IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 13th – Wednesday 14th May 2025

Before:

Justin Turner KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimant

JJH Enterprises Limited (trading as ValueLicensing)

V

Defendants

Microsoft Corporation and Others

A P P E A R AN C E S

Matthew Lavy KC and Jon Lawrence (Instructed by Ghaffari Fussell LLP) on behalf of JJH Enterprises Limited.

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

Tuesday 13 May 2025

(10.30 am)

Proceedings

THE CHAIR: Some of you are joining us livestream, so I must state a warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual and breach of that provision is punishable as contempt of court.

Can I just explain we have visiting from Japan, Judge Hiroshima, who is here to observe today and not playing any part in the decision-making process.

I have just been handed a new directions --

MR LAWRENCE: Sir, yes, you have. That is in completely agreed form, save for one point.

THE CHAIR: Okay, right, we'll come to that. I can lose the other one then.

MR LAWRENCE: You can lose all of the other ones.

MR LAVY: Good morning, sir. I appear with Mr Lawrence for ValueLicensing, and the team for Microsoft is Mr Hobbs, KC, Mr O'Donoghue KC, Mr Riordan, Mr Grubeck and Ms Lukacova.

There are six items, we think, on the agenda. It is reducing. The first one is the question of whether

there should be a PI trial. That's where the parties are ad idem, but obviously subject to the Tribunal's view.

THE CHAIR: Yes.

MR LAVY: Then there is the forum point which is related but actually distinct, as to whether the Tribunal has jurisdiction to deal with the copyright issues.

THE CHAIR: Right.

MR LAVY: We say yes, it does, Microsoft says no, it doesn't.

THE CHAIR: That's still in issue, is it, Mr O'Donoghue?

MR O'DONOGHUE: Yes.

MR LAVY: So there is that point which is obviously rather important for the preliminary issues but it is also more generally quite important, because the preliminary issues are not the only point where this might arise.

THE CHAIR: Yes.

MR LAVY: Then there is ValueLicensing's disclosure application relating to collateral waiver. That's the CELA point. Then there is ValueLicensing's database disclosure application. So two disclosure applications on this side. Then Microsoft has an application for a cost for the summary judgment application with an interim payment and finally, there is Microsoft's application for disclosure in relation to CRM and Verba.

I think that is everything on the list. I am sure someone from Microsoft will stand up if it is not.

MR O'DONOGHUE: Sir, that is basically correct. There is a small coda on the other disclosure which doesn't require decision today. You remember, sir, there was the residual of categories 2.6 to 2.11 held over from CMC5. We don't need a decision on that today.

THE CHAIR: I am relieved to hear it. My memory is a little bit -- yes.

MR O'DONOGHUE: Sir, in the interests of further momentum, there was a dispute about a date for a response to a request for information. That has been resolved. They will respond by 13 June, so we can take that off the table. As Mr Lavy indicated on both PI directions and main trial directions, everything is agreed apart from the trial length for the main trial which I can come back to. It's a very short point. Three weeks versus four weeks but we can deal with that very briskly. So a number of things have been taken off the table.

I would hope, with a fair wind, we can finish today, but famous last words.

MR LAVY: Actually, sir, just on that heady point of three weeks versus four weeks, it is really, frankly, a matter for the Tribunal as to whether it's better to reserve three weeks, on the basis that there is a possibility it

won't be enough and it will need to be extended as we get closer or better to ask the Tribunal if it can reserve four weeks, on the basis that the parties will promptly tell the Tribunal if it doesn't think it is going to need them. So really, I have no submissions to make on it, I am entirely in your hands.

THE CHAIR: Yes. We need to have at some point, further discussion about, actually, what the shape and form of the trial is likely to be.

If there is a hearing of a preliminary issue and those matters have been disposed of by then -- it is not clear to me at the moment that either three or four weeks will be necessary. But it may be, I don't know.

MR LAVY: The way we sort of ended up triangulating there, sir, is we said two, they said four, we said "Okay, three." So there we are.

THE CHAIR: Yes.

MR LAVY: The preliminary issues then. As you have seen, that is now a joint request to the Tribunal.

THE CHAIR: Yes. So just to cut through. I see the attraction in hearing it as a preliminary issue. I have well in mind your desire to get on with this. Obviously, the jurisdiction point is pretty crucial to that.

MR LAVY: Yes.

THE CHAIR: I have some concerns about the scope of the preliminary issue, just again, to alert you to what we need to come on to. You seem to be asking me to answer questions as if I was the Court of Justice. They are extremely broad at the moment, the preliminary issues, so they will need to be narrowed down to the specific facts of this case, I think.

MR LAVY: Yes. On that point, sir -- yes, but, if I may say so. Because I totally take the Tribunal's point that as framed, particularly issue 1 appears quite broad. Issue 2 specifically talks about Microsoft Office and Microsoft Windows, so it is very much grounded in those two products, and whether the fact that they contain what's been characterised as non-programme works means they are not subject to exhaustion.

Now issue 1, although it is framed in general terms, it has to be read, sir, with paragraph 2 of the order, because the intent, certainly, is to ground it in some specific sample transactions.

THE CHAIR: Yes.

MR LAVY: And those sample transactions will be the factual groundings, so that we are not asking the Tribunal to answer very abstract questions.

THE CHAIR: No, but I mean 1A at the moment is a broad statement of law and it just needs to be tied -- needs

to be made clear that question will only be answered in the context of the facts from paragraph 2. That is really all the point I am making.

MR LAVY: Sir, absolutely, that is the intention. We can tighten up the drafting, I am sure.

THE CHAIR: Yes.

MR LAVY: So it is probably -- if the Tribunal is minded in principle or at least attracted in principle by the idea of the preliminary issues, rather than spending a lot of time telling you why it is a good idea, it might be better to go through the order and should you how it is meant to be shaping up.

THE CHAIR: Very well, yes. Then perhaps I should also alert you to just another concern. At the moment it's not clear to me that these are bare questions of law. It does seem there could be a lot of important facts, particularly -- please do not read too much into these suggestions, they are just, really, off the top of my head -- but I mean there may be issues as to the number of copies that are produced if one buys a bulk licence. Are those copies held on a single server, are they held on individual computers? What does destroying a copy mean? There may be quite a lot of -- those may or may not be relevant facts, but they will be facts it will be necessary for the Tribunal to have before it when it's

making a decision.

MR LAVY: Yes. I mean on that --

THE CHAIR: And whether that involves any expert input or whether there is going to be any dispute is a matter that we need to --

MR LAVY: That's the key point, sir, the costs. Without wishing to bind myself, I certainly agree that I also anticipated that those sorts of facts are very likely to be relevant, at least contextually.

THE CHAIR: Yes.

MR LAVY: But I would -- I suspect I will regret these words -- be surprised if many of them were contentious.

THE CHAIR: Yes.

MR LAVY: The draft order does provide for facts, for both an agreed statement of facts and also evidence --

THE CHAIR: Let's have a look at that as we go through, as you were going to suggest. Sorry, I was just --

MR LAVY: Yes. So after the issues then, the starting point is paragraph 2.

THE CHAIR: So we can just make sure it is explicitly the issues are tied into the facts.

MR LAVY: Sir, yes.

THE CHAIR: And then --

MR HOBBS: Can I suggest on that, it has come up before on orders for reference to the CJU --

THE CHAIR: Yes.

MR HOBBS: -- and the experience there was to preface it with the words "in the circumstances of a case such as the present."

THE CHAIR: Well that may be, may be, yes, yes.

MR LAVY: The second paragraph is where the proposed directions start, effectively. This I have already drawn the Tribunal's attention to.

So the parties identify transactions -- Claimant's transactions -- and the contractual terms relevant to those, because plainly the contractual terms are going to be relevant to the points as well.

Then under 2A, there is an already identified transaction. Then the general scheme is that each party identifies two further transactions that it thinks are going to be useful. So we have a set of five transactions. Those transactions will be the factual grounding to the 1A dispute.

THE CHAIR: We need five, do we? Why would three not suffice? Are these materially different on either party's case?

MR LAVY: The short answer is it may well be that three is enough, sir, but it seemed right to allow flexibility for each party to have two --

THE CHAIR: Right.

MR LAVY: -- because it may be that there are differences and at this stage -- of course, at this stage the transactions haven't actually been identified.

THE CHAIR: Quite.

MR LAVY: So if one gets past this stage and, actually, what we are dealing with is five transactions that are, to all intents and purposes, materially identical, it will be surprising if the Tribunal needs to grapple with all five.

THE CHAIR: Yes. I think whatever happens -- assuming we proceed with this -- it will need another sort of pre-hearing review. We can, I think, at that stage, decide whether it is necessary to press ahead with all five or reduce it to three or two or one or whatever.

MR LAVY: Potentially, once the evidence is in.

THE CHAIR: Once the evidence is in, exactly.

MR LAVY: That leads me on to the evidence. Two stages are envisaged. The first is an agreed statement of facts. That we see at paragraph 3.

So that really does two things. 3A is most closely related to the first preliminary issue and that is pulling together and identifying the licence terms, et cetera.

THE CHAIR: Obviously, that is relatively easy. What else is included in "and details of the sample transactions"?

MR LAVY: It is going to be licence terms, it is going to be numbers of licences bought. It may be the source of the licences, whether they all came together, whether they came separately.

THE CHAIR: Right.

MR LAVY: All of the mechanical and --

THE CHAIR: So it's all about, essentially, the terms of supply or the circumstances of supply or terms of supply?

MR LAVY: What was bought, what was resold and what were the relevant terms.

THE CHAIR: Right. So no facts on -- no technical facts, if I can put it that way, in 3A?

MR LAVY: No technical facts under 3A, no. No.

Then 3B is a matter for Microsoft to identify what non-programme works it wants to rely on, on the second preliminary issue, for obvious reasons.

THE CHAIR: I understand that, yes.

MR LAVY: Then there is sort of the regime for trying to get to agreement on this. We see that in paragraphs 4A and B.

THE CHAIR: Yes.

MR LAVY: Then over the page at 4B(iv) there is also the opportunity for the defendant to file evidence in support of its position. So that's where we move -- we

transition from an agreed statement of facts to also evidence.

THE CHAIR: Sorry:

"So the Claimant shall serve ...(Reading to the words)... any outstanding points of disagreement. Statement of facts shall be filed in the agreed form. The parties shall file further evidence and then evidence in reply."

Sorry, (iv):

"File any evidence in support of the position on the preliminary issue."

MR HOBBS: The thinking there, sir, is if we put in the evidence, it will assist with the finalisation and closure of the agreed statement of facts.

THE CHAIR: I see. Let me just re-read that, sorry. Right. Where does the technical background come in?

MR LAVY: So far as it is necessary. If we then go down to paragraph 6 -- because 4 and 5 are about agreeing the statement of facts and then allowing the supplementary evidence on Microsoft's side. Then on paragraph 6 there is a broader evidence in support of the respective positions of the parties. That's where insofar as there is technical evidence, that will have to go in.

THE CHAIR: Okay. I am not sure I am content with that. I think we need, don't we, to have any relevant

technical background in the agreed statement of facts? At the moment it's not just licence terms, it's also, you know, for these particular contracts, how many copies are being produced. I mean, sorry, again, please do not take a note of this and cite it back at me, but there will be technical background which as you say, may be no more than context. It may, in the end, be determinative of the issues. So we will need relevant material, technical material, to understand what is happening.

MR LAVY: And in a sense, the more one can cram into the agreed statement of facts --

THE CHAIR: Yes, it should be agreed. If it's not agreed, it's only because you are not familiar with what Microsoft do, I would expect.

MR LAWRENCE: (Inaudible words).

THE CHAIR: Yes, exactly, yes. In order for the Tribunal to determine this preliminary issue, it needs to have all the technical facts. Not just the technical facts in dispute, all the technical facts that you think may be relevant. We need to understand at an appropriate level the generality of what is going on in respect of each of the five examples that you are giving.

MR LAVY: Sir, that obviously makes complete sense.

THE CHAIR: Yes. In the expectation, that would be agreed

and if it's not agreed, obviously then it can get picked up -- any disputes -- in paragraph 6, I think, as you suggest.

MR LAVY: So that's that one. Then paragraph 7 there is a round of reply evidence.

THE CHAIR: Yes.

MR LAVY: Then I suppose, following your indications, we need a 7A which is potentially a CMC or some sort of review direction, to see where we are.

THE CHAIR: Yes. That may need to come a little earlier. So in terms of dates, October is just not an option because I am sitting on another matter. So early September is going to be the likely date for this.

MR LAVY: That doesn't allow much slippage, does it?

THE CHAIR: No, it doesn't. So we could be looking at the 8th. Perhaps trying to avoid the first week of September, as people may be coming back from holiday and things, but 8 September is likely. We will need to confirm that.

MR HOBBS: The only time in September I don’t have is the last week. I am in court --

THE CHAIR: Okay.

MR HOBBS: I can do the earlier dates in September.

THE CHAIR: That is very helpful, Mr Hobbs. We can finalise that out of court. When looking at when there should be

a review, I think, really -- I am assuming nobody really wants to be around in August, so probably late July would be the appropriate time. It may be sufficient to have juniors only on that. Just half a day to work out the mechanics and where the areas of dispute are and if anything needs to be done.

So the agreed statement of facts is -- sorry, what date?

MR LAVY: Sir, that should ultimately read 18 July, paragraph 5.

THE CHAIR: That is for the evidence, I think.

MR LAVY: I'm sorry. In a sense, the most ideal time is right at the back end of July, isn't it? But obviously that is subject to the Tribunal's availability, et cetera.

THE CHAIR: Yes.

MR LAVY: In any event, I would have thought that after 18 July, it has to be because --

THE CHAIR: Those dates, they are not particularly generous. There is quite a lot of work to do between now and 18 July, if these are going to be full and proper descriptions of the relevant evidence.

I am less concerned about it being after paragraph 6, but I think it probably, as you say, is after 18 July. Then again, we will liaise on a specific

date. It will depend on the availability of other Tribunal members and so forth.

Then in the light of the dispute -- yes, anyway, we will see where we are then.

MR LAVY: So then, as you see at paragraph 8, a three day trial is envisaged, with one day of pre-reading.

THE CHAIR: And whether there needs to be cross-examination or not is unclear at this stage.

MR LAVY: It's unclear at this stage.

THE CHAIR: And whether there needs to be some expert -- maybe internal experts rather than external experts -- whether there needs to be some short statement from experts and circumscribed cross-examination on those issues. Again, it is not possible to say at the moment.

MR LAVY: Hopefully not.

THE CHAIR: Hopefully not.

MR LAVY: There is a risk of bloat, but, yes, one has to see what the evidence looks like.

THE CHAIR: Very good.

MR LAVY: Then we move on to directions for the liability trial at paragraph 9 onwards.

The first thing to draw your attention to in paragraph 9 is the disclosure carries on in parallel.

THE CHAIR: Yes, that must be right, yes.

MR LAVY: But over the page at paragraph 10, the witnesses

of fact, 24 April 2026, so that's in practice, after the preliminary issue and perhaps after --

THE CHAIR: So these preliminary issues, I mean, these are -- it's not easy points, I think is our -- we have these two lines of authority. One on the need for the software directive, one on the UsedSoft and attempts to reconcile them. So these are by no means straightforward or trivial points to decide.

What is going to happen when these go on to appeal, which seems possible, to say no more than that at the moment, whichever side prevails?

MR LAVY: Yes, so the thinking on this side of the court is really as per the timetable, which is things carry on -- that's at ValueLicensing's risk. If we are in a position where -- things are only carrying on if the preliminary issues aren't decided wholly in Microsoft's favour because they are dispositive if they are decided wholly in Microsoft's favour.

So if there is then --

THE CHAIR: In either event, there may be an appeal from that decision.

MR LAVY: Yes, I suppose.

THE CHAIR: Is the Court of Appeal -- are we going to carry on? We don't want to have the liability trial -- it seems to me likely that that should go off as a distinct

point to the Court of Appeal, assuming it appears as crisp then as it does now, to be decided and then the appeal will be heard before the liability trial, the main liability trial.

MR LAVY: That would be the ideal, wouldn't it. But the problem -- not problem -- from this side of the court, the real concern is drift. So in a sense, an important part of the reason for wanting the preliminary issues at all is to try to narrow the issues, move the proceedings forward.

THE CHAIR: I understand that, yes. And the Tribunal is accommodating you by getting an early date in September to do all this.

MR LAVY: Yes, absolutely, we are very appreciative of that. But in a sense, that excellent work all gets undone if we then pause everything to see what happens after the Tribunal's judgment in the preliminary issues.

So our thinking is you carry on --

THE CHAIR: With directions. Carry on with directions through to trial.

MR LAVY: With directions through to trial. I suppose, although this is somewhat presumptuous of me to try to persuade the Court of Appeal that if they hear something, it should be expedited, and that hopefully we know where we are. Of course, because we are not -- in

part due to the Tribunal's availability, we are not looking until Easter 2027 for an actual liability trial.

THE CHAIR: Yes.

MR LAVY: So we are only talking about --

THE CHAIR: There is every possibility of the Court of Appeal being able to hear it and we can keep the liability timetable.

MR LAVY: Exactly. If witness statements are done and if expert reports are done, so be it. But it would be pretty disappointing if, by the time that the date comes for the actual liability trial, we don't know where we are on the preliminary issues.

The alternative, of course, is you simply pause everything. But the problem with that is then, realistically, we probably won't be looking at a liability trial until 2028. So we are very keen to get on with all the other directions.

MR HOBBS: We are not looking to pause anything. It is an ever present risk if you do a PI that there is going to be an appeal. If you give that too much weight, you would never order a PI in the first place. We are not looking to stop or stay anything but get on with it. You will know, I think, from the FRAND cases, that that's what happens all the time in those cases.

MR LAVY: That then takes us on to the directions which are

subject to you, in agreed form, leading to the liability trial. The only point of dispute is the one I touched on earlier, which is paragraph 17: how long the trial should be?

As I noted earlier, ValueLicensing's starting proposition was that it is a two week trial. Microsoft say four weeks.

THE CHAIR: Just summarise for me the issues. Assuming you have succeeded on the points on the preliminary issue, there is no dispute as to the contractual terms, what are we going to be arguing about?

MR LAVY: Well, it is the competition issues, isn't it? It is market, it is dominance --

THE CHAIR: No, those are being heard separately.

MR LAVY: Yes. But maybe Mr Lawrence would be better qualified than I.

MR LAWRENCE: Yes, sorry to interpose.

THE CHAIR: That's all right.

MR LAWRENCE: If the preliminary issue has been fully disposed of, that leaves the question of the campaign and whether it existed. If you remember, there are three parts to the campaign --

THE CHAIR: Let's get the pleading out, I will have to look at that.

MR LAWRENCE: It is bundle B, A2.

THE CHAIR: Paragraph 48 I was looking at.

MR LAWRENCE: Paragraphs 44 through to 52. The campaign has two stages as pleaded. One is the custom contractual terms -- those are the Custom-Anti Retail terms at 47.

THE CHAIR: That is just a document we have to look at.

MR LAWRENCE: It is documents, and we don't know how many. You will remember the debate with Mr Schaefer last time. Then we have 48 which is --

THE CHAIR: 48(3).

MR LAWRENCE: 48(3) and 48(4):

> "Microsoft seeking to dissuade customers from reselling Perpetual Licences. Microsoft purporting to link existing or future discounts on subscription licences to customers retaining or otherwise not selling Perpetual Licences."

THE CHAIR: What shape is the case on 48(3) going to take?

MR LAWRENCE: That will be --

THE CHAIR: Calling customers --

MR LAWRENCE: -- I wouldn't want to commit myself at the moment, but it will be documentary evidence of what was done. Maybe recordings of conversations of what was done. Maybe customers giving evidence, correspondence with customers. We are going through the further disclosure exercise at the moment.

THE CHAIR: It seems to me that knowing the scope of that

largely determines the length of this trial.

MR LAWRENCE: I would agree. I would agree.

There is the New From SA -- stage 2 as well -- the genesis of the New From SA, which will be the subject of witness evidence as well, I would expect.

THE CHAIR: Yes.

MR LAWRENCE: The terms we know, but it is how we got to those terms, I think will be the subject of evidence.

THE CHAIR: Right. Just elaborate on that a little bit.

MR LAWRENCE: I would expect that Microsoft would have to call witnesses to support the case it's making in relation to the justification and reasons for the introduction of the New From SA Condition.

So we say it was introduced for the purposes -- the sole purpose really -- of restricting and limiting the supply of Perpetual Licences. And I believe that will be consisted, unless those on the other side of the room tell me otherwise. So I would have thought there would be some witness evidence in relation to that.

THE CHAIR: Even though the matters on the PI have been disposed of, there will still be other reasons advanced?

MR HOBBS: It depends where the PI issues go. The trial could shrink considerably.

THE CHAIR: It could.

MR HOBBS: The anticipation is that on certain results it

will disappear altogether.

THE CHAIR: Of course.

MR LAWRENCE: If Microsoft were to win, we accept we go no further. But if we win, the question is then to what extent the objective justification of the defences are taken away, to what extent the conduct can be proved. There will, of course, linked to that, be the question of appreciable effect, which is left from the first trial.

I know this is all in the context of trying to work out how many witnesses will be called and on what issues and whether we would run from two into three into four weeks. For my part, I would have thought it was likely to be relatively self-contained and capable of being done in two weeks, which is why we put that forward, whether that is helpful.

MR O'DONOGHUE: Sir, if I may.

THE CHAIR: Yes.

MR O'DONOGHUE: It is interesting Mr Lawrence says, of course, there will be factual evidence from his side and my side. One of the problems with this gelatinous case is we have shifted from contracts which we can all read to alleged non-contractual restrictions which seem to amount to nodding and winking or some form of informal threats on customers --

THE CHAIR: It is more than nodding and winking but, yes.

MR O'DONOGHUE: So they say.

THE CHAIR: So they say.

MR O'DONOGHUE: By its very nature, that is a very bitty and granular thing and Mr Lawrence is quite right, he will have witnesses on the effect on the market. So will we. We will have witnesses on the genesis and introduction of these clauses.

Of course, the one thing Mr Lawrence has not mentioned, which is very important, is there has to be an effect on the market and the competition, and there will have to be expert evidence in terms of sizing the market, understanding the impact of these alleged contractual and non-contractual restrictions and that will be a pretty involved exercise.

So sitting here today -- of course the PI, it remains to be seen how that cookie crumbles. Sitting here today, as a practical matter, given the issues of availability, in my submission the sensible thing to do is to list for a somewhat longer period because we can always shave off at a later stage.

And, sir, if I may say so, you hit the nail on the head at the outset which is when the dust settles on the PI, it will be much, much clearer as to what the main trial shape looks like.

THE CHAIR: Yes.

MR O'DONOGHUE: So my pragmatic suggestion is we say four today, with a hope or expectation that can be trimmed and we cross that bridge when we come to it, following the PI judgment. That seems to me the pragmatic thing to do. Everyone on the front row and back row is very, very busy. If we can get something pencilled in for the Easter term, where the dates are locked in, that's much easier than having to cut our cloth too short to measure and then trying to find an extra week or too at a later stage. Experience shows that if one pencils in a longer date, it is much easier to cut back than it is to extend. So it is a pragmatic submission we make but we say based on what has been averted to in terms of factual evidence and of course, expert evidence, four weeks is not at all unrealistic.

THE CHAIR: Right. I will make the directions up to paragraph 15 now. Sorry, today. I am not going to list the trial. We can correspond on that issue.

Those directions are agreed up to paragraph 15, is that --

MR LAVY: They are, yes, sir.

THE CHAIR: Good.

MR LAVY: I wonder whether perhaps the issue of paragraph 17 can be revised at the proposed hearing at the end of

July.

THE CHAIR: Yes. If not before, yes.

MR LAVY: So, subject to one point, that was all I was going to say on the preliminary issues. The one point is this: of course, it all rather turns on the forum issue. Because if the Tribunal were to decide it didn't have jurisdiction to hear, then we are obviously in a totally different world.

THE CHAIR: Yes, you have to start again. I appreciate that.

MR LAVY: This is quite an important point. It's not as simple as saying: okay, have preliminary issues and they can be dealt with in the Chancery division because then that begs the question: what about the other copyright issues which haven't been parcelled off as preliminary issues?

THE CHAIR: Yes.

MR LAVY: Because they are maybe not as big and hairy but they are still there and the jurisdiction point still arises.

THE CHAIR: Yes. Copyright is at the heart of this case, whichever way you look at it, yes.

MR LAVY: So the question is -- trying not to be too facetious about it -- are we in the wrong forum? I submit obviously not, but that's the critical thing.

THE CHAIR: Yes, but it was transferred from the Commercial Court.

MR LAVY: Yes, from the Commercial Court.

THE CHAIR: And it was not suggested at that stage it should be transferred to the Chancery Division.

MR LAVY: No.

MR HOBBS: Just before you go there, on the list of paragraphs you are willing to make, can you add in paragraph 18, please.

THE CHAIR: Of course, Mr Hobbs, yes.

MR LAVY: We certainly don't object.

MR HOBBS: We've had a few objections.

MR LAVY: I don't know what would be most useful. I can launch straight into my submissions on jurisdiction.

THE CHAIR: It probably makes sense to hear from Mr O'Donoghue first; is that right?

Submissions on jurisdiction by MR O'DONOGHUE

MR O'DONOGHUE: Sir, I will be as brief as I can. The points have been well covered in our note on forum back in February and you have had a relatively long section from VL on its objections.

THE CHAIR: You have not dealt with it in your skeleton -- have you dealt with it in your skeleton for this --

MR O'DONOGHUE: Sir, we resubmitted the note on forum in February as part of the reasons --

THE CHAIR: Okay, yes, I am with you, yes.
MR O'DONOGHUE: Things had not fundamentally changed. So we had a stand-alone document on forum which was reasonably comprehensive.

What I want to do this morning quickly is focus on two issues. One to give you the context, two to give you the core of our submissions --

THE CHAIR: I didn't make a decision on this at the last hearing, did I? Is that right?
MR O'DONOGHUE: No, sir, I think you expressed more than once a provisional view.
THE CHAIR: Yes, it was a provisional view.
MR O'DONOGHUE: But we have reached a terminus today. So I want to start with the context, then I want to give you the essence of the points we want to make in substance and then respond very briefly to VL's skeleton.
THE CHAIR: What I am struggling with at the moment is what does this have to do with the preliminary issue? This is whether this court has jurisdiction to hear this action --
MR O'DONOGHUE: Yes.
THE CHAIR: -- and consider the defence. It seems a more general issue. You have not applied to transfer it back to the Chancery Division. You have not objected to this Tribunal hearing it.

MR O'DONOGHUE: Yes.
THE CHAIR: Why does it arise on the preliminary issue?
MR O'DONOGHUE: Well, it has brought it into sharp focus. Sir, you hit the nail on the head. Copyright is the heart of the case.

What has happened since VL's application is more than half of our pleading now only deals with copyright. You may stand-alone in reply only dealing with copyright. So a flank or seam of the case has opened up in a very significant way.

Sir, if I can quickly start with context. In terms of where this takes us, in my submission the logical way to approach this is to deal with the question of jurisdiction first. If it transpires that there is not jurisdiction, then there may then be follow on questions as to whether there should then be a transfer --
THE CHAIR: Sure.
MR O'DONOGHUE: -- to the High Court. If, sir, you decide you have jurisdiction, then that doesn't arise. That is how, at least at this stage, I propose to deal with that.

Starting with context. I am obviously not tone deaf to the vista of Microsoft simultaneously expressing strong support for a preliminary issue on the copyright issues but raising an objection as to jurisdiction in

parallel.

It is not a case of Microsoft being unwilling to take yes for an answer. There are particular reasons why the jurisdiction issue arises now.

We have been very upfront with VL immediately following their preliminary issue application as to why we have raised the issue of forum. We have proposed a solution whereby that can be side-stepped which they have refused to accept.

Now just to show you the correspondence on this, if we start at FA41, please.

THE CHAIR: Sorry. Give me a second.

MR O'DONOGHUE: This is our letter in response to the application having been issued. I should say parenthetically, the application was issued without prior notice to us. But anyway, be that as it may.

THE CHAIR: I am just suffering from a bundle issue at the moment.

MR O'DONOGHUE: Page 125, sir.

THE CHAIR: Yes, I know. But that's not the issue. 125, yes, I have it now.

MR O'DONOGHUE: Paragraph 13, sir. We say:

"The question of the Tribunal's jurisdiction to determine the Copyright Issues is material to Microsoft but is not material to VL. The Copyright Issues arising

in VL appear to also arise in the proceedings issued in the High Court on 28 January 2025 against Microsoft by Discount Licensing. They are also likely to arise in the opt-out collective proceedings in respect of which Microsoft received a letter before action dated 24 August 2024. The question of the Tribunal's jurisdiction over Copyright Issues is, consequently, material to Microsoft which considers that the Copyright Issues must be determined by the High Court. Microsoft considers that there is a hard edged question of law regarding the jurisdiction of the Tribunal, an issue that has never been definitively considered and determined by the Tribunal."

Just to unpack that a bit. Obviously, collective proceedings, as you will know, sir, can only cover competition law issues, they don't extend to non-competition law issues.

The question of whether the Tribunal is competent to deal with copyright issues could be particularly important in the context of the opt-out collective proceedings which we refer to here. Putting my cards on the table, what Microsoft wishes to avoid is that not taking a jurisdiction point now would lead to some form of res judicata or estoppel or abuse of process issues that would prevent it from taking the point,

potentially, in the other cases. So that is the reason why this has become acute.

You will see then, sir, over the page at 15 and 16, we invited VL immediately to agree that the copyright issues could be dealt with by a specialist IP judge at the High Court, that we would support expedited treatment of a preliminary issue involving the copyright issues before the High Court. We say:

"... the Copyright Preliminary Issues also present a means by which to avoid a dispute about the Tribunal's jurisdiction and any consequent delays resulting from the resolution of that issue. Contrary to the suggestion in Fussell 2 that Microsoft is seeking to create delay and disruption, Microsoft has no such interest."

Then we say:

"Accordingly, VL could agree with Microsoft that the Copyright Preliminary Issues should be resolved by a specialist intellectual property judge in the High Court. Microsoft further considers that with a request from the Tribunal to the High Court for expedition of the Copyright Preliminary Issues, there is no reason why they cannot be determined in broadly the same time period as they would be in the Tribunal. Microsoft sees no substantive reason why VL would insist on the

Copyright Issues being determined by the Tribunal, when such insistence would delay the VL proceedings. VL should support a position whereby the Copyright Issues can be determined by a specialist intellectual property judge in the High Court without the consequent overall delay to the VL proceedings ..."

At the end:

"Microsoft, therefore, invites VL to consent to the Copyright Issues being determined by the High Court, and for this to be presented to the Tribunal as an agreed position."

Now the short answer to this question is no.

If we then -- well, first of all, there was a degree of agnosticism. If we look at A5, please.

THE CHAIR: Bundle A?

MR O'DONOGHUE: Yes. Page 54. Sir, this is the note on forum that I mentioned at the start which was on the reading list. So this is back in February.

Again, at paragraph 2, over the page, the top of the page, we say:

"... Microsoft has also made clear to VL that it would support measures intended to ensure that the High Court can resolve the Proposed PI Issues in a prompt time frame, including, if necessary, expedition."

You will have heard this morning, sir, that on the

PI directions and on the main trial directions, everything is agreed in terms of timing. So there is no suggestion that can fairly be made that Microsoft is trying to delay or kick for touch. We have been very, very transparent with VL and we have agreed procedural deadlines for both the PI and the main trial.

If we then quickly look at VL's response and go back to FA53, please.

THE CHAIR: Can you give me the page number?

MR O'DONOGHUE: 167, sir.

THE CHAIR: Yes.

MR O'DONOGHUE: Paragraph 4, bottom of the page. So initially their position seems to be agnosticism. They say to avoid:

"... an unnecessary and time-consuming debate at CMC5, our client is minded to leave the issue [of forum] ... to the Tribunal."

They say they think the Tribunal is competent:

"In our client's view whether or not the Copyright Issues should be transferred to the High Court is principally dependent upon the timing of the Preliminary Issues trial."

And then they say: "We don't know when the High Court could accommodate this."

So initially it seemed to be agnosticism, or at

least subject to a timing question, they didn't seem too fussed.

Then we see in their letter of 28 April, it is a flat no. That's at A77, on page 373.

THE CHAIR: Yes.

MR O'DONOGHUE: Paragraph 7, sir, over the page. They say:

"For the avoidance of any doubt, that our client does not accept your clients' arguments on forum ... Our client's position is that the Competition Appeal Tribunal plainly has jurisdiction to determine the Copyright Issues and our client will, therefore, be seeking a direction at CMC-6 that the Copyright Issues should be determined ... By the Tribunal."

So our offer that this be expedited and we avoid a jurisdiction issue, has been firmly rejected.

Now the other contextual point -- I will come on then to the core submissions and then wrap up on VL's skeleton. The preliminary issues in particular involve the questions of copyright infringement into very, very sharp focus. Because it is clear there are fundamental issues of pure copyright law in these proceedings that may dispose of the proceedings entirely, without needing to get into anything to do with competition law.

Now that much at least, I think, ought to be common ground. I will show you the pleadings in a moment. But

it is an important new development in these proceedings, as the optics of several eminent IP lawyers before you today attest to.

Just to draw these threads together before I move on to my core submissions, the jurisdiction point is potentially important to Microsoft, for reasons not directly concerned with the VL case. Indeed, in my submission, it ought to be unsurprising that a company whose lifeblood is intellectual property would be concerned to have clarity on the limits of the Tribunal's powers to deal with issues of pure IP law. Indeed, I would venture to suggest that that is an issue of importance that transcends Microsoft. It is an important issue.

So that is the starting point. As you saw, sir, we have made very, very clear to VL we have no desire to delay them in the main proceedings or the PI. We have agreed to a very aggressive timetable on the PI and we have agreed to a set of directions on the main trial, subject to revisiting under paragraph 16 in due course.

As you saw, we have offered to have these issues expedited in the High Court, insofar as we can support that, and VL has rejected that offer, for reasons we don't fully understand. Frankly, that would have completely side stepped any jurisdiction issue. And

with VL having refused our offer, Microsoft faces --

THE CHAIR: I appreciate you want to make these points, but the question of whether this Tribunal has jurisdiction has nothing to do with whether or not it will lead to a delay. Either we have jurisdiction or we don't.

MR O'DONOGHUE: Indeed, sir.

THE CHAIR: If it leads to a delay, it leads to a delay.

MR O'DONOGHUE: It is a binary question of law.

THE CHAIR: It is a binary question of law, yes, and practice.

MR O'DONOGHUE: Indeed. It is what it is and the consequences are what they are. But there have been suggestions of delay, that there was some gamesmanship on our part. I want to be very clear at the outset that we have done everything we can to ensure there is no delay. Some things are outside our control, we don't decide expedition.

THE CHAIR: There is no need to press on this point. I think it is perfectly proper for you to raise it and the question is what's the answer.

MR O'DONOGHUE: Indeed, indeed. So this issue is one that is important to Microsoft in the sense of respect of the PI, it is not going to magic away. It needs to be determined now.

That is the context.

Now, sir, the other thing I can say on instructions is if, sir, you determine you have jurisdiction and my client had to give active consideration to an appeal, we would also undertake in that context, we would not seek a stay of either the preliminary issue or indeed, the main proceedings.

So again, we will do everything we can to avoid any delay or any knock-on impact on the PI or the main proceedings.

THE CHAIR: Again, you are fully entitled to seek permission to appeal.

MR O'DONOGHUE: Yes.

THE CHAIR: If it leads to a delay, it leads to a delay. It's not your fault, it is just the way things are.

MR O'DONOGHUE: Indeed. Okay, so that's the first issue.

Then the main issue is the core submissions. The starting point, of course, is that the question of jurisdiction goes to the subject matter of jurisdiction of this Tribunal. The Tribunal is a statutory only Tribunal, with no more powers than those conferred on it by legislation. The significance of this will be obvious to you, sir, but it bears repeating: if the Tribunal lacks jurisdiction under the legislation, in a subject matter sense, then it cannot be said that Microsoft has submitted to the jurisdiction or otherwise

waived its rights. The matter is simply outwith the Court's jurisdiction to begin with, and that of course is different, for example, to private international law jurisdiction disputes, where a defendant can, of course, submit to the jurisdiction by not challenging jurisdiction or otherwise waiving its rights. So it is a subject matter jurisdiction issue.

Now, sir, on the core of the argument, just to give you a roadmap of where I am going, I first want to show you, quickly, the pleadings on the copyright issues. Second, having done that, I will make good the point that on a proper analysis, the copyright issues are anterior stand-alone issues that are disconnected from the essential ingredients of the competition law claim. Then finally, I will show you how this maps on to the legislation and the legislative guidance.

THE CHAIR: You haven't mentioned what principles I should be applying in addressing my mind to whether or not this Tribunal has jurisdiction. That gets picked up somewhere, I hope, on that list?

MR O'DONOGHUE: Yes. I will pick up the case law and the legislative guidance, so we can anchor ourselves on the background material.

Starting with the pleadings, sir. Starting with the amended particulars of claim in bundle B.

THE CHAIR: I think you can take this relatively quickly.
MR O'DONOGHUE: Yes.
THE CHAIR: I have re-read the pleadings, I appreciate that copyright is at the -- I don't say it is the heart, but I say it is at the heart of this dispute.
MR O'DONOGHUE: Yes. So more of an architectural point I want to make.
THE CHAIR: Very good.
MR O'DONOGHUE: If we start on page 9, you see subsection B is factual background.
THE CHAIR: Sorry? I interrupted you --
MR O'DONOGHUE: Page 9 of the amended particulars.
THE CHAIR: The amended particulars, yes.
MR O'DONOGHUE: It starts at paragraph 8.
THE CHAIR: Yes.
MR O'DONOGHUE: So there is a background section starting at paragraph 8. If we then, within that section, jump forward to 20 and 21, you will see the first reference to the copyright issues. You will see those mentioned, for example, under 20(1) and 20(2).

Then, sir, if you jump forward to section C on page 18, there is a separate section entitled "The relevant markets and Microsoft's dominance." Now the reason for this architectural approach is that one of the arguments VL makes is that the copyright issues are

all about the relevant market in competition law and the counterfactual. That's how they try to connect the copyright issues with the competition law claim.

Now I come to the substance of that argument in a moment. It is wrong, but the simple point I am making at this stage is that based on its own pleading, the copyright issues arise before one even gets to the competition law issues of the relevant market.

We then jump forward to our defence at the next tab. You have a lengthy -- I think it is fair to say -- response to paragraphs 20 and 21 of the amended particulars of claim, starting on paragraph 23A of the amended defence on page 46.

Sir, you have approved this but the simple point I make at this stage is all of this is rooted purely in copyright law, not competition law. It is essentially a distillation of the InfoSoc Directive and software directive case law, with some analogous references to trademark. That's our defence. Then as I indicated, sir, on the next tab, the reply from VL only deals with copyright issues.

So we have looked at the two preliminary issues themselves. Again, obvious, these are all self-contained issues of IP law, based on software directive and the InfoSoc Directive. Now my core

submission is that in substance, these are issues of pure IP law. They are not the essential elements of a competition law claim. They are anterior and they stand apart.

One way to think about this, in my submission it cannot be seriously contested that if VL brought a claim for a declaration based on the two copyright issues in the Tribunal -- which it can do so since January of this year, under the Digital Markets, Consumers and Competition Act -- if it brought a claim for declaration without any reference to competition law, the Tribunal would not have jurisdiction to deal with those declarations. We say that is clear.

But in substance, that is what the Tribunal is being asked to do by the preliminary issue and indeed, the other copyright issue, to grant what are effectively stand-alone declarations of legal entitlements under the software directive and the InfoSoc Directive. Again, based on the architecture of their own pleading, these issues arise before one gets into the weeds of relevant market dominance and abuse.

Now it is important to see how the copyright issues on the VL side have evolved. There was an attempt at an early stage before the application to say: well, this is all wrapped up in the competition law claim. They

have now tried to reverse that part (inaudible). There is the vestiges of an argument that: well it is still wrapped up in competition law issues and I will show you, sir, why that is wrong.

It is interesting to see where they started on this. So hot on the heels of the application itself, if we go back to FA46 --

THE CHAIR: Could you give me a page number, Mr O'Donoghue?

MR O'DONOGHUE: Yes, it is at 141.

It is paragraph 4, sir. They say:

"Our client does not accept the copyright issues are 'anterior' to the competition law claim. On our client's case, the copyright issues arise only once liability is established: they concern the counterfactual question of what sales could lawfully have been made but for your clients' anti-competitive behaviour. The copyright issues are also said by your clients to arise in relation to its alternative defence of objective justification ..."

But that is obviously wrong, as you can see from VL's own pleading. VL in paragraphs 20 and 21.

THE CHAIR: I am just not sure about what is anterior to what. Whether you are a dominant undertaking anterior to this entire -- if you are not in a dominant position, is that not an anterior question? I mean, any question

that's sort of determinative can be said to be an anterior question.

MR O'DONOGHUE: Yes. Well, sir, this is important. We can look at how this is put in our skeleton --

THE CHAIR: Leaving aside the nuance of how it is put, how is a Tribunal, beyond going -- there you said it in that letter, how do we determine whether something is anterior, and why does that matter?

MR O'DONOGHUE: Well, if one goes to VL's argument -- the point you made, sir -- and say: well this will tell us about the scope of the relevant market in the competition law claim, and that's what they say at paragraph 18 of their skeleton --

THE CHAIR: Mm-hm.

MR O'DONOGHUE: -- but this point, with respect, doesn't go anywhere. In a competition law claim, the relevant market is about whether product A is a close enough economic substitute for product B. That's typically, as you know, sir, based on this SSNIP test, whether a price rise would be profitable, compared to the loss of sales volume from that price rise.

Now in our submission, the fact that VL had no a priori entitlement under the software directive and/or InfoSoc Directive, to resell licences, that is not a competition law question of market definition. It

simply means there is no market to begin with, but crucially, for reasons that have nothing to do with competition law or indeed, relevant market definition in competition law. You cannot conduct a competition law relevant market definition analysis of a market that because of intellectual property law, does not lawfully exist.

That is why we say these are distinct and anterior copyright issues.

THE CHAIR: Okay. But why does it matter whether it is anterior? You are saying if I am against you on it being anterior, then your arguments collapse or are you -- I mean, why is being anterior determinative of whether this Tribunal has jurisdiction?

MR O'DONOGHUE: Well, sir, I am not hung up on the semantics of anterior versus some analogous word. The question of substance is these copyright issues, are they in any sense a competition law infringement issue? We say they cannot be, based on the architecture of the pleading, based on the fact -- as is common ground, if we succeed, there will be no competition law claim. At least based on --

THE CHAIR: Because the activities are illegal?

MR O'DONOGHUE: Indeed, and for other reasons. That's why we say they are in substance and in pleading,

disconnected from the competition law claim. Now another way to think about this is what are the essential ingredients of a competition law claim? They are dominance in a relevant market, abuse of that dominance --

THE CHAIR: Yes.

MR O'DONOGHUE: -- and a causal impact on the market in competition with VL. The copyright issues are not an essential ingredient of any of those key components of the competition law claim. That's why we say on a proper analysis, they stand apart.

My anterior point is not some adjectival submission. It is as a matter of substance on a correct analysis, these copyright issues in no shape or form are part of the essential ingredients of a competition law claim. Now true it is, sir, that they are pleaded in the context of a competition law claim. That doesn't transmogrify them into a competition law claim, over which the Tribunal has jurisdiction.

One way to think about this, you will be familiar, sir, with the vexed question of pay for delay in competition law, where a patentee settles litigation with a generic company, and it is sometimes said that the settlement infringes Chapter 1 and/or the Chapter 2 prohibitions.

Now in that context, it would be a complete defence for the patentee to say "I have a valid patent, and that has been infringed by the generic." In that context -- it is a thought experiment, but would it be open to this Tribunal to find patent invalidity, find it was infringement and revoke the patent --

THE CHAIR: I think that's a really complicated question. I'm not sure that is going to help me.

MR O'DONOGHUE: Well, one thing is certainly clear: this Tribunal would have no power under legislation to revoke a patent. That, I think, is crystal clear.

THE CHAIR: Yes. So here we clearly have no jurisdiction to award damages for breach of copyright.

MR O'DONOGHUE: Indeed.

THE CHAIR: I understand your submissions. I will need to think about them a little bit more. But I understand why you say that -- I think I understand why you say that this is really distinct from the competition law claim. This is not an aspect of the competition law claim at all and --

MR O'DONOGHUE: You never get there.

THE CHAIR: -- you never get there if you are right on this being illegal activity.

So why does that mean -- the fact it is distinct and the fact it's -- let's call it for present purposes

anterior -- why does that mean that this Tribunal doesn't have jurisdiction?

MR O'DONOGHUE: Sir, that is a neat segue to the legislation and case law which I am going to turn to next. Then I can wrap up on VL's skeleton.

So, sir, can we start -- we can look at section 47A, but in a sense, it is a neutral provision, we say, because it simply says the Tribunal has jurisdiction over Chapter 1 and Chapter 2, so that doesn't directly, we say, answer the question in this case.

But we do say that the legislation on transfers to and from the Tribunal does give us an important indication on questions of transferability and what can and cannot be transferred. So if I can first of all look at the 2002 Act, section 16, in the authorities tab 56.

Authorities 56, page 1088. Section 16 of the 2002 Act.

THE CHAIR: Yes.

MR O'DONOGHUE: This gives the power to make regulations.

THE CHAIR: Yes.

MR O'DONOGHUE: I would ask you to underline "... determination so much of any proceedings before the court ..."

THE CHAIR: Sorry, I'm not sure where you are reading?

MR O'DONOGHUE: 16(1)(a)(i).

THE CHAIR: Yes.

MR O'DONOGHUE: "... determination so much of any proceedings before the court as relates to an infringement issue ..."

And then subparagraph (4), again, same phrase:

"... so much of any proceedings before and it as relates to a claim to which section 47A ... applies."

And then subsection (6):

"'Infringement issue' means any question relating to whether or not an infringement of the Chapter I prohibition or Chapter II prohibition has been or is being committed."

That's the underlying legislation. The legislation then gave rise to a statutory instrument which I want to look at next at tab 60, please. This is regulation 2, 1141. Again, sir, I will ask you to underline the words the High Court "may ... transfer to the Tribunal for its determination so much of the proceedings as relates to the infringement issue." That takes us back to section 16(6) of the 2020 Act we just saw, infringement issue being a breach of competition law.

In our submission, the text is important. It does not say the Tribunal can deal with all issues that relate to an infringement issue. Rather, the

legislation says that only so much of the proceedings as relates to the infringement issue can be transferred. Which we say is an important distinction.

THE CHAIR: But it's not clear what that distinction means. I mean, if you have a claim where you have different parts which are clearly distinct, you hit me with your motor car and you also breach competition law, the latter gets transferred but it's not telling you where -- it's not really assisting on your point where you have a distinct and you would say anterior aspect to the competition issue, whether that then gets transferred with it or not. I mean, no doubt if one was applying this rule, one would end up with considerable argument on that point.

MR O'DONOGHUE: Indeed, sir. Just to put my cards on the table, we say that when one sees in regulation 2A a reference to "so much of the proceedings as relates to the infringement issue", that means that if there are IP parts of the proceedings, they do not transfer with the infringement issue.

THE CHAIR: Yes. But if there is a claim -- so in a case, if there was a claim for damages for copyright infringement, and a competition law claim, the claim for damages for copyright infringement wouldn't be transferred. But here there is no copyright claim, but

the copyright issue is relevant --

MR O'DONOGHUE: Yes.

THE CHAIR: -- to the competition claim. The answer doesn't fall out of this subsection.

MR O'DONOGHUE: Sir, we say it does. Because it doesn't say -- it doesn't mention the word "damages", it mentions "so much of the proceedings as relates to the infringement issue."

We say from that, it is clear that if there are IP parts of the proceedings, they cannot be transferred to the Tribunal or must be transferred back to the High Court if wrongly transferred.

Finally, sir, on the --

THE CHAIR: I mean, this is quite an important point, inasmuch as -- I can think of quite a few other cases where there are IP issues which are arising in the context of a dispute under the Act.

MR O'DONOGHUE: Yes. It is an important issue.

THE CHAIR: You don't know what those other cases are, necessarily. Are you saying in all cases, IP issues, insofar as they arise, should be dealt with in the Chancery division; or are you saying that this case is different because of this -- it's anterior and the competition points don't arise, if you are right about the -- where you are putting the dividing line?

MR O'DONOGHUE: I am certainly saying loud and clear -- if for example, one takes the two preliminary issues, they on any view, involve self-contained questions of whether or not certain conduct infringes the software directive, or InfoSoc Directive. What we do say is if, in substance, there is a claim for a pure infringement of intellectual property law, that is outwith the Tribunal's jurisdiction.

THE CHAIR: Yes. If there is a claim for infringement or a claim for an injunction arising from IP infringement.

MR O'DONOGHUE: This is important.

THE CHAIR: Then I am entirely with you, yes.

MR O'DONOGHUE: Yes, the easy case is where someone brings a claim or counterclaim saying you are in breach of the patent or copyright. We can all agree that is outwith the jurisdiction.

THE CHAIR: Yes.

MR O'DONOGHUE: My submission goes further. We say that where, in substance, what is sought are declarations of infringement or non-infringement of pure intellectual property that are completely disconnected in competition law which I think certain of the preliminary issues are and indeed, all the --

THE CHAIR: Now you are moving away from the pleaded case and you are saying it's because of the preliminary

issue.

MR O'DONOGHUE: Well, sir, the preliminary issue is an important microcosm.

THE CHAIR: It's a perspective with which to look at the problem.

MR O'DONOGHUE: It is.

THE CHAIR: But as I understand your submission, correct me if I am wrong, your position would be the same without the preliminary issues?

MR O'DONOGHUE: Well, my position on the copyright issues generally, yes, would be the same.

THE CHAIR: Would be the same, yes.

MR O'DONOGHUE: Yes. Now, sir, finally on this, of course, this is a question of statutory interpretation. In that context, the reasons why the Tribunal was set up and its expertise, they are an important part of the matrix, we say.

Just to give you a reference to the legislative materials, if we go to tab 57 of the authorities, with the explanatory notes to the statutory instrument we just saw. We start at page 1092, paragraph 7.4.

THE CHAIR: Paragraph?

MR O'DONOGHUE: 7.4.

THE CHAIR: Yes.

MR O'DONOGHUE: So it is actually underlined:

"... so that the CAT can consider the competition issues."

7.6, at the bottom of the page:

"The CAT is a specialist tribunal with cross-disciplinary expertise in law, economics, business and accountancy ..."

And I note parenthetically that intellectual property is not mentioned here. So, of course, we have the great fortune of having you, as an IP expert, in this Tribunal --

THE CHAIR: That's completely irrelevant.

MR O'DONOGHUE: All I am saying is that it is by no means the garden variety of chairs in this Tribunal.

THE CHAIR: It is an irrelevant consideration. It is just happenstance.

MR O'DONOGHUE: Indeed. But the point I am making here is that the genesis of the CAT is cross-disciplinary expertise in competition law, competition economics and analogous regulatory matters. That is an important central policy reason why issues of pure IP law are not within the wheelhouse and jurisdiction of this Tribunal.

Now, just to put my submission in a nutshell, the infringements of the software directive and the InfoSoc Directive in the two preliminary issues, they do not concern a competition law infringement issue. They are

issues of infringement of intellectual property only. The fact that they might prevent VL from raising a competition law infringement issue doesn't transmogrify them into a competition law infringement issue. They are an IP infringement issue only.

Then finally, sir, my last issue before I sit down. I want to respond very quickly to the key points made in VL's skeleton.

So the three points. First they say, picking up on a point you made, sir: well this is a competition law claim only. The Tribunal has jurisdiction over such a claim means "that it necessarily follows that it has jurisdiction to make decisions about legal issues that arise in respect of such a claim." And the next bit is important, "regardless of whether those legal issues are themselves to be characterised as competition law." That's paragraphs 25.2 and 4 of their skeleton.

Now we say that is really a question of form over substance. We see this in spades in the present case. Again, the PI issues are pure issues of copyright law, they do not touch on competition law in any way. Indeed, if we are right, we never get to competition law in any event.

We say the VL's argument that anything which is loosely connected, even by way of background, with

a competition law claim, falls within the jurisdiction of this Tribunal, would be open to misuse, whether deliberate or otherwise and it would not be difficult for claimants or indeed, defendants with counterclaims, to say they are only bringing a competition law claim but to include within that claim, various non-competition law points that were anterior to and distinct from the competition law claims.

Now I have given you the pay for delay example which seems to me bang on point. There are other possibilities. For example, the Tribunal does not have jurisdiction over employment disputes or tax matters. If the Tribunal had to determine, for example, that someone had been unfairly dismissed, before it considered a competition infringement issue, whether it complied with the corporation tax requirements, before considering a competition law claim, would those matters fall within this jurisdiction? Again, we say no.

THE CHAIR: Yes, but you are just being consistent and restating the problem in other contexts. But the point can be made that this is a claim brought under the Competition Act and that's the basis on which relief is sought.

There are within that claim, distinct questions of intellectual property law. In those circumstances, what

approach should this Court be taking to determine whether it has jurisdiction? You have not really taken me to any authorities to suggest, either in the context of the CAT or other tribunals, to the extent what approach one should take to an analysis. You have made lots of helpful suggestions of what makes sense in the context, but you have not really provided me with any rock solid authority on how I should approach this.

MR O'DONOGHUE: I am going to come to the case law in a second.

THE CHAIR: You are going to. Right, I thought you were sort of dealing with the other side's case now.

MR O'DONOGHUE: Indeed.

THE CHAIR: Yes.

MR O'DONOGHUE: Of course, in the other direction, it's not as if VL has shown you a single case where this Tribunal has determined infringement of intellectual property rights either.

THE CHAIR: That's not helping me either, no.

MR O'DONOGHUE: Well, I am not making a score draw point. They are the ones inserting --

THE CHAIR: Can we just have five minutes for the transcriber?

MR O'DONOGHUE: I don't have long to go.

THE CHAIR: Let's have five minutes now.

(11.51 am)

(A short break)

(12.02 pm)

MR O'DONOGHUE: Sir, two final points on VL's statement before I sit down.

THE CHAIR: Yes.

MR O'DONOGHUE: The second point they make is essentially a floodgates argument, that if Microsoft is right on jurisdiction in respect of the copyright issues, then issues such as causation, remoteness, limitation and other points to do with damages, they will also fall outside the Tribunal's jurisdiction. That's at 25.4 of their skeleton.

But in my respectful submission, that attacks a straw man. Because competition law is accessory tort, the existence of at least some damage caused by the competition law infringement is an essential ingredient of the tort. That's not true of the copyright issues in this case. They are not an essential ingredient of the competition law infringement, as indeed we see from VL's pleading and again, if I am right, we never get there. So that is one way of showing that they are disconnected. So the floodgates point, with respect, like most floodgates points, doesn't go anywhere.

Finally on the case law, to put the Tribunal out of

its misery, there is not a case directly on point addressing the legislation. Indeed, if there were, our task would be considerably simpler.

THE CHAIR: Not other tribunals? Other statutory tribunals or other --

MR O'DONOGHUE: Not that we found in the time available.

THE CHAIR: Okay.

MR O'DONOGHUE: Mr Lavy may pull a rabbit out of a hat. Not that we have been able to identify in the time available.

I don't think anyone is saying in this jurisdiction there is a case that is bang on point. In our note on forum we had a section on the case law. To be clear, that is set out to give the Tribunal the landscape as it is, they are not being put forward as on all fours with the present.

Just to pick up on a couple of points which I think are important -- it ties in, sir, with the point you made more than once to me. VL quote from the Sportradar case which is mentioned in both of our skeletons, where Mr Justice Roth said: "Stand-alone competition proceedings under section 47A will often raise legal issues outside pure competition law." Which, sir, is the point you put to me as well.

Now in my submission, one needs to be quite careful

in reading that comment -- quite apart from the fact it was obiter. Sportradar itself was about transfer and not jurisdiction. Indeed, in Sportradar, it was common ground the Tribunal did not have jurisdiction over the counterclaim in that case which was a breach of confidence issue.

As I already mentioned, it is obvious when you get to issues of causation, remoteness and damage that issues outside the competition law will arise. That is inevitable. The key point is that they are part of the essential ingredients of the statutory tort. Again, breach of the software directive and/or InfoSoc Directive is not an essential ingredient of a competition law infringement issue or a competition law claim.

But the key point in Sportradar is that the claimant's answer to the counterclaim by the defendants was also competition law. Their case was that competition law trumped the defendant's private law rights. We see that at paragraph 54. In our case it is the obverse. VL relies on its non-competition law rights to say that it can then mount a competition law claim. VL is not saying the competition law trumps those rights and indeed, it would be completely incoherent for VL to say this, given its reliance on

those rights. So it is the obverse of Sportradar.

One final point on Unwired Planet. It's in authorities 9, page 168, please. It is at paragraph 44. It is Mr Justice Birss as he then was. This was a FRAND case on contract competition law.

THE CHAIR: I am very familiar with the case, yes. Which tab was it?

MR O'DONOGHUE: 44, sir.

MR GRUBECK: Yes.

MR O'DONOGHUE: About two-thirds of the way down, where it starts "Patent and contract claims." Do you have that?

THE CHAIR: Yes.

MR O'DONOGHUE: Three points. One, patent and contract claims fall to be decided by the High Court. That's a version of my pay for delay analogy. The second, he says:

"The fact that the specialist expertise of the CAT could be usefully brought to bear in grappling with those issues since they are so closely intertwined ... does not mean they can be transferred."

So again, an obvious point, the fact that it would be helpful for the CAT to address the issues or indeed, that they were strongly interrelated with the competition law claim, is not sufficient if jurisdiction is lacking. Third, the point I picked up in the

legislative materials:

"The CAT is a specialist tribunal for dealing with infringements of competition law. Nothing in the Act or the regulation demonstrates any intention by the legislator to broaden the scope of its responsibilities beyond that."

We say a fortiori for copyright infringement issues.

So, sir, those are my submissions.

Submissions on jurisdiction by MR LAVY

MR LAVY: Sir, three sets of points, I will try to be relatively brief. The starting point is actually section 47A. Although Mr O'Donoghue says we don't really have to look at that, it's neutral, it's not neutral, sir. It's the absolute starting point. So I will deal with that and our claim in that context.

Then I will deal with the transfer issue. I will show that, actually, that is immaterial to the analysis. The fact that we didn't start in the CAT and we were transferred in, doesn't affect matters, given the way that the order for transfer worked. I will deal with that.

Then finally, sir, I will deal with the authority. Which in my submission, at least Unwired Planet is quite helpful. I agree with Mr O'Donoghue, it's not 100 per cent on point but I say it does actually

articulate the principles precisely -- or at least sufficiently precisely for present purposes.

THE CHAIR: I would also be interested in your views of whether the analysis that the copyright issues are anterior --

MR LAVY: Yes.

THE CHAIR: -- is correct, or whether it could also be said that the copyright issues are a defence.

MR LAVY: Yes, two points on that, sir. They are very short answers --

THE CHAIR: Come to them in your own time.

MR LAVY: Section 47A, the starting point, before we look at the legislation itself, is what is the claim? The claim here, as the Tribunal knows, is it is a claim for damages, for infringement of competition law. That is the claim before this Tribunal. Specifically, it's a claim under section 2 and section 18, and there are claims under the TFEU equivalents but those are the claims and it is very clear that those are the only claims.

It may be that we don't need to turn it up, but -- in fact, if I can ask you to turn it up, sir, it is bundle B, A.2, page 27. Mr O'Donoghue looked at structure but I would like to look very briefly at the substance of what this claim is.

So granted it is an introductory paragraph. Bundle B, A.2, page 7. The fact that we have bundles that are lettered and then tabs that are lettered is confusing.

THE CHAIR: I did notice that, I was not going to say anything.

MR LAVY: It's responsible for every false reference I'm going to make today. So "the claimant claims damages and other relief" -- I will have to come back to the other reach point -- "arising from breaches by the defendant of" -- and then there is the section 18 point and the TFEU equivalent. Then over the page, the section 2 point and the TFEU equivalent or Article 53 of EEA. Collectively, the prohibitions against abuse and the prohibitions against the anti-competitive agreement.

That is the starting frame of this claim. If one then goes forward, that is expanded upon in section E -- well, section B is the factual background. Then various bits and pieces.

We get back to the law in section E, which is B, A.2, page 27. The bottom of the page, "Microsoft's breaches of competition law." That's where everything is set out. The applicable laws are set out through to paragraph 66. We don't need to read them. It is just about seeing where we are oriented.

Then, on page 30, paragraph 67, "Particulars of

breach." These are the only particulars of breach. There is paragraph 67, which is the abuse allegation and paragraph 68 which is the anti-competitive agreements allegation. That then trundles through. If one -- actually, one asks yourself: breach of what? Competition law. It's an infringement of competition law. That's what these things are. That's the only thing that they are.

Then if one goes to the remedies at the end, probably a good place to pick it up is paragraph 70, "Loss and damage", on page 32. Paragraph 70 starts:

"By reason of Microsoft's unlawful conduct, VL has suffered loss and damage."

By what unlawful conduct? Well, that's the infringements of competition law. That's all it is.

Then there is a claim for interest on those damages and then there is a claim for a declaration of unenforceability of terms and that's at paragraph 75. If one asks why should the terms be unenforceable? Answer, because they infringe competition law.

So that really is the critical starting point. This is and is only a claim for infringement of competition law and for remedies flowing from that, a damages remedy, a declaration remedy. The declaration point is historically quite important, for reasons we will see

when we look at section 47.

If one asks: does the Tribunal have jurisdiction to deal with the claim at that helicopter level? The answer is obviously yes. But if one asks why, it's because that's jurisdiction is conferred by section 47A. And that's where I would like to go to next, which is in the authorities bundle at page 1084. Of course, sir, you will be very familiar with it, but it is just worth taking a look.

THE CHAIR: I have lost my authorities bundle. I can't find it at the moment.

It has emerged.

MR LAVY: 47A at 1 --

THE CHAIR: Sorry, you will have to tell me where it is again.

MR LAVY: Page 1084, tab 55.

THE CHAIR: I am there.

MR LAVY: So 1:

"A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act ..."

Then, paragraph 2:

"This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any

part of the United Kingdom in respect of an infringement decision [that doesn't apply here] or an alleged infringement of --

"(a) the Chapter I prohibition or.

"(b) the Chapter II prohibition."

If one then asks, what type of claims are these? Well that's subsection 3. The claims are, (a), a claim for damages.

So just pausing there, VL's damages claim is a claim for damages in respect of an alleged infringement of the Chapter 1 prohibitions and the Chapter 2 prohibitions. Because that's a reference to section 2. And 18, obviously, of the competition acts.

It is also, of course, a claim in relation to the EU provisions. It doesn't matter because I don't think anyone is taking a point on it, but, sir, you may know that the ellipsis after C and D in subsection 3 used to deal with the EU equivalents. Now, of course, we have lost those because of Brexit, but they come back transitionally through the back door but as this point it's not taken, I am not going to spend time doing the analysis, unless you would like me to.

THE CHAIR: No, no, no.

MR LAVY: But in any event, for present purposes it is good enough to note that the domestic competition claims fall

squarely within 47A.

Then over the page, sir, I say this parenthetically for now, so we don't have to come back to it, but there is paragraph 3A. This section also applies to a claim for a declaration or in relation to Scotland for a declarator, which a person may make in respect of an infringement decision or an alleged infringement of the prohibitions.

I will come back to the significance of that shortly, but just to note it is there. Just ignoring that for now, what does 47A tell us? It tells us the Tribunal does have jurisdiction to hear VL's claims for damages for infringements of competition law. Importantly, it doesn't say that the Tribunal only has jurisdiction to deal with competition issues. That's not what the statute says. It says that the party can bring a claim for damages for infringement of competition law before the Tribunal, and that necessarily must mean, sir, that the Tribunal has jurisdiction in relation to whatever issues of law and fact are necessary, in order to determine the competition law claim.

I will come back to this in the context of what anterior means, and whether it really matters. But I say it must be that under section 47, that the

Tribunal has jurisdiction to deal with whatever issues arise of law and fact, provided -- and it is an important proviso -- that they are necessary for determination of the competition law claim. Because if it were otherwise, the Tribunal couldn't do its primary job under section 47A, which is to decide such claims.

So that is, in a sense, my headline foundational submission. 47A gives this Tribunal the jurisdiction it needs. Of course, one would see the nonsensical position that might arise if the Tribunal couldn't deal with these sorts of matters. Of course, Mr O'Donoghue doesn't like my example of causation, but if I could ask you to look at instead then, our pleading at B, A.2, page 80. That's at paragraph 72.

THE CHAIR: B, A.2 --

MR LAVY: A.2 -- actually, page 32.

No, I have the bundle references completely wrong. B, tab A.3. I am sorry. It is page 81, paragraph 72. This is the defence.

So:

"Further or alternatively, if the Claimant did suffer loss or damage (which is denied), its tax liabilities would have been lower than if it had not suffered such loss."

Now that, in my submission, may -- I don't put it

higher than may -- raise issues of fact and may raise issues of law as to what the tax liabilities may or may not have been. But that's obviously an issue that the Tribunal can deal with, because it needs to deal with it as part and parcel of working out what quantum is available to ValueLicensing on its damages claim.

THE CHAIR: I don't know, maybe when it gets to that stage of the claim, there may be an application to have this point transferred out of the Competition Appeal Tribunal too. I don't know -- the Defendants have pleaded all these matters in this Tribunal, so I am not sure that really takes it further forward.

MR LAVY: Of course, the question of whether, as a matter of case management, things might be transferred, is one thing --

THE CHAIR: No, we are not dealing with case management, we're dealing with the powers --

MR LAVY: The question is can the Tribunal deal with it.

THE CHAIR: Yes.

MR LAVY: I suppose, really, what I'm trying to illustrate, perhaps badly, is a broader point, which is that any complex case in this Tribunal or indeed any court, is going to raise lots of different bits of law, lots of different bits of fact. It's totally unworkable if the Tribunal then can't deal with certain aspects.

THE CHAIR: But this case is unusual, in that at the heart of the case are difficulty questions of copyright law. That is not -- many other cases, IP issues will arise, questions of contractual interpretation. You say damages, all sorts of things will arise, but this case is unusual, in that now, the way it is pleading out, it is at its heart a copyright claim.

I mean, the fact it is on the far end of the spectrum may make no difference, I don't know, to your arguments, but it is on the far end of the spectrum.

MR LAVY: Where it is on the spectrum, I say, actually doesn't make any difference. The real question is: what, analytically, is this claim? Analytically, this is a claim for infringement of competition law issues.

THE CHAIR: Quite. That's as far as the analysis has to go, to say what is the claim --

MR LAVY: That, in my submission, is --

THE CHAIR: -- for damages under the Competition Act and that's the end of that.

MR LAVY: Then there is a second stage. Let me focus on the copyright issues that are here, rather than giving you parallels. Does this issue have to be determined -- is it necessary -- in order for that competition claim to be determined? If the answer is yes, then the Tribunal has jurisdiction. If the answer is no, then it

may be that the Tribunal doesn't have jurisdiction.

THE CHAIR: Yes.

MR LAVY: Let me get off the fence. If the answer is no, the Tribunal doesn't have jurisdiction.

THE CHAIR: Yes.

MR LAVY: Now the way in which these copyright issues arise, and the question of whether they are anterior -- well, let me ask the question another way. The claim alleges that Microsoft has appreciably restricted and/or distorted competition through its campaign. Now as part of the background, we describe in our pleading a market and a factual state of affairs. And that factual state of affairs is that there is a market and certainly was at the relevant time, a market in the resale of secondhand Microsoft software. That's just a stated fact.

Microsoft comes back and says in response in its defence, in a number of things obviously, but one of those things is "Well hang on a second, the resale of secondhand Microsoft software is unlawful." Of course, they put it more eloquently and in more detail, but that's the substance of it, it's unlawful. Why does Microsoft say it is unlawful? Because it allows them to say "and therefore your claim fails." So the IP issues here actually arise on proper analysis, for what it is

worth -- and I am going to come back and say, actually, it doesn't matter that much -- but they are not anterior in a substantive sense. They come in by way of defence because on analysis, they want to say the claim fails because there is not a lawful market. And all of this stuff that's going on in the secondhand market is simply unlawful.

Therefore, you haven't got a claim, because you can't claim damages for your unlawful activity. That's how the issues actually arise in these proceedings.

THE CHAIR: Mr O'Donoghue puts it a little more simply, doesn't he? He says you can't have -- this cannot be described as anti-competitive activity if the activity is illegal. I mean, stopping it cannot be described as an anti-competitive activity, if the activity is illegal in the first place. That's why it's anterior. You just simply don't engage the provisions of the Competition Act. That's his point.

MR LAVY: In a sense, one can put these things any way round. For any claim -- and this one is no different -- there are a set of logical stepping stones one has to jump through to decide whether or not there is a claim.

THE CHAIR: Yes.

MR LAVY: Now I can decide them in any order and in a sense, to call one anterior and the other not, is a matter of

taste. That's not a very helpful test, I respectfully -- with deference to Mr O'Donoghue. The more helpful test is: do you have to decide these in order to decide the claim that's before the Tribunal?

That's really -- analytically, that's all there is to it. I was going to say it might be useful to go straight to the authorities on this because I think Unwired Planet in particular --

THE CHAIR: I would like to have a look at Unwired Planet, if now is convenient.

MR LAVY: It is taking it out of order but there's no reason why not.

THE CHAIR: No, no, no, please don't go out of order for my sake.

MR LAVY: In which case, I will plough on in order. the next point I would make --

THE CHAIR: I didn't mean it.

MR LAVY: -- relates to transfer. Because clearly a point has been taken on section 16 of the Enterprise Act and transfer.

The reason why I say it makes absolutely no difference that this claim started life in the Commercial Court is because on a proper analysis of Mr Justice Foxton's order, the whole lot came over with an irrelevant carve out. We see that at bundle B, tab

C.6, page 301.

This is the transfer order. Paragraph 1 is crisp and to the point:

"The claim be transferred to the Competition Appeal Tribunal ..."

I will come on to paragraph 2 in a moment, but just pausing at paragraph 1: not part of the claim, not competition issues arising in the claim, but "the claim." So the whole claim comes over, subject to the qualification in paragraph 2.

And the qualification in paragraph 2, rather than me reading it out, could I just ask you to read it, sir?

THE CHAIR: Yes, of course.

MR LAVY: Thank you.

THE CHAIR: Right.

MR LAVY: Two things arise out of paragraph 2 in my submission. One is what I am going to call the circularity point. It is only an element of the claim not capable of falling within the jurisdiction of the Tribunal that's been reserved in the High Court. That's why I say, actually, it is section 47A that is the critical provision that this Tribunal needs to be concerned with, because question 1: does this Tribunal have jurisdiction to try the claim? If the answer is yes, then this transfer order brings it across, and

paragraph 2 doesn't reserve it to the High Court.

THE CHAIR: Right.

MR LAVY: So that's point one. The second point to come out of this is if you look at the final sentence, it's "Any application for such relief is stayed until further order."

Which might be thought to be slightly odd language, because what's happening here is an element of the claim is being equated with relief, on just a normal reading of what Mr Justice Foxton has done here. So an element of the claim that cannot be transferred stays and remains within the jurisdiction of this court. However, any application for "such relief" is stayed until further order.

So one asks yourself what relief? And the answer, of course, is the declaration. Because do you remember, sir, I parenthetically pointed you to 3A of section 47A of the Act, which was --

THE CHAIR: I do remember, yes.

MR LAVY: Well, that didn't exist in these days. That came in by amendment, I think 2023.

THE CHAIR: Yes, yes. If that's what it meant.

MR LAVY: It's very interesting, actually, and one can see --

THE CHAIR: It is a bit obtuse, if that's what it meant. It

1 could have just said that the declaration --
2 MR LAVY: It is quite interesting to see how this all
3 emerged at the time and I spent an --
4 THE CHAIR: There was argument, wasn't there?
5 MR LAVY: There was argument. We have in bundle A, tab
6 A.1 --
7 THE CHAIR: I am not sure any of this is relevant, is it?
8 If this court doesn't have jurisdiction to hear the
9 action, then how does Mr Justice Foxton's order assist?
10 MR LAVY: No, I agree, sir. It's the other way round. My
11 point is that if the court would have had jurisdiction
12 had the thing been commenced here, then nothing in
13 Mr Justice Foxton's order precludes jurisdiction --
14 THE CHAIR: Oh right. No, no --
15 MR LAVY: I am dealing with a point that I thought
16 Mr O'Donoghue was making.
17 THE CHAIR: I don't think so. He's shaking his head.
18 MR LAVY: In which case, that's easier.
19 But the submissions on transfer are relevant for
20 a different reason.
21 THE CHAIR: All right.
22 MR LAVY: This is Microsoft's submissions on transfer. If
23 you look at paragraph 2, the very last sentence, they
24 are saying --
25 THE CHAIR: Sorry, what am I looking at?

MR LAVY: I am sorry, this is hearing bundle A, tab A.1. This is my last point before the authorities.

THE CHAIR: Okay. Sorry, apologies, I have not looked at this.

MR LAVY: There is no reason, necessarily, you should have done, sir, because it's not -- this was submissions before Mr Justice Foxton. This was Microsoft explaining why there shouldn't be a transfer into the CAT.

THE CHAIR: Right.

MR LAVY: The first point that's made -- we see this at the end of paragraph 2 -- is that it is premature. Then paragraph 3, there are three points made: first, the pleadings are not yet closed. That doesn't matter for us for the moment.

The second reason at paragraph 4 is quite interesting:

"Secondly, and relatedly, it is already apparent that the issues covered by the existing pleadings involve significant, non-competition issues, including contractual issues and issues relating to copyright and software licensing. The Claimant highlights the central nature of these copyright issues, by saying that they are 'fundamental to [the Claimant's] claim'."

I draw that to your attention, sir, because it's not quite right -- although I accept that the copyright

issues have come to the fore recently -- but they were always there. And here is Microsoft making precisely that point prior to Mr Justice Foxton's order.

THE CHAIR: Did Mr Justice Foxton produce a judgment?

MR LAVY: I don't believe he did. It was just an order, wasn't it?

THE CHAIR: Was it done on paper? On paper.

MR LAVY: Yes. Then paragraph --

THE CHAIR: But it wasn't appealed?

MR LAVY: No, sir, it wasn't.

For the avoidance of doubt, it is said at paragraph 6:

"For the avoidance of doubt, the Defendants do not suggest that the CAT is necessarily an inappropriate forum for issues of this kind where they arise in the context of a competition law claim. Rather, the Defendants' point is that a proper consideration of the relative extent and significance of these issues, and their precise interrelationship with the competition law claims that the Claimant advances (which are plainly relevant considerations to the question of the transfer), will only be possible ..."

THE CHAIR: So this was all in the context of what the appropriate forum -- it wasn't really dealing with questions of jurisdiction?

MR LAVY: Not quite yet. But paragraph 7, sir --

THE CHAIR: And -- right, okay.

MR LAVY: -- does squarely deal with jurisdiction.

THE CHAIR: Yes, sorry, I beg your pardon.

MR LAVY: "Thirdly, the claim as presently advanced could not be determined by the CAT in its entirety. That is because the Claimant seeks a declaration that the licensing terms to which its claims relate are void and unenforceable ..."

Then it explains why that is a problem.

THE CHAIR: Right. That's a separate problem. The fact that Microsoft didn't take the point at this stage doesn't preclude it taking the point now, does it?

MR LAVY: It doesn't.

THE CHAIR: In fairness to Microsoft, it is -- well, I don't know whether it is in fairness or not -- but Microsoft has developed the copyright aspects of the claim significantly since this. It may have seemed a relatively peripheral issue at that stage, it didn't take the point; now it is central, they have addressed their minds to ramifications of having the CAT hear fundamental and important questions of copyright law and they now wish to take the point. You are not objecting to that per se?

MR LAVY: I am certainly not objecting to the point being

taken.

My perhaps forensic and unnecessary point was that, actually, they got the analysis right then, which was there was a piece that couldn't be transferred to the CAT as a matter of jurisdiction.

THE CHAIR: Yes.

MR LAVY: And that was the declaration. I don't put it higher than this: their instinctive --

THE CHAIR: They didn't take the point at that stage --

MR LAVY: They didn't take the point and it didn't occur to them to take the point.

THE CHAIR: It may have occurred to them, we don't know about that. They chose not to take it, didn't they.

MR LAVY: Unwired Planet, sir.

THE CHAIR: Yes.

MR LAVY: I won't tell you what the case is about, because you have already indicated you are familiar.

THE CHAIR: I am familiar with it, but it is a very long and complicated case so don't be embarrassed about reminding me of any aspects of it.

MR LAVY: Well, the relevant part for present purposes is this is an application to transfer part of those rather complex proceedings out of the patents court into the CAT. The application was to transfer out competition claims, together with what were described as closely

related contractual claims, which are the FRAND terms claims.

Now a large part of this judgment on transfer is dealing with the discretionary matters. We don't really have to worry about those for present purposes. For present purposes, the relevant part starts on page 167 of the authorities bundle. It is paragraph 39, where Mr Justice Birss, as he then was, says:

"This takes me to the question of whether the court has jurisdiction to transfer the contractual FRAND issues to the CAT."

Could I possibly ask you to read paragraphs 39, 40 and 41?

THE CHAIR: Yes. So when the judge is asking whether the court has jurisdiction to transfer contractual FRAND issues to the CAT, it's really asking whether the CAT has jurisdiction to hear it.

MR LAVY: Indeed, sir, yes.

THE CHAIR: Yes, okay.

MR LAVY: So the critical point there, sir, is that the distinction being drawn, in my submission, is between legal issues that have to be decided to deal with the competition claims and those that relate to a separate cause of action, the contractual FRAND claims.

Issues that needed to be decided to deal with

competition law claims were capable of being transferred in Mr Justice Birss's view, but separate causes of actions were not. And that's precisely the distinction that I submit is the right one. Of course, if there is a claim for damages for copyright infringement, that's no business of the CAT. But that's what one has to ask: what is the claim and what do I have to decide in order to decide the claim? So this is coming back, really, to where I started: my submissions were based on just a reading of 47A, but I submit, actually, this passage is entirely consistent with that and, effectively, makes the same point.

My learned friend took you to paragraph 44 over the page, but I think he read part of that paragraph. It is really quite important to read the whole of paragraph 44 in context to understand it.

THE CHAIR: Yes.

MR LAVY: So, sir, this case -- this paragraph read as a whole is really, actually, identifying the same distinction, in my submission. It is between those that are central to the transferable cause of action and those that aren't. So I actually say, standing back, this case is authority -- maybe not squarely on point, but it is certainly the closest I found and I say it's properly called authority for the proposition that the

Tribunal does have the jurisdiction to deal with non-competition issues, provided that it's dealing with those issues because they are necessary to decide a competition law claim.

That, in my submission, is precisely the position we are in here. Because there is only one reason why the copyright issues are before the Tribunal in this action, and it's because they are necessary in order to decide competition law claims. That really is the end of it, in my submission.

The one other thing I should probably say, really, by way of footnote -- because it doesn't add anything but it is just for accuracy -- my learned friend took you to the Enterprise Act, section 16.1. It is worth pausing on 16.4 as well. I will just read it out because it is short. It is on page 1088:

"The court may transfer to the Tribunal ... so much of any proceedings before it as relates to a claim to which section 47A ... applies."

So again, actually, we are back to 47.

Unless I can help you further, those are my submissions.

THE CHAIR: Thank you.

Submissions in reply by MR O'DONOGHUE

MR O'DONOGHUE: Two very short points if I may. First, it

was suggested more than once by my learned friend that the copyright issues are really a defence by Microsoft to the claim. He also said at one stage: Well, it's really a matter of taste and preference and semantics as to whether one calls these ancillary or anterior or something else.

With respect, that's not a tenable reading of his own pleading. Their pleaded case at paragraphs 20 and 21 is that an essential ingredient of the case they put forward is that they positively assert rights lawfully to resell licences under the software directive. That is a predicate of their own case.

The reason his defence argument doesn't work is that if we are right that under the software directive and/or InfoSoc, there is no such right, we do not need a defence. That's why the matters of taste or trying to reposition this as a defence simply does not work. Their positive case is that they have a lawful right to resell. If they don't, it is the end of the matter, we never get to competition law.

On Unwired Planet, he took you to paragraph 41 which we say is instructive because Mr Justice Birss uses the words "consequential or ancillary" to the infringement claim. We say by contrast in this case, the copyright issues are fundamental, at the heart, and certainly not

consequential or ancillary in any way. If we are right, they're entirely dispositive.

So if those are Mr Lavy's adjectives now, he fails that test.

THE CHAIR: Thank you. Well, I am going to reserve judgment on this point. But as I understand it, it's common ground, whatever I decide, we carry on as we are for the time being.

Where next?

MR HOBBS: I confirm that is the position.

THE CHAIR: Thank you, Mr Hobbs, yes.

MR LAVY: Now Mr Lawrence will make his application.

Submissions re disclosure by MR LAWRENCE

MR LAWRENCE: Sir, just as a sort of housekeeping matter, I am going to address the application for disclosure and I'm going to set that in context by reference to some documents in the bundles that are marked as "Defendants' Confidential Information". When we reach them, we will have to decide whether it is better to stop the livestream or whether we can go forward just looking at the documents, but my preference would be to stop the livestream and give us freedom to discuss what the documents say.

THE CHAIR: We will see how we go, shall we?

MR LAWRENCE: Yes. So the Claimant's application for

specific disclosure started on 20 December. It relates to the CELA presentation as it has become known. I will take you to that in a moment.

It is a privileged document. Waiver was made by letter of 12 November 2024. I will take you to that and other correspondence shortly. Two questions really arise for the Tribunal: one, whether the application is premature; and if it's not premature, what further disclosure, if any, should be ordered.

The claimant seeks an order for the disclosure of legal advice. CELA is the commercial enterprise -- it stands for -- and legal affairs --

THE CHAIR: I think it has "lawyer" in there somewhere, or "legal".

MR LAWRENCE: Yes, we will come to it. But CELA is the legal team which I think is responsible for the running of this case.

THE CHAIR: I don't think it is just the legal team --

MR GRUBECK: It is Microsoft's Corporate External and Legal Affairs team.

THE CHAIR: Corporate External and Legal Affairs.

MR LAWRENCE: Thank you, I am grateful. We are seeking the legal advice and related documents given by CELA in relation to secondhand sales in the territory --

THE CHAIR: Yes, I have had a look at it, yes.

MR LAWRENCE: -- in the relevant period. The reference for that is paragraph 81 of Mr Fussell's first witness statement.

We have narrowed the requests in correspondence. Again, I will go through all the correspondence, but the reference will be to our letter of 29 April 2025, where we set out the six categories that we believe encompass the transaction in respect of which waiver has been given.

THE CHAIR: Let's have look at that now. Which page is it?

MR LAWRENCE: 29 April.

THE CHAIR: We can come to it later.

MR LAWRENCE: I am going to come to it in turn. I am just giving an overview of what we are looking at.

THE CHAIR: Yes.

MR LAWRENCE: We say it's not premature, that there has been a waiver which has been relied on, and that we are entitled to some more disclosure. I will take you through what I say the transaction is in respect of which waiver has been given.

So I would like to start with the correspondence --

THE CHAIR: Just to give you an early warning shot: I think the challenge you face at the moment is explaining why this document is relevant.

MR LAWRENCE: Right.

THE CHAIR: And why, therefore, other documents -- why the transaction is relevant by reference to your pleading and how you are going to prove things at trial.

MR LAWRENCE: Yes. Can I take you to the correspondence and then to the documents that I think show the relevance of this particular conversation that Microsoft was having with its legal team in seeking advice in relation to the specific issue of exhaustion of rights?

THE CHAIR: Yes.

MR LAWRENCE: So I will give a summary answer to your question.

THE CHAIR: I am just warning you that at the moment the difficulty and the reason why this may be premature is it's not clear me why this is relevant. The legal advice might have been one thing and the team might have been doing something else. It wouldn't be the first time.

MR LAWRENCE: I would ask you to look at the correspondence, look at the purpose for which the document has been disclosed --

THE CHAIR: Yes.

MR LAWRENCE: -- and the context of the other CELA involvement in advising on exactly the same issue in connection with the matters that constitute the campaign.

THE CHAIR: Yes, but in the end we have to bring it back to your pleaded case.

MR LAWRENCE: Yes, we do.

THE CHAIR: And the pleaded case isn't what the legal advice was within Microsoft.

MR LAWRENCE: It isn't.

THE CHAIR: No.

MR LAWRENCE: I accept that. I accept that.

Could we start with bundle F, which is the correspondence bundle, tab A.17 and page 67. This is the letter by which CMS, acting for Microsoft, disclose the CELA presentation. Paragraph 1, clients' contending there is a campaign. Microsoft, paragraph 2, has always denied the campaign or equivalent conduct.

THE CHAIR: Just as a start, that doesn't make any sense to me. I understand aspects of the campaign are common ground, so it suggests we are already at cross-purposes --

MR LAWRENCE: There is the existence of the CAR agreements and the restrictions in them, the existence of the new from SA condition are common ground.

THE CHAIR: But you define campaign by reference to those agreements, don't you?

MR LAWRENCE: And by reference to the non-contractual conduct that occurred across the period.

THE CHAIR: I understand that. But the difficulty is what people understand by "campaign", and it seems Microsoft perhaps were focusing on the softer aspects when they wrote this letter. It is why it is quite important to have in mind what it is we are dealing with, what is going to be in dispute at trial.

MR LAWRENCE: Yes.

THE CHAIR: So aspects of campaign. Aspects of what you call the "campaign", and I think Microsoft are not too happy with that term, but aspects of what you call the campaign are common ground, i.e. the contractual provisions.

MR LAWRENCE: Yes. But there is a dispute, both in relation to the purpose for which those contractual provisions were put in place --

THE CHAIR: Does that matter?

MR LAWRENCE: Yes, it does. When we come to look at the conduct that occurred between the start of the CAR period and the new from SA conditions, so from 2014 maybe 2016 through to 2020, our case will be that there was a course of conduct -- whether you call it a policy or a frequent occurrence -- of discouraging those who were customers or partners of Microsoft from reselling their Perpetual Licences.

We will not be able to prove each and every instance

that that happens. So we will be able to prove that a certain number of instances occurred and we will be drawing an inferential case from that, that that was the general conduct through the period.

THE CHAIR: Right, I understand that.

MR LAWRENCE: Therefore, seeing what the purpose was for the introduction of the new from SA condition will inform the Tribunal as to what the course of conduct was seeking to achieve. That's where I do want to go to some of the documents and put some flesh on those bones.

But it's my position that it does matter why. The explanation for the adoption of the new from SA condition was essentially that they wanted to achieve something which they had been trying to achieve in discussions with customers but perhaps with diminishing success. Therefore, looking at the correspondence leading to and the advice given in relation to the adoption of the new from SA condition, is an important part of the picture that the Tribunal will want to see.

THE CHAIR: Right.

MR LAWRENCE: It is going to have to decide whether there was actually a course of conduct here, as we say, or whether there were just isolated problems with perhaps executives going off piste because Microsoft's legal team -- it is said we should take great comfort from the

fact that Microsoft's legal team was telling everybody to comply with the law. But actually we very strongly suspect -- and believe we should be entitled to see -- what exactly the conversation was between the legal team and those who were implementing the new from SA condition, because it will inform us as to what the policy had been in the prior period. That's why it really matters. That's our position.

THE CHAIR: All right. So you are saying the legal team were responsible for the campaign?

MR LAWRENCE: Can I show you the documents? You will see how I --

THE CHAIR: We need to look at --

MR LAWRENCE: I might not be putting it quite that high but they were intrinsically involved.

THE CHAIR: Which documents are we going to look at? We are on correspondence.

MR LAWRENCE: The structure I was going to adopt was to take you through the correspondence, which sets up where we are in terms of what more documents have been allowed --

THE CHAIR: Let's take that as quickly as we can, the correspondence. Show me the important paragraphs.

MR LAWRENCE: Okay. The important paragraphs are in the letter of 12 November --

THE CHAIR: Which we are looking at, yes.

MR LAWRENCE: -- the context for all this is that, paragraph 3, disclosure process is ongoing. They say it is very difficult to prove a negative, they have been taking a lot of time to produce documents.

THE CHAIR: Yes.

MR LAWRENCE: Paragraph 4 --

THE CHAIR: So they are waiving privilege, yes.

MR LAWRENCE: "In an effort to give your client comfort ..."

THE CHAIR: Yes.

MR LAWRENCE: Paragraph 4, page 67.

THE CHAIR: I have read that.

MR LAWRENCE: "Unusual step". Over the page they say:

"... the notion of any Campaign as alleged by your client is bogus and that it's case entirely ignores the suite of perfectly lawful measures ..." that could be taken.

So you have to ask yourself (inaudible) and we will come to the Fulham Leisure case. In defining the transaction in respect of which there has been a waiver of privilege, it is necessary to look at the purpose for which the waiver is made.

This disclosure is made in order to try to disprove the campaign. It is going to be said, when I say you should draw inferences that there was a campaign from the examples --

THE CHAIR: Yes, I understand that. You know, no doubt you will be saying loud and clear, "This doesn't prove anything. This document doesn't prove anything. It doesn't prove one way or another whether there was a campaign or not. All it shows is some legal advice has been given on a particular day".

MR LAWRENCE: We will be saying that.

THE CHAIR: Yes. So one needs to take a somewhat holistic view of where the parties are as to the relevance of this document.

MR LAWRENCE: Yes. At least until very recently, a lot of weight was placed on this document in terms of this letter, the next letter you find --

THE CHAIR: Okay, let's go to that.

MR LAWRENCE: -- at page 85. It is 29 November. The relevant passage is on page 87:

"... Microsoft's position is that these allegations are entirely misguided for the following reasons: ..."

And over the page:

"If the alleged conduct did [exist], it would have run directly contrary to the guidance provided by the ... legal team."

That's the CELA presentation.

Mr Henderson, we don't need to turn it up, in his 13th witness statement refers to the CELA presentation

as well in the context of disclosure.

THE CHAIR: Sure, sure.

MR LAWRENCE: What is being said at that time in that context is, "We don't need to undertake any further examination. We don't need to give widespread disclosure or conduct detailed investigations, because you can take it from us the legal team was involved and therefore the campaign didn't exist."

So it's being deployed, if you like, in order to limit the scope of the litigation.

THE CHAIR: Yes, they are trying to persuade you not to run up massive costs on this fishing expedition to look for soft evidence.

MR LAWRENCE: Exactly right, yes. Exactly right.

So if you can just bear with me for a moment --

THE CHAIR: It is my fault, I am sure, but at the moment we seem to be stampeding into a narrow issue of "has there been waiver of privilege", which there has, and how widely should that be understood to have taken the waiver of privilege. But at the moment there seem to be questions anterior to that: how are you going to be approaching your pleading as a matter of evidence; what disclosure are you getting generally on this issue? And that context seems to be relevant before one decides to look at this particular transaction. That's all.

MR LAWRENCE: So, with respect, I would agree with that. There is also an additional factor, which is what evidence have we been faced with at the summary judgment and disclosure application stage in terms of trying to explain the reasons for the introduction of the new from SA condition.

THE CHAIR: Yes.

MR LAWRENCE: We say that the documents which I am going to show you -- and we would need to go offline to look at them -- we say that those documents flatly contradict the witness evidence. And have a look at the involvement of CELA in all of this.

THE CHAIR: Okay. We will have a look at that. Thank you.

(1.00 pm)

(The luncheon adjournment)

(2.00 pm)

MR LAWRENCE: Sir, can you I take you through the documents in bundle D that I want to refer you to. The first document I was going to take you to would be the CELA presentation itself, which is not marked "Confidential." After that I have in mind to show you briefly four documents that are marked confidential. I am assuming that Microsoft will not want those read out in open court.

THE CHAIR: Let's see how we get on.

MR LAWRENCE: We will see where we go. All right.

So the CELA preparation, it's not stated on its face but I don't think it is an issue that it is from February 2016 and that there were other versions of this. In fact, in the correspondence which I have not yet shown you, an offer has been made to provide other versions of the presentation, together with emails circulating the presentation and certain attachments in unredacted form.

So what is this presentation? We know that it's put forward, as we've seen from the 12 November letter, to explain that because CELA was involved in advising on secondhand sales, there could not be a campaign. If we just turn the pages, page 8 in the bundle "New challenges", we see reference to anti-trust complaints, more aggressive dealers and increased business pressure. Some of the documents I will show you will refer to that business pressure.

What it then does is it goes on to explain that in certain circumstances, secondhand sales are lawful, subject to the principle of exhaustion. It is my submission that this document is dealing in large part, not exclusively, with what the principles of exhaustion are and how they relate to the business activities which Microsoft is carrying on, and is cautioning against

boycotting resellers.

We see from page 9: SHS, secondhand sales, is legal and UsedSoft has clarified that -- that is CJEU -- be careful with any statements about it and even internal communication might be discoverable; don't criticise or retaliate against partners selling SHS or customers, play fair and communicate objectively.

So in itself, helpful in terms of accurate advice to the business.

Page 12, we see the market, and the SHS dealers that there are. It's a large and growing and threatening market, we say, to Microsoft at this time. There are examples of documents provided by SHS dealers at page 12.

Page 16, if you turn to page 16, is a reference to "The world has changed." In fact, what the CJEU did, of course, was not change the law but clarify the law. But it appears that the Microsoft view at this time is that there would be circumstances that they had been treating secondhand sales as potentially unlawful that now become lawful, subject to the principle of exhaustion.

The next section, starting at page 17, deals with transfer of software enrolment that for present purposes -- and page 20 is specifically on exhaustion and deals with article 4.2 of the EU directive -- and

then the prerequisites for exhaustion are considered at 22. So it is giving advice on what would constitute exhaustion.

If we look at 24, 24 is interesting almost as an aside. It's the interpretation of the UsedSoft ruling by further case law:

"Exhausted academic licences may be further distributed as commercial licences."

And then second:

"Volume licences may be split up, except in client-server architectures."

THE CHAIR: I notice that the interpretation of UsedSoft is different now than it was then. There we go. I am not sure anything turns on that. It is a slight amusement, that's all.

MR LAWRENCE: I don't need it to make my point. It is obvious that different views were taken at different times.

THE CHAIR: Sure, sure, sure.

MR LAWRENCE: Page 26, key rules for secondhand software, so it's sort of repeating what was said in an earlier slide, be objective and balanced.

Then, slide 28 is of some interest: don't discredit secondhand sales vendors; don't prevent partners selling; and seek legal support -- that's important,

seek legal support -- to go after illegal secondhand sales offers.

So what it is doing -- we will come to see this when we just look at the last few pages of the document -- it is setting up a policy of ensuring that CELA is involved in the interaction with resellers in trying to prevent a breach of the law. I don't think there is any difference between myself and the other side of the room on that.

What it does is it says, slide 31:

"Please use the Reactive Letter on SHS for EU/EFTA in case you get questions regarding Microsoft's general position [so that's what it's policy is] on secondhand software or specific inquiries ..."

I say that's important. Those reactive letters, the template for which is at page 32, we have asked for and they have not been provided. My submission would be that they are not privileged, and never have been privileged: they are the letters that would be sent to resellers which would tell us whether this advice was being followed by the business or modified.

Looking at the terms of the reactive letter is informative. The only bits that I would draw to your attention, sir, are the first line -- so it is going to be piloted first with customers. Then --

THE CHAIR: Sorry, I beg your pardon?

MR LAWRENCE: Page 32.

THE CHAIR: Where is "piloted"? I am looking for that.

MR LAWRENCE: "Dear customer/partner, (sending this letter to partners needs to be agreed with ... CELA after first piloting it with customers) ..."

So CELA are involved in advising on the interaction with resellers, after it is piloted. We don't know whether it was piloted, we don't know whether any letters were sent.

THE CHAIR: I may have made it clear before, I just don't have clear in my mind the difference between -- I understand you want disclosure around the campaign or this aspect of the campaign. I understand that. I am not clear as to what disclosure you have already, or I am not clear as to what disclosure is in dispute. The bit I am really not clear about is why this question of waiver is coming before determining all those other issues. As you just pointed out, some of the disclosure you would be really interested in seeing wouldn't be considered privileged anyway.

I am quite confused as to how those various elements slot together. Just come to it in due course, but --

MR LAWRENCE: Can I just address where we are in the disclosure process?

THE CHAIR: That may be helpful, yes.
MR LAWRENCE: If that would be helpful to you.
So there was a sampling exercise carried out last year, ordered at the third CMC, which I think was February 2024. That sampling exercise has produced some very limited disclosure, which then led to a more precise definition of what should be disclosed on both sides. You may recall that in February this year, at CMC5, an order for disclosure was made. That process is continuing and the disclosure is due to be given in large part on 27 May.
THE CHAIR: But which categories impact on this? You have categories that impact on this entire aspect --
MR LAWRENCE: We don't have anything that would specifically, as I understand it -- those behind me may correct me -- but we don't have anything that will go specifically to the involvement of CELA in the --
THE CHAIR: That's not what I meant by my question.
MR LAWRENCE: Apologies for misunderstanding.
THE CHAIR: Not at all. I meant in relation to the campaign. So, for example, you have just said you would like to see this reactive letter. You have asked for copies, you've not had it.
MR LAWRENCE: Yes.
THE CHAIR: Is that reactive letter not falling within

a category of disclosure already? As a for instance?
MR LAWRENCE: I am being told behind it may well be. I am looking across the room and I can see others nodding.

So if it is confirmed that any reactive letters that were sent, as opposed to just the template, would be included in the 27 --

THE CHAIR: You are interested in what is going on between Microsoft and its customers.

MR LAWRENCE: Yes.

THE CHAIR: That's the interface --

MR LAWRENCE: Correct.

THE CHAIR: -- that this Court is concerned with.

MR LAWRENCE: And why that is taking place. Why and how that is taking place.

THE CHAIR: How, yes. Depending on what one means by why. But yes. Let's go with why as well. Why as well.

The legal advice that has been given from one part of the organisation to another is relatively peripheral. Let's leave it there. Compared to that, what is Microsoft actually saying to customers?

MR LAWRENCE: It may be less directly relevant, but it is nonetheless, in my submission, relevant, particularly when one sees the genesis for the New From SA Condition which reflects, we say, the policy that was adopted internally by Microsoft for the prior period.

We are not going to be able to prove each and every instance.

THE CHAIR: I understand that. That's a separate matter. Let's keep going with the documents anyway. That's my area of confusion. Maybe it will all become clear.

MR LAWRENCE: We are nearly finished with this. All I would highlight in relation to the reactive letter is that the last two paragraphs, which are the reference to UsedSoft and Microsoft therefore recommends to carefully examine the origin of software offered as secondhand, to make sure that the requirements for exhaustion are actually met.

So this is letters to customers, enquiring about the ability to resell the product. The legal team has designed a standard form template response which is pointing out the risks of non-exhaustion to those -- either customers or partners who are proposing to resell their Perpetual Licences.

So this is part of the persuasion of customers and partners not to part with their licences.

Against that backdrop, I would like to turn -- I have four documents and I heeded what you said and I cut down to the bare minimum, the documents I want to refer to, but I do have four documents and they are marked confidential.

THE CHAIR: Yes.
MR LAWRENCE: They are in bundle D. The first one is at 317.
THE CHAIR: Page 317?
MR LAWRENCE: It is page 317. I will give you the tab in a moment.
THE CHAIR: A.35.
MR LAWRENCE: A.35, yes. I am working from page numbers. When I have found the page, I can get the divider number.
MR O'DONOGHUE: Sorry to interrupt. Just to confirm that we have no objection to proceeding in open, but of course, we would like the confidential status of these documents to be maintained. So we do not agree to them being read out. We have no objection to you reading them, sir.
THE CHAIR: I understand.
MR LAWRENCE: I would quite like to read --
THE CHAIR: Tell me what bits you want. It's not very long. I can read it to myself.
MR LAWRENCE: On this one it isn't very long. It starts on 318.
THE CHAIR: There's a bit in yellow? Is that the bit that has --
MR LAWRENCE: All of that bit, from the first line.
THE CHAIR: "I would like your approval ..."

MR LAWRENCE: Down to the "draft wording." All of that.
THE CHAIR: Okay. Let me read this.
MR LAWRENCE: Please do.
THE CHAIR: So this is from -- do we know who these people are?
MR LAWRENCE: Yes, I do. I can explain who they are. That's, actually, somewhat significant as well. It is the whole of this chain on both pages, working up 317 to the top.
THE CHAIR: I am sure it's not confidential who these people are. We won't read the contents that are marked confidential. Do you want to say who they are?
MR LAWRENCE: I will give you details. Mr Carlos Cruz and Randy. So Carlos is the General Manager, Product Management and Business Planning. So that's his formal title, as I understand it.
THE CHAIR: Yes.
MR LAWRENCE: And Randy is Randy Levitt, Director, Commercial Licensing and Monetisation and Online Licensing Strategy, Cloud Marketing. They are being contacted by Ryan Baker, Senior Business Planner. So it is going up the chain of command.
THE CHAIR: Yes. Let me read it then.
MR LAWRENCE: Please do.
THE CHAIR: That all seems perfectly straightforward.

MR LAWRENCE: In your copy, like mine, I hope there is some wording which is blanked which is privileged.
THE CHAIR: Yes.
MR LAWRENCE: And a piece in red which is the offending provision that we plead.
THE CHAIR: Yes.
MR LAWRENCE: So that sets out the reasons for the introduction of the offending provision, we say.
THE CHAIR: Yes, yes.
MR LAWRENCE: That then gets approved on page 317. You see the response from Mr Levitt.

As you go up the page, because the email chain has the most recent at the top, one sees another piece of legal advice that's been screened in the response from Mr Cruz, approving the change. Then we see it sent --

THE CHAIR: This is not confidential. It is not highlighted in yellow. Does that mean it's not confidential?
MR LAWRENCE: I don't know. I am not sure what that yellow highlighting, as opposed to the designation of the whole document -- I have been cautious and treated the whole document as confidential.
THE CHAIR: Looking by the second hole-punch, it is a sentence that starts "This was a question ..."
MR LAWRENCE: Yes.
THE CHAIR: And then there is a reference, there is an

acronym CLAB. I won't read anymore. Who are CLAB?

MR LAWRENCE: It is the next wording.

THE CHAIR: Who is CLAB?

MR LAWRENCE: I will be corrected, but I believe it is part of the legal function within Microsoft, CLAB, at that time.

THE CHAIR: It may be unclear at this stage. I don't want people to have to answer these questions on the hoof.

MR LAWRENCE: Yes. Then it is the next wording which is part of the course of conduct, we say.

THE CHAIR: Sorry, the next?

MR LAWRENCE: So "I agree."

THE CHAIR: Not the bit blanked out?

MR LAWRENCE: No, it's the wording you can see.

THE CHAIR: I understand, yes.

MR LAWRENCE: Then we see this is sent to Wolff at FPS-law. I don't know what FPS-Law is, but CELA are copied in, and some of the CELA advice, as you have seen, is blanked out in the document.

THE CHAIR: Right.

MR LAWRENCE: This is the final approval that we have seen of the New From SA Condition. Sets out its reasons for adoption, no reference to breach of copyright, and it has CELA all over it.

So that's the first --

THE CHAIR: It is inconceivable that a change in the contractual conditions wouldn't be sent to the legal department.

MR LAWRENCE: Indeed.

THE CHAIR: You need the document to --

MR LAWRENCE: I completely agree. Can we see the genesis?

THE CHAIR: Sure.

MR LAWRENCE: I started at the end of the picture.

THE CHAIR: Yes.

MR LAWRENCE: This is why the infringing provision was, as we say, introduced. The next document -- it is really the first in the chain -- there are three more I would like to show you. One is at page 143 of the bundle. From Mathieu Sponselee.

THE CHAIR: Sorry, hold on, give me a second.

MR LAWRENCE: Sorry. A.13.

THE CHAIR: A.13?

MR LAWRENCE: Yes, D, A.13, at page 143. You will see there are two pages that are blanked out. That is presumably because CELA are advising on the piece that we have seen.

THE CHAIR: How are you linking these? These are quite different dates, aren't they?

MR LAWRENCE: They are.

THE CHAIR: This is 2018.

MR LAWRENCE: We go back in time to see the genesis and then I am going to take you to the pleading to show you how these little snapshots we have from the scoping exercise --

THE CHAIR: What do you want me to read here, first of all?

MR LAWRENCE: If you could read that email and particularly the piece over the page. It is the heading -- the heading is very important --

THE CHAIR: Hold on. Start again, my fault. I have been looking at other things as we go.

MR LAWRENCE: Page 143, halfway down.

THE CHAIR: There is an email of 23 March. Am I to be reading that?

MR LAWRENCE: That's correct. 11.07. That one, please, thank you.

THE CHAIR: Okay, I have read that email.

MR LAWRENCE: You have seen that CELA must have been advising on that email. Or there must be a record of some legal advice, previous legal advice, at 144.

In the prior pages that precede 143 and 142 -- 142 is almost completely blanked out and 141 is -- one assumes that CELA were involved at this stage.

THE CHAIR: Not that I am disagreeing with you, but where do you get that CELA were involved?

MR LAWRENCE: Because of the privilege claim. That's the

legal team. So the blanking out -- everything that's black screened is screened for privilege.

THE CHAIR: Okay. So lawyers were involved? That may be good enough for your purposes.

MR LAWRENCE: Lawyers were involved. It could be external lawyers, yes. Although I think it was CELA and we will see why.

THE CHAIR: Okay.

MR LAWRENCE: But 144, the first sentence on 144 --

THE CHAIR: Yes.

MR LAWRENCE: -- I just draw to your attention.

So when we come to look at the pleading and the allegation that there was a course of conduct, a policy, a campaign, we have this snapshot.

The next document -- it is being pointed out to me also that the Mathieu Sponselee email was, of course, copied to CELA.

THE CHAIR: Right. That was the purpose of my question, really. I have it, yes.

MR LAWRENCE: Yes. Then if we could go to tab A.26.

THE CHAIR: Sorry, a basic question: is there any suggestion that the from SA conditions were introduced for the purpose of anything other than stopping the sale of secondhand software?

MR LAWRENCE: Yes, the whole of the summary judgment

application and the whole of the copyright issues are based on the premise that there is an objective justification which is the protection of copyright. So the evidence being put forward is that all this was done for the protection of copyright.

THE CHAIR: Right. You are saying no, this was competition. No one is mentioning copyright. I understand. I understand.

MR LAWRENCE: They were trying to eliminate the market.

THE CHAIR: I understand.

MR LAWRENCE: If I can just stay with that, because it is a really important point. What CELA was doing was advising on exhaustion as a means of, nonetheless, preventing resale. Resale is lawful -- SHS is lawful -- subject to there not being exhaustion.

What the business did was it came to CELA and said: can we use the exhaustion principle to justify including a provision in our contracts that stops completely the supply of secondhand licensing to the downstream market?

THE CHAIR: So you are saying there is a potential case that -- I see -- that CELA thought they could legitimately, perhaps, circumvent UsedSoft --

MR LAWRENCE: Correct, that's exactly my case.

THE CHAIR: -- By putting in the term.

MR LAWRENCE: That's exactly my case. To start to make it

good -- because all I have is a tiny snapshot from the disclosure given so far -- could we turn to tab A.26 and page 227 to start with? I will go to 225 after that. But 227 is an email.

THE CHAIR: Hang on, give me a second.

Yes?

MR LAWRENCE: Email from Dee Bradshaw, Senior Licensing Executive, Western Europe. I think at the earlier period. Then Western European public sales, sector sales, excellent at this time, I believe. So we are talking now 2019. This is a matter of eight months before the provision is adopted.

If I could ask you to read that, the Dee Bradshaw, Wednesday 30 October email --

THE CHAIR: The whole thing?

MR LAWRENCE: -- to Nuno Alves Silva.

THE CHAIR: Right.

MR LAWRENCE: And turn over to page 228 as well, sir. 228 at the top of the page, B, is important.

Then we have some blanking out again, which one assumes is CELA advice or record of it or maybe other legal advice. It is the bullet point on that page I draw your attention to.

THE CHAIR: Okay.

MR LAWRENCE: Then finally, I can make my submissions based

on --

THE CHAIR: Just give me a second, sorry.

Yes. Where next?

MR LAWRENCE: The last one. And apologies for so many but 225, there is a further email.

THE CHAIR: 225.

MR LAWRENCE: Page 225. It's the same tab as the previous documents. A.26. It is the same email chain and it's a week later and it is Dee Bradshaw again. I would particularly ask you to read the first two paragraphs. In fact, over the page as well, is relevant.

THE CHAIR: This is the one, 14.01?

MR LAWRENCE: It is the one at 14.01.

THE CHAIR: Right.

MR LAWRENCE: The most important sentence, if you like, that I draw your attention to, is the one that starts "However, we would need ..." just below the hole-punch on 226.

THE CHAIR: Sorry, I haven't got that far. Let me just read on. I beg your pardon.

MR LAWRENCE: Apologies.

THE CHAIR: Right, I am with you.

MR LAWRENCE: So I am going to draw this back to the pleadings in a moment, but if I can make the submission that what one sees from these documents is a concern

about secondhand sales and an engagement of CELA --

THE CHAIR: Yes, I think there is a lot -- I think a lot of the confusion comes from where you are using the word "campaign." As I understand, your point on this is quite a short one: you say they are saying that this is all justified for copyright infringement, to prevent -- their legitimate interests in preventing copyright infringement. You say when you look at these documents in the context of the discussions in UsedSoft and what has followed, it has nothing to do with copyright infringement.

MR LAWRENCE: That's what I am saying, yes. I say that. I say that.

THE CHAIR: This was all about trying to reduce competition. You don't see --

MR LAWRENCE: Yes.

THE CHAIR: -- and whether it is legitimate or illegitimate doesn't matter, but they thought a way to avoid the UsedSoft consequences was to put it in terms into the From SA contract. Do I have that right or wrong?

MR LAWRENCE: I think I agree with that. The way I would put it is this: there was a concern about secondhand licensing flooding the market. The business sought a way or ways -- a suite of measures, some of which might have been lawful, some of which we allege

weren't -- to try to prevent that happening. CELA were involved intrinsically in helping to design the conduct and policy that was ultimately adopted, including the New From SA Condition. But also in the prior period, we believe, advising in relation to issues arising regarding the persuasion or coercion of customers into not selling their licences.

If I can take you to the pleading very briefly.

THE CHAIR: Yes. Not briefly, please. We need to look at this, it is important.

MR LAWRENCE: On this piece it all turns on paragraph 48, which is bundle B, tab A.2, page 21. But the definition of the "campaign", if you like, comes at page 20.

So the campaign, in the heading of D, is to keep preowned licences off the market. That's what we define as the campaign:

"VL sets out below the elements of the Campaign of which it is currently aware."

It divides it into two, as I explained this morning. Stage 1 is custom contractual terms and also including the non-contractual infringements listed in 48, in paragraph 48.

THE CHAIR: Hold on. I want to take this much more slowly.

MR LAWRENCE: Okay.

THE CHAIR: First of all, you have the custom anti-resale

terms.
MR LAWRENCE: Yes.
THE CHAIR: Which are 2016, which is a similar date.
MR LAWRENCE: So the CAR agreements were entered into, as far as we know, from 1 January 2014, through to, I think, the last one we are aware of -- or the last two -- there is one on 1 July 2019 and one in June 2019. Importantly, the CELA presentation is dated 16 February 2016. There was a CAR agreement entered into on 31 March 2016.
THE CHAIR: Okay. I am grateful for the information. But we are not really focusing on this at the moment, are we? On this application?
MR LAWRENCE: So what I am asking for is the advice that CELA gave in relation to the CAR terms.
THE CHAIR: Right.
MR LAWRENCE: At the same time as it was issuing its presentation, two of the CAR terms, CAR agreements --
THE CHAIR: The documents you --
MR LAWRENCE: They are in the bundle. I can take you to it.
THE CHAIR: The documents you have shown me -- 20 -- 18, 19 and 20.
MR LAWRENCE: There are others that refer back to 2017. We know that the CAR agreements, the bulk of the CAR agreements, date from 2016/2017. There are some later

ones.

But it is around the time that CELA is giving its presentation --

THE CHAIR: Why do you need to know the reason why these terms were put in? Because you say you want to disprove that it was about copyright infringement? Is that the reason?

MR LAWRENCE: We say that there was no justification for these agreements based on copyright. We do have some documents, by the way. I should accept that we have some documents that show the rationale for the CAR agreements, but we don't have the advice that was given in relation to it.

What we believe may have happened --

THE CHAIR: CAR agreements, the documents that you have are supportive of your position?

MR LAWRENCE: Yes. Can I show you the CAR agreements?

THE CHAIR: You'd better, yes.

MR LAWRENCE: Two of the CAR agreements are in the bundle. They are at D3 and D4. Bundle D.

THE CHAIR: What it is relating to, as opposed to the agreements. You show me the agreements.

MR LAWRENCE: I think these are the agreements themselves. A.3 and A.4. These are more defendant confidential information documents.

I would just like to look at two clauses in them. If you go to page 42 of the bundle, tab A3.

THE CHAIR: What is this document?

MR LAWRENCE: It's an amendment agreement.

THE CHAIR: With a customer?

MR LAWRENCE: With a customer. I am not sure if I should mention the customer name, but you can get it from page 44.

THE CHAIR: Okay.

MR LAWRENCE: It is clause 5, at page 42 of the bundle, which contains what is more or less a standard term clause regarding the basis for what we have described in the pleading and is in the document as relinquishment. It is essentially preventing the resale of the Perpetual Licences, in return for this customer switching to a subscription basis of --

THE CHAIR: This can't be confidential, can it?

MR LAWRENCE: I am sorry?

THE CHAIR: Microsoft, this can't be confidential? Maybe who the customer is and the quantities, but the sections we are looking at, is this really confidential?

MR GRUBECK: Sir, the confidential information is presumably the specific pricing information in this document. But I would need to take instructions on this particular passage.

THE CHAIR: Could you take instructions, please?

Sorry, I am not sure I was reading the right bit. Under the table on 5, that paragraph.

MR LAWRENCE: Yes, that paragraph sets out the restriction. You can see the tens of thousands of licences --

THE CHAIR: It uses the word "relinquished."

MR LAWRENCE: Yes.

THE CHAIR: You may well be right, but that may be --

MR LAWRENCE: Basically, there is also the words "no enduring", and following. I think it is common ground that the effect of these licences was to prevent resale of the Perpetual Licence, which ceased.

THE CHAIR: Right.

MR LAWRENCE: One can see it also at page 52 of that bundle, tab A4.

THE CHAIR: This is another one of these agreements, is it?

MR LAWRENCE: Yes. It is the same. If you note under paragraph 10, below the box, you can see the number of licences. I mean, we are not talking small numbers of licences here.

So below that, you see exactly the same wording. So there was --

THE CHAIR: That's why I'm doubting there was confirmation.

MR LAWRENCE: There was a standard wording that started to be adopted from around 2014 but was more prevalent 2016

and 2017. Again, that must have been adopted on the basis of CELA advice, one assumes -- or maybe external advice, legal advice -- and again, we say CELA were giving the advice on exhaustion.

The conversation that CELA is having with its client and that the client relies on, Microsoft says: you can take comfort from the fact that my lawyers were in the background; you can take comfort that I was not breaking the law. That's the transaction that's going on. They are talking about exhaustion, and then the business of coming and Microsoft is coming --

THE CHAIR: What date was UsedSoft, remind me? 2012, thank you.

MR LAWRENCE: Yes. It took them a while. I assume, but I don't know because I have not seen them, that there were earlier iterations of this presentation and that this is just one in a string.

THE CHAIR: Right.

MR LAWRENCE: But throughout the period, we believe -- we have not seen all the presentations or any more of the advice, I am pretty much showing you what I have -- the essence of it was the business, having a communication, a conversation, with its legal team, saying "Tell me how I can use exhaustion of rights to justify ..."

THE CHAIR: That was later. That was later.

MR LAWRENCE: We are saying it started at the latest in 2018.

THE CHAIR: Yes. But we are now on these earlier agreements.

MR LAWRENCE: Yes. And it is all happening at the same time. There are these two parts to the conversation: how can I stop resale? Two ways you can do it: one is you can exercise exhaustion principles, you can seek to show that there has been no exhaustion of the licence and you can tell customers that they have to be wary of selling licences because they are going to have to comply with the UsedSoft principles. Alternatively, you can actually prohibit -- not prohibit, but can encourage contractually, the client not to resell by offering that incentive to go to the cloud. What these CAR agreements are doing -- as I understand it, this is Microsoft's case, that these are so-called dark customers, who were slow in moving to the cloud because they were using old licences, and they were incentivised to move to the cloud, given a discount, a one-off discount, on the basis that they did not resell their licences.

We say that had an impact on the secondary market. It stopped a supply of licences to the secondary market, including the claimants in this case. And there was no justification for that. It's abusive for Microsoft to

have done that.

We also say there was no copyright breach, copyright infringement fear at the time, to justify the relinquishment requirements.

We would like to see -- we think it is important that the tribunal sees -- exactly why these agreements were adopted. What I am trying to do --

THE CHAIR: Sorry, I am assimilating a lot of information. I understand that you want to know the purpose behind it to negate the copyright position.

A. Yes.

THE CHAIR: I understand that. What's the other reason you need to see the purpose? Why does it -- let's assume that wasn't --

MR LAWRENCE: It is possible that what happened with this provision was that it morphed into -- they have in a whole bunch of relationships with customers. They have a relinquishment provision that, presumably, CELA have signed off on and said it is lawful. Later they use that as a model or a basis for a discussion with CELA about exhaustion: can we use exhaustion to get into our global standard terms --

THE CHAIR: Why do we care what CELA's advice was?

MR LAWRENCE: Because the communications between CELA -- it's not just the advice given but it is the

communications between CELA and the business -- will set out the real reasons for the adoption of the New From SA.

THE CHAIR: Coming back to your point, I just asked you: why do the reasons matter?

MR LAWRENCE: The reasons matter because there is an objective justification defence and I need to meet that.

THE CHAIR: That's the copyright. I understand that, thank you.

MR LAWRENCE: And there is also the point that is made that it is implausible that there was a policy of unlawfully shutting down the market or cutting off supply, because CELA were involved.

And seeing the CELA advice will dispel that. If my learned friend wants to say "We will place no reliance whatsoever on the CELA presentation or the involvement of CELA", that would be one thing. But he hasn't said that. They have been given numerous opportunities to do it. They said they relied on 12 November, 29 November --

THE CHAIR: I appreciate that point. But I don't quite understand what you submitted there. There was also the point --

MR LAWRENCE: I am sorry.

THE CHAIR: It is implausible that there is a policy of

lawfully shutting down the market?

MR LAWRENCE: So we say, if you go to paragraph 48 of that pleading, we have --

THE CHAIR: We have not finished with the pleading, yes.

MR LAWRENCE: We say there are four bases on which we say, at the moment, the campaign consists, so far as we know. We would like to know whether there were other steps taken by Microsoft.

What they are doing is they are trying to restrict or eliminate, we say, the supply of Perpetual Licences to the second hand market. They do it in a number of different ways. There is the Custom-Anti Resale terms which you have seen at paragraphs 46/47. At 48, we say in the intervening period and in addition to those restrictive provisions, certain things were done by Microsoft. So Microsoft simply advised customers through its licences --

THE CHAIR: Where are you reading?

MR LAWRENCE: I beg your pardon, 48.2 on page 21 of --

THE CHAIR: "Advising customers that such licences could not be resold." Yes, okay.

MR LAWRENCE: Microsoft seeking to dissuade customers from reselling Perpetual licences.

THE CHAIR: 2 and 3 seem very similar, yes.

MR LAWRENCE: Yes. And we have seen that CELA were helping

with that. In the CELA presentation they are helping their sales team have a reactive letter that points out the hazards of selling secondhand software.

THE CHAIR: Sorry, just take me back to the letter.

MR LAWRENCE: Yes. If we go to the reactive letter at D2, page 32 of the bundle. So it is D, tab A.2, page 32 of the bundle. This is in the context of CELA helping the business stop, certainly, unlawful secondhand sales.

THE CHAIR: Just show me the relevant bit.

MR LAWRENCE: It is the final two paragraphs of the reactive letter template. This is part of the persuasion. I will let you read it and then make my submission on it.

THE CHAIR: Let me just read.

So this letter is going to be sent to Microsoft customers.

MR LAWRENCE: Correct.

THE CHAIR: It is slightly odd that it seems to be saying that the people you sell the licences to have a burden of proof if they were ever to get sued. That's what it is saying, isn't it?

MR LAWRENCE: It may well be, but I am not commenting on whether that's right.

THE CHAIR: There is not actually -- it's not actually a threat to the Microsoft customer. It is a bit of an

odd letter.

MR LAWRENCE: It is. It is.

THE CHAIR: Why you would want to say this in a letter, whatever your position is -- it doesn't say: you have to be really careful about selling this software, guys, because it is going to be a heap of complexity and potential trouble for you. It is not saying that, it's just saying that --

MR LAWRENCE: Just saying that that's the backdrop. One doesn't know.

THE CHAIR: Right. Well anyway.

MR LAWRENCE: You have seen from the other emails that we looked at, the confidential emails, that a strategy was being devised to try to cut off the supply.

THE CHAIR: I understand that. I understand that.

MR LAWRENCE: We say this is part of that.

THE CHAIR: Right. So again, I keep coming back to the same point. I understand your submissions and see some force in your submissions that all this is highly relevant because it suggests the copyright story is not what is driving this behaviour. I am still struggling a little bit to understand the relevance of all these documents otherwise. Because I am not sure why purpose matters, other than the objective justification which is copyright infringement.

MR LAWRENCE: Can I put it this way: the case against me, based on the 12 November letter, is that CELA's involvement gives one comfort that there was no cause of conduct as set out in paragraph 48.

THE CHAIR: Yes, okay. Which is why I started off by saying this seems completely peripheral, the comfort even -- they are sending it to you for comfort, in the hope you drop the case but when it comes to this Tribunal making findings, I can't see how that document is really going to -- beyond evidencing the fact that the legal department in Microsoft was aware of UsedSoft, I don't see what it really adds.

MR LAWRENCE: I agree with that. What I don't want it to be said is that there are so few instances of the conduct in 48 that there couldn't have been more because CELA were involved advising business. That is how I have read the CMS correspondence.

THE CHAIR: That may be what they are saying, but one needs to be realistic.

MR LAWRENCE: They can speak for themselves.

THE CHAIR: All you have shown me, at least in the landscape we are inhabiting today, the only thing you have shown me that relates to 2, 3 and 4 -- or 2 and 3 anyway -- is the reactive letter. You have not suggested there are any other materials that support the suggestion that the

threats down the phone were coming from CELA.

MR LAWRENCE: I don't think that's right.

THE CHAIR: Okay, then help me.

MR LAWRENCE: I will have to take you back to bundle D. Bundle D, let me see if I can find one good example to show you.

If you turn to the final document that I showed you, page 225/226 of bundle D. It is tab A.26.

THE CHAIR: The one after --

MR LAWRENCE: So the bottom of 225, you can see the reference to "mobilising on a few areas."

THE CHAIR: Yes.

MR LAWRENCE: Over the page, what they are trying to do -- it is really difficult to explain the point, but paragraph 1, the first line over the page, the essence of what is happening is that a strategy of persuading -- seeking to dissuade customers from reselling potential implied legal threats. So that is 48(3).

THE CHAIR: I see a reference to "positioning language and customers" and "best practices."

MR LAWRENCE: Yes.

THE CHAIR: Just remind me, who are the people on this? This is --

MR LAWRENCE: So this is --

THE CHAIR: This is from Dee Bradshaw, but she's not in CELA.

MR LAWRENCE: Apparently CLAB is a client, a customer of Microsoft, not a legal team. CLAB, I think -- I am being instructed from behind. That was 317, sorry, it's a different document.

Anyway, we will come back to that. The people on this email, Dee Bradshaw.

THE CHAIR: Dee Bradshaw is not in the legal department.

MR LAWRENCE: No.

THE CHAIR: None of these people are in the legal department, so far as one is aware.

MR LAWRENCE: That's correct. Although they are recording legal advice in their email. Then lower down, if you look at 227, which came before, one assumes -- one assumes there is an email there, to or from CELA, that's being screened.

If I just ask you to turn to 222 as well. This document got culled in my lunchtime musings, but you can see from the mid-point of the page there is a bit that is blacked out. Then above that there is a reference to August 2017.

THE CHAIR: Yes.

MR LAWRENCE: So we think the policy and the strategy of (inaudible) situation and so on goes back beyond the Mathieu Sponselee email of 2018. We think it goes back to 2017. In 2017 and 2016 the CAR terms, relinquishment

provisions, were being put in place and CELA was advising on all of this, and was advising on exhaustion of copyright and also on, strategically, what they could do with customers.

THE CHAIR: Engagement with this customer.

MR LAWRENCE: Yes.

THE CHAIR: And CELA were involved, it says.

MR LAWRENCE: Yes, one assumes.

THE CHAIR: From CELA.

MR LAWRENCE: Exactly. Exactly.

THE CHAIR: So that's an indication of CELA having direct contact with the customer. Possibly anyway.

MR LAWRENCE: Certainly its business people were dealing with the customer. It could have been actually direct contact, yes.

THE CHAIR: "Engaged with C on this from CELA ...were involved." So there is some involvement in the meeting. If not direct, indirect involvement in the meeting.

MR LAWRENCE: One of the things I would emphasise is we have a tiny snapshot of documents from which we have extracted these. The protestations on the other side are they have gone to a lot of expense, carried out investigations and not produced anything of value. We have seen this, it is clear that there is asymmetry of information here. We have had a waiver of privilege and

an assertion that the waived document in some way influences the view of whether the infringement took place or not. We can disagree or we can agree that the document itself is not that relevant. It's what that document is part of and how it's relied on that I say is important.

I don't know whether I should spend a little bit of time just talking about the law on prematurity and on the definitional transaction, or whether you are familiar with the materials on that?

THE CHAIR: Yes. I think you should spend a little bit of time on it, yes. I mean, I have read your skeleton.

MR LAWRENCE: Yes. Particularly because of the intimation that you gave earlier, I would like to make some submissions on prematurity, in particular.

THE CHAIR: Yes. Can I just ask Microsoft, what use this document -- how is this document going to be deployed at trial, so far as your current position is on that?

MR GRUBECK: Sir, this document was disclosed, as you have identified, in the context of disclosure. Seeking to give the other side comfort that there wasn't a need to trawl endlessly to prove a negative.

THE CHAIR: Quite.

MR GRUBECK: There is no current intention or clarity as to how it might be used at trial. That's part of the

reason we say it is completely premature. It's not been put in evidence. It's not formally been adduced in any way in court. We are just not at that point yet.

THE CHAIR: You don't currently have any intention to assume a position based on that document at trial?

MR GRUBECK: Sir, no. At the moment, there is no firm intention of any kind in relation to this document, beyond the very limited scope within which it was provided.

THE CHAIR: All right. You obviously need to just keep that in mind. You may think that is a helpful concession, I don't know.

MR LAWRENCE: The one thing we have not heard is that they won't rely on it. So if they do rely on it or put it in evidence or use it at trial, we will have come back, we are all assembled here --

THE CHAIR: You make some persuasive points in relation to what was going on, and you make -- I obviously have not heard from Microsoft, but just on their face, persuasive points about what was going on. You make some persuasive points that copyright doesn't seem to have formed a part of this analysis, at least in the documents that we have looked at, and I appreciate I've only seen a snapshot. The bit that still is up in the air is what this document has to do with anything. This

document that we are discussing.

I am looking at the CELA documents. I am struggling at the moment to see how that engages with any of these points. You say CELA, on the one hand, were giving this general advice to the business but you say on the other hand, they were in cahoots with the business people as to how to shut down this market and whether that was legitimate or illegitimate is going to be a matter for argument.

I get that, but why is that document of any -- if they are saying: we are relying on this document to rebut the suggestion that CELA were in cahoots, I would understand it. But they are saying: well, no, we were just trying to provide some comfort. We were advising people on UsedSoft, so there we go.

MR LAWRENCE: What they have done is they have cherry-picked part of a conversation between Microsoft and its legal team on the question of exhaustion and how it can be used to stop secondhand sales. We have seen this one document where they talk about exhaustion principles and they talk about how to deploy that in the template letter with customers. But there is an ongoing dialogue which we, in fairness, should see, and it is the advice that CELA gave in relation to exhaustion principles, in relation to, particularly, in 48 and in 44 to 48 of our

defence.

So in relation to the CAR terms, in relation to the New From SA, and in relation to the strategy of shutting down sales --

THE CHAIR: I am still struggling to understand why --

MR LAWRENCE: Why does it help?

THE CHAIR: There are two possibilities. One is they say: this is legal, go team, let's do this, we can shut down this market.

MR LAWRENCE: Yes.

THE CHAIR: The other possibility is to say, "This is not legitimate", and I am going to assume in their favour at the moment but they say it is not legitimate and, therefore, they are not, at the same time, encouraging people to do it.

MR LAWRENCE: There is a third possibility that they are saying: you can use this as an excuse in the future for shutting off supply. So you can use exhaustion -- they may be right, they may be wrong about that -- but if they have, then where does it leave their objective justification argument? Also it suggests --

THE CHAIR: That's coming back to the copyright case.

MR LAWRENCE: -- you have CELA and you have CELA helping to set the policy.

We will be asking the court to draw an inference

from the few examples -- maybe we will get many examples when we have seen disclosure -- asking the court, the Tribunal, to draw the conclusion that from those examples there was a course of conduct and policy. I think the Tribunal will be informed by seeing what the legal advice, if any, was that was being given.

One possibility, for example on the CAR terms, is that no anti-trust legal advice was taken. That would be informative in my view. That the policy is then being set by the business without reference to CELA. Later on it is set with reference to CELA but somehow the New From SA Condition gets put in the agreement. Was CELA asleep on the job, does CELA --

THE CHAIR: I still don't understand why that matters. We seem to be in a bit of a loop. You then say objective justification. I go: yes I understand your copyright point but then we seem to be back into the loop again. What is it, other than the absence of any concerns about copyright infringement? What else is there --

MR LAWRENCE: That is the primary concern. Then there is the inference that CMS said which Microsoft seek to draw from the involvement of Microsoft which I think you have given a strong indication is an inference that would not prevail.

THE CHAIR: I don't understand it at the moment. I am not

in any way binding this Tribunal to (inaudible) with provisional views.

MR LAWRENCE: To the extent that it is persevered with, though. To the extent that it is continued to be said that this document has proved something or could be relied on, we ought to decide here and now, rather than at some future date, what the consequences of reliance on the document will be.

THE CHAIR: What is it you are asking for? Just remind me, because I have seen various iterations.

MR LAWRENCE: Right, the best way to get on top of this is, I think, to start with Mr Fussell's first witness statement, which is in bundle C --

THE CHAIR: I thought things had moved on since then.

MR LAWRENCE: Yes, that's the starting point.

THE CHAIR: Just start with what you are asking for now?

MR LAWRENCE: So it is our letter of 29 April --

THE CHAIR: Yes.

MR LAWRENCE: -- and that --

THE CHAIR: We can work backwards.

MR LAWRENCE: -- is going to be in bundle F. It is at page 437 of that bundle.

THE CHAIR: I have that.

MR LAWRENCE: It is paragraph 5 and it splits into six parts. So we ask for the documents --

THE CHAIR: Do you have a hard copy of this by the way? Is it possible to hand up a hard copy of this letter? (Handed).

Thank you very much.

MR LAWRENCE: So we are asking for the legal advice relating to the lawfulness or otherwise of the new from SA condition, and essentially the same in relation to the CAR terms. That is A and B. We are asking to know when and who acted on the CELA presentation and the reactive letters. In the correspondence they are called slides 24 and 25, but you have seen the reactive letter at bundle D, page 32.

Then fourth, documents evidencing advice sought by executives seeking to implement the strategy of migration to the cloud to the extent that the advice related to secondhand sales market.

So what we want to know is what advice was being given (inaudible) to the move -- to attempts to prevent the secondhand sales market flourishing and move customers -- accelerate customers -- to the cloud. Because that is what the concern was: it was the emerging secondhand sales market that led to a series of steps being taken -- a suite of measures it has been described as, I think, in the correspondence -- some of which were lawful, some of which were unlawful. The CAR

terms were unlawful; the new from SA condition was unlawful; the conduct identified at paragraph 28 would have been unlawful. So we want to see who was implementing the strategy and the advice to those implementing the strategy.

Then specifically E is: to what extent did they actually implement the CELA presentation? That one really goes to the inference or the reliance question, that it is said that this CELA presentation means that it is highly implausible that there was a course of conduct as alleged in paragraph 48 of the points of claim.

THE CHAIR: Is there anything in the CELA presentation which you object to, which you say is inaccurate?

MR LAWRENCE: Is inaccurate?

THE CHAIR: Yes, is inaccurate.

MR LAWRENCE: I am not sure. Inaccurate in the sense of legally wrong?

THE CHAIR: Yes.

MR LAWRENCE: I am not sure there is.

No, I think there is nothing that has got the law wrong, but it is telling those charged with trying to stop secondhand sales -- which may be unlawful secondhand sales or maybe lawful secondhand sales -- telling them: don't write things down, and beware we

have anti-trust complaints about us. I don't think there is, unless I am instructed from behind --

THE CHAIR: I am not going to hold you to it.

MR LAWRENCE: We accept that it is all good apple pie and motherhood stuff.

THE CHAIR: Yes. Just remind me, I have now mislaid the CELA presentation.

MR LAWRENCE: The CELA presentation is D, tab A.2.

THE CHAIR: I should remember that, apologies.

MR LAWRENCE: A.2. Of course we would adopt, as you pointed out, the comment on splitting of licences.

THE CHAIR: Okay.

MR LAWRENCE: It may be we positively adopt the CELA presentation.

So you can see what we are asking for in the letter. I should have time before lunch to cover it. Some documents have been offered already.

THE CHAIR: I am assuming they will be given.

MR LAWRENCE: And they will be given on the 27th. But we are asking for more than that.

THE CHAIR: If we could take five minutes for the shorthand writer.

(3.14 pm)

(A short break)

(3.27 pm)

THE CHAIR: Mr Lawrence.
MR LAWRENCE: I am going to finish by making a point about prematurity.
THE CHAIR: Before you do that, sorry, this may be a foolish question, but if this document had been presented -- if Microsoft legal department had gone along to a conference on copyright law and been asked to talk about the UsedSoft principles, and had presented, essentially, what was in that, would that amount to a waiver of privilege or --
MR LAWRENCE: So if -- no. No, because they are not advising their client then.
THE CHAIR: Right. But they have advised their clients in the past. They have then gone and said "Look, this is ..." They have presented publicly -- (Overspeaking).
MR LAWRENCE: If they said "The advice we are giving to Microsoft at the moment is that secondhand sales are unlawful", or whatever, then that could be -- (Overspeaking).
THE CHAIR: On one analysis there's nothing --
MR LAWRENCE: Can I ask what the purpose of the question is because I'm not sure I'm taking it head on.
THE CHAIR: You don't get to know the purpose, I am just asking you the question. On one analysis, all this document is, is a vanilla description of what UsedSoft

says.

MR LAWRENCE: It is an internal presentation --

THE CHAIR: Yes.

MR LAWRENCE: -- telling the client, Microsoft, how to deal with secondhand sellers and to come to the legal team if they get any questions. And it is telling them: you must use a standard form letter.

THE CHAIR: I take the point on the letter. Thank you.

MR LAWRENCE: My last point will be on prematurity. It is simply this. We say the reliance or deployment of this document happened as a result of the 12 November letter, 29 November letter, Mr Henderson's 13th statement. We were all here. There was nothing about prematurity in the skeleton for CMC5 in February. We were all here. We were about to start and, of course, CMC5 was truncated.

The first time that Microsoft took the point that it might not rely on the document was in a letter on 2 May. I can show you the letter if you wish. But my short point is that it is a point that wasn't raised, is now raised. It would be, in my view, wasteful of time and costs if we had to come back and argue these points again.

THE CHAIR: Maybe, but if they say they are not relying on that document -- I appreciate they have not gone that

far, but if they gave a firm assurance that they are not relying on that document at trial --

MR LAWRENCE: Yes, that would help me considerably.

THE CHAIR: -- your application largely falls away, as I understand it.

MR LAWRENCE: I think I would be happy with that. But it's not something that's been forthcoming before today.

THE CHAIR: Right.

Submissions re disclosure by MR GRUBECK

MR GRUBECK: Sir, this is an allegation regarding a collateral waiver. Standing back, it is quite an extraordinary submission on the basis of one document sent with a letter. In the context of the disclosure process, years off any trial, VL went on to seek all of Microsoft's legal advice regarding the secondhand software market. Even the supposedly slimmed down version that my learned friend has relied on today in the 29 April letter, is hugely broad.

THE CHAIR: Yes, it is broad.

MR GRUBECK: That drives a coach and horses through the concept of legal professional privilege and that is a principle which the Courts have emphasised time and again is an important public interest.

Unsurprisingly, this approach is not borne out by the authorities and that's an area that my learned

friend's submissions has been notably light on. Looking at the case law, it is striking that there are no cases where a collateral waiver of anything like the scope sought has been granted. I will be taking you through that case law. Moreover, there has been no good explanation as to why the material sought is relevant now and what point in VL's pleaded case it actually goes to. I just take this moment to dispatch the idea of the objective justification defence and the purposes.

Our pleaded position on that is that as a matter of law, we are not required to make that good on the basis of contemporaneous documents. For your reference, that's in our RFI response at bundle B, tab D.1, page 431. No need to turn it up now. I just wanted to knock that point on the head.

Now my learned friend's submissions just now reinforce why all this is premature. He has floated various arguments about inferences he says might be made at trial, what CELA supposedly was or was not involved in. But as you saw, most of that is not reflected in VL's pleadings. It is pure conjecture as to what may or may not be argued at trial in due course.

That's just underlined by the piecemeal excerpts you have been shown from various disclosure. Completely out of context and without evidence setting it in the right

persuasion.

Now, as we canvassed earlier, the CELA preparation was provided for a very limited purpose. We have no current intention to rely on it further. Now that will remain under review as we approach trial, but we will certainly not rely on it further without giving adequate advance notice. They are not going to be ambushed with this.

Even if it were further relied upon, as you said, sir, that then doesn't automatically mean there is some collateral waiver, let alone a collateral waiver of all legal advice VL "would like to see." As you said, sir, VL may well argue that this document does not prove anything. It simply shows a snapshot in time of what legal advice was given on a certain day by a certain team. That's, of course, open to them in due course. If we were to rely on this. But we are nowhere near there yet and it certainly doesn't justify a hugely expansive interpretation of an alleged collateral waiver.

Now there are three parts to my submission. The first two are primarily points of law. Depending where you stand on those, you may not need to hear the third.

The first is this entire application is premature. There is no basis for a collateral waiver disclosure

order at this stage, and there is no relevant material that fairness might plausibly require needs to be disclosed now. There is no cross-examination coming up. There is nothing they need to see at this point for fairness. Even leaving aside the legal argument that I will go on to address you about, you have now ordered a preliminary issues trial, sir. On no account is the material my learned friend seeks relevant to this.

Indeed, my learned friend was very clear earlier today that "If Microsoft were to win, we accept we go no further." In that context, what plausible reason is there for embarking on a major contentious and costly disclosure exercise of the privileged material now, when the relevance of that material is entirely unclear at this stage and it may all fall away in any event?

The second point is even if you are not with me on prematurity, there is a fundamental lack of merit in this application. That is because VL has failed to apply the correct legal test, and has therefore misunderstood the scope of what could plausibly be caught by a collateral waiver. That is a concept that the authorities show has to be interpreted narrowly. It is not a wish list for every kind of material, privileged or otherwise, one might like to see.

Finally, if you are not with me on both of those

limbs, then I will proceed to address you on the individual categories that have been requested.

The final introductory point. As I have emphasised, this is not disclosure requests 2.0. You have heard plenty of argument about disclosure. You have now heard a long wish list of further documents. But that's not the test. So, for example, my learned friend has argued that VL would like to receive reactive letters. Such letters have actually already been disclosed as part of CMC3 disclosure, but more pertinently for present purposes, it is entirely unclear why they could plausibly be covered by any collateral waiver engendered by the CELA presentation.

THE CHAIR: So sorry, in the 29 April letter? At the end of 5C there is a request for any reactive letters of the nature referred to at slide 25 of the CELA preparation.

MR GRUBECK: Yes.

THE CHAIR: You said those have been disclosed or will be disclosed?

MR GRUBECK: Yes, so far as we are aware, at least 16 examples of such letters are already in the CMC3 disclosure.

THE CHAIR: Right.

MR GRUBECK: But that really just reiterates the point. This is a very specific application for disclosure on

the basis of an alleged collateral waiver. It needs to be considered on those legal principles, not in some abstract disclosure universe. With that, I was going to start looking at the legal test and at the case law.

So the starting point, the applicable legal principles, is the case of General Accident Fire and Life Assurance Corporation Ltd v Tanter, the Zephyr. That is in your bundle at tab 3. Joint authorities bundle-tab 3, page 51. As I will go on to show you, the principles articulated in this case by Mr Justice Hobhouse, as he then was, were subsequently adopted by the Court of Appeal. They constitute binding authority on you, so they are worth looking at in some detail. The case concerned an alleged breach of a reinsurance contract. We don't need to worry about the facts too much for present purposes. the issue of the collateral waiver and how it arose is recorded at page 54H. Perhaps, sir, if you just have a quick skim of that, just so you have the background.

In essence, use was made of a privileged document in cross-examination at trial. The judge found that although extensive use had been made of this document in cross-examination, it was not part of the evidence properly so-called. That's at 56C.

He says:

"It has so far merely been used as a vehicle for cross-examination, not part of the evidence in the case properly so-called."

Nonetheless, there was an application for extensive collateral disclosure. You see that summarised. 56H says:

"Our client requires specific disclosure of all other documents previously privileged."

Then the summary of those documents is at the bottom of page 58:

"Proof of evidence, instruction to counsel, memoranda prepared by the solicitors for the purposes of trial or indeed, any other purpose."

So quite similar to what we see sought here.

Across the page, top of page 59, Mr Justice Hobhouse says that is a submission of astonishing breadth:

"If it is to be acceded to, it has very serious implications not only for the disclosure of confidential documents that are created or obtained for the purposes of a trial and its preparation, but also for a whole number of situations that arise almost every day in litigation."

So he's concerned about the wider integrity of legal professional privilege.

He then reviews the authorities. I pick it up again

at page 65B:

"Applying those decisions ..."

That's his review of the authorities:

"... I have come to the conclusion that the application is misconceived and premature and that the submissions were incorrect."

He finds that:

"Privileged documents had not yet been adduced in evidence, so the principle of waiver had not yet come into play. Only once that has happened would the principle of waiver arise. In any case, when and if such a waiver arose, it would be limited to the specific question of what was or was not said to be in the specific exchange recorded in the relevant document."

He expressly says it does not extend to subsequent privileged communications or to the subject matter of those communications.

He then goes on to say:

"The principles upon which I am relying will be set out."

And emphasises:

"A party can choose what evidence he does or does not adduce at trial."

Is the first. The second is:

"Legal professional privilege protects certain

categories of communication from disclosure."

Third:

"A party is at liberty to decide whether or not to waive privilege, and if so, the extent to which he does so.

"A waiver of part of a document is a waiver over the whole of that document but these principles apply equally to a waiver before trial. A waiver in relation to a document does not in itself waive privilege in anything else."

Principle 6:

"The issue of further waiver arises if and when that document is then adduced at trial and the extent of that waiver is still limited. It is limited to the specific transaction in question."

And he emphasises:

"It is not the subject matter of those conversations. It does not extend to all matters relating to the subject matter of those conversations."

Contrast that with my learned friend's wish list, I interpose.

Justifying the limited scope of any collateral waiver, the judge says at 66B:

"If the broad collateral waiver argued for in that case were permitted, that would be tantamount to

a disruption of legal professional privilege."

Then that:

"Any waiver of privilege at all would be liable to have the most wide ranging consequences and indeed, give rise to a reductio absurdum. If one follows the approach of looking at the transaction concerned, rather than at the subject matter of the communications, that problem does not arise."

Finally 7 and 8, briefly:

"7. The evidence must have been formally adduced by the party waiving privilege."

And I highlight the point at 66D that:

"The mere production of the document on discovery or in some pre-trial procedure cannot, in ordinary course, be treated as a waiver of anything beyond the document itself."

66D.

THE CHAIR: Give me that reference again? Sorry, apologies.

MR GRUBECK: Page 66 of our joint authorities bundle at letter D. The sentence starts "Likewise ..."

THE CHAIR: I have it here, thank you.

MR GRUBECK: You have that, sir?

THE CHAIR: Yes, thank you.

MR GRUBECK: Finally, the 8th principle:

"Once evidence is adduced, fairness requires that

the other side be allowed properly to cross-examine on it."

So once it has been adduced -- that means seeing other documents relevant to the transaction but only those, not matters which are merely referred to in the relevant communication.

Then you go on to see the judge's conclusion at 67H, bottom of page 67:

"My decision is, as I have previously indicated, that the application for discovery is premature and that when and if Mr Baxter is called and gives evidence, then he will be able to be cross-examined with regard to the totality of the transaction. I hold that the waiver of privilege does not go further than that."

So far, so good. This is a High Court decision.

However, if you turn to the next authority in the bundle, tab 4 of the authorities bundle, that is the case of Tanap Investments v Tozer in the Court of Appeal.

You will see at page 70, internal page 3 --

THE CHAIR: Sorry, I'm catching up with you. Just give me a second.

MR GRUBECK: Page 70 of the joint authorities bundle, tab 4, the decision of the Court of Appeal in Tanap v Tozer."

You have Lord Justice Balcombe saying, just above the page:

"The applicable principles are not substantially in dispute. I propose to refer firstly to Tanter's case ..."

That's the Hobhouse judgment we have just seen at page 114, starting at D:

"... at which Mr Justice Hobhouse, having set out at considerable length the previous authorities on the issue here, namely how far, when privilege has been waived, should that waiver extend and what documents should then be disclosed [so it is squarely on point], says this."

And he then repeats the principles we have just gone through.

Turning over the page, he says:

"I would like to express my complete agreement with the principles there enunciated with Mr Justice Hobhouse."

So these principles have been adopted wholesale by the Court of Appeal. Also worth noting in passing the decision of Mustill J in Nea Karteria is qualified as articulated by Mr Justice Hobhouse in his sixth principle and I will come back to that.

Turning on in the Court of Appeal judgment, bottom of page 5, you see that Lord Justice Balcombe goes on to decide the case by express reference to Mr Justice

Hobhouse's principles. And specifically, to the sixth principle. So his adoption of these principles is clearly part of the ratio of that case.

Just to put the matter beyond any doubt, he returns to that judgment over the page, page 73 of the joint authorities bundle, penultimate paragraph, before Lord Justice Taylor's judgment and he says this:

"I go back for the last time to the judgment of Mr Justice Hobhouse in Tanter. As he puts it, and I agree: 'The underlying principal {here} is fairness ... in the conduct of the trial. Then I also take up his point that 'any waiver of privilege ... would be liable to have the most wide ranging consequences and {would} give rise to a reductio ad absurdam' if one follows it to the length to which the defendants seek to follow it in the present case."

Mr Hobbs KC also points to the first sentence in that paragraph:

"I put to Mr Reid, in the course of argument this morning, the same sentence as I had put to Mr Leonard: to what issue in the action did this particular piece of evidence relate?"

Of course, that's the question, sir, you put earlier to my learned friend.

The final point on this judgment, if you turn on to

Lord Justice Taylor's judgment:

"For the reasons given by my Lord, I agree ..."

So in short, these principles are binding Court of Appeal authority and they must be treated as such.

VL has ignored this and instead, started with Nea Karteria, paragraph 36 in the skeleton argument, seeking to give it the much broader interpretation that was expressly rejected by the Court of Appeal. In support of this, it goes on to cite two other cases --

THE CHAIR: Which is the bit in paragraph 36? From the citation in Hollander which is the bit you just gave --

MR GRUBECK: No, sorry, it is the first bit in VL's skeleton argument. So that is paragraph 36.

THE CHAIR: Yes.

MR GRUBECK: You will see they quote from Nea Karteria.

THE CHAIR: They say it is cited in Hollander. Yes, I see.

MR GRUBECK: Yes, exactly.

THE CHAIR: That's actually a quote from -- sorry, I misread it. But there is nothing wrong with that statement, is it? It just needs to be seen in the context of other authority on that point.

MR GRUBECK: It needs to be seen in the context of first of all the deploying in court is specifically explained in these principles; and secondly, the whole of the material relevant to the issue in question has been

qualified very narrowly.

THE CHAIR: Yes, I understand.

MR GRUBECK: That's the way it needs to be construed. There is nothing wrong with it as such.

THE CHAIR: As such, I understand.

MR GRUBECK: VL goes on to cite two other cases in support of its argument in favour of a broader construction, but those are Factortame, which is a Divisional Court authority, and Fulham Leisure Centre, which is the High Court, so they can't alter the binding ratio of the Court of Appeal. In any case, they are not materially consistent with it.

If you briefly want to look at Factortame, that's tab 5 of the joint authorities bundle, page 81. Page 81 is the relevant bit I wanted to take you to. You see right at the top of the page that the Divisional Court talks about reliance on a proposition of Mr Justice Hobhouse to the effect in Tanter. He cites the High Court decision but not the Court of Appeal decision. He says at the bottom of the paragraph:

"I respectfully join in that disagreement of Hobhouse J's proposition" having given various commentary and one first instance decision.

But of course --

THE CHAIR: So, sorry, they didn't cite the Court of

Appeal?

MR GRUBECK: Precisely. They have not cited the Court of Appeal decision approving these principles, so it takes one nowhere.

THE CHAIR: Right. Let me just read this a minute.

So he's agreeing with Mr Justice Peter Gibson?

MR GRUBECK: Yes. It is basically there is a proposition put by --

THE CHAIR: (inaudible) yes.

MR GRUBECK: Exactly. He relied upon a proposition posited by Mr Justice Hobhouse at 114H to 115A. The Divisional Court there disagrees with that, but they had simply not been sighted, it appears, of the Court of Appeal confirming and adopting that, otherwise it would have been binding on them.

THE CHAIR: Nothing more recent?

MR GRUBECK: We are coming to it, sir. I am simply saying that Factortame doesn't take you any further. In any event, it's not materially inconsistent because the Divisional Court in Factortame agrees that much will depend on, of course, the indication given by the party waiving privilege before trial and whether he intends to rely upon the privileged material at trial, and if so for what purpose. We have had that exchange earlier. We are not there yet. There is no indication that we

will rely on it at trial. If we were to rely on it, they would have ample advance notice.

Page 81 of Factortame. At the bottom of that second paragraph:

"Where, however, there is uncertainty as to the use, if any, a party intends to make at trial of disclosed privileged material the resolution of the opposing party's claim to further and associated discovery may have to await the trial, with all the tactical and costly disadvantage that that may be to the party concealing his hand."

So the point is if it is not clear, it has to wait even if it is inconvenient. And ultimately that is the problem of the party trying to conceal its hand.

THE CHAIR: Okay.

MR GRUBECK: Then the final point on Factortame. It is worth pointing out towards the end, page 84, bottom of the last full paragraph on that page, they take a narrow interpretation of collateral waiver in that case. They say very limited scope and say:

"If the Secretary of State does [not] seek to take an unfair advantage of his partial discovery at the trial, whether as a matter of evidence or argument, the applicants would be entitled to invite the trial judge to re-open the matter and determine whether there should

be further disclosure."

So it is fairly on all fours with what we say about prematurity.

Now, sir, the second case that VL relies on is Fulham Leisure Centre, at tab 6, page 87, the decision of Mr Justice Mann in the High Court. So again, insofar as there is any inconsistency with Tozer and the Court of Appeal, Tozer is binding authority on you.

In the interests of time, I am not going to go through it in detail, but I do note VL relies on paragraph 18. Perhaps you could quickly have a look at that, sir.

THE CHAIR: Mr Justice Hobhouse is cited again, yes.

MR GRUBECK: Yes, Hobhouse is being cited crucially as the starting point, paragraph 12, and the judge says at 18: once the transaction has been identified, then the whole of the material relevant to that transaction must be disclosed.

THE CHAIR: Sorry, I just lost you there. You were in the citation?

MR GRUBECK: No, it is paragraph 12 where he says Hobhouse is the starting point. Then we jumped to paragraph 18.

THE CHAIR: 18. I am sorry.

MR GRUBECK: No, it is my fault, we are cantering through these.

THE CHAIR: Yes, okay.

MR GRUBECK: That's the bit that VL relies on. They say surely that gives us a much broader scope here.

However, three points on that. I have already made the first point, which is insofar as this were inconsistent with Tozer, it doesn't take you anywhere because Tozer is binding.

The second point is it is not actually inconsistent. There is no suggestion that he materially seeks to expand the principles because he, too, was bound and he was aware of the Court of Appeal decision. So there is no suggestion he's trying to depart from that or broaden it.

Second, the judge ultimately finds that there is no ground for supposing that there has been some form of illegitimate partial disclosure and no basis for saying the material is being deployed unfairly. So again he takes a narrow view, paragraph 21.

THE CHAIR: Okay.

MR GRUBECK: Third, finally, if further support is needed that can be found in one final authority which is Jet2.com. It is another Court of Appeal case. That's in the joint authorities bundle, tab 16 page 345.

THE CHAIR: Sorry, I have not looked at this section.

MR GRUBECK: The discussion of waiver starts at page 382 of

the joint authorities bundle.

THE CHAIR: 382?

MR GRUBECK: 382, the very bottom, you see the heading "Ground 4: Waiver."

THE CHAIR: Just give me a second.

MR GRUBECK: Do you have that now, sir?

THE CHAIR: I have it now, I think.

MR GRUBECK: So the first thing you see is paragraph 110 over the page. He says: "... this ground has become academic. I will deal with it shortly".

So this is obiter, but nonetheless it is helpful to consider what Lord Justice Hickinbottom says about the principles because it draws together some of the strands. Paragraph 111:

"Although the voluntary disclosure of a privileged document may result in the waive of privilege in other material, it does not necessarily have the result that privilege is waived in all documents of the same category or all documents relating to all issues which the disclosed document touches. However, voluntary disclosure cannot be made in such a partial or selective manner that unfairness or misunderstanding may result."

Paragraph 112 then specifically reiterates the public interest in the non-disclosure of privileged material, and the fact that the Court therefore imposes

constraints.

Paragraph 113, again, identifies Tanter, the Zephyr, Mr Justice Hobhouse's judgment, as the starting point, and specifically the transaction test referred to in that. I interpose here that in this case, too, the Court was aware of the earlier Court of Appeal decision in Tanap approving that, and in no way suggests that it was wrongly decided --

THE CHAIR: Does it make reference to the Court of Appeal in Tanap?

MR GRUBECK: It does at 117. So not specifically on this point but it is clear they have had it cited to them and they were aware of it. That, in turn, it makes it clear that if they were departing from it, they would have said so. Because of course, you are aware, sir, of the test of the Court of Appeal departing from its own authorities.

Going back to paragraph 113, Zephyr is identified as the starting point. The Court of Appeal then makes clear the transaction is not the same as the subject matter of the disclosed document or communication. The waiver does not apply to all documents which could be described as relevant to the issue.

It then refers to Fulham Leisure Holdings which it interprets as consistent with these principles, and

notes the need to identify a transaction is, for example, the advice given by a lawyer on a given occasion. Precisely what we have here. So not all advice a legal team may have given in relation to an issue: the advice given by a lawyer on a given occasion.

Finally --

THE CHAIR: Where is that you are reading?

MR GRUBECK: 114.

THE CHAIR: After the citation?

MR GRUBECK: Yes. 114, after the citation is the purpose of voluntary disclosure is an important consideration in the assessment of what constitutes the transaction --

THE CHAIR: You said it then interprets it as consistent with these principles and notes --

MR GRUBECK: Precisely, sir.

THE CHAIR: Yes.

MR GRUBECK: So narrowly construed but, yes, one takes the purpose into account.

That is confirmed by paragraphs 117 to 119, where you see the Court takes a narrow view on the facts applying this, and says it would, despite the discretion afforded to the first instance judge, have overturned his finding if the ground were not academic, taking a much narrower view on what was actually disclosed as part of the waiver.

Sorry, my learned friend points me to one further point I should highlight. The last sentence of paragraph 119, in this judgment:

"It cannot be right that such a modest voluntary disclosure could result in the collateral waiver (and thus the forced disclosure by the [defendant in that case]) in respect of all the internal communications relating to the drafting of the ... letter, including those that expressly reveal legal advice from CAA's lawyers; nor is it what the law (or fairness) requires."

Now that is already much narrower than what is sought in the present case, because this is the advice relating to the drafting of that particular letter. Here all advice is sought.

So, sir, standing back from this, where does that take us? You have binding Court of Appeal authority that covers both prematurity and scope, let's apply that to the facts of this case.

My learned friend has covered the background, so I don't need to take you back to this. There are two points I want to emphasise. The first is it is perfectly clear from the correspondence that this presentation was provided in the context of the disclosure process.

Sir, you have suffered through, you remember the arguments about trying to prove a negative and endless searches. That was the context. It was trying to give comfort that no, there really is no needle in this haystack, we can stop searching. It doesn't go beyond that.

Second, the presentation concerned guidance provided to Microsoft's business units. It contained guidance on how those units should conduct themselves. So to an extent this is at all relevant to anything in this case, it would be in relation to the conduct allegation, certainly not advice going to introduction of contractual terms. But as you have seen, that is not the way VL approached this. Instead we have a catch-all application for legal advice on everything to do with this case.

Now the final point on the facts that I wish to highlight is we have in fact made a very generous and far-reaching proposal about further information to provide in relation to this. You can find that at bundle F, tab A.57, page 177.

THE CHAIR: Yes.

MR GRUBECK: As simply you see at paragraph 2, it sets out all the additional material we say we will provide with disclosure in order to put the CELA presentation in its

proper context. That is already more than could reasonably be construed as forming part of the relevant transaction. There is nothing more, and certainly what we would not want to countenance is then an unravelling saying but this refers to something else. Ultimately this has to be capped in line with the authorities.

Now very quickly, prematurity, scope. On prematurity, in light of the authorities I have taken you through, we say this is the conclusion you are required to reach. The material has not been adduced in evidence. It has not -- sorry, the point in evidence, I do quickly need to note --

THE CHAIR: Sorry, you have said with slight menacing tones on a number of occasions what I am bound by. On the prematurity, what is the -- sorry, on prematurity, do you have a precise submission as to when something is premature and when it is not? Are you saying it is premature until it is deployed in evidence, is that your case?

MR GRUBECK: Sir, I clearly need to work on my bedside manner, so apologies for that.

My case is that a situation where a document is deployed in a mere letter in the context of the disclosure process years off trial, it's not been put into evidence for any particular purpose, it's not been

deployed at trial, it's not been deployed in court in any other way, it remains unclear whether and if so to what extent it will ever be used in the case going forward --

THE CHAIR: Right. But having further rounds of disclosure after evidence has been exchanged leads to complications. The world has moved on a little bit. Mr Justice Hobhouse's principles are undoubtedly right, as you made clear, still the way we prepare evidence for trials and the advance notice we give of things and so forth has moved on considerably. I mean, that might even be pre witness statements and things back in 1984, I don't know.

But at what point is something premature? At what point do you have to nail your colours to the mast and say whether or not you are going to rely on this? Possibly exchange of evidence is too late, I think.

MR GRUBECK: Well, sir, it is in the context of evidence that, if at all, this would become relevant.

THE CHAIR: Right.

MR GRUBECK: So I say we don't need to nail our colours to the mast now, because the whole point --

THE CHAIR: I understand that submission. But there is a gap between now and when it ceases to be premature. I am just trying to pin you down a little bit more.

MR GRUBECK: Mr O'Donoghue KC notes that there is provision for reply evidence, which is agreed, so that would not be a point at which there would be any unfair prejudice, pinning one's colours to the mast. So if one says in evidence that is not too late --

THE CHAIR: For practical purposes, your position is you will make it clear at the very least by the time evidence is in-chief whether or not you are relying on this document?

MR GRUBECK: May I take instructions?

THE CHAIR: Of course.

MR GRUBECK: Sir, we are happy to say that for practical purposes, we would pin our colours to the mast with evidence, and there is then two months for reply evidence.

THE CHAIR: Right.

MR GRUBECK: So if it is necessary, then --

THE CHAIR: We would need to know what purpose you are relying on the document for. Then once we understand that, we can then address how broad any further disclosure should be.

MR GRUBECK: Exactly, sir. We are saying whatever it is now is premature, but at that point, if we have pinned ourselves down with a clear purpose and a clean explanation "we are relying on it ..." -- which I have

just told you, sir, we are prepared to commit to -- then that would be the moment to hear it.

But short of that, and moving away from the menacing side --

THE CHAIR: I was only teasing.

MR GRUBECK: -- even if you are not with me on the law and you say these conclusions are not binding on you, there is no dispute that it is at the very least open to you to decide this is premature. That is within your case management powers. Certainly, neither case law nor VL suggests otherwise.

VL encourages you to deal with this in the spirit of the CPR. They say at paragraph 42 of their skeleton argument that waiting until trial to determine the effects of any further reliance makes no sense and could lead to waste of time, delay and unnecessary costs. But, sir, you have now directed that we are about to embark on a PI trial which may well be dispositive -- VL accepts it will be dispositive potentially -- and this privileged material is simply not relevant to that.

So what plausible reason is there for doing this heavily contested and costly disclosure exercise now? If anything, that's what would cause waste of time and unnecessary costs.

At the very least, it would be appropriate to await

the conclusion of that preliminary issues trial, which conveniently sits very well with our submissions on making this clear in evidence. If the case continues, the Tribunal will then be able to consider how, if at all, the CELA presentation is deployed in the factual evidence. So we say there is no need, and no valid basis, to make this decision now.

Now there is one second point of principle I would like to address you on briefly, which is the scope. As the authorities show, the scope of the waiver depends on the transaction in question. I have shown you the bit in the Nea Karteria where VL takes a very broad interpretation, but we say that is just not consistent with the Hobhouse judgment in Zephyr, with the Court of Appeal in Tozer and with Jet2.com.

As Jet2.com paragraph 133 makes clear, the transaction is not the same as the subject matter and the waiver does not apply to all documents which could be described as relevant to the issue.

Just emphasising from those authorities, there is this idea of the reductio ad absurdum which has reappeared in a number of the authorities. This idea there is one short voluntary disclosure --

THE CHAIR: I think I have that point.

MR GRUBECK: You have that point.

In which case, sir, that shows they have just completely misunderstood what the transaction relates to, and that alone is a reason to refuse this application.

What it also does is it favours deferring consideration of the matters. So the two points are interrelated because of course only once reliance is defined is it clear what may conceivably be within the scope of the transaction.

Sir, that concludes my points of principle. Do you want me to take you at this stage through the specific request or do you want to make a decision?

THE CHAIR: If you have any submissions on it. I have your point on this is the classes documents, you say they are very broad and they are not tied to the transaction. As I understand your submission, it's not clear that there is a transaction in the first place, because you don't know if you are going to rely on this document yet and you have no positive intention to as of today, you are not binding yourself as to it going forward, and you have heard the questions I put to your opponent on what the relevance of this document is. We have touched on that a number of times.

You say that these classes are clearly -- (a) it is not clear what the transaction is; but whatever it is,

it's nowhere near this broad.

Was there anything else you wanted to add on these classes?

MR GRUBECK: Sir, I should be able to do that in five minutes. Just go through the classes of documents and that will then give Mr Lawrence opportunity to reply before we wrap up.

This is the letter from VL at F, tab 100, page 437.

THE CHAIR: I have it, yes. I have it in front of me, yes.

MR GRUBECK: I am looking at the categories. So the first and second category: legal advice concerning the contractual conditions. We say, first of all, not mentioned in Fussell 1; but secondly, nothing to do with the guidance to the business units on how to conduct themselves.

THE CHAIR: I have that point, yes.

MR GRUBECK: Yes. Completely unrelated.

So (c), it seems to refer to slides 24 and 25 where they say "if necessary check with legal." Sir, as I say, the reactive letters have already been provided --

THE CHAIR: Yes.

MR GRUBECK: -- and already addressed. Secondly, the transaction of what Microsoft executives were told to do or not to do as a matter of policy doesn't include any

follow-ups or unrelated strands of legal inquiry.

THE CHAIR: It is broader than that, isn't it? It is documents evidencing when and who acted on the CELA presentation and how.

MR GRUBECK: Yes, it could be anything. It is miles off what you have seen countenanced in the authorities. Indeed, it goes so far as to ask for non-privileged documents and it is very hard to understand how non-privileged documents could conceivably be caught by collateral waiver.

So it is simply an attempt to seek additional disclosure through the back door under the guise of a collateral waiver application. That's, sir, something you should not countenance at this stage of proceedings given all the effort we have put into disclosure.

D again only partly targets privileged documents. Not the same as a transaction, and to the extent it targets non-privileged documents, you have my submission. More importantly, D goes beyond even the pleaded issues. It is not delineated by any reference to the alleged campaign or any other pleaded issue; it is simply a "Tell us every bit of advice you had in relation to the strategy of migration to the cloud." It is very interesting, how does this relate to the claim?

Then finally, the last two. You already have my

submission on those, so I don't need to detain you on those, but we say none of that is appropriate.

THE CHAIR: Okay.

Submissions in reply by MR LAWRENCE

MR LAWRENCE: Sir, I am going to be very brief. I can see which way the wind is blowing, but I would say this: in terms of nailing colours to masts and reliance, we do say it is really important to know well in advance of trial what use is going to be made of the CELA document, if any. So I think we would adopt, actually, the suggestion of it being indicated in evidence-in-chief, if you are against me on prematurity.

I want to dispel -- I think this is probably the final point -- the idea that actually we are asking for a huge amount of documentation or asking for engagement with an expensive and costly exercise. These are documents that would be held by CELA, readily identified: they relate to the relevant territories in the relevant period in relation to impact on secondhand sales or controlling secondhand sales. That's a narrow category of documents. We can see that CELA's involvement in the campaign, as we allege it, was really intense. There are screenings for privilege on many of the documents we have looked at today, and CELA did play an integral role, it appears.

Certainly in the adoption of the new from SA condition and also in advising in relation to the general strategy in relation to secondhand sales in the prior period. So if and to the extent any reliance is going to be made in the future, we would be seeking those categories of documents, which we don't think would be disproportionate or onerous.

THE CHAIR: Okay. What else do we have to do, and how long will we need tomorrow?

MR O'DONOGHUE: I am optimistic we will be done in an hour. It is essentially three points. One is we seek an interim costs payment --

THE CHAIR: Yes.

MR O'DONOGHUE: There is an issue on our database disclosure which is (inaudible), and there is an issue on VL's disclosure which is probably more --

THE CHAIR: What about the RFI that you have not responded to: has that been agreed?

MR O'DONOGHUE: We have no application on that.

MR LAWRENCE: Sir, there may be an application, but we don't have one yet. So we are reserving our position as to adequacy.

MR O'DONOGHUE: It is not for tomorrow.

THE CHAIR: Sorry, we are at cross-purposes. There was an order that an RFI --

MR O'DONOGHUE: We have responded.
THE CHAIR: You have responded?
MR O'DONOGHUE: Yes.
MR LAWRENCE: And we will be saying, I think, inadequately, but that's not for tomorrow.
MR O'DONOGHUE: That's for another day.
THE CHAIR: That's not for tomorrow.
MR O'DONOGHUE: Sir, the other reason to draw stumps today is there has been some correspondence today on some of these points. It may be that things narrow overnight.
THE CHAIR: Fine, but we will not go beyond lunch. That's all I just needed to make sure.
MR O'DONOGHUE: Certainly not.
MR HOBBS: May I, with no discourtesy, absent myself?
THE CHAIR: Yes, of course, Mr Hobbs, yes.
(4.22 pm)
(The court adjourned until 10.30 am,
Wednesday, 14 May 2025)