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IN THE COMPETITION

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

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 9th October 2023

Before:

Justin Turner KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimant

JJH Enterprises Limited (trading as ValueLicensing)

V

Defendants

Microsoft Corporation and Others

APPEARANCES

Max Schaefer and Andris Rudzitis (Instructed by Charles Fussell & Co LLP) on behalf of JJH Enterprises Limited.

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

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Monday, 9 October 2023

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(10.30 am)

(Proceedings delayed)

CASE MANAGEMENT CONFERENCE

MR SCHAEFER: May it please the Tribunal, I appear for the Claimant, ValueLicensing, with my learned friend Mr Rudzitis, and my learned friends Mr O'Donoghue KC, Mr Grubeck and Mr Armitage appear for Microsoft.

Sir, there have been a number of updates to the bundles. I believe that you should now have the most recent update which includes an agreed list of issues. There has also been a further bundle sent through by email by Microsoft at 10.11 this morning to us and the Tribunal. I do not know if you have a hard copy of that. If you do, you are ahead of us.

THE CHAIR: I do not think so.

MR O'DONOGHUE: It is essentially the correspondence since Friday.

THE CHAIR: I am grateful, thank you.

MR SCHAEFER: I believe it also contains excerpts from disclosure.

THE CHAIR: Okay.

MR SCHAEFER: We do not have one, but...

THE CHAIR: All right, I am sure that can be sorted.

MR SCHAEFER: Sir, there is a reasonably long list of issues

1 before the Tribunal and you will have seen there has
2 been quite a lot of correspondence since the first CMC
3 but you will also have seen that in many respects
4 limited progress has been made and indeed some of what
5 is before you today is a rerun of what you heard in May.

6 But the list of issues can be found at bundle I/4 at
7 the back of the CMC bundle.

8 THE CHAIR: Okay.

9 MR SCHAEFER: Obviously we are in your hands as to how you
10 want to approach these. I would say two things. We can
11 take one item off: item 5, request for a witness
12 statement concerning the Claimant's devices, which was
13 first raised in Mr Henderson's witness statement on
14 Thursday night. ValueLicensing is quite content to
15 provide that not because it thinks there is anything in
16 it, but because it thinks it is easier to do that than
17 to argue about it.

18 THE CHAIR: Okay, all right.

19 MR SCHAEFER: Otherwise, if you are content to proceed with
20 the suggested list, the first item is confidentiality
21 but obviously --

22 THE CHAIR: Shall we do disclosure first and
23 confidentiality at the end? Shall we do disclosure
24 first or is that inconvenient?

25 MR SCHAEFER: That is fine. So there are a number of issues

1 applying for a split trial. Back then the directions
2 that Microsoft were proposing were that disclosure
3 orders would be made at a second CMC in October 2023,
4 and disclosure would follow at the start of
5 February 2024. This is, of course, that second CMC and,
6 as I say, the parties now recognise that we are not in
7 a position to ask you to make disclosure orders.

8 MR O'DONOGHUE: Sir, we do seek disclosure orders today, in
9 paragraphs 7 and 8, as you will see.

10 MR SCHAEFER: Sir, I apologise. Let me rephrase that.
11 Microsoft is applying for specific disclosure in certain
12 categories but the parties are agreed that disclosure
13 generally has to be kicked off to the next CMC.

14 THE CHAIR: Yes.

15 MR O'DONOGHUE: Sir, again, just to make my position clear,
16 as I will develop, sir, with your permission, the
17 proposals in paragraphs 7 and 8 in our submission will
18 tackle the bulk of disclosure, certainly across
19 liability issues. I do not want to trivialise and
20 minimise that proposal, but it is a substantial one
21 intended to hit the ground running and not kick this off
22 for another date.

23 MR SCHAEFER: Perhaps we can deal with general directions
24 first and then come to specific disclosure after that.

25 MR O'DONOGHUE: Sir, again --

1 MR SCHAEFER: There are 25 categories agreed for the first
2 stage --

3 MR O'DONOGHUE: In my submission the question of directions
4 logically follows from what has been ordered by way of
5 disclosure at this stage and I would suggest we raise
6 that at the end rather than deal with it at the
7 beginning in the abstract.

8 MR SCHAEFER: Sir, I think Mr O'Donoghue has just suggested
9 we kick this off.

10 MR O'DONOGHUE: No, we come back to it at the end of the
11 disclosure once it is clear what the Tribunal is and is
12 not ordering.

13 MR SCHAEFER: I understood, just to be clear --

14 THE CHAIR: You press ahead and make your submissions.
15 I do not think Mr O'Donoghue --

16 MR SCHAEFER: As I say, Microsoft previously was suggesting
17 that disclosure generally should be given at the start
18 of February 2024. It is now re-applying for a split
19 trial and what it now says, if you compare the parties'
20 position on timing, is that disclosure orders should not
21 even be made until after the end of February 2024, so
22 nearly five months from now and a month later than it
23 previously contended the disclosure generally, with
24 whatever asterisk my learned friend wants to add to that
25 phrase, should be given. It says that a date for such

1 general disclosure, asterisk, cannot even be fixed
2 today. So, sir, the Tribunal will hopefully understand
3 why ValueLicensing is concerned about creeping delay in
4 this case.

5 Remembering that the idea was that disclosure orders
6 would be dealt with today, I respectfully invite the
7 Tribunal to order the dates proposed by ValueLicensing
8 and not by Microsoft, and those are my submissions on
9 that point.

10 THE CHAIR: Right. So this is in blue?

11 MR SCHAEFER: Sir, yes.

12 THE CHAIR: So you want 17 November, and Mr O'Donoghue
13 wants 23 -- so we are talking paragraph 10 and
14 paragraph 11 at the moment, yes?

15 MR SCHAEFER: Paragraphs 10-13 sir, from the parties
16 discussing orders to disclosure being (inaudible).

17 THE CHAIR: Right. Of course one of the things that
18 will speed the case up generally is not dealing with
19 market dominance at this stage, but you are still
20 resisting that coming out as a separate issue, as
21 I understand it?

22 MR SCHAEFER: Sir, yes. There is an issue as to whether
23 that will speed the case up. At least my learned friend
24 says it will reduce the size of the case. I do not
25 think it necessarily affects when it could come on.

1 THE CHAIR: Whether it?

2 MR SCHAEFER: When it could come on.

3 THE CHAIR: Right. But experience suggests the narrower
4 the issues, the quicker the interlocutory phases through
5 to trial, subject to court diaries, of course,
6 I appreciate that.

7 MR SCHAEFER: Sir, yes, that is true. But in this case
8 neither party -- but Microsoft does not propose bringing
9 on the case earlier.

10 THE CHAIR: No, okay, all right.

11 MR O'DONOGHUE: Sir --

12 THE CHAIR: Right. It is helpful to hear the
13 submissions. I am not going to make a decision on the
14 timing at the moment, but I understand the scope of the
15 dispute.

16 So shall we move on to the categories? Was there
17 more you wanted to say on timing?

18 MR SCHAEFER: No, sir, that was all.

19 THE CHAIR: Shall we move on to the categories, and then
20 we can deal with the things compendiously.

21 MR SCHAEFER: The remaining disclosure issues are the joint
22 disclosure schedules --

23 THE CHAIR: Yes.

24 MR SCHAEFER: -- and then the orders that ValueLicensing
25 seeks which are not disclosure orders but orders to

1 enable us to have proper discussions about disclosure,
2 and then the specific disclosure that Microsoft is
3 seeking.

4 THE CHAIR: Right.

5 MR SCHAEFER: Sir, I do not know what order now makes sense
6 to deal with those. Perhaps the joint disclosure
7 schedules first.

8 THE CHAIR: Yes, I think that would be sensible, yes.

9 MR SCHAEFER: There is a slight caveat here which, for
10 reasons I will come on to, it may be necessary to park
11 your decisions about this until after split trial, but
12 perhaps I can introduce the subject and explain how this
13 arises.

14 THE CHAIR: Yes.

15 MR SCHAEFER: The starting point is the order you made at
16 the last CMC. I will not ask you to turn it up, but you
17 will recall that it required the parties to file
18 disclosure reports and EDQs. There were two sets.
19 There was a later date for issues relating to market
20 definition and dominance, and an earlier date for
21 everything else.

22 THE CHAIR: Yes. I remember. Yes.

23 MR SCHAEFER: Sir, perhaps we could start with the
24 disclosure reports that were given for the first set.
25 ValueLicensing's is at bundle C, tab 2. You will see

1 that the first question is:

2 "Please describe..."

3 THE CHAIR: It is the schedule I want at tab 3; is that
4 right?

5 MR SCHAEFER: I am sorry, bundle C, tab 2, 372.

6 THE CHAIR: Okay, right. It just says "See attached
7 schedules".

8 MR SCHAEFER: It says "See attached schedules", yes, and the
9 schedule is over the page at tab 3.

10 THE CHAIR: Yes.

11 MR SCHAEFER: It is a very short point. There are
12 18 categories.

13 THE CHAIR: Yes.

14 MR SCHAEFER: If you then turn to Microsoft's, that is at
15 bundle D, tab 2.

16 THE CHAIR: Mm-hm.

17 MR SCHAEFER: That also says "See the schedule", and the
18 relevant page is 480.

19 THE CHAIR: Mm-hm.

20 MR SCHAEFER: You will see that Microsoft had identified for
21 the entirety of the case, other than market
22 definition/dominance, six categories of document on
23 their face. But if you actually look, the first one is
24 just documents mentioned in the statement of case, and
25 then the second and fourth are the same category divided

1 by electronic communications and other documents. The
2 third and fifth are also the same category. So
3 Microsoft for this entire case have produced a list of
4 materially three categories, plus documents mentioned in
5 the statements of case --

6 THE CHAIR: Mm-hm.

7 MR SCHAEFER: -- and that obviously caused some concern.

8 As ValueLicensing pointed out in correspondence at
9 the time, we have been trying, in advance of the last
10 CMC, to agree a list of issues that would help inform
11 these disclosure reports, which Microsoft had not
12 engaged with.

13 Sir, if we can then move on to the correspondence
14 that followed this at bundle F, tab 143 -- there are not
15 really tabs in the F bundle, so it is page 1054. You
16 will see essentially we had another go. We provided
17 an updated draft list of issues --

18 THE CHAIR: Yes.

19 MR SCHAEFER: -- and we also provided a list of the
20 categories of documents that we had been expecting to
21 see from Microsoft.

22 THE CHAIR: Yes.

23 MR SCHAEFER: There was no response ever to either of these
24 documents.

25 THE CHAIR: Yes, I have read that in your skeleton.

1 MR SCHAEFER: I am grateful. You will have also seen in the
2 skeleton that the next step essentially was we had tried
3 again and on 1 September we had put together joint
4 disclosure schedules and the purpose of those was to
5 have a staged disclosure process where the parties first
6 agreed the list of issues and the categories of document
7 relevant to those issues, and then used those categories
8 to discuss and seek to agree disclosure orders before --

9 THE CHAIR: Yes, I understand. There is now a later
10 version, is there not?

11 MR SCHAEFER: There is now a later version.

12 THE CHAIR: Just remind me, where is the later version?

13 I have seen it, I have just forgotten where it is.

14 MR SCHAEFER: The latest version is at the end of the
15 bundle. So there are various iterations and Microsoft
16 has most recently provided --

17 THE CHAIR: Tab 7, yes, that was it. So that is.

18 MR SCHAEFER: Yes, so I/2 and 3.

19 THE CHAIR: I?

20 MR SCHAEFER: 2 and 3.

21 THE CHAIR: That is the later version than the one at --
22 and that is the one I should work from; right?

23 MR SCHAEFER: There is a dispute as to whether you should
24 work from it. Our hope is at the very least today we
25 can get these sorted out.

1 THE CHAIR: Which is the latest -- it is a later one
2 than the one at 650?

3 MR SCHAEFER: I am told 1542 by my learned friend.

4 THE CHAIR: Both parties have had input into this in one
5 way or another?

6 MR SCHAEFER: There is a limited amount of disagreement
7 (overspeaking) can be sorted out today and Microsoft
8 says it should be kicked on.

9 THE CHAIR: Okay, "rigidly defined areas of doubt and
10 uncertainty".

11 MR SCHAEFER: Indeed. The only reason that they are -- the
12 only reason I say that this realistically has to be
13 dealt with after split trial is this: you will recall,
14 as I have said, that at the last CMC you made orders for
15 disclosure reports and EDQs divided between the rest of
16 the case and market definition and dominance, and you
17 did that simply to speed things up because Microsoft was
18 repleading, or had been given the opportunity to replead
19 market definition and dominance.

20 Microsoft took 25 days to respond to these, and the
21 main reason it gives is that it needed to divide what we
22 had produced, which is a consolidated schedule, across
23 those two categories, and we have engaged with that on
24 the substance in an attempt to take it forwards today,
25 but what we have not sought to do is rigidly police

1 Microsoft's demarcation of those categories. So if we
2 end up with a split trial, there will be --

3 THE CHAIR: Okay, I understand we may have to unpick
4 some of that.

5 MR SCHAEFER: But that is where we are --

6 THE CHAIR: But it seems wherever we start we end up
7 having to take one step forward and one step back, so
8 let us follow this path for now.

9 MR SCHAEFER: Sir, that is really as far as I can take it
10 (inaudible) at this point. So if I can move on to the
11 draft orders that VL has applied for.

12 THE CHAIR: So you are not asking for any categories of
13 documents to be determined today?

14 MR SCHAEFER: We are asking for the court to resolve the
15 limited differences between the parties (overspeaking)
16 the schedule.

17 THE CHAIR: Yes.

18 MR SCHAEFER: But it seems to us that because of the point
19 about split trial -- it may be (inaudible) revisit it if
20 you do order a split trial.

21 THE CHAIR: Just make your submissions on it now on the
22 assumption that there is no split trial, and if there is
23 a split trial --

24 MR SCHAEFER: Sir, yes, absolutely. So my submissions will
25 essentially follow the schedule we provided with our

1 skeleton.

2 THE CHAIR: Yes, right. Because these are not all
3 related to the -- anyway, let us just take them through,
4 let us just see where we get to because I am just
5 worried if we leave disclosure to the last thing it is
6 going to get squeezed, that is why I wanted to keep
7 a little bit of structure.

8 MR SCHAEFER: You will see as a general matter -- I am going
9 to work from mine because I have marked it up -- you
10 will see as a general matter there are a large number of
11 green categories and a small number of red categories
12 and the yellow categories are the ones in issue.

13 There is also -- I should say we received a letter
14 from Microsoft.

15 THE CHAIR: I am sorry, the colour coding. So we have
16 white, green and yellow.

17 MR SCHAEFER: Yes.

18 THE CHAIR: Just remind me, what is... white is?

19 MR SCHAEFER: White are issues rather than categories.

20 THE CHAIR: Okay. Yellow?

21 MR SCHAEFER: Green is... It is largely green. Yellow is
22 in issue.

23 There is a sub-point here, which is that we had
24 attempted to identify in this schedule the differences
25 of substance. There are a couple of very minor points

1 MR SCHAEFER: Sir, the first disputed group are categories
2 2-6, and if you look through those you will see that
3 these are Microsoft-proposed categories.

4 You will see the first one, number 2, is:

5 "Documents showing the remuneration charged to the
6 first acquirer of each such copy corresponded to the
7 economic value of that copy of Microsoft's copyright
8 works."

9 Perhaps I can deal with this and then the others --

10 THE CHAIR: Sorry, this is?

11 MR SCHAEFER: This is a Microsoft proposal. You will see --

12 THE CHAIR: Sorry, a Microsoft proposal of?

13 MR SCHAEFER: This is a Microsoft proposal of a category
14 from which -- that I think they seek from
15 ValueLicensing.

16 THE CHAIR: Okay. Right, thank you.

17 MR SCHAEFER: There is a general point I would make which
18 applies to categories 2-6 and then a specific point
19 about 2.

20 THE CHAIR: Yes.

21 MR SCHAEFER: As we understand it, what these arise from is
22 a number of points in Microsoft's defence dealing with
23 the circumstances under which it is lawful to resell
24 perpetual software licences in the EU and UK, and they
25 take a number of points of, really, IT law that I look

1 forward to working up by the time we get to trial, and
2 these categories seem to go to those.

3 So what they seem to be saying is: please give us
4 documents that show that you complied with these various
5 aspects of IT law that we say apply.

6 THE CHAIR: Sorry to cut you off, but if this is
7 Microsoft's class, do I not need to hear why Microsoft
8 want them first and then you can tell me why they should
9 not have them.

10 MR O'DONOGHUE: Sir, I was proposing to address the
11 disclosure issues in a composite way because our basic
12 point is -- we put forward in paragraphs 7 and 8 the
13 comprehensive disclosure orders that can be ordered
14 today. What I am going to do in my submissions is
15 triangulate that onto these categories and my submission
16 will be the bulk of these categories are wrapped up in
17 the orders we invite today. Rather than having
18 discussions about discussions, we have an order today
19 that deals with the bulk of this. I would much rather
20 deal with that on a composite basis. I am in your
21 hands, sir, as to when we deal with that but I am coming
22 at this from a slightly different perspective than --

23 THE CHAIR: You are saying it is not appropriate to
24 break down these categories at this moment, is that what
25 you mean?

1 MR O'DONOGHUE: I am saying two things -- I do not mean to
2 interrupt --

3 THE CHAIR: No, please, I just need to understand.

4 MR O'DONOGHUE: First of all if we can go to the
5 supplemental bundle, there is a series of problems with
6 this schedule, it is in 1526 of the bundle you should
7 have received.

8 THE CHAIR: Sorry, I have already got about ten
9 different documents out. So this is the supplemental
10 bundle I was handed up. Sorry, 15-?

11 MR O'DONOGHUE: 1526 of the internal numbering. It is the
12 6 October letter from CMS on behalf of the Defendants.

13 THE CHAIR: Right. Okay.

14 MR O'DONOGHUE: Sir, if I can invite you quickly to read the
15 letter. Essentially the point made there is the
16 schedule is incomplete.

17 THE CHAIR: Well, just explain it to me rather than --

18 MR O'DONOGHUE: I will take you through the letter.

19 THE CHAIR: Right. So this is -- as I understand, the
20 document I have got in front of me, subject to the
21 tracked changes, is a document setting out the rival
22 parties' positions?

23 MR O'DONOGHUE: Partially.

24 THE CHAIR: Partially. So you do not have specific
25 submissions on the documents in box 2?

1 MR O'DONOGHUE: Sir, I will come to that. Let us just tee
2 up the --

3 THE CHAIR: Just give me a bird's eye position, because
4 I feel we are circling around and not getting anywhere
5 at the moment.

6 MR O'DONOGHUE: Indeed. Well, the first time we saw the
7 schedule attached to my learned friend's skeleton was in
8 his skeleton and as you see in this letter the
9 schedule you are now looking at, sir, is materially
10 incomplete, leaves out of account completely a whole
11 series of categories, and we say is not an appropriate
12 basis.

13 Essentially, sir, what has happened is we have been
14 bounced into this exercise, none of this was properly
15 foreshadowed, there is no application as such, and there
16 are severe problems with this schedule before you, sir,
17 and our submission is the disclosure we are proposing
18 should be ordered today. If triangulated, that deals
19 with the bulk of this, and that can be done today and
20 can be ordered and we can in parallel work on the
21 rest --

22 THE CHAIR: How does it deal with it if there are
23 disputed categories? I appreciate it -- as I understand
24 what you are submitting, if I make an order in the terms
25 you suggested, that will pick up a lot of this material.

1 MR O'DONOGHUE: It will pick up the bulk, yes. I will
2 explain the triangulation with some care.

3 THE CHAIR: There will still be issues in dispute, as
4 I understand. You will leave court today and there will
5 still be disputes about what subcategories within your
6 broader categories have to be provided by way of
7 disclosure; is that right or not?

8 MR O'DONOGHUE: We say in substance, no. It is obviously
9 a matter for you, sir, but in my submission, if one does
10 the triangulation it is pretty clear that this covers
11 the vast bulk of the issues in dispute, and the way
12 forward, in my submission, is not looking row by row in
13 the schedule but looking at the disclosure that can be
14 made today and leveraging that. I am happy to --

15 THE CHAIR: But if I am against you on that --

16 MR O'DONOGHUE: Yes.

17 THE CHAIR: -- where does that leave you?

18 MR O'DONOGHUE: We say, sir, for the reasons set out in this
19 schedule, it is (a) not fit for purpose, being actually
20 quite misleading, and (b) would be unjust in relation to
21 my client expecting us to deal with each and every one
22 of these categories today because none of this has been
23 foreshadowed.

24 THE CHAIR: Leaving aside whose fault it is, the purpose
25 of today, at least I thought the intended purpose, one

1 of the intended purposes, would be that disclosure,
2 I thought, sorted out. Have I misunderstood that?

3 MR O'DONOGHUE: Yes, and we have a substantial proposal that
4 will do a lot of that, we say.

5 THE CHAIR: Right.

6 MR O'DONOGHUE: To be clear sir, it is not a binary choice
7 between this schedule and my proposal. We will, of
8 course, continue to work in parallel to see whether
9 there are some gaps, based on these categories or
10 otherwise, in our proposal. None of that is being shut
11 out today. What I am saying is there is a tractable
12 and --

13 THE CHAIR: It is not a question of being shut out. It
14 is a question of trying to get everything sorted today
15 so we are not all back here next month arguing it again.

16 MR O'DONOGHUE: Yes.

17 THE CHAIR: You are advancing, just so I understand,
18 some very broad categories, which as ValueLicensing
19 points out, is really just saying: give disclosure of
20 everything arising out of the pleadings subject to
21 certain areas that is premature.

22 MR O'DONOGHUE: I am not sure that is quite fair, with
23 respect --

24 THE CHAIR: Right, okay.

25 MR O'DONOGHUE: -- because we have proposed keywords, we

1 have custodians, we have the databases, this is
2 a properly developed proposal. It is not correct to say
3 it is just disclosure by reference to an issue in the
4 pleadings.

5 THE CHAIR: Right.

6 MR O'DONOGHUE: It is a substantial, fully formed proposal,
7 and they are not being shut out from, in parallel,
8 engaging in a proper way with some of the wrinkles at
9 the margins.

10 THE CHAIR: Right.

11 MR O'DONOGHUE: But there comes a point, I am in your hands
12 as to when and how I develop it -- I mean, it occurs it
13 might be useful for me to give you the gist of the point
14 now and see where it takes us because it does affect, in
15 my submission, how we proceed for at least some of
16 today.

17 THE CHAIR: Can I suggest we deal with your categories
18 you are seeking at this stage -

19 MR SCHAEFER: Yes, sir, I am grateful.

20 THE CHAIR: -- and we will leave the yellow ones until
21 Mr O'Donoghue has made his broader submissions. So that
22 means -- as to at least his categories, not the yellow
23 ones. But tell me what you are saying. Obviously if it
24 is caught -- if you are confident it is already caught
25 by Mr O'Donoghue's broader categories then you do not

1 need to dwell on it.

2 MR SCHAEFER: You will be surprised to learn I am not
3 confident, and in fact it is the first time at all that
4 these four lines of proposed disclosure from Microsoft
5 are intended comprehensively to put any order in this
6 extremely detailed schedule which we have been trying to
7 get them to engage with for some time.

8 THE CHAIR: Yes, I understand.

9 MR SCHAEFER: I was (inaudible) respond to two things.

10 Microsoft says it was bounced into this --

11 THE CHAIR: You do not need to address me on that at the
12 moment, we can come back to that in due course. I just
13 really want to make some progress on specific categories
14 before we run out of time.

15 MR SCHAEFER: So (inaudible) categories 1 to 6 we can bypass for
16 now because they are Mr O'Donoghue's.

17 THE CHAIR: Yes.

18 MR SCHAEFER: There is then category 11, and this is red.

19 THE CHAIR: The peach colour, yes.

20 MR SCHAEFER: This is a category proposed by ValueLicensing
21 and objected to by Microsoft. You will see there is
22 an "object" but no reasons. The short point is these
23 are categories that arise squarely on the pleadings.

24 THE CHAIR: Mm-hm.

25 MR SCHAEFER: In fact, you will see the paragraphs which are

1 referred to, (a), (b), (c) and (d), all track
2 allegations in the pleadings that are variously denied
3 and not admitted, and so we simply do not understand the
4 basis on which documents going to those issues are ones
5 that Microsoft says should not be disclosed.

6 THE CHAIR: So why is the advantage -- I mean,
7 I understand that... sorry, so I am not at
8 cross-purposes with you. So I understand there is
9 a pleaded issue and, indeed, the Defendant takes issue
10 with it in its defence, whether the 365 subscription
11 service was financially advantageous.

12 MR SCHAEFER: Sir, yes.

13 THE CHAIR: Why does that -- I mean, I will hear from
14 Mr O'Donoghue, but assuming it is advantageous in some
15 way, why does it need to be financially advantageous for
16 your case?

17 MR SCHAEFER: Sir, it is part of the background to the
18 Campaign. It is denied, it is a fact --

19 THE CHAIR: Yes, just because you have a fact that is
20 pleaded and denied does not mean it is necessarily
21 relevant to what the Tribunal is going to have to
22 determine. At the moment I could not see why you needed
23 to succeed on the reasons for introducing the
24 subscription service. Unless we hear to the contrary,
25 it will be taken it is accepted that it is advantageous

1 in some way to Microsoft, and any advantage to Microsoft
2 in some way is going to be financially advantageous
3 because it is in the business of doing business.

4 So I was not sure whether we needed to drill down on
5 what might be quite a difficult enquiry to determine
6 the -- how it all balances out and what assumptions one
7 makes and whether Microsoft made the right assumptions.
8 Is that something the Tribunal needs to determine?

9 MR SCHAEFER: Sir, the point is well taken. It is included
10 because it is denied. It is also true that we do not
11 need to prove these matters to succeed on them.

12 THE CHAIR: So that does not mean you are shut out from
13 asking for it at a later stage if things change.

14 But Mr O'Donoghue, can I ask you at the same time,
15 do you consider this to be determinative?

16 MR O'DONOGHUE: Well, no, for two reasons. As you said,
17 sir, this migration has taken place on a vast scale so
18 it is obvious on some level it was advantageous because
19 otherwise it would not have happened.

20 THE CHAIR: Yes.

21 MR O'DONOGHUE: The issue in this case is not about is it
22 lawful to migrate, it is about whether, in that context,
23 you can attach the conditions they object to, which is
24 a separate issue.

25 THE CHAIR: Yes.

1 MR O'DONOGHUE: Secondly, sir, as you know, this is the
2 mother of all rabbit holes, this has to be the subject
3 of disclosure --

4 THE CHAIR: Yes.

5 MR O'DONOGHUE: -- and it is really, at best, a completely
6 peripheral part of the case.

7 THE CHAIR: Yes. So, Mr Schaefer, subject to you
8 changing your mind, I am not going to -- I am inclined
9 to pass over that category because I do think it is
10 potentially a lot of work.

11 Okay.

12 MR SCHAEFER: The next is 12, and here you will see a partly
13 agreed category, the mark-up is ValueLicensing's, and
14 you will see that ValueLicensing's -- apart from saying
15 "documents and data" rather than "data", it is narrowing
16 language so rather than "relating to relevant revenue
17 that the Defendants earned", it is material which is
18 relevant that the Defendants earned as a result of the
19 Campaign. I do not know whether Microsoft objects to
20 this one or not.

21 THE CHAIR: Sorry, so it is -- before we get to the
22 documents --

23 MR SCHAEFER: Yes.

24 THE CHAIR: -- just explain what the data is. So data
25 is agreed, is it? "Data relating to the relevant

1 revenue" --

2 MR SCHAEFER: Yes.

3 THE CHAIR: -- "to be discussed between the experts."

4 So as yet we do not know whether -- you are not

5 making submissions on what is relevant and what is not

6 at the moment?

7 MR SCHAEFER: Sir, not at all.

8 THE CHAIR: But "the Defendants earned during the period

9 relevant to the claim". Who has added in "as a result

10 of the Impugned Terms"?

11 MR SCHAEFER: (Inaudible) added "licencing conditions".

12 THE CHAIR: You have added that?

13 MR SCHAEFER: Yes, which, as I now read it, narrows the

14 scope of the category.

15 THE CHAIR: Which narrows?

16 MR SCHAEFER: Yes, rather than being revenue generally it is

17 revenue specifically tied to that campaign, which is

18 what is relevant.

19 THE CHAIR: Yes, "until relevant", and how "as a result

20 of Impugned Terms" qualifies "relevant", which is

21 difficult to know until you know what "relevant" is --

22 MR SCHAEFER: Sir, that is fair.

23 THE CHAIR: -- I am not sure this is anything more than

24 a marker at the moment; is that right?

25 MR SCHAEFER: In the sense that it is obviously to be

1 discussed between the experts, yes. It is not clear to
2 us --

3 THE CHAIR: I am not going to rule at the moment on
4 whether it should be documents or not because it may
5 depend on whether you are producing an agreed -- some
6 form of interrogation of Microsoft systems that is
7 agreed between the experts. You may not need documents.
8 In other circumstances you may need documents. It
9 really depends; is that...?

10 MR SCHAEFER: Yes.

11 THE CHAIR: Mr O'Donoghue, do you have anything to say
12 on this class at the moment? It seems this is agreed in
13 principle there should be disclosure, what that
14 disclosure will be is yet to be determined because the
15 experts have to consider it.

16 MR O'DONOGHUE: Well, indeed, which is one of the many
17 reasons why we say this is something we have been
18 bounced into.

19 Sir, two points. First of all, our response on this
20 and another category was sent on Friday evening which is
21 why I am in some difficulty today in terms of some of
22 the particular --

23 THE CHAIR: Yes, ValueLicensing, I appreciate this
24 document may be recent, but ValueLicensing say you have
25 been dragging your feet on this for some weeks. Now, we

1 can go back through all that correspondence and try and
2 get to the bottom of it, but if we could just, at the
3 moment, park whose fault it is.

4 MR O'DONOGHUE: I am trying to take some of the heat out of
5 this and shed a bit more light.

6 THE CHAIR: Yes, and just deal with what order is
7 appropriate today for category 12, subject to your
8 overarching points, I understand.

9 But as I understand, you have no objection to there
10 being -- data being supplied within this subject to what
11 the experts discuss. Is there any objection that it
12 should be limited to "as a result of Impugned Terms"?

13 MR O'DONOGHUE: Well, sir, my friend presents this as
14 a narrowing. We say it is extra work because then we
15 would need to -- of course our primary --

16 THE CHAIR: It could make it much more complicated.

17 MR O'DONOGHUE: Indeed, and in circumstances where we deny
18 there was any effect in relation to these terms. So
19 this is rather question-begging and in fact it is not
20 a narrowing at all.

21 THE CHAIR: Well, it could be narrowing but extremely
22 complicated.

23 MR O'DONOGHUE: Indeed. Indeed.

24 THE CHAIR: I do not think until the experts have met --
25 I am not going to order the bit -- again, subject to

1 further submissions, I am not going to make the order in
2 your tracked changes. That is not to say I am against
3 you on them ultimately, it is just that the experts have
4 to meet first.

5 MR SCHAEFER: That is something the experts will discuss.

6 THE CHAIR: Obviously that will be caught up in their
7 expert discussions. So subject to that, subject to
8 further submissions on the general approach, put a tick
9 next to 12, because that is agreed.

10 Where do we go next?

11 MR SCHAEFER: Sir, 13. This is another one where the
12 mark-up is ValueLicensing's, and the substance of the
13 mark-up is that without it this is only "documents in
14 correspondence evidencing Microsoft's consideration
15 towards the prevention of reselling pre-owned licences",
16 and that obviously would not catch any other documents
17 in which Microsoft discussed pre-owned licences unless
18 it was specifically discussing their resale. So we have
19 proposed to expand it to capture what is material, which
20 is Microsoft's discussion of the pre-owned licence
21 market generally.

22 THE CHAIR: Just give me a second and I will just read
23 this more carefully.

24 (Pause)

25 Sorry, "POL" stands for...?

1 MR SCHAEFER: Pre-owned licences.

2 THE CHAIR: Pre-owned licences. I have spent a long
3 time scratching my head on that. DO caused me some
4 confusion as well, but I got there eventually.
5 Reselling of POLs, right.

6 So consideration and attitude, why does attitude not
7 fall within consideration?

8 MR SCHAEFER: That is a fair question. Consideration
9 including policy. I think the point is it is intended
10 to include policy --

11 THE CHAIR: All right, so let us take attitude out and
12 "consideration including policy towards the reselling of
13 POLs and prevention". Right.

14 Mr O'Donoghue, again, subject to your broader
15 points --

16 MR O'DONOGHUE: You have pre-empted my point on attitude.

17 THE CHAIR: Right. Attitude has gone.

18 MR O'DONOGHUE: Well, sir, I will develop the point, but we
19 say in many ways this shows the sterile nature of this
20 exercise, because if you see in the third column that:

21 "Searches of all relevant custodians may involve
22 some ... involving sampling of keywords proposed by the
23 Defendants."

24 So, sir, a long time ago we had proposed a series of
25 keywords based on the pleadings to search for these very

1 issues, I think back in June, and we have not had
2 a single reaction to those keywords.

3 THE CHAIR: All right, again we are descending into --
4 we are just dealing with the category, I understand, as
5 opposed to what searching will be done; is that right?
6 Or am I misunderstanding? Mr Schaefer, are we dealing
7 with categories at the moment or --

8 MR SCHAEFER: Sir, yes, our position is we will now define
9 the categories and that will allow us to define
10 appropriate searches rather than --

11 THE CHAIR: All right. So we are just on categories at
12 the moment.

13 So as a category this seems unobjectionable
14 considering -- is there -- are you objecting to this as
15 a category?

16 MR O'DONOGHUE: Yes. This is one of the points I rely on.
17 If you triangulate this into our proposal it would be
18 included.

19 THE CHAIR: Well, okay, it would be included in your
20 proposal anyway?

21 MR O'DONOGHUE: Yes.

22 THE CHAIR: So there is common ground in that respect?

23 MR O'DONOGHUE: To that extent.

24 THE CHAIR: Understood. Next one.

25 MR SCHAEFER: Sir, there is of course here number 27, this

1 is not on the schedule, but you will recall that
2 Mr O'Donoghue just showed you a letter and he explained
3 that our schedule was misleading because it did not
4 include every difference, so here is one of the
5 non-included differences at 27. The addition is:

6 "Recordings of telephone discussions, memoranda, reports
7 and minutes of meetings..."

8 THE CHAIR: Right, again as a category, Mr O'Donoghue,
9 do you object to 27, subject to the caveat it will be
10 caught by your categories anyway?

11 MR O'DONOGHUE: Well, sir, we received these marked-up
12 schedules on 3 October. There was simply insufficient
13 time as a matter of evidence to deal with each and every
14 one of these categories in Henderson. That is why I do
15 say repeatedly we have been bounced into this. There is
16 a risk of substantial injustice with this approach.
17 This has not been properly --

18 THE CHAIR: Mr Schaefer, when did you first send this,
19 subject to the -- ignore the schedule for the moment,
20 Mr Schaefer, when did you first identify this category?

21 MR SCHAEFER: Firstly it was on 28 September that we wrote
22 to Microsoft proposing that these categories be sorted
23 out at the CMC, so any suggestion that they have been
24 bounced into that generally -- as to the specific
25 mark-up, I am going to ask --

1 THE CHAIR: Not the mark-up, the original text. It was
2 sent on the 28th --

3 MR SCHAEFER: The original text -- these schedules were
4 first put together on 1 September. Microsoft responded
5 on the 25th.

6 THE CHAIR: All right, show me on 1 September where
7 I find it, please.

8 MR SCHAEFER: I am grateful. It is at E/1. This is before
9 Microsoft divided them into...

10 THE CHAIR: Yes, see if you can identify it in that.
11 Number 8? No, beg your pardon, that is another one.
12 That is the one we looked at earlier.

13 MR SCHAEFER: I think you are right, 26 is the...

14 THE CHAIR: No, it may not be.
15 (Pause)

16 MR SCHAEFER: You will understand there has been a mark-up by
17 Microsoft as well as us since this started.

18 THE CHAIR: Yes, yes, sure.

19 MR SCHAEFER: I am told by my learned friend that it is 22.

20 THE CHAIR: Yes, okay. Mr O'Donoghue, I appreciate
21 there has been a little bit of tweaking, but this was
22 1 September -- is that right, Mr Schaefer?

23 MR SCHAEFER: Sir, yes.

24 THE CHAIR: So you have had this class -- and have you
25 taken issue with it in correspondence, class 22?

1 (Pause)

2 MR O'DONOGHUE: It is the additional recording of the
3 telephone discussions.

4 THE CHAIR: All right. Okay. I am afraid I am against
5 you on recordings of telephone discussions. So, fine.
6 Let us include that category.

7 Next, do we need to go back? You jumped forward to
8 27.

9 MR SCHAEFER: Sir, I think there was nothing between the
10 parties on the next one, which is 30. This is
11 a category proposed by ValueLicensing. Microsoft has
12 objected and sought an explanation, and if you will see
13 in the second column, in the mark-up we had intended to
14 provide an explanation.

15 THE CHAIR: Sorry, can I just re-read it? This is in
16 yellow; yes?

17 MR SCHAEFER: This is in yellow.

18 (Pause)

19 THE CHAIR: Right, okay.

20 MR SCHAEFER: So in short, sir, this is disclosure relevant
21 to a pleaded issue, which was the number of ways in
22 which there appear to have been links made between the
23 From SA SKU, which was the discounted version of
24 Microsoft software available before the so-called new
25 From SA condition came in, which nevertheless appeared

1 to link that to an inability or a disincentive to resell
2 pre-owned licences.

3 There is a link between this and 31, which is
4 agreed. So 31 goes to the actual -- agreed apart from
5 the mark-up. 31 goes to:

6 "Actual communications between Microsoft or its
7 partners and customers about that issue."

8 Whereas 30 seeks to capture Microsoft's internal
9 guidance and policies on that issue.

10 THE CHAIR: Yes, I see.

11 Mr O'Donoghue, is there anything you want to say
12 about that?

13 MR O'DONOGHUE: Sir, no, subject to my overarching points.

14 This will be included in our proposal.

15 THE CHAIR: Okay, we will get to your overarching
16 points. I am grateful, thank you.

17 MR SCHAEFER: Sir, on 31 there is another minor addition
18 which we have not included in the schedule which
19 Microsoft says is misleading of us not to include.

20 THE CHAIR: Sorry, say that again?

21 MR SCHAEFER: The mark-up in 31 is another of the points
22 identified in Microsoft's recent letter that my learned
23 friend said caused our schedule to be misleading.

24 THE CHAIR: Leave aside that. Tell me the relevance and
25 why you need it.

1 MR SCHAEFER: The issue is, again, just including the
2 "(inaudible) correspondence, memoranda and reports of
3 meetings".

4 THE CHAIR: Let me just read this.

5 MR SCHAEFER: The rest is agreed.

6 THE CHAIR: What does the addition add? What is in the
7 addition that is not a document?

8 MR SCHAEFER: Sir, we say nothing. It is -- it is intended
9 to give some guidance but it does not expand the
10 category.

11 THE CHAIR: Right. Mr O'Donoghue, what do you say about
12 this?

13 MR O'DONOGHUE: Well, it is really your point, which is the
14 subdivision of this category seems to me unhelpful.

15 THE CHAIR: Right. But it is unhelpful on the
16 understanding it falls within the definition of
17 "documents". If it comes out it does not mean that
18 correspondence, memoranda, reports and minutes have to
19 be provided.

20 MR O'DONOGHUE: (Overspeaking) we have then further
21 categories for each document and whether it was
22 correspondence --

23 THE CHAIR: Are you happy on that basis, Mr Schaefer?

24 MR SCHAEFER: Yes.

25 THE CHAIR: Yes, thank you.

1 Where next?

2 MR SCHAEFER: 33.

3 THE CHAIR: Yes.

4 MR SCHAEFER: Sir, you will see this is a category that goes
5 to quantum and it derives from discussions with our
6 expert advisers. The original text in black Microsoft
7 had said was unclear so what we have sought to do is to,
8 with input from our experts, clarify and make it more
9 precise.

10 THE CHAIR: Why do you need sales data, sorry?

11 MR SCHAEFER: My understanding is that these items are
12 required to allow the experts to establish which
13 perpetual licences were impacted by the restriction at
14 the time that the accompanying licences switched to
15 subscription and that goes to the supply of pre-emptive
16 licences in the counterfactual --

17 THE CHAIR: Sorry, slow down. I am not following, it is
18 my fault.

19 MR SCHAEFER: It may not be.

20 THE CHAIR: So these are licences -- these are the
21 non-subscription licences, these are the licences that
22 your client would wish to pick up in the second hand
23 market?

24 MR SCHAEFER: Sir, my understanding, and I will be corrected
25 if I am wrong, my understanding is that these are both

1 and what the experts are seeking to do is assess in the
2 counterfactual, assuming that we succeed on liability,
3 assess in the counterfactual what the sales of pre-owned
4 licences would have been by comparison to the sales that
5 were actually made largely of new perpetual licences in
6 the Cloud. The point is we are obviously not saying in
7 the counterfactual all of the sales that Microsoft
8 actually made of new and subscription licences would
9 have been POLs, so this is the kind of data the experts
10 say they need to assess in the counterfactual how the
11 split would have arisen.

12 Again, this is --

13 THE CHAIR: So on the counterfactual -- I do not
14 understand quite how quantum is going to be calculated
15 in this case.

16 MR SCHAEFER: Sir, the quantum is effectively
17 ValueLicensing's losses from not being able to purchase
18 and resell existing licences.

19 THE CHAIR: That makes perfect sense, yes.

20 MR SCHAEFER: In the factual case, ValueLicensing's case is
21 that at least a large number of the sales that it would
22 have made of pre-owned licences were replaced by sales
23 by Microsoft of new licences and perpetual licences, and
24 so in order to assess how that would have been different
25 in the counterfactual, assuming greater supply, what the

1 experts need -- and this also goes to split trial which
2 I will come to -- what the experts need is data and
3 evidence that allows them essentially to assess how
4 those are different options for different customers,
5 different customer groups, in order to estimate what the
6 differences would have been in the sales in the
7 counterfactual, if that makes any sense.

8 Again, I think this is one that is subject to
9 discussion of experts, so there may be a limited need to
10 ask you to rule on the precise wording.

11 THE CHAIR: Well, it is not so much precise wording; it
12 is just really the category. So there is not
13 an application -- is there an application to split off
14 quantum at this stage?

15 MR SCHAEFER: There is not.

16 MR O'DONOGHUE: No (inaudible).

17 THE CHAIR: There are the separate issues about the
18 number of contracts and causation and them doing the
19 accountancy to work out the damage. You are of the view
20 it should all be heard at the same time, Mr O'Donoghue?

21 MR O'DONOGHUE: Yes, the market definition and dominance is
22 our application (inaudible).

23 THE CHAIR: Yes, everything else will be. A question to
24 both parties: why is it necessary to get into this at
25 this stage, at trial? Is there not a starting point

1 which would be to work out how many contracts you lost?
2 I am sorry, I may be misunderstanding, so please
3 contradict me if I am wrong. I need to understand how
4 many sales you have lost, or your client has lost, if
5 you are successful in showing that is as a result of
6 an abuse. In terms then of arriving at a sum which
7 represents those lost sales, that could certainly be
8 heard in a separate trial, could it not?

9 MR SCHAEFER: Sir, it could be. Neither party is contending
10 for that.

11 THE CHAIR: Well, you may not be.

12 MR SCHAEFER: (Overspeaking) I think one of its major
13 arguments is going to be, well, there was supply and
14 there was not enough demand so they are quite keen on
15 determining quantum at this stage (overspeaking) to
16 that.

17 THE CHAIR: That desire will be satisfied by identifying
18 the number of lost sales, as I understand it.

19 MR SCHAEFER: But, sir, the number of lost sales is going to
20 be a function of that question. That question is going
21 to be a function of, among other things, working out
22 which of the sales were in fact made by way of new
23 perpetual subscription sales by Microsoft would, in the
24 counterfactual, have been made by new licensing, by way
25 of pre-owned licences.

1 THE CHAIR: Sorry, I am probably asking you to repeat
2 yourself, but just take me through again how this data
3 is going to assist.

4 MR SCHAEFER: My understanding, and I am afraid I am reading
5 out here, but my understanding, according to the
6 schedule, is this is what the experts have told us they
7 need to establish which perpetual licences are affected
8 by the restriction when the company switched, and to
9 analyse the sales of new perpetual licences and Cloud
10 take-up and therefore demand for pre-owned licences --

11 THE CHAIR: So that is a top-down inference as opposed
12 to your client coming along and saying, look, this is
13 the business I was doing, realistically, and then you
14 see a sudden drop and this is what the graph should have
15 looked like. It seems to me you can approach it two
16 different ways.

17 MR SCHAEFER: There will certainly be a factual expert witness
18 as well, but this is the evidence on it.

19 THE PRESIDENT: Have I got any evidence on this at the
20 moment in this class?

21 Mr O'Donoghue, does this -- are you going to give
22 this because it falls within your current
23 all-encompassing strategy of offering broad classes of
24 disclosure? Will this be given?

25 MR O'DONOGHUE: Sir, we do on quantum include it as I have

1 indicated. I have some narrower points on the text in
2 blue which are important.

3 THE CHAIR: Right.

4 MR O'DONOGHUE: As you see in the second column it says:

5 "Scope to be discussed by experts."

6 Now, we received the text in blue --

7 THE CHAIR: Sorry, second column? I am with you, yes.

8 MR O'DONOGHUE: We received the text in blue on 3 October,
9 which is the same day our evidence in Henderson was
10 lodged, and we have not had time to deal with these new
11 matters in blue text with our experts and to put in
12 evidence on that point. That is why, sir, I have made
13 the point more than once, that there is a significant
14 prejudice to our client in being bounced into at least
15 some of this in this way. We simply have not had time
16 to deal with this at a client level, much of which, of
17 course, is on the west coast of the United States, and
18 to surface this on 3 October, we say, is quite wrong and
19 unfair to my client.

20 MR SCHAEFER: Sir, that is helpful. My understanding is
21 that this is all intended for discussion by experts and
22 could, presumably, be refined at that stage.

23 MR O'DONOGHUE: Well, it is a category that he seeks ordered
24 today. He cannot have it both ways: either it is in
25 today or it is not.

1 THE CHAIR: Well, it is not that simple, is it, if the
2 scope is to be discussed by experts? The scope will
3 include the need for (a) to (h), I suppose.

4 MR O'DONOGHUE: Indeed, and so then there is a question as
5 to whether it is proper to order it at all. A lot of
6 these orders are discussions about discussions whereas
7 by contrast the order I am asking --

8 THE CHAIR: But we are making the order in the other
9 category which the experts are going to...

10 So where was the other category, do remind me
11 which... Mr Schaefer, the one where the experts were
12 going to discuss, which one?

13 MR SCHAEFER: 12.

14 THE CHAIR: 12, thank you.

15 MR O'DONOGHUE: Sir, we still say it is unsatisfactory to
16 have the category ordered today --

17 THE CHAIR: I do think in both these categories there
18 should be a direction of the experts. That is the order
19 to be: there is a direction that the experts will do
20 whatever you say they are going to do. Then insofar as
21 there is any dispute, I do not think it is satisfactory
22 to have an order of uncertain scope, so that will apply
23 to both of those.

24 Then I think, Mr O'Donoghue, subject to your
25 overarching points, you would be content on that basis

1 that there would be a direction of the experts to
2 discuss these matters?

3 MR O'DONOGHUE: On that narrow point.

4 THE CHAIR: On that narrow point, okay.

5 MR SCHAEFER: Sir, we then move to 34. This is a deletion
6 on the basis that this is, as I understand it, included
7 in the other schedule level and therefore not necessary
8 here.

9 THE CHAIR: Sorry, the other schedule being?

10 MR SCHAEFER: The market definition and dominance schedule
11 that Microsoft has --

12 THE CHAIR: Sorry, I am with you. Yes, yes.

13 MR SCHAEFER: Sir, I do not know whether my learned friend
14 has an objection to it being on the schedule or not.
15 This is on 34?

16 MR O'DONOGHUE: No.

17 MR SCHAEFER: So perhaps we can slightly cut through 35 and
18 36 by suggesting that they are subject to the same
19 approach you have ordered on the other issues that say
20 they are to be discussed by experts.

21 THE CHAIR: Yes, okay.

22 MR SCHAEFER: The next is 39, and you will see the addition
23 by ValueLicensing in mark-up. So it is discussing not
24 just the fact of discounts being offered, but also
25 including, you may say it already includes, but the

1 clarity, the rationale of any such discounts.

2 THE CHAIR: Right. Mr O'Donoghue, I do not see that is
3 obviously objectionable.

4 MR O'DONOGHUE: No.

5 MR SCHAEFER: 40 is another. We are suggesting a narrowing
6 and certainly a relevance increasing amendment, because
7 the issue in the case is the extent to which the
8 Campaign and the terms in issue affected Cloud uptake
9 rather than whether discounts per se reflected Cloud
10 uptake, and that is the reason for this suggested
11 amendment.

12 THE CHAIR: Mr O'Donoghue, any objection to that?

13 MR O'DONOGHUE: We do object in strong terms to this, sir,
14 essentially for the same reason that arose with the
15 other category in relation to a subscription-based
16 model. It was not in dispute that it was legitimate for
17 Microsoft to transition towards subscription-based
18 licensing using incentives, and the idea that in
19 category 40 some version of that resurfaces, we do
20 object to. One can see from the category this is
21 potentially vast, and although these two words in blue
22 are basically innocuous, this is another point that, had
23 we known about this before 3 October, we would have
24 wished to have put in quite a lot of evidence on why it
25 is simply not tractable and why it is a category that is

1 problematic and manifestly disproportionate. So we say
2 it is not a category that should be ordered as worded.
3 The original wording, in our submission, is as far as it
4 should go. Because that is the link with this case.
5 This is not some form of sector enquiry; it is in
6 relation to a navigation of specific abuse of conduct
7 alleged in relation to incentives and other conduct to
8 cause migration events, the selling of pre-owned
9 licences.

10 So we say it is effectively out of scope and is, on
11 its face, manifestly problematic.

12 THE CHAIR: Sorry, a different point to either of you
13 making, what is the relevance of this? So this is
14 someone --

15 MR SCHAEFER: I think I can show you the relevance of this
16 if we go to A/6, page 221.

17 THE CHAIR: A/6, page 221.

18 MR SCHAEFER: So this is Microsoft's response to one of our
19 RFIs.

20 THE CHAIR: Yes.

21 MR SCHAEFER: This is particularly concerned with
22 Microsoft's pleaded defence of -- by reference to
23 alleged deficiencies created by the Impugned Terms. So
24 it says that:

25 if it is wrong that there was no prima facie

1 restriction of competition, nevertheless the Impugned
2 Terms should be treated as lawful because they produced
3 benefits under Article 101(3) TFEU and the corresponding
4 Competition Act provision.

5 You will see that in request 5 we asked them to
6 explain in slightly more detail than their defence does
7 what benefits they were referring to. If you go to
8 response 3, you will see that:

9 "The specific benefits relied on are... the benefits
10 associated with the Cloud-based subscription services
11 that are not available to holders of perpetual
12 licences."

13 Then there is an argument about who the recipients
14 are, which is less important for this point.

15 So Microsoft's argument is that there is a causal
16 link between the impugned terms and Cloud uptake, and
17 that is precisely what this issue is aimed at.

18 THE CHAIR: I do not quite -- so the person who enters
19 into the contract, which says you cannot pass on your
20 licence, they are already going to a Cloud system, then
21 they cannot sell their -- ValueLicensing cannot sell
22 their system to another third party, fourth party, and
23 that party anyway instead goes up to the Cloud. That is
24 the basic argument?

25 MR SCHAEFER: Sir, precisely -- sorry.

1 THE CHAIR: Then we engage specific benefits on top of
2 that?

3 MR SCHAEFER: I cannot tell you exactly the argument
4 Microsoft is running here but they do appear to be
5 saying that there will be benefits arising from the
6 Impugned Terms which consisted in increased use of
7 Cloud-based subscription services and, as you will see,
8 that is precisely what this category is asking for full
9 evidence of.

10 THE CHAIR: Right.

11 MR O'DONOGHUE: Sir, I am somewhat baffled. This, of
12 course, is a section dealing with quantum, and I am
13 grateful my learned friend has made the point of
14 a causal connection. What is entitled on a causal
15 connection is to assess to what extent the conduct
16 inhibited the supply of pre-owned licences, in the
17 context of a migration to a subscription-based model.
18 What he is not entitled to on the basis of this category
19 is some other non-causally related train of enquiry into
20 this migration generally. This is the problem. As soon
21 as we go down that rabbit hole it is potentially
22 enormous and it has to be firmly anchored in the causal
23 connection.

24 THE CHAIR: Why is this wording sending you down that
25 rabbit hole?

1 MR O'DONOGHUE: Because it really is questioning the extent
2 to which the alleged Campaign affected Cloud uptake.

3 THE CHAIR: Yes. That is fairly -- it strikes me as
4 a narrow category. You have the document saying --
5 obviously not in words -- the Campaign, but these
6 requirements are impacting Cloud uptake, then you will
7 have to give disclosure. I am not quite following you
8 why this is a broad category.

9 MR O'DONOGHUE: Because Mr Schaefer seems to have an eye on
10 something different which is that one would look into
11 the benefits and disbenefits of this migration more
12 generally.

13 THE CHAIR: I am not reading it that way. Mr Schaefer
14 is shaking his head. Record it on the transcript, is
15 that a shake of agreement rather than disagreement?

16 MR O'DONOGHUE: That is the only point he made, it is the
17 only justification (inaudible) --

18 THE CHAIR: Okay, I am going to --

19 MR O'DONOGHUE: (Overspeaking) where in relation to my
20 objection to the justification point, it is something that
21 Mr Schaefer relies upon.

22 THE CHAIR: Right. Anyway, I am going to order this
23 category with that -- with a replacement of "discounts
24 for alleged Campaign".

25 MR SCHAEFER: Sir, I am grateful.

1 The next is 41, and as you will see from the deleted
2 text, it is ValueLicensing deleted text in the second
3 column, Microsoft objects to 41 on the basis that they
4 say it duplicates 37.

5 So if one compares those two, 37 is:

6 "Documents relating to the incidence and propensity
7 of enterprise customers in the Relevant Territories,
8 absent the Impugned Terms, selling, destroying or
9 otherwise dealing with their existing perpetual
10 licences."

11 41 is relating to the number of enterprise customers
12 and proportion of pre-owned licences that were affected
13 by the Impugned Terms.

14 So there are two different points: 37 is going to
15 Microsoft's argument that the Impugned Terms did not
16 really matter because no one was really going to resell
17 these things anyway and 41 is going to the actual effect
18 of the Impugned Terms. So they are not duplicative, in
19 my submission.

20 THE CHAIR: Sorry, just say that again?

21 MR SCHAEFER: Sorry, yes. 37:

22 "Documents and data relating to the incidence and
23 propensity of enterprise customers in the Relevant
24 Territories absent the Impugned Terms, selling,
25 retaining", et cetera.

1 So this goes to Microsoft's argument that with or
2 without the Impugned Terms, enterprise customers did not
3 tend to resell these things, they tended to destroy them
4 or keep them. Whereas 41 is specifically about the
5 effect of the Impugned Terms. They are ontologically
6 distinct.

7 THE CHAIR: All right. Well, there may be overlap.

8 MR O'DONOGHUE: Sir, we have no problems with the first part
9 on Impugned Terms, but it is the second part that is
10 problematic, because it says:

11 "Other pleaded aspects of the alleged Campaign
12 during the Relevant Period."

13 If we can quickly go to the pleadings -- that is in
14 volume 1, 30 -- these are the amended particulars of
15 claim. So you will recall, sir, from the discussions
16 that the expunging allegation originally made has now
17 been dropped. There is now a new allegation in 48 on
18 advising --

19 THE CHAIR: Yes.

20 MR O'DONOGHUE: -- which we say, as a matter of pleading, is
21 incredibly vague and should not form a basis for
22 a category of this kind. It is, if you look at...

23 MR SCHAEFER: I am sorry, I apologise, I can attempt to cut
24 through that. We are content if the 41 ends before
25 "and/or".

1 THE CHAIR: Is this a convenient moment? The
2 transcriber needs five minutes.

3 MR SCHAEFER: Sure.

4 THE CHAIR: As do I.

5 (11.54 am)

6 (A short break)

7 (12.04 pm)

8 MR SCHAEFER: Sir, thanks to your patience I think we are on
9 42.

10 THE CHAIR: Right. Okay.

11 MR SCHAEFER: This is another category -- you will recall
12 there was an earlier category today where I showed you
13 that it arose from Microsoft's denial of something we
14 said in the defence and you suggested that the
15 proposition was quite hard to dispute. This is the
16 same.

17 If I can show you, first of all, our particulars at
18 A/2/35.

19 THE CHAIR: Sorry, let me just read this. (Pause)

20 This is the use of redundant licences. So by
21 redundant, you mean no longer needed by the owner of the
22 licence. Including assessment... yes. You were going
23 to show me what?

24 MR SCHAEFER: A/2/35, this is our particulars.

25 THE CHAIR: Yes.

1 MR SCHAEFER: You will see we say this is in the context of
2 alleging that the whole point of the Campaign was to
3 take these things off the market. You will see we say
4 at 56(1):

5 "Microsoft has no interest in acquiring pre-owned
6 licences of its own software. It can produce new
7 licences for its own software at near-zero incremental
8 cost."

9 THE CHAIR: Yes, sure, yes.

10 MR SCHAEFER: If you then go to the defence at page 70.

11 THE CHAIR: Yes.

12 MR SCHAEFER: Paragraph 57(2) is denied. So, again, this
13 arises -- I mean, I do not think we are suggesting that
14 any documents in this category are actually going to
15 exist, but the surprise is on the pleadings it appears
16 to be Microsoft that is taking this point.

17 THE CHAIR: Well, I am not going to order any searches
18 on that. I think I agree with you, it is very difficult
19 to see what point Microsoft is going to take on the use
20 for redundant licences. Obviously if they do advance
21 something at any stage, you can apply then. Have you
22 got an explanation, Mr O'Donoghue, as to why you would
23 have a use for a redundant licence?

24 MR O'DONOGHUE: Well, sir, it would be a matter for
25 evidence. Our objection to this category is --

1 THE CHAIR: No, it is not a matter for evidence. It
2 would be an issue to which evidence might be addressed.
3 But are you saying there is a use for a redundant
4 licence? I mean, how can there be?

5 MR O'DONOGHUE: Well, it will be matter for evidence.
6 Again, sir, our objection to this category is -- it is
7 all very well --

8 THE CHAIR: I have said I am inclined not to order it.

9 MR O'DONOGHUE: Yes.

10 THE CHAIR: What I am trying to identify is whether I am
11 making a mistake, whether there is an issue, and all you
12 have said at the moment is it is a matter for evidence.
13 But do you want to take instructions as to what that
14 issue might be? This is a licence. How could you have
15 a use for a licence for your own product? I do not quite
16 understand that.

17 MR O'DONOGHUE: We agree, sir, this is not an issue.

18 THE CHAIR: If anything does emerge out of the woodwork
19 we will address that when we get to it.

20 MR SCHAEFER: Sir, I am grateful.

21 43 and 44, these are two of the entries listed in
22 Microsoft's letter as having been omitted from the
23 schedule. You will see we have changed "showing" to
24 "relating to". I do not know if my learned friend has
25 an objection to either of those.

1 THE CHAIR: Sorry?

2 MR SCHAEFER: I apologise, 43 and 44 are not in the schedule
3 because we thought this was a de minimis element, but
4 they are identified in Microsoft's letter complaining
5 that we failed to produce a proper schedule, so I am
6 going through these items as well.

7 THE CHAIR: I see. Is there any objection to those
8 changes?

9 MR O'DONOGHUE: No.

10 THE CHAIR: Okay, 43 and 44.

11 MR SCHAEFER: So 45-47 are Microsoft categories to which we
12 object because if you look at them they are about how we
13 have assessed our quantum for the purposes of this
14 litigation.

15 THE CHAIR: Sorry, I lost the page. 45 to?

16 MR SCHAEFER: To 47. So these are not requests for
17 disclosure of contemporaneous documents. These appear
18 to be requests for potentially privileged documents
19 created during the course of this litigation and we do
20 not quite understand what these requests are. These are
21 matters for expert evidence.

22 THE CHAIR: Right, but we are dealing with your
23 categories at the moment.

24 MR SCHAEFER: Yes, in that case we can park these.

25 THE CHAIR: Yes.

1 MR SCHAEFER: That takes us to 49-51. Well, this is the
2 same point again. The deletions are made by
3 ValueLicensing on the same basis: that the deletions
4 rather than the remaining text are matters for expert
5 evidence, not disclosure. So all of this in that sense
6 are Microsoft categories that we are trying to remove.

7 THE CHAIR: So these are Microsoft categories?

8 MR SCHAEFER: That is my understanding, yes. Or at least
9 that the text deleted is objected to by us.

10 THE CHAIR: Yes. We are going to come back to
11 Mr O'Donoghue's categories if we get there.

12 MR SCHAEFER: Yes, we will come back on that.

13 That is, you will be pleased to know, the end of
14 this schedule, and there are a relatively small
15 number -- let me check there are no more mark-ups.

16 So we then move to the market definition and
17 dominance schedule.

18 THE CHAIR: Where does that start?

19 MR SCHAEFER: I think Mr O'Donoghue has handed up two
20 separate lists.

21 THE CHAIR: This is a separate document, is it?

22 MR SCHAEFER: I believe so.

23 THE CHAIR: Where do I find it?

24 MR O'DONOGHUE: Sir, it was handed up in the schedule that
25 we just went through. I have a spare copy in case you

1 have trouble finding it.

2 THE PRESIDENT: Sorry. It is not stapled on the back.

3 (Handed)

4 I have got it. Thank you.

5 I do not want to perhaps -- I just want to
6 understand the scope of the disputes at the moment,
7 because we have yet to decide on the split trial.

8 MR SCHAEFER: Sir, yes. 1 appears to me to fall into your
9 "experts to discuss" category.

10 THE CHAIR: Right. So that is experts to discuss.

11 Right.

12 MR O'DONOGHUE: Would it make sense to do this after split
13 trial?

14 THE CHAIR: Probably. I just want to understand, just
15 broadly, what the scope of the dispute is, and then we
16 can make detailed submissions in due course.

17 9 looks relatively minor. Then we have got 10, 11,
18 12, 13, 14. Just tell me what the dispute is about
19 those?

20 MR SCHAEFER: Sir, these are categories that we have been
21 asked to include by our expert, we do not know whether
22 Microsoft objects or not, but presumably they will in
23 any event come into expert discussion.

24 THE CHAIR: So these will be subject to the discussion
25 between experts?

1 MR SCHAEFER: Sir, yes.

2 THE CHAIR: Okay, that is all I wanted, Mr O'Donoghue,
3 just to get an idea of the scope.

4 So shall I hear from Mr O'Donoghue now, so ignore
5 dominance for the moment, disclosure, go back to the
6 original one. I know you have some overarching
7 submissions you have not had a chance to make yet.

8 MR O'DONOGHUE: Shall I start with those?

9 THE CHAIR: Yes, absolutely, yes, yes.

10 MR O'DONOGHUE: As the Tribunal is aware we have, from the
11 outset of this case, advocated for staged disclosure,
12 as indeed is the Tribunal's normal approach in cases of
13 this kind.

14 The first stage of this disclosure, the order at the
15 first CMC has, in our submission, been effective. It
16 has led VL to withdraw the expungement case and if we
17 had not done so we would have had expensive and
18 time-consuming disclosure on that.

19 We also had disclosure of the freedom of information
20 materials, which I will quickly show you, and we say
21 those too have a significant bearing on the case.

22 Now, as you will have seen in our skeleton, in
23 Henderson we have made a substantial proposal for
24 disclosure today, not simply some order in relation to
25 categories, and it is disclosure by both parties, in

1 terms of the symmetry, we would say the burden of our
2 proposal almost certainly falls on Microsoft. We say
3 that that proposal goes to the heart of the case. It
4 deals head-on with questions of infringement, or alleged
5 infringement in particular.

6 Now, on the Microsoft side the disclosure costs of
7 that proposal are estimated at half a million pounds,
8 across 23 custodians, leading to a corpus of up to
9 70,000 documents going to the core infringements in this
10 case, and on any view that is a pretty substantial
11 disclosure proposal.

12 Now, I will take you to some aspects of the
13 evidence, sir. So that is on our side.

14 Then on the VL side the disclosure we propose
15 involves essentially the documents relating to the
16 supply of pre-owned licences for resale, and the demand
17 for those licences, and those issues, of course, will be
18 key to whether there was any or any material effect on
19 competition, causation and, of course, quantum. Though
20 there was pain, there is a degree of parity on both
21 sides of our proposal.

22 Now, as I said, sir, at the outset, I will explain
23 very clearly how this triangulates onto the schedules
24 you have just been seeing, and my essential submission
25 is that the overwhelming bulk of what is set out in the

1 schedules will be captured by the proposals we put
2 forward, subject, of course, to market definition.

3 Importantly, our proposal does not shut out either
4 side from a further phase or further stage of
5 disclosure. It is at least agreed there will need to be
6 a further CMC on disclosure early in 2024 to deal with
7 any outstanding matters, but we do say, sir, that to
8 focus on concrete proposals of a substantial variety
9 today, that will make the exercise in the new year much
10 more tractable. Our strong anticipation is that the
11 residue that is left, once we have done the exercise we
12 propose, will be something that is less substantial and,
13 in any event, more tractable.

14 It avoids, sir -- in my submission, one of the
15 issues with these categories is, inevitably at
16 this stage, looking at things more or less completely in
17 the abstract by reference to pleadings at the foothills
18 of the case, if I can call it that.

19 By contrast --

20 THE CHAIR: It is a depressing thought we are only at
21 the foothills!

22 MR O'DONOGHUE: Indeed. Indeed.

23 THE CHAIR: It may well be accurate.

24 MR O'DONOGHUE: As was said in the other case, let us hope
25 we are not climbing the Matterhorn.

1 But on a more serious note, the difficulty, of
2 course, with these categories is they are essentially
3 abstract, cross-referring in the most part to items in
4 the pleadings, and of course when one is concretely
5 engaged in an actual disclosure exercise, and one is
6 actively interrogating the database, the keywords and so
7 on, all of this becomes much more tangible and then
8 these categories can be more easily stress-tested
9 according to what is actually produced or hardwired into
10 that process rather than being decided today in
11 essentially abstract terms. So we say there is a value
12 to disclosure being ordered on a staged basis for that
13 reason as well.

14 Now, just to show you, sir, our proposal, it is in
15 the second bundle at 1502.

16 THE CHAIR: Is it not in the joint order, consolidated
17 draft order?

18 MR O'DONOGHUE: Yes, 7 and 8. So you will see, sir, on the
19 Microsoft side essentially the disclosure goes to the
20 core of the alleged infringement and causation and
21 aspects of quantum in terms of our requests, and then in
22 terms of VL's requests of Microsoft, we can see policy
23 documents going to the Impugned Terms, the alleged
24 Campaign, and so on.

25 THE CHAIR: Sorry. Hold on. Let us deal with VL

1 seeking disclosure from you.

2 MR O'DONOGHUE: Yes.

3 THE CHAIR: So from paragraph 28, as I understand it.

4 MR SCHAEFER: For clarity, it is not VL seeking from

5 Microsoft, that is Microsoft seeking disclosure from VL.

6 THE CHAIR: Right. So how would you deal with VL's

7 disclosure to Microsoft?

8 MR O'DONOGHUE: Sir, 7.

9 THE CHAIR: 7, sorry. Then I meant Microsoft. The

10 disclosure that Microsoft is giving.

11 MR O'DONOGHUE: Yes, would be in 8.

12 THE CHAIR: In 8.

13 MR O'DONOGHUE: So it essentially leads to breaches.

14 THE CHAIR: "Documents or data responsive to the agreed

15 search terms."

16 So there are no categories at all here?

17 MR O'DONOGHUE: Well, sir, I am going to map out both, but

18 we have put forward, based on the pleadings, keywords to

19 which we have had no response. We have identified,

20 including by reference to evidence, 23 custodians, we

21 have identified the databases. So we say this is

22 oven-ready. I will show you this in Henderson, this is

23 something that has been thought about in great detail.

24 We say once this is understood --

25 THE CHAIR: As you rightly point out, serving stuff at

1 the last minute is not very satisfactory, and as
2 I understand, Henderson was only served three or
3 four days ago; is that right?

4 MR O'DONOGHUE: It was served on the same day as we received
5 their schedule.

6 THE CHAIR: Yes. Okay. So you will accept that
7 Mr Schaefer has not had a chance, really, to digest and
8 take full instructions on that?

9 MR O'DONOGHUE: Sir, I do not. Of course paragraphs 7 and 8
10 have been in our draft order since I think, the --

11 THE CHAIR: There is nothing wrong with paragraph 8 save
12 for its lack of detail and specificity. Anyway, show me
13 what you want to show me in Henderson. You say this is
14 specific when one gets to Henderson.

15 MR O'DONOGHUE: Yes, so it is Henderson in the second
16 volume, 1437.

17 THE CHAIR: Yes.

18 MR O'DONOGHUE: Sir, I will quickly rattle through it. At
19 2.1, you will see at the bottom of the page references
20 to comprehensive investigations. Over the page:

21 "The Defendants are presently aware of 10 customers
22 in the UK" --

23 THE CHAIR: Sorry, so I am on page?

24 MR O'DONOGHUE: 1438, 2.1, the bottom of the page.

25 THE CHAIR: 2.1, okay. "Presently aware of", yes, I am

1 with you. Sorry.

2 MR O'DONOGHUE: "... presently aware of 10 customers in the
3 UK (inaudible) terms."

4 THE CHAIR: Mm-hm.

5 MR O'DONOGHUE: Then -- now, one of the points made
6 parenthetically by VL is: you have changed your case on
7 this. That is not correct. We pleaded originally that
8 it was 10 and up to 10. That is then -- as you see,
9 there have been further investigations and the
10 up-to-date position, of course, with the statement of
11 truth, is that it is 10 --

12 THE CHAIR: Okay, but that is not relevant to this
13 paragraph 8, is it?

14 MR O'DONOGHUE: No, these are corrections that needed to be
15 made in light of what has been said.

16 Then, sir, as you see at 2.7, the expungement case
17 has, of course, been dropped.

18 THE CHAIR: Mm-hm.

19 MR O'DONOGHUE: (Inaudible) stage of disclosure has at least
20 avoided the pain of disclosure on that issue.

21 On my learned friend's approach, there would have been
22 disclosure on that for no reason, which is concerning.

23 Then, sir, at 2.19, we see the freedom of
24 information material. So we received, in light of the
25 first CMC staged disclosure order, just over 7,500

1 unique documents. Then at 2.23:

2 "438 authorities were asked if they had relinquished
3 licences. Only 25 answered yes."

4 THE CHAIR: Okay. I have read that. I have got that
5 point. I am still not sure how that helps me on
6 paragraph 8.

7 MR O'DONOGHUE: Then 2.25:

8 "84 authorities were asked about" --

9 THE CHAIR: I have read all this.

10 MR O'DONOGHUE: Only one said yes.

11 Then, sir, in terms of scoping out the disclosure
12 exercise, it is -- section 4 is the sale(?) terms.

13 You will see, sir:

14 "... In view of the size of the organisation
15 hundreds of thousands of contracts."

16 Then you will see, sir, the -- there is
17 an explanation of the role of the Deal Desk.

18 At 4.5, the Deal Desk is split out into UK and EEA,
19 and then you will see at (i) over the page there is
20 an explanation of how the Deal Desk and the business is
21 organised within the UK --

22 THE CHAIR: Mm-hm.

23 MR O'DONOGHUE: -- and, likewise for the EDQ.

24 Now, sir, the point of this is to show that we have
25 conscientiously, for the last several weeks and months,

1 been scoping out the disclosure on our side in terms of
2 custodians, databases and so on, and where the relevant
3 material information is likely to be located, and we
4 have set all this out here in some detail.

5 Then, sir, if we go forward to section (iv) on
6 page 1460 --

7 THE CHAIR: Yes.

8 MR O'DONOGHUE: -- there we have set out the modalities of
9 the disclosure we are proposing to do on our side.

10 So you will see, sir, 7.43 would be the CAR
11 custodians, from SA custodians.

12 THE CHAIR: Okay, so you have identified some
13 custodians.

14 MR O'DONOGHUE: We have identified what we say are the
15 relevant --

16 THE CHAIR: Yes, I understand that.

17 MR O'DONOGHUE: Then at 7.45 we have taken the keywords
18 based on the pleadings.

19 THE CHAIR: Right.

20 MR O'DONOGHUE: We have not had a response from VL on those
21 keywords.

22 THE CHAIR: Let us just for the moment park the
23 criticisms. I am just trying to understand how this is
24 going to work, not who is right and who is wrong.
25 I just do not understand this at the moment.

1 So you will provide disclosure of documents or data
2 responsive to the agreed search terms. Okay, so
3 a document has the word "relinquish" in it and it comes
4 up and of course it could be nothing to do with this
5 case at all, and then you consider: is that document in
6 respect of the -- I do not know, what happens next? So,
7 "we are going to relinquish our premises at number
8 4 Oxford Street". Okay, so that is obviously not
9 relevant to this dispute. So how do you then decide
10 whether it should be disclosed?

11 MR O'DONOGHUE: Sir, it is a composite point. So we have,
12 one, identified who we say are the appropriate
13 custodians, two, identified what we say are the
14 appropriate databases, which is very important --

15 THE CHAIR: Yes, I understand that.

16 MR O'DONOGHUE: -- and, three, mapping onto those the search
17 terms on their pleadings.

18 THE CHAIR: Right.

19 MR O'DONOGHUE: We say this is a traditional, if I can call
20 it that, approach to disclosure of this kind.

21 THE CHAIR: Because you then screen for the -- the way
22 we used to do it is you used to sit down and say, is
23 that relevant, is that not relevant, yes, no, yes, no.
24 The point of the modern disclosure system is it is meant
25 to narrow the scope of dispute about relevance because

1 you have had that relevance discussion at this stage.
2 You do not then just get presented with a bunch of
3 documents and not know which -- on what basis they have
4 been screened for relevance.

5 MR O'DONOGHUE: Well, sir, if we could go back to Henderson,
6 we say that is already hardwired into our proposal.

7 THE CHAIR: Well, except that Mr Schaefer does not have
8 sight of that, does he? If there has been no debate and
9 determination by this Tribunal of what classes of
10 documents are relevant. You show me how he has been --
11 how he can seek comfort from what Mr Henderson has said.

12 MR O'DONOGHUE: He has had our keywords for months, he has
13 had our custodian list for many weeks.

14 THE CHAIR: Yes, but the keywords can be all sorts of
15 things, could they not? You may well decide that
16 because there is a reference to relinquishing a property
17 on Oxford Street that that disclosure should not be
18 given. So the keywords are -- I am not in any way
19 criticising your keywords at this stage, but they are
20 not the bottleneck, necessarily, it is the screen for
21 relevance.

22 So you have got a person who is a custodian, has
23 a document with the word "relinquish" in it, and then
24 you need to decide whether or not to give disclosure.
25 On what basis is that decision going to be made?

1 MR O'DONOGHUE: Sir, if we look for example at 1457 you see
2 the table of custodians.

3 THE CHAIR: Yes.

4 MR O'DONOGHUE: Again, this has been a comprehensive
5 exercise.

6 THE CHAIR: I understand the custodians.

7 MR O'DONOGHUE: So we identify who we say are the relevant
8 people. They have had that for some weeks.

9 THE CHAIR: Yes. So on what basis are you -- I am not
10 sure, we may be at cross-purposes. I am not sure you
11 are answering my question: on what basis will relevance
12 be determined?

13 MR O'DONOGHUE: Well, we say we have the right people. I am
14 going to show you the databases point next.

15 THE CHAIR: I think we are going to come to further
16 argument on databases, but I have read the evidence.

17 MR O'DONOGHUE: Yes, and we say with the right people and
18 the right databases and the judicious use of keywords,
19 plus the (overspeaking) I accept that --

20 THE CHAIR: So what are the parameters for the sift?
21 Because, as I understand it, the basis of this document
22 is it says "on the basis on which the sift takes place".

23 MR O'DONOGHUE: Well, sir, in any case, including of course
24 with categories, it will have to be sifted, because
25 there is no magic in the category. Ultimately there

1 have to be modalities agreed.

2 THE CHAIR: I understand.

3 MR O'DONOGHUE: So there will always be a sift and my
4 submission is that (overspeaking) --

5 THE CHAIR: You say that there is no need to identify
6 categories in this case?

7 MR O'DONOGHUE: We say if one has, through a comprehensive
8 investigation, the correct custodians, the correct
9 databases and agreed keywords, then yes, that should
10 lead to an output that is essentially fungible or, in
11 our submission, better, than a category-based approach.

12 THE CHAIR: I understand.

13 MR O'DONOGHUE: Sir, on the databases, it is at 7.32 and --

14 THE CHAIR: We will come back to discuss the databases
15 as a further -- I understand -- I am going to assume in
16 your favour that these are the absolutely right
17 databases, carefully chosen, for the purposes of this
18 part of the application, and that the custodians are the
19 right custodians, for the purposes of this part of the
20 application.

21 MR O'DONOGHUE: Yes.

22 Now, as I said, my learned friends have had the
23 keywords for some time, we have explained our position
24 in detail on the custodians, there have been detailed
25 discussions on the databases. In truth their only

1 objection to this proposal is a form of paranoia: well,
2 we are not convinced, for some non-specific reason, that
3 these are necessarily the right people or the right
4 databases. So their engagement is on the question of
5 databases and custodians, although notably not keywords.

6 If I can just deal with those objections --

7 THE CHAIR: Yes, we are going to come on to discuss
8 custodians and databases in a moment. I am assuming in
9 your favour they are the right custodians and the right
10 databases.

11 MR O'DONOGHUE: Yes.

12 THE CHAIR: But as you will have appreciated from my
13 questions, what I am struggling with at the moment,
14 Mr O'Donoghue, is why there do not have to be categories
15 in this case when that is the way disclosure is done
16 these days.

17 MR O'DONOGHUE: So let me move on to triangulation because,
18 in my submission, maybe that is the key to unlocking
19 this.

20 THE CHAIR: Yes, okay.

21 MR O'DONOGHUE: So we say if one considers the proposal in
22 the joint disclosure schedules we have seen, we say it
23 is clear that they actually cover a lot -- our proposal
24 covers those categories in a very substantial way and
25 unlike --

1 THE CHAIR: Well, depending on how you do your sift. If
2 you have somebody who agrees with the schedule and does
3 the sift on that basis, and goes, yes, no, yes, no, in
4 accordance with the schedule there will be considerable
5 overlap, and if they do it really well there will be
6 100% overlap.

7 MR O'DONOGHUE: We say there will be substantial overlap.

8 THE CHAIR: Why should the categories of disclosure not
9 be ordered in the usual way?

10 MR O'DONOGHUE: Well, sir, the categories are essentially
11 abstract and amorphous and what we have done is to --
12 and this is over a period of weeks and months -- we have
13 interrogated the UK and EEA businesses, we have spoken
14 to the managers. You will see in Henderson -- I was not
15 going to take you, sir, through each and every point,
16 but just if we look, for example, at 4.6, so you will
17 see there is a reference to Mr Morgan --

18 THE CHAIR: Yes.

19 MR O'DONOGHUE: -- he is a senior person.

20 THE CHAIR: Yes.

21 MR O'DONOGHUE: 4.7, 100 (inaudible) through to customers.

22 4.8, not limited by start date.

23 Mr Morgan, at 4.9, he spoke to the Deal managers in
24 his team.

25 At 4.11 he went through documentation on the top

1 deals in the UK to look for these terms.

2 So there has been a very methodical and, we say,
3 rigorous process already whereby the critical -- and you
4 will see, sir, the output of 4.12, that is where the 10
5 comes from.

6 So we say the proof of the pudding in terms of the
7 integrity of the process we have put forward is shown
8 by -- it is very much capable of yielding the relevant
9 material and information for the purposes of this
10 alleged infringement.

11 Then likewise on the EU side, there was a similar
12 process. So you will see in 4.14, Ms Cason, she
13 interacted with her teams, you can see there were
14 searches for email documentation, and so on.

15 So we say that the exercise which has been engaged
16 in is superior to an abstract category approach put
17 forward in the absence of any link with custodians, any
18 link with databases.

19 THE CHAIR: But, as I understood, I may be
20 misunderstanding VL's position, but if we identify
21 categories today and then there will be further
22 discussion on custodians and search terms. So it is not
23 as if that is not part of the process; it is just
24 additional.

25 MR O'DONOGHUE: Well, perhaps, sir, but we are proposing

1 an order today that that exercise can start in earnest
2 rather than having to drift for the next several days
3 and weeks on discussions about discussions.

4 THE CHAIR: Okay.

5 MR O'DONOGHUE: Now, sir, in terms of triangulating, which
6 seems to me the key point, if we go back to 1579 of the
7 supplemental bundle handed up this morning.

8 THE CHAIR: Yes. Now this is the -- back to the
9 categories, yes.

10 MR O'DONOGHUE: Sir, the original table we were looking at
11 this morning. If we start at A, 2 --

12 THE CHAIR: Yes.

13 MR O'DONOGHUE: "documents and claims and activities in
14 relation to relevant software."

15 If one then drills down with these categories, they
16 will cover at least in part the question of supply and
17 demand for second hand licences.

18 Indeed, as you will see under C, in row 2, over the
19 page, VL says:

20 "The arguments advanced by Microsoft are said to be
21 relevant to the issue of how many POLs could have been
22 purchased and resold."

23 THE CHAIR: Sorry, where are you?

24 MR O'DONOGHUE: Sir, it is on page 4.

25 THE CHAIR: Yes. Right.

1 MR O'DONOGHUE: "The arguments advanced by Microsoft are
2 said to be relevant to the issue of how many POLs VL
3 could have purchased and resold but for the impugned
4 conduct."

5 That is a counterfactual question and so on. So
6 that is really about supply and demand which is covered
7 by our proposal.

8 Then, sir, in category B, customer incentives --

9 THE CHAIR: Sorry, I am just lost. Why are we looking
10 at this?

11 MR O'DONOGHUE: Sir, what I am doing now is showing the
12 Tribunal our proposal to make disclosure today
13 triangulates with the categories.

14 THE CHAIR: Right. I think I am confused on the three
15 points of the triangle. Right, you are saying your
16 disclosure will overlap with this?

17 MR O'DONOGHUE: That is the point, yes.

18 THE CHAIR: Well, obviously it does to a degree, of
19 course.

20 MR O'DONOGHUE: We say to a very substantial degree.

21 Just to quickly give you the point, sir. So B is on
22 customer incentives. Again, that is a question of
23 supply and demand: what are the incentives for customers
24 to purchase these licences, was there demand, was there
25 supply?

1 C -- C is not relevant at all.

2 Then D really is the core of the case, about the
3 alleged abuses. That maps perfectly, we say, onto our
4 proposal.

5 F is the quantum points, and again we say that is
6 primarily concerned with how many licences would they
7 have purchased in the counterfactual, which is a supply
8 and demand question.

9 So you will see on a couple of points, E and
10 A1, we have said that these categories are better
11 approached in the first instance through witness
12 evidence, followed by supplemental or specific
13 disclosure where appropriate.

14 So, for example, sir, if you look at A1, there
15 is a category:

16 "The periods for which product support was provided
17 by the Defendants."

18 One can see on a category basis, or frankly on any
19 disclosure basis, that it is potentially enormous. We
20 say on an issue like this, which in the end should not
21 be contentious, we say it is better to proceed in the
22 first instance through witness evidence. If that needs
23 to be then supplemented with specific disclosure that
24 seems to us a better way forward.

25 THE CHAIR: So just remind us, when did you put forward

1 categories of disclosure for evidence? Because I am
2 looking at a joint -- at some stage you put forward
3 categories.

4 MR O'DONOGHUE: Yes.

5 THE CHAIR: You are not saying it is the appropriate
6 order today, but at some point you engaged. When did
7 you engage in the categories?

8 MR O'DONOGHUE: Early September (overspeaking).

9 MR SCHAEFER: (Overspeaking) they put forward the categories
10 on the 1st and then they responded on the 25th.

11 THE CHAIR: So the first time you got categories were on
12 the 25th. Can I see where they are?

13 MR SCHAEFER: Sir, this would be in section E, which is the
14 joint disclosure schedules. So E/2 and E/3. If you
15 look at the index you will see they are dated on the
16 23rd and received on the 25th, that is Microsoft's
17 response to our initial draft.

18 THE CHAIR: Sorry, slow down. E?

19 MR SCHAEFER: Yes, maybe it is easier to just show you. If
20 you start at E/1, this is the original draft which we
21 provided on the 1st which we sent under cover of
22 a letter saying the idea is that we will agree
23 categories --

24 THE CHAIR: Were these just categories that you were
25 giving disclosure of?

1 MR SCHAEFER: No, this is a proposed joint schedule that was
2 intended to cover categories (inaudible) indeed subject
3 to disclosure orders --

4 THE CHAIR: So you advanced categories against yourself,
5 so to speak?

6 MR SCHAEFER: Yes. Well, sir, we advanced categories
7 against ourselves in our disclosure report in June,
8 I believe (overspeaking) along with things that we would
9 expect to see from Microsoft on the 1st. Then if you go
10 to 2 and 3, Microsoft responded on the 25th in two
11 documents, having divided ours up into market --

12 THE CHAIR: I recall that, yes. But did not add any
13 categories or amend any categories?

14 MR SCHAEFER: I believe they did add categories.

15 MR O'DONOGHUE: I do not want to delay the point being
16 taken but we were asked --

17 THE CHAIR: No, I am not on delay, I am just asking for
18 what happened.

19 MR O'DONOGHUE: We were asked for a response on the 22nd and
20 we provided one on the 23rd.

21 THE CHAIR: The 23rd? Of?

22 MR O'DONOGHUE: September.

23 THE CHAIR: What did the order require the parties to
24 do, my last order, or the order that was agreed?

25 MR O'DONOGHUE: We will get the reference. As you are

1 aware, sir, there have been at least two meetings with
2 the parties.

3 THE CHAIR: Yes, and you have discussed categories.

4 MR O'DONOGHUE: I am trying to take some of the heat out of
5 this. In my respectful submission, the parties have
6 been working hard on disclosure and cooperating and --

7 THE CHAIR: But what I am absolutely bamboozled by at
8 the moment is why you are saying there should not be
9 categories of documents. You have had categories going
10 between the parties and you have had meetings and you
11 have discussed categories of documents and you come
12 along today and say, "That is unnecessary", which is
13 a surprising submission, and I understand your reasons
14 for saying it, but I do not see anything in this case to
15 take it out of the ordinary where normally one would
16 identify categories for disclosure.

17 MR O'DONOGHUE: Well, sir, we do say it maps on to
18 substantial extension to the categories and to that
19 extent we are invited to --

20 THE CHAIR: No, you do not, but...

21 MR O'DONOGHUE: There is potentially asymmetry here between
22 the parties, because VL is, of course, a single company
23 and from their perspective one or more categories may
24 not be problematic in the sense that there would be
25 a limited number of places they have to look and

1 a limited number of people they have to ask.

2 Now, Microsoft is one of the largest undertakings
3 anywhere in the world, across multiple different
4 territories. The difficulty we have is that if one
5 disaggregates the process away from the pleaded issues,
6 and into individual categories, they do not map neatly
7 within the undertaking onto an easily identifiable set
8 of individuals.

9 So it may be that from that perspective the parties
10 simply have different starting points, and our concern
11 is that the categories, in a sense, end up dramatically
12 increasing the workload in circumstances where we have
13 done a comprehensive exercise to identify the relevant
14 people, databases, and so on.

15 That is why we suggested, at least in this
16 particular case, that is the way forward. So it was not
17 sort of an intent to sidestep the categories; it is that
18 the atomisation of the categories, we have more than 60,
19 the atomisation of the categories from my clients'
20 perspective causes substantially more problems than it
21 solves, and the proposal we put forward --

22 THE CHAIR: Right, okay.

23 MR O'DONOGHUE: The proposal we put forward is not a trivial
24 one, it is half a million pounds, 70,000 documents,
25 almost two dozen custodians. So we are not shirking

1 anything. It is a serious, good faith and, we say,
2 entirely proper proposal intended to grapple with the
3 issue that the categories from our perspective will
4 cause significant issues.

5 We say, in effect, sir, that the categories give
6 rise to a substantial risk of either a wild goose chase,
7 or enormous effort to find things within a large
8 undertaking that is simply not worth the candle. In
9 circumstances where you have before you, on the core
10 allegations, a very, very comprehensive proposal to get
11 to the heart of this, we say that is something the
12 Tribunal should be giving, with respect, serious
13 consideration to, not as an alternative to the
14 categories, but as a better modality or means to achieve
15 the objective that I think is common ground.

16 Now, sir, in the order, it is at 351 of the first
17 bundle.

18 THE CHAIR: Oh yes, sorry. 351.

19 MR O'DONOGHUE: It is paragraphs 7-10.

20 So we say we complied with 7, 8 and 9 -- and 10, at
21 least from our side, was the application we make today.

22 THE CHAIR: Does your disclosure report comply with
23 60(1)(b)?

24 MR O'DONOGHUE: Yes, it does.

25 THE CHAIR: Right. So you have described what documents

1 exist or may exist. Your disclosure report, just remind
2 me where that is?

3 MR O'DONOGHUE: It starts at 470 -- sorry, it starts at 455.

4 So one of the points Mr Schaefer made --

5 THE CHAIR: Sorry, I am just catching up.

6 "The documents which exist or may exist relevant to
7 the matters in issue in the case."

8 Where have you identified those, sorry? Just
9 catching up.

10 MR O'DONOGHUE: Sir, we have set out in section 4 and 5 the
11 databases --

12 THE CHAIR: Which page?

13 MR O'DONOGHUE: It is 486.

14 THE CHAIR: 486, I am on the wrong tab.

15 MR O'DONOGHUE: Then we say in 2:

16 "Should further investigations indicate additional
17 databases, updates will be provided..."

18 THE CHAIR: It is identifying the databases, is it not,
19 not what documents may exist?

20 MR O'DONOGHUE: So that is market. Then at 479 is the
21 schedule to our disclosure report.

22 THE CHAIR: Yes, that is what I was looking at before,
23 yes.

24 MR O'DONOGHUE: Now, one of the points Mr Schaefer made --

25 THE CHAIR: No, no, just show me where you have

1 identified the documents that exist or may exist that
2 are relevant to the matters in issue?

3 MR O'DONOGHUE: So it starts in 455. You see the databases,
4 keywords --

5 THE CHAIR: Just under the documents it describes
6 briefly what documents exist or may exist.

7 MR O'DONOGHUE: Where are you reading from, sir?

8 THE CHAIR: The rules. So you say you have complied
9 with 60(1)(b). It says:

10 "A disclosure report which describes briefly what
11 documents exist."

12 It is normally that which gives -- "or may be
13 relevant to the matters in issue" and it is normally
14 that which gives rise to the report. Can I just ...

15 MR O'DONOGHUE: It is really the schedule --

16 THE CHAIR: Right. Okay.

17 MR O'DONOGHUE: -- which is signed with the statement of
18 truth.

19 THE CHAIR: Yes, do you want to show me which... sorry,
20 I feel we are just turning pages. Do you want to show
21 me which page and which paragraph of the schedule?

22 MR O'DONOGHUE: Yes.

23 THE CHAIR: I assume it is 1-6?

24 MR O'DONOGHUE: Sir, yes.

25 THE CHAIR: Okay, so it is done at an extraordinarily,

1 an unusually high level, I think it is fair to say.

2 MR O'DONOGHUE: Well, sir, in our submission it certainly
3 matches or exceeds what VL has done.

4 THE CHAIR: All right, thank you.

5 Did you have any other submissions on the area we
6 are on? We will come back and discuss databases,
7 and custodians. But on the order for disclosure,
8 Mr Schaefer has done it by reference to the categories
9 of documents. Your approach is that it should be --
10 what should be ordered is in accordance with your
11 paragraphs 7 and 8?

12 MR O'DONOGHUE: Sir, on our side we have identified the
13 (inaudible) and databases and so on. So we say that is
14 a fully formed proposal which can be ordered and
15 activated today.

16 Now, if that needs to be supplemented in some way by
17 some refinement, so be it. As I say, on things like
18 keywords we have had no engagement at all --

19 THE CHAIR: You have said that several times.

20 MR O'DONOGHUE: -- which is problematic.

21 THE CHAIR: Is there anything else?

22 MR O'DONOGHUE: Sir, I will come back on databases and
23 custodians at a later stage.

24 THE CHAIR: Sure.

25 Mr Schaefer, anything?

1 MR SCHAEFER: Sir, yes. Just stepping back, the issues
2 raised by my learned friend's submissions go to a number
3 of the issues before the Tribunal in the agreed list,
4 and just to remind you what those are, they are numbers
5 4, 5 and 6.

6 THE CHAIR: Sorry, on the agreed list?

7 MR SCHAEFER: On the agreed list of issues, which the
8 Tribunal has somewhere at the back of...

9 THE CHAIR: I have got that, yes. Oh, sorry, the list
10 of issues... the list of issues, sorry, we had trouble
11 finding it before, did we not?

12 MR SCHAEFER: It is at page 1587 of the bundle.

13 So, you will see number 3 is about the joint
14 disclosure schedules which we have already discussed at
15 some length. Number 4 is about information provided
16 from Microsoft that VL seeks. 5 and 6 are the
17 disclosure provisions that my learned friend just
18 advocated for.

19 The reason that these all fit together is that there
20 are two radically different approaches being urged on
21 you today. What VL is suggesting is that the parties
22 should seek to do what they always should have done and
23 start by identifying categories of disclosure and
24 properly explaining -- and you know there is a dispute
25 about this -- properly explaining what sources of

1 documents they even have, and that those are then the
2 inputs to proper discussions of appropriate orders for
3 each of the categories.

4 The reason we have four in our list is that there
5 are, in our submission -- well, sorry, the reason that
6 we have three in our list is the one you have seen. But
7 the categories actually identified by Microsoft were, as
8 you put it, at an extremely high level. Certainly
9 nothing like I am used to seeing in litigation, even at
10 a much smaller scale.

11 The reason we have four in our list is that we have
12 been asking Microsoft since July to answer a number of
13 questions about its custodians and its databases, some
14 of which a partial answer was finally provided in
15 Henderson 3 and is not adequate. Our submission is we
16 need to understand more about what repositories
17 Microsoft has before agreeing searches, and in that
18 respect you will note that my learned friend's proposed
19 orders are to apply agreed searches. There are no
20 agreed searches because we have been asking for
21 information that would allow us to discuss that for
22 months.

23 So, in our submission, this is entirely premature.
24 I can speculate as to why Microsoft is trying to do
25 this, but our concern is to identify the categories,

1 understand what information Microsoft has, and then
2 formulate proper orders so that both sides can be
3 confident it will produce the disclosure required. It is
4 unusual for a company to be seeking specific disclosure
5 orders against itself. We ask you not to do that
6 because at this stage we are not remotely ready, in our
7 submission.

8 I can address you on 4, 5 and 6 in more detail, in
9 whatever order you like, but that is the high level
10 point.

11 THE CHAIR: Right. Okay, well, look, I am going to
12 order -- I do not accept it is appropriate that
13 disclosure should go forward without identifying the
14 categories of documents, and we have been through the
15 disclosure, the categories in your document identifying
16 what is in issue. We have been through the categories
17 identified by the Claimant, and those categories,
18 subject to the qualifications that are already made, can
19 proceed. I think there are some dates which we will
20 come back to, but the next stage, you say, is to refine
21 any dispute between the parties as to the search terms
22 and the custodians and the databases. So, I will make
23 that order today with respect to your categories of
24 documents. I will also make the order with respect to
25 categories of documents that are agreed that you have

1 offered to provide Microsoft.

2 With regards to disputed categories, well, I have
3 just not heard any submissions as to the disputed
4 categories, which is not ideal, so I am not quite sure
5 what to do about that. We will hear further argument on
6 that. But certainly, the categories that are agreed can
7 proceed.

8 Then we will need to agree some dates, and if we can
9 have a look at the order, the order that you are seeking
10 on that.

11 MR SCHAEFER: Sir, yes. So, the first relevant paragraph is
12 4, which is really the paragraph of the order that
13 infringes the joint disclosure schedule, and that will
14 have to be amended, I think, in two ways: one, to
15 reflect the limits to which you have approved the joint
16 disclosure schedule; secondly, for a number of
17 categories you had ordered that the experts discuss
18 those, and we probably need a date for that.

19 THE CHAIR: All right, we can come back to that.

20 MR SCHAEFER: Then the remaining paragraphs relevant to this
21 paragraph are 10 through 13.

22 THE CHAIR: So paragraph 4:

23 "The parties are to conduct disclosure searches in
24 accordance with the agreed or ordered searches pursuant
25 to paragraph 5 below ...

1 "The Defendants will by 4pm ... provide the
2 following information to the Claimant:-

3 "A list of the databases ..."

4 We are going to discuss that. We are going to
5 discuss, I think, (b), we have not discussed that yet,
6 have we? Also (c), and (d), organisational charts.

7 So what about EDQs, where is that dealt with?

8 MR SCHAEFER: Sir, a number of those have already been
9 provided.

10 THE CHAIR: I know, but they have not in this case, or
11 they are still the subject of further -- I mean,
12 disclosure searches cannot be carried out until all that
13 has been agreed.

14 MR SCHAEFER: Sir, yes. So, we are seeking certain specific
15 additional information on some of the information in
16 Microsoft's EDQs, but the process that we are proposing
17 is not that Microsoft reserves any EDQs; it is rather
18 that we, having established the joint disclosure
19 schedule, we take the steps in paragraphs 10 through 13.

20 THE CHAIR: Yes.

21 Right, so before we settle on those dates, do we
22 need to debate your argument on the residue of
23 paragraph 5?

24 MR SCHAEFER: Sir, yes, that is probably the next item on
25 the agenda.

1 THE CHAIR: Okay, so let us -- and as I understand your
2 point on this is that you have been informed about two
3 databases but you do not have enough information in
4 relation thereto and you want an explanation from them?

5 MR SCHAEFER: Sir, yes, and I am happy to do it --

6 THE CHAIR: Mr O'Donoghue, why is there any objection as
7 to having an explanation as to what databases you have?

8 MR O'DONOGHUE: Sir, we say we have on more than one
9 occasion given the explanation, and we have also said
10 this is ongoing and if we find other databases we will
11 update the position. They do not seem to want to take
12 yes for an answer.

13 THE CHAIR: But you have identified the databases that
14 you are including but not the ones that you possess?

15 MR O'DONOGHUE: We have identified the three databases that
16 we say hold relevant material and documents, at least
17 potentially, and we have said our work is ongoing. If
18 we identify others, we will update the Claimant and the
19 Tribunal immediately, so we do not understand the
20 difficulty.

21 THE CHAIR: The explanation you are after, Mr Schaefer,
22 is where?

23 MR SCHAEFER: Sir, yes, perhaps I can expand on my
24 submissions in a minute. So, you have seen that the
25 original EDQ identifies two databases and a third one

1 emerged.

2 THE CHAIR: A third one emerged later?

3 MR SCHAEFER: A third one emerged. So, our first submission
4 is that it is inherently unlikely that that is all that
5 Microsoft has, given the nature of its business.

6 But, secondly those databases were referred to in
7 the context of a disclosure report that, as you have
8 seen, failed also to grapple with the extent of the
9 categories in the case.

10 Thirdly, as we have set out in our skeleton --

11 THE CHAIR: Sorry, I do not mean to interrupt -- well,
12 I do, but sorry for interrupting. But 5(a),
13 Mr O'Donoghue would say: look, we have complied with
14 that, we have told you about the relevant databases, if
15 we understand.

16 MR SCHAEFER: He did, and I can give you some reasons as to
17 why we do not accept that.

18 THE CHAIR: You may not accept that but -- the
19 questions, are they relevant to this issue in your
20 letter?

21 MR SCHAEFER: Yes, they are also --

22 THE CHAIR: Shall we have a look at those?

23 MR SCHAEFER: Yes, perhaps I could start by showing you our
24 letter of 7 July --

25 THE CHAIR: Yes.

1 MR SCHAEFER: -- which is our response to the original

2 EDQ --

3 THE CHAIR: Oh sorry, it is 1.05. Time flies!

4 I will see you back -- shall we adjourn now and I
5 will see you back at 2 o'clock.

6 (1.06 pm)

7 (The short adjournment)

8 (2.01 pm)

9 THE CHAIR: We were just going to go to the letter of
10 7 July; is that right?

11 MR SCHAEFER: Sir, yes, and that is at F/137, page 1045.

12 THE CHAIR: Sorry?

13 MR SCHAEFER: Tab 137, page 1045.

14 THE CHAIR: I have got it, yes.

15 MR SCHAEFER: This was the letter that, as you can see, was
16 written in response to Microsoft's original disclosure
17 reports of EDQs.

18 It is quite long, I am not going to ask you to look
19 at the whole thing, but if you turn to page 1035, you
20 will see at B7-9 the categories we know already today.

21 Then at paragraphs 12-16 on page 1036 we deal with
22 the databases. If you could perhaps cast your eye over
23 that. We note at 12 they have only identified two
24 databases.

25 In 13, we then say that is surprising and we had

1 expected to see various others, including there is
2 an explanation of why a CRM (customer relationship
3 manager), database -- we explain in some detail why we
4 would expect that to hold some relevant documents
5 in 14.

6 Then in 16 we therefore ask for a full list of --
7 well, we say schematic -- of databases and systems which
8 could potentially hold documents and other relevant
9 information. So this is still just the kind of thing
10 that is meant to be provided in the EDQs.

11 THE CHAIR: Right, okay. Yes.

12 MR SCHAEFER: Then if you could turn to 17, we then address
13 the two databases that they have identified, and you
14 will see -- in particular 17(a) notes that:

15 "Microsoft states that the 'E-Agreements'..."

16 Which is a contracts database, has limited search
17 functionality.

18 THE CHAIR: Yes.

19 MR SCHAEFER: Then in 18 we ask a series of questions,
20 including at 18(b):

21 "Given the apparently limited search functionality
22 of the E-Agreements... what consideration has
23 [Microsoft] given... to... sample-based disclosure...
24 instead."

25 Then at D, the approach to custodians, we note

1 that Microsoft has identified about a third as many
2 custodians as ValueLicensing.

3 You will see at 24 there is a request for the
4 organisation charts that Microsoft refers to and they
5 say they have identified the custodians. That was
6 7 July.

7 Until recently none of those requests have been
8 properly answered, but we did get in Henderson 3
9 an explanation of -- which I think I did not show you
10 this bit, but an explanation of the investigations that
11 Microsoft had carried out. So, of the four orders that
12 we are seeking in paragraph 5 of the draft order --

13 THE CHAIR: You do not need (c)?

14 MR SCHAEFER: (c) falls away.

15 THE CHAIR: Okay.

16 MR SCHAEFER: So, if I could deal with the databases first,
17 and you will see again it is a request for:

18 "A list of databases in use by it at the relevant
19 period which contains or are likely to contain data or
20 documents falling within the categories."

21 I have already -- in the joint disclosure schedule --
22 suggested that it is inherently unlikely
23 that there are only two and made the point that the EDQ
24 was not given by reference to the joint disclosure
25 schedule or anything like it, but by reference to a very

1 small number of categories.

2 The third point is that, as I have just shown you,
3 we have identified particular databases we would expect
4 to see, including a CRM. Now, in fact, ValueLicensing's
5 own disclosure reports and EDQ has identified its own
6 CRM as an important source of disclosure. That CRM
7 happens to be a Microsoft product.

8 Microsoft is not saying that it does not have a CRM
9 system and it is not saying that its CRM does not
10 contain relevant documents or data. Its eventual answer
11 to this point appeared in a letter roughly three months
12 after this event, which you can find at F page 1366, and
13 the relevant section, sir, is section 162.

14 Paragraph 2.2:

15 "We have already advised you of the list of
16 databases in use by the Defendants during the period
17 which contain or are likely to contain [and then there
18 is a new underlined word] non-duplicative documents or
19 data falling within the categories".

20 Sorry:

21 "... identified in the joint disclosure schedule."

22 That second part - I do not understand because
23 obviously, these lists were not made by reference to the
24 joint disclosure schedule.

25 Then you will see at 2.4 they have actually found

1 another database. Then 2.5:

2 "Defendants are offering considerable
3 custodian-based disclosure in addition to the
4 repositories outlined above. We therefore do not
5 consider that it is proportionate to provide disclosure
6 of the Defendants' CRM as it would simply be duplicative
7 of the custodian-based and database disclosure, putting
8 the parties to unnecessary cost."

9 So, their argument is: yes, we have a CRM and yes it
10 includes relevant documents and data, but it would be
11 duplicative to disclose from that. That point is then
12 picked up in my learned friend's skeleton at 36(a).

13 THE CHAIR: But you are not asking for an order in that
14 respect? So, you are asking just for a response to the
15 questions at paragraph 18?

16 MR SCHAEFER: 18 -- sorry, sir, and this is also going to
17 the request for a list of databases. The point being
18 that the original list of databases --

19 THE CHAIR: Yes, although -- yes, that may have been
20 complied with or may not, depending on what response you
21 get. You say the CRM -- the fact its duplicative, it
22 should be included in --

23 MR SCHAEFER: If I could show you one more example. Of
24 course the problem is the fact that ValueLicensing is in
25 the dark here and we are reliant on Microsoft to do this

1 properly.

2 If I can show you one more document in the
3 databases, and this is at F/1131.

4 So, this is a policy that was disclosed by Microsoft
5 in August, and you will see that it is called "Custom
6 and side agreements". You will see:

7 "... purpose is to ensure that Microsoft negotiates
8 and finalises contracts that accurately reflect the
9 totality of the agreement and are properly documented."

10 If you then turn over the page, you will see at the
11 bottom of the next page there is something saying
12 "Customer agreements procedure".

13 Over the next page, paragraph 2:

14 "For customised terms associated with a commercial
15 licensing, Cloud services... or consulting...
16 transactions, you must work with your commercial
17 licensing or Contract and Commercial Management Deal
18 Desk representative to ensure that all binding terms in
19 the agreement... are memorialised in an amendment to
20 a commercial licensing agreement and approved in MOPET
21 or a services agreement..."

22 We are not talking about services.

23 If you turn over the page to 1134, there is then a
24 table breaking down these rules. The second line,
25 "Commercial licensing" --

1 THE CHAIR: Hang on, I am not with you. All right, the
2 second part, yes.

3 MR SCHAEFER: It says:

4 "All templatised or customised Agreements including
5 commercial licensing and/or cloud services commitments
6 must follow the commercial licensing contract
7 customisation and need to be approved and stored in
8 MOPET."

9 We have no idea what MOPET is but according to this
10 document it is a system for approving and storing custom
11 licensing terms. Microsoft has never mentioned this in
12 the context of the disclosure it is proposing to give in
13 respect of custom licensing terms.

14 So that is another reason why I suggest we are not
15 simply being paranoid; we are being rational.

16 THE CHAIR: This is an attachment to the letter of
17 30 August, is it?

18 MR SCHAEFER: Yes.

19 THE CHAIR: Right.

20 MR SCHAEFER: We are not being paranoid, as my learned
21 friend suggests, ValueLicensing is being rational and
22 sceptical in its response to the original EDQ.

23 So that is on the list, sir. Then the questions on
24 paragraph 18, which we have looked at -- sorry, it is my
25 fault, I am jumping around. That is at page 1037. So

1 subparagraph (a) asks for a proper explanation of the
2 contents of the two databases that Microsoft originally
3 identified, and apart from anything else that is
4 a necessary step for us being able to engage with the
5 argument that these other databases were duplicative.
6 Until we are told what is in these various databases we
7 are simply relying on Microsoft for that. That has never
8 been verified. The only thing we are told in
9 Henderson 3 is you can only search the agreements by
10 customer number and not by anything else.

11 Subparagraph (b) then, as I say, asks about the
12 search functionality, which we have had a response to.
13 So, Henderson 3 now says not only that keyword searches
14 are not possible, but seems to be suggesting -- and
15 I can show you this if necessary -- that it might not be
16 proportionate for Microsoft to disclose copies of
17 contracts at all on the basis that it can take nearly
18 6 hours to pull a customer's contract from its
19 databases.

20 Obviously, this has come very late, and this is not
21 an issue for you today, but this is one of the world's
22 leading tech companies and the notion that suddenly when
23 it comes to finding copies of their contracts we are
24 back in punch cards in 1965 is very hard to understand.

25 In any event, that is why we are asking these

1 questions and why we are specifically asking: well, if
2 you cannot search these things, what about sample-based
3 disclosure? They have never responded to that.

4 Subparagraph (c) then asks various questions about
5 the Microsoft sales database, the other one they
6 identified, including whether it is the only source of
7 the Microsoft licensing statements that ValueLicensing
8 is used to seeing. So again, we are trying to understand
9 where the data we have seen in the past comes from,
10 where Microsoft is storing it. Again, this has never
11 been answered.

12 So, I respectfully invite the Tribunal to order
13 Microsoft to provide the list of databases we have asked
14 for and answers to these questions.

15 THE CHAIR: Mm-hm. Okay.

16 MR O'DONOGHUE: Very briefly, so if we go to Henderson at
17 1458, please.

18 THE CHAIR: Sorry, just remind me, where is this?

19 MR O'DONOGHUE: Second bundle, 1458.

20 THE CHAIR: Yes. Okay.

21 MR O'DONOGHUE: This is at 7.32. I would suggest it is not
22 surprising there are a vast number of databases and
23 repositories materials at Microsoft, so the suggestion,
24 for example, that each and every database should be
25 listed really is for the birds.

1 Now, we then say certain issues --

2 THE CHAIR: But 5(a), "which contains or are likely to
3 contain", so you do not have to list all databases.

4 MR O'DONOGHUE: Indeed. Well, we say we have, so 7.33 of
Henderson 3

5 has a statement of truth as a starting point.

6 7.34 - there has been a substantial exercise, and we
7 have seen it set out in Henderson, in the interim
8 identifying the databases.

9 We say at 7.34, well, it is ongoing, and if and when
10 we have further information, further databases, we will
11 let you know.

12 Then you see, sir, the databases which have been
13 identified, and they are described over the page at 7.38
14 in quite some considerable detail and they are what they
15 are.

16 We have the EDQ and Henderson both signing
17 statements of truth, saying: here are the databases we
18 have found with relevant and material information.

19 THE CHAIR: But it is not completely over, it is still
20 ongoing.

21 MR O'DONOGHUE: It is still ongoing, and we have said
22 conscientiously if there are other databases we come
23 across we will let you know. So again, we do not
24 understand the basis of this order. We have been
25 proactive --

1 THE CHAIR: But there has been no objection to the order
2 at 5(a). Your answer is you are going to do this
3 anyway. It is just a question of whether it goes into
4 an order or not?

5 MR O'DONOGHUE: The answer is: Henderson's statement of
6 truth tells you the up-to-date position; insofar as we
7 find something else, we will tell you.

8 Then, sir, on the CRM, perhaps we are at
9 cross-purposes. You see at 7.42 -- we are offering
10 custodian-based disclosure in addition to the databases.
11 So, this is essentially the emails of the custodians.
12 They will be searched. Now, the search terms of
13 custodians are to be confirmed, but in principle we are
14 willing to interrogate the custodians' emails insofar as
15 they contain relevant material documentation. That is
16 in addition to the databases, and that is my response to
17 the CRM point. That is something we are doing over and
18 above, as you would expect, the databases themselves.

19 So, we say, plain and simple, we have answered every
20 question we have been asked. We have told them we will
21 update them if we have new information or different
22 information. On that basis, nothing should be ordered
23 today.

24 THE CHAIR: Where are we on MOPET, since it has been
25 raised?

1 MR O'DONOGHUE: Sir, this is the first time we have heard
2 about this.

3 THE CHAIR: Well, it is not. It is your document, is it
4 not? You sent it to them.

5 MR O'DONOGHUE: There has been no follow-up from VL until
6 today.

7 THE CHAIR: It is not the first you have heard of it.
8 You provided the document and on the face of it, it seems to
9 have another database. Are you able to take
10 instructions as to whether that is a database or not?

11 (Pause)

12 MR O'DONOGHUE: Yes, so what I am told on instructions, and
13 this was not raised until five minutes ago --

14 THE CHAIR: I understand that, yes.

15 MR O'DONOGHUE: -- that the contractual documentation is set
16 up on the databases we indicate in its final form, and
17 I think they indeed are entitled to be set out there.

18 THE CHAIR: Mm-hm.

19 MR O'DONOGHUE: So, you will understand the difficulty from
20 my part, if we are playing whack-a-mole with databases
21 we will be here for a long time indeed. That is our
22 concern.

23 There has been an enormous exercise --

24 THE CHAIR: Sorry, I am not following, I thought you
25 said you had already done this.

1 MR O'DONOGHUE: Yes.

2 THE CHAIR: So why is it going to take a long time?

3 MR O'DONOGHUE: We have identified every database we say is
4 relevant, that work is ongoing, and that is the terminus
5 we have reached.

6 THE CHAIR: Right. Well, what about the questions on
7 the letter, then, the letter of 7 July?

8 MR O'DONOGHUE: Well, sir, my answer is the same: we have
9 effectively answered each and every one of those
10 questions. There is nothing material outstanding.

11 THE CHAIR: Right, thank you. I am going to make those
12 orders. I am not in any way suggesting Microsoft has
13 not, as Mr O'Donoghue submits, been conscientiously
14 addressing its mind to these things and has given an
15 up-to-date position in the witness statement, but
16 enquiries are still ongoing, and I think the better
17 course is to make the orders in 5(a) and 5(b) so that
18 the parties know where they are.

19 That leaves 5(c) which is no longer required. 5(d)?

20 MR SCHAEFER: Sir, yes, organisation charts.

21 THE CHAIR: Shall I just hear from Mr O'Donoghue on
22 that. Is there any objection to an organisational
23 chart?

24 MR O'DONOGHUE: There is in the sense that one historically
25 does not exist.

1 THE CHAIR: You have to make it up?

2 MR O'DONOGHUE: Re-creation, yes, and we would suggest the
3 way forward is clear, which is on the custodians we have
4 proposed and/or any other custodians ValueLicensing
5 suggest we should add that, that is the way in which we
6 suggest there is engagement. We have suggested a list
7 of 23 custodians, given their job titles and start
8 dates. We have given a comprehensive set of information
9 on these custodians, I have shown you the sections in
10 Henderson dealing with the UK and EU parts of the
11 business and how these other custodians were arrived at.
12 We say there has been a very comprehensive exercise in
13 terms of scoping this out, and on that basis the
14 custodians who have been put forward, we say, are the
15 relevant and material people.

16 Now if, having looked at those custodians and looked
17 at their job titles, VL says: well, we think some other
18 custodians are relevant or if on discussion with their
19 experts there is an expansion of the categories or they
20 think something is missing, so be it. We suggest the
21 answer to this question is not the creation of new
22 documentation by way of organograms, that the effort and
23 focus should be on identifying the relevant custodians
24 rather than creating an organogram for its own sake.

25 Of course, sir, we are extending back some time, and

1 there may well be difficulties for my client in terms of
2 complying at this stage in relation to an organogram
3 some years back in time. That is not a straightforward
4 matter if it needs to be created de novo.

5 THE CHAIR: Well, I am going to order that to be
6 provided. I appreciate that this does concern issues
7 a long time ago and there may be gaps, but nevertheless
8 they should be ordered to provide what is available, and
9 that means provide the information that is available,
10 and I appreciate it is going to need to create a new
11 chart in order to do that.

12 Where do we go next?

13 MR SCHAEFER: Sir, I think that leaves us with split trial.

14 MR O'DONOGHUE: Sir, there are the categories we seek,
15 I think --

16 THE CHAIR: You did have an opportunity to address me on
17 categories several times and declined to do so. It
18 would be churlish to say you are not entitled to any
19 disclosure at all, of course, but in the light of
20 that --

21 MR O'DONOGHUE: Well, not (inaudible) agreed in a sense.

22 THE CHAIR: But yes.

23 MR O'DONOGHUE: Forgive me for taking this slightly out of
24 sync, it is actually quite a short point.

25 THE CHAIR: Okay. So, do I want the... yes, I think this

1 is the latest one.

2 MR O'DONOGHUE: So, if I can start at 45 and 47.

3 THE CHAIR: Yes.

4 MR O'DONOGHUE: These are on quantum and damages and
5 methodology. You will see 45, 46 and 47. The only
6 response to this category as I understand it is: well,
7 it may be privileged. My response to that is: we do not
8 seek privileged information; insofar as there is
9 non-privileged information going to methodology, we do
10 seek that.

11 THE CHAIR: So how could there be non-privileged
12 material in this category?

13 MR O'DONOGHUE: Well, certainly it entirely depends --

14 THE CHAIR: Give me an example.

15 MR O'DONOGHUE: If, for example, prior to engaging experts,
16 and prior to embarking on this litigation, VL had
17 internally considered the impact of these alleged
18 conducts on its business, and internally scoped out
19 a working methodology for the adverse impact on the
20 business then we plainly would be entitled to that, even
21 if at a later stage --

22 THE CHAIR: But that would not fall within the category,
23 would it? The first one, it has to be methodology used
24 for the damages that Claimant has alleged. That, then,
25 would be a document detailing the damage to the company

1 in some other context, not the damages -- not the
2 methodology used in this litigation.

3 MR O'DONOGHUE: Again, if there is anterior documentation,
4 that is one thing. If there is damage for the purpose
5 of litigation, that may well be privileged, I accept
6 that. So, it is essentially a tentpole question: were
7 there pre-existing documents within the company that are
8 not privileged that are relevant to the question of
9 quantum?

10 Indeed, sir, you can see at 46 and 47, that given
11 that they identified two potential restrictions of
12 competition, it would be surprising, in my submission,
13 if contemporaneously, prior to the litigation having
14 been commenced, they had not identified in any shape or
15 form even the potential impact of these alleged
16 restrictions.

17 So, we say VL's objection answers itself: if it is
18 privileged, fine; if it is not privileged we are
19 entitled to it.

20 MR SCHAEFER: Sir, I am struggling to understand why any
21 non-privileged pre-litigation documents would not be
22 captured by 43.

23 THE CHAIR: Mr O'Donoghue, would they not get picked up
24 in 43?

25 MR O'DONOGHUE: Then you get a no objection to it.

1 THE CHAIR: Is there anything else you want to say on
2 that? I mean it may be there is a gap between the...

3 MR O'DONOGHUE: There is one obvious gap in 46 and 47 which
4 is a splitting out of the losses, that is something much
5 more specific than in 45 to 47.

6 THE CHAIR: Right. With some hesitation I am going to
7 order 45 through to 47, although I do think there is
8 some force in VL's submission that these may get --
9 insofar as they are non-privileged they may get picked
10 up by 43 anyway, but out of an abundance of caution
11 I will order 45-47.

12 MR O'DONOGHUE: Sir, I am grateful. Sir, quickly, 49 is
13 essentially the equivalent of what we have just seen.
14 You will see the deletions at the end. So, we say it
15 follows the parity, we say.

16 Then, sir, on 50 and 51 we are content with the
17 Claimant's proposals.

18 THE CHAIR: Sorry, just looking at 49 --

19 MR O'DONOGHUE: The bit at the end. 45-47 (inaudible) by
20 parity of reasoning (inaudible) so should 49.

21 MR SCHAEFER: That is slightly circular, but I am struggling
22 to understand what 49 with the deletion contains that 49
23 without the deletion would not contain, save for
24 something to do with our damages -- our formulation of
25 damages for the litigation.

1 49 is not limited, and then the bit at the end says
2 "and the equivalent", but the equivalent is already in
3 the first bit, is it not?

4 THE CHAIR: It may be there is nothing in it but I will
5 make the order sought by Microsoft in 49. Again,
6 I accept that there may be a theoretical rather than
7 a real difference.

8 MR O'DONOGHUE: I am grateful, sir.

9 Then, sir, a couple of final points very quickly.
10 On the market definition and dominance schedule which is
11 separate.

12 THE CHAIR: Which we will come back to after we have
13 done --

14 MR O'DONOGHUE: Let me just lay down...

15 THE CHAIR: Yes.

16 MR O'DONOGHUE: In our submission, the new material which is
17 in blue --

18 THE CHAIR: Hold on, give me a second, sorry.

19 Okay, so what did you want to go to?

20 MR O'DONOGHUE: So, for example, sir, the blue text, for
21 example on page 4, that is all new. We received that
22 for the first time on 3 October. Now, it is said that
23 it reflects, at least in part, input from expert
24 economists. We have not had the opportunity to engage
25 with that with our expert economists, and we say in any

1 event it would be quite wrong, at least in relation to
2 this category, for us to be bounced into dealing with
3 the disclosure on that today.

4 THE CHAIR: I understand that is an omission, I will
5 come back to it. Obviously if the matter gets split off
6 it becomes less important.

7 MR O'DONOGHUE: Sir, finally on our requests in issues 2-4
8 of our schedule.

9 THE CHAIR: Oh, the first schedule?

10 MR O'DONOGHUE: 2-6.

11 You will see, sir, on page 5, VL has asked whether
12 we would reformulate some of the requests, and we are
13 content to do so. We will come back with (inaudible).

14 THE CHAIR: All right, fine.

15 So, are we on...

16 MR O'DONOGHUE: Split trial.

17 THE CHAIR: Split trial.

18 MR O'DONOGHUE: I am conscious that this is not our first
19 rodeo on split trial, and it has been set out in some
20 detail in writing and in evidence so I will keep the
21 point short (inaudible) and instinctively (inaudible)
22 like to do.

23 I am obviously acutely conscious, sir, that last
24 time around you did not order a split trial and
25 therefore, what I wanted to do --

1 THE CHAIR: Remind me, where is my judgment? I did look
2 at it. Do you remember where it is in the bundles?

3 MR O'DONOGHUE: I will cut to the quick and tell you
4 straightaway what we say has changed that makes
5 a difference.

6 THE CHAIR: Yes.

7 MR O'DONOGHUE: VL has rather pejoratively called this
8 "split trial redux". I want to reassure the Tribunal
9 I am not reheating cold liquid. We say several things
10 have changed, materially so, and in combination they
11 make a compelling case for a split trial at this stage.

12 THE CHAIR: There is nothing wrong with your
13 re-applying. I am not offended by the fact that you are
14 coming back. It does not mean I am going to agree with
15 it. We will look at it again.

16 MR O'DONOGHUE: (Overspeaking), sir, you will regret it, but
17 I hope not too much.

18 Sir, we say five points have changed (inaudible).
19 First, we have, unlike last time, pleaded a positive case
20 on market (overspeaking). One of the points, sir, you
21 made last time round was, well (inaudible) finally
22 responded to VL's case on market definition but you do
23 not have an affirmative case of your own. That has now
24 been remedied to the extent --

25 THE CHAIR: So, as I understand, I am doing this from

1 memory, the point is you are saying they are different
2 -- effectively VL is operating in a different market?

3 MR O'DONOGHUE: Yes.

4 THE CHAIR: Are there other cases where the new market
5 has been held to be distinct from the secondhand market
6 for the purposes of dominance?

7 MR O'DONOGHUE: It is not something that is currently in the
8 report (inaudible).

9 THE CHAIR: Is it something you recall off the top of
10 your head...anyone on your team?

11 MR O'DONOGHUE: In stating that my answer is yes, I cannot give
12 you more than that at this stage. I am sure, sir, that
13 is right. I have remedied what I say is the pleading
14 gap.

15 THE CHAIR: It is a short point. So I am trying to
16 understand why you say it is going to be a two-week
17 trial and eye-watering amounts of money. But it seems
18 such a short point, why is it going to be quite that
complicated, which is why I was asking as to how it has
19

20 been dealt with in other cases.

21 MR O'DONOGHUE: Yes. Obviously there are competing market
22 positions. Even grappling with VL's market position on
23 their pleading will involve a pretty complex and
24 iterative exercise.

25 THE CHAIR: So, this is not your only point?

1 MR O'DONOGHUE: Well, it is a composite one. If one
2 accumulates the work that has to be done in relation to
3 VL's positive case --

4 THE PRESIDENT: No, but what I mean is if your only point
5 was the two markets are separate, there would not be any
6 work to do on VL's case, it would just be that one
7 point. But you are saying there may be other points as
8 well?

9 MR O'DONOGHUE: No, I am going to show (inaudible) where
10 they flesh this out in more detail.

11 Now, on our pleading there has not been a reply
12 querying this and there has not been a request for
13 information, and we have Dr Chowdhury, which I will
14 shortly bring you to.

15 So, the first point is that we have remedied the
16 pleading gap.

17 The second point is we have quantified with greater
18 precision and with evidence the savings that would arise
19 from a second trial not taking place, and you will have
20 seen in Henderson, it is 1465 of the second bundle,
21 there is a delta of about 3.7 million between the --
22 8.3.4.

23 THE CHAIR: Sorry, what are you looking at?

24 MR O'DONOGHUE: It is 1465, just underneath the table, sir.

25 THE CHAIR: Yes. How is that arrived at?

1 MR O'DONOGHUE: It is the difference between --

2 THE CHAIR: No, I do understand that. I mean how is it

3 arrived at, substantively? How does one apportion that

4 through you?

5 MR O'DONOGHUE: Essentially, sir -- the most substantial

6 saving would be the economic experts would not be

7 dealing with market definition and dominance at all in

8 the first trial, so that is already a substantial

9 saving, and likewise for the teams there would be

10 factual and witness evidence which would be avoided. We

11 make --

12 THE CHAIR: But in terms of how those issues build to

13 3.797, how does one -- there is not a breakdown of how

14 it is arrived at.

15 MR O'DONOGHUE: Well, it is 8.337. You are right there is

16 not a line-by-line breakdown, but we do say this has

17 been something we have --

18 THE CHAIR: It is just very precise: 3,797,250 suggests

19 there is a -- there has been some sort of calculation.

20 I am not saying: well, in my experience these things

21 tend to be 3-4 million. It is not saying that. It

22 looks like there is a calculation there.

23 MR O'DONOGHUE: I will be corrected, but I think it is

24 a percentage saving relative to the full trial in terms

25 of the --

1 THE CHAIR: I see, and if you apply that percentage you
2 end up with the figure... I think somebody wants to
3 attract your attention.

4 MR O'DONOGHUE: Yes, and of course all the costs incurred
5 today are precise.

6 THE CHAIR: Not round sums.

7 MR O'DONOGHUE: No.

8 THE CHAIR: Okay.

9 MR O'DONOGHUE: Sir, I would say the sort of ballpark saving
10 is consistent with what you would expect, in any event,
11 at least, as a rule of thumb but if you can obviate
12 completely the need to deal with market definition --

13 THE CHAIR: So how are you going to, at trial, show that
14 the secondary market and the primary market, if I can
15 call them that? The secondhand market and the primary
16 market are distinct markets? Are you going to show
17 that? Just remind me.

18 MR O'DONOGHUE: Sir, (overspeaking) --

19 THE CHAIR: Yes.

20 MR O'DONOGHUE: So, sir, it starts at 1479. Do you see the
21 bullet at the bottom of the page?

22 "Our new primary licence and secondhand licence is
23 in the same market and in several markets (inaudible)
24 the purchase of a primary licence is considered
25 (inaudible) secondary licence to be substitutable

1 include for example a comparison of prices of
2 comparables, payers of primary and secondary licences
3 [as read]."

4 THE CHAIR: Is that a matter for experts? It seems to
5 be straightforward fact.

6 MR O'DONOGHUE: It is both, it is the factual change, it is
7 the economic significance of that change:

8 "Analysis of sales of primary and secondary licences
9 over time; characteristics of the licences and to what extent
10 each meet customer requirements and preferences, extent of actual use
11 by customers and for what purpose each is used..."

12 THE CHAIR: This is very (inaudible) -- we know as
13 a matter of fact, I assume it is not disputed, that VL
14 had a business selling this software to companies or
15 public bodies who do not want to pay, or are not able to
16 pay for the latest additional software. As I understand
17 it the savings could be very considerable indeed.

18 So is it being suggested that those people, if they
19 did not have available that alternative source, what is
20 being suggested that they are going to do? How are they
21 going to process their Word documents if they are not
22 buying a product from VL, a secondhand licence that is
23 referred to? What would they do?

24 MR O'DONOGHUE: Well, sir, in a sense what Dr Chowdhury... is
25 saying you build this from the bottom up, you look at

1 the shift in shares and sales over time and that gives
2 you the answer. The question is: well, if the price of
3 a new licence went up by 5% for a non-transitory period,
4 would enough people switch to a secondhand licence to
5 defeat -- price-wise, that is?

6 THE CHAIR: Why would that attract -- why do not you ask
7 somebody in the industry who has been selling software
8 for 20 years and say: as an expert in the market this is
9 what happened, these are the options open to people and
10 70% will go on and buy the software - the branded
11 software (new licence). 30% will go on and use an open
12 source --

13 MR O'DONOGHUE: Sir, that may well be right, which is why we
14 say this will be a matter of factual evidence and
15 witness -- and expert evidence.

16 THE CHAIR: Yes. A sort of top-down economic analysis
17 looks a rather clumsy way of meeting a short point,
18 an important point but a short point.

19 MR O'DONOGHUE: Well, certainly the economic question is
20 an empirical one, which is: would a price rise be
21 possible if defeated by supply and that is the
22 SSNIP test. That is the economic question. Now, it may
23 well be that there is qualitative evidence and other evidence
24 of a factual nature from the --

25 THE CHAIR: Sorry, just say what you just said again.

1 MR O'DONOGHUE: Well, the traditional way of testing for
2 market definitions is you ask yourself if somebody
3 increased the price of their product by 5-10% for
4 a non-transitory period, would there be enough switching
5 to an alternative to make that price rise unprofitable?

6 THE CHAIR: Yes.

7 MR O'DONOGHUE: That would be a question, an economic
8 question --

9 THE CHAIR: Yes, it just seems surprising to say there
10 is no relationship in the secondhand market and the new
11 market, which is why I asked you about cases in relation
12 to that.

13 MR O'DONOGHUE: Yes --

14 THE CHAIR: Is the price of secondhand cars unrelated to
15 new cars and as the price of secondhand cars goes up
16 people buy new cars?

17 MR O'DONOGHUE: Ultimately that question is empirical and it
18 can only be answered through the analysis of data and
19 market share -- and of course I accept, sir, perhaps
20 factual evidence from the market itself. So that is why
21 we say this aspect of the trial will not be a trivial
22 matter, it will be something --

23 THE CHAIR: At the moment, with no disrespect,
24 Mr O'Donoghue, I do not feel I am getting to the nub of
25 what is going to happen at trial and why -- I mean, as

1 you say, today you do not have the case law as to how
2 this has been approached in other cases at your
3 fingertips, and I am finding it difficult -- and I am
4 not in any way criticising people who put forward these
5 suggestions -- but there is not a lot of discussion at
6 the level we are having now.

7 MR O'DONOGHUE: Yes, but on the case law, sir, of course it
8 may be interesting, but the empirical relationship
9 between a new and a secondhand good in a different
10 market is not merely going to answer the question in
11 this case on the relation between --

12 THE CHAIR: No, but the approach taken to investigating
13 whether there is a relationship may be informative.

14 MR O'DONOGHUE: Well, sir, in my submission, what Oxera is
15 saying is: you look at the prices, the differentials,
16 the price movements over time and the question of
17 substitution. That is the empirical question which is
18 being tested. They say it has an economic component.
19 They do say, sir, at the end, because of the market
20 studies, industry research, which I think, sir, is your
21 point, to understand the preferences of primary and
22 secondary licence purchasers and any asymmetry of
23 substitution.

24 My junior has reminded me, to your point, sir, that
25 the CMA, to your point, sir, did investigate a secondary

1 ticketing market, a case called *StubHub*, and they
2 concluded that there was a primary and secondary market
3 for concert tickets.

4 THE CHAIR: That is not -- you cannot have secondhand
5 concert tickets, can you? It is the same event.

6 MR O'DONOGHUE: Well, it is resale -

7 THE CHAIR: It is not Elton John singing out of tune.

8 You go to the same concert. It is people dealing in -

9 MR O'DONOGHUE: A secondary market rather than a secondhand
10 market, you are right. In my submission, the economic
11 concept is the --

12 THE CHAIR: Right.

13 MR O'DONOGHUE: That is Oxera's first point and of course it
14 does not end there. They also say that there is a
15 (inaudible) on: is the market limited to desktops, the
16 traditional PC, or are there other non-PC devices with
17 it that come into play? You will see, sir, then, they
18 say:

19 "The experts would need to assess whether software licences
intended for

20 other non-desktop devices within the same market(s) as
21 licences intended for desktops or, even if not within the same
22 market, whether they exercise 'out-of-market' constraints
23 due to users utilising different devices for specific
24 tasks at different times. This aspect of the market
25 definition is likely to vary over time as technology has

1 changed. For example the boundaries have blurred between
2 desktops, laptops, notebooks, tablets and mobiles", and
3 so on.

4 Then over the page, sir, it is a very important
5 point, which does come up in multiple cases, you would
6 need to investigate the extent of multi-homing, which is -
7 are there customers who have both secondhand and new
8 licences for the various reasons we set out in the
9 pleading. The multi-homing issue will be
10 a data-intensive and evidence intensive question.

11 Then, sir, finally, and this is the point, to some
12 extent, I started with, you will see some reference to
13 the SSNIP test. You see:

14 "The analysis would need to include an assessment of
15 whether any of the aspects above would
16 likely differ across different customer groups, public
17 organisation, SMEs and large private corporations. For
18 example, the experts would
19 need to analyse whether large corporations have
20 different preferences such that they would be less
21 likely to switch from primary to secondary licences
22 following a SSNIP relative to the other customer
23 groups."

24 That is the point about the profitability of the
25 price increase.

I will invite you to read 2.7 and following, but it
gives you a flavour of the kind of issues Oxera will be

1 covering.

2 THE CHAIR: So, we have not discussed quantum much, but
3 on the economics of this, this will be sequential expert
4 reports, are you envisaging?

5 MR O'DONOGHUE: Well, sir, normally it would be simultaneous
6 but if there is an application for sequential then we
7 can deal with that --

8 THE CHAIR: But there would be no reason why you could
9 not provide disclosure, maybe not at the same time as
10 the other issues we have been looking at, but get on
11 with disclosure and then serve your expert evidence and
12 your fact evidence and revisit the question of -- I am
13 going to regret saying it -- revisit the question of
14 whether this should be heard separately at that stage.

15 MR O'DONOGHUE: Well, sir, in principle, yes, one could
16 consider a split trial at any stage. But of course, if
17 we have to go through the bulk of the expenditure that
18 would be avoided by splitting it at this stage, then
19 there would quickly come a point at which this trial
20 would lose its efficiency.

21 THE CHAIR: Not necessarily. They still could be
22 considerable. The bit I do not understand, you keep
23 saying that this will settle --

24 MR O'DONOGHUE: Yes.

25 THE CHAIR: That gives me the impression that at some

1 point you will give up on the point. I do not see why
2 at the moment the Claimant would settle on the basis,
3 having got home and shown there is an abuse and suffered
4 a huge loss, would suddenly go: all right, Microsoft is
5 not dominant in this field, I will give up, or I will
6 settle on very favourable terms to Microsoft. That just
7 seems vanishingly unlikely if VL has got over all the
8 other hurdles.

9 MR O'DONOGHUE: I will come on to settlement. That is the
10 next point.

11 But on your specific point we say the bulk of
12 savings for split trial --

13 THE CHAIR: But you are choosing to take these points --
14 on the one hand you are choosing to take these points,
15 which you are probably entitled to, but then on the
16 other hand you are saying: they are very expensive and
17 we would rather not have to pay for them. That is where
18 we are today.

19 MR O'DONOGHUE: Sir, we are saying more. We are saying it
20 is in the interests of justice that neither side should
21 have to pay for them and, in the interest of the
22 Tribunal and Tribunal users, that we do not waste
23 two weeks dealing with things.

24 THE CHAIR: I will ask Mr Schaefer why on earth he wants
25 to press on with this as well and not save his clients

1 a lot of money and a lot of difficulty. But anyway,
2 there we are. The default position is it proceeds, as
3 I see it.

4 MR O'DONOGHUE: Sir, we do say loud and clear that if we
5 have to go through the cost and expense of an expert
6 report and evidence and disclosure, then for practical
7 purposes the savings of a split trial would vanish.

8 THE CHAIR: Well, they would still be two weeks in
9 trial, you say. They have vanished on the assumption
10 you are right, and that this is going to settle on terms
11 the parties can agree upon.

12 MR O'DONOGHUE: Well, sir, if the vista then faced by the
13 parties is one where we can save some of the (inaudible)
14 in one go, then that is a different factual matrix to
15 one in which there is a potentially £4 million saving
16 and two weeks of court time. It is a different
17 proposition, is what I am saying.

18 Indeed, in the Chancery Guide -- it does not bind
19 you today, sir -- there is a clear direction that a
20 split trial should be raised at the first CMC for the
21 very reason that the efficiencies and savings --

22 THE CHAIR: We are at the second CMC, do not forget
23 (overspeaking) you cannot be criticised for not applying
24 on the first --

25 MR O'DONOGHUE: CMC1 bis on this. But you get the practical

1 point that if there are efficiencies --

2 THE CHAIR: It is perfectly proper to raise it, yes.

3 MR O'DONOGHUE: So that is on the savings.

4 Now, the third point -- I have got five -- is we
5 have sought to engage in the interim with VL on the
6 point they made last time which appears to concern the
7 Tribunal, which is the possibility that the savings in
8 trial 1 would be nullified or compromised by
9 a development in trial 2 that could affect the
10 conclusions in trial 1, and in particular I think it was
11 suggested that there could be some variation of market
12 definition that could have a significant bearing on the
13 question of anti-competitive effects.

14 So, in this context we have done three things. We
15 have asked VL, I think more than once, can they identify
16 an alternative market that they have not pleaded that
17 they say could well make a material difference in terms
18 of the outcome of trial 2 (overspeaking) trial 1.

19 THE CHAIR: This is where I am getting a little
20 confused, because you are saying: your point is that the
21 markets are -- well, if you are right and the markets
22 are distinct and you are not dominant, which, I will
23 listen to what Mr Schaefer says, but it seems likely you
24 are not dominant in the market for secondhand licences
25 and they are indeed separate markets, then it is

1 difficult to see how Mr Schaefer is ever going to
2 recover from that position.

3 MR O'DONOGHUE: Indeed.

4 THE CHAIR: So, if that is the only point that you are
5 taking, that falls away.

6 MR O'DONOGHUE: Well, I am responding to Mr Schaefer's
7 point. So, he said last time around: well, there could
8 be a development in trial 2 of market definition.

9 THE CHAIR: I think I may have raised it. But yes, it
10 was raised, it was discussed.

11 MR O'DONOGHUE: So, the first simple point is we have asked
12 them: what is this alternative market that could make a
13 difference? We have not had a single response.

14 THE CHAIR: I am sure Mr Schaefer will say your only
15 point is this binary point of whether the primary and
16 secondary markets are different or distinct for the
17 purposes of assessing dominance, then he does not have
18 to worry about a secondary case. That is just --

19 MR O'DONOGHUE: Then we are in violent agreement. That is
20 the first point.

21 THE CHAIR: There was a point on the pleadings though,
22 was there not, which I did not see addressed in your
23 skeleton. Are you going to come to that?

24 MR O'DONOGHUE: Yes, I am.

25 THE CHAIR: You know the point I mean?

1 MR O'DONOGHUE: Yes.

2 So, the first response is we asked them what is the
3 other market they cannot identify. The second point, we
4 went back to Oxera at 3.7 -- it starts at 1485. I can
5 ask you, sir, to read 3.3 to 3.6, and then (inaudible)
6 conclusions at 1487.

7 (Pause)

8 MR SCHAEFER: I hesitate to rise but it is only to be
9 helpful. Having given it some thought, we agree with
10 Mr O'Donoghue that it is unlikely that a different
11 (inaudible) market definition at a second trial could
12 lead to a risk of having to have a third trial.

13 THE CHAIR: Do I still need to read this?

14 MR O'DONOGHUE: Well, sir, if I can ask you, at least, to
15 read --

16 THE CHAIR: I wanted to see how it ends, that is all.

17 MR O'DONOGHUE: Sir, it ends at 3.7, which is the -- well,
18 to paraphrase, the essential point Oxera make is that
19 the issue in this case in terms of anti-competitive
20 effects and causation and quantum are the interface
21 between supply and demand, and if there was substantial
22 ineffective supply of licences and/or insufficient
23 demand for the licence they say they were denied, then
24 the case, we say, collapses.

25 So, what they say at 3.7 is if that is the starting

1 point, that does not depend on the precise contours of
2 a relevant market. It is a more straightforward point,
3 which is - it is a numerator and denominator point: what
4 was the available supply and how much was affected and
5 was there demand or to that effect?

6 THE CHAIR: There was an issue floating around at the
7 last hearing, I remember now, about the relevant
8 territories.

9 MR O'DONOGHUE: Yes.

10 THE CHAIR: So, if Mr Schaefer puts forward his
11 territories as being the EEA, and talking hypothetically...
12 obviously, and for some reason it turns out that
13 Romania -- well, maybe Romania is the wrong country, but
14 Romania was an entirely independent market operating
15 separately, where does that leave us?

16 MR O'DONOGHUE: Well, sir, I do not want to over-egg that
17 pudding today. I think the way that we would put it is
18 that what that shows you is that on relevant geographic
19 market there may be some detail that needs to be
20 grappled with, and for example trade flows between
21 Romania and other countries and so on, there will be
22 data and analysis that needs to be conducted to reach
23 that conclusion.

24 But we say that heavy lifting, if I can call it
25 that, that is how we get to a figure of 3.7 million --

1 THE CHAIR: Yes, but going back to -- you say
2 Mr Schaefer said his case was based on being dominant
3 across the EEA --

4 MR O'DONOGHUE: Yes.

5 THE CHAIR: -- and I have now demonstrated that he is
6 wrong about that because he is only dominant in the
7 majority of the EEA and he is not dominant in Romania
8 and you can throw in another country if you want. So
9 tough, he has put his best foot forward and he failed.

10 MR O'DONOGHUE: Yes, that is a possibility.

11 THE CHAIR: So that remains a possibility? That has not
12 gone?

13 MR O'DONOGHUE: No, it is a possibility.

14 So, sir, at 3.7 Oxera say: well, as far as we can
15 say at least in this case, we do not understand how
16 tweaking the market definition changes anything
17 regarding anti-competitive effect.

18 THE CHAIR: Okay.

19 MR O'DONOGHUE: The final point, sir, before I respond to --
20 including the point you raised about the pleading and
21 a couple of other things VL has said, since the first
22 CMC, we continued to see split trials of the kind we
23 advocate for. We have given you, sir, a reference to
24 the *Boundary Fares* litigation, a former president of
25 this Tribunal, and we have made the point in the

1 skeleton that I think -- again, I am not seeking to put
2 forward that suddenly we have got a statistical sample
3 which is robust, what we are saying is this continues to
4 be a feature of this kind of litigation, consistently,
5 and we make the point in our skeleton, which I think has
6 not been challenged, that so far as we are aware there
7 has only been one substantive trial in which a second
8 trial has stood up. Now, whether that is statistical or
9 anecdotal, one can -- it may not matter, but what we are
10 saying is there is a pretty good track record of these
11 kind of procedural devices being effective, in practice,
12 and I do not put it any higher than that.

13 Now, just to respond quickly to what VL says, and
14 I appreciate one point may have fallen by the wayside.
15 They continued to say our market definition case is not
16 clear. As I said, there has been no amended reply on
17 this point and no request for information.

18 I have shown you Oxera where they at least identify
19 the contours of what we were discussing, and it is
20 unusual to have at this stage, albeit preliminary and in
21 some respects broad, an indication from an expert
22 economist as to the contours of this case. As we say,
23 that is a useful piece of evidence at this stage.

24 Now, one of the points VL queries at 42(3) of their
25 skeleton, they say:

1 "Who, on Microsoft's case, are the competitors?"

2 Now, the second point is, that is not a point about
3 the clarity of our pleading. That is Mr Schaefer
4 saying, I think I am going to win on this point, and
5 with respect, we disagree.

6 But in any event, as we see from Oxera, there is
7 quite a lot of terrain to be covered in terms of the
8 contours of this (inaudible) and they do, for example,
9 mention at least the types of competitors that might be
10 considered.

11 You see, for example, at 2.9 there is Google, Apple
12 and Linux. Somewhat paradoxically in Mr Schaefer's own
13 skeleton, where he complains about, well, who are you
14 competing with - he lists a lot of people who Microsoft
15 may be competing with, and he says, we do not think you
16 are, but my short response to all of that is: well, that
17 is a matter for trial.

18 Now, Mr Schaefer also makes the point that: well,
19 you have a 70% market share, on our market definition
20 therefore, we win. I have two responses to that: one, we
21 do not agree with the market definition, we pleaded
22 that; and two, in any event market shares are a starting
23 point, they are not the end point.

24 They do set out a quotation from a textbook I have
25 the misfortune to co-author, and on this point, just to

1 give your Lordship the fuller picture, if I can hand
2 up -- what they did not give to you, sir, was the
3 introduction to the section on market shares, which puts
4 all this in a rather different context. If I can just
5 hand that up. (Handed)

6 So, sir, you see over the page at 190 the internal
7 offering. So Mr Schaefer relies on the 70%, you see
8 that under "General market share integrators". What he
9 has not shown the Tribunal is the previous page, which
10 is a series of reasons why market share is simply
11 a starting point, and may, depending on the case, not be
12 informative at all. We say on that basis it is not
13 a complete statement of the principles in this area, but
14 in any event...

15 Now, the second point he makes is: well, you cannot
16 infer too much from the other cases, and, therefore,
17 *Boundary Fares* tells us nothing new. You have our point
18 on that, sir, which is that in my submission it tells us
19 something, and in particular it tells us that is
20 a well-used mechanism and is, in practice, likely to be
21 an effective one.

22 The third point he makes in his skeleton is he says:
23 well, nothing has changed on the second trial to impinge
24 in terms of the scope of a first trial. But that is not
25 right. We have now pleaded our firm case on market

1 definition of dominance. I think as Mr Schaefer now
2 concedes he has been unable to identify on both of the
3 pleaded cases what is the third way that might arise in
4 the second trial that may affect the first trial. So
5 that point, I think, has been effectively conceded.

6 The penultimate point, sir, it is at paragraph 48 of
7 his skeleton, which I think is the point you raised, so
8 you can just look at that.

9 THE CHAIR: This is the pleading?

10 MR O'DONOGHUE: Yes. Paragraph 48, sir.

11 THE CHAIR: Of?

12 MR O'DONOGHUE: Of his skeleton.

13 THE CHAIR: Yes, shall we go to the pleading?

14 MR O'DONOGHUE: He gives the reference there, it is 53.

15 THE CHAIR: Okay, I have got everything open.

16 MR O'DONOGHUE: As I understand it, the point he wanted to
17 make is really the one at the end. He says: well,
18 I have a second string to my bow, which is I say
19 Microsoft has paid potential competitors not to compete
20 with it and Microsoft's only point to this defence turns
21 on market definition.

22 Now, the first response to that is if the Tribunal
23 orders a split trial, it can only be ordered on the
24 basis that my learned friend's pleading on dominance and
25 market definition is assumed to be 100% correct. So

1 that is an assumption to apply completely in his
2 favour --

3 THE CHAIR: Sorry, say that again, please? I did not
4 understand. So, this is if a split trial is ordered?

5 MR O'DONOGHUE: Yes.

6 THE CHAIR: Oh, I see, in the liability phase, we assume
7 in his favour that he is --

8 MR O'DONOGHUE: We have to.

9 THE CHAIR: Yes, of course.

10 MR O'DONOGHUE: Second, and in any event --

11 THE CHAIR: So, then what happens to your defence? It is
12 54.3. So, we can strike through that, can we?

13 MR O'DONOGHUE: That is my second point: he has misread our
14 pleading. The point we will be making in defence -- we
15 make two points here: one, we are not sure what markets
16 you are pleading, therefore we are not pleading back at
17 this stage. Of course, we have remedied that point now,
18 it has gone.

19 Secondly and in any event, we deny there is
20 anti-competitive effect. So, our case will be these
21 alleged restrictions, either they did not exist at all
22 or they existed on such a small or de minimis scale,
23 that there was no anti-competitive effect and in any
24 event no causation of loss. That is a complete answer
25 to that part of his pleading. That of course will be an

1 issue to be decided in the first trial.

2 THE CHAIR: So, the second and third sentences are
3 contingent on the definition of the relevant markets.
4 The second sentence starts in the brackets.

5 So, the Claimant and others cannot compete with
6 Microsoft? That is the allegation. You say it depends
7 on market definition. So, it is back to the point that
8 whether the secondhand market, if I can put it that way,
9 is in competition with the primary market. It is the
10 same point.

11 MR O'DONOGHUE: Yes, but sir, we say in any event we win on
12 anti-competitive check.

13 THE CHAIR: I think this is fixable, but at the moment
14 this is part of the abuse trial, would be, but that --

15 MR O'DONOGHUE: We say the first two parts have been
16 overtaken by our amended pleading.

17 THE CHAIR: Well, if you were only running one point on
18 market definition, I can see that.

19 MR O'DONOGHUE: We say it is clear on analysis, but if that
20 is the only issue we will happily fix that on the
21 pleading.

22 THE CHAIR: Okay, anything else?

23 MR O'DONOGHUE: A couple of final points.

24 Now, the other head of claim that VL pleads is part
25 of the 101, anti-competitive agreements case, and as we

1 understand their case, we understand there is
2 an anti-competitive object in these clauses, and of
3 course that does not depend in any shape or form on the
4 definition of the relevant market because for an object
5 case you would not typically define the market because
6 it is not said to be injurious to competition by its
7 very nature, and that of course will be resolved in
8 a first trial.

9 Of course, on the question of settlement it does
10 then raise a very interesting vista for the Claimant,
11 which is let us assume they win on Article 101, but for
12 some reason lose on the liability aspects of Article 102.
13 Would they want a second trial simply on the question of
14 dominance in that scenario?

15 THE CHAIR: It depends on whether they are worrying
16 about the Court of Appeal or not, really.

17 MR O'DONOGHUE: My simple point for today is they do not
18 seem to have thought through the consequences of them
19 relying on an Article 101 case. That does not depend on
20 market definition.

21 THE CHAIR: Right. Okay.

22 MR O'DONOGHUE: The final point is well they say there is no
23 evidence on savings. We have seen Henderson. VL say,
24 to be fair, that the aggregate cost of two trials might
25 exceed the cost of a combined trial, but of course that

1 is a truism of any split trial, and in my submission
2 they avoid -- it is a neutral point. If the split is
3 appropriate for other cumulative reasons, that does not
4 then become a tiebreaker, and our essential point is
5 that we do not get to a second trial, or likely do not
6 get to a second trial in any event, and this is all
7 somewhat theoretical.

8 Now, sir, you pushed me on: well, why might this
9 settle? My answer is: well, (a) this seems to have
10 happened in practically every other case; (b) of course
11 a defendant who has gone down in flames on
12 anti-competitive effects, causation, quantum, and lost
13 on all of those points, would have to think pretty long
14 and hard going into a second trial with the same
15 Tribunal on a single issue. At that stage the
16 commercial realities of the case, including, of course,
17 costs, will raise a reasonable likelihood, if not
18 a strong one, that a second trial does not take place.

19 THE CHAIR: Well, if that was your concern, you would be
20 pressing to have this heard at the same time.

21 MR O'DONOGHUE: Well, sir, the savings of nearly £4 million
22 are not trivial. The two weeks of court time is not
23 trivial. One thing, of course, which is obvious in the
24 course of these issues is the disclosure burden will be
25 highly asymmetric in that the bulk of the burden would

1 fall on my client, in parallel with all that the other
2 disclosure would have to do in any event.

3 So, there are good reasons why Microsoft would wish
4 to avoid dealing with these issues if they can be split
5 on the basis we propose. We say it is not just in the
6 interests of Microsoft. It is bizarre that VL does not
7 want to save this money and we say, certainly from the
8 Tribunal's perspective, and in terms of judicial burden,
9 these are savings which are well worth achieving and, in
10 my submission, are tangible in this case.

11 THE CHAIR: Mr Schaefer, I mean you are faced
12 potentially with a potential liability for your client
13 in costs, very significant costs of disclosure and so
14 forth, and I am not sure why you feel it is to your
15 client's benefit -- it is for your client to take any
16 course it chooses, but why is it to your client's
17 benefit to have dominance heard at trial? Are you --
18 maybe you have nothing to add on that, but is there any
19 explanation you can give to the Tribunal? I appreciate
20 there may be --

21 MR SCHAEFER: The explanation is relatively straightforward.
22 There is a question of what the savings are. We have
23 been asking Microsoft to explain savings it has
24 envisaged for about a month. We finally got that in
25 Henderson 3. It is not broken down and we do not really

1 understand it --

2 THE CHAIR: Right, but we all know these things can be
3 extremely expensive.

4 MR SCHAEFER: It can be expensive --

5 THE CHAIR: You have got a potentially expensive
6 disclosure exercise, and then you have got -- economists
7 can make what should seem very simple questions very
8 complicated by trying to look at comparative datasets,
9 or on datasets which are not really comparable, trying
10 to compare them. So of course, it can be expensive.
11 Whether it is 3 million or 1.5 million or 5 million, who
12 knows, but it certainly could be -- and you could
13 succeed, but because you have dug your heels in on this
14 point, it may be said that you are at risk on costs
15 because, you know, you were asked not to grapple with
16 this at an early stage but you went ahead anyway. So, I
17 have no idea where those arguments would end up, but
18 they need to be borne in mind.

19 MR SCHAEFER: Sir, that is (inaudible) which I am happy to
20 take instructions.

21 The more general point is it is a balance of
22 uncertain savings. There will doubtless be some
23 savings, but I can get into the reasons we are convinced
24 they are not as large as Microsoft says, against
25 potentially very significant delay.

1 The lack of delay only arises -- delay only
2 arises -- does not arise --

3 THE CHAIR: You say you have a judgment in your favour,
4 effectively, and then Microsoft have the opportunity
5 to --

6 MR SCHAEFER: The (inaudible) giving you a bit of a nod and
7 a wink and saying, well, of course, this will not
8 actually apply, and at the same time of course Microsoft
9 is sticking to its guns on the pleadings.

10 THE CHAIR: Mm. So, what I am inclined to do, and I will
11 make this suggestion first, is to -- when it comes to
12 disclosure of -- from the economic experts, and this is
13 subject to further discussion, certainly on dominance,
14 so on facts, any expert evidence on dominance to be
15 served sequentially, because at the moment I am not
16 satisfied I understand the complexities of the case. It
17 could be quite a simple position. So that will be
18 served by Mr O'Donoghue, and we would then -- in the
19 light of that you will have had disclosure, then decide
20 whether to park dominance at that stage.

21 Now, Mr O'Donoghue is perfectly correct that, that
22 could lead to a very significant upfront cost as against
23 parking it today.

24 Equally on quantum you would have to put your best
25 foot forward on quantum first, at the same time, and you

1 are at risk because you are being told that even if
2 there have been abuses de minimis, 10 contracts or less
3 than 10 contracts, you are shouldering a risk in that
4 respect and you have obviously decided to plough on
5 because it is commercially worthwhile to do so.

6 That is what I am inclined to do, and then have a --
7 and this is not just fobbing Mr O'Donoghue off -- have
8 a serious look at whether this should be split off,
9 whether dominance should be split off at that stage and
10 equally quantum, whether quantum should be split off at
11 that stage.

12 You will have arrived -- you will have had
13 disclosure, you will have arrived at some figures, you
14 will have a sound basis on which to see where your claim
15 may land. You may need to take instructions. Is that
16 unattractive to you, Mr Schaefer, as a way forward?

17 MR SCHAEFER: Perhaps I could take instructions?

18 THE CHAIR: Shall I rise for five minutes?

19 (3.18 pm)

20 (A short break)

21 (3.28 pm)

22 MR SCHAEFER: Sir, may I check that we understand the
23 proposal. So, if we go to the draft order, page 1506.

24 THE CHAIR: I am just working from your consolidated
25 draft.

1 MR SCHAEFER: I am sorry, I have got the wrong order, it is
2 1539. I am grateful.

3 So, at the moment at paragraph 16 we have expert
4 evidence, which there is a small issue on that we will
5 come to, expert reports and replies.

6 I think, but please correct me if I am wrong, that
7 what you are proposing is that rather than having the
8 single process, we effectively have three whereby we
9 have expert reports on market definition and dominance
10 served sequentially with Microsoft first; expert reports
11 on quantum served sequentially with ValueLicensing
12 first; and expert reports on the remainder of liability,
13 I assume still exchanged in the way that is provided
14 for.

15 THE CHAIR: Yes, that is what I was aiming at.

16 MR SCHAEFER: Happening at the same time, presumably.

17 THE CHAIR: Yes.

18 MR SCHAEFER: So then, subject to the issue of when, in the
19 timetable, we would -- the Tribunal would be able to
20 decide, find itself in a position to decide on the scope
21 of the trial, we certainly have no opposition to that.

22 THE CHAIR: Well, the trial will be listed on the
23 assumption that everything is going ahead, but then, you
24 know, we are hiving off something.

25 So, you would have no objection to that course?

1 MR SCHAEFER: Certainly.

2 THE CHAIR: I mean, subject to anything further,
3 Mr O'Donoghue, that is what I am inclined to order.

4 MR O'DONOGHUE: Yes. Well, sir, looking at it in that way it is
5 a minor variation on directions that are otherwise
6 largely agreed.

7 THE CHAIR: Yes.

8 MR O'DONOGHUE: It may be for another day but if these
9 reports are coming (inaudible) at the end of the process
10 before trial, they may --

11 THE CHAIR: Sorry, which reports?

12 MR O'DONOGHUE: The expert reports. You will see, sir, at
13 16.

14 THE CHAIR: You mean the reports in answer?

15 MR O'DONOGHUE: Well, sir, in 18 the reports as they stand
16 -- there is a dispute about dates, whether it is October
17 versus January, but in any event, it is not long before
18 trial, and by that stage we suspect a very substantial
19 portion of the costs will already have been incurred --

20 THE CHAIR: Yes. But when is trial at the moment?

21 MR O'DONOGHUE: So, on a split trial we had suggested May.

22 THE CHAIR: Sorry, where in the order? 26.

23 MR O'DONOGHUE: So, on a split trial we suggested May. If it
24 is everything, we suggest July --

25 THE CHAIR: So, for everything you suggest?

1 MR O'DONOGHUE: July onwards -- this is a first trial only.

2 So, the practical point I am making is if by the end
3 of 2024, the beginning of 2025, at that stage the
4 sequential mechanism you have indicated kicks in, we
5 suspect the vast bulk of costs (overspeaking) trial will
6 have already been incurred.

7 THE CHAIR: Let us pick up the trial timetable. Now is
8 probably a convenient moment, is it? Do we need to go
9 back to the beginning? Where the first date is in
10 issue -- we have got the rival dates for paragraph 10.

11 MR O'DONOGHUE: So, to be clear, the date we had proposed
12 was on the basis that our proposal of staged disclosure
13 would be accepted, and that it makes sense after that
14 date to have a CMC. I can see, sir, if we are going
15 down the category route, that there will need to be
16 an intermediate stage quite soon whereby we have the
17 possibility of coming back in front of the Tribunal if
18 there are outstanding...

19 THE CHAIR: Okay, but the categories have been
20 determined today.

21 MR O'DONOGHUE: Yes, but there may be issues around
22 custodians, date ranges, keywords and stuff.

23 THE CHAIR: Yes, there may be, there may be.

24 MR O'DONOGHUE: We hope we do not need to come back, but
25 that is a possibility. Now, if that is the case, within

1 reason, the sooner the better, frankly.

2 THE CHAIR: Yes, so this is 17 November. This is just
3 to agree the scope. So, it is really just the EDQ that
4 needs to be -- so it is to deal with questions of
5 custodians, databases.

6 MR O'DONOGHUE: Yes.

7 THE CHAIR: We will need to go back, actually, to what
8 the dates are for those. Aiming for 17 November seems
9 to be sensible to me.

10 MR O'DONOGHUE: Yes.

11 THE CHAIR: So, going back -- sorry, we need to go back
12 to paragraph 5 and we have got the date of 20 October
13 for those questions, which really ties to the -- which
14 ties in with that date.

15 MR O'DONOGHUE: So, on 5(d), as I have indicated, we
16 (inaudible).

17 THE CHAIR: So, 5(d), organisation of -- okay. So how
18 long do you need for that?

19 MR O'DONOGHUE: We suggest another two weeks.

20 THE CHAIR: Okay, any objection to that, Mr Schaefer?
21 So, you would have -- the earliest is the date you seek
22 for (a) and (b)?

23 MR SCHAEFER: I think that is still -- the question is -- so
24 20 October for the rest, two weeks from there is about
25 6 November, and then we have a meeting. It is quite

1 close to the meeting.

2 THE CHAIR: When is the meeting going to be?

3 MR SCHAEFER: It may be that the (overspeaking) the meeting

4 is at 11.

5 THE CHAIR: So, if I give you a month -- where are we

6 today? We are on the 6th already.

7 MR O'DONOGHUE: We are on the 9th.

8 THE CHAIR: We are beyond that. Could that not be done

9 by 1 November? You say you have looked at this already.

10 MR O'DONOGHUE: Well, we have looked at the fact we do not

11 have this organisational chart.

12 THE CHAIR: You do not have them, you are going to have

13 to prepare something, but you have already looked at who

14 the custodians are, and you have come up with a list, so

15 it is just a question of putting down on paper why those

16 are appropriate in chart form, a system to explain why

17 those are the appropriate --

18 MR O'DONOGHUE: Sir, in part, of course, if it is to be the

19 organogram, it has to be all the other people who are

20 going to populate it, and many of those will have left.

21 It is not a trivial amount of work. That is why we have

22 resisted this possibility.

23 THE CHAIR: Sure. I understand.

24 MR O'DONOGHUE: My learned friend suggested the 3rd.

25 THE CHAIR: 3 November, very good.

1 MR SCHAEFER: Sir, if Microsoft needs until -- I think my
2 friend said 6 November.

3 THE CHAIR: The 3rd.

4 MR SCHAEFER: 3 November, then maybe the solution is --
5 well, if it is 3 November, then, I am sorry,
6 10 November, that is probably fine.

7 So, the 11th is the meeting?

8 THE CHAIR: Sorry, which paragraph is the meeting?

9 MR SCHAEFER: Paragraph 11.

10 The only concern is there is enough space between
11 receipt of the charts and the meeting. Perhaps
12 seven days otherwise (inaudible) --

13 THE CHAIR: You could obviously vary that by consent.
14 Then insofar as there are any disputes, I mean I would
15 hope, given where we are, they will be of narrow
16 compass, and so I am happy to deal with them on paper if
17 they are on a very narrow compass. If not, we can come
18 back and have a -- we certainly do not want a time
19 estimate of a day. So, a time estimate of half a day. I
20 will aim for before the 22nd, although I know I have got
21 a -- I may be in some difficulty earlier than that, but
22 we will liaise.

23 MR O'DONOGHUE: Sir, yes, we will liaise. I am in a trial
24 until Christmas.

25 THE CHAIR: Until Christmas? So why do we not put that

1 back to a January date now, then and say on or before
2 10 January.

3 MR O'DONOGHUE: Sir, I am in your hands but would it make
4 more sense to address the remaining directions at that
5 stage in a more integrated manner? But we are obviously
6 in your hands.

7 MR SCHAEFER: The concern is that if we do not make
8 directions to trial at some point then the listing will
9 just keep getting further and further away.

10 THE CHAIR: Let us press on. We can always vary them if
11 need be.

12 So, when is disclosure going to be given by? Are you
13 content with -- if we are still fighting about
14 disclosure by 10 January is disclosure by 10 February
15 realistic?

16 MR O'DONOGHUE: Sir, again, the date we put forward is for
17 the staged approach we suggest (inaudible) not accepted
18 --

19 THE CHAIR: Do not fight old battles, Mr O'Donoghue.

20 MR O'DONOGHUE: I would not dare! But if we are going down
21 the category route and there is the hearing in January
22 I think that would be extremely challenging.

23 THE CHAIR: Yes, I think so.

24 MR O'DONOGHUE: I do reiterate the point that there may be
25 an asymmetric problem here. Because of the nature of

1 the Microsoft organisation, the category approach, for
2 my client, may be much more involved and problematic --

3 THE CHAIR: Inefficiencies of scale.

4 MR SCHAEFER: Sorry, can I take all those points? I would
5 only note that as the intention is for as much to be
6 agreed as possible and the meeting is in November, one
7 would hope that both sides could be cracking on with
8 quite a bit before 10 January.

9 THE CHAIR: Maybe. But let us have a realistic...

10 MR O'DONOGHUE: Sir, I would suggest the end of March. If
11 we are going to have a longstop, it has to be realistic.

12 THE CHAIR: Let us go for 23 March, subject to where
13 that falls.

14 Then witness statements --

15 MR O'DONOGHUE: That is a Saturday.

16 THE CHAIR: A Saturday. Well, we will go over to the
17 end of the Monday the 25th.

18 Then witness statements. Let us do the expert
19 report first.

20 MR O'DONOGHUE: It might be simplest to work back from
21 a trial date.

22 THE CHAIR: Yes, that is what I am thinking.

23 MR O'DONOGHUE: So, for everything we have suggested, the
24 first date (inaudible).

25 THE CHAIR: So, when do we want the experts' meeting? We

1 are going for 30 May.

2 MR O'DONOGHUE: 30 May seems to us to put a lot of pressure
3 on the factual evidence.

4 THE CHAIR: 30 May 2025. Sorry, just give me a second.

5 So, we will come back to the facts, but on the expert
6 reports, why they cannot be 25 October with the reply
7 evidence on the -- early in 2025? Would that work? So
8 the side expert reports, all the ones in chief on the
9 24th, so stick with that, and then there will be
10 evidence in answer around 1 February; is that not... or
11 reply, depending on which -- maybe we will stick with
12 the reply evidence on 1 February so there will need to
13 be evidence in answer, if you are getting served with
14 these expert reports on 25 October, how long will you
15 need to answer them? I am thinking of the...

16 MR O'DONOGHUE: We think because it is sequential that is
17 unusual, but 1 February, yes, is reasonable.

18 THE CHAIR: Okay.

19 MR O'DONOGHUE: Also (inaudible) the 3rd.

20 THE CHAIR: If you are having an expert meeting, when do
21 you want the expert meeting? Because there will need to
22 be another round, there will need to be evidence in
23 reply.

24 So why don't you have the expert meeting in the
25 middle of March? 15 March, again subject to getting the

1 dates right, and evidence in reply on 1 March (sic). Is
2 that going to be a little bit tight, a month for reply
3 evidence?

4 Maybe we need a little bit longer than that. So
5 this is what I will suggest, subject to your views. So
6 expert reports to be exchanged on 25 October, or served
7 in chief if it is for those issues. Evidence in answer
8 on 1 February and evidence in reply on 15 March, and
9 then an expert meeting, 25 March?

10 MR SCHAEFER: Sir, again, apparently the 15th is a Saturday,
11 so that is the 14th.

12 THE CHAIR: 14th, okay. What is 25 March; is that
13 a weekday?

14 MR SCHAEFER: The 25th is a Tuesday, sir.

15 THE CHAIR: That is not giving long for the experts to
16 meet.

17 Do you want the experts to meet before the reply
18 evidence or after reply evidence?

19 MR O'DONOGHUE: The usual one would be... (inaudible) -- yes,
20 well the...

21 THE CHAIR: They are usually after.

22 MR O'DONOGHUE: We are content (inaudible)... then we are
23 agreed, yes.

24 THE CHAIR: So, let us say 25 March for a meeting. So
25 a meeting will take place quite shortly after reply

1 evidence.

2 So, then fact evidence -- so if expert evidence is
3 sticking with 25 October, fact evidence would be --

4 MR SCHAEFER: So at the end of June, we will still be
5 three months from disclosure.

6 THE CHAIR: I would be inclined to stick with that. You
7 say you think that is tight, Mr O'Donoghue?

8 MR O'DONOGHUE: Sir, it is three months after disclosure,
9 which I apprehend will be substantial.

10 THE CHAIR: This is fact evidence.

11 Well, there is scope for slippage on that if need
12 be. Shall we put in -- have you got an alternative
13 proposal?

14 MR O'DONOGHUE: We are thinking mid-July.

15 THE CHAIR: Mid-July. So, if you said 15 July. Then
16 when do you have reply evidence of fact? Early
17 September?

18 MR O'DONOGHUE: Maybe mid-September.

19 THE CHAIR: Mid-September. So, 15 September.

20 MR SCHAEFER: (Inaudible).

21 THE CHAIR: You have then got -- this is only fact in
22 reply and then you have got another five weeks. That
23 should be all right.

24 Do you want to take instructions? Sorry, those
25 behind you may have stronger view than counsel do on

1 some of these dates. Do you want to take instructions
2 and see if there are any concerns?

3 No? Okay. Have we got any other matters to deal
4 with? Have we dealt with all the other dates?

5 MR SCHAEFER: Sir, I hate to ask you to come up with another
6 date but given where we ended up on the joint disclosure
7 schedules and the fact that a number of those categories
8 are now to be discussed between the experts, we probably
9 need a date for that to happen by before the parties
10 finally seek to agree the lists, so prior to the date
11 you have ordered in paragraph 10 which is, I believe,
12 still the 17th -- yes.

13 MR O'DONOGHUE: So, we obviously know the date we are working
14 to, because that depends on the availability of experts.

15 THE CHAIR: Do you want to agree on that?

16 MR O'DONOGHUE: Yes. I am content with that.

17 MR SCHAEFER: I am sure the parties will consent to that.

18 THE CHAIR: I am just wondering on disclosure whether
19 there should be an earlier date for disclosure on abuse
20 and a later date for disclosure on the economic
21 matters. Is there any benefit to you in that?

22 MR SCHAEFER: I think we both think that (inaudible) --

23 THE CHAIR: Fine. All right.

24 MR O'DONOGHUE: Sir, on the trial date I suggested the first
25 available date in -- on the trial date itself I suggest

1 the first available date in Michaelmas.

2 THE CHAIR: So, we have got the --

3 MR SCHAEFER: That is eight months after the end of the
4 expert process.

5 THE CHAIR: What is wrong with 30 May 2025?

6 MR O'DONOGHUE: Well, sir, as you see in the red that was
7 the date we had indicated for a split trial. We do
8 think that a combined trial is substantially more work.

9 THE CHAIR: What date are you proposing?

10 MR O'DONOGHUE: Sir, the alternatives I gave you were July
11 or, we say more realistically, Michaelmas.

12 THE CHAIR: Right.

13 Well, I think these directions should get you to...
14 all right, give me a second.

15 Well, at the moment I cannot do anything in June or
16 July anyway.

17 MR O'DONOGHUE: Sir, on that basis we think first of all the
18 earliest date suggested is after 30 May, which seems to
19 be out in any event.

20 The second thing, sir, the four-week trial from our
21 perspective was a split trial. If it is everything, we
22 had suggested six weeks.

23 THE CHAIR: You had suggested? Yes. Oh, six weeks.

24 MR O'DONOGHUE: Of course, this can be kept under review.

25 Maybe once we see the exact number of witnesses it may

1 become narrower, but it is always prudent to list on
2 a slightly longer basis than suddenly trying to find
3 dates that are suddenly no longer available.

4 THE CHAIR: I think we are going to have to liaise on
5 fixing this. It is difficult to do at the moment given
6 where we are.

7 Can we liaise through the usual channels in the next
8 few days and try and sort out a trial date?

9 Confidentiality? So, Mr O'Donoghue, I was a little
10 confused as to how the inner and outer confidentiality
11 rings -- who was going to fall in the inner ring, or
12 fall in the outer ring and not be in the inner ring.
13 Have I got that the right way around?

14 MR O'DONOGHUE: So, this is in relation to the application
15 from Mr Horley.

16 THE CHAIR: This is the confidentiality ring. So as
17 I understand it, the principal of the Claimant company,
18 there are concerns about his position. Mr Schaefer
19 says: well, VL is not actually trading at the moment,
20 but if we park that -- or is not trading actively. They
21 obviously understand your concerns. So, I understand why
22 you do not want him in the inner confidentiality ring.
23 What I do not understand is why he cannot be in the
24 outer confidentiality ring and if he is not in the outer
25 confidentiality ring, who is in the outer

1 confidentiality ring? That is my question.

2 MR O'DONOGHUE: Sir, to try and take some heat out of this,
3 at this stage all we have requested is some further
4 information in relation to Mr Horley and we have asked
5 a series of questions which are perfectly fair and if
6 and when we get a response we can deal with the issues.
7 At this stage, from my perspective, it is simply
8 a question of should the further information be ordered
9 and then we can deal with the --

10 THE CHAIR: Right, and as disclosure is not going to be
11 given for a little while, there is probably no great --
12 is that right, there is no urgency to dealing with this?

13 MR SCHAEFER: Sir, both sides -- certainly there are
14 a number of documents that Microsoft has been not
15 providing that are mentioned in the statements of case.

16 But perhaps the way to deal with it is this: there
17 is the question of Mr Horley, there is also the issue of
18 principle, as you say, what is the outer ring for if it
19 is defined as being limited to internal lawyers and
20 ValueLicensing has no internal lawyers.

21 THE CHAIR: That is what my question was, yes.

22 MR SCHAEFER: Perhaps you could deal with the wording of the
23 order today and then the people in the ring could be
24 dealt with between the parties.

25 THE CHAIR: Well, it may be -- I think it is -- it may

1 be there will be no outer ring in this case. If I am
2 with Mr O'Donoghue, confidential documents should be
3 seen by your principal, which would be an extreme
4 position, but if that was the position there would be no
5 outer ring. So, it is not really the terms of the order;
6 it is more the substance --

7 MR O'DONOGHUE: Sir, to be clear we are not shutting anyone
8 out. We want some information and if we get this
9 information this problem may go away.

10 THE CHAIR: So where is the information you seek?

11 MR O'DONOGHUE: So if we go to the request of the Claimant at
12 1294. So this is a letter from VL's solicitors. We
13 sent them a draft order. They then said, you will see
14 in 3, "We want to add certain people", this is
15 22 September. Then if you go to the schedule, 1307.

16 THE CHAIR: Sorry, 1?

17 MR O'DONOGHUE: 1307, this is the schedule to the order,
18 this is the amendment they proposed. You will see for
19 the Claimant there is quite a large number of people
20 proposed and accepted. I think it is -- I count 17, and
21 we have a similar number of people, and you will see
22 that as things stand, the only internal committed
23 persons from either side would be the three individuals
24 proposed. There is no one as of yet from Microsoft's
25 side.

1 THE CHAIR: Sorry, I am having trouble --

2 MR O'DONOGHUE: So it is 1309.

3 THE CHAIR: 1309, yes.

4 MR O'DONOGHUE: (Overspeaking) on behalf of the Claimant,
5 these are the three people they would propose to add,
6 including Mr Horley, and on our side, you will see in
7 a moment, there is no one called.

8 THE CHAIR: Mm-hm.

9 MR O'DONOGHUE: So, this was the request. We quickly
10 responded at 1392.

11 THE CHAIR: Mm-hm.

12 MR O'DONOGHUE: At 3 we say the disclosure information could
13 be extremely sensitive. Then at 9, that is the further
14 information request.

15 "... a full explanation of his role, why you
16 consider that it is necessary for him to specifically
17 give instructions on confidential material, and how you
18 consider the above concerns in respect of him being
19 an Internal Permitted Person can be addressed?"

20 We have had no response to that letter, which is
21 why -- all we seek today is the further information.

22 Now there is one further point, sir --

23 THE CHAIR: I think we now know his role, do we not?

24 MR O'DONOGHUE: Well, we know he was the MD. That is about
25 as much as we know.

1 THE CHAIR: Yes. It is a relatively skeletal company.
2 So, he is obviously, subject to being told otherwise, he
3 is a key person making all the important decisions at
4 VL, I have no doubt, and so you are not going to get
5 an answer to say: do not worry, he just does the
6 photocopying. He is the key man at VL.

7 MR O'DONOGHUE: This all needs to be explained. That is all
8 new, and it needs to be dealt with in an orderly and
9 fair manner, rather than on the hoof in this hearing.
10 Of course, there has been no witness statement. All of
11 this could have been set out in a witness statement.

12 We did ask a further question; it is in the first
13 bundle at 871, please.

14 THE CHAIR: Sorry, 1?

15 MR O'DONOGHUE: 871 of the first. Also, in the second
16 bundle. Page 872.

17 THE CHAIR: Sorry, give me a second. Okay, yes.

18 MR O'DONOGHUE: 1.6 over the page, there is actually
19 a particular concern we have as well:

20 "We note only recently Mr Horley was a sole
21 shareholder in a company called Value Litigation Limited
22 ..."

23 We have asked for various confirmations in relation
24 to that role, and, again, we have not had a response.

25 So, all we seek at this stage is the further

1 information, this is sensitive documentation. If
2 someone is to be admitted to the inner ring, there needs
3 to be a clear, reasoned, we would say, evidenced basis.
4 We have raised legitimate points to which we have not
5 had a response.

6 THE CHAIR: Right. So, there is no dispute that he is
7 allowed into the outer ring?

8 MR O'DONOGHUE: Well, sir, it is a composite point. We need
9 to understand first the information before we can take a
10 view on which tier.

11 THE CHAIR: Right. So, at the moment he can see no
12 disclosure, and disclosure cannot be discussed with him
13 at all?

14 MR O'DONOGHUE: Indeed.

15 THE CHAIR: Well, this obviously needs to be resolved
16 sooner rather than later.

17 MR O'DONOGHUE: Indeed. This is why we have asked for this
18 information. I am surprised we have not had a response.

19 MR SCHAEFER: Sir, if I could ask you to flip back slightly
20 earlier in the bundle to page 883. It has been
21 repeatedly suggested that we have not been forthcoming
22 about questions that were first asked on 2 October. But
23 if you look at this letter written on 12 April, you will
24 see Charles Fussell is saying from the beginning that
25 the confidentiality ring needs to include Mr Horley.

1 If you then go over to page 899, I would like you to
2 read that letter to yourself. (Pause).

3 THE CHAIR: Yes, that is right. You said this is where
4 there has been a change of tack.

5 MR SCHAEFER: What is set out here and what is proposed --

6 THE CHAIR: Sorry, who is in the outer ring -- leaving
7 aside Mr Horley, who is in the outer ring?

8 MR SCHAEFER: Sir, at the moment we propose three employees
9 of ValueLicensing. Really the point of principle is
10 simply whether the outer ring is defined in a way that
11 nobody but that person --

12 THE CHAIR: Yes, it seems -- so the outer ring needs to
13 be defined by reference to appropriate employees --

14 MR SCHAEFER: Until just now, sir, both parties wanted the
15 confidentiality ring order to be made. I mean, members
16 of the ring, other than Mr Horley, who is (inaudible)
17 the confidentiality ring.

18 THE CHAIR: Right. But how many employees does
19 ValueLicensing have?

20 MR SCHAEFER: Six.

21 THE CHAIR: Right. Yes.

22 MR O'DONOGHUE: All we are saying is that this needs to be
23 set out carefully and comprehensively. What Mr Schaefer
24 has not shown you is where the answers to the questions
25 we have asked have been made, and it is a very, very

1 simple request. Frankly, it could have been answered in
2 the time we have been debating this. We do not
3 understand why it is not being answered. We have
4 a particular question in relation to the litigation side
5 which also needs to be answered, and when that is
6 answered properly, we will promptly refer to them on
7 that basis.

8 THE CHAIR: Is Mr Horley still the managing director, or
9 not?

10 MR SCHAEFER: Sir, he is.

11 THE CHAIR: So Mr Horley is the managing director, so
12 that question, we know what he is.

13 MR SCHAEFER: Yes.

14 THE CHAIR: In a small company, so he is on top of
15 everything, or one imagines if he is a competent
16 managing director, which I am sure he is. So that
17 question is answered. What else do you need to know?

18 MR O'DONOGHUE: What we now understand is the skeletal
19 company.

20 THE CHAIR: With six employees, yes.

21 MR O'DONOGHUE: Which, again, is new. All this needs to be
22 carefully set out, that is all we are saying, and we
23 have a particular concern on the litigation which has
24 never been answered, which is a particular reason in
25 itself why we are concerned about the inner ring.

1 THE CHAIR: I am not going to decide this today. Will
2 you please provide Mr O'Donoghue with the information
3 he requires. Can I give a strong indication that I will
4 expect Mr Horley to have access to relevant documents in
5 this litigation unless they are of the utmost
6 sensitivity, and it is not really possible to conduct
7 litigation where no one in the principal company has
8 access to the documents. It is extremely difficult.

9 So, subject to that, I will hear -- if there is
10 a need to come back on this, we will try and do it
11 promptly. So, I will leave you, if we could liaise over
12 the next week or so, and then we can arrange a short
13 hearing to determine this.

14 MR O'DONOGHUE: Yes, there is a mechanism in the ring for
15 people to be added.

16 THE CHAIR: Yes. Thank you. I have probably -- I do
17 not think I need to make a formal order on that today.
18 I will leave the parties to ...

19 MR O'DONOGHUE: Sir, there is one short point which
20 I suspect we do not need to be decided today. We had
21 indicated in the context of expert directions the
22 possibility that, for example, we might have economists
23 who just deal with market definition and dominance, and
24 a different set of economists, for example, dealing with
25 anti-competitive effects. We have not reached any terms

1 on that. For reasons I do not understand, that seems to
2 be resisted in principle. From our perspective, if it
3 happens there will be no duplication, and we do not
4 understand on what basis there is any sensible
5 objection.

6 THE CHAIR: Sorry, this is for?

7 MR O'DONOGHUE: For the expert economists.

8 THE CHAIR: Oh right, so you are asking for two.

9 MR O'DONOGHUE: We propose a division of labour that there
10 are distinct issues in the case that one set of
11 economists could deal with and the other set could deal
12 with, for example, anti-competitive behaviour.

13 THE CHAIR: That seems potentially -- the real world
14 does not necessarily divide as crisply as one would
15 like. Why is that advantageous?

16 MR O'DONOGHUE: Well, sir, it is a question of capacity,
17 trying to get a dedicated singular person to deal with
18 organisations from our perspective is challenging. We
19 do say from our perspective these are quite distinct
20 issues and there would not be duplication, therefore,
21 between the experts.

22 THE CHAIR: Is there any evidence on the problem of
23 getting access to... is there any evidence on this? It
24 is an unattractive proposition to have experts dealing
25 with, with the same qualifications, as I understand it,

1 dealing with different parts of the case given there is
2 no overlap between loss and the nature of the market.
3 One is going to be addressing the nature of the market
4 and the other is going to be addressing loss, and it
5 does seem that there could be considerable overlap
6 between those two areas.

7 MR O'DONOGHUE: Sir, what I can say is (inaudible)... we have
8 had separate teams dealing with these issues.

9 THE CHAIR: I can understand why one might have separate
10 teams doing the donkey work, if I can put it that way,
11 but in terms of having someone with an overall
12 understanding of the economics of the dispute, are these
13 different firms that you are using?

14 MR O'DONOGHUE: Yes, they are different firms. Sorry,
15 I thought I made that clear. These are completely
16 different firms.

17 THE CHAIR: Mr Schaefer --

18 MR O'DONOGHUE: Sir, might I suggest this is something we
19 could revisit at a future date. Perhaps in the light of
20 your indication that some evidence on this would be
21 helpful. It might be something we could deal with
22 either on paper or perhaps in January.

23 THE CHAIR: Okay. So, at the moment there is permission
24 for one expert each, which puts the onus on you,
25 Mr O'Donoghue, to say why. I will keep an open mind

1 when you come back, but it does mean you have to make
2 the application for a second expert.

3 MR O'DONOGHUE: On economics?

4 THE CHAIR: On economics, yes.

5 MR O'DONOGHUE: (Inaudible).

6 THE CHAIR: Separate experts on?

7 MR O'DONOGHUE: Financial accounting. On quantum.

8 THE CHAIR: Yes, I think that is agreed, is it not?

9 Yes.

10 MR SCHAEFER: This is the only point I would raise:

11 Obviously, there is some etiquette -- if the decision is
12 delayed and Microsoft continues to use two firms it
13 becomes a bit of a fait accompli because it becomes a
14 very entrenched use of two firms on their part.

15 THE CHAIR: Anyway, we are where we are at the moment.

16 So, thank you.

17 MR O'DONOGHUE: Also, sir, costs in the case.

18 THE CHAIR: Costs in the case, yes.

19 (4.12 pm)

20 (The hearing concluded)

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