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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

Thursday 21st November 2024

Before:

Justin Turner  
(Chair)

John Davies

Ioannis Lianos

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Claimant**

**JJH Enterprises Limited (trading as ValueLicensing)**

V

**Defendants**

**Microsoft Corporation and Others**

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

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

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

Thursday, 21 November 2024

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(10.02 am)

(Public session)

MR O'DONOGHUE: Sir, there's one correction I want to make.

THE CHAIRMAN: Yes, of course. I have to read out this information.

MR O'DONOGHUE: Sorry.

THE CHAIRMAN: Some of you are joining us on live streams so I'm going to start with a warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Sorry, Mr O'Donoghue.

MR O'DONOGHUE: Yes, on the 2009 Commission guidance I said yesterday it had been withdrawn.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: That isn't quite right. What happened, sir, is parts of it were amended and partially withdrawn and in some respects added to. That amended guidance remains in force. It will be replaced by the draft guidance once finalised. The timeline as I understand it, those to the left and right of you I suspect know this intimately, the deadline for the consultation is

1           the end of this year and there's an expectation that the  
2           final guidelines would be promulgated at some point in  
3           2025.

4       THE CHAIRMAN: Which bit of the guidance has been withdrawn?

5       MR O'DONOGHUE: Not the bits that concern us.

6       THE CHAIRMAN: So it's not withdrawn at the moment?

7       MR O'DONOGHUE: Not those parts, no, but other parts were  
8           amended. So I misspoke and I wanted to --

9       THE CHAIRMAN: No, no, that's helpful. Thank you.

10      MR O'DONOGHUE: I've taken some instructions overnight on  
11           all things Comet but I am content to come back to that  
12           at a later stage.

13      THE CHAIRMAN: All things? Sorry, I misheard that.

14      MR O'DONOGHUE: You asked me yesterday as to the intended  
15           progress of the second audit Comet litigation, how that  
16           might interact.

17      THE CHAIRMAN: Yes, we'll get onto that in due course.

18      MR O'DONOGHUE: I'm happy to come back to that, but I'm in  
19           your hands, sir, as to --

20      THE CHAIRMAN: Let's deal with that later. Yes,  
21           I understand that. Was there anything else?

22      MR O'DONOGHUE: No.

23      THE CHAIRMAN: Thank you.

24      MS LESTER: I'm not sure if this is on.

25

## 1                   Reply submissions by MS LESTER

2           MS LESTER: Members of the Tribunal, the response by  
3           Microsoft to our application is mainly an unpleaded  
4           entirely new case, that it was appropriate and necessary  
5           to have a term preventing all resale of second-hand  
6           licences, both lawful and unlawful, in order to deal  
7           with rife infringements of the use of conditions by  
8           ValueLicensing and others. There are at least four  
9           problems with this approach.

10           First of all, and as you've seen, it is nowhere in  
11           the pleadings. The skeleton arguments and witness  
12           statements in support in response to an application for  
13           summary judgment are not pleadings. The defence merely  
14           contains an assertion, as we've seen, that terms were  
15           necessary having regard to the need to ensure compliance  
16           by licensees with requirements for resale, but the basis  
17           for our application, as you've heard, is that nowhere do  
18           the pleadings set out the basic facts explaining how and  
19           why shutting down the market was appropriate, let alone  
20           necessary, to achieve that.

21           Second problem. You cannot infer that this is what  
22           was intended as Microsoft's pleadings from the  
23           pleadings, even if that were an appropriate thing for  
24           the Tribunal to be doing, and of course it would not be,  
25           because the pleadings are wholly inconsistent with this

1 case. The pleadings are entirely clear throughout that  
2 they were not seeking to keep large numbers of pre-owned  
3 licences off the market. That was not the purpose or  
4 effect of what Microsoft were doing. And, moreover,  
5 customers were completely free to resell their old  
6 licences if they chose not to take the discount.

7 The third problem is that Microsoft now say they  
8 couldn't have pleaded this new case and still are  
9 considering bringing separate proceedings because  
10 they've only just discovered the facts underlying this  
11 new point, and with respect, this simply cannot be  
12 right. The main example Mr Gringras gives of the new  
13 rife infringements as alleged, ie the subdivision of the  
14 Rabobank licences, was averred in an affidavit given by  
15 Mr Horley in 2020 before the ValueLicensing claim was  
16 even issued, and the reference to that is in  
17 Mr Gringras' first statement at paragraph 65.

18 In any case, ValueLicensing certainly does not  
19 accept that it was not permitted to subdivide the  
20 licences, and indeed it told Microsoft that's what it  
21 was doing in 2020, and we know from Mr Gringras' own  
22 evidence that Microsoft itself advised its own customers  
23 that volume licences could be subdivided in 2015, and  
24 the reference to that is in our skeleton argument at  
25 footnote 15.

1 THE CHAIRMAN: Sorry, footnote 19?

2 MS LESTER: It's the reference in our --

3 THE CHAIRMAN: Yes. Thank you.

4 MS LESTER: So ValueLicensing's case, were this ever to be  
5 pleaded, is that this would be completely hopeless.

6 But the fourth problem at this stage is that it  
7 would be hopeless even if it had been pleaded as the  
8 basis for a defence of objective justification. How can  
9 it be alleged that unpleaded ValueLicensing  
10 non-compliance, just been discovered by Microsoft, can  
11 have been the justification for terms introduced in  
12 2015? It makes no sense. And Microsoft's response to  
13 say the test is objective, with respect, simply doesn't  
14 mean that you can make up an ex post facto  
15 justification, refuse to plead it, and put it in  
16 a skeleton argument and witness statement in response to  
17 a summary judgment application.

18 The correct position is that ValueLicensing's  
19 historic compliance or not with the UsedSoft conditions  
20 is entirely irrelevant to these proceedings. It's  
21 simply not true to say that these issues are going to  
22 trial anyway and therefore you might as well let the  
23 defences through, because we have taken the pleadings as  
24 the place where Microsoft sets out its case and there is  
25 nothing in the pleadings about this. And therefore this

1 is not evidence that could be expected at trial that  
2 should be taken into account by this Tribunal.

3 The cases, as you've seen, warn against what's  
4 repeatedly called Micawberism: something might turn up  
5 and therefore you can't summarily dispose of this. But  
6 this, with respect, takes Micawberism to a new level:  
7 something might turn up in a case we might plead in  
8 separate proceedings at an unspecified time that might  
9 have justified conduct ten years ago.

10 What we did say is an issue for these proceedings,  
11 indeed for a quantum trial or the stage of the  
12 proceedings dealing with quantum and quantum only, is  
13 the scope of the UsedSoft conditions, in other words,  
14 what UsedSoft means and what impact that has on  
15 licensing. Not ValueLicensing's alleged compliance or  
16 otherwise with them. And the reason the scope of the  
17 UsedSoft conditions are relevant to quantum is because  
18 we have only ever claimed damages for licences that  
19 ValueLicensing could lawfully have resold, and therefore  
20 obviously the Tribunal will need to know what that  
21 means. In the counterfactual world, without Microsoft's  
22 anti-competitive conduct, which licences could lawfully  
23 have been sold?

24 So obviously the scope of UsedSoft is relevant, but  
25 ValueLicensing's historic compliance in the actual world

1 is not relevant to any pleaded issue so this is not  
2 an issue going to trial and not a reason to reject our  
3 summary judgment application.

4 Now, the Tribunal suggested yesterday that a better  
5 attempt at a factual basis for the defences might have  
6 been a perceived risk at the time by Microsoft, at the  
7 time it introduced the impugned terms, that there might  
8 be non-compliance with the UsedSoft conditions and  
9 therefore that it needed some sort of blanket  
10 restriction on resale to deal with the problem because  
11 it had tried other remedies and failed.

12 With respect, there are two key problems with this.

13 First of all, this is simply not pleaded. Microsoft  
14 was given every chance to plead its case and indeed  
15 ordered to do so in a way that would enable us to  
16 understand its case. It could have said that we tried  
17 other remedies, they failed, and therefore we need an  
18 across-the-board policy to deal with this, but it  
19 hasn't. And with respect, of course -- and this is not  
20 what was meant -- it's not for the Tribunal to speculate  
21 on what facts might have been pleaded. But particularly  
22 in this case where the pleading says they weren't trying  
23 to keep second-hand licences off the market. Microsoft  
24 is precisely not saying that they were and that that was  
25 justified as a way of addressing an actual perceived

1 risk of breaches of the UsedSoft conditions, and that  
2 their other suite of remedies that they referred to as  
3 a copyright holder had been tried and failed. They're  
4 saying the opposite.

5 The second key problem with this is that Microsoft  
6 cannot square the circle, as was put to them yesterday,  
7 even if they try to plead this now, and that is why we  
8 seek summary judgment. They simply can't have it both  
9 ways. They can't say our primary case is that we didn't  
10 introduce terms to keep used licences off the market,  
11 but in the alternative we did introduce terms to keep  
12 used licences off the market.

13 Had they made that alternative case, which we say  
14 would not have been open to them, it's obviously absurd,  
15 we would have been entitled to rely on that as  
16 an admission on our case for liability. We'd have had  
17 the right to reply and all the other procedural  
18 entitlements of parties responding to pleadings.

19 But if they really want to rely on their new case in  
20 their skeleton argument and witness statement, they  
21 would of course have to apply to amend their pleadings  
22 to this Tribunal and amend it to run essential facts  
23 that are not now pleaded. And we could then have had  
24 a reply and know the case that we would have to meet.

25 The first purpose of pleadings is to allow the other

1 party to know the case they have to meet, from the King  
2 v Stiefel, three purposes. But we say this case is  
3 a very good illustration of all three purposes of proper  
4 pleadings. The first is to know the case against you.  
5 The second, and crucial here, is to ensure that the  
6 parties can properly prepare for trial and that  
7 unnecessary costs aren't spent, and Tribunal time,  
8 chasing points which aren't in issue or which lead  
9 nowhere. That's the second factor underlined by  
10 Mrs Justice Cockerill.

11 The Tribunal is about to hear submissions on  
12 disclosure, and without stealing the thunder of  
13 Mr Schaefer making those submissions, I make one point.

14 Microsoft are newly seeking disclosure on  
15 ValueLicensing's historic compliance with the UsedSoft  
16 conditions. They think that's a relevant issue in these  
17 proceedings. In fact, they described it yesterday as  
18 a major issue in this case.

19 But the parties have been debating the scope of  
20 disclosure since before the second CMC in October 2023,  
21 at which the categories for disclosure were fixed by the  
22 Tribunal, but it's only very recently that Microsoft  
23 have sought to introduce new categories of disclosure  
24 going to ValueLicensing's compliance with UsedSoft, and  
25 we have resisted. It is simply not --

1 THE CHAIRMAN: Sorry, how does that fit in with the  
2 documents that appeared a few months ago? Those were in  
3 different proceedings, is that the --

4 MS LESTER: The documents that appeared a few months ago?  
5 Yes, that's different. They are now seeking further  
6 categories of disclosure in these proceedings. And we  
7 say this is an illustration of why it should be clear  
8 from the pleadings what the issues are in these  
9 proceedings. If these defences are not now struck out  
10 and are permitted to stand, there will be argument  
11 before this Tribunal, and repeated uncertainty and waste  
12 of costs about what is in and what is out because the  
13 issues are simply not clear from the pleadings. This is  
14 a very helpful illustration of that key purpose.

15 The third purpose of pleadings is for the parties to  
16 do an audit check of the key elements of what they are  
17 pleading, here the defences, and we say that again this  
18 case is a helpful illustration of that principle because  
19 it is not satisfactory, that we still don't know the  
20 precise remit of the defence that Microsoft is in fact  
21 relying on. We specifically asked them which defence  
22 they were relying on and they replied: legitimate aims  
23 at page 244, you saw that yesterday, core bundle, B/5.

24 They now say, although we are still not entirely  
25 clear, that in fact they're relying on the slightly

1 different reasonable response to an attack on their  
2 commercial interests I think is now what is suggested.  
3 If that is so, that should have been clearly stated in  
4 the pleadings either at the outset or when we asked. We  
5 said: there are different defences here, could you  
6 please tell us which one is his and what you rely on?  
7 If they had come back saying: well, the attack on our  
8 commercial interests, for example, was an attack on our  
9 intellectual property rights as copyright holders, that  
10 is something we could have responded to. There would  
11 have been some factual basis for a bare assertion.

12 We say in any event it doesn't matter, because  
13 Microsoft have accepted that they need to show  
14 necessity. And this is my final point, members of the  
15 Tribunal, just on the meaning of the word "necessity",  
16 because this did come up yesterday.

17 Now, Microsoft doesn't suggest that "necessary"  
18 doesn't mean what it says: necessary. You have seen the  
19 reference to the Lumsdon Supreme Court judgment in our  
20 skeleton argument at paragraph 27 and the reference to  
21 could it have been achieved by less onerous means or  
22 not.

23 Just two other references. One, again the  
24 Mastercard Interchange Court of Appeal judgment, which  
25 is -- you've seen it in the authorities bundle, tab 24.

1 I don't ask you to turn it up. But what is said by the  
2 Court of Appeal at paragraph 105:

3 "... a restriction will only be indispensable [ie  
4 necessary] if there are no ... less restrictive means of  
5 achieving the same benefits or efficiencies ..."

6 And that is why, of course, in the Hilti situation  
7 the Court of Justice said: if you haven't used the  
8 plainly less onerous and more appropriate means of  
9 vindicating your rights through legislation aimed at  
10 just that, then you can't simply shut down a market.  
11 Exactly the situation we have here.

12 So the final reference which I think is helpful just  
13 to show you is from the Purple Parking judgment at  
14 tab 15 on this point of the authorities bundle,  
15 paragraph 234, page 1056. That section of the judgment  
16 is about objective justification in relation to the  
17 arrangements for Terminal 3, you see the heading on  
18 page 1052. And at 233 Mr Justice Mann was explaining  
19 that it hadn't been demonstrated that the relief of  
20 congestion could justify relocation of all off-airport  
21 meet and greet operations at the Terminal 3 car park.

22 But if I could just ask the Tribunal to read paragraphs  
23 234 and 235 --

24 THE CHAIRMAN: These points didn't go on appeal?

25 MS LESTER: I don't think so, but we'll check that.

1 THE CHAIRMAN: Yes.

2 MS LESTER: So a high degree of necessity of objective  
3 justification is relied on. The Commission had said not  
4 satisfied because there were other solutions. And at  
5 235:

6 "The factor or factors relied on must therefore be  
7 justified in that sense -- not merely that it is  
8 a solution to the relevant problem, but that it is the  
9 solution to the problem. If there are other solutions  
10 then the conduct is not justified."

11 We're checking the appeal point, but those are my  
12 submissions.

13 Reply submissions by MR O'DONOGHUE

14 MR O'DONOGHUE: One new point raised by Ms Lester that I do  
15 need to come back on. She suggested there were a whole  
16 bunch of new UsedSoft disclosure categories; in fact  
17 categories 2.1 to 2.5 inclusive are UsedSoft and are  
18 agreed by VL, and they're agreed --

19 THE CHAIRMAN: This is disclosure categories?

20 MR O'DONOGHUE: Yes. They've agreed five UsedSoft  
21 disclosure categories precisely because, as Ms Lester  
22 concedes, this is relevant for trial.

23 THE CHAIRMAN: We'll get on to disclosure, of course.

24 Right, where do we go now? We're going to look at  
25 access to documents.

1 MR O'DONOGHUE: Sir, on Purple Parking I can confirm there  
2 wasn't an appeal.

3 THE CHAIRMAN: There wasn't an appeal, sorry, thank you.

4 Public submissions on access to documents by MS LUKACOVA

5 MS LUKACOVA: Sir, I realise this isn't my application, of  
6 course, but there is a proposal that we make that we say  
7 might short-circuit some of this, and so I wouldn't want  
8 to waste anyone's time by waiting to mention that. It  
9 isn't new, it was already mentioned in Mr Henderson's  
10 ninth witness statement. What I would propose is to  
11 give to the Tribunal the headline points, if convenient,  
12 just so that everyone's on the same page.

13 The key points are this. We say Microsoft has acted  
14 properly throughout, that all documents that have been  
15 designated as restricted have been designated properly  
16 throughout. However, in the light of ongoing  
17 discussions about this, Microsoft has agreed to  
18 redesignate a proportion of the sample documents and  
19 that has already happened and that isn't the only --

20 THE CHAIRMAN: What's the proportion?

21 MS LUKACOVA: It's 14 out of 20.

22 THE CHAIRMAN: That's just the 20. What about the other  
23 6,000-odd?

24 MS LUKACOVA: Precisely. But in addition to having  
25 redesignated those documents, also on a voluntary basis,

1 Microsoft has confirmed that it is prepared to apply the  
2 same permissive approach to other documents, but what we  
3 would need is VL to identify documents that they need to  
4 take instructions on.

5 THE CHAIRMAN: I'm assuming -- is it agreed?

6 MR SCHAEFER: Sir, no. That's precisely what our  
7 application complains about, the suggestion that --

8 THE CHAIRMAN: I understand, I just wanted to check whether  
9 they had been behind the scenes.

10 Can I just let you know our provisional view is that  
11 Mr Horley should have access to documents and at the  
12 moment we don't see that a case has been made out for  
13 the exceptional course that he should not have access to  
14 document, and certainly we can't see any argument at all  
15 for documents that are more than five years -- that are  
16 older than five years. Those more recent, there may be  
17 some financial figures which are subject to discussion,  
18 but it's not satisfactory given the approach that's been  
19 taken, not satisfactory to say we're going to go away  
20 and have another look. That's our provisional view.  
21 We'll hear argument but just to let you know.

22 MS LUKACOVA: We'll all have points on that but perhaps I'll  
23 sit down.

24 THE CHAIRMAN: Yes. I'm just wondering if -- I'm assuming  
25 you're not disagreeing with that provisional view?

1 MR SCHAEFER: Sir, obviously not.

2 THE CHAIRMAN: Perhaps Microsoft can explain what it is that  
3 Mr Horley cannot have access to under conditions of  
4 confidence and why, and I appreciate we got the 20  
5 documents, that may be a starting point, but it's up to  
6 you what -- I'd like to get into the detail as quickly  
7 as possible.

8 MS LUKACOVA: Certainly. Given that we will now be going to  
9 the restricted documents in short order, would this be  
10 a convenient time to go into closed session?

11 THE CHAIRMAN: Yes, it may be necessary for this.

12 (10.25 am)

13 (Continued in closed session)

14 (11.57 pm)

15 (Public session resumed)

16 THE CHAIRMAN: I warn you, we're out of camera now, or if we  
17 can be out of camera, so do you want to let people know?  
18 You have? Right. It should be switched on.

19 Did you have anything you wanted to add?

20 Submissions by MR SCHAEFER

21 MR SCHAEFER: Sir, yes, two things. We have been addressing  
22 the position of Mr Horley. There are in fact five  
23 members of VL in a ring and we would invite you to make  
24 the same decision in relation to all of them -- sorry,  
25 internal permitted persons, external ring.

1 THE CHAIRMAN: Right, I don't know if any issues arise on  
2 that. Why do you need so many, would be my next  
3 question?

4 MR SCHAEFER: Those are the people that have been admitted  
5 into the ring. I don't have specific reasons for all of  
6 them because those were between the parties.

7 THE CHAIRMAN: I see. So ...

8 MR SCHAEFER: Insofar as documents are re-designated as  
9 confidential, they'll be seen anyway.

10 THE CHAIRMAN: If the documents are confidential, they'll  
11 obviously go into the ...

12 MR SCHAEFER: As I understood the way you saw the order  
13 working was effectively documents would be treated as  
14 confidential rather than restricted, in which case --

15 THE CHAIRMAN: For the historic documents, subject to  
16 an opportunity to make a further application with more  
17 specific reasons, and for recent documents, insofar as  
18 they include financial information, they'll be  
19 treated -- then obviously it's open to raise other  
20 issues as well. So that's where we got to. So I think  
21 we probably don't need to deal with who else is in the  
22 ring, yes.

23 Discussion on costs

24 MR SCHAEFER: The other matter is costs. For the record, in  
25 light of your comments, we will be seeking indemnity

1 costs. We had previously proposed to the other side  
2 that those be dealt with subsequently in writing and  
3 we're prepared to stick to that.

4 MS LUKACOVA: That would be (inaudible) but it may be that  
5 the way to deal with it is to deal with it in writing.

6 THE CHAIRMAN: To deal with costs? Why can't we deal with  
7 costs now?

8 MS LUKACOVA: With the principle of costs?

9 THE CHAIRMAN: Yes.

10 MS LUKACOVA: Or we can deal with it now.

11 THE CHAIRMAN: So the principle of costs, let's deal with it  
12 now.

13 MS LUKACOVA: Very well. It may make --

14 THE CHAIRMAN: My -- Mr Schaefer, although it's been a --  
15 we've taken a robust view on this, I don't think we're  
16 really contemplating indemnity costs. Of course you can  
17 argue for it if you want, but --

18 MR SCHAEFER: Sir, we would suggest they're appropriate in  
19 this case. I appreciate that this is an unusual thing,  
20 but that is to satisfy a particularly high threshold.  
21 Effectively what has happened is your indication at the  
22 CMC that Mr Horley should have access to all but the  
23 most sensitive documents has been entirely ignored.  
24 Microsoft was in breach of the confidentiality order, in  
25 terms of the highlighting, which it didn't carry out at

1 all, and the designation of documents -- and as you  
2 yourself said that the evidence put in support for the  
3 designation of documents was plainly insufficient, and  
4 for those reasons we do suggest that this is a case for  
5 indemnity costs.

6 MS LUKACOVA: That is -- this comes nowhere near the  
7 threshold of it being out of the norm in respect of the  
8 indemnity costs. Plainly we've lost on the application  
9 so I have to accept that a costs order is the  
10 appropriate order but I will submit that costs on the  
11 standard basis is the appropriate order to be made here.  
12 It isn't the case that we haven't engaged over time.  
13 There is extensive correspondence between the parties in  
14 which we have kept saying that if VL were to, for  
15 example, identify specific documents in relation to  
16 which they wished to take instructions, we would look at  
17 those again. We did also ultimately agree on  
18 a pragmatic basis to redesignate a proportion of the  
19 documents. And my overall submission is that we did  
20 engage and it would be inappropriate to order indemnity  
21 costs in this case.

22 THE CHAIRMAN: Anything further you want to add?

23 MR SCHAEFER: No. (Pause).

24 THE CHAIRMAN: I will award you your costs, Mr Schaefer, but  
25 not on an indemnity basis, on a standard basis.

1 MR O'DONOGHUE: We can now move on to disclosure.

2 THE CHAIRMAN: Yes.

3 MR O'DONOGHUE: Subject to (inaudible) already have.

4 THE CHAIRMAN: Yes.

5 Further discussion

6 MR O'DONOGHUE: Sir, on disclosure there were essentially  
7 two buckets. There was a preliminary point as to what  
8 we say is non-compliance with CMC3 orders. We think  
9 that should go hand in glove with the disclosure.

10 On disclosure --

11 THE CHAIRMAN: As I understand, that failure to comply,  
12 that's now been sorted, those materials have been  
13 produced.

14 MR O'DONOGHUE: Not quite, sir. I'll come back to that.

15 THE CHAIRMAN: Okay.

16 MR O'DONOGHUE: But, sir, on the disclosure we seek from the  
17 Claimant, it's again no criticism of anyone, it has  
18 been rather chaotic. We received a marked-up version of  
19 the JDS on the evening before the hearing yesterday. We  
20 worked frantically overnight and early this morning to  
21 amend that and we sent that to the Tribunal early this  
22 morning. A number of things have been agreed.

23 For our part, we would very much like to start with  
24 our disclosure and then come back to the Claimant's  
25 disclosure because we think that it will actually

1 shorten things --

2 THE CHAIRMAN: In principle that's fine, but obviously we  
3 had made our comments yesterday that we -- as to how  
4 efficiently we're going to deal with liability in this  
5 trial --

6 MR O'DONOGHUE: Sir, that's the other point I wanted to come  
7 to.

8 THE CHAIRMAN: Because a lot of these documents -- and it's  
9 only an initial impression, it may be completely wrong,  
10 but a lot of these documents seem to relate to quantum.

11 MR O'DONOGHUE: For some of them, that's entirely true. In  
12 that context, there's a second point I was going to  
13 make. It may be useful, if only on a provisional basis,  
14 if the Tribunal were to sketch out in more detail what  
15 potential splits it has in mind, and that might allow us  
16 to refine even further the JDS categories particularly  
17 of course on the Claimant's side. So for those reasons  
18 we would suggest we start with our disclosure.

19 THE CHAIRMAN: Yes.

20 MR O'DONOGHUE: And I suspect more realistically tomorrow we  
21 come back to the Claimant's disclosure.

22 THE CHAIRMAN: Right.

23 MR O'DONOGHUE: Because I'm optimistic that with the  
24 agreements that have been achieved overnight and giving  
25 VL time to digest what we sent this morning, that we can

1 finish that in no more than half a day tomorrow.

2 THE CHAIRMAN: Right, but in terms of this trial going  
3 forward, you applied some time ago to stay dominance, as  
4 I recall?

5 MR O'DONOGHUE: Yes, a split to deal with --

6 THE CHAIRMAN: And I said I wasn't prepared to do it at that  
7 stage and then required you to plead it.

8 MR O'DONOGHUE: Yes.

9 THE CHAIRMAN: And there is a pleading of sorts, which I'd  
10 quite like to go through and find out what the issues  
11 are on that.

12 MR O'DONOGHUE: Okay.

13 THE CHAIRMAN: But if we park that for a moment and then  
14 look at the nub of the dispute, there doesn't seem to be  
15 a lot in issue factually until you start looking at the  
16 extent to which the Claimant's business has been  
17 impacted by the behaviour, whether it's abusive or not,  
18 but you say, look, there aren't that many contracts in  
19 play and the Claimant exaggerated. But if we're just  
20 dealing with liability, I wasn't sure whether we needed  
21 to get into that at all.

22 MR O'DONOGHUE: Again, it may be more useful to address that  
23 in the context of categories.

24 THE CHAIRMAN: It may, but one has to start off with what  
25 the issues are going to be for trial. If we had

1 a liability-only trial, what would the issues be?

2 That's the starting point.

3 MR O'DONOGHUE: Yes.

4 THE CHAIRMAN: I don't know if you've -- it may be you've  
5 not had a chance to turn your minds to that yet.

6 MR O'DONOGHUE: Candidly, no.

7 THE CHAIRMAN: No. Mr Schaefer?

8 MR SCHAEFER: Sir, we had some initial discussions in light  
9 of your indications yesterday, and I can outline where  
10 we are now, which isn't --

11 THE CHAIRMAN: You say "we". You're speaking on behalf of  
12 your clients?

13 MR SCHAEFER: Yes.

14 The indication you gave yesterday of stricter case  
15 management and potentially trying to resolve liability  
16 more quickly and more efficiently was very attractive to  
17 my client, particularly in light of the submissions  
18 yesterday.

19 It does appear to us that it would be possible,  
20 although I'm not in a position to put before you right  
21 now a completely finalised set of proposals as to how  
22 that would work, but it would likely be possible,  
23 essentially for the reasons you've just given, to  
24 conduct a shorter and more focused trial on liability,  
25 subject really -- and this is the nub -- to the

1 Tribunal's decision on the strikeout application,  
2 because if Mr O'Donoghue is going to run the arguments  
3 he was outlining yesterday in the way he said he would  
4 run them, which I think he said would involve going  
5 through all of ValueLicensing's transactions in a way  
6 that was I think he said like determined in Chancery  
7 by itself, that's not only not a narrow liability trial,  
8 it's a far wider liability trial than is currently  
9 contemplated.

10 THE CHAIRMAN: Let's just park that issue for the moment,  
11 which we'll need to come back to because is important,  
12 but on the case otherwise, apart from the shadow  
13 copyright infringement trial, what is going to be in  
14 issue? I'm not going to hold you to anything, but in  
15 broad terms, if you've turned your mind to it, what's  
16 going to be in issue in the first trial on liability  
17 because a lot of the facts are agreed.

18 MR SCHAEFER: At a very high level, sir, we agree with you  
19 that much of the dispute appears to be about the extent  
20 of the conduct rather than the nature of the conduct.  
21 There are some areas, particularly in respect of the  
22 conduct allegations, as to the term allegations, where  
23 I'm sure Microsoft will say it's broader and more  
24 diffuse, but it seems to us that we could -- absent at  
25 least objective justification, we could come up with

1 proposals to try to reach a much shorter and narrower  
2 trial with narrower disclosure for that reason.

3 As I say, I can't give you chapter and verse.

4 THE CHAIRMAN: No.

5 And you've not had a chance to turn your mind to it  
6 yet, Mr O'Donoghue?

7 MR O'DONOGHUE: We've been frantically tied up with the JDS.

8 THE CHAIRMAN: Yes.

9 MR O'DONOGHUE: I would suggest that by the end of today,  
10 whenever that is, outside of normal working hours, that  
11 the parties exchange their respective proposals to  
12 address this --

13 THE CHAIRMAN: I think we need to -- before we -- I mean,  
14 I don't want to push disclosure off to the never-never  
15 because we have bigger fish to fry sort of thing, but  
16 I do think determining today and tomorrow whether this  
17 is an appropriate course, having a trial of narrow  
18 compass and working out at least a preliminary view of  
19 what the issues are likely to be, which may need to be  
20 refined, we can establish that and some -- agree to  
21 categories of disclosure --

22 MR O'DONOGHUE: Yes. There are a number of things which can  
23 be taken off the table on any view, so (inaudible) and  
24 quantum.

25 THE CHAIRMAN: Yes.

1 MR O'DONOGHUE: That can be put over to one side with  
2 a question mark. There's an open question over  
3 objective justification, but I apprehend, sir, it's the  
4 irreducible minimum of liability that you're  
5 particularly interested in.

6 THE CHAIRMAN: Yes, yes. And then we'd need to think of how  
7 long a trial that would be and what sort of evidence,  
8 and I'd like to have a discussion about that tomorrow.

9 MR O'DONOGHUE: Yes.

10 THE CHAIRMAN: With a view to having -- because I appreciate  
11 this is being sprung on you and you need time to go away  
12 and reflect on it -- possibly another CMC in January.

13 MR O'DONOGHUE: Certainly. I was about to say that.

14 THE CHAIRMAN: Okay.

15 MR O'DONOGHUE: It does seem with the best will in the world  
16 we would not reach (inaudible) on disclosure today but  
17 I was thinking that perhaps a one-day hearing, maybe  
18 even just with the juniors, to try and expedite it  
19 in January would be appropriate.

20 THE CHAIRMAN: Yes. Let's try and make some progress --

21 MR O'DONOGHUE: Today and tomorrow.

22 THE CHAIRMAN: -- today and tomorrow. But in terms of just  
23 jumping into the disclosure document, I'm not sure  
24 whether -- I think there needs to be some discussion,  
25 first, of what the issues are going to be and I'm just

1           wondering whether we should rise now and give you the  
2           afternoon --

3           MR O'DONOGHUE: Well, sir, given that we're stopping at 3.00  
4           anyway --

5           THE CHAIRMAN: -- to look at issues --

6           MR O'DONOGHUE: -- it may make sense to draw stumps now and  
7           then we --

8           THE CHAIRMAN: We hit the ground running tomorrow.

9           MR O'DONOGHUE: Yes.

10          THE CHAIRMAN: But I do want to start with what the issues  
11          for that trial will be first.

12          MR O'DONOGHUE: Of course. I understand the logical  
13          sequence.

14          THE CHAIRMAN: And then with regards to the copyright issue,  
15          I understand you're saying that there's copyright  
16          infringement. I've given a preliminary indication that  
17          we're not yet persuaded whether that's going to have any  
18          relevance. Your perceived risk of infringement seems to  
19          be the relevant thing. So if you're seeking to hold  
20          these proceedings up pending the High Court, if you're  
21          seeking to get disclosure in these proceedings mirroring  
22          what's going on in the High Court, then we will need to  
23          hear argument on that, which will -- and maybe that  
24          can't be done until January.

25          MR O'DONOGHUE: As I said yesterday on that, I don't want to

1           get ahead of myself. Having taken instructions  
2           overnight, I can say the following. It does seem that  
3           the High Court action is inevitable. The response we've  
4           had from VL, they don't accept anything.

5           THE CHAIRMAN: Yes.

6           MR O'DONOGHUE: We're keen to progress those proceedings in  
7           the High Court as speedily as possible because we say  
8           that on analysis they will dispose of all, if not most,  
9           of the claim in any event. So we will therefore  
10          prosecute those proceedings as expeditiously as we can,  
11          but of course we're in the hands of the court and VL as  
12          to how much ball has been played.

13                    One possibility, of course --

14          THE CHAIRMAN: Okay, at the moment I'm considering fanciful  
15          the suggestion that all VL's business is a breach of  
16          copyright. At the moment, I'm working on the basis  
17          that's fanciful. If you can make a case out in due  
18          course, because it's not pleaded, so --

19          MR O'DONOGHUE: Well, it is an issue in the following sense.  
20          You saw in their pleadings, which I showed you  
21          yesterday, they say their business is exclusively bulk  
22          licensing.

23          THE CHAIRMAN: Yes.

24          MR O'DONOGHUE: That is the subdivision point. So if we're  
25          right on how we see subdivision, that is an issue

1           between the parties, we say that is the end of --

2           THE CHAIRMAN: Maybe that needs to be an issue in these  
3           proceedings, whether --

4           MR O'DONOGHUE: There may be jurisdictional questions, given  
5           that this is a competition-only Tribunal. But, sir, all  
6           this is to say that I don't want to get ahead of myself.  
7           There will be an issue in the new year, early, I hope,  
8           as to how the two proceedings interlink. You wanted  
9           full transparency on this and I don't want to, at this  
10          stage, rule anything in or out as such. We'll have to  
11          see once the proceedings are up and running what the  
12          respective timings are. Of course, one possibility is  
13          that the High Court is willing to expedite the  
14          IP proceedings, we then have a res judicata between the  
15          parties that could be factored in, to the extent  
16          necessary, into a trial in 2026 in this Tribunal, but  
17          there are other possibilities. There are a number of  
18          permutations and we want to think about this in a more  
19          methodical manner. That's all I'm saying to do.

20          THE CHAIRMAN: So -- right. So shall we adjourn? Is there  
21          anything else you feel can usefully be done today?

22          MR O'DONOGHUE: At the risk of testing the Tribunal's  
23          patience further, might we start at 10.00 tomorrow  
24          (overspeaking) --

25          THE CHAIRMAN: Yes, absolutely.

1 MR O'DONOGHUE: Thank you.

2 MR SCHAEFER: Yes, sir, just to be clear, what will happen  
3 tomorrow is the parties will make submissions on the  
4 shape of the trial and the broad issues?

5 THE CHAIRMAN: So there'll be some disclosure categories  
6 which can proceed in any event, hopefully by agreement,  
7 and there may be some disclosure categories are in  
8 dispute that we can sort out tomorrow because they're  
9 questions that are going to be in the liability trial.  
10 We then need to think at what stage disclosure is going  
11 to take place for quantum, and those will be less  
12 urgent, and then at some point we'll need to just decide  
13 what those categories are. Then there may be disputes  
14 around issues as to -- there may be disputes about sort  
15 of what issues will be appropriate for the liability  
16 trial, and obviously top of the list is this copyright  
17 matter, but there may be other issues as well.

18 MR O'DONOGHUE: Directions.

19 THE CHAIRMAN: And directions. Well, it may be we -- yes.

20 So tomorrow I'd like to be able to discuss the shape  
21 of the trial, what the headline issues will be, whether  
22 there are any disputes as to what the issues will be,  
23 what disclosure is neutral to that debate and what  
24 disclosure is agreed, and then we can fix a further CMC  
25 to at least discuss those issues, so I'm afraid it will

1 depend a little bit where you are, and then we'll need  
2 to discuss some further detail what happens on the  
3 copyright matter. As Mr O'Donoghue says, one option is  
4 that the High Court proceeds. I'm not entirely  
5 convinced that there's a jurisdictional point, because  
6 if this defence is relevant to the competition case,  
7 then I'm not sure why this court can't determine it. It  
8 may not be able to determine a copyright claim, but it  
9 can determine this as an interpretation of UsedSoft and  
10 so forth.

11 MR SCHAEFER: As I understood, the parties had been  
12 proceeding on the basis that the court could determine  
13 how UsedSoft was to be interpreted.

14 THE CHAIRMAN: The court could? You were proceeding on that  
15 basis?

16 MR SCHAEFER: That was one of the issues that was an issue  
17 between the parties was the proper interpretation of  
18 UsedSoft quite separately from this new issue of --

19 THE CHAIRMAN: Yes. I mean, obviously all these things  
20 could be revisited --

21 MR O'DONOGHUE: But the question of jurisdiction would be  
22 a question as to who's best placed to deal with that.

23 THE CHAIRMAN: Bear in mind the High Court proceedings --  
24 these proceedings have been going on for three years and  
25 the High Court proceedings haven't started, obviously

1           there's something to be said for just cracking on here  
2           on that narrow issue.

3   MR O'DONOGHUE:  The Comet Application is a self-contained point,  
4           which  
5           could be expedited.

6   THE CHAIRMAN:  Yes.  Well, could be expedited in the High  
7           Court?

8   MR O'DONOGHUE:  Yes.

9   THE CHAIRMAN:  But the High Court proceedings haven't  
10           commenced yet.

11   MR O'DONOGHUE:  They were stayed to commence in the new year  
12           once --

13   THE CHAIRMAN:  I'm not quite on top of where those --

14   MR O'DONOGHUE:  The High Court proceedings actually started  
15           in 2018.

16   THE CHAIRMAN:  And they've been --

17   MR O'DONOGHUE:  Stayed until now.

18   THE CHAIRMAN:  You'll need to assist me with that a bit  
19           tomorrow.

20   MR O'DONOGHUE:  Yes, we'll set out (overspeaking) --

21   THE CHAIRMAN:  I'm sure you explained, but I'm just --

22   MR O'DONOGHUE:  That's very helpful.  We'll do our best in  
23           the 18 hours.

24   THE CHAIRMAN:  We will fix -- obviously things that can't be  
25           determined in the next two days, we'll determine  
          in January.  We don't want to cause further delay.

1 (12.20 pm)

2 (The hearing adjourned until 10.00 am

3 on Friday, 22 November 2024)

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