberg's responsibility, but of course he can't be across the working level discussions, across the board now that he has a vastly wide area of responsibility with many, many people reporting to him. Completely different relationships than the relationship Mr Corsi has with Mr Silva.

What does Sony say about this now? First, they said we should have reviewed what they have provided us with, what they provided us on 23 December before we made this application by a deadline of 20 December. You heard those dates right, quite an impossible position to maintain.

Their second point is: well, we provided these documents now, and you can see Mr Corsi and Mr Silva were not ultimately responsible for the negotiations with Epic. Mr Rosenberg was ultimately responsible. That may well be so, we don't dispute that, we can see that from the organogram and the emails. That doesn't change the fact Mr Corsi and Mr Silva had the day-to-day working responsibility for those negotiations. They are not just post-boxes forwarding matters on. That's really the rub when it comes to that original email chain where Mr Silva says that he would forward the emails to executives, he's no mere post-box. Of course there will be occasions when things get escalated, but that doesn't apply to the day-to-day negotiations and the details we've seen.

Our position is these should have been included from the beginning -- I shan't give you all the correspondence, I'm sure you don't want to see that. But for your note, it was on 9 June 2024 that we asked for this. And it was only the first substantive response from Sony on 19 November 2024 when they accepted that email correspondence shows they were involved in negotiations with developers and publishers during the

claim period, but said there was nothing of unique relevance.

That is what they have sought to develop now by saying: look, this disclosure we have provided you shows Mr Rosenberg and others participating in these disclosures, there is nothing unique to Mr Silva and Mr Corsi. Of course there wouldn't be because they haven't searched Mr Silva's and Mr Corsi's mailboxes yet, so that is an entirely circular argument.

So we say it's plainly proportionate to include these two custodians. Yes, it will mean there are some thousands of documents to review, but that is what TAR is for. And with the experience that Sony has enjoyed to date in identifying relevant documents, it may well be firstly that duplicates can easily and quickly be removed by TAR; secondly, that there's filters(?) to be applied as to appropriate keywords to which we are open.

Sony emphasises the original email exhibit doesn't evidence the conclusion of any negotiations, but that is entirely beside the point. And lastly, they say the only document referred to in the application wasn't unique. Of course that is a circular argument which I have made.

Those are reasons why we asked for these two custodians to be included, so we actually get the nitty-gritty of these negotiations on a working day basis and really understand how those negotiations went and what was said by these two, we say, significant actors in this story. There is nothing in Sony's response which undermines that position.

So that's that application.

THE CHAIRMAN: Yes, thank you.

Submissions by MR BEARD

MR BEARD: Right. Can I deal with it in three stages? First of all, I just look very

briefly at the relevant test, going back to *Ryder*. Then I do want to make one or two submissions about context because frankly Mr Palmer hasn't fairly represented Sony's position, SIE's position, in relation to questions of proportionality. Then I will deal with a series of particular points in relation to these individuals.

So if I can just deal with it that way if that's okay.

If we could just go to *Ryder* itself, which I think, sir, you obviously are ahead of me already because you were referring to it. But if we can pick it up at 465, it's under tab 18, if you are using tabs in the authorities bundle.

THE CHAIRMAN: I am. I have paragraph 40, I am.

MR BEARD: Exactly. So this is obviously in the discussion in the context of the *Trucks* case. But the important issue here is we are not dealing with standard disclosure, we are dealing with issues of questions of reasonableness and proportionality overall. And it was very, very striking that when Mr Palmer set out his case in relation to this he said:

"Are these people likely to have documents that are unique and relevant?"

That was his emphasis.

What is missing is therefore what the Tribunal stresses at page 465. It is not therefore simply a question of relevance as some of the skeleton arguments we receive seem to suggest:

"Disclosure will only be ordered in relation to specific category of documents if the Tribunal is satisfied that the documents sought are relevant and that disclosure would be necessary and proportionate."

Now, Mr Palmer started off going down the: look at the approach on standard disclosure and so on. We are not taking issue with reading principles across from CPR but actually the modern approach in disclosure in commercial cases is not to

start with standard disclosure; it is to start with the sort of process that we have here, Redfern schedule, exchange and identification of likely sources of relevant material and proportionality. Because that is what is lost here. We've emphasised this in the context of our skeleton. Because it is obvious that the level of work that has gone into the disclosure exercise, the nature of the exercise in identifying custodians and applying relevant criteria, including for TAR analysis, it's not clear why Mr Palmer is referring to TAR's timesaving. All of our estimates on time, all of our efforts have involved TAR in order to try and streamline matters.

I will take just if I may take you to the most recent Williams statement which is Williams 5. I know this is in the context of the application that is being dealt with this afternoon but if you could just pick it up in the supplementary bundle at page 8 you will see there from paragraph 8 through 9 onwards a detailed consideration of what has gone on in relation to this process of disclosure, this inordinately extensive process of disclosure that has involved us already spending over £5 million on disclosure. Doing disclosure in a timeframe which was far shorter than that has been applied to for instance in the *Google* and *Apple* cases. In those cases of course there had been prior litigation so there was already a repository of documents.

We have instead had to go away and carry out these searches. We have made enquiries within the business who it is most likely are going to have relevant documents that will answer to the categories specified in the Redfern schedule and the disclosure list. And we have collected over 19 million documents. We've reviewed over 300,000, including using TAR. We have disclosed over 160,000 documents. We have used over 50 reviewers in this process. It is absolutely colossal what we have done.

And of course you have a situation where this burden is totally asymmetric. As far as

we are aware, the Class Representative is not even going to produce a factual witness, never mind any question of there being any possible disclosure burden upon them. And they turn up and they say: you haven't given enough, you haven't given enough.

Now, I understand Mr Palmer's dilemma where he says: well, you criticise us for not reviewing things before we make our application, but we need to get on with matters. I understand that. But it's not a point well made in the context of these two individuals particularly, since, as Mr Palmer recognised, these are matters that have been in play since last autumn.

But leave that to one side, what we have here is material that illustrates a fundamental issue in relation to these individuals that when it comes to questions of negotiation insofar as they might potentially be relevant -- and I'll come back to that -- what is being received is extensive material from the senior people who are involved in those negotiations so that the Tribunal is getting the picture of what the business is doing in terms of its negotiation with third-parties. And there is a grave danger with Mr Palmer's submission that he is lapsing into the fallacy that you should emphasise the position of more junior colleagues within a business as being determinative of the considerations and approaches that a business overall takes. That is not right.

Of course there are many people involved in negotiations. That's not denied. It's not denied that Mr Corsi and Mr Silva were involved in negotiations. But they are not the ones that are determining the strategy. They are not the ones that are taking decisions in relation to these matters of cross-platform, cross-commerce issues. Those custodians are being identified and then somewhat perversely Mr Palmer said: ah yes, but Mr Brown is much lower in the chain, so why are you including him? Well that is because we thought when we carried out the business investigation that he was one

of the people that might have materially relevant, unique documents that it would then be proportionate to search his email box.

I emphasise the scale of the exercise. It is relevant to the questions of proportionality. And Mr Palmer is simply wrong when he says we are ignoring matters of cost, the value of the case, the position of the parties. We recognise that we have to spend substantial amounts of money. We recognise that we have to commit vast amounts of resource, as we have been doing, given the nature of the case, even though we think this case is fundamentally flawed; and that we will not get all of this money back even if we succeed entirely because that is the reality of costs recovery in litigation.

And this isn't some sort of abstract plea merely on the part of a Defendant in proceedings. Of course, this is precisely the sort of concern that was being articulated, particularly by the minority in *Merricks,* about the risk that opt-out class claims which are essentially asymmetric can be used oppressively. And one of the key tools is imposing costs, through disclosure, in circumstances where the relevance of the material in general terms might be identified but the proportionality of searching for it is simply not. And that is what those instructions and guidance is *Ryder* about: it's not just about relevance but it's about proportionality, which apply *a fortiori* in opt-out cases.

So the very fact that Mr Palmer was so keen to emphasise: is it unique? Is it relevant? just betrays how he is losing sight of the key consideration here, which is: is it proportionate in all the circumstances?

Now, as we've seen from the organogram Mr Corsi who was the head of global second party games and Mr Silva who was a former accountant executive, that they reported to Mr Rosenberg, and we have seen from the material that in relation to salient matters they were both deferring to Mr Rosenberg, as they had to, and reporting up to him in

Sony in relation to the negotiations. That is critical.

But it's not just Mr Rosenberg who is a relevant custodian. We have Christian Svensson, Simon X Brown, Kevin Reilly and Michael Pattison, and I will refer you to our skeleton argument at paragraph 34 at (1) where we explain why it is that those custodians were identified as the ones who were germane here.

THE CHAIRMAN: Can I just ask you whether --

MR BEARD: Please.

THE CHAIRMAN: -- just in terms of what Mr Corsi and Mr Silva were actually doing, is there any dispute -- I appreciate the point you are making about who's making the decisions -- but is there any dispute about the nature of the content that they were having? In other words, Mr Palmer has shown me some documents which suggest that issues like access to cross-platform functionality is being discussed between Mr Silva and his counterpart and Mr Corsi is getting involved in that in circumstances where Mr Rosenberg is not always present and they are going to meetings, and things like that are happening, I mean, is there any dispute that there is at least a dialogue that's taken place between -- (overspeaking) --

MR BEARD: Absolutely. No, no, there's undoubtedly a dialogue. That is not the point. We completely accept that there is a dialogue involving those people but they were not responsible for negotiating the cross-play and cross-commerce arrangements that are concluded with Epic Games. They are not the ones who are setting the parameters. They might explore things, but they are not setting the parameters here. To put it very colloquially, it's just above their pay grade.

THE CHAIRMAN: Just to explore that a little, I think I understand it. It's just so I'm clear. You are saying -- you need to say two things, don't you? You need to say that there are limits on -- was it two things, I don't know. Let me try again.

MR BEARD: [Distorted audio]

THE CHAIRMAN: I just want to make sure I get this right. You are saying they are involved in discussions, and they have relationships with these people, and they may well have relationships which involve them talking about things that aren't always apparent to the people senior to them. But you are actually I think saying that that's not what we should be interested in, and we should actually be interested in what crystallises into more formal negotiation, or doesn't; which in other words are decisions of significance and those which are taken at different levels; is that the point?

MR BEARD: I don't think it's limited to that. Insofar as it's relevant, it seems to us that that will be the critical issue, what is actually crystallised in relation to these points. But the issue goes wider than that because in relation to any salient negotiating issues those are precisely what are being highlighted in the emails that you've been taken to. Mr Palmer seems to be saying: well, it's problematic that it was a summary that was provided to Mr Rosenberg with not every item on the previous email chain that Mr Corsi had been involved in. But that actually works against him because what is being done there is actually an identification of what mattered for the purposes of these negotiations.

THE CHAIRMAN: Yes, I see -- (Overspeaking) --

MR BEARD: I'm so sorry. I cut across you.

THE CHAIRMAN: No, no. Just two points, isn't it? You are saying actually we shouldn't really be interested in stuff which is day-to-day discussions between them, we should be interested in what actually is -- we should be interested in it at a -- I suppose there are things that get concluded and things that don't get concluded, and --

MR BEARD: Yes.

THE CHAIRMAN: -- decisions are made by other people and there will be a summary of it in some way. So you are saying that.

MR BEARD: Yes.

THE ARBITRATOR: And you are saying in any event in the discussions they are having you would expect, and there is, you say, some evidence that you think anything important is being elevated anyway.

MR BEARD: That's the nature of these structures. What Mr Palmer was taking you to is that where things mattered in the negotiations they were actually being elevated to Mr Rosenberg. He took you to one email -- I won't go back to it -- where there was a reference to: well, we will spin up a proposal; or: we'll spin up a deck. What that is talking about is the idea that you actually prepare material that is considered by the senior people for the purposes of these discussions.

That means that what you are looking at in terms of email searches is what is then being provided to and discussed with the senior person who is setting the parameters for the negotiations. So you are not just seeing the conclusion, you are seeing the gestation of it but you are seeing the gestation of it in relation to those people who have the actual decision-making power. And some of that, as those emails illustrate, will be coming from a range of other people within the organisation. Because of course in an organisation of this sort all of the negotiation is not done simply by the heads of these relevant departments. Although actually what we see is there are direct meetings between the very senior people within the developers and within Sony on these sorts of issues and those, insofar as any of this is relevant -- and I'm going to come back to some of that -- that is what you are getting.

And what we are saying, therefore, is yes, there might be some documents that are unique, as Mr Palmer puts it, in the sense that particular email chains from particular

individuals within the -- to put it, as the chain of command in somewhat military terms, some of their emails are not going to be captured in the disclosure that relates to Mr Pattison, Mr Rosenberg, Messrs Svensson, Reilly and Brown, that's true. But actually we have identified those people as the people most likely to capture the salient negotiations and the salient conclusions in relation to these developers. And that's why it is disproportionate to just spend your time working down the chain and say: well these people fed stuff up to us, therefore they must have unique documents, therefore they must be relevant and is proportionate to search them. That's just not the right logic here.

THE CHAIRMAN: Can I just ask you, sorry -- the point that you make in paragraph 31 of the statement about who does what, it wasn't entirely clear for me what from what Ms Williams said in Williams 4, what enquiries you had made. And I am taking it no one's actually spoken to Mr Corsi and Mr Silva because I'm sure someone would have told us if they had. But are you able to point me to what we know about what is the exercise that's been undertaken as to what these two were actually doing? In other words, we seem to be looking at these documents and trying to pass them to decide whether Mr Corsi or Mr Silva are doing important things that aren't being reported. But has anyone actually asked them or people who work with them that precise question?

MR BEARD: In terms of this, I don't -- obviously the summary of the process for identifying custodians, if we go to page 946 in the bundle in Williams 4, so paragraphs 21 and 22 -- if you just give me one second, I have managed not to have that in front of me, but I will now have it. The answer is yes, there were discussions with people within the business in order to identify initially the 27 custodians and then the increase up to 31.

THE CHAIRMAN: I suppose I'm asking a slightly different question which is: once it became apparent that there was going to be an issue with this, and I think Mr Palmer identified the November letter from Linklaters as the point at which it was apparent, do we have any evidence about what happened in order to reach their conclusion? Because I can understand at the start someone is going round and asking questions about who did what and it may have involved some discussion about Mr Corsi and Mr Silva, but I'm just wondering whether anyone has gone back, once it's plain there's an issue and has kicked the tires properly on it, that's the question, I think.

MR BEARD: I think the answer is yes, the task has been kicked properly but not directly -- I should say not directly with Mr Corsi and Mr Silva, both of them left in 2019.

CHAIRMAN: No, I understand.

MR BEARD: So the issue is yes, there would have been discussions within SIE about these issues, about who is the relevant custodian. As the organogram that Mr Palmer took you to showed -- I don't need to necessarily go back to it -- there were lots of people within these structures involved in lots of issues, and obviously what we are trying to do is identify the sorts of people that will have the relevant documentation that answers to these categories. That is exactly what we are doing. We are not engaged in some kind of obstructive exercise. The reason why Mr Palmer has all the material he has is because we have clearly identified the relevant people who are involved in these negotiations who are leading these departments.

THE CHAIRMAN: I suppose I just have to push you again on that because what I think I am missing a little bit is -- and it may be this doesn't matter, because actually it may be that there wasn't really any dispute between you and Mr Palmer about what their roles were, it's just as to whether it's necessary for us to get into the detail of what they did. But I am missing I think any direct evidence of a discussion with someone

like Mr Rosenberg who supervised them as to exactly what -- as to the points you are making, which is that: I made all the decisions and if they didn't tell me anything important I would have expected them to tell me and there would have been trouble if they didn't. But I haven't got that anywhere, have I?

MR BEARD: No, no, you don't have a witness statement for Mr Rosenberg or anyone of that sort, no, that is absolutely right. But that is the point that is being made here.

THE CHAIRMAN: Or even the recording of an enquiry to that effect. I don't even have that, do I?

MR BEARD: That isn't really entirely fair. Although it may well -- you may well say that paragraphs 21 and 22 of Ms Williams's witness statement aren't spelling these things out, the whole reason why the identification was made of the 27 and then 31 was, as it says here:

"... to identify the individuals currently or previously employed by SIE who, within the relevant date ranges, held roles which meant they might possess unique documents responsive to the categories. Without waiving privilege this exercise was informed by consideration of SIE's and its broader corporate groups business structures and practices, discussions with SIE's in-house legal and business teams and enquiries made of potential custodians themselves."

Now I've made clear in my submissions that we didn't make enquiries of Mr Corsi and Mr Silva because they'd left. But we were making enquiries actually of the custodians. Now you are right, we haven't then gone the further step and say: ah, well X or Y said they would not expect that they would hold specific unique documents. But that is what this enquiry exercise was intended to do.

THE CHAIRMAN: There is some difficulty with that, isn't there? Because the way that Ms Williams puts it is:

"They held roles which meant they might possess unique documents responsive to categories listed."

Then of course what Mr Palmer saying, and I think what is actually happening here is there is a further exercise which -- I'm not criticising this at all and I think this is the way it's unfolded, but there is a further exercise, isn't there, where someone's exercised some judgment as to whether it is a proportionate thing to do for the reasons we discussed, because someone's formed the view that what's important is reported and that they won't make a decision which are really the important ones.

The question I'm asking you, I think, is: are we just relying on the documents we have to reach their conclusion? Or has somebody actually tested that proposition with somebody in (inaudible)? I'm not asking you to give evidence on it --

MR BEARD: No, no. Look --

THE CHAIRMAN: I don't think I've seen anything that indicates to me that that question has been asked and answered by anyone.

MR BEARD: No. I think you haven't seen material that's specifically asks and answers that question. Obviously, the enquiries that are being referred to are trying to identify what is the best way of identifying the relevant, unique materials, answering to the relevant categories of disclosure on the basis of enquiries being made of the business, both legal in-house and custodians. And I should confirm that that did include members of the group of custodians that I've already referred to in this context.

THE CHAIRMAN: Yes.

MR BEARD: There are limits to how much further I can take that. But I do think it is -- to just get this in a little bit of context as well, because although it's completely right that we haven't taken issue with the extent to which documents pertaining to the negotiations about cross-platform materials should be the subject of disclosure, and

therefore we have carried out this exercise, it is just important to bear in mind that Ms Pearman and Mr Palmer heavily rely on Mr Harman as to why it is this material is needed. And I just want to track through this for a moment because I think it's also instructive in relation to these issues.

THE CHAIRMAN: Yes. Mr Beard, just before you do, sorry to interrupt you again, I am just conscious of the time, and I think we do have a transcript being taken.

MR BEARD: I'm so sorry.

THE CHAIRMAN: To be fair to the transcriber we ought to take a few minutes. I am hoping we might be able get to through all of this and then do it (inaudible). You are going to be a bit longer, I think, aren't you (inaudible)?

MR BEARD: I think I'm going to be probably another ten minutes on this. I hope not to be too much longer but yes, I think it will be ten-minutes. So if, sir, the Tribunal wants to break now and then return at 12.00 then that's ...

THE CHAIRMAN: Let's do that, shall we, and we will take a ten-minute break.

MR BEARD: I'm grateful.

THE CHAIRMAN: Thank you.

(11.51 am)

(A short break)

(12.00 pm)

THE CHAIRMAN: Yes, Mr Beard.

MR BEARD: Thank you. I wanted to just pick up a little bit of context on the fact that Ms Pearman and Mr Palmer rely on the Harman reports in support of this, because I think it is also a relevant consideration for the Tribunal in thinking about all of this proportionality. So the emphasis in Ms Pearman's statement is on Annex A to Mr Harman's methodology report, which I think Mr Palmer did refer you to. But if we

could go there, it's at page 399 in the bundle.

THE CHAIRMAN: Yes.

MR BEARD: It's annexed to Ms Pearman's statement, and you see there that the reference is made in A.6.1 to:

"Any internal documents produced during the course of Sony's negotiations to implement on PlayStation the unified wallet model in respect of virtual currency in particular and other cross-platform features in general, including the final commercial offering from each party that was ultimately accepted."

Just taking that on its face, Mr Harman's apparent focus is on one particular aspect. He does go further, but he also emphasises final commercial offering.

That's where we start from, and obviously I don't think they are -- given the points we've made about senior people, and the fact that junior people coming up with proposals may be rejected or accepted by the senior people and they can't be taken as being the business's position at all, it's obviously understandable why he would do that. But it's actually just worth going backwards.

Mr Palmer referred to page 368 in this document particularly as providing a basis for the desire for disclosure because this is in the context of market definition cross-platform features. You'll see there that actually in relation to the paragraph he referred to, negotiations aren't actually emphasised at all in that context. That's not what Mr Harman refers to.

It will be noted of course that this is his methodology report, and Ms Pearman in her statement actually emphasises Mr Harman's first report, interestingly not Mr Harman's second report. You will recall Mr Harman's first report we would say is problematic, I think is the euphemism, given that in particular it doesn't deal with anything to do with two-sided markets, and those were issues which were canvassed previously. If we go

back to that first report -- that is one of the problems with it -- to 281 in particular, this is in relation to the market for distribution of add-on content. You can see that's on the preceding page 281, and if one goes down to the bottom, 282, you will see he there reflects on the relevance of cross-commerce, and he says:

"For the reasons set out in paragraph 4.3.21 onwards, I consider that cross-commerce may represent an alternative distribution channel….However, for the reasons I have set out, I do not consider that its impact is likely to be material. Therefore this does not materially affect my conclusions on the scope of the relevant market."

So his position there seemed to be cross-commerce didn't really matter, and certainly -- I'm so sorry.

THE CHAIRMAN: I think the way Mr Palmer put it earlier, unless I have misunderstood this completely, was that the Class Representative's case is that it isn't a constraint. So I suppose it is consistent with him not thinking it's a constraint, isn't it?

MR BEARD: I think if that's the position, then the issue -- the question then becomes very much more: to what extent do you actually need disclosure in relation to these issues, beyond what you are getting from senior people and others within the custodian chain in relation to these issues? Because if you are --

THE CHAIRMAN: Yes. Because if you are effectively trying to prove the negative -- the picture we'll see, whether there is any picture that matters is whether there's any change in behaviour, isn't it, from Sony? That is really what it's about.

MR BEARD: That may be right, but then of course if you are talking about change in behaviour, you really are talking about that final limb of what does Sony actually do. It's not really to do with the negotiations. And that's really the point I'm making in this context: we are not denying the relevance in this context, notwithstanding the fact that

it's difficult to understand how relevant that will be. We didn't have a fight about that. But the point I'm making here is if Mr Harman is really saying: no, no, none of this really matters, the idea that you should be getting into the terms of negotiation of the people lower down the chain in relation to this makes it all the more difficult to understand why it's necessary and proportionate in these circumstances.

And of course if we actually went to Harman 2, which we provided copies of, Harman 2 actually contains lists of material which is said to be the sorts of material Mr Harman considered is relevant for market definition. You probably have it separately, you will see the section on market definition starts at page 13, and you will have seen this previously during the course of certification proceedings. If we go on to page 22, you'll see there Mr Harman's wish list of information to be obtained. He starts off with the information from third party sources, which is generally public material. Then it's additional material from Sony, over the page. You'll see there that his adumbration of what is appropriate as relevant disclosure for his market definition exercise touches on in no regard to these sorts of issues.

The reason I raise this is I'm not taking issue with the fact that in the disclosure schedule, in the Redfern schedule, we didn't take issue with relevance here. But when this Tribunal is assessing whether it's necessary and proportionate, and Mr Palmer and Ms Pearman are coming forward saying it's because of what Mr Harman has said in his first report and it's carried over into his methodology that this is all so terribly important. One needs to really get that in context, and that fits of course with the Ryder test, which is you're looking at these issues not just for some pure notion of relevance, but how necessary and proportionate is it if Mr Harman is saying none of this matters. Why is it, why is it, that in these circumstances, it is necessary to be looking at disclosure from individuals who are engaged in negotiations, but I think

Mr Palmer accepts are not the decision-makers in relation to this and, as is put in the emails, "spin things up" to the hierarchy to make those sorts of decisions.

So as I said earlier, you're not just getting the conclusions, you are getting the business consideration of what is relevant and what can be negotiated through the custodians. If Mr Harman is seeking to prove a negative, he has all of that material. Why do we need anymore here? What really is the relevance?

THE CHAIRMAN: I suppose it's possible, isn't it, that -- this is off-the-cuff and you may tell me it's rubbish -- but I suppose it's possible that Mr Palmer might want to say: look, you have Mr Silva's counterpart writing to him -- we saw a bit of that -- writing to him every week saying, "I want this, I want this, I want this", and Mr Silva doesn't do anything with it because he knows no one's going to agree to it. That would be some evidence, wouldn't it, of the lack of leverage that Epic had with Sony, so it would actually tend to prove the negative, which is that Sony didn't really care what Epic thought or wanted.

MR BEARD: I think you need to take it in stages. If that is potentially relevant, the question is: are Mr Corsi or Mr Silva in a position to be simply rejecting that such that it might putatively assist Mr Harman? Or is it going to be the case that it's consideration of those proposals by the senior individuals which matters?

And how plausible really is it that if there are any salient proposals coming from these developers that actually it's Mr Corsi and Mr Silva, who have to defer to the senior people, who have to spin these matters up, who are making those determinations? The answer is it's not.

The point we have then is in circumstances where even if you are getting proposals through -- and it won't just be at that level because I can take you to emails where we have direct discussion between, for instance, Mr Rosenberg and very senior people

within the developers where these discussions were going on. It's at that level that really these questions are going to be determined, if and insofar as they are relevant. I will take you to one of those, if I may, page 1249 in the bundle.

THE CHAIRMAN: Yes.

MR BEARD: I think I need to do no more than indicate who is involved in this, and I'm not going to refer to the names.

THE CHAIRMAN: Sure.

MR BEARD: Mr Palmer kept saying: well, there are two prongs to the negotiations. That's not correct. There aren't two prongs to the negotiation, there isn't a lower level and a higher level, and somehow you get different outcomes through those different prongs. There is a negotiation. Anything important is going to be determined by the senior individuals, and there are going to be high level negotiations. Therefore, by definition, almost, what you are suggesting are the unique documents are ones that are not really germane to the issues that matter, insofar as they matter at all for Mr Harman, or indeed anyone else.

Therefore, we say yes, you can trail through the emails we have disclosed to you. What it shows is when anything is salient, it gets elevated. That includes proposals from the developers which are then axed, accepted or qualified by more senior people with input from the more junior people. But that is what matters here, and that feeds into the overall proportionality analysis and why it is unnecessary to go further in relation to the custodians, given the amount of material we have disclosed.

I would just raise two further points just for completeness. We say there is no need to include these two people. That is inappropriate, it is not necessary and proportionate. If the Tribunal were minded to do so, we note Mr Palmer has now said it doesn't -- the Class Representative doesn't press for category 1. I do note that that does reduce the

number of documents which would have to be searched and sifted.

There are two other brief points. One is if the Tribunal were minded to go down this route, then we would strongly suggest that there should be a temporal limitation on these searches which cover the period of these negotiations without prejudice to any points about relevance, and so on. But just in order to delimit the scope of the documentary material, so it would cover 2018 through to when they left in 2019.

THE CHAIRMAN: Yes.

MR BEARD: The other point is just a clarification, which is I think Mr Palmer referred to category 3 in the disclosure. That isn't a relevant category in relation to mailboxes, so we would resist any order in relation to category 3. But I think what he focused on were categories 2, 4, 16 and 20. 2 and 4 actually involve the same search term, so they almost roll together. I am just clarifying that.

THE CHAIRMAN: Thank you, that's helpful. I suppose you are not in a position to tell me what -- we had some information in Williams 4 about the volume of documents that might be required if you had to go back and do it --

MR BEARD: I actually do, because we made enquiries overnight in relation to anticipating what the Tribunal might ask. The best estimate I have is that if it were for the period 2018 to 2019, covering 2, 4, 16 and 20, it would be somewhere around 2,500 to 3,000 documents.

THE CHAIRMAN: That's what you would anticipate extracting from their mailboxes.

MR BEARD: Yes. This is obviously applying the search terms methodologies that we have for each of those categories.

THE CHAIRMAN: Yes, I understand. Just so we absolutely clear, if I were to order as you say 2018/2019 only for those two custodians you would expect to extract when you applied the search terms about between 2,500 to 3,500 documents, which would

then need to be dealt with in some way.

MR BEARD: Yes. They would then be subject to TAR. I'm not suggesting that those are pre-TAR numbers --

THE CHAIRMAN: Yes.

MR BEARD: -- and it would be a de-duplication process. So before Mr Palmer says so ...

I'm so sorry, I'm being corrected. Those are de-duplicated numbers. We checked on de-duplication, but it's pre-TAR. That is where the scoring system is applied in relation to these search terms, and Ms Williams has provided evidence on how TAR -- we've not denied that TAR is helpful, indeed we have been using it, we are not deprecating TAR. But it would then be applied and then there would be a residual review as to those which scored over 50 per cent on the TAR scores.

THE CHAIRMAN: Yes, absolutely. I understand. Okay, thank you.

MR BEARD: Unless I can assist you further --

THE CHAIRMAN: That's helpful. Thank you very much. Mr Palmer.

Submissions in reply by MR PALMER

MR PALMER: Very briefly, sir. Sony don't agree with the test in *Ryder*. My submissions did cover why this is necessary by reference to Mr Harman's response and the agreed position in the schedule. The issue as to whether it's proportionate, I haven't lost sight of that, as stressed: the overall size of the case, the value of the case, and the overall exercise. What is now apparent only a very small part of additional disclosure would play in it. This isn't an asymmetric exercise in any real sense, of course. It falls upon Sony to do the review and produce disclosure. We are reviewing documents which disclosed, we don't want to unnecessarily add to the burden which exists on us any more than we do on Sony. So the idea this is some

sort of pressure tactic is entirely misplaced and inappropriate to suggest.

What it boils down to, sir, is this: there is no answer to the point that email correspondence does show a two-pronged approach to the negotiation was explicitly being undertaken. Of course it's all one negotiation between two corporate entities in the end, but in terms of the interaction between the two parties, that is operating at two different levels and two different prongs, and we only have one of them.

So that's the key and what, with respect, Mr Beard has failed to answer. He says anything which is significant would be passed up. What you can tell, even from the email chain we have, is the level of negotiating power, the level of constraint which is being asserted on each side with Sony -- with Epic saying, "We will never agree to X, Y and Z", and of course what transpires later casts some light on whether that's right or not.

It allows us to assess in the dominance context the strength of the constraint which even big publishers, very influential publishers like Epic, can or cannot exert on Sony. And do you get that from the detail, these working level emails, as much as from the end result. The end result is covered by category 3 and the final agreement. There's been common ground up to now that you need to look at negotiations.

So in a rearguard action towards the end of the submissions, for the first time we had from Mr Beard some suggestions this material might not be that material. But Harman 1 -- of course the initial preliminary report before we received Sony's defence and any disclosure to the defence indicating his provisional views, and indicating his provisional view that the offer of these cross-platform features would not affect or ultimately be material to his assessment of what he provisionally defines the relevant markets, and his provisional assessment as to dominance.

But all of that since then has been put into issue by the defence which relies heavily

on the existence of cross-platform features and refers to them -- you have that, for example, at page 139 and 140 -- find the reference ... he responds to paragraph 56(e), you have, for example ... I've lost the reference. **(Pause)**.

It's on page 140 at the top at (iii). You can see dispute as to the level of restrictions which were alleged on cross-commerce, that being particularised thereafter. And later on down the same page, 57:

"It is denied the possibility of cross-play or cross commerce in respect of add-on content is very limited."

And so it goes on. But all the way through, particularly in the factual section, there's real dispute as to the extent and possibility -- a dispute as to what is said by the Class Representative to be the limited capacity for cross-platform features to make any difference. All that's been put in dispute.

Mr Beard referred to Harman 2. That was not a substitute for Harman 1, it was supplementary to Harman 1 and addressed specific shortcomings alleged by Sony. So it's not simply you can refer to Harman 2 and substitute for Harman 1. What we have had since then, as you will recall, sir, which are more recent than Harman 2, was methodology statements from both experts; and we had a CMC and a hot-tub in which there was a full exchange of views between the experts as to methodology.

It's in that methodology report which Mr Harman produced that these negotiations are identified and subsequently, with the benefit by now of Mr Colley's input, agreed by Sony. So it lies ill in the mouth of Mr Beard at this stage to say it's not really that relevant when it's been agreed up to now that this actually should be done, and indeed had been done. The only question is given that they are being done, who the appropriate custodians are. In the absence of that working level disclosure, we say it's wholly proportionate to include in the search what is now identified for the first time

we had asked: 2,500 to 3000 documents pre-trial, which is in the scheme of a case like this, in all honesty, a tiny amount.

It does make a difference, I fully accept, to exclude category 1, which is one of the lowest categories, and that assists in arriving at that point. It will also make a difference to focus on 2018 to 2019. Certainly we don't want any searches of mailboxes after they had left the company, that would make no sense and that won't exist either. But these negotiations with Epic certainly had begun by February 2018. We don't know if there were precursors to that towards the end in 2017, but that is something Sony can inform us of. Certainly it wasn't 2018 that Fortnite made its big push for cross-platform features and implement them and gradually achieved it, despite what was often said internally within Sony, so we're going back to now.

We say there's no real proportionality argument. In particular, although you have heard it twice now and it remains a constant theme for Mr Beard throughout his submissions, it's no answer based on a proportionality argument to say, "Look at what we've already done. We've reviewed 300,000 documents, it's been a lot of work it's been colossal". That doesn't answer the question as to whether these custodians also should have been included from the outset. There's no evidence that Mr Corsi and Mr Silva's roles have been properly considered or interrogated. That matters. It's only now that the limited scale of the task has become clear and in all circumstances, sir, we say you can be satisfied that it's a proportionate request.

THE CHAIRMAN: Thank you. Can I just check with you the request 3. Do you accept that is one you don't need to apply a mailbox search to?

MR PALMER: Can I just check on that point, sir?

THE CHAIRMAN: Yes, of course. **(Pause)**

MR PALMER: Provisionally we can accept that. I think some checks are being done,

so if I can confirm that in due course. But it sounds like that might be capable of agreement.

THE CHAIRMAN: Is it worth just having a quick look at it? I think if I'm going to rule on it, we ought to work out the answer.

MR PALMER: Yes, thank you. You will find it --

THE CHAIRMAN: This is on the Redfern, is it?

MR PALMER: It's not on the Redfern Schedule. On the Updated Disclosure Table, which is in tab 17.

THE CHAIRMAN: Yes.

MR PALMER: You will find it at page 407 annotated.

THE CHAIRMAN: Category 3 is contracts of third parties, contracts and other documents showing the outcome of negotiations. So these are actually the GDPAs, aren't they?

MR PALMER: Yes, that's confirmed. That intuition was right, so we don't need to include 3A either.

THE CHAIRMAN: Good, okay.

RULING(extracted)

MR BEARD: I am grateful and I will take some instructions over the short adjournment in relation to those matters.

THE CHAIRMAN: Thank you, Mr Beard. Mr Palmer, we should move on to Ms Tao. I'm a bit conscious of time, I don't know whether you anticipated that that was going to take about --

MR PALMER: Certainly Ms Tao is a lot quicker.

THE CHAIRMAN: I suppose the only point of raising it is that I don't particularly want to be extending the day; and if you really think that we are not going to get everything

done after the short adjournment, then maybe we could start a bit earlier. But I would much prefer if we got everything done after the short adjournment. It's just a question, really, of whether between two of you, you think we have enough time to get all this done in ordinary sitting hours, but they are (inaudible) something slightly different.

MR PALMER: Perhaps we can take stock at 1.00 and maybe we need a slighter shorter luncheon adjournment. But let's see how we get on with Lin Tao.

THE CHAIRMAN: Yes.

MR PALMER: Can I take you, first of all, to an organogram produced by (Inaudible) as I understand it, or Sony. It's at page 1229, this is --

THE CHAIRMAN: Yes. Which -- I'm in the wrong bundle, that's why.

MR PALMER: Hearing bundle 1229.

THE CHAIRMAN: Sorry, it's my fault. Yes, I have that.

MR PALMER: We shall see it's described as a custodian organogram. It's been drawn up -- it's not an original internal document, contemporaneous. It's been drawn up for the purposes of these proceedings by Sony. It includes in green those custodians who have been proposed by Sony, and in orange those who at an earlier stage we had proposed. The only one I am concerned with is to the left, you can see Lin Tao, Senior Vice President, Corporate Finance and Strategy. We see her omission is striking.

Above her is the CEO position, previously but no longer held by Jim Ryan. Beneath her, you see a Ms McCormack, Rebecca McCormack, and immediately beneath her also on the left-hand side, a Mr Nikhil Bhat. Ms McCormack is described as the SVP Commercial Finance, and beneath her within her team is Mr Bhat, Director of Commercial Finance.

The reason why we have asked for her to be included as a custodian is because of

the description which Sony itself has provided as to her role. You can see that at page 866, a Sony document announcing halfway down the page some finance leadership changes. In the second paragraph, you see:

"Lin Tao will join SIE [from the last line], effective from 1 July 2021 as SIE as SVP, Finance, Corporate Development and Strategy."

So not just their corporate finance team:

"She currently serves as Senior General Manager ... many years experience ... working with others."

Last sentence:

"In her new role, she will be based in Tokyo and report directly to Jim Ryan [the then-CEO] where she will oversee all aspects of financial management and corporate planning and strategy effective July 1."

It's not just that. In submissions that Sony made to the CMA during the course of the *Microsoft/Activision* merger, Sony described Ms Tao in the following terms -- and you have this at page 196 of the witness statement, multiple submissions, one of the -- identifies one of the individuals who:

"... has oversight or visibility into almost all major strategic decisions relating to relevant aspects of the business."

Now what Sony say about this, just going back to that organogram at page 1229, is we really don't need to include any searches for this individual who has that level of involvement in all major strategic decisions, because you have chief executive above her and we have two members of the finance team below her, and things will have gone from below her upwards to her, and there will have been missives to and from the chief executive Mr Ryan's successor, into which she will be copied as well, so you really don't need anything from her.

We find that deeply problematic because it seems to suggest that she had no active role exercising her own jurisdiction, so to speak, in particular on strategic decisions, which wouldn't necessarily include finance matters for which those immediately below her were directly concerned. She won't have copied the CEO in to all her day-to-day emails; she must have had authority to deal with many things in her own portfolio on an unsupervised basis, and she will have documents post-dating Mr Ryan's retirement in any event.

We don't have any indication -- perhaps we have been given one for the first time today, as we were just now -- beyond a broad assertion that including her would require a view of "thousands of documents". We don't know where in the thousands, whether it's low in the thousands or what, and of course whether that includes duplicative documents and the extent to which TAR can be used.

This is a request made on 24 September in correspondence. A detailed response was provided on 19 November for the first time, setting out at that stage just reliance on Ms McCormack and Mr Bhat in her team. Subsequently in evidence, it relied on Mr Ryan as well. For reasons I have given, we say that is inadequate.

The only other remaining point is they say many of the documents we have for her will be in Japanese. But the documents we have for her already by virtue of the other custodians are not in Japanese. If there are separate Japanese documents which not disclosed by the existing custodians, that in itself may be (inaudible). I have given the size and full scale of Sony who say they are likely to be (inaudible words) on translation anyway or could easily be done.

For all those reasons, we say it's a striking omission in the chain of command, particularly in respect of someone who has such involvement and oversight of nearly all major strategic decisions Sony makes, and that's the basis upon which we made

that request.

That's our application --

THE CHAIRMAN: Mr Palmer, just in terms of issues in the case, are you saying that this is a general request?

MR PALMER: Sorry, I should have identified the -- it's not a general request in respect of everything. The application which is made is made in respect of categories 1 to 4 and 6 and 13, and on the Redfern schedule 4B to H and 6A.

THE CHAIRMAN: Just in broad terms so I understand how this fits in. This isn't just about -- or is it just about what she knows about, for example, pricing strategies? It's that sort of thing, isn't it? It's --

MR PALMER: If I can take you to the Updated Disclosures Request Table again, which begins at 407.

THE CHAIRMAN: Yes, I have that.

MR PALMER: 1 to 4 you've seen and are familiar with already. 6, business plans and documented commercial rationale, firstly in respect of the PS5 digital edition, and secondly in respect of the PlayStation Store.

THE CHAIRMAN: Yes.

MR PALMER: 13 was about correspondence concerning alternative distribution, in particular correspondence with publishers and operators of games distribution platforms. Then you have the Redfern Schedule as well at tab 18, which is from page 415. And 4B to H begins at page 430, and this is all in relation to Sony's pricing and margin.

THE CHAIRMAN: Yes.

MR PALMER: That's 4B to H. 6A is at the bottom of page 431 -- and it's in red so I won't read it out.

THE CHAIRMAN: Sorry, give me -- 6 what?

MR PALMER: Bottom of page 431, 6A.

THE CHAIRMAN: Yes. Yes, I understand. Thank you.

MR PALMER: That's the application. Thank you, sir.

THE CHAIRMAN: Yes, thank you very much. Mr Beard.

Submissions by MR BEARD

MR BEARD: Essentially, the key issue here is we don't have any reason to believe that there'll be any relevant unique documents that are held by Ms Tao which won't have been picked up by the extensive concatenation of custodians that we are already covering the various issues.

We've identified a series of custodians in these proceedings on the basis they likely hold documents relevant to SIE's financial management and corporate planning. So we have the former CEO, Jim Ryan, to whom Ms Tao reported until his retirement in 2024. So in relation to anything critical, he's going to be the person that will hold and -- those holdings will disclose relevant material.

But it isn't just them. If we could just pick it up in relation to these issues in the witness statement perhaps of Ms Williams, which is at page 952.

THE CHAIRMAN: I have a hard copy. Do you want to give me the paragraph number?

MR BEARD: Yes, sure. It's 25 and 26. It's just all under the headings of the term.

THE CHAIRMAN: Yes, I have it. Yes.

MR BEARD: The point is we are covering with custodians people both below and above her in the chain of responsibility. We are not for a moment suggesting that Ms Tao doesn't do anything, that's not the point. The question is: what's the likelihood of her doing something, communicating something relevant which either isn't going to

have been copied to her juniors or isn't going to be copied to her seniors? This is literally a question of proportionality in circumstances where there are just no indications that she will have held any materials which are unique.

Just to be clear, so far in tranche 5, in relation to those categories Mr Palmer was referring to, we've disclosed well over 40,000 documents. He started referring to some of the -- I can go through the disclosure table, but it talked about things like plans, business plans and so on, that are going to be picked up. The idea that business plans are not going to be picked up in the searches of all these other custodians is just vanishingly implausible. Therefore the idea that we need to refer her material in addition in relation to those sorts of issues is just not -- I'm so sorry, I've been corrected. 140,000, not 40,000, apparently, in relation to those categories. Therefore, in relation to those materials, we are picking these sorts of categories up.

We have made the assessment that these people are the relevant people. Mr Palmer referred to the fact that she was involved with submissions made to the CMA in relation to *Microsoft/Activision,* the merger case, but that was alongside Messrs Svensson and Rosenberg and Lempel, all of whom are custodians.

So the idea that there is anything relevant to submissions to the CMA by Sony in relation to *Microsoft/Activision* that somehow only she had and none of these other people had, again it's just implausible.

Those circumstances -- as I say, in the witness statement, it's dealt with in some detail. The actual identities of the other custodians, what roles they had, and why it should be expected that they will ensure that we are covering actually everything which is likely to be potentially relevant here, never mind proportionately so. But the idea that we need to keep adding people is just wrong. And the fact that Mr Palmer can say, "Look, you've drawn up an organogram and there are lots of greens and I can find

an orange", is no answer. Because it is on an informed basis we are saying, "Look, you just don't need to do this".

He raises the point about Japanese documents. The point about it is: no, Ms Tao would have both English and Japanese documents, but we believe she would have an awful lot of Japanese documents. That's in part because she's dealing with the world, not just the UK. Insofar as the most relevant documents are going to be UK focused is not an absolute rule, but it will be more likely that it's English language documents which are going to be germane to the UK proceedings, certainly in relation to submissions to the CMA. That is definitely going to be true.

In those circumstances, part of the reason it becomes more disproportionate to include her is that processing her mailbox in relation to all of this material, and indeed carrying out further searches, involves the consideration, translation and sifting of large amounts of Japanese material. Therefore, we do anticipate that there will be thousands and thousands and thousands of documents we would have to sift through. We do not have numbers in relation to it, but we do know that in relation to her mailbox alone, it amounts to 93 gigabytes of data.

We can't tell how many documents that will be, but it will be massive. It will be massive and it will be significantly Japanese, and we just do not anticipate that there will be any unique documents which are not being picked up in relation to the other custodians. It's plainly disproportionate.

THE CHAIRMAN: Can you help me just in terms of -- I'm just trying to think of the process. You may not know the answer, so sorry if you don't. I just want to work out how you would do this. If you have a mailbox and you therefore apply search terms to it, presumably the search terms are completely useless in relation to anything she has in Japanese, but it will pick up the items in English. Is that right broadly, do you

think?

MR BEARD: No, I think what you would do is run the search terms also in Japanese, so you have to run the equivalent, because we are not standing on ceremony about that. So you end up with huge complications in relation to it.

THE CHAIRMAN: If I reach the conclusion that at least for the meantime it would be interesting to run the search terms in English and see what you get, is there any reason technically why you couldn't do that?

MR BEARD: Yes. I think that is not -- I think we have to actually decompile the mailbox in order to be able to run the searches on it, so I'm not sure it's a straightforward -- although we can count the size of it, I'm not sure we can then just throw the search terms in in English and then be sifting English documents.

But the problem, sir, is that what you are contemplating, even if it were feasible, would then involve us doing a full audit in order to be able to identify these things. That's precisely the exercise we say is disproportionate here because there's no reasonable expectation that there's any material number of unique documents that will help --

THE CHAIRMAN: I understand your submission on that, I understand that. I'm just trying to get a handle on -- for the proportionality discussion what it actually involves. I am a bit surprised you can't just apply search terms to the mailbox in English and do that as a first step. But anyway, let's put that aside for the minute.

It is a curious thing, isn't it, that when you look at the organogram -- and in a way, a little bit inconsistent with the points you were making in relation to the previous two custodians -- that she sits on this line. She's quite senior, very senior, and yet you are taking the view that -- I mean, it does rather stick out, that there is an anomaly when you look at this thing ... gone about it.

I'm not suggesting it's for any sinister reason or anything like that, Mr Beard, it's just

a bit odd. I just wonder again why I don't see anything in Williams 4 which tells me whether anyone has been to speak to Ms Tao and has actually had this conversation with her. Do we know if anyone has had that conversation with her?

MR BEARD: I will take instructions in relation to whether or not there's been a direct conversation with Ms Tao. But I think we need to be careful about the organogram because it was drawn up for the purposes of illustrating what we had done relation to these issues. And it's important note in relation to it just the number of other senior executives included in it, and therefore any significant material in relation to plans, for example, we would expect to either have been picked up with the other senior executives, or be picked up by juniors. And if there was something very specific and important, of course, as we say, you have Mr Ryan at the top of this, who was also going to be picking these issues up. And indeed Mr Nishino who was a senior individual at the very top of that tree.

As I say, we are not saying somehow she didn't fulfil a proper role within Sony or anything silly like that. It's not that in the slightest. It is actually an assessment being made as to whether or not we are likely to be finding any unique documents, and we don't have any reason to believe that.

Obviously, we are doing that against the background of looking at the categories of disclosure we are talking about. I'm only picking up the ones Mr Palmer just articulated, but as I say, if you are looking at plans in relation to the store or the digital version, there isn't any reason to think that the financial person, Ms Tao, is going to have documents in relation to that which are material and not held by any of the other custodians.

And really that is critical here because if you don't have someone -- if you don't have reason to believe they are going to have unique documents, then plainly embarking

on this extensive exercise isn't appropriate.

If I could just take you to 955 in Ms Williams's fourth statement, there she describes in more detail what the sort of process would be which would need to be undertaken in relation to these issues.

THE CHAIRMAN: What paragraph's that?

MR BEARD: Sorry, it's 26(d). In the proceedings -- yes, I took you to 26, which is a long be paragraph starting on 952. What you see there is first the reference to the *Microsoft/Activision Blizzard* point, which has been emphasised. But there is really just zero basis on which there is any suggestion that any CMA material, submissions or relevant documents will be held by Ms Tao and by none of the other people that were closely involved in this. So that as a primary point is a poor one. Then (b), you'll see:

"While SIE recognises that Ms Tao likely holds at least some relevant documents, there is nothing to suggest that those documents are likely to be unique to her and not also held by one or more other individuals."

Then Ms Williams has set out in great detail the roles of those people. So she has effectively gone through and explained why it is that by reference to that organogram, actually the people we are picking are going to cover all of the relevant bases in relation to the time period and the disclosure categories.

Then you'll see the point made at (c): if you were to apply these sorts of criteria, there might be a whole range of people. But then (d), I was just drawing your attention to was some of the issues in relation to how the process worked, because I think Sony were asking that. So if you wouldn't mind reviewing that.

THE CHAIRMAN: Yes. **(Pause)**. So basically the point is there is expense in actually just getting the documents into the e-discovery process.

MR BEARD: Yes. That's why I was saying we couldn't just throw the terms at them -- I'm not sure I'm using the right language, but one actually has to transfer and effectively decompile the whole thing. My understanding is that whether or not that is made harder or easier by presence of Japanese documents, that process would have to be gone through even before you could do an English-only search in relation to that mailbox.

I should say the request that's being made is not limited to mailboxes. What is actually being asked for is then a targeted search under categories 1 and 3 in particular. So there is just no limitation being placed on this in circumstances where there is frankly no good basis to expect that there are going to be unique documents, apart from us flagging this individual in orange on an organogram and then picking out her job title. With respect, those are not sufficient bases for fulfilling the criteria in paragraph 45 of *Ryder.* This is the sort of fishing expedition that is not appropriate in circumstances where there have been 140,000 documents answering to those categories already provided.

When I say 140,000 documents, those the ones that have been through collection, TAR sift and review. Because unlike in other cases with which, sir, you will be familiar, where the parties have effectively just dumped millions of documents on the claimants, we are going through and we are trying to carry out a sensible, proportionate search in relation to these things. So we are applying our mind to it, and the fact we explain what we are doing, we give diagrams, doesn't mean you can fix on an orange box and say, "That's not enough, we should have her too".

THE CHAIRMAN: Thank you. Mr Palmer, anything else?

MR PALMER: Yes, sir. Thank you.

Reply submissions by MR PALMER

MR PALMER: Very briefly, what you have from Mr Beard, and indeed from Ms Williams in her witness statement, is frankly a lot of unevidenced assertion that she wouldn't be likely to have unique documents. It may well be, as Mr Beard says, final business plans would have made it across the desk of the chief executive. That doesn't mean everything we have sought, including in between (Inaudible) likely to drafts of those matters, or in relation to the pricing and margin category, or in relation to their confidential category which I showed you in the Redfern table at the end. It does not follow that all of that would be shared either with her juniors working in the finance team from a strategic point of view, or what could in total have been reviewed by the chief executive at the time.

What we are asking is at least for the search to be done. Duplicates can be excluded with comparative ease. We fully accept that would require Sony to access the mailbox to the extent of decompiling it, identifying those duplicates and email threads. But that in itself is not an exercise which Sony has scoped at all. They haven't opened that mailbox or any other documents from Ms Tao in order to assess that, beyond looking at the headline volume of documents, about 93 gigabytes of data.

There's no evidence anyone has spoken to Ms Tao to establish from her point of view the likelihood of such documents existing. There's no evidence that there's been any sampling or any access to that mailbox on a more limited basis to find out what is there. What you have is simply Mr Beard submitting a negative, saying, "We don't have any reason to believe there will be uniquely held documents", in circumstances where no one has done any investigation with Ms Tao or with her mailbox and document depositories to establish whether that is likely to be the case.

So this is a striking omission, with respect. It can't just narrowly be said well, business plans would be shared, our request goes wider than that. If the documents are in

Japanese but relevant to the big strategic decisions, then they are likely to be unique, based on what we have seen so far.

For all those reasons, sir, we say this is a striking omission and one which ought to be remedied at a minimum by reference to those initial enquiries. But given the time, really Sony ought to be cracking on and reviewing that mailbox for these limited categories which we have identified.

THE CHAIRMAN: Thank you. What I suggest we should do --

MR PALMER: Can I just clarify one other thing, sir, sorry.

One other thing I should clarify: it was never my submission that there are any submissions to the CMA which Ms Tao would have which others would -- this is what I said, and I listed to the category of documents which I identified that should be searched for her. The point about the CMA is that in Sony's submissions to the CMA, she was identified as a person who had oversight or visibility into almost all major strategic decisions relating to relevant aspects of the business. That is why she was identified as a custodian to the CMA, not in respect of submissions made, but custodians with relevant internal documents. That's the basis upon which she was advanced to the CMA, and she was so described. That being the case, we say she is likely to have documents which are responsive to those categories. Thank you.

THE CHAIRMAN: What we will do is I think we will take the short adjournment, I'll give you a short ruling then we come back. We have made some good progress then. What about timing, Mr Palmer? What do you suggest?

MR PALMER: Sir, we saw a number of --

THE CHAIRMAN: I would have thought that the parameters --

MR PALMER: I'm around halfway through my speaking notes, which are rough and ready --

THE CHAIRMAN: I would have thought that the parameters and the top 50 point would be pretty quick, actually. I mean, I would hope it were.

MR PALMER: I hope so.

THE CHAIRMAN: I'm not sure -- I've read the materials, I'm not sure there is an awful lot more you can and it's obviously -- it almost becomes a question of practicality and obviously it's a question of proportionality. But it's just trying to find a sensible answer to what -- you've obviously got stuck in the discussion about those.

Clearly, we need to spend some sensible time on the confidentiality ring but again there's only so much that can be said about that, I would have thought. I mean, should we start at 1.45? I'm very anxious to make sure the transcriber has a proper break, but --

MR PALMER: I would be grateful for that, thank you.

THE CHAIRMAN: We do that and then that gives us just a little bit of extra time.

Mr Beard, are you happy with that?

MR BEARD: Certainly, yes.

THE CHAIRMAN: Okay. I will rise now and we will start again at 1.45.

(1.06 pm)

(The short adjournment)

(1.45 pm)

RULING(extracted)

MR BEARD: I'm grateful. Yes, I think that's sensible because those nearby me will have heard what you've said, sir, and can feed in what sort of timing that preliminary process you are referring to would require. But I will defer to them at the moment.

THE CHAIRMAN: Thank you, that's helpful.

MR BEARD: Thank you.

THE CHAIRMAN: Mr Palmer, shall we move on to the next application?

MR PALMER: I am grateful, yes. I'll press on. The next application is the proximity parameter application, and this relates --

Application by Mr Palmer

THE CHAIRMAN: I'm just wondering whether we should deal with this and the top 50 publishers together, I know they are different, but it might be helpful because there are some similarities, I suspect, on the various points. Why don't we deal with this and the top 50 point together, and then we'll deal with the --

MR PALMER: Certainly, sir. One can combine reading at the end, yes. I will address both.

This proximity parameter relates to the Updated Disclosure Table categories 2, 4, 6, 14, 16 and 20. 2 and 4 you've seen; 6 you've seen, that's the business plans; 14 relates to the value of the PlayStation system -- that is the closed system's benefits -- claimed by Sony; 16 you see in relation to cross-commerce; and 20 you have also seen, that was cross-progression and cross-purchase.

In relation to those categories, the dispute between the parties is whether the parameters should be within 10 words, Sony says; or within 20 words, as the Class Representative said, when comparing proximity of certain keywords with, for example, the names of certain games or publishers. If one wanted to see an example of what that looks like, we could go to 478 -- it's in fact category 1, nothing turns on that for the moment. If we go to one of the first categories, 2 and 4, that is on page 482. On this version of the table, you can see that the search parameter was "Any set 1 term and any set 2 term" within the same document. That's what has resulted now is within 10 words, so within 20 words.

THE CHAIRMAN: Yes.

MR PALMER: You see the list of custodians. But then set 1 in this example, various publishers; and in set 2, various keywords, such as "exclusive" and "variance" or (inaudible) and variance", or "negotiation and variance", and so forth. So the question is whether within 10 words in that particular example would be sufficient to identify relevant documents.

The background to this, which I won't go over laboriously, you will have seen, sir, from the witness statements that on 6 September, the Defendants proposed within 50 words; and on 24 September, the Class Representative pushed for, as we see here, within the same documents, rather than combined certain case -- some certain word limits. On 25 October, the Defendants unilaterally revised those search terms and reduced the search parameters position to within 10 words.

It's important to understand that was not the only change they made. They've changed the word search terms, to the search parameters down to within 10 words, and to the top 50 publishers point, reducing from the 50 which had been asked for by Mr Harman, down initially to the top ten; and now to 10 randomly selected publishers from the top 50.

So all of that combined to mean that there was a pool resulting of 560,000 documents.

If we go to page 603, you can see Linklaters' letter of 25 October, which is put forward --

THE CHAIRMAN: Sorry. Give me that reference again, would you?

MR PALMER: 603.

THE CHAIRMAN: Thank you, yes.

MR PALMER: And 7.2 -- do I still have you, sir, can you hear me? I seem to have lost --

THE CHAIRMAN: No, I have you.

MR PALMER: I can't see you, but --

THE CHAIRMAN: I'm still here.

MR PALMER: I will press on and hope someone else is able to resolve that. But I'm fine as long as you can hear me.

THE CHAIRMAN: I can.

MR BEARD: I can see the Chairman. He's on our screen, so I don't --

THE CHAIRMAN: I can see Mr Palmer.

MR PALMER: You are there, I'm just -- it's just about to turn off automatically to save energy. That's what's happened. So perhaps --

MR BEARD: We won't comment on the (inaudible) of the system.

MR PALMER: There we are, I'm back, I've been saved. Thank you.

25 October was at paragraph 7.2. You can see Sony retreated from its initial position "within 50 words of various search terms, top 50". They said that resulted in a disproportionately high number of documents for review with 2.1 million-odd unique documents hits. And if they were to adopt the Class Representative's modified search parameters, that would go up to 3.8 million, and they say that's just too much.

At 7.4, they say:

"To that end, we enclose our revised search terms and associated parameters at Annex 1."

And that results in a pool of 560,000. So even ignoring the Class Representative's then-proposals and just focusing on Sony's proposals and the changes they made, what they did was to eliminate around 1.6 million documents from that pool by the combined effect of that change in search terms and parameters, and so forth.

There is no disaggregation there of what would happen if you only changed "within 50 words" to "within 10 words", or only changed the search terms, or only changed to top

50. The headline aggregate effect that was explained and that only.

Now, what we know is at this juncture, the 10-word parameter was not arrived at on the basis of any assessment of the likelihood of the words in question actually being within 10 with words of each other in the same relevant document. It was purely an exercise in control of numbers and applied without differentiation between the different disclosure categories. It's a one size fits all approach.

So the Class Representative did two things: first, it sought further information about this; and secondly on receipt of that, it compromised.

As to the request for further information, that is on 1 November, and you have that at 646, paragraph 27, at the foot of that page, saying:

"[We are] not currently content to accept [that change down to 10] without further explanation as to the extent to which this excludes relevant information. Please provide further details as to:

"Whether search term combinations within 50 were run and, if so, the extent to which they resulted in false positives.

"Your rationale for using within 10 (and not for example, within 25).

"If search term accommodations within 50 were not run, please run search terms [within the] sets of parameters (i) within 10; and (ii) within 50, in order to provide a by side-by-side comparison of the data that would result and an indication of false positives ..."

At 691 is the response on 19 November. At 5.4, this is the response. They said:

"We ran search term combinations across a range of proximity comparators including within 50 words and within the same document, and these combinations resulted in disproportionate and unreasonable hit counts."

No indication there as to what those counts were with this change in isolation.

THE CHAIRMAN: Sorry, I missed that reference as well. Which page is that?

MR PALMER: Sorry, it's at 691.

THE CHAIRMAN: 691.

MR PALMER: This is Linklaters' response, 19 November paragraph 5.4. I'm just focusing on 5.4.1, an issue of numbers there.

Then 5.4.2:

"Upon identification of a proposed pool of 2,146, 383 documents - which was ... plainly disproportionate, we worked with SIE's e-discovery provider to [change] different combinations of proximity parameters including 'within 50 words' ... and 'within 20 words'. Neither of these ... sufficiently reduced the pool ... to proportionate level ... in relation to the queries ...(Reading to the words)... the following table illustrates the hit counts based on the current data extracted when different proximity parameters are applied to the revised search terms and associated disclosure categories in Annex 1 to this letter ... the document numbers at all proximity parameters outside of 'within 10 words' are plainly disproportionate [it is asserted]."

Then it's broken down by the categories. You can see in the last two rows, which are at the top of the next page. For present purposes, (inaudible) crystallises the difference is we are no longer concerned with category 1, but we are with the remaining categories.

And you can see in categories 2 and 4, it's 6,000 or 7,000; about 100 in category 6A; 5,000 in category 6B; 4,000 for 14; about 10,000 for 16; and about 1,500 for 20. So that's the difference there.

THE CHAIRMAN: Wait a minute. Just so I understand: the 2,146,000-odd, that wasn't the only starting point because on the previous document, it was about 3 million and something. Is the 2 million just within 50 words, or does that -- this seems to

suggest they were within 50 words and within the same document, presumably -- it doesn't make any sense to have both of those, it would be --

MR PALMER: I will explain this table. The 2 million-odd was on the basis of Sony's original search terms. The 3 million-odd was what would happen if you changed to the Class Representative's then proposed search terms, not its current search terms. And this table, as I understand it, is on the basis of the new search terms, i.e., the more restricted Sony search terms on the top 50 publishers and specific search terms, the actual words you are searching for.

THE CHAIRMAN: Yes --

MR PALMER: (overspeaking) -- within that. So it's always going to be less than the 2 million as a starting point.

THE CHAIRMAN: I understand there's obviously something else going on here, other things moving as well. But just give me a handle on -- so the 2.1 million is within 50 words on the original search parameters, and the 3 million was once you've added within the same document. Is that broadly right?

MR PALMER: Not just that change, but also all of the 50 top publishers and various other search terms.

THE CHAIRMAN: Yes, and all the other bits.

MR PALMER: That's what I understand. But if it's wrong, it can be corrected. That is what we understood to be told, for example the 3.5 million.

THE CHAIRMAN: Then when you get down into this, obviously these numbers in the bottom two bits of the table, once you take category 1 out, there's not a lot of difference between them, is there? But presumably that does rather depend on where you end up with the top 50, does it?

MR PALMER: Yes.

THE CHAIRMAN: That would also have an effect as well, one assumes, because there would be more publishers in the relevant column.

THE CHAIRMAN: Where I think the sharp point of this is going to be is at what stage is there just a continuing and potentially disproportionate burden on Sony, and how much longer are we going to keep adding things which make them go and do more work with large volumes of documents. In some sense, what the aggregate amount of we ask is quite important, but I don't know whether we have to ask Mr Beard --

MR PALMER: That is all within Sony's possession, not ours. We can only go on what they've told us.

THE CHAIRMAN: Okay.

MR PALMER: What I want to draw from this table is this: it's a number's game is what Sony are playing here. What there isn't is an answer to is our request in our letter of 1 November of the number of irrelevant or false positives which are included within these numbers.

What we've suggested and explained that meant was doing a sampling exercise, reviewing just a sample for each category to see, based on that review, how many false positives are being produced. That could be done relatively straightforwardly. It is a human process, you need humans involved in that. But it can be facilitated by TAR as well.

But rather than do that, this exercise in cutting the numbers by reference to this parameter of within 10 words is proceeding solely on the basis of hits and on the basis of no assessment whatsoever of the relevance of those hits. That is what this numbers game is all about, and what we asked for was that the object of proportionality be achieved not just by that blunt tool of cutting the numbers, but also seeking to assess the amount of relevant documents which were being caught, or indeed excluded, as

the case may be.

My submission is it's not open to the Defendants to simply take an axe to hundreds of thousands of relevant documents just because they are large in number; and by doing so without actually assessing the relevance of the documents within the numbers which are produced by this axe.

THE CHAIRMAN: What sort of sample do you say is necessary in order to -- I mean, part of the problem with this depends maybe which category you are in, but if you were in category 6B -- maybe it's category 14 where you have 20,00 -- actually, take 16, you have 35,000 documents. How many do you need to look at before you have some confidence about the population?

MR PALMER: I'll leave that to statisticians, but I can move on from that because as I said, we enquired about that further information. That revealed the lack of any assessment of relevance, so we then proposed a compromise. The compromise was then to move to within 20 words, rather than 10 words, on the basis that no assessment of that relevance had been done, and Sony was apparently unwilling to do it, so that is what generated the compromise of within 20 words.

That still produces much lower numbers than "within the same document "or "within 50 words", and not hugely greater numbers than "within 10 words" to provide a level of assurance in the circumstances where there's been no investigation by Sony whatsoever as to the relevance of these documents.

I go back to CPR PD 31B we looked at earlier, and bear in mind it's the relevance or likely probative value of these documents which has to factor into that proportionality exercise. You cannot simply ignore that and just focus only on numbers without any such weight being given to their relevance.

What this does --

THE CHAIRMAN: I understand that absolutely fair point, but there is a point of practicality here, isn't there? I think what's being suggested by way of numbers is not an unusual way of dealing with this, is it? It's actually probably the only way can you sensibly do it. And in a sense, this is not a case, and indeed most cases aren't, where there's going to be one document that makes any real difference to the outcome. A lot of this is actually just about making sure you have enough material to be able to properly paint a picture and to understand context.

Obviously if there are things that look like they are missing, then you are entitled to come back and ask for them. So I am just not entirely sure -- maybe this doesn't matter because you have given up the relevance point, but I do think that ultimately this has to exercise in pragmatism, which is how many documents can sensibly be useful in a case like this, and how many **documents can the parties** sensibly digest and manage between them.

That is partly -- there is almost a bit of a feel about it, isn't there, Mr Palmer, where if you have 2 or 3 million of them, then everybody knows it's not going to work. You get down to a couple of hundred thousand, everybody knows they probably will.

MR PALMER: It's that interest in pragmatism which precisely motivated the Class Representative's offer of going to within 20 words, rather than within 10. Because it is in fact a perfectly standard procedure to test false positives in irrelevant documents by means of a sampling exercise. It's the reluctance of Sony even to do that which requires some sort of compromise, which we say means just expanding the net. "Within 10 words" is a very tight criterion to apply. That's within the same sentence the name of the publisher, one of those keywords which you can see dramatically has even on this basis more than halved the number of documents which have been flagged up -- in some categories a quarter, reduced by 75 per cent. That's a reflection

of just how tight that criterion is.

There's no particular reason to think *a priori* that if a document is irrelevant, then that search term will be within 10 words of the name of the publisher, which may be a subject title right at the top of an email.

THE CHAIRMAN: In a way, that is sort of by the by now, isn't it? It's perhaps my fault for taking us down that rabbit hole. But if where we are now is the between 20 and 10, then it's really actually -- we are not looking at any -- I don't think anybody is suggesting we are going to do any sampling or anything. It's really just a question as to which of those is most sensible, isn't it? It's not --

MR PALMER: The reason why we say given there's no magic in any given number, the reason why we say that's sensible, is it has to be borne in mind that narrow disclosure "within 10 words" has been arrived at without assessment of relevance. What Ms Williams says about that is: we did do an exercise to remove embedded Excel spreadsheets and Outlook calendar entries. (Inaudible) insofar as it goes, but that's still not a sampling exercise relevant to what is then produced. So we say we need some sort of value to account for that. We do say a result of this is an increase in 5 per cent pool compared to "within 10 words", and that is a proportionate and pragmatic basis upon which to proceed.

Ms Williams finally argues at paragraph 24 that:

The proportionality or otherwise of any request requires consideration of the number of documents that would need to be collected and reviewed and the likely relevance of those documents."

Which is ironic because we say that's precisely what hasn't been done. The fact "within 10 words" has nonetheless produced a number of hits doesn't suggest it's likely those words will necessarily appear within 10 words of each other before a document

can be called relevant.

So we want that greater safety of assurance that even without that assessment of relevance a proper search has been done, so within 20 words was intended to be and I hope strikes you, sir, as being a sensible, pragmatic compromise.

THE CHAIRMAN: I think I have all that. Anything you want to say about proximity, or shall we move on to top 50?

MR PALMER: That's it for proximity, that's the application.

Top 50 can be dealt with relatively quickly, I hope. It's another way, it's another change which was then applied at the same time to get down from the 2.1 million figure.

On 25 October, Sony proposed just the top 10, excluding smaller publishers. This is for categories 1, 2 and 4; and Redfern 4B to G, the margins we have seen before.

We consider that that led to an obvious problem: skewing the results to large publishers only, that precisely raising a problem as to relative market power, and so forth -- which I won't develop here, the detail of that is confidential material.

Sony's response to that was on 19 November. They said it would take an approach of 10 random publishers, taking every fifth publisher when they are all listed in alphabetical order which, as I understand, happened to include Epic at letter E. This risked skewing the analysis in the other direction by ignoring the biggest publishers beyond, I would assume, two of them, a point which (Inaudible) not to understand saying: oh, it's skewed the other way. But the point is: it's skewing in one direction so as not to skew it in the other direction.

Our position is the result should be to include that top 10 and 10 random others, whether alphabetically or some of other means. We say that is important, and I want to show you the context for why this is likely to be important.

Can I take you to page 148, this is Sony's Defence. If you look at the top of 147 for

context, you will see it's under the heading "Alleged dominance". This is Sony's answer to dominance, then go back down to (ii) at the top of 148. The point is made: "Publishers likewise have a wide choice of gaming systems and distribution channels to choose from, including the option of multi-homing."

It's asserted:

"Certain publishers hold significant countervailing buying power. The Class Representative has failed to take account of this fact due to its failure to analyse the two-sided nature of the market. Publishers are vital to consoles and have leverage, holding substantial market power that materially constrains SIE's commercial behaviour. Users choose between different gaming environments based not only on the quality of the hardware available but also, importantly, based on the content that they offer. Since gaming is a 'hit-driven' business, the publishers' leverage comes from the fact that users value variety but also focus on a limited set of top 'hits' (including exclusives) when choosing consoles, and with certain hit games including 'Call of Duty' and 'Fortnite' experiencing overwhelming popularity and constituting 'must-sells' on any mainstream video gaming service. This means that publishers have substantial leverage when it comes to distribution negotiations with the operators of those environments. This is particularly so in the case of larger publishers like Electronic Arts and Activision Blizzard."

So we have reference to three big publishers there: Epic, Fortnite, then Electronic Arts -- other games: Activision Blizzard, Call of Duty, and other games.

Now this is asserted to be a material constraint relevant to dominance, particularly amongst these big players. No doubt it was that which motivated Sony originally to oppose just the top 10. It's important to be able to compare their position with 10 other of the top 50 to see the difference on a randomly selected basis so it's not skewed

either in one direction or the other.

We anticipate that in due course, Sony will produce witnesses to say: oh, yes, Activision Blizzard, Electronic Arts, Epic, others, have huge negotiation powers, substantive market power, and they have countervailing buyer power. We want to be able to interrogate that by reference to actual negotiations, actual documents, with these third-party providers.

What's (Inaudible) arbitrarily excluded because you get Epic because that's letter E, but you don't get Electronic Arts because that's opposing alphabetical order. We say that makes no sense at all, and the solution is to make sure we do include these larger publishers, but also includes other randomly selected big publishers as well.

THE CHAIRMAN: I'm going -- you were talking about I think a relative comparison, I don't quite get that. How does it help you to compare the leverage you can see in relation to top 10 -- you may want for other reasons to have people outside the top 10, but I don't really get the relevance point because either the constraint is a constraint, or it isn't. It doesn't matter whether it's more constraint or less constraint than somebody else, does it?

MR PALMER: The question is how widely shared is that constraint. Is it Epic only, for example, that can effectively negotiate, if they can, at all? Or how far down the tree does this go, is there any influence at all **--**

THE CHAIRMAN: But really, Mr Palmer, if you were -- I mean, just for argument's sake -- in a way, I'm sort of not entirely sure why you didn't accept the offer of a top 10 in the first place. Because if you had the top 10 and you can make the case on the top 10, you've made your case. And if you can't make it on the top 10, you're not going to make it on number 39 at least in terms of this, are you? So it's just a bit odd that we've got into the situation where you've not taken the top 10 and ending with

something quite different.

MR PALMER: If it turns out this top 10 who do have countervailing power but doesn't extend beyond that, then you have to get the economist to number crunch that to see what is the net effect of all that.

THE CHAIRMAN: I'm not **(overspeaking)** -- I don't think that's your best argument today. I think if you have the top 10 customers of publishers who obviously have buyer power, I'm not sure you are going to find many economists telling you that is what happens at number 15. And in a way, maybe that's not really the point --

MR PALMER: I don't accept that at the moment. I'm conscious that much of the next topic is confidential and there are confidential restrictions around that, but there are negotiations -- you will see the next heading, perhaps I can do it without saying anything --

THE CHAIRMAN: Where in the documents?

MR PALMER: Can I take you to the Defendants' skeleton argument.

THE CHAIRMAN: Yes.

MR PALMER: If you see there -- I might be being overcautious here, but you see the heading at the bottom of page 18? It's not marked confidential, but by making this link, there might be something confidential. If you see that heading, in (Inaudible) aspects, and of course there's an argument about disclosure of those documents and what needs to be done to ensure that we have the complete set, and that does extend to top 50.

THE CHAIRMAN: I understand. **(overspeaking)** -- take your point.

MR PALMER: You might think there's variation there, and it depends how much variation there is, which may well be a factor of presence or absence of countervailing power.

THE CHAIRMAN: I'm assuming -- maybe I'm wrong about this -- if somebody has a game like Call of Duty or Fortnite, they're going to be in the top 10 because if it's successful, that's why they would be in the top 10.

MR PALMER: There is no doubt about it, and we should certainly be home. But in addition to the 8 other publishers which Sony are currently offering to random down the list, just 2 more of those as well to complete the set. What we need is --

THE CHAIRMAN: Isn't there a practical problem here, which is as I understand it, this discussion is happening behind the curve. Because as I understand it, Sony is already in the process of executing on the plan it's settled on and you don't agree with, so actually as I understand it, you are not getting 8 of the top 10 because they are going to have a different path, because they say they were prompted by you to move away from the top 10.

MR PALMER: We didn't propose that they come up with this. They did that on an entirely unilateral basis.

THE CHAIRMAN: No, I understand what you say about that. I'm just trying to cut to the chase here a bit, which is that all of this is sort of fine, except that if the point you've made is a good one generally, which on the face of it seems to -- we'll see what Mr Beard says -- then what it rather suggests is that the logical starting point for this would have been to do the top 10. Instead, we are somewhere else, we are not doing the top 10, but in 2 of the top 10 and a whole bunch of other people who are probably of marginal interest.

Let's not even worry about how this came about, but it is unfortunate, isn't it, that we are now going down what appears to be the wrong path? That's really what this is about, isn't it?

MR PALMER: Just to recall where that came from: it wasn't us saying we don't want

the top 10, we asked for top 50. That's what Mr Harman was asked for, and he takes all those references away and wants the top 50. Sony have pushed back against that on proportionality grounds. That remains our primary position, top 50 --

THE CHAIRMAN: They pushed back and offered you the top 10, and you said, "No thank you, we don't think that's going to work" --

MR PALMER: We didn't say "Therefore abandon the top 10 and give us something else". What we wanted was the top 10 plus others, i.e., top 50.

THE CHAIRMAN: Okay. Look, I think -- I mean, I have to say, and I don't think this requires any answer, but just to be absolutely clear with you: neither of these points are points which I think we ought to be arguing about in this context because they really are points that everybody ought to have a vested interest in getting right, and it is a bit disappointing to find that we have spend Friday afternoon arguing about them. So I don't really want to spend a lot of time on them, I actually would like to find a pragmatic answer, which is what I had rather hoped your instructing solicitors would do. Just so we are clear about this, there's no point of serious principle here; this is all just about running a big bit of litigation sensibly. What's not happening is that we are getting -- on the face of it, we are just not getting the right answers. I don't know why that is and I'm not really interested in a debate about it.

But for those sitting metaphorically behind you, I hope they get the message that I don't think this is the right way to deal with this sort of issue. It should be dealt with by solicitors working out what the sensible answer is, recognising there's a degree of compromise on both sides. I don't want to get into whose fault it is, but that does involve a proper constructive debate between them, in accordance with their obligations to the Tribunal, rather than writing letters to each other which are cross and not agreeing things.

That's my little speech over, Mr Palmer, and forgive me for venting a bit, but it's not really what we should be arguing about, is it?

MR PALMER: I entirely agree. We hadn't suggested the abandonment of the top 10 and we weren't given a choice about it. That is why we've had to come here: to say we need that top 10 back, in addition to other randomly selected publishers. If we only get 2 more of those, we're not going to die in a ditch over that, but it's the restoration of the top 10. We've never abandoned our request for that, we always wanted the top 50. We said top 10 wasn't enough, at no point did we suggest we don't even need the top 10, you can pick some minnows instead.

THE CHAIRMAN: Fine, but --

MR PALMER: That's why we are here --

THE CHAIRMAN: Okay, fine. I don't want to have the debate about why it's gone wrong. It just has gone wrong, quite evidently it has gone wrong, and actually (inaudible) such that the people sitting behind you have responsibility to make sure it doesn't go wrong on things like that. That's all I'm saying. I don't really care whose fault it is because it's somebody's fault, and probably a bit of both, I would have thought. I hope they have heard what I said.

Shall we move to Mr Beard now and see what he has to say about these things? Mr Beard, how do you want to do it? Do you want to do it in order, or do you want to start at the top 50?

Submissions by MR BEARD

MR BEARD: Do you want to do in reverse order just because you happen to be focusing on --

THE CHAIRMAN: I think that would be helpful, actually. Am I right in thinking that you are in the middle of this, and is there a constructive suggestion about how we can

get back in what I thought is the most obvious sensible way to do it? I don't know if you disagree with me, just tell me if I'm wrong about that.

MR BEARD: Well, look, it's pragmatic, I completely understand. But you will see in our skeleton argument that what happened was, as you've already indicated, we offered top 10 back in the day. That was rejected as not a sufficient spread, so we did this randomised approach, so you get a couple from the top 10.

The reality is it's the problem in paragraph 58(3) of our skeleton: if we were to include the remaining top 10 publishers as search terms, it would increase the pool of documents for review by an additional 150,000. That's the real problem with this.

As I say, it's not that we had some kind of vested objection to the top 10 because we proposed it at the beginning. But when we are told, "No, it has to be the top 50", we said, "Look, you can't ask for that, that's just not reasonable", so we go off with a different suggestion. You are in a position now, if this Tribunal orders 150,000 more documents to be reviewed, we would be in -- that is going to have a massive impact on timing. We just can't do that.

If the Tribunal were to say, well, pick one or two other random examples from the top 10, then perhaps we could cope with it. The difficulty is -- as the judges always say we are where we are now -- there was a deeply unrealistic approach adopted by the Class Representative to these issues, and we have done our best in relation to those things.

It's not a matter of retreating, changing position, or anything like that. We are taking into account what we are learning as we do this exercise. The reality is even if we had gone with the top 10 publishers, we might have had to impose further restrictions just because of the number of documents we were getting. So all we can do is say, "Look, we will try to do more, but we thought this was the sensible compromise". You get

a couple from the top 10, Mr Harman could knock himself out with his comparative exercise because he's going to get range from across the top 50. We think this is worthless, but we are doing what we are asked do, and now we are being criticised for it in circumstances where we cannot just reverse gear.

THE CHAIRMAN: Sorry to interrupt. Just tell me exactly where you are with this. So you are doing -- two of the top 10 have been done anyway.

MR BEARD: Yes.

THE CHAIRMAN: I don't know whether you can tell me -- maybe it's sensitive -- perhaps you can't tell me where they are in the top 10.

MR BEARD: I definitely can't tell you where. I don't actually know the identities of them, and I'm not sure if we --

THE CHAIRMAN: Do we know the identities?

MR BEARD: We do know, and they may well be identifiable from the disclosure that's already happened, I'm not sure.

THE CHAIRMAN: Never mind.

MR BEARD: I'm so sorry. I can check --

THE CHAIRMAN: No, no, I can understand why that's difficult. No, I understand. But anyway, it's in flight. This has been done, has it, or is being done? Where are we?

MR BEARD: This has all been done because this was part of the whole disclosure exercise which was supposed to be completed by the end of December. We got an extension to 23 January and we've asked until 14 February to complete it. But we are doing this.

I should say that other categories of disclosure will pick up some of these sorts of issues as well. It's not just, you know, searching the top 10 publishers is the only way in which this sort of material will come out. We are guessing there will be other material

that may be germane that will come out through other searches.

But in terms of a focused search using the parameters -- so these are the parameters that were delimited from the start -- and just doing the remaining 8 top 10 publishers, it's 150,000 documents is what we have, and that's de-duplicated.

THE CHAIRMAN: That is extraction and de-duplication --

MR BEARD: It's not TAR'ed.

THE CHAIRMAN: So it will go through more than 50 per cent, whatever it is, how that works.

MR BEARD: Yes.

THE CHAIRMAN: Then produce something physical at the other end.

MR BEARD: Yes. I mean, even if we assume that TAR rolled at the same rate with this as broadly we have as the average, which is taking it down to 75,000, that is still a massive number of documents then to be reviewed, and so on. We are not disagreeing. The whole point we've been making about this stuff is it's a proportionality exercise. We did what we thought was the sensible response, which was proportionate in relation to what was a totally unrealistic request by the Class Representative.

If you say to us, "Do two random people from the top 10", then we can go away and do that and come back with a number. But the truth is there will have a large number of documents and we are incrementally adding more and more and more that have to be processed, even post-TAR. It is going to have a knock-on effect if we do this.

The alternative is to stay where we are and this exercise gets reviewed. Because I have to say, the points that are being averred to in the defence about the dynamics of this, the extent to which you need tens of thousands of documents in order to deal with this, I confess, just stepping back, I'm pretty sceptical about.

THE CHAIRMAN: I can understand that as well. Just tell me the relationship between this and the other point we are going to come on to: is the 150 sensitive to whether it's 10 or 20 words?

MR BEARD: Oh, yes. This is within 10. Shall I just deal with the within 10 and within 20?

THE CHAIRMAN: Yes.

MR BEARD: Mr Palmer's getting it all the wrong way round. The reason you use a parameter within 10, which broadly he is capturing is within the same sentence, is because what you're trying to do is identify terms that might indicate the document's relevant.

Now obviously if you are looking for business plans in relation to PlayStation, it might not be that every document that really is telling you about the business plan has "PlayStation business plan" next to each other, so it's completely juxtaposed. So you add some degree of flexibility into that. You say, "Well, it might be PlayStation, we are considering a business plan in relation to it". Well, you catch that within 5.

Obviously if you go within 10, as Mr Palmer broadly put it, you're capturing those concepts within the same sentence. Therefore, the chances that document is going to have something relevant in it is proportionately higher than if you extend it. If you are out to within 20 words, the phrase "PlayStation" and the phrase "Business plan" could be in completely different sentences to do with completely different things.

It is of course true that documents which have those terms within 20 words could be relevant, we are not denying that. But you are using an exercise to try and constrain the universe of documents that you are dealing with in a sensible practical way and within 10 is obviously the sensible way of doing it. That's not a retreat from within 50, or anything that Mr Palmer was putting.

What we did was we said if we like the loosest possible measure, you get these massive numbers -- because obviously if within 50 had generated 100,000 documents, we would all be laughing, no one would have to have an argument about it. It's because that's not the case you then apply sensible parameters. We say it is patently obvious that the level of relevant material you're going to get from within 10 is much higher than within 20.

And let's just bear this in mind: we are doing it on a within 10 basis, then we are applying TAR, and 50 per cent of the documents are irrelevant when we use the TAR process. Then of course when we do document review in human terms, it comes down probably another 50 per cent. So even in relation to the within 10 criteria being applied, we are talking about a fraction of the documents actually being relevant and answering to the disclosure categories. You push that out to within 20, you are increasing the likelihood that you are catching irrelevant documents, you are increasing the burden significantly, and it is frankly irrational to be going in this direction at this stage. You have the table that Mr Palmer took you to in relation to it, and even in relation -- I'm so sorry, I cut across you.

THE CHAIRMAN: I just want to make sure I'm looking at it -- I'm now looking at it in Williams 4. It's the same table, isn't it?

MR BEARD: Yes, it's the same table, just all on one page, so I was looking at it in Williams 4 as well. No, no, it's exactly the same thing, sorry. I don't think there's any dispute about that. You can do the maths, but broadly speaking, if you total up the differences between within 20 and within 10, using not the bracketed figures but just the headline non-italicised figures, there is approximately 70,000/80,000 difference between those two lines.

There is a degree, I should say, of overlap in the differences between the categories:

some documents fall within multiple categories. So 70,000 to 80,000 may actually be an overstatement, but it's still tens of thousands of documents.

THE CHAIRMAN: You are not looking at column 1, you are looking at everything else to -- you are excluding category 1 from that, aren't you? No, you're not, because it's 4B --

MR BEARD: No, no. If you exclude category 1 from that, I think that drops it by -- it goes down to something like 20,000/30,000 documents something like that. I have to do the maths for that.

THE CHAIRMAN: Just directionally so I understand it. The first column is category 1 and 4B to G.

MR BEARD: Yes, exactly.

THE CHAIRMAN: If you took category 1 out of that, you get some smaller numbers, but we are not -- we still have some numbers in that first column.

MR BEARD: Yes, that's right, you still have numbers. And you still have a delta in relation to every category. Some of those deltas are large, like in 2 and 4, you have broadly 6,000 delta in relation to it. But the totals are provided in our skeleton, paragraph 50, and it's 60,500 documents, excluding family documents, but 31,000 including family documents.

THE CHAIRMAN: I'm now a little bit confused.

MR BEARD: I'm sorry.

THE CHAIRMAN: No, it's my fault, I'm sure. I thought you told me 70,000 to 80,000, but suddenly we are down to --

MR BEARD: Let me take a step back. If we go back to the table, so the numbers outside parenthesis are documents which you'll see not including families of documents, so documents associated.

THE CHAIRMAN: Yes, I get that.

MR BEARD: So the numbers I was giving you without category 1 are 16,000 without families and 31,000 with families. This is just the maths of the deltas in all of the other six columns from left to right, effectively. Does that make sense?

THE CHAIRMAN: Yes, it does. But does that mean we are not dealing with the Redfern 4B to G?

MR BEARD: Yes, yes, we're not dealing with that at all, Redfern B to G.

THE CHAIRMAN: That is in Mr Palmer's list, isn't it? He does want 1.

MR BEARD: Yes, he wants that -- sorry, I was trying to answer your question, sir. If you add the category 1 and 4B to G -- I'm not sure we can separate those two out, but you'd add approximately 90,000 documents, including family documents, to those totals, you would be going up from 30,000-odd to 120,000.

If you weren't adding the family documents, which I think you should in these circumstances, you would be adding 60, which is where I got my 70 to 80 total which I was giving you earlier.

THE CHAIRMAN: Yes.

MR BEARD: Just to be clear, as Ms Sarathy reminds me, the reason why I can't separate out 4B to G is because it's category 1 in the disclosure, and 4B to G in the Redfern, it's the same search terms. They are one category, effectively.

THE CHAIRMAN: That doesn't make any difference because Mr Palmer doesn't want category 1.

MR BEARD: No. If he is asking 4B to G, then it makes no difference whatsoever. I don't want to -- it's obviously a numbers game in part. But here, when we are talking about moving from within 10 words to within 20 words, you do have these other measures of relevance testing which we have done on the cohort we have gathered,

this enormous cohort documents we have been through, and we're hitting relevance within 10.

So these documents, which we are tagging as within 10 words of the relevant terms exist, 50 per cent are being wiped out by the electronic search, and another around 50 per cent by the manual search. The idea that you should be asking us to go and do any more in relation to within 20 is just a wholly disproportionate waste of time and money.

THE CHAIRMAN: Sorry. I was going to say -- I imagine people will shudder when I say this, but has anybody done the exercise of working out what the numbers are if you did within 15 words?

MR BEARD: I think the answer is no. There are people clutching their heads near me, I won't turn the camera towards --

THE CHAIRMAN: I knew that would happen.

MR BEARD: I'm sorry, but I'm going to be honest about this. We do test the permutations, but there are limits to what we can do.

THE CHAIRMAN: I was just giving what judges always do, they always split the difference.

MR BEARD: No, it's fine. And look, I'm going to get it somewhere in the middle.

THE CHAIRMAN: I think the other thing, I suppose, is that if I agree with you, then I think you have to accept that if Mr Palmer were to find along the way that there were gaps, you're going to have to go away and fill those gaps. That might require you going away and having to do another exercise. I do think you have to accept that if for some reason the 10 turns out not to be a helpful place to be, then, you know, there may well be some consequences of that, but they're going to fall on Sony rather than on anybody else.

MR BEARD: I don't think we have ever -- we have always recognised that there a possibility of specific disclosure applications being made subsequently. Obviously, we are not try to stop that, we are trying to sensibly manage the basic exercise.

And look, part of the reason why we do have an interest in making sure we do hit relevant documents in quantity that answer to these categories is because we don't want to be asked subsequently about these things. So we actually have an incentive not to underdo these things because we know there is always that threat further down the line.

I do think it is worth bearing in mind that amongst the thousands of documents we've provided, just going back to the point on the top 10/top 50, there will be lots of documents amongst those other searches, for instance from the custodians we were talking about earlier. When we were looking at Mr Rosenberg's emails, for example, he is dealing with one of the top 10 developers, so you are getting documents through those other means as well.

We understand that it's sensible to have different categories you search for, we are not deprecating that. But I think -- going to your point about whether or not Mr Palmer and his team might find that actually they're getting more in relation to a range of publishers, we expect that to be the case because of those other searches we are doing under other headings as well.

So again, if in due course he says, "Yes, but we are missing X or Y and Mr Harman really needs it", of course we will listen to those sorts of requests, we understand that. What we object to is this sort of you can push it out to another 10 words, or why don't we add another 8 people, it doesn't matter to you. It really does and there isn't good ground for doing it.

THE CHAIRMAN: Thank you. Mr Palmer.

I think just on these two -- let me just give you a bit of heads up and you can see what you think of it. In relation to the top 50, we're just in a difficult position, aren't we? It's not good place to be, and (Inaudible) it's the whole thing unsatisfactory and we needn't say any more about how we got there.

I do think that going back and generating another 150,000 documents and putting them into the machine is not actually the answer. But on the other hand, it is important we get a proper selection for that top 10, and Mr Beard is offering a couple of choices -- effectively, a choice by you of 2 more, which will give you 4 out of the top 10. Is that a sensible and pragmatic solution, at least for the meantime?

MR PALMER: Certainly it's a holding position, so I'm not going to say no to anything that is offered, although there will need to be some discussion about how those were identified, and it certainly ought to include the ones which Sony especially rely upon in the context of countervailing buyer power. So yes --

THE CHAIRMAN: On that point, do you know who the 2 are that they are looking at, at the moment?

MR PALMER: They haven't told us. I picked up Epic from their skeleton argument, which seems to be implied that they were included. If I've misunderstood that, I will told otherwise. But here, it appears --

THE CHAIRMAN: I don't think you can work on any assumptions, Mr Palmer.

THE CHAIRMAN: Look, I think --

MR PALMER: I was working on the basis of your skeleton argument, but --

MR BEARD: No, no, it doesn't say that.

THE CHAIRMAN: I think the answer probably, Mr Palmer -- and I can make a ruling on this if you want me to -- but basically it seems to me you not going to get top 10 at this stage, unless somehow you are indicating that Mr Harman is going to be in such

difficulty he can't deal with it.

I think there some force in what Mr Beard says about painting a picture as opposed to opening up every can, but I've mixed my metaphors. I think -- and the practicality, because we've got to where we've got to, I think the practicality suggests that there needs to be bit of a compromise.

What I am suggesting is you're getting 2 anyway, and if you know who those are and you have the ability to choose the other 2-- and then obviously Sony may well come back and say, "Well, this produces an enormous bundle of documents and we'd like to deal with it in a slightly different way". But the expectation is they are going to find a way to deliver to you the relevant documents in relation to those 2.

I think that's the sort of offer which is on the table and it seems to me it's probably a pragmatic way of dealing with it.

MR BEARD: Just to be clear, I did suggest random was the sensible way of dealing with it this, so picking 2 random I think is sensible way of dealing with it.

MR PALMER: We don't agree with that.

THE CHAIRMAN: I think to be fair, Mr Beard, I understand -- and you did say that, that's entirely fair. But I think I'm putting it to Mr Palmer that he might get a choice to see whether he would agree with that.

MR BEARD: I understand. I just wanted to be clear what I had --

THE CHAIRMAN: No, that's entirely clear, and I am reserving to Sony the possibility of saying, "Actually, for whatever reason, that's not a good idea". But I'm happy we agree, it would have to be a very bad idea to divert us. I'm not saying it's just a given, I'm just saying if Mr Palmer could choose 2 more, we can see what the position is and --

MR BEARD: Yes. I think that's right because I think there are going to be two issues.

There's going to be -- how one talks about representativeness, I don't know, but there is also just going to be a practical number of documents issues because I'm going to guess it could vastly fluctuate even in relation to the top 10, so there may just be a numbers issue again.

But I think it's probably better to park that in relation to this issue than do anything else at this stage.

THE CHAIRMAN: Okay, thank you. Mr Palmer, that is sort of where we are. Obviously if at some stage which is not too far in future, you have something from Mr Harman in particular which indicates there's a real problem with that because it emerges that somebody he hasn't got he really needs, because of a particular document that's come out or illustrates, whatever it is, you can come back. But I think that's probably the sensible answer at the moment.

MR PALMER: We can't come back on a specific disclosure in that eventuality, but in the meantime back the proposal as you have outlined it.

THE CHAIRMAN: Yes, I think. The reason I'm leaving you that window, just to be clear -- and Mr Beard may have something to say about this -- what I don't want to find as we get to trial somebody saying: well, it turns out that someone on this list who was in the top 10 but not the 4 we have is really important and we don't have the documents, and as a result there is some silly argument about burden of proof, or something like that.

I imagine that once you have your disclosure, you are going to know whether that is a sort of problem which arises. And equally I think, Mr Beard, there is a bit of an onus on you: if you think something is going to happen -- and after all your client knows about these documents knows and who they are -- I don't want you popping up saying, "Here's X which wasn't in the 4, no one's ever asked us specifically for those

documents and as it happens there's a proof problem".

I think we all have to recognise there are some consequences from what's happening now. I don't know, Mr Beard, if you want to say anything about that.

MR BEARD: Obviously I have to reserve all arguments on burden of proof. But I completely understand the Tribunal Chairman's position that if you say: look, we are not going to give disclosure on X because it's disproportionate, to turn round and go, "Aha, but you have no documents", might not be our best look, of course.

But I'm going to say that's not going to be our primary line at trial.

THE CHAIRMAN: No, no, and I'm not suggesting it would. I think really all I'm saying is if you thought it was going to be a line, you are not going to be able to run it unless you actually reverse course --

MR BEARD: I understand the indication of lack of sympathy with that sort of hypocrisy in due course, yes.

THE CHAIRMAN: Okay. Mr Palmer, do you want me to make a ruling on that, or are you happy to accept that as a --

MR PALMER: I'm content to accept that. As I understood you, I think that will require Sony to provide us with their top 10 list and --

THE CHAIRMAN: Sorry, I don't know whether it's my connection, but I have just lost your voice there. Do you mind saying that again?

MR PALMER: I will try again. It's going to require Sony to --

THE CHAIRMAN: I think it is probably me. Can you hear, Mr Beard?

MR BEARD: I can hear fine, yes. I can hear Mr Palmer and I can hear you.

THE CHAIRMAN: Can you hear -- I'm back. Sorry, it was just a bit of static on the line. I don't know where that came from.

MR PALMER: I see. It's going to require, I was saying, Sony to give us their top 10

list so that exercise can be done, so we can understand which ones they're proposing to give us and which ones we might ask for. I appreciate that there will be a confidentiality ring, that will be a necessary step --

MR BEARD: It's footnote 14 in Ms Williams's statement, yes. I don't think we actually need to provide it.

THE CHAIRMAN: Hang on, I think I'm just a bit confused about that. Are you telling me you don't know -- is the position, Mr Beard, you are saying you are not tell --

MR BEARD: No, no, no. We have already done it is the point. We don't need to say, "It's in footnote 13 at page 694".

MR PALMER: Sorry --

THE CHAIRMAN: Yes, I see, here we are. That's the top 10. Funnily enough, I only have nine, I counted 9 (Inaudible), but I could only find nine in there.

MR BEARD: Because of the footnote, it's to Activision. So there's Activision, plus those.

THE CHAIRMAN: Got it, okay.

MR BEARD: You're quite right.

MR PALMER: This is the selection of the 10 as we understood footnote 13. Not the top 10, but the selection which has been made from the top 50.

THE CHAIRMAN: Look, I mean, let's not get bogged down --

MR BEARD: That's not --

THE CHAIRMAN: However you want to deal with it, may be it is helpful if the two of you could just make sure that is sorted out, rather than leaving it to people writing letters to each other. If you would just butt heads with Mr Palmer over there.

MR BEARD: Yes, that's fine.

THE CHAIRMAN: I think -- that's the position, Mr Palmer, then the ball's in your court.

Again, we'll come back to talk about timing in a minute, but the idea is you will choose 2 of those --

MR PALMER: Yes.

THE CHAIRMAN: -- with the knowledge of course of the two which are already in flight. Then we will see what happens.

MR PALMER: Thank you, sir.

The only other point: within 10 and 20 words, the key to Mr Beard's submission was this assertion that a document was more likely to be relevant to the issues in this case if the search terms were found within 10 words of each other, rather than 20. That assertion was entirely unevidenced and precisely why I've asked for a sample exercise to be done to see if that proposition actually held up. We don't accept it, that's why we've asked for that false positives ratio to be calculated in relation to each.

There is no *a priori* reason why a document relevant to the issues in this case should necessarily have those words in one sentence rather than, say, two sentences away from each other. So that's a difference between 10 and 20 words. We don't accept my learned friend's assertion that once you take away, what you're left with is a comparatively small pool still. Once you've excluded category 1 -- sorry if I misspoke earlier, that does mean excluding 4B to G as well, they go together, as Mr Beard explained. Once you do that, you're left with a difference of 27,500 documents, which in this context and this pool, we say is proportionate, less than 5 per cent.

That is what we say about that parameter.

THE CHAIRMAN: That's helpful. Just so we're clear about that: you are now only looking for 2, 4, 6, 14, 16 and 20, and not the Redfern 4B to G. Is that right?

MR PALMER: Sorry, I should -- when I made clear we were dropping category 1, I should have extended that for reason Mr Beard gave. I think that is me getting that

wrong, rather than --

THE CHAIRMAN: No, it may have been my fault, okay. Sorry to do this, Mr Beard, but that does change the picture a little bit, doesn't it? What is a little bit frustrating about this, we really are talking about a very small number of documents, aren't we? If that's the position and we're down to effectively down to your 16,000 without family documents, why don't you just run 16,000 without the family documents and give them to Mr Palmer? Then if there's any need to, they get the family -- it's really a tiny amount, a tiny proportion of documents, isn't it, in the great scheme of things?

MR BEARD: Look, I think there's a framing issue here. 16,000 documents, I don't know about you, that takes me quite a long time to read. Obviously TAR running across it might halve it, but you still have a lot of documents to review.

THE CHAIRMAN: I think you've told me, haven't you --

MR BEARD: It's smaller than it was, certainly.

THE CHAIRMAN: You've told me, I think, that 50 per cent of TAR knocks out 50 per cent them, so we're talking about someone has to look at 8,000 documents, which is -- I appreciate it's not a day's work, it's a serious endeavour. But in terms of resolving this issue, isn't it just the obvious, practical thing to do?

MR BEARD: Sir, I think -- I can feel the direction the Tribunal's heading in in relation to this. I think we are going to need to do a cumulative count of where we are getting to with these things. As I say, I think this is conceptually the wrong way of doing things. I understand it's in part a numbers game, I understand that 8,000 as compared to 80,000 is distinctly in order of magnitude smaller.

THE CHAIRMAN: That is helpful and I'm grateful. I understand the point of principle you are making, and I absolutely accept the point about the asymmetry and the size of the exercise. I'm just really trying to find a pragmatic way so we get through the

thing.

MR BEARD: I understand the Tribunal's point of view. You can perhaps understand from mine, sir.

THE ARBITRATOR: Yes, I do entirely. Mr Palmer, if we were is to do that, we give you 16,500, which is effectively responsive documents without family documents for those categories in the table except the first category.

If as a result -- I think the logic of not giving you the family documents is that if it turns out these are important documents, then you can obviously ask for the family documents, because they will be apparent on face of it. I think there is some logic in that: you're not getting everything you want, but it seems to me that is a pragmatic solution. Would you be happy with that?

MR PALMER: Thank you, sir, we would. I'm very grateful.

THE CHAIRMAN: That's helpful, thank you both. Is it convenient now to have that conversation about --

MR BEARD: Sorry, I do need to just pick up something, sir. I don't think in fact it's practical to do the review without the family documents because they are all attached to the particular documents, so distinguishing in practical terms is not actually workable. I don't want us to proceed on that wrong basis.

THE CHAIRMAN: Okay. Well, look, I mean -- are you now saying --

MR BEARD: 27 is the minimum number you can -- if you're going to ask us to do the recovery by reference to within 20, we will generate 27,000 documents. I think we said 31 -- Mr Palmer seems to calculate 27, I think our maths may be different, but it's around 30,000 documents. Even if you TAR that -- assuming I'm correct that because what you are doing within 10/within 20 is actually trying to focus what is most likely to be a relevant document by the tagging terms, TAR would take more out than

50 per cent. You're still going to end up with a large cohort of documents here.

THE CHAIRMAN: Okay, let's try and do this a different way. Why don't we, in effect, do something of a sample, so why don't we pick the ones that are least onerous from this table and at least apply it to that, sort of a mixture of proportionality. So if we were to leave categories 2 and 4 for now and leave -- what is the other big delta? It's probably category 16, isn't it? Those are the two largest deltas, is that right?

MR BEARD: Yes, I think that's right.

THE CHAIRMAN: If we were to leave those out for now and you do the exercise for 6A, 6B, 14 and 20 --

MR BEARD: We'll do that.

THE CHAIRMAN: -- it's a much lower number, even with the family documents.

MR BEARD: Yes.

THE CHAIRMAN: Will Mr Palmer be able to tell -- well, he will be able to tell which are within 10 and which are within 20, won't he?

MR BEARD: Yes, I think that's right, because we have already done the within ten searches. I can confirm that. If you just give me one moment, sir.

THE CHAIRMAN: Yes. **(Pause)**

MR BEARD: The answer is: no, we will not provide the distinction, but of course their document review system will enable them to identify in the two.

THE CHAIRMAN: So Mr Palmer, that's the revised offer: you get the family documents for those categories, not for 2 and 4 and 16 at the moment, but as a result --

MR PALMER: It won't tell us very much about categories 2, and 4 or 16, so what we suggest is a sample, not having to produce all the documents, but again a sampling exercise from those categories as well --

MR BEARD: We can't do that because we can't run TAR in that way. You can't do

this sort of sampling, it's not a practical exercise. What you are doing is you are running the search terms algorithm in relation to the documents, then you do the TAR search as a whole. You can't do it on subsets in this way, it's not realistic. We can do it in relation to these three categories.

If Mr Palmer thinks that somehow systematically there are good reasons he thinks the relevance hit rate in relation to the other categories would be different from those three, then I'm sure he can articulate it. But at the moment, we find that difficult to understand, and therefore this is a good way and a practical way of doing the sampling exercise he is pressing for.

THE CHAIRMAN: Let's give it a go, Mr Palmer, and see what happens. I'm afraid it is going to be a compromise, otherwise I'm afraid you are not going to get what you want, basically.

So we have to find -- this is, I think, really a reflection of trying to limit the exercise to something a bit more manageable; and if it has the benefit of giving you some ammunition for a further go at the point, then so be it. If it doesn't, then that's just life, isn't it?

MR PALMER: Thank you so much. We will take the compromise and see where that takes us.

THE CHAIRMAN: Of course. Just to clear, as Mr Beard acknowledges, if -- and no doubt you will find there are some gaps in all this, you can come back and ask for them, or at least ask Sony, and hopefully you won't need to come back here for it.

Is that clear? Do we need to go over that again, or has somebody got that in terms of drawing up the order? Has somebody got that so it's clear?

MR BEARD: We think we have, yes. I imagine Mr Palmer's team also think they have, so we can compare notes in due course.

THE CHAIRMAN: Good, okay. Thank you, that's very helpful. Do you want to deal with your application for the extra time to the extent you want to say anything else, Mr Beard? And also, I don't know whether you are in a position to say anything about when the extra things we have given you to do need to be done.

MR BEARD: I'm not sure -- because we have just been going through this, I would need to take some instructions on the additional material. In relation to the 14 February, that is simply the soonest we can get the completed exercise done. I think as Ms Williams's statement sets out, this not a situation where somehow the Class Representative is sitting waiting for all the documents. It has hundreds of thousands of documents effectively already, and it's 160,000. We understand that there was a desire to get it done by the end of December which needed to move to January. Simply with all the best will and expenditure in the world, we have not been able to complete that.

I'm very happy to go through Ms Williams's fifth statement if you want me to, but she sets out all of the detail in relation to it. The truth is we just don't think we can do it sooner than that.

THE CHAIRMAN: Just so you are clear, I haven't had a chance to read it properly, I'm afraid. But if there is anything else you want to draw out on that, I understand that.

MR BEARD: I can go through it, but the gist of it is: we have really been hammering away at this, we have not slacked off. We have spent vast amounts of money on it, we have used large numbers of people. There comes a point when you are above 50 reviewers as we are where actually you need to do some cross-checks on stuff that they are generating because it's so difficult to manage a consistent approach being adopted in those circumstances.

But we are doing that, we are doing our absolute best with it, and the punchline is

14 February is the best we can do. But I don't want that to be the punchline overall in relation to the disclosure because as I took you to in relation to paragraph 9 in her statement, we have been providing materials on a rolling basis since last year. But most particularly, there were over 70,000 documents produced in December in relation to the Tranche 5 disclosure.

As I've already indicated, they now have 160,000 documents, so it's not as if they are short of reading material, I think is the euphemism. We don't see it holding things up I think is the short point.

THE CHAIRMAN: Understood, okay. Looking very quickly at the timetable -- I'm on page 188 of the bundle -- it looks to me as if we're -- so what we now do is go into a bit of pleading, don't we?

MR BEARD: Yes.

THE CHAIRMAN: I think the Class Representative to a great extent has to do some work on some technical evidence as well. But broadly speaking, we are in a pleading period, and then witnesses of fact, which from the sound of things is you rather than the Class Representative.

The question really, I suppose, is: to what extent the Class Representative is going to be disadvantaged in relation to the service of the Re-Amended Claim Form, which is -- we'll see if Mr Palmer has any concerns about that, but is there anything else you want to say about that before I go to him?

MR BEARD: I do want to say that in relation to that, we have been through the process of talking about Mr Corsi, Mr Silva and Ms Tao, and so on. We are at the margins of this disclosure exercise on any account, therefore when you have 160,000 documents across this vast range of disclosure categories in relation to a vast number of custodians, the idea that this should be holding anything up is not really very clear

to us, even -- they are additional points, but it's not going to reshape things.

THE CHAIRMAN: Okay, thank you. That's helpful. Mr Palmer, what's your position on this, then?

MR PALMER: I've had the opportunity to take instructions. If you have the supplementary bundle which contains Williams 5 within it.

THE CHAIRMAN: Yes.

MR PALMER: If you go to page 14, paragraph 23, you'll see Ms Williams puts forward some suggested amendments to the timetable in response to this extension until 14 February for additional disclosure.

THE CHAIRMAN: You get an extra week, do you, for your --

MR PALMER: That includes the two-week extension for that pleading stage, the Re-Amended Claim Form and the Amended Defence; then a subsequent six to seven working days -- I think there are some bank holidays in the mix there -- so seven working days for the reply and rejoinder; and then further deadlines for factual witness evidence being put back by one week. Same for reply witness evidence; and then technical evidence all bar one week.

So that's what I wanted to take instructions on because these proposals appeared for the first time yesterday.

THE CHAIRMAN: Does everything moves a week, is that the idea?

MR PALMER: Either two weeks for the first stages: the pleading stage, Re-Re-Amended Claim Form, and then Sony's Amended Defence. They are proposed to be going back by two weeks. So we have three weeks extra for disclosure on the existing timetable -- the existing application that is -- then put the next pleading stages back by two weeks, so there's a one-week concentration there. Then subsequent stages either by seven working days or by one week, so again a further

concentration but proportionate I think is the proposal made by Ms Williams.

I have taken instructions on that --

THE CHAIRMAN: Yes. Sorry, just so I'm clear about this: that all stops in the middle of August, doesn't it? It doesn't affect the --

MR PALMER: It doesn't affect at this stage --

THE CHAIRMAN: -- evaluation, the economic and accounting expert reports.

MR PALMER: It doesn't affect those. I think the intuition is there will still be enough time for at least to close this round of disclosure by 14 February for economists to take account of that evidence and build it into what they are doing.

My instructions are we can agree those with one caveat. The caveat is much as we are reassured by Mr Beard's optimism, well, we're not really going to get that much, or much consequence of any steps, but we don't know the position as yet. If upon receipt of that evidence it becomes necessary to make an application on an informed basis, there is some other variation, then we will reserve the right to make the application at the appropriate time. But as presently advised, that seems a perfectly sensible and pragmatic way forward, so we are content on that basis to agree the proposals at paragraph 23.

THE CHAIRMAN: Yes, okay.

MR PALMER: None of which can mean anything in correspondence when they are specifically to consent to this extension, which is why we asked for proposals. Having received them, we are content to agree.

THE CHAIRMAN: Yes, that's fine. I think in regard to the timetable, there is little bit of extra space -- there's not very much, is there, so in a way -- I mean, I'm not entirely sure that it is necessary for all these consequential amendments to happen. I am not sure I want to spend a lot of time arguing about it. But I do worry a little bit that for

something which may or may not require extra time, we are reducing the ability to extend time for other things that may definitely require it. I'm just putting down a marker that I'm not convinced these are necessary extensions, but I'm happy to agree them on that basis.

If other things happen, and on the assumption you want to hold your trial date, Mr Palmer, we are not going to be in the business of many more extensions before that becomes quite difficult, I think.

MR BEARD: Just to be clear --

MR PALMER: We can effectively catch up with the existing timetable by August.

THE CHAIRMAN: I appreciate that, but that wouldn't take an awful lot to upset the timetable between now and then, which would then force the consequential post-August change. That's the thing.

MR BEARD: Look, I think it's worth saying Ms Williams is obviously a very generous and kind individual in making these suggestions. To my mind, just looking at that timetable, it doesn't actually need to change. But that's a matter for the Tribunal.

THE CHAIRMAN: You've offered it and Mr Palmer has accepted it.

MR BEARD: We are very kind and thoughtful in that way, and Mr Palmer has obviously taken it. It will just make ...

THE CHAIRMAN: I'm probably more in your camp than anybody else's, or certainly more in your camp than Ms Williams. Fortunately Ms Williams's offer has been accepted, so I'm making the point just on that basis, Mr Palmer: we probably don't need to make all these extensions, but I'm happy to have them on the basis we all understand that we are -- it is now getting a bit tighter.

MR PALMER: Thank you very much.

THE CHAIRMAN: I'm assuming you will take them because they are offered. If you

agreed with me, particularly if you agreed with Mr Beard, then there might be something to be said for not doing them, but I'm taking it that's not your position.

MR PALMER: We do take them. We don't have the optimism that none of this disclosure is going to affect the Re-Re-Amended Claim Form, and we think some of this material is going need a serious analysis to inform that. Obviously, we are led by what goes in that can be produced at the moment. We can't risk being put in the position where we don't have time to absorb what needs to be absorbed.

THE CHAIRMAN: Understood, okay, we will leave it on their face, Mr Beard.

So that extension is granted, and the consequential changes set out at paragraph 23 should be made to the timetable.

Then, Mr Beard, we will come back -- I will give you some more time to try and work out timings for the other things.

MR BEARD: I'm just conscious that it might be a moment to take a break for the transcriber. I might be able to get instructions in the next ten minutes if -- I don't know, I'm not going to hold those instructing me to that, but I might be able to come back with something useful.

THE CHAIRMAN: Okay, let's do that, we'll take a break. The only thing we have after the break, then, is the confidentiality ring issues, is that right?

MR BEARD: Yes. Just in connection with that, I was going to take you, sir, in relation to this to a description of some of the relevant materials. I don't want to have everyone just sitting round whilst you are reading what is quite a lengthy piece. Would it be possible to have a 15-minute break and you read this section of the Tranche 3 disclosure statement which starts at 1476 in the bundle?

THE CHAIRMAN: Let me just have a look at that now and make sure I have the right thing. **(Pause)**

This is the stuff in green, is it?

MR BEARD: Yes. It's all Inner Confidentiality Ring material, and it runs on for about four pages through to 1479 where it stops at “Accounting Materials.

THE CHAIRMAN: Section 5?

MR BEARD: Yes, exactly.

THE CHAIRMAN: Let's break for 15, let's start again at 3.30.

MR BEARD: Thank you.

THE CHAIRMAN: I will read it in the interim, and you see what instructions you can get.

MR BEARD: I'm most grateful, sir, thank you.

(3.15 pm)

(A short break)

(3.30 pm)

THE CHAIRMAN: Yes. Shall we get straight into the confidentiality ring, Mr Palmer?

MR BEARD: Did your want timing points -- (distorted audio) -- I can do them now if you want.

THE CHAIRMAN: (Distorted audio) -- we do that.

MR BEARD: Just so that Mr Palmer, if he or his team have got further thoughts they have a moment to think about it.

In relation to the (inaudible) exercise of decompiling the email box and going through it and writing about the results of that process in line with, sir, your order, we should be able to respond on that week commencing 10, February. Because it will take some time to do the de-compilation and the review that's envisaged. But we can come back with the results of that process and any proposals we have in relation to it week commencing 10 February.

In relation to the Corsi/Silva and within 20 words exercise on those particular categories, I think we will need to extend to 21 February for providing the additional disclosure and we will be able to then include that disclosure within what we deliver. So we'll move from the -- we will treat the application as moving from the 14th to the 21st and then it will cover all of this.

Your anticipated question, which is: why don't you do it in two stages? The practical issue is if you try and do a production on 14 February you will have to be pausing review in order to do that and that likely slows up the process. We think overall we will be able to do it more quickly if we do all that's remaining by the 21st in a single production. It's just the logistics of this exercise. But we will be able to provide Corsi/Silva material and the within 20 material on those categories by then. Those will be our points on that.

In relation to the top 10 publishers, there is one correction I should make which is because of the way that the "every 5 alphabetically" works, it's one of the top 10 and 9 others which is actually clear from the place in the skeleton I refer to I think, but in any event it's paragraph 58 in our skeleton and footnote 41.

What we were thinking was probably a practical thing to do is we can actually provide an indication of the hits that we would obtain, this will be on a "within 10 basis", I think, isn't it?, in relation all of the top 10 publishers and we would provide those numbers to Mr Palmer and the Class Representative next week, such that they -- it might be sensible at that point for Milberg and Linklaters to have a conversation about what the sensible and proportionate way of dealing with those issues is. But at that point they will actually have numbers that they can be looking at because I think that is probably more constructive in all of this.

Obviously, we can't give a timetable on how fast we can do the additional publishers

until we have sorted out actually what numbers we are talking about and who and so on. So that's what I'm suggesting might be a pragmatic way forward but that can then be dealt with next week.

THE CHAIRMAN: Mr Palmer.

MR PALMER: I am grateful for that and I think I will need to take time to get the reaction to that and revert.

Before we start on the confidentiality ring issues there was one remaining disclosure issue but I'm going to, with your permission, sir, just park that mainly for reasons of time, the GDPAs issue which is dealt with at some length in my learned friend's skeleton argument. We will park that. We will consider what's said. We may need to make further enquiries but we think we can do that in correspondence.

THE CHAIRMAN: If it helps I think it is quite difficult, Mr Palmer, for you to insist that they dig out all of them because it's clear that these things can be spread around multiple repositories, so by all means come back with some sort of suggestion --

MR PALMER: That's not our concern. Our concern would be to what extent it's actually been established? I'm not going to take time on that now.

THE CHAIRMAN: Okay.

MR PALMER: We will raise anything further on it in correspondence if we need to.

So with that said we can move to the confidentiality ring issues.

Before I begin on that there was an update to the ECR supplementary bundle uploaded to the Linklaters platform this morning, I'm told at 11.43 am. I don't know if the one you have has been updated in line with that or whether you are still have an open-ended one that you had from --

THE CHAIRMAN: The only thing I have in the supplemental bundle is the Milberg letter.

MR PALMER: Right. There's an updated version of the bundle, that bundle, which was uploaded to the Linklaters platform this morning. It's a like-for-like replacement, as I understand it. It's not a lot more documents but there's a few.

THE CHAIRMAN: Okay. If you just get going I am sure somebody is going to send me --

MR PALMER: That would be super-helpful. If someone would have a look at that in the background that would be super-helpful and I will come to it in due course.

THE CHAIRMAN: Yes.

Submissions MR PALMER

MR PALMER: Sir, the law is (inaudible), I anticipate I can take that relatively quickly because the authorities will be familiar to you. It's set out in my skeleton argument from page 13 onwards, and it hardly need be said that it's all worth bearing in mind that the starting point is that any confidentiality ring is any departure from open justice. And the law is strict in it terms, the greater the departure and the greater the need for justification. And the onus is on the party who seeks to justify, not only its existence but also its terms, and in this context also the need for limited membership.

Those authorities will be familiar. Turn to paragraph 45 of my skeleton argument, in *Al Rawi*, I doubt I need to take it up, but the recognition that confidentiality rings are an exceptional solution which are a response to cases which raise special problems. The example given by Lord Dyson was IP cases. But of course this Tribunal well knows competition cases frequently raise such problems. Because under ordinary disclosure principles, in most competition cases competitors would come into possession of sensitive, competitive information. In *Infederation v Google* it was emphasised by Mr Justice Roth that they were nonetheless exceptional even in the context of competition proceedings. The relevant passage is set out at paragraph 46

of our skeleton argument. It must be limited to the narrowest extent possible.

That, we say, includes not taking an overly restrictive approach to the admission of an individual. And where there normally is a dispute it's because a party seeks to admit into a confidentiality ring a member of the business itself or sometimes in-house counsel, who obviously interact with people in the business. And that was observed by Mr Justice Roth in the preceding paragraph, paragraph 41.

But none of that is the case here. Here, the problem is that Sony seeks to justify its closed system by reference *inter alia* to the need for security, including cryptographic protection. And of course it may be readily acknowledged that those security measures would be defeated if the world at large could access the detail of that protection, as they normally would under open justice principles where there are no confidentiality rings or witnesses referring to a document in open court, for example.

But that doesn't begin to establish a reason why a Class Representative's expert witness team should not be admitted into a confidentiality ring, or here where they have been admitted into two other confidentiality rings, the inner and outer rings, why they shouldn't be admitted into an enhanced confidentiality ring.

There is no special problem here which in the case of these four individuals from BRG requires an exceptional solution. It's accepted, without question, that they can be trusted to observe the inner confidentiality ring and outer confidentiality ring requirements. We say there is no reason, none identified, as to why they cannot similarly be trusted with the sensitive information, where it is sensitive, within the ECR.

The real purpose of the ECR, we acknowledged, when asked, and consented to, is to provide additional protection to certain information by way of restrictive handling arrangement. I notice there you approved this order but can I just remind you of its terms. It is at page 437 of the hearing bundle.

THE CHAIRMAN: Yes. I should say I have the supplemental bundle, the updated one if you need to refer to it.

MR PALMER: I'm very grateful. I will come to that briefly in due course.

In the hearing bundle at page 437 under section 3, "Confidential Information", enhanced confidentiality ring information is to be provided or made available solely to the enhanced confidentiality ring members. To be held by them on the terms set out in Annex B1.

Then you see in 3.2 there is a specific provision that this material needs under (a) to be accessed solely via a password protected platform, access to which is by login credentials provided to the ECR members for their own use only, "such access will be on a read-only basis with no possibility to download and/or print the relevant documents."

Now, one exception to that is when we have a hearing like this and we have an ECR bundle and that is dealt with under (b):

"a separate electronic volume of the agreed hearing bundle prepared by [in this case Linklaters] comprising only documents containing enhanced confidentiality ring information which shall be shared via a password protected secure platform and saved in a password protected secure electronic folder."

And there are subsequent provisions which allow that bundle to be downloaded, for example on to counsel's laptops as I have done. There is further provision which says after the hearing you have to get rid of that, you have to delete all of that earliest opportunity when it's not needed anymore and you revert to that secure platform which is online only and you can't print and you can't download.

So that is the type of protection provided for. And of course that imposes a burden on those who instruct me. They can't, for example, email me a document, you have to

go via a platform, via a password and so forth, and it complicates the handling arrangements. That is to protect their [SIE's] security because it acknowledges that there will be some information which is so sensitive that such handling arrangements are justified. But there is absolutely no reason why experts from BRG shouldn't be allowed access to the same platform, bearing in mind it won't allow them to download the documents, it won't allow them to print the documents, and they will have their own login credentials which are unique to them.

Just turning back to the law on specifically -- the law on admission of people to a confidentiality ring. The cases which have been decided tend to refer to the admission of someone into a single confidentiality ring, or confidentiality ring arrangements rather than multiple confidentiality rings. Because BRG has been admitted to, in this case, the inner and outer confidentiality rings and they want to be admitted to the enhanced confidentiality ring as well. Even bearing that in mind it's clear from *Viasat* that the question of admission is one of practicality and fairness. In fairness, of course, it has to be assessed in the context that these are all incursions into Article 6 rights and principles of open justice by way of exception and necessity, deal with (inaudible) *Al Rawi* special problems.

Then Mr Justice Marcus Smith in *Anan Kasei*, we can look that up in the authorities bundle at page 495, at paragraph 16 at the foot of the page. This is into the general confidentiality ring rather than a sub ring:

"It seems to me that where a party contends the particular person should be allowed into the confidentiality ring the court should be slow to second-guess that convention. It is after all a basic right of every party to conduct litigation as he/she or it sees fit. That does not mean a party can by bare assertion dictate the terms of the confidentiality ring: there will always be court scrutiny, and the touchstone for that

scrutiny is fairness."

And the language of fairness harks back to *Al Rawi* and *Infederation,* and in *TQ Delta* which we cited at paragraph 45 of our skeleton argument. The case is about article 6, open justice and principles of natural justice, all of which include -- which this is an interference.

So the application which I press before you, sir, today, I don't need to press the one on Mr Oldnall whose admission is now agreed, but in relation to the BRG team, we have identified four core members at BRG who are working on this case. They of course include Mr Harman, they include also senior advisers who are working with them. So we haven't taken a blanket approach, or said we need everyone. We have identified four individuals who were working closely together.

I emphasise the needs of practicality. I anticipate that the reason Mr Beard asked you just before the break to read the third tranche disclosure statement, the explanation of the contents of much of the enhanced confidentiality ring, is he wants to say none of this need concern any economist. That is precisely the wrong way in which to approach an application like this, not least for the reason that Mr Justice Marcus Smith gave.

There are real issues of practicality here. At the moment, sir, as you will recall, when we were looking at the timetable just now, the next substantive step that is going to happen is that Professor Pietzuch is going to provide an outline of the scope of his expert evidence, which of course is going to be very relevant to the counterfactual, which must be then pleaded in more detail in the Re-Re-Amended Claim Form. And that of course the timing has been designed so that it can be informed by Professor Pietzuch's review of the technical disclosure and what he makes in particular of whether or not the security arrangements currently in place on the PS4

and PS5 PlayStation system would be fatally undermined if digital distribution restrictions were removed in the manner which the Class Representative contends that they should be.

Professor Pietzuch's analysis is therefore playing directly into the identification of the counterfactual. Simultaneously, without waiving privilege, there are of course discussions going on with our economists about the implications of the counterfactual for their analysis. I don't intend to go very much further than that. It might be helpful to turn up page 772 to the letter written by Milberg to Linklaters, first making this request for the admission of the four individuals. See can that on 771. It's 16 December and the four individuals named at paragraph 2, all at director and associate director levels.

So paragraph 3 explained that the Class Representative considered it reasonable and necessary for those members of the BRG team to be designated as ECR members because the experts will all need to liaise, and in particular Mr Harman will require input from Professor Pietzuch for his expert report. And then they set out a series of eight ways in which technical evidence overlaps with and feeds into the economic evidence. Not all of that technical evidence will of course necessarily be ECR evidence. But the point is we straight away require Professor Pietzuch to start distinguishing between the two as he holds conversations, or if we have a team conference, again without waiving privilege. And experience has shown that this has become increasingly difficult to navigate. And in particular, that is due to the strict obligation obviously not to share any ECR material with anyone who is not an ECR member. It means particular caution and precaution has to be taken to avoid inadvertently sharing that information in the discussion of the case.

Paragraph 4 of that letter on page 773, it was emphasised that these were only

illustrative examples. Ultimately, it is essential that the expert economist is able to base his views on all the material disclosed, subject to appropriate confidentiality arrangements. We sought to limit the number down to four key individuals and consider that reasonable.

In addition to those points which were made back in December, experience has shown that Professor Pietzuch is keen to continue to liaise with the economists but feels very inhibited in what he can and can't say and finds it very difficult to distinguish. That is not very surprising when you look at --

THE CHAIRMAN: I am sorry -- just to pause, do we have evidence from Professor Pietzuch at all?

MR PALMER: We don't have that evidence but we have correspondence bundles -- That is the reality of what as a matter of practicality has obvious difficulty and it has particular obvious difficulty when you take a moment to look at what Sony has put within the ECR.

Now there is a letter in the supplementary bundle, supplementary ECR bundle, I should say -- amended supplementary ECR bundle, that's the one. There is a letter starting on page 2 of that bundle, with a lengthy table which I have no intention of going through for you, sir, but with a selection of the documents which have been put in the ECR. And what it reveals -- this is only a selection -- is that Sony had not applied their conscious mind to the need for this material to be in the ECR at all. There has been no systematic review for this material whatsoever. I happen to scroll to page 7 and the first box on that is [redacted]. We have taken --

MR BEARD: I'm sorry, this is ECR-related material. Mr Palmer should not be referring to it or describing it. I understand what he's talking about. He is misunderstanding what has been done in relation to the ECR.

We are currently on a live-stream. If Mr Palmer wanted to get into these sorts of issues he should have provided this material sooner than yesterday, we would have made arrangements in order to explain these matters properly. This is not fair, it is not proper.

MR PALMER: It is entirely fair. We wrote about it. I'll leave you to look at it, sir. I won't read out its comments.

If you go to page 15 you see a screenshot there, (inaudible) "enhanced confidentiality agreed material".

Page 16, another screenshot.

Pages 17, 18, 19, number, and 20. Then a new page, and 21. (Inaudible words).

THE CHAIRMAN: 21, yes.

MR PALMER: A screenshot from (inaudible).

Now, you can see from the table where the material -- faced with all this, it's unsurprising someone in Professor Pietzuch's position might find himself unsure as to what he can and can't discuss with an expert economist. There was another glaring example which has now been remedied to significant extent. I just want to show it to you anyway. That's in the original, not supplementary, the original ECR bundle, where you see at tab 1 the Sony's information statement. This statement now says at the top "Contains Inner and Enhanced Confidentiality Ring Information", on page 3. When this was served on us, that read "This document is Enhanced Confidentiality Ring Information in its entirety", without distinction. We had to push back and that job has now been done in relation to this document. If you flick through it you will see some material was not protected at all, (inaudible). Other material is covered to show that if it's inner or if it's enhanced, and some discernment has now been applied. But not in it's first interation and it wasn't until this was done and in any event could be

communicated to those in the inner confidentiality ring.

There is a similar exercise that haven't been done in relation to the rest of the material. The law is very clear: when someone pushes for enhanced protection like this it's for them to justify the inclusion of that material. And although of course there is facility under the terms of the order for us to push back and say: what about this? What about that? We shouldn't be needing to do that in respect of every single document, particularly of the kind which has been provided. It requires Sony to apply actually their own conscious mind to this issue.

Mr Beard, I am conscious has just said I'm misreading it entirely and misunderstanding it and he can develop that in due course. But if I am misunderstanding it it's not surprising someone in Professor Pietzuch's position is utterly confused about what he can and can't refer to.

There is no good reason why we need to labour under these difficulties. There is no good reason why a professional expert economist, entrusted in the confidentiality ring already, can't be entrusted with responsibility of access to that secure platform without a battle. And thus we can have a free conversation between experts, between solicitors, without having to distinguish between what is or may be enhanced, rather than inner confidentiality ring.

It is a question of practicality, it is a question of fairness. That is the test that the authorities say should be applied and that is the basis upon which we ask you to admit these individuals so that we can be placed as nearly as possible in a position of an(?) ordinary litigant who is able to access the materials, discuss them with expert witnesses, in a professional and responsible way.

Taking all of that into consideration we say the balance of prejudice falls squarely in favour of including the BRG team in the ECR. And what Sony has been unable to do

is point to any reason why they should not be beyond their concern that this material should not be released to the wider public. On a secure platform like this which can't be downloaded and can't be printed, that risk may be thought to be minimal, particularly so when you have four responsible professional experts as we do in this case, rather than individuals who are competitor or in-house counsel or anything of that nature. We say it's fall squarely in our favour. We make that application.

THE CHAIRMAN: Thank you.

Mr Beard.

MR BEARD: In order to be able to address you on some of this I'm sorry, I am going to have to ask that we do it on the inner confidentiality ring basis.

I assume that with Mr Palmer and his team, the people there are inner confidentiality ring members, and that if we stop the live-stream we will be able to deal in Inner Confidentiality Ring circumstances.

THE CHAIRMAN: Yes.

MR BEARD: In those circumstances, sir, might we pause the live-stream please.

THE CHAIRMAN: Yes. I am sure we can do that. The other thing is the transcript. So the transcriber will need to switch from public to private. I assume that is straightforward but if there's any issues for that could you please let me know.

(In private session (extracted))