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5 **IN THE COMPETITION**

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

6 **APPEAL**

7 **TRIBUNAL**

8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Monday 24<sup>th</sup> February 2025

13  
14 Before:

15  
16 Justin Turner KC

17  
18 (Sitting as a Tribunal in England and Wales)

19  
20  
21 BETWEEN:

22  
23 **Claimants**

24  
25 **JJH Enterprises Limited (trading as ValueLicensing)**

26  
27 V

28 **Defendants**

29  
30 **Microsoft Corporation and Others**

31  
32  
33 **A P P E A R A N C E S**

34  
35  
36  
37 Max Schafer and Jon Lawrence (Instructed by Charles Fussell & Co LLP) on behalf of JJH  
38 Enterprises Limited.

39  
40 Robert O' Donoghue KC, Nikolaus Grubeck, Jaani Riordan, Kristina Lukacova and Geoffrey  
41 Hobbs KC (Instructed by CMS Cameron McKenna Nabarro Olswang LLP) on behalf of  
42 Microsoft Corporation and Others.

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(10.30 am)

(Proceedings delayed)

(10.50 am)

Opening remarks

MR JUSTIN TURNER: Just give me a second.

(Pause)

Right, disclosure. Just to recap, at the last hearing in November -- are we online? Do I need to? Sorry, I will just do this first. Some of you are joining us via live stream on our website. I will start with a warning: an official recording is being made and an authorised transcript will be produced. 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.

So just again just to recap, so in November we formed the view, the tribunal formed the view then that the application for disclosure was insufficiently prepared.

There had been a failure in particular to identify the relevant issues in the case for which disclosure was necessary.

The skeletons provided insufficient assistance to the tribunal dealing in what was recognised to be a large disclosure application in only a page or two.

The tribunal directed that the application had to be properly prepared with greater attention in particular to the issues to which disclosure is addressed and directed the parties meet.

The tribunal invited the parties to come back in January to deal with this issue. That didn't happen. I should add that at the November CMC the tribunal reconsidered what should happen at a first trial. We accepted the formulation advanced by Microsoft.

So that was an additional reason for giving the parties, and in particular the claimant,

1 a further opportunity to reformulate the disclosure applications.

2 The position today is that in addition to dealing with disclosure applications we have  
3 a host of further issues now to deal with, which we do not have an opportunity to deal  
4 with today.

5 On disclosure alone I have been invited to read hundreds of pages of evidence going  
6 right back. That evidence, much of it seems to focus on mutual criticisms and sniping  
7 of the way at the other party has described matters and dealt with matters.

8 There's still very little focus on the substance of why disclosure is necessary in order  
9 to get this matter to trial and it makes it very difficult to understand why disclosure is  
10 being sought.

11 Whereas the tribunal had ample time to hear a disclosure application in January, it has  
12 limited time I'm afraid in February so we'll have to do the best we can in the half day  
13 available.

14 So I was proposing, subject to anything parties have to say, to deal first with matters  
15 that were held over from November and in particular the disclosure to be given by  
16 Microsoft as the first topic. Is that an appropriate way of going forward?

17 MR SCHAEFER: Sir yes, I'm grateful.

18 MR JUSTIN TURNER: I remain unclear as to why disclosure is necessary and  
19 proportionate -- let's start off -- at all, by reference to how you intend to prove various  
20 elements of your case. Can I remind you of the transcript from the last hearing? By  
21 the way, do we have the document where the issues were set out? I appreciate there  
22 have been -- the document you all handed up, you had rival positions: Microsoft's  
23 formulation of how the trial would proceed and your formulation of how the trial would  
24 proceed. Is that in the bundles? Or has that been -- I noticed in the back of bundle C  
25 there's a list of issues. It may be that that is now what we should be working off.  
26 Is that bundle C?

1 A list of issues somewhere. **(Pause)**

2 Anyway, we'll come back to that.

3 Perhaps if we have a look at the -- look at the transcript from the last hearing. If

4 someone could direct me where the transcript is?

5 **(Pause)**

6 MR SCHAEFER: The transcript is in bundle E, tabs A2 to A4.

7 MR JUSTIN TURNER: Yes, thank you very much.

8 So if we go -- if we go to -- yes thank you -- A4, and if we go to page 14, these were

9 the submissions of Mr O'Donoghue, and just at the -- he's answering a question from

10 the tribunal, and just at the very bottom of page 14:

11 **"Answer:** ... and Mr Davies, There are, we say, four tectonic plates that are

12 unavoidably necessary to grapple with when it comes to liability."

13 If you recall we had already decided that quantum wouldn't be heard at trial at that

14 stage.

15 "One is how much of the supply was affected. Two is were there other reasons why

16 customers were reluctant to buy these licences? Three, what about the demand side?

17 And ... four ... [was] the IP issues."

18 So I confess, pre-reading this, I was a little unclear as to the difference between two

19 and three. But the first issue is how much -- how much supply there was.

20 Now, it's common ground that the contractual terms in issue were used in a number

21 of the contracts. I think the figures we have is 10 in the UK -- or this is Microsoft

22 figures, 10 in the UK and four in Europe.

23 I understand that these contracts can involve -- I don't know if this is the right

24 language -- but thousands of individual licences. They can be quite substantial. So

25 we know those licences, subject to further argument, were potentially unavailable to

26 the claimants for resale.

1 So the claimant will, at least according to the defendant, have to show that there was  
2 a material limit in supply to prove its case. It says, "Well not all contracts have these  
3 terms," so you are going to have to prove that you were limited in your supply of  
4 contracts.

5 Now, as I understand it, neither parties are going to argue that these terms were not  
6 used; it's admitted that they were used. As I understand it, you may correct me, but  
7 my understanding is neither party is arguing is that they impacted all contracts. So  
8 how many contracts they impacted is somewhere in the middle.

9 So I think the starting point, Mr Schaefer, is, before we turn to the questions of  
10 custodians and so forth, how at trial are you going to show that the supply was  
11 materially limited? What's your case? And let's assume we go through an expensive  
12 disclosure exercise and we discover that there are -- it's not 14, in fact there are 24  
13 contracts that were affected, or 64 contracts or some other number, how does that  
14 assist you? How are you going to be developing your case?

15 **CMC Hearing**

16 MR SCHAEFER: Sir, there are a number of aspects to that, if I could take them in  
17 turn.

18 First, you've raised what were referred to in the pleadings as custom anti-resale terms,  
19 and that is an area --

20 MR JUSTIN TURNER: I am referring to both terms, yes, the CAR and the --

21 MR SCHAEFER: For custom anti-resale terms, Microsoft's case is that they only  
22 applied to a limited number of contracts.

23 MR JUSTIN TURNER: Yes.

24 MR SCHAEFER: Obviously ValueLicensing doesn't accept that and that's one of the  
25 things we want to test in disclosure. The other thing we want to test in disclosure is  
26 it's not just the number of contracts --

1 MR JUSTIN TURNER: What's your case before -- before you test it, what is it that you  
2 are testing?

3 MR SCHAEFER: ValueLicensing's case is that there was a significant restriction in  
4 the supply of secondhand software licences such that it was unable to acquire and  
5 resell as many as it would have been able to acquire and resell but for Microsoft's  
6 conduct.

7 MR JUSTIN TURNER: How are you going to show that at trial?

8 MR SCHAEFER: So if I may break it down into the three parts of the allegations.

9 MR JUSTIN TURNER: Okay.

10 MR SCHAEFER: The first of the custom anti-resale terms, and that is the area where  
11 the allegation is, and the allegation is admitted in part, that Microsoft entered into  
12 agreements with large enterprise customers by -- in -- which included provisions  
13 restricting them or preventing them from reselling their old perpetual licences when  
14 they transitioned to the cloud, and that is an issue where the dispute is to the scope  
15 and extent of the conduct; it is admitted in part but, as you say, Microsoft's case is that  
16 it affected a small number of contracts and a small number of customers. And that is  
17 therefore a dispute that the parties agree requires disclosure to test the extent to which  
18 the customers were affected by those terms.

19 MR JUSTIN TURNER: But what is your case about how many -- I mean you were in  
20 this market and what is going to be your case at trial? Are you going to be saying,  
21 look, it was 36.4 per cent of contracts were affected? Therefore -- and then I don't  
22 quite understand the "therefore", because you still have the other 70 per cent. Let's  
23 assume that 95 per cent of contracts were impacted. You still have a market of  
24 5 percent.

25 So the -- the numbers doesn't necessarily answer this question. So at trial are you  
26 literally going to be looking at a number and go "There you go"? Or are you going to

1 be adducing some other sort of evidence to show that supply was restricted, as  
2 a practical matter?

3 MR SCHAEFER: There will obviously be evidence from ValueLicensing about its  
4 difficulties in obtaining these licences on the market. So that is -- that is all we --

5 MR JUSTIN TURNER: Because of these terms?

6 MR SCHAEFER: Well, that is the case. We -- we are unable to tell you at the moment  
7 exactly how many contracts were affected. That's one of the things that is in issue.

8 MR JUSTIN TURNER: No, I'm not -- the point I'm putting to you, how -- why does it  
9 matter whether it was 14 licences or 24 licences?

10 MR SCHAEFER: Some of these licences are with very, very large enterprises. We're  
11 not talking about therefore 10 licences; we're talking about contracts potentially  
12 affecting extremely large numbers of licences.

13 MR JUSTIN TURNER: Right. But the point still remains, 14 maybe a very large  
14 number and may be of itself sufficient to be material in the marketplace.

15 MR SCHAEFER: Indeed.

16 MR JUSTIN TURNER: Indeed.

17 So why -- why at this stage of the proceedings do we have to decide whether it's 14  
18 or whether it's 24?

19 MR SCHAEFER: Because there is an issue between the parties as to the extent to  
20 which these contracts were affected. Microsoft's defence is that --

21 MR JUSTIN TURNER: I'm -- I -- I want to understand what your case is going to be  
22 at trial.

23 MR SCHAEFER: Our case is that there was a significant restriction in the supply.

24 MR JUSTIN TURNER: Right, right. How are you going to determine whether it was  
25 significant? Having a number doesn't make it significant. I assume you're not using  
26 the word "significant" as a mathematician would use the word "significant"; you are

1 using "a large number".

2 So for your case, how big is that number? Is it more than 50 per cent? Is it less than  
3 50 per cent? How do you measure it? Do you measure it as contracts? Do you  
4 measure it as licences within contracts?

5 MR SCHAEFER: Sir, I don't want to start giving expert evidence. This is an issue on  
6 which parties agreed there should be disclosure. It will then be a matter for expert  
7 evidence taking into account this -- and if I may come to it, the other two significant  
8 pleaded aspects of the conduct taken together.

9 MR JUSTIN TURNER: So you're not -- I just want to be -- give you an opportunity to  
10 answer this question.

11 Why are you saying the number of contracts matters? You know about 14; why do  
12 you need more to make out your case at trial?

13 MR SCHAEFER: Because we need to show appreciable effect at trial, and we need  
14 to show causation -- I'm sorry to keep going back to Microsoft's defence, but  
15 Microsoft's defence is that a small number of contracts were affected.

16 MR JUSTIN TURNER: I am going to ask Microsoft the same question so you can rest  
17 assured, but I want to know what your case is going to be.

18 At the moment we know there are 14. We can go through what I understand may be  
19 a very expensive disclosure exercise, and then we will come up with a different  
20 number. Okay? So you now have a different number. Tell me how that different  
21 number makes a difference to your case.

22 MR SCHAEFER: Sir, what is proposed is not just an absolute number but  
23 a proportion. What the parties have agreed is a sampling exercise, so that would allow  
24 the court to make inferences about the proportion of licences in total that were affected.

25 MR JUSTIN TURNER: Right, so what proportion is 14?

26 MR SCHAEFER: I can't possibly tell you the answer to that question.

1 MR JUSTIN TURNER: So when you get a greater number how are you going to know  
2 what proportion it is?

3 MR SCHAEFER: The point of the sampling exercise is to move from a number that,  
4 as you say, by itself doesn't tell one very much, to a proportion of licences which would  
5 be obviously much more meaningful input for the expert analysis.

6 MR JUSTIN TURNER: You'll have to say that again, I didn't follow. **(Pause)**

7 MR SCHAEFER: Sir, I am being reminded this is only part of our case, but while we  
8 deal with this part of our case the point you are fairly putting to me is that there is  
9 an admitted 14 between -- there is an admitted number of 14 customers, not licences,  
10 customers that were affected.

11 MR JUSTIN TURNER: You say they are big customers.

12 MR SCHAEFER: We believe they are big customers. Most of them are big customers  
13 in many cases.

14 MR JUSTIN TURNER: We're not talking about anything de minimis.

15 MR SCHAEFER: No. But the reason this matters is although we can say therefore  
16 you can infer from this that there was an effect, and you can infer from our inability to  
17 acquire licences that there was an effect, Microsoft's case is that there was no effect  
18 because so many other licences were unaffected. So the sampling exercise is  
19 designed to test the extent to which customers overall were affected and the extent to  
20 which licences overall were affected.

21 As I say, that is an agreed category of disclosure --

22 MR JUSTIN TURNER: I'm not really prepared to just proceed on the basis of what is  
23 agreed, I want to understand why this disclosure is being sought. At the moment  
24 I don't understand, to be clear.

25 So when it comes to disputes in relation to the class -- so you said that there are other  
26 aspects of your case. So one is you want to know -- want a better understanding of

1 the number of contracts that is affected, but you are not telling me that a particular  
2 number is informative or how you are going to calculate relevant to percentage.

3 MR SCHAEFER: Sir, the aim of a sampling exercise would be to produce an inference  
4 as to percentage, yes. That is why instead of saying can you -- instead of producing  
5 something where there will simply be then an argument about whether that was  
6 a small or large part of customers, we're going to agree a sampling exercise whereby  
7 Microsoft -- the parties will agree a set of customers to be checked and we will know  
8 from the result of that exercise what percentage --

9 MR JUSTIN TURNER: Okay. Look, if you do this sampling exercise and it comes up  
10 at 99 per cent, I can see you romping home. Let's assume that. But if it comes up at  
11 60 per cent, 30 per cent, 75 per cent, or 25 per cent, how does that answer the  
12 question of whether your supply was materially impacted?

13 MR SCHAEFER: Sir, taken together with the other aspects I will come on to, that is  
14 a question for expert analysis I can't --

15 MR JUSTIN TURNER: Why is it a question for expert analysis? Either you had trouble  
16 getting hold of these licences or you didn't; either you were supply constrained or you  
17 weren't. You don't need to ask an expert.

18 MR SCHAEFER: Our evidence will very clearly be that we had trouble getting hold of  
19 these licences. Microsoft's defence will be: "That's not our fault."

20 MR JUSTIN TURNER: I want to know what your case is. You're bringing this claim,  
21 so what other aspects of evidence are you going to be adducing at trial to show you  
22 were supply constrained?

23 MR SCHAEFER: There was evidence from ValueLicensing about its attempts to  
24 acquire licences and its difficulties in doing so.

25 MR JUSTIN TURNER: And which -- okay, so which companies did they approach,  
26 and what problems did they have with those companies? I mean you may not be able

1 to answer that.

2 MR SCHAEFER: I can't trot out the witness statement at this stage, sir.

3 MR JUSTIN TURNER: Why isn't a sensible way forward to say look there  
4 were -- ValueLicensing will be giving evidence that they approached the following 10  
5 companies, couldn't get any licences out of any of them. In the case of three of those  
6 we know why. In the case of seven, we don't know and we suspect it might be these  
7 terms, and then we can pull out the licences for those particular contracts and have  
8 a look at them, and we know if they've got anti-resale terms or not.

9 Why is going off to companies you've never spoken to --

10 MR SCHAEFER: Because the companies were also coming to us -- so -- so  
11 ValueLicensing was marketing a service whereby it was brokering and/or purchasing  
12 and reselling these licences. It advertised.

13 MR JUSTIN TURNER: Right.

14 MR SCHAEFER: So if we only look at the customers that ValueLicensing happened  
15 to speak to that is likely (a) disproportionately to reflect customers who may have been  
16 in a position to sell licences -- suppliers who may have been in a position to sell  
17 licences because they will have been the ones that approached ValueLicensing; it will  
18 tell you nothing about the customers who didn't because they couldn't.

19 MR JUSTIN TURNER: You say companies were approaching you. Are you going to  
20 be showing a drop off in the companies that approached you? How are you going to  
21 develop this case?

22 MR SCHAEFER: The case, sir, is not -- as I was discussing with Mr Davies at the last  
23 CMC, the case is less of a drop-off than a failure to grow, because the case that  
24 ValueLicensing advances is that during the relevant period there was a massive  
25 transition among Microsoft's enterprise customers from perpetual licences to the  
26 cloud. So there should have been a massive increase in supply on the secondhand

1 market of perpetual licences that were no longer needed. That supply, that increase  
2 did not happen. The market continued at a very low level and our case is in the  
3 counterfactual that would not have happened.

4 MR JUSTIN TURNER: You are going to be looking at your data, and, as you say, get  
5 your experts, although big question mark over what expertise they have, but to say:  
6 look, the trends weren't -- the expected trend wouldn't happen; these are the inputs,  
7 this is the gradient, and there was a change. And that's how you are going to show  
8 that there was a limited supply.

9 MR SCHAEFER: We can draw inferences -- we seek to draw inferences of course  
10 from our data and our evidence as to a limited supply, but we need to prove the cause  
11 of the limited supply and that can only be done through Microsoft's evidence.

12 MR JUSTIN TURNER: Right, so you show this trend in your graph or whatever, or  
13 your data, it doesn't expand like the way you expect it to, and we now know that  
14 45 per cent of contracts had these terms. So what?

15 MR SCHAEFER: Sir, I am being asked to remind you of the other part of the case.

16 MR JUSTIN TURNER: We'll come on to the other part of the case, but how does the  
17 number impact that? All you are going to get out of this is a bunch of contracts which  
18 have these terms in; you are not arguing that it was the vast majority of contracts.

19 MR SCHAEFER: We have no idea whether it was the vast majority of contracts.

20 MR JUSTIN TURNER: You've seen -- you've done some sampling already, haven't  
21 you?

22 MR SCHAEFER: No.

23 MR JUSTIN TURNER: You've had some disclosure already.

24 MR SCHAEFER: We've had disclosure from Microsoft in three aspects.

25 MR JUSTIN TURNER: Yes.

26 MR SCHAEFER: The first of those aspects are what Microsoft describes as adverse

1 documents from its own internal investigations which were not court directed.

2 MR JUSTIN TURNER: I thought you identified some --

3 MR SCHAEFER: We identified a small number of customers --

4 MR JUSTIN TURNER: Exactly. That's what I'm talking about, the sample, yes, yes.

5 How many customers did you identify?

6 MR SCHAEFER: I think we asked about nine customers in total.

7 MR JUSTIN TURNER: Nine customers. How many of those had the restrictive terms?

8 MR SCHAEFER: So that -- those enquiries were not solely directed at restricted

9 terms, they were directed at a number of aspects of the alleged conduct.

10 MR JUSTIN TURNER: So you didn't receive the contracts?

11 MR SCHAEFER: Sir, this wasn't specifically a search for contracts; these were the

12 customers, if I recall, that were largely referred to in paragraph 48 of our pleaded case,

13 which is about the so-called conduct allegations.

14 MR JUSTIN TURNER: Right. So you are going to have to just help me, just elaborate

15 a little bit so I understand --

16 MR SCHAEFER: So, as I say, there are three parts of the case. The part we've been

17 talking about to date which are the custom anti-resale terms, as how they are defined.

18 The second part is the new From SA condition.

19 MR JUSTIN TURNER: What disclosure have you had on that to date?

20 MR SCHAEFER: We have been given, as far as I understand, the -- what Microsoft

21 says are the custom anti-resale terms that it has identified in its own internal

22 investigations.

23 MR JUSTIN TURNER: I've read the evidence on that, yes. But that's all you've had.

24 MR SCHAEFER: That's all, yes.

25 MR JUSTIN TURNER: You've not had the opportunity to sample contracts and say:

26 I'd like the following 10 contracts --

1 MR SCHAEFER: That is part of what has in fact been agreed for today. Subject to  
2 your indication, that might not be sufficient.

3 MR JUSTIN TURNER: Right, so you want to go in and sample so you can then get  
4 a feel for what numbers we're talking about.

5 MR SCHAEFER: Sir, that's correct.

6 MR JUSTIN TURNER: Right. So I interrupted you. So --

7 MR SCHAEFER: The second limb is the From SA condition, and that was  
8 a global -- a global product term that applied to every customer in the world during  
9 a one-year period.

10 MR JUSTIN TURNER: Yes.

11 MR SCHAEFER: For all of those customers -- every customer, sorry, who wished to  
12 benefit from a so-called From SA discount.

13 MR JUSTIN TURNER: That was the one that was discontinued.

14 MR SCHAEFER: That was the one that was discontinued after we complained about  
15 it, yes.

16 That is admitted but it is admitted obviously for the period in which it applied, so it  
17 applied to a huge number of people but for a limited period, and Microsoft's case is,  
18 well --

19 MR JUSTIN TURNER: So you don't need any disclosure on that?

20 MR SCHAEFER: Not on that per se, but the third and important part of this is what  
21 are called the conduct allegations, and the most important part, if I may focus on one,  
22 of the conduct allegations as they have emerged in light of the disclosure so far is our  
23 contention that prior to the From SA condition being formalised, Microsoft was  
24 applying it as a matter of policy generally for a longer period. And that is obviously  
25 quite key because again that would -- if that would apply to anybody, if we are right  
26 that was being applied as a matter of policy, that would affect any enterprise customer

1 that was seeking to benefit from these discounts.

2 MR JUSTIN TURNER: So sorry, I don't understand what -- how the policy -- I can see  
3 the fact that they are pursuing a policy may be a point you want to make, but how did  
4 that policy manifest? You said it would affect any customer. So you mean it was  
5 a policy that became incorporated into a contract?

6 MR SCHAEFER: Yes. Perhaps it might help if I went to the pleadings very briefly.

7 MR JUSTIN TURNER: Yes.

8 MR SCHAEFER: So our re-amended particulars of claim is at AA2.

9 MR JUSTIN TURNER: Page 18?

10 MR SCHAEFER: If you turn to page -- bundle, page 20.

11 MR JUSTIN TURNER: Yes.

12 MR SCHAEFER: So at paragraphs 46 and 47 we deal with the custom anti-resale  
13 terms which we've been discussing at length already.

14 MR JUSTIN TURNER: Yes.

15 MR SCHAEFER: If you jump over the page to page 22, you see stage 2 of the  
16 campaign the From SA condition.

17 MR JUSTIN TURNER: Yes.

18 MR SCHAEFER: That was a condition that, as I say, applied globally to any customer  
19 wishing to benefit from a From SA discount and prevented it from reselling.

20 MR JUSTIN TURNER: Yes.

21 MR SCHAEFER: Apologies for jumping, if you jump back to the bottom of page 21.  
22 48 contained what Microsoft just called the conduct allegations, and there are various  
23 other ways in which ValueLicensing alleges that Microsoft sought to restrict supply,  
24 and the key one is 48(4):  
25 "Microsoft purporting to link existing or future discounts on subscription licences  
26 (including From SA subscription licences) to customers retaining, or otherwise not

1 selling, perpetual licences, in ways that fell short of contractual agreements ..."

2 MR JUSTIN TURNER: Right, okay.

3 MR SCHAEFER: That allegation is essentially and, as you may have seen in  
4 Mr Fussell's evidence, there is good evidence in support of this that prior to the  
5 From SA condition being formally --

6 MR JUSTIN TURNER: So non-contractual -- I understand -- non-contractual.

7 MR SCHAEFER: Yes.

8 MR JUSTIN TURNER: That presumably could be: look, we'll give you a discount but  
9 it has to be on the understanding you are not going to sell your perpetual licence. And  
10 then there you go, it never gets written down and it never gets formulated.

11 MR SCHAEFER: Exactly.

12 MR JUSTIN TURNER: Right.

13 MR SCHAEFER: If that is the case, then the number of custom contractual terms  
14 providing for the same thing may not make a big difference. If as a matter of policy  
15 this was being done anyway that is why we are seeking --

16 MR JUSTIN TURNER: Sure I'm not -- this discussion is not seeking to strike at the  
17 heart of your case, so no need to be sensitive. I am just trying to understand how the  
18 disclosure exists. I'm not looking beyond disclosure at the moment so I am not forming  
19 any preliminary views as to the merits of the case.

20 So, right, so you have those three elements.

21 Can I ask Mr O'Donoghue the same questions? I'll come back to you.

22 Mr O'Donoghue, can I just ask you -- sorry, whoever it is, I beg your pardon.

23 MR O'DONOGHUE: Sir, the way we have divvy-ed things up today is I will deal with  
24 the claimant's disclosure and Mr Grubeck will deal with Microsoft.

25 MR JUSTIN TURNER: Yes, of course. I do apologise. So I suppose what is your  
26 positive case going to be at trial? Will you be advancing a positive case that a certain

1 proportion of contracts only have the CAR terms? Or -- or that it was such a specific  
2 number which indicates that it did not impact supply? What's your positive case going  
3 to be at trial?

4 MR GRUBECK: Yes, that is our positive case, and in fact you can see that --

5 MR JUSTIN TURNER: What is? I gave you two possibilities.

6 MR GRUBECK: Sir, can I show you our skeleton for the last CMC where we set that  
7 out? It's in bundle G, page 84.

8 MR JUSTIN TURNER: Yes.

9 MR GRUBECK: If you look at the bottom of page 84 starting at paragraph 10 and then  
10 going on.

11 MR JUSTIN TURNER: Yes, okay. What's your -- what's your case on that?

12 MR GRUBECK: Sir, the long and the short of it is we have searched carefully and  
13 diligently. We have found 14 of these contracts. Contrary to what my learned friend  
14 said, there has been a sampling exercise, that's part of CMC3.

15 MR JUSTIN TURNER: Anyway let's just focus on the issue for the moment if we can  
16 without the sniping. So the 14 -- you say there are 14 contracts. What proportion of  
17 relevant licences is that?

18 MR GRUBECK: De minimis.

19 MR JUSTIN TURNER: What proportion is it?

20 MR GRUBECK: What proportion of relevant licences had these terms?

21 MR JUSTIN TURNER: Yes.

22 MR GRUBECK: Like absolutely minimal in the scheme of things. 14 --

23 MR JUSTIN TURNER: Can we just approach this mathematically? What proportion  
24 and how are you calculating it?

25 MR GRUBECK: So we say it's 14 contracts out of a pool of millions that included --

26 MR JUSTIN TURNER: Out of a proportion of?

1 MR GRUBECK: Out of a pool of millions.

2 MR JUSTIN TURNER: Millions, and these are all contracts are they?

3 MR GRUBECK: They are reasonably large contracts but of course there are many  
4 large contracts. If one thinks of every business that uses Microsoft products, 14  
5 contracts, even if they are large customers, is a tiny amount, so on the face of what  
6 we've found it's less than a per cent, presumably.

7 MR JUSTIN TURNER: Right. You are going to be advancing that as a positive case,  
8 that figure.

9 MR GRUBECK: We are going to be advancing 14 contracts out of a pool of millions  
10 and it had no material impact on supply. Can I just --

11 MR JUSTIN TURNER: Show me where this is pleaded.

12 MR GRUBECK: Sir, in our -- I think it's summarised in our skeleton argument.

13 MR JUSTIN TURNER: I'd like it in the pleading, please.

14 MR GRUBECK: Paragraph 39.2 of the amended defence which is on page 52 of  
15 bundle A.

16 MR JUSTIN TURNER: Yes, I have that. **(Pause)**  
17 Can you point me to where you say it was a tiny percentage?

18 MR GRUBECK: No, we've not pleaded the percentage, but we've said and we offered  
19 in respect of two very limited and selective subsets of customers and agreements.  
20 And then if you go on in the pleadings to paragraph 54(d), delta, 54.2(d), it says:  
21 "In any event, the proportion of second-hand licences covered by any of the Terms in  
22 Issue is so small that the aforesaid terms had no, or no material, effect on the supply  
23 of second-hand licences."  
24 So that's the positive case.

25 MR JUSTIN TURNER: Just going back to -- sorry ... 39.2. Sorry, just orientate me.  
26 Who are the subsets of customers? Are they defined? Do you explain what you mean

1 by the subsets?

2 MR GRUBECK: So we've given a list of who the 14 customers are, we've provided  
3 that. And all the contracts have already been --

4 MR JUSTIN TURNER: The subsets, you don't mean the particular type of customer,  
5 you mean a small amount.

6 MR GRUBECK: It is 14 individual customers.

7 MR JUSTIN TURNER: You said "selective subsets". Was there a -- was that just bad  
8 drafting or do you mean a subset? How do you define a subset?

9 MR GRUBECK: The first subset is the 14 individual customers with whom these terms  
10 were in place.

11 MR JUSTIN TURNER: Okay. But let's -- okay, this is very poor drafting if I may say  
12 so. It could be 98 per cent and still be a limited subset of customers. Is that all you  
13 mean by limited subset of customers, as it is those customers who have those terms?

14 MR GRUBECK: Yes, what we mean is the first subset is the limited pool of customers  
15 who had CAR terms in place which is a number of 14 customers that we have found.

16 MR JUSTIN TURNER: Right. So it's not --

17 MR SCHAEFER: Sir, it may help to know we did RFI on what that meant. That's  
18 page 133 of the pleading bundle.

19 MR JUSTIN TURNER: Page 133. Yes.

20 MR SCHAFER: Sir, you'll see question 25: please provide particulars of the very  
21 limited and selective subsets and agreements.

22 MR JUSTIN TURNER: Yes.

23 MR SCHAFER: And the response is over page -- page 134, number 25: a matter for  
24 disclosure in evidence in due course.

25 MR JUSTIN TURNER: Sorry, just slow down.

26 MR SCHAFER: 25 on --

1 MR JUSTIN TURNER: I'm with you, yes. Right. Thank you.

2 MR GRUBECK: Can I just one more point to make on this.

3 MR JUSTIN TURNER: Yes.

4 MR GRUBECK: Just to clarify what has then happened.

5 So we have then done the searches, we've identified these subsets of customers, and

6 we have provided the information on them. So as part of the disclosure that was

7 provided following CMC3 we've done two things: we've provided known adverse

8 documents which includes material in relation to these 14 customers, but we've also

9 done a sample search.

10 That sample search you can see that in the order from CMC3. And --

11 MR JUSTIN TURNER: Where is that?

12 MR GRUBECK: That is at bundle A.

13 MR JUSTIN TURNER: Yes.

14 MR GRUBECK: And it's page 352. C/15.

15 And you'll see paragraph 1 and 2 the defendants shall provide disclosure in

16 accordance with annex A.

17 MR JUSTIN TURNER: Mm-hm.

18 MR GRUBECK: If you then scroll down to page 357, you see annex A, so the first one

19 is known adverse documents which has already been provided, and then there's

20 a search-based disclosure, parameters set out in annex B.

21 MR JUSTIN TURNER: Cut to the chase. I will read it. It is quite a lot to take in so just

22 give me the nub.

23 MR GRUBECK: Annex B basically sets out a list of 13 customers. You see it on

24 page 359 --

25 MR JUSTIN TURNER: Yes.

26 MR GRUBECK: -- who were put forward by the claimant as --

1 MR JUSTIN TURNER: Yes, I recall. This is why I was asking --

2 MR GRUBECK: That's their best shot -- this is where you'll find --

3 MR JUSTIN TURNER: Many of those have the terms?

4 MR GRUBECK: None.

5 MR JUSTIN TURNER: They've seen the contracts?

6 MR GRUBECK: Yes, yes, we've provided disclosure of those.

7 MR JUSTIN TURNER: Okay. Sorry, let me -- I was hearing from Mr Schaefer. Just

8 explain to me -- so you had your shot at saying, "Look, here are some customers, we

9 put forward," and you've had the contracts and none of them had restrictive terms in

10 them.

11 MR SCHAEFER: Sir, yes, my understanding was that this was not an attempt to

12 sample customers for CAR terms in particular. These were largely customers to whom

13 the conduct allegations have been directed, and in some cases the customer conduct.

14 MR JUSTIN TURNER: You mean the third class.

15 MR SCHAEFER: In some cases those were made good.

16 MR JUSTIN TURNER: Right.

17 MR SCHAEFER: The other point I would make is that you were quite rightly putting

18 to my learned friend 14 out of how many? He said 14 out of I think millions.

19 MR JUSTIN TURNER: Millions, he said.

20 MR SCHAEFER: The kinds of customers we're talking with the 14 are customers like

21 HSBC, BT, Ministry of Defence, Unilever, Capgemini. These are huge companies.

22 Microsoft does not have --

23 MR JUSTIN TURNER: These are huge but if it really is only 14 one imagines they

24 have at least another 50 customers of similar sizes.

25 MR SCHAEFER: They do not have, as was put to you, millions of contracts of that

26 scale.

1 MR JUSTIN TURNER: Right. So thank you very much. I now understand the  
2 parameters of the issues much better. So where do we go from here? Let's deal with  
3 your class is at the end of your skeleton, is it?

4 MR SCHAEFER: Yes. And there is an updated version of that table which I sincerely  
5 hope I will be able to hand up to you. This reflects --

6 MR JUSTIN TURNER: Have matters narrowed since --

7 MR SCHAEFER: They have to an extent, yes. **(Handed)**

8 MR JUSTIN TURNER: If we -- we are really on issue 7 at the moment, aren't we?

9 MR SCHAEFER: We are. If I might just show you the structure of it.

10 MR JUSTIN TURNER: I have read it --

11 MR SCHAEFER: I'm grateful.

12 MR JUSTIN TURNER: -- carefully.

13 MR SCHAEFER: I'm grateful.

14 So everything on the left-hand side is, as we understand it, in light of the  
15 correspondence agreed.

16 MR JUSTIN TURNER: Under the -- you mean in the middle under "Agreed"?

17 MR SCHAEFER: In the middle, yes.

18 Everything on the right-hand side is -- is not agreed, although I had actually  
19 understood that something I am looking at is.

20 But if you look through the right-hand side you'll essentially see there are really three  
21 issues. There are eight custodians that reappear.

22 MR JUSTIN TURNER: Yes.

23 MR SCHAEFER: There are two databases that reappear.

24 MR JUSTIN TURNER: Yes.

25 MR SCHAEFER: There are two shared mailboxes that reappear.

26 MR JUSTIN TURNER: Yes.

1 MR SCHAEFER: And otherwise this is -- this is, sorry this is not ... **(Pause)**  
2 And otherwise my understanding is -- and I apologise this is not the updated table that  
3 I had thought it was and there seem to be some other things --  
4 MR JUSTIN TURNER: This is the same as the one I have --  
5 MR SCHAEFER: That is, as I understand it, really all that is left in dispute --  
6 MR JUSTIN TURNER: Yes.  
7 MR SCHAEFER: -- subject to the collateral waiver point which is rather different.  
8 MR JUSTIN TURNER: Yes.  
9 MR SCHAEFER: So what I was proposing to do, sir, was going through the custodians  
10 first.  
11 MR JUSTIN TURNER: That applies to all the issue things because it's really the same  
12 point coming up again and again and again.  
13 MR SCHAEFER: If one custodian and that custodian applies to a set of categories,  
14 but should this custodian be searched or not.  
15 MR JUSTIN TURNER: Right, okay.  
16 MR SCHAEFER: What I was proposing to do is deal with the custodians first then the  
17 databases.  
18 MR JUSTIN TURNER: Right. There's some evidence on the custodians that's coming  
19 from the defendants in the 13th witness statement, I think.  
20 MR SCHAEFER: Now, the slight difficulty I'm in on custodians is that I do need to show  
21 you documents that, as you are doubtless aware, are no longer restricted so my client  
22 can see them, are still designated by Microsoft as confidential. So I will have to invite  
23 you to go into closed session to look at these documents.  
24 MR JUSTIN TURNER: Well can't we just look at them? And you can tell me which  
25 bits to read.  
26 MR SCHAEFER: I will do my best to do that, sir.

1 MR JUSTIN TURNER: Yes.

2 MR SCHAEFER: It may be harder to say anything out loud about what I want you to  
3 draw from them is the problem, but I will do my best.

4 MR JUSTIN TURNER: Let's see how we get on. So this is dealt with in the 13th  
5 witness statement of Mr Henderson, in answer to what you are about to show me.

6 MR SCHAEFER: Sir, yes.

7 MR JUSTIN TURNER: So we need to keep an eye on that at the same time.

8 MR SCHAEFER: Indeed.

9 MR JUSTIN TURNER: Who are we dealing with first?

10 MR SCHAEFER: I was going to deal with Mr Cruz first, but if I could make two  
11 overarching points first.

12 One is that these are all custodians that Microsoft already has available for searching,  
13 and that is clear from Henderson -- as far back as Henderson 10.

14 The second point is, as a consequence of that, if Microsoft wanted to argue that  
15 searching for a particular one of these custodians was disproportionate, it could  
16 provide, as ValueLicensing has repeatedly invited it to provide, asked it to provide, the  
17 results of scoping the particular combinations of key words and custodians in issue,  
18 because the problem at the moment is we have very high level objections about  
19 proportionality but what we're not able to do is find out whether it's one particular  
20 keyword that is producing the alleged issue. We have repeatedly asked for granular  
21 scoping data to allow the parties to discuss --

22 MR JUSTIN TURNER: But you say scoping has nothing to do with which custodians  
23 you search. I mean -- sorry the search terms may be in issue --

24 MR SCHAEFER: It's a combination of search terms and custodians. Microsoft says  
25 we can't have these custodians because it will produce a large number of results.

26 MR JUSTIN TURNER: But they don't give you any particulars and there's no scoping

1 that they've done.

2 MR SCHAEFER: There's no scoping data.

3 MR JUSTIN TURNER: That's our hope in Mr Cruz.

4 MR SCHAEFER: So Mr Cruz is, according to Microsoft, a GM business operations  
5 and programmes, and the reason that we asked for him to be included principally is  
6 because the scoping disclosure that we have received from Microsoft -- I have to tread  
7 very carefully here, I don't know how much I can say based on the documents -- shows  
8 him essentially involved in the new From SA condition.

9 MR JUSTIN TURNER: Right.

10 MR SCHAEFER: And as you're aware, a central issue in dispute was the purpose of  
11 that condition. We say it was to restrict supply; Microsoft says it was for other reasons.  
12 So the document that I would invite you to look at is in bundle C.

13 MR JUSTIN TURNER: Before we go -- I mean that -- you say he was involved in new  
14 From SA, he's at the heart of all this. So what does Mr Henderson say?

15 MR SCHAEFER: Mr Henderson says --

16 MR JUSTIN TURNER: In this passage, I just have it open.

17 MR SCHAEFER: He makes two points. One is that Mr Cruz reported during a period  
18 between 2011 and 2016 to somebody called Mr Matz, and Mr Matz is also the  
19 custodian. The document I'm about to show you is from 2020 and Mr Matz is nowhere  
20 on it.

21 MR JUSTIN TURNER: Right, okay. Show me that.

22 MR SCHAEFER: So the document is at B33, page 5 -- sorry, bundle C, tab B33,  
23 page 587.

24 MR JUSTIN TURNER: Sorry, B33?

25 MR SCHAEFER: Of bundle C.

26 MR JUSTIN TURNER: Sorry.

1 **(Pause)**

2 Bundle C.

3 MR SCHAFER: Tab B33, page 587, although I would invite you actually to start --

4 MR JUSTIN TURNER: B33.

5 MR SCHAEFER: I'm sorry, yes.

6 MR JUSTIN TURNER: Yes.

7 MR SCHAEFER: Sir, I hope I can refer to at least some of the metadata. If I could

8 invite you to start at page 590, down the bottom of the page. You'll see the bottom

9 email which is from Mr Baker.

10 MR JUSTIN TURNER: Mr Baker ...

11 MR SCHAEFER: Dated -- 12.35 pm.

12 MR JUSTIN TURNER: To Carlos Cruz, "Hi Carlos & Randy", that one.

13 MR SCHAEFER: That one sir, yes.

14 If you read through you'll see what Carlos and Randy are being asked to do, and that

15 is effectively to approve the new From SA condition. If I could ask you to look at the

16 section that says "Rationale and background".

17 **(Pause)**

18 MR JUSTIN TURNER: Yes, okay.

19 MR SCHAEFER: You'll see --

20 MR JUSTIN TURNER: You say, right, that's bang smack in the middle of your case,

21 of course he should be included.

22 MR SCHAEFER: Sir, precisely.

23 If you read up you will see that Mr Cruz is as important in these discussions as the

24 other two and is being asked for his approval and is -- if you look at, for example.

25 MR JUSTIN TURNER: Who cares -- you say he's potentially got relevant documents,

26 here is the relevant document, he's got it, that is the end of the matter.

1 MR SCHAEFER: Yes.

2 MR JUSTIN TURNER: Shall we deal with Mr Cruz first?

3 MR GRUBECK: Just two points we need for framing these. The first is that these  
4 can't be looked at in isolation, they have to be looked at against the custodians we've  
5 already agreed to provide. And this email is actually a good example of that because  
6 if you look at it, both Ryan Baker and Randy Levitt are custodians.

7 MR JUSTIN TURNER: Right. What's the problem? If Mr Cruz is in the thick of this,  
8 what's the problem with having him as a custodian?

9 MR GRUBECK: Well, the problem is that it becomes a matter of overall volume. We  
10 have evidence from Mr Henderson saying that reviewing 20,000 documents, 10,000  
11 of which were disclosed, cost about £600,000 and took about six weeks.  
12 We also have given indication in terms of scoping on the basis of the most recent  
13 proposals that we think adding these custodians, this list of extra eight custodians,  
14 would add about 35,000 to 40,000 additional documents.

15 MR JUSTIN TURNER: Right. Just show me that evidence.

16 MR GRUBECK: So the evidence of Mr Henderson is first in Henderson 10.

17 MR JUSTIN TURNER: I think I saw that for the last hearing, didn't I?

18 MR GRUBECK: Yes exactly.

19 MR JUSTIN TURNER: So what's the position on the custodians?

20 MR GRUBECK: And the position on the custodians is a recent update in a letter. It's  
21 in bundle G, 20 February, page 322 the letter starts.

22 MR JUSTIN TURNER: Sorry, which tab?

23 MR GRUBECK: Tab F8.

24 MR JUSTIN TURNER: F8.

25 MR GRUBECK: F8, page 322. So you see at the bottom "Custodian Searches",  
26 keywords agreed across the page. "Custodians".

1 And you then say: every time the parameters change this needs to be re-scoped. The  
2 parameters have just changed as a result of the skeleton argument, but it is estimated  
3 that searching the mailboxes of these eight custodians would add around 35,000 to  
4 40,000 individual reviewable items.

5 MR JUSTIN TURNER: So -- and that costs how much?

6 MR GRUBECK: On the basis of --

7 MR JUSTIN TURNER: Pro rata from the earlier data?

8 MR GRUBECK: About -- over £1 million, and it would take about three months,  
9 roughly speaking.

10 MR JUSTIN TURNER: Right.

11 MR GRUBECK: So on the basis of --

12 MR JUSTIN TURNER: That's all eight, of course.

13 MR GRUBECK: That's all, sorry?

14 MR JUSTIN TURNER: That's all eight and we have to consider not just its custodians  
15 but the scope of searching as well which I understand is also in issue, the keywords.

16 MR GRUBECK: No, the keywords have been agreed.

17 MR JUSTIN TURNER: The keywords have all been agreed.

18 MR GRUBECK: So this is just adding the custodians.

19 MR JUSTIN TURNER: Right.

20 MR GRUBECK: And this we say would add around £1 million to the exercise.  
21 That needs to be balanced against: what do these custodians add?  
22 Now of course there will be people who are copied on certain emails, and there will be  
23 people who pop up here or there in the KADs but it doesn't follow that it's proportionate  
24 to add them to disclosure.  
25 If you look at the case law on this it's very clear it has to be shown why is it necessary,  
26 what does it add to the overall picture? We say if you look at that example we just

1 | looked at, in a world where we're disclosing and we are searching against the  
2 | mailboxes of Ryan Baker, that's -- and Randy Levitt, and we're providing evidence by  
3 | them, Carlos Cruz adds nothing.  
4 | In addition, we also have his direct report, Joe Matz, as another custodian.  
5 | So that too is taken care of.  
6 | If I can just show you -- it was in the bundles last time, it's not this time but I can hand  
7 | it up quickly -- the organogram showing that.  
8 | MR JUSTIN TURNER: Yes. Yes.  
9 | MR GRUBECK: **(Handed)**  
10 | MR JUSTIN TURNER: So why is this adding more documents?  
11 | MR GRUBECK: Sorry?  
12 | MR JUSTIN TURNER: Why is adding a custodian who you say is duplicative adding  
13 | more documents? You say it's adding -- it will bring up effectively documents which  
14 | are nothing to do with this dispute.  
15 | MR GRUBECK: Well, it will do two things. It's -- sorry just to hand up the organogram.  
16 | MR JUSTIN TURNER: Yes.  
17 | MR GRUBECK: It does two things. The first is, and you'll see there Joe Matz in the  
18 | centre, and then in the -- on the far right as you go down reporting to him you see  
19 | Carlos Cruz.  
20 | MR JUSTIN TURNER: Sorry, I can't find it.  
21 | MR GRUBECK: Joe Matz is in the very centre.  
22 | MR JUSTIN TURNER: I see Joe Matz.  
23 | MR GRUBECK: If you go down from that to the right far column, the third one down,  
24 | Carlos Cruz.  
25 | MR JUSTIN TURNER: Okay. Well, I don't get a lot out of that.  
26 | MR GRUBECK: Why is that a problem to add them? Well, it adds a huge amount of

1 volume in two respects. First of all, it adds documents which are duplicative, and you  
2 say why can't you just de-duplicate them? The reason for they are not identical in the  
3 sense that the header looks different, it's obviously from a different mailbox. So even  
4 if the substance is identical they are not automatically weeded out. So they have to  
5 be physically reviewed. Somebody needs to turn the pages which costs a lot of  
6 money. Similarly it will add a lot of irrelevant material, just false positives --

7 MR JUSTIN TURNER: Where is this figure of --? Sorry I maybe need to read this  
8 letter more carefully. Where is the figure of 35,000 coming from?

9 MR GRUBECK: That's on the basis of the ongoing scoping, so you see that in the  
10 letter, it's explained there.

11 MR JUSTIN TURNER: Which paragraph?

12 MR GRUBECK: Paragraph 5 of the letter.

13 MR JUSTIN TURNER: (sotto voce reads).

14 So it's prior scoping.

15 MR GRUBECK: Yes, this is because prior to the skeleton we were in the process of  
16 trying to get as exact figures as possible for the latest parameters, and that all then  
17 changes --

18 MR JUSTIN TURNER: Have you added in these -- you've added in -- I don't quite  
19 know enough about your scoping but you've added in these additional eight custodians  
20 and run the same search, and you have an extra 35,000; is that right?

21 MR GRUBECK: Exactly. In essence that's what it comes down to.

22 MR JUSTIN TURNER: It's more than scoping; it's documents to be reviewed. Have  
23 you used the right search terms?

24 MR GRUBECK: Yes. So this is the prior -- I think there's -- that may change with the  
25 changes to the keywords, but we don't know if it could change up or down because  
26 the keywords have been extended so it might actually change up, more likely.

1 MR JUSTIN TURNER: Right.

2 MR GRUBECK: But that's the most recent figure we have to hand and given that the  
3 hearing was coming up this is what we provided.

4 So that was on the basis of the keywords as they stood before we agreed to add some  
5 additional ones in.

6 MR JUSTIN TURNER: But those additional ones are not restrictive, they're ... they're  
7 not subsets.

8 MR GRUBECK: No, they're not restrictive. No, they are likely to result --

9 MR JUSTIN TURNER: They are going to result in more, they must result in more.

10 MR GRUBECK: They're likely to result in more.

11 MR JUSTIN TURNER: Well, they must.

12 MR GRUBECK: Yes.

13 So this is a conservative estimate but it all comes down to the point of this adds over  
14 £1 million-worth of costs, and over three months roughly of time spent on this.

15 MR JUSTIN TURNER: £1 million of costs as against what? Sorry, what are you  
16 comparing it to?

17 MR GRUBECK: As in a million pounds of costs in addition to the exercise that would  
18 have to happen without these custodians.

19 MR JUSTIN TURNER: So it's an extra million by adding the extra custodians.

20 MR GRUBECK: Precisely.

21 MR JUSTIN TURNER: Yes.

22 MR GRUBECK: These extra custodians add an extra million, and for that one would  
23 expect to see some really coherent, really detailed reasons for why these are said to  
24 add something on top of what is already there.

25 And an email that says, well this chap is copied on the chain between two other  
26 custodians --

1 MR JUSTIN TURNER: But I mean it may not be a surprise that the claimant is only  
2 identifying the emails where other people are copied in at this stage, inevitably  
3 because he's not seeing the complete picture.

4 MR GRUBECK: So what we have done, in an attempt to cut through this is, we made  
5 an offer -- you see that actually in the same letter, a little bit further down, where we  
6 say: Cruz isn't required in any event.

7 MR JUSTIN TURNER: Where are you?

8 MR GRUBECK: This is the same letter, it's page 323 of bundle G.

9 MR JUSTIN TURNER: I'm on 401. Sorry, I beg your pardon, I switched bundles.

10 MR GRUBECK: Too many bundles.

11 MR JUSTIN TURNER: I beg your pardon. 323 of -- yes, I see.

12 MR GRUBECK: So you see paragraph 7 is the offer we put forward, where we say  
13 none of these additional custodians are required, but in an attempt to give you comfort  
14 and in an attempt to show look we're not trying to hide anything, we are simply  
15 concerned about overall volume and overall cost, what we have put forward is to say:  
16 claimant, you may pick two out of these custodians and we'll add those two. Pick two  
17 of them, that at least constrains the volume, keeps costs down somewhat more; and  
18 if something exciting emerges from them there's always the possibility of coming back  
19 with the --

20 MR JUSTIN TURNER: So there's no problem, you say you have to do this for each  
21 custodian anyway, your manual turning over of documents. You say it can't be done  
22 efficiently, it has to be done document by document for each custodian.

23 MR GRUBECK: It has to be done document by document, each mailbox needs to be  
24 extracted. You then run an automatic -- if -- I say this with caution but as I understand  
25 it one then runs an automatic de-duplication exercise but that only gets you so far  
26 because it only removes exact duplicates which obviously most documents aren't in

1 a different mailbox, simply for a different header or a different ordering of the names.  
2 And then they need to be reviewed, and you have an initial relevance review which is  
3 done by the disclosure provider and then it gets flagged for a follow-on review by  
4 lawyers and needs to be reviewed for privilege; it's a whole process.

5 MR JUSTIN TURNER: Mr Schaefer, what's wrong with taking two or three custodians  
6 with you having the option to come back?

7 MR SCHAEFER: The pin the tail on the donkey approach.

8 MR JUSTIN TURNER: If you get something useful you can say, look, I've got a toe in  
9 the cliff now, I'm going to want another -- I may even add another 10 on top of that  
10 because this has simply not been reliable.

11 MR SCHAEFER: Sir, the starting point of what is wrong with that is the premise. Now  
12 what you were shown was a letter from CMS saying that searching mailboxes of all of  
13 these custodians would add 35,000 to 45,000 individual reviewable items prior to  
14 de-duplication.

15 You then heard, with respect, my learned friend giving evidence on the limits of  
16 de-duplication which we absolutely do not accept.

17 MR JUSTIN TURNER: You are not disputing at the moment the scoping that has been  
18 done.

19 MR SCHAEFER: We're not disputing, because we are told, that this is the total  
20 number; what it doesn't give us is what we have asked for for weeks, which is, "Please  
21 break it down by custodian and keywords so that we can make an informed decision."

22 MR JUSTIN TURNER: That's not quite an answer to my question. If we went  
23 forward -- if you got to pick three extra custodians today simply to limit costs because  
24 this is plainly an expensive exercise. And if, having obtained those documents, you're  
25 then of the view that what Microsoft is saying is not correct, that's that it's only 14, but  
26 it's only 14 contracts, if you then discover that's not correct you can come back and

1 have the others.

2 MR SCHAEFER: Sir, may I take instructions?

3 MR JUSTIN TURNER: Yes.

4 MR SCHAEFER: I have instructions to nominate three custodians.

5 MR JUSTIN TURNER: Right. Let's do that.

6 MR SCHAFER: On the basis that we can come back obviously.

7 MR JUSTIN TURNER: Yes. You won't be prejudiced against coming back for the

8 other custodians on your list but you'll have to argue whether it's appropriate to have

9 those, but you'll then have a lot more information, a lot more documents.

10 MR SCHAEFER: I'm grateful.

11 Would your -- shall I nominate them to you or tell Microsoft later?

12 MR JUSTIN TURNER: You can tell -- is there anything you want to add? That is

13 going to be my suggestion.

14 MR GRUBECK: May I just take instructions?

15 MR JUSTIN TURNER: Yes.

16 MR GRUBECK: Sir, we're prepared to live with three custodians. It's ultimately -- it

17 becomes a matter of total costs, and I'll come back to this when we get to the next

18 items but for present purposes three custodians we can live with.

19 MR JUSTIN TURNER: Thank you very much for that. So what next?

20 MR SCHAEFER: Databases. On databases, my understanding in light of the

21 correspondence is that there are really just two points in dispute. One concerns

22 Central Approvals, which is the database that used to be called MOPET which is

23 a name you may remember from previous CMCs. Microsoft describes it as:

24 a centralised repository of submissions for volume licensing terms, including

25 documents that require approvals.

26 Because Microsoft says that any custom anti-resale terms require approval, this

1 database is likely to contain information about those terms.

2 Now, Microsoft has agreed to search Central Approvals for that purpose. But there is  
3 an issue as to the scope of the searches which has played out in correspondence, so  
4 perhaps I can show it to you there.

5 At the time of Henderson 13 the position was simply that Microsoft was prepared in  
6 principle to search this database that was scoping it, and then there was a letter last  
7 Tuesday from CMS which you will find in bundle G, page 230.

8 MR JUSTIN TURNER: Yes.

9 MR SCHAEFER: So the relevant paragraph is number 2:

10 "In relation to ... Central Approvals, Microsoft has extracted the unstructured data held  
11 in this database and ... container holds around 4.4 million records ... Of these  
12 documents, Microsoft's eDiscovery team is able to extract 541,271 items ... for  
13 processing. The remaining documents are archived documents with no filename ...  
14 and no file extension to indicate the type of file. Extracting these documents would  
15 require very significant planning and resourcing to determine how to map the file  
16 extension and filename back before the documents could be extracted and processed.  
17 Any proportionate proposal .. would therefore need to involve first searching the items  
18 referred to above which can be processed."

19 And as Microsoft often says, if that turns anything up you can ask for more.

20 And there's a response to that letter the next day from my instructing solicitors at  
21 page 261 -- excuse me, this is now -- no, this is still bundle G. Tab D16.

22 MR JUSTIN TURNER: Yes.

23 MR SCHAEFER: Sir, it refers back to the letter.

24 Then in paragraph 2:

25 "We note with some confusion your statement that for the c.3.9 million 'archived' files,  
26 it would be necessary to invest 'very significant planning and resourcing to how to map

1 the file extension and file name back ...' At least some eDiscovery platforms (such as  
2 Relativity) do not rely on the file extension in order to determine the file type and make  
3 its content available for searching and review ..."

4 Then it sets out text from the Relativity search page saying you don't need the file  
5 extension for this purpose.

6 It says: we don't really understand why that is a road block, in essence.

7 Then if you go down to the last paragraph which is important, page -- paragraph 6:  
8 "We also note that you have not explained why c.3.9 million of the 4.4 million files have  
9 been archived, and others have not. This could obviously be a material consideration,  
10 for example if the reason reflects some date-based rule. Please provide details."

11 The final letter --

12 MR JUSTIN TURNER: Sorry, I have just got confused on the numbers.

13 MR SCHAEFER: I'm sorry.

14 MR JUSTIN TURNER: My fault.

15 MR SCHAEFER: So 4-point --

16 MR JUSTIN TURNER: It holds around 4.4 million.

17 MR SCHAEFER: Yes.

18 MR JUSTIN TURNER: But you can extract half a million, so I got a little bit confused  
19 as to why -- what is the 3.9 million?

20 MR SCHAEFER: That's the remainder.

21 MR JUSTIN TURNER: Oh that's the minus -- sorry, yes, yes. Okay, all right.

22 MR SCHAEFER: So my understanding is they can all be -- from the letter is they can  
23 all be extracted but the point in CMS's letter was they don't have the file extensions.

24 MR JUSTIN TURNER: And you say they don't need them.

25 MR SCHAEFER: And we say they don't need them, and so the final missive is at  
26 page 322, which is tab F8.

1 MR JUSTIN TURNER: Yes.

2 MR SCHAEFER: And the relevant paragraph is 14a on page 324. If I could ask you  
3 just to read that to yourself.

4 MR JUSTIN TURNER: Yes. **(Pause)**

5 Right.

6 MR SCHAEFER: So two points about that.

7 MR JUSTIN TURNER: I don't need to read (b)?

8 MR SCHAEFER: You don't need to read (b) for present purposes.

9 MR JUSTIN TURNER: Right.

10 MR SCHAEFER: Two points about that. First, there's no -- there's no resistance to  
11 the point that you can do this without the extensions.

12 But more importantly, there is no answer to the question in Charles Fussell's letter  
13 about whether there is a date-based distinction between the archived and the other  
14 archived files. The reason that that is important is that this is a search aimed at the  
15 CAR terms, and Microsoft's case is that it stopped use in the CAR terms when we  
16 complained about them, which is about 5 years ago. So if what would be done in  
17 searching only the unarchived records is that only very recent records are searched,  
18 that would not be probative at all --

19 MR JUSTIN TURNER: You say it may be biased. Unstructured documents are likely  
20 to be biased towards the older documents.

21 MR SCHAEFER: No, my understanding is that they simply -- they are unstructured  
22 documents across time.

23 MR JUSTIN TURNER: Right, okay.

24 MR SCHAEFER: Yes. So that is a question we haven't had an answer to.

25 MR JUSTIN TURNER: Anyway.

26 MR GRUBECK: Sir, on the databases, the picture is slightly different for the

1 | custodians because the problem here is not just overall volume, although that is  
2 | a consideration, it's also that, to an extent, the claimant is just asking for things that  
3 | are technically not feasible. We have fairly detailed evidence on this from  
4 | Mr Henderson. I can give you the references to it.  
5 | It's Henderson 13, paragraph 68 to 78, which is bundle B, tab A22/407.  
6 | MR JUSTIN TURNER: All right.  
7 | Which paragraph?  
8 | MR GRUBECK: So it starts at paragraph 68. It then sets out some of the general  
9 | problems as we go through it. I note the searches cannot be performed as requested,  
10 | 68.1. The claimant hasn't engaged with that.  
11 | If you then go on, paragraph 72, it highlights the volume of data.  
12 | The databases we're talking about contain 2 to 3 terabytes of data, millions of items.  
13 | If you recall at the last hearing, VL considered that a database of 25,000 items was  
14 | too much to search, it wasn't proportionate, and they thought it would take them 6  
15 | weeks, 25,000 as opposed to several millions.  
16 | There's then the distinction between structured and unstructured data. With structured  
17 | data that just cannot be extracted. Unstructured data can be, but it's extremely  
18 | complicated, in many cases, to deal with.  
19 | And then paragraph 74, you see Mr Henderson going through the different databases,  
20 | what can and cannot be achieved, really trying to be as realistic and as constructive  
21 | as possible.  
22 | If you look at the proposals, including in the hand-up table and in the draft order, you  
23 | will see that we have really tried to be constructive on databases and make some  
24 | progress. But here, on VL Central Approvals, you're looking at about 1 terabyte, 970  
25 | gigabyte of material, that the claimants say, cheerfully, well, go and extract that. We  
26 | say that just isn't realistic as a proposal.

1 MR JUSTIN TURNER: You do not have any technical evidence on this.

2 MR GRUBECK: So we don't have technical evidence, but we say this is the wrong  
3 way round. We have given evidence from Mr Henderson, who has been dealing with  
4 these proceedings throughout, explaining why it can't be done. The claimant --

5 MR JUSTIN TURNER: Well, he hasn't really explained why it can't be done, he just  
6 says it can't be done.

7 MR GRUBECK: Well yes, but that is on the basis of detailed enquiries with the  
8 business.

9 And what --

10 MR JUSTIN TURNER: There's no -- he doesn't say who he has spoken to or what  
11 technical expertise they have or ...

12 MR GRUBECK: Sir, yes, but --

13 MR JUSTIN TURNER: I mean, databases should be searchable.

14 MR GRUBECK: Databases are searchable but they are not necessarily bulk  
15 searchable. They all serve different functions. In fact, if you look at -- there's  
16 a diagram that sets out the overall database architecture, I believe it's at F/A10/80.

17 MR JUSTIN TURNER: F.

18 MR GRUBECK: Bundle F, A10, page 80.

19 MR JUSTIN TURNER: So this is the --

20 MR GRUBECK: This is just the letter. I don't go to it for the substance of that letter,  
21 I go to it to show two things. One is that this debate has been ongoing for a very long  
22 time. And two, that it's not like we're refusing to provide any disclosure from the  
23 databases. For example, the MS Sales, which is very much at the centre of things, is  
24 something we have always said we can provide. There are then other adjunct  
25 databases which serve different functions, and they are often not searchable because  
26 that's not their purpose and that's not the way they operate.

1 Then what the claimant does is they say, well, you can use SQL --

2 MR JUSTIN TURNER: So how many other databases are we arguing about?

3 MR SCHAEFER: There's three that we're arguing about that we say can't be done.

4 MR JUSTIN TURNER: So this is the Central --

5 MR GRUBECK: VL Central Approvals.

6 MR JUSTIN TURNER: Hold on. Just show me on the diagram. VL Central Approvals.

7 Where is it?

8 MR GRUBECK: Where in the evidence? Or --?

9 MR JUSTIN TURNER: I'm just trying to find on the document that's been handed up.

10 MR GRUBECK: That is Mr Schaefer's document.

11 MR SCHAEFER: Sir, it's at 7(i) and 7(ii). Because it is the database that Microsoft

12 says will contain approvals for customer (inaudible).

13 MR JUSTIN TURNER: It says "agreed". Sorry, I'm with you now.

14 MR SCHAEFER: This is only a point about the scope and the date, it's not a point

15 about whether Microsoft can search this because it says it can and will.

16 MR JUSTIN TURNER: What are the other two databases?

17 MR GRUBECK: So DD360, you actually see that in the same issue but I think also

18 features in some of the others.

19 MR JUSTIN TURNER: I couldn't hear you then.

20 MR GRUBECK: DD360, if you look in that issue 7(ii), for example.

21 MR JUSTIN TURNER: Yes.

22 MR GRUBECK: You find it as the top of the list of databases.

23 And then MSX, the CRM.

24 The problem with those, just in a nutshell, MSX CRM does not hold any unstructured

25 data. So it's not in the database, it's not in any associated location, and the structured

26 data is quasi-impossible to be searched.

1 Now, obviously the point made against me is my client produces excellent software.  
2 Yes, but it's expensive to do that, it's not something that can be done --  
3 MR JUSTIN TURNER: What does DD360 contain?  
4 MR GRUBECK: DD360 is the Deal Desk's deal repository. And the problem with that,  
5 that's different to the MSX, is, again, 3 million documents over a terabyte of data --  
6 MR JUSTIN TURNER: Sorry, just say that again. DD360 is the Deal Desk repository?  
7 MR GRUBECK: Yes.  
8 MR JUSTIN TURNER: Of what? Of everything or --?  
9 MR GRUBECK: Of deals.  
10 MR JUSTIN TURNER: So what does that mean? Just contracts? Or does it mean --?  
11 MR GRUBECK: Sorry, I am just taking instructions.  
12 MR JUSTIN TURNER: (inaudible) contractual negotiations?  
13 MR GRUBECK: So it's a storage system whereby emails and documents pertaining  
14 to deals are stored, but it overlaps both with the MS Sales database, which we're  
15 already searching, and we have agreed to search, and it also overlaps with the emails,  
16 of course. So by doing the custodian mailbox searches we are getting those  
17 documents of the relevant custodians. There's no need to plough through millions of  
18 documents.  
19 This is a mailbox one can't bulk extract from, so the problem is one would need to  
20 physically click on each individual item in order to open that up, there's just no bulk  
21 extraction mechanism.  
22 So what we are saying --  
23 MR JUSTIN TURNER: I mean -- we need to take 5 minutes for the shorthand  
24 writers -- this is the last question before we do that. Just again, there's no -- there are  
25 no economies in doing these together? So an option -- you may say it's  
26 an unattractive option for other reasons -- but the option is to search certain databases

1 at this stage, and then search other databases at a later stage. That may have  
2 ramifications for timing and all sorts of things, I appreciate.

3 MR GRUBECK: That is precisely what we proposed and that I think offers a way to  
4 cut through it. If you look at -- it features in Mr Schaefer's hand-up document, and it  
5 also features in schedule 2 of the draft order 2 we handed up -- you will see we have  
6 agreed to search several other databases. In addition to MS Sales, the Empowerment  
7 Guide, a different CRM, the licence CRM, MS policy, et cetera. We have also agreed  
8 to do a sampling proposal that the claimants have put forward. If you look in  
9 Henderson, 13, paragraph 68.2, you see there's a brand new proposal in relation to  
10 the three largest databases which proposes some sampling in respect of 23  
11 customers, I believe.

12 MR JUSTIN TURNER: Sorry, where are you in Henderson 13? Sorry?

13 MR GRUBECK: Page 406 of bundle B, 68.2.

14 **(Pause)**

15 So this covers MSX CRM, so one of the ones in dispute, and also a second one, which  
16 is DD360. If you look at the letter I showed you earlier, bundle G, page 324 --

17 MR JUSTIN TURNER: I think we need to rise to give the shorthand writer --

18 MR GRUBECK: But just --

19 MR JUSTIN TURNER: -- a break. We'll come back.

20 MR GRUBECK: Certainly.

21 MR JUSTIN TURNER: You may want to think over the adjournment how far you are  
22 apart on sampling these databases to check whether they have any additional  
23 information or proceeding with one of the three. I don't know whether that's -- and  
24 again, without prejudices coming back if the story being told by Microsoft is not  
25 accurate.

26 MR SCHAEFER: Sir, apologies --

1 MR JUSTIN TURNER: I am going to rise now just because of the shorthand writer.  
2 Just for 5 minutes. Thank you.

3 **(12.10 pm)**

4 **(A short break)**

5 **(12.15 pm)**

6 MR GRUBECK: So sir, picking up on your point: is there a way of cutting through this?  
7 If you look at the table my learned friend handed up, take, for instance, issue 8(iii).

8 MR JUSTIN TURNER: 8(iii)?

9 MR GRUBECK: 8(iii). But we can also take it from issue 9, if that's easier, whichever  
10 one you happen to have.

11 MR JUSTIN TURNER: Okay.

12 MR GRUBECK: You will see in the not agreed column databases, and there's  
13 essentially a sampling exercise proposed in relation to MSX CRM, the GP CRM and  
14 DD360. That's what was put forward by the claimant.

15 We are prepared to agree that. We have in fact communicated that by letter.

16 MR JUSTIN TURNER: Right.

17 MR GRUBECK: So that is the letter, 324 of bundle G, where we say We are prepared  
18 to do this in relation to 23 customers identified in Fussell 1. So that's their sample.  
19 That will then give them an opportunity to say: there's something really exciting in this,  
20 you must go await and do the technically impossible.

21 So that, I say deals, with MSX and the --

22 MR JUSTIN TURNER: So the technical challenges -- so we have -- what's the  
23 problem with -- we have discussed VL Central Approvals.

24 MR GRUBECK: Yes, VL Central Approvals are separate, so I'll come to that in  
25 a second.

26 MR JUSTIN TURNER: Okay. So what are the technical challenges with DD360 and

1 MSX CRM?

2 MR GRUBECK: So MSX has no unstructured data, it is only structured data, so it's  
3 technically almost impossible to bulk search. It would require going away and writing  
4 programs. The claimant says why can't you do that via SQL? We don't see how. If  
5 the claimant thinks that is an easy route, they are free to put forward a proposal with  
6 expert evidence.

7 MR JUSTIN TURNER: So why -- just explain to me a little bit more the difference  
8 between structured and unstructured data, where is that in the evidence, and the  
9 problems that causes.

10 MR GRUBECK: So, if you look at Henderson 13 again.

11 MR JUSTIN TURNER: Yes.

12 MR GRUBECK: Starting with 68.

13 MR JUSTIN TURNER: Yes.

14 MR GRUBECK: What you can't do is one can't search complex search strings. So  
15 these various key word combinations that the claimant has put forward and that we've  
16 now agreed, those just can't be run on the data.

17 MR JUSTIN TURNER: What am I meant to be reading here, paragraph 68?

18 MR GRUBECK: 68.1.

19 MR JUSTIN TURNER: Which databases is he talking about here?

20 MR GRUBECK: So he is -- you'll see that explained in paragraph 74 where he goes  
21 through each of the databases, but essentially anything that only has structured data  
22 on it.

23 MR JUSTIN TURNER: Right. So how can you do the sampling then?

24 MR GRUBECK: So the sampling can be done by physically clicking through on the  
25 individual customers and calling them up and printing off those records.

26 MR JUSTIN TURNER: Right.

1 MR GRUBECK: That's why it's so cumbersome, that's why we're saying we can't just  
2 run -- because if you look at complex search strings, for example, take the hand-up  
3 document, the keywords list, the first --

4 MR JUSTIN TURNER: So you wouldn't be using search strings at all, you would just  
5 be clicking on the customer and then seeing what the document says.

6 MR GRUBECK: Exactly, basically saying: here is the customer, here you go, here is  
7 the data in relation to that customer. There's no searching in that sense.  
8 What we can do is we can search for the customer, but what we can't do is we can't  
9 do a search like the one, say, issue 1, the first page, relinquish all --

10 MR JUSTIN TURNER: No, I understand.  
11 Mr Schaefer, what's --?

12 MR SCHAEFER: Sir, I am in slight difficulty because I had opened with  
13 Central Approvals, and I had invited you to make an order in respect of  
14 Central Approvals and explained that Microsoft's only point about it was twofold --

15 MR JUSTIN TURNER: I have your point on --

16 MR SCHAEFER: -- and that we were very concerned that the documents that they  
17 were offering to search would be irrelevant because they were too recent.  
18 My learned friend, with respect, didn't come back on any of that but he moved on to  
19 why they can't search MS and 360.

20 MR JUSTIN TURNER: Well, let's deal with DD360 and MSX CRM.

21 MR SCHAEFER: So my learned friend is right to say that Mr Henderson has said in  
22 the past that it is not possible to search these using complex keywords because that  
23 is not possible through the interface. And that is -- I say Mr Henderson, actually -- that  
24 was said in a letter back in, I believe, 2020 --

25 MR JUSTIN TURNER: It's been said again, yes, yes.

26 MR SCHAEFER: Yes.

1 That led to a process of engagement between the technical experts. This is actually  
2 a point I raised at the last CMC.

3 MR JUSTIN TURNER: Right.

4 MR SCHAEFER: There was a meeting between the parties to discuss the databases  
5 and how they could be searched. That's in the bundle but I won't ask you to go through  
6 it because it's an automatic transcript and not a very helpful one.

7 The meeting was short and inconclusive. But the concerns, as Mr Fussell explains in  
8 his witness statement, the concerns raised by Microsoft were not about whether things  
9 were technically possible, which was the original line, but because of the amount of  
10 engineering resource that would be taken.

11 So after the meeting my instructing solicitor sent a letter to CMS with a number of  
12 follow-up questions. I would invite you to look at that, that is at bundle G, which I have  
13 now lost, bundle G, tab 81, page 161.

14 This was an attempt to actually engage with the --

15 MR JUSTIN TURNER: Sorry bundle G, tab?

16 MR SCHAEFER: Tab -- I'm sorry, I think I have the wrong reference.

17 It may be -- excuse me one second.

18 **(Pause)**

19 Excuse me, I have the wrong bundle reference. It's bundle F.

20 MR JUSTIN TURNER: Yes.

21 MR SCHAEFER: A31, tab 16 -- well, tab -- page -- let me slow down. Page 161.

22 MR JUSTIN TURNER: 161, yes.

23 MR SCHAEFER: So you'll see at -- I'm sorry, do you have that?

24 MR JUSTIN TURNER: Yes, I have.

25 MR SCHAEFER: You'll see the meeting was productive, able to make progress on  
26 a number of issues:

1 "In this letter, we do not address any wider issues but focus simply (as your Mr  
2 Gringras requested) on what our client requires as a result of that meeting."  
3 Then there's a number of questions.  
4 If you turn to page 162, further enquiries required by our client.  
5 Then on the databases in issue, GPS CRM and MSX CRM, the questions begin at the  
6 bottom of page 163. So these are all Dynamics systems but vary considerably with  
7 respect to their complexity.  
8 "DD360 is likely to be central to the issues in this case and contains a relatively small  
9 number of tables and consists of roughly equal amounts of structured and unstructured  
10 data. By contrast the MSX CRM has over 300 tables and apparently contain little or  
11 no unstructured documents ..."  
12 Then paragraph 18:  
13 "With respect to all such systems, our client requires to know if the process of  
14 extraction could be automated, as Mr Johnson [our technical expert] suggested at our  
15 meeting, rather than there simply being a manual review of individual items [which is  
16 what my learned friend was describing] ..."  
17 "If not, please explain the difficulties in automating such extraction so that we can  
18 understand them. We understand that data is routinely extracted by automated  
19 processes and consider that this process could be replicated for data relevant to these  
20 proceedings."  
21 Then in paragraph 19 you'll see:  
22 Mr Johnson [ValueLicensing's technical expert] suggests the following strategies (in  
23 combination or in isolation) for searching ..."  
24 Including:  
25 "(b) Keyword searches on the back-end database directly using query language (e.g.  
26 SQL)."

1 The point is I'm sure sir you have is that there is a difference between the front end of  
2 the database, that the user who is meant to be inputting information is given access  
3 to, and what can be done by a database programmer using a language such as --

4 MR JUSTIN TURNER: Then it's coming back to what is it we're trying to find? What  
5 are you actually looking for in all these databases?

6 MR SCHAEFER: Sir, I can tell you that.

7 The two databases in issue are MSX CRM and DD360.

8 Sorry, if I may just finish this --

9 MR JUSTIN TURNER: So that I can ask the right question. What is it -- are you  
10 expecting to find a contract with these CAR terms in it?

11 MR SCHAEFER: No, my understanding is we're expecting to find information about  
12 the policies that Microsoft was actually applying to its customers, not just contract  
13 terms. So this goes to the point we were discussing earlier, was there a policy --

14 MR JUSTIN TURNER: You say "policies". You mean the soft pressure on companies.

15 MR SCHAEFER: Indeed, yes.

16 So DD360 --

17 MR JUSTIN TURNER: So if you can search -- if you can search for your 24  
18 companies, had these databases interrogated on the sampling, and find pressure  
19 being applied, then you have got ahead of steam, haven't you? What's wrong with  
20 that?

21 MR SCHAEFER: Sir, what is -- the difficulty is that we are being told we cannot apply  
22 key word searches which would actually be the obvious way of trying to find this  
23 information.

24 MR JUSTIN TURNER: But I cannot resolve -- on the one hand I am being told this is  
25 extremely difficult. Of course, at some level it can always be done, but it's extremely  
26 difficult to do, with structured data it's not possible to ordinarily do these searches with

1 strings. I think that's common ground.

2 The question is can you then sidestep that?

3 The experts had a meeting, they couldn't agree. You've written some letters saying  
4 a bunch of stuff. I do not have expert reports. I do not have experts to be  
5 cross-examined to find out -- I do not have any costings. It's very difficult for me to  
6 reconcile this on the sort of fly in a hearing when we're dealing with dozens of other  
7 things. I mean, it's really tricky.

8 MR SCHAEFER: Sir, your point is very well taken.

9 I would say two things. One is the experts didn't disagree, actually, there was progress  
10 between the experts, but it was an initial meeting that was meant to be followed up.  
11 This letter was the follow-up. There has never been a response to this letter, that is  
12 a point --

13 MR JUSTIN TURNER: But that doesn't enable me to resolve the technical issues.

14 MR SCHAEFER: It doesn't, but you are disabled from resolving it by Microsoft's  
15 refusal to answer this letter.

16 MR JUSTIN TURNER: You could have called some expert evidence if you were that  
17 confident in your position.

18 So, because I can't resolve it, I think we have to proceed on the basis of the sampling  
19 that is being suggested for DD360 and MSX CRM. I am with you on the other  
20 database.

21 MR GRUBECK: Sir, on VL Central, I still owe you a response on what we were going  
22 to propose on that.

23 MR JUSTIN TURNER: Right, okay. Yes.

24 MR GRUBECK: I said what we could do is go and bottom out this question of when  
25 things are archived. So --

26 MR JUSTIN TURNER: Well, you've had an opportunity to do that.

1 MR GRUBECK: A matter of days. This proposal was put forward in a very short time.  
2 We are actively making enquiries, I took instructions. We're trying to find out what is  
3 the process by which things are archived on that, and on that basis we can then cut  
4 the sample of unstructured data to be searched differently.

5 What's not realistic is to search all unstructured data because it's almost a terabyte of  
6 data. That's just a question of logistics and cost.

7 MR JUSTIN TURNER: So you say you can provide more technical information on this  
8 over the next --?

9 MR GRUBECK: Well, we can provide more technical information, but also what we  
10 can do is we can propose a differently cut sample, if it turns out that things are archived  
11 after a certain period, and therefore, if we only search what is not in the archives now,  
12 we might be able to make a different proposal for a sample. Essentially, what I'm  
13 proposing is that we do a sampling exercise on VL Central Approvals as well, with  
14 a limited number of documents to be searched and the parties to agree the parameters  
15 thereto.

16 MR JUSTIN TURNER: The parties to agree?

17 MR GRUBECK: The parameters of that sample, so that way we can address the  
18 archiving issue.

19 MR SCHAEFER: Sir, there is a real risk with (inaudible) expert evidence by counsel,  
20 but just to join the club, this has 4 terabytes of data (Indicates). I can search it instantly.

21 MR JUSTIN TURNER: Right.

22 MR SCHAEFER: Microsoft has had an opportunity to do this. If I might invite you to  
23 order them to search the database, and if they really can't proportionately search it  
24 they can come back and apply. But we are constantly faced with assertions of  
25 impossibility.

26 MR GRUBECK: Sir, just to say this is not expert evidence by counsel.

1 MR JUSTIN TURNER: Right. Let's just --

2 MR GRUBECK: Henderson, paragraph --

3 MR JUSTIN TURNER: -- decide what we're doing on DD360 and MSX CRM. If we  
4 go back to VL Central Approvals, and if you could remind me of the technical problems  
5 with VL Central Approvals.

6 MR GRUBECK: Yes, sir you find that in Henderson -- Henderson 13, paragraph 74(f)  
7 is the summary.

8 MR JUSTIN TURNER: Henderson --

9 MR GRUBECK: 13. It's page 408 of bundle B.

10 MR JUSTIN TURNER: Yes. Page 408, where? (sotto voce reads). Yes.

11 MR GRUBECK: "... unstructured data searches could be undertaken", but "vast"  
12 quantity, one terabyte in size.

13 So this is Mr Henderson's evidence, not mine.

14 "... take weeks to process for searching".

15 And what we're proposing to do is much like DD360, and MSX, a sample.

16 May I just take instructions on what --

17 MR JUSTIN TURNER: But you have unstructured -- yes, okay.

18 MR GRUBECK: It's half unstructured, half structured. That's set out in the annex to  
19 Henderson 10.

20 MR JUSTIN TURNER: Right. So you could search -- but you can search the  
21 unstructured part, there's no problem using strings to search that?

22 MR GRUBECK: Well, there are constraints in terms of volume. So  
23 there's -- structured is impossible to search for complex search strings; unstructured  
24 can be searched but physically running a search on one terabyte of data takes months  
25 and costs a fortune. So --

26 MR JUSTIN TURNER: Does it -- where is your evidence that it takes -- to actually just

1 run the search?

2 MR GRUBECK: Well, for one I can give you VL,'s evidence on this.

3 MR JUSTIN TURNER: I don't want VL's evidence on this please, I want your evidence  
4 on it.

5 MR GRUBECK: So it's Henderson 10, annex 2.

6 MR JUSTIN TURNER: Give me a page.

7 MR GRUBECK: Page 304. You see second column down sets out the problems  
8 regarding VL Central.

9 MR JUSTIN TURNER: Sorry, what am I meant to be reading here?  
10 I don't really get much out of this, I'm afraid.

11 **(Pause)**

12 I am going to order that you search the unstructured parts, if -- you have liberty to  
13 apply if this searching cannot be done for technical reasons. I don't feel we have  
14 sufficient evidence before the court. But that's --

15 MR GRUBECK: If the evidence, the problem is that it takes what we consider to be  
16 disproportionate amount of time, is that --?

17 MR JUSTIN TURNER: You can -- we can raise that at the next hearing.

18 MR GRUBECK: Yes, because that is ultimately our concern. But this is putting it the  
19 wrong way round. VL says "Well, this might be interesting," and we're being ordered  
20 to spend a fortune on searches --

21 MR JUSTIN TURNER: I am going to need better -- the presumption is that the order  
22 will be made and I am going to need better technical evidence from you if it's not  
23 feasible.

24 MR GRUBECK: If it's not feasible we will come back with technical evidence  
25 explaining the cost and the time.

26 MR JUSTIN TURNER: In the meantime we will have the samples for the --

1 MR GRUBECK: Yes MSX and DD360.

2 MR JUSTIN TURNER: Mr Schaefer, is there anything else we needed to deal with  
3 this on document?

4 MR SCHAEFER: I just want to understand -- understand your decision on MS360,  
5 and that's DD360 and CRM. On Central Approvals you are ordering Microsoft to  
6 search subject to liberty to apply?

7 MR JUSTIN TURNER: I am giving a provisional indication that they should search the  
8 unstructured part. There will need to be more, as I understand, technical  
9 understanding of what that involves. It's being suggested it might take months to run  
10 the search. I'm sceptical, but I don't know. So if they want to maintain that position  
11 and -- then they'll need to argue that at the next hearing.

12 MR SCHAEFER: I'm grateful.

13 MR JUSTIN TURNER: So for practical matters the search is not going to happen  
14 before the next hearing, that search; the other searches can proceed.

15 MR SCHAEFER: I'm grateful.

16 I believe as far as Microsoft's disclosure goes that leaves us with the collateral waiver  
17 point.

18 MR GRUBECK: Can I just check, does that mean the claimant is not pursuing the  
19 shared mailboxes?

20 MR SCHAEFER: I am sorry, thank you for reminding me!

21 MR JUSTIN TURNER: The shared mailboxes?

22 MR SCHAEFER: The shared mailboxes.

23 So, as well as the custodians which you've dealt with, there is an issue as to what are  
24 called shared mailboxes which, as I understand, are shared mailboxes, and there are  
25 three -- there are three categories. Excuse me, I am just finding it. Here we are.

26 There are three categories where ValueLicensing had asked Microsoft to search these

1 shared mailboxes and Microsoft has agreed to search them for one of those three  
2 categories. So if you have the table, they are called EOC Deal Desk and WCS BC  
3 Admin.

4 MR JUSTIN TURNER: What am I looking at? What page?

5 MR SCHAEFER: If you look at the table it's item 6(iii), item --

6 MR JUSTIN TURNER: Shared mailbox ... right.

7 MR SCHAEFER: It's the same two --

8 MR JUSTIN TURNER: Yes.

9 MR SCHAEFER: -- that we had asked to be searched for 6(iii), 7(ii) and 7(iii).  
10 Microsoft has agreed to search for 7(ii) but refuses to search for the others on the  
11 basis that it would be disproportionate.

12 But again, there's no granular evidence on what the problems are.  
13 It's quite difficult to understand, in my submission, if you look at --

14 MR JUSTIN TURNER: So the 6(iii) and --?

15 MR SCHAEFER: 7(ii), if I could ask you to -- if you keep your thumb on 6(iii) and also  
16 look at 7(ii). So there is --

17 MR JUSTIN TURNER: This is EOC Deal Desk. What is WCS BC Admin?

18 MR SCHAEFER: My understanding is that both of these are shared mailboxes that  
19 were used to share information across the Deal Desk. Is that right? Yes.

20 Sorry, they are similar, they are both used to share information across the Deal Desk  
21 rather than individuals.

22 MR JUSTIN TURNER: They are both Deal Desk shared --

23 MR SCHAEFER: Both Deal Desk shared mailboxes as I understand.  
24 So 7(ii) Microsoft has agreed to search for the keywords set out.  
25 6(iii) it then refuses --

26 MR JUSTIN TURNER: Why -- sorry, I am just trying to understand the scope of the

1 | dispute. Why can't you just search these shared mailboxes, if they are Deal Desk  
2 | mailboxes? Deal Desk seems to be at the centre of all this.

3 | MR GRUBECK: The reason we can't search them, sir, is that because would add  
4 | some 60,000 to 65,000 documents. The reference for that is bundle G, F8, 323,  
5 | paragraph 9.

6 | MR JUSTIN TURNER: Sorry, G?

7 | MR GRUBECK: G, tab F8, paragraph 9.

8 | So that would add 60 to 65,000 additional items to be searched. That would, on the  
9 | evidence, cost around £2 million. And take --

10 | MR JUSTIN TURNER: Just for the shared mailboxes?

11 | MR GRUBECK: To search the shared mailboxes, yes.

12 | MR JUSTIN TURNER: Mr Schaefer, is that in dispute, the cost? That seems to be  
13 | a proportionality question.

14 | MR SCHAEFER: Sir, the point I was about to make, and the reason we find this  
15 | slightly confusing, is that the agreed searches of 7(ii) overlap very considerably.

16 | MR JUSTIN TURNER: Maybe there's an inconsistency, but you have that in the bag,  
17 | so why -- do you dispute that the 60, 65,000, that's not an issue, that's -- then that's  
18 | on the evidence it looks, if you scale things up, that looks like more than £1 million and  
19 | in fact closer to 2 --

20 | MR SCHAEFER: As ever we don't know whether this is one particular keyword that  
21 | is said to give rise to the problem. If I may take instructions for just one second.

22 | MR GRUBECK: Could I also --

23 | MR JUSTIN TURNER: Let Mr Schaefer just take his instructions.

24 | **(Pause)**

25 | MR SCHAEFER: Sir, so I have a proposal.

26 | Microsoft has agreed to search, for category 7(ii), the keywords set out in the table.

1 If Microsoft is willing, when it's reviewing the results of those searches, to identify  
2 documents that also come in to categories 6(iii) and 7(iii), so no further searches  
3 necessary, that would be sufficient for present purposes.

4 MR JUSTIN TURNER: That sounds reasonable. **(Pause)**

5 MR GRUBECK: Sir, yes. We can give corresponding instructions to the review team  
6 that there will only be a search for the parameters of the agreed category and then  
7 that pool of documents will be reviewed for relevance in relation to any of the three  
8 categories.

9 MR JUSTIN TURNER: Great, thank you very much.

10 MR SCHAEFER: I'm grateful.

11 MR JUSTIN TURNER: The next thing is the waiver, did you say?

12 MR SCHAEFER: Sir, yes.

13 MR JUSTIN TURNER: I'm not going to deal with waiver today. That will have to  
14 be -- that's a fairly weighty topic.

15 MR SCHAEFER: Understood.

16 Sir, then that covers it as far as our application is concerned.

17 MR JUSTIN TURNER: Right. So issues on the agenda. Mr O'Donoghue, sorry,  
18 you've been a wall flower today so far!

19 MR O'DONOGHUE: There's the small matter of the claimant's disclosure.

20 MR JUSTIN TURNER: Yes, I know. We can't do that today.

21 MR O'DONOGHUE: Realistically we can't go through this in 20 minutes. What I can  
22 do, sir, is I can outline in a few minutes what actually has been agreed, so at least that  
23 can be put on the stocks, as it were.

24 MR JUSTIN TURNER: Yes, yes.

25 MR O'DONOGHUE: Then there may be a rump I think of a couple of issues that we  
26 may need a remote hearing on or find some other way to deal with that.

1 MR JUSTIN TURNER: We're going to need -- there are a lot of outstanding issues  
2 that have not been dealt with. I'm sorry, February has been really difficult for the  
3 tribunal.

4 MR O'DONOGHUE: I understand.

5 MR JUSTIN TURNER: We will try and attend to these promptly.

6 MR O'DONOGHUE: Yes.

7 MR JUSTIN TURNER: We're going to need a couple of days, aren't we, to get through  
8 everything?

9 MR O'DONOGHUE: I suspect so. Sir, on my --

10 MR JUSTIN TURNER: Can I just before you do that, before I forget, these preliminary  
11 issues on which the parties seem to be interested in on --

12 MR O'DONOGHUE: On intellectual property.

13 MR JUSTIN TURNER: -- intellectual property. I was a little -- so in the judgment  
14 I wrote, or the tribunal wrote, rather, which records your submission -- I just want to  
15 have a look at that.

16 Yes, it's at C, tab 20.

17 You said it requires -- looking at the defences under Article 102, it's necessary to keep  
18 in mind that there's a holistic assessment. I am just trying to reconcile with the idea of  
19 the holistic assessment and the fact that this could be a preliminary issue.

20 MR O'DONOGHUE: Sir, that I think would be for another day, but from our perspective  
21 maybe the easiest way to pick this up is in the pleading itself, the particulars of claim  
22 at 8.2, please.

23 MR JUSTIN TURNER: I mean you have all these new amendments which I haven't  
24 looked at yet.

25 MR O'DONOGHUE: Yes. I can give you the sort of -- the headline point.

26 MR JUSTIN TURNER: Yes.

1 MR O'DONOGHUE: It's at A2, pages 12 and 13.

2 MR JUSTIN TURNER: Yes.

3 MR O'DONOGHUE: Sir, it's really 21 on page 13. So this is VL's positive case,  
4 licences could be lawfully resold notwithstanding any purported restriction in the  
5 licence agreement.

6 Now this on their pleading is a predicate or anterior issue. They accept I think on  
7 certain permutations it may be entirely preclusive of any claim. And again, this is really  
8 for Mr Hobbs and I understand Mr Lavy.

9 MR JUSTIN TURNER: This is assuming your case is good at all it's going to be messy,  
10 isn't it; it's going to be maybe some licences they could resell and some licences they  
11 couldn't. I mean that's going to be -- assuming you've got a case at all that is, that's  
12 where we're going to end up.

13 MR O'DONOGHUE: I don't want to get ahead of myself. Certainly on their pleaded  
14 case there is an anterior predicate that may well be a knockout.

15 MR JUSTIN TURNER: Help me. We have some evidence from Mr Morgan on this,  
16 haven't we, as to why these terms were incorporated.

17 MR O'DONOGHUE: Yes.

18 MR JUSTIN TURNER: That's at bundle B -- B1. He doesn't make any reference to --

19 MR O'DONOGHUE: 439.

20 MR JUSTIN TURNER: Yes. He doesn't make any reference to these CAR terms  
21 being introduced because of copyright infringement; he says they're looking at it as  
22 a way of wrapping up a discount essentially.

23 MR O'DONOGHUE: That's one piece of evidence, there's obviously Mr Baker as well.

24 MR JUSTIN TURNER: Yes.

25 MR O'DONOGHUE: Again, sir, I'm going off-piste, but of course there were at least  
26 two intellectual property infringement actions against VL and Discount-Licensing. So

1 the whole issue of secondhand market compliance with UsedSoft has been very much  
2 a live issue for the last decade or so.

3 So you're right that Mr Morgan in that narrow piece of evidence that's not something  
4 he raises, but it certainly was uppermost in my client's mind, for example Baker,  
5 paragraph 16, does mention the issue of infringement.

6 MR JUSTIN TURNER: Let's have a look.

7 MR O'DONOGHUE: A14, 209.

8 MR JUSTIN TURNER: A14. Paragraph?

9 MR O'DONOGHUE: 16, sir.

10 MR JUSTIN TURNER: **(Pause)** I mean, you're not quite saying the same thing. He's  
11 not saying that was the reason these terms were introduced. Good luck with that.

12 MR O'DONOGHUE: He's saying it's part of the context.

13 Again, sir, we're getting ahead of ourselves.

14 MR JUSTIN TURNER: Right.

15 MR O'DONOGHUE: As a matter of law, there's no requirement on my client that the  
16 reason must contemporaneously appear in a document or evidence; the question is,  
17 is it a good defence?

18 MR JUSTIN TURNER: Yes, but there does seem to be a question which we'll need  
19 to grapple with, obviously not today, that you seem to be saying that you need to audit  
20 what was going on.

21 MR O'DONOGHUE: Yes.

22 MR JUSTIN TURNER: And I think Mr Schaefer says: well no, it's got nothing to do  
23 with what's going on behind the scenes so --

24 MR O'DONOGHUE: Sir, in terms of what -- we sent the tribunal last night a draft order.  
25 There's a handful of things which have been agreed.

26 MR JUSTIN TURNER: Yes.

1 MR O'DONOGHUE: Can I just show you those and then indicate what is left over?  
2 I'm sorry, sir, even subject to, as usual, a blizzard, this came in. I have hard copies,  
3 sir, if that helps. This came in --  
4 MR JUSTIN TURNER: I did have it, perhaps it would be quicker to hand it up.  
5 MR O'DONOGHUE: It came in yesterday evening.  
6 MR JUSTIN TURNER: I did look at it. **(Handed)**  
7 MR O'DONOGHUE: And sir, paragraphs 1 and following are the claimant's disclosure  
8 and then over the page is Microsoft's disclosure which we've dealt with.  
9 Sir, if I can start at paragraph 3, so it is now agreed that the contents of the claimant's  
10 CRM system and Verba --  
11 MR JUSTIN TURNER: Yes, are going to be handed over in parity.  
12 MR O'DONOGHUE: So that's agreed.  
13 Then sir, at paragraph 1 there's a point on a date. So there's an index to Verba and  
14 there are trackers associated with the CRM. We'd like to hit the ground running. If  
15 they can be provided by 10 March, we'd like those a bit earlier if possible.  
16 I don't know if that's opposed.  
17 MR JUSTIN TURNER: So you at want -- when do you want it?  
18 MR O'DONOGHUE: 10 March.  
19 MR JUSTIN TURNER: What's the date that is being suggested?  
20 MR O'DONOGHUE: We haven't had a counter-proposal in fact.  
21 MR JUSTIN TURNER: Is that something we can sort out?  
22 MR SCHAEFER: I think the proposal we were going to make was disclosure by both  
23 parties at the same time on 28 April.  
24 MR JUSTIN TURNER: Right.  
25 MR O'DONOGHUE: Well sir, again without getting into what I call archaeology and  
26 you, sir, call sniping, we should have had these databases a year ago, and they are

1 critical information on the demand side, the customer-facing side. As you can see  
2 from the order, it was proposed they would be handed over in toto subject to a privilege  
3 review. So there's no need for --

4 MR JUSTIN TURNER: Why do you need them before 28 April?

5 MR O'DONOGHUE: We want to crack on with building our case on demand.

6 MR JUSTIN TURNER: I think we'll go with 28 April for that, if that's going to be the  
7 date for Microsoft's disclosure; is that -- is that agreed or not?

8 MR GRUBECK: Sir, I am just taking instructions on that but we envisage we're going  
9 to need longer than that in light of what has been agreed and ordered.

10 MR JUSTIN TURNER: You may be able to give some earlier, perhaps you could take  
11 it -- some by 28 April even if others take longer.

12 MR GRUBECK: That may be possible.

13 Can I take instructions and come back to you on that?

14 MR JUSTIN TURNER: Of course, of course.

15 MR O'DONOGHUE: So then continuing, paragraph 2 is known adverse documents.  
16 I'm afraid we need to come back on that.

17 MR JUSTIN TURNER: This is the ongoing obligation to provide known adverse  
18 documents.

19 MR O'DONOGHUE: Both historic and ongoing, yes.

20 MR JUSTIN TURNER: I mean I -- I would've thought this could be resolved. There  
21 seems to be a lot of --

22 MR O'DONOGHUE: Indeed, indeed.

23 So we have had a helpful discussion this morning.

24 MR JUSTIN TURNER: Right.

25 MR O'DONOGHUE: Some movement has been made, but again I am just trying to  
26 understand what is absolutely agreed today and what we may need to come back on.

1 MR JUSTIN TURNER: I would be disappointed if we have to come back and argue  
2 that, but we'll see where we get to.

3 MR O'DONOGHUE: So would I.

4 Then sir, on 3 it is agreed I think, subject to two points. One is, sir, the categories you  
5 alluded to as to whether there should be -- for the IP-related issues, whether there  
6 should be --

7 MR JUSTIN TURNER: We're going to have to --

8 MR O'DONOGHUE: Come back on that. But that would be carved out from  
9 schedule 1.

10 3(b)(ii), sir, that, I think, is agreed subject to a best endeavours clause. Now, the point  
11 as I understand it is that some of the individuals assisting with the reasonable  
12 searches are no longer with VL -- yes, yes.

13 So (b)(ii) I think is agreed in principle as to a witness statement. There is a dispute as  
14 to how many custodians should be assisting with the reasonable searches.

15 Now, VL, as I understand it, makes the point, well not all of these people are still with  
16 the company. We have queried whether some of them for example have cooperation  
17 agreements to assist the company. The parties are in discussions on that, but I think  
18 the resolution on that, subject to what VL says, is that there would be a response to  
19 our query about cooperation agreements and a best endeavours clause in any event.

20 Sir, I'm reasonably confident that can be agreed today or shortly after today.

21 So with that I think the -- the known adverse documents, the category 2 IP-related  
22 disclosure, they would be the outstanding points. I would hope the rest can be ordered  
23 today and I would hope we can avoid troubling the tribunal with this in the future.

24 MR JUSTIN TURNER: Okay.

25 MR O'DONOGHUE: Sir, for the -- so for the tribunal's pen really, so in terms of what  
26 is still outstanding, obviously the preliminary issue application, we will need directions

1 towards the hearing of that application. There is my client's amendment application.  
2 We still have open questions as to the main trial directions, and of course, depending  
3 on the PI, there may be an issue as to whether this all moves in tandem or it is  
4 staggered in some way. They are interrelated, so there are at least those four issues.  
5 MR JUSTIN TURNER: Waiver.  
6 MR O'DONOGHUE: And there may be two issues on the claimant's disclosure, so  
7 that's the menu that is still left over.  
8 MR JUSTIN TURNER: Right. So -- well at this stage let's still keep one to two days,  
9 I think. It may be things narrow and we can do it in a day.  
10 MR O'DONOGHUE: Sir, we request that everything that is agreed on the claimant's  
11 disclosure, or is effectively agreed subject to the two points I mentioned should be  
12 ordered today, and we are concerned, sir, about an asymmetry whereby we had to do  
13 quite a lot and then the claimants are kicking for touch.  
14 MR JUSTIN TURNER: In terms of dates those things that are agreed, where are we  
15 going on dates? Mr Schaefer do you want to start? You said 28 April for your  
16 databases.  
17 MR SCHAEFER: 28 April was the proposal for both sides.  
18 MR JUSTIN TURNER: We'll come back to the --  
19 MR SCHAEFER: Both sides want to crack on --  
20 MR JUSTIN TURNER: You are just handing over some databases.  
21 MR SCHAEFER: Sir no, we we're handing over databases in their entirety which was  
22 not the proposal. Under the CMC3 order they were meant to be searched. Since then  
23 Microsoft said they want to see everything and we've agreed to that, but it does mean  
24 they need to --  
25 MR JUSTIN TURNER: I'm not pushing back on 28 April.  
26 MR SCHAEFER: I'm grateful.

1 MR JUSTIN TURNER: That doesn't necessarily mean Microsoft can do everything by  
2 28 April. Are there any other dates -- anything else that's agreed or nearly agreed?  
3 Again, we should try and crack on with it and not have to come back and argue dates.  
4 Any other dates you need from --

5 MR O'DONOGHUE: Sir, in the draft before you we have given dates for everything  
6 else subject to the two points which have been carved out.

7 MR JUSTIN TURNER: So 3(a) was the next, so -- so we've dealt with 1.  
8 3(a): "By 25th ... provide the defendants with the contents of the claimant's CRM of  
9 a recording ..."  
10 28 April as well. It's the same --

11 MR O'DONOGHUE: Yes. 3(b), well, the same, it's only three days.

12 MR JUSTIN TURNER: Yes. But you didn't tell me that was agreed, you said it was  
13 nearly agreed.

14 MR O'DONOGHUE: Yes, it's close to being agreed. I understand if a best endeavours  
15 clause was added subject to our --

16 MR JUSTIN TURNER: I hope it will be agreed and if it is agreed at the moment I can  
17 see no reason why it couldn't be 28 April.

18 MR O'DONOGHUE: Thank you.

19 MR JUSTIN TURNER: But that is just an indication, I'm not making an order on that.

20 MR SCHAEFER: I'm grateful.

21 MR JUSTIN TURNER: So Microsoft, disclosure.

22 MR GRUBECK: Sir, looking at experience from the last batch of disclosure, it's also  
23 in the evidence, it took six weeks to review 20,000 documents.

24 MR JUSTIN TURNER: Tell me what you want first of all.

25 MR GRUBECK: We think the absolute minimum, excluding the databases, is 26 May,  
26 three months, and that --

1 MR JUSTIN TURNER: 26 May for?

2 MR GRUBECK: For all the custodian-related and mailbox-related disclosure.

3 MR JUSTIN TURNER: Right. Is there anything that can be done before that?

4 MR GRUBECK: I explored that, but it would make it hugely inefficient because one  
5 would need to set up parallel processes.

6 MR JUSTIN TURNER: This is substantial disclosure. I don't think 26 May is on its  
7 face unreasonable.

8 MR GRUBECK: So it should be 27 May, I'm told it's a Bank Holiday, the 26th.

9 MR JUSTIN TURNER: There's a lot of discussion -- I don't think 27 May is  
10 unreasonable, Mr Schaefer, so I'm inclined to order that. Is there anything else you  
11 want to say on that?

12 MR SCHAEFER: Sir, only that we are as keen to crack on with reviewing their  
13 disclosure as they are to crack on with ours.

14 MR JUSTIN TURNER: Of course, of course.

15 MR O'DONOGHUE: We will draft an order for the tribunal's approval.

16 MR JUSTIN TURNER: Thank you. We can liaise about finding a one to two days to  
17 deal with the other things. I apologise we are not in a position to be able to deal with  
18 all those matters today.

19 MR O'DONOGHUE: If I may so, it did lead to more discipline on our side -- which may  
20 have been a collateral objective! It succeeded.

21 MR JUSTIN TURNER: And on costs, are we -- costs in the case or --?

22 MR SCHAEFER: Yes.

23 MR O'DONOGHUE: Yes.

24 **(12.55 pm)**

25 **(The hearing concluded)**

26