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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1640/7/7/24

Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday 13th May 2025

Before:

The Honourable Mr Justice Hildyard
Professor Pınar Akman
John Davies

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Vicki Shotbolt Class Representative Limited

Proposed Class Representative

And

Valve Corporation

Proposed Defendant

A P P E A R AN C E S

Julian Gregory on behalf of Vicki Shotbolt Class Representative Limited (Instructed by Milberg London LLP)

Brian Kennelly KC and Tom Coates on behalf of Valve Corporation (Instructed by RPC)

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Tuesday, 13 May 2025

(10.30 am)

Housekeeping

THE CHAIR: Yes, good morning.

MR GREGORY: Good morning. Sir, members of the Tribunal, I appear for the proposed class representative, Ms Shotbolt. Mr Kennelly and Mr Coates are here representing the Proposed Defendant.

In terms of bundles, you will hopefully have received one hearing bundle and one pleasingly slim authorities bundle.

THE CHAIR: Yes.

MR GREGORY: The agenda is at tab 1 of the hearing bundle. There are only two issues today, timetable and confidentiality.

THE CHAIR: Yes.

Timetable

MR GREGORY: Perhaps we should start with the good news, which is that, subject to your approval, the issues of timetabling are agreed as between the parties.

THE CHAIR: Yes.

MR GREGORY: If you have a look at tab 4, the Tribunal identified a few days when you could hear a one day certification hearing. Those dates included 14 and 15 October. We are hopeful that a one day hearing should be sufficient, but thought it would be sensible to plan to hold a hearing on the 14th, with the 15th held in reserve. You will be aware that certification does not involve a merits assessment, and that the courts have repeatedly warned against certification hearings being turned into mini trials. Nonetheless, as Valve has not yet served its response to the application, we do not know the number of points that it will take on certification. Therefore, we just need

to be wise to hold the second day in reserve, just in case it spills over.

If you look a bit further back in the timetable, you can see the dates of Valve's response and the PCR's reply. For the skeletons, the 8th or 9th of October are suggested. The standard week before the hearing would be Tuesday, 7 October. The PCR has no preference as between the 7th, 8th or 9th in terms of skeletons. The reason for proposing the 8th or 9th was to give Valve another day or two, given that it will have had to digest the PCR's reply. But we obviously do not want to unduly delay or cut into the Tribunal's reading time.

So, subject to anything that Mr Kennelly may want to say, I think we are in the Tribunal's hands in terms of the deadlines for the skeletons.

THE CHAIR: Because the mark is Tuesday 7th, so it's either the Wednesday or the Thursday.

MR GREGORY: Yes. I think that's the only small point of detail remaining in relation to the timetable, assuming the Tribunal is happy with the rest of the arrangements.

THE CHAIR: Yes. Well, we've had a look at the timetable and subject to clarification of the one day difference, I think I'm right in saying that we are grateful to you for being able to agree this and it seems satisfactory. I will give directions myself for one or two reading days, which is internal to me because otherwise I'm hauled off to do some other case. But maybe I should hear from Mr Kennelly as to what he proposes with respect to the two days.

MR KENNELLY: Sir, we ask for the Thursday, the later of the two days, the 9th and the 10th, for the reason given by my learned friend.

THE CHAIR: So, the 10th is the Friday, is it?

MR KENNELLY: Yes, sorry. The 9th is Thursday and the 10th is the Friday.

THE CHAIR: Which squeezes us a bit, doesn't it?

MR KENNELLY: It does, which is why, sir, if you have a concern about that, I'm not

going to press the point. But for our purposes, it would be better to have that extra day.

THE CHAIR: I think I would prefer the earlier day, because otherwise the weekend is a write-off and I very often have other reading to do on the Friday.

MR KENNELLY: I'm content.

THE CHAIR: So, I think we will press you for the earlier days.

MR GREGORY: Just to clarify, is it the 7th or the 8th for the earlier deadline?

THE CHAIR: Eighth.

MR GREGORY: Eighth?

THE CHAIR: That's what I'm offered, isn't it? Wednesday 8th for filing and serving skeleton arguments and the agreed electronic authorities bundle will come in on the 9th. Those are the two days you've --

MR GREGORY: Yes.

THE CHAIR: -- the earliest of the two days that you've put forward.

MR KENNELLY: We are content. Thank you, sir.

THE CHAIR: Thank you.

Confidentiality

THE CHAIR: So, that leaves the only matter presently on the menu for today as the issue of confidentiality; is that right?

MR GREGORY: Yes.

THE CHAIR: I think I speak for us all in saying that we have read your skeleton arguments, for which many thanks, and we've read the practice direction which may lie at the front of the issue, insofar as there is one which has arisen.

I think I also speak for all of us in saying that we're a little bit baffled as to what truly the issue really is at this stage in the proceedings and we'll need your assistance in

that regard. I mean, it's early days; we do not know quite what is envisaged with respect to the sequencing of events. We are wondering what your true point is. Perhaps you could start on that. What are you really bothered about?

MR GREGORY: Well, so there are two issues here. One is the arrangements that are put in place up to the CPO hearing --

THE CHAIR: Yes.

MR GREGORY: -- and the other is the arrangements which will exist throughout the proceedings.

THE CHAIR: Yes.

MR GREGORY: The arguments that Valve put forward aren't specific to the current stage. They're basically objections to carrying out a detailed confidentiality review of documents that have been disclosed already in the US, at any stage of the proceedings.

THE CHAIR: Yes.

MR GREGORY: The real objection is that on Valve's approach, a very large quantity of documents in the region of 350,000 could be disclosed into the confidentiality ring without, at the point of disclosure, there being any identification of the specific information in the documents which was in fact confidential or any attempt to justify why enhanced protection for that confidentiality is required, going beyond the requirements of rule 102, which is that the party should only use the material for the purpose of the proceedings.

What that effectively does is it shifts -- it's very easy for the defendant to disclose information in that way -- the burden of trying to pare back the category of designated confidential material onto, in the first instance, the PCR, and then, because of the 350,000 documents disclosed in a very sort of generic fashion into the ring, quite possibly the Tribunal as well, because queries will inevitably be raised about whether

some of this material is actually confidential and, as I will hopefully show you, some of it very clearly isn't.

So, that in a nutshell is the issue here. The disclosure of an excessive amount of material into the confidentiality ring obviously can create practical problems for the claimant in terms of how they manage the litigation and showing relevant personnel such as the funder or members of the advisory panel relevant material.

It could also create practical problems for the parties and the Tribunal down the line, because if you start off with a vast tranche of designated confidentiality material, at some stage, you are going to have to carry out a proper confidentiality review, in particular for the purpose of the hearing, because you want the hearings to be as open as possible and you run into practical problems in terms of cross-examining witnesses and so on if a lot of the relevant information has been designated as confidential.

It also undermines the principle of open justice because, if large amounts of material are being designated as confidential, it limits the ability of interested parties, including members of the press, to get access to court documentation throughout these proceedings, which then, as you'll be aware, collective proceedings can often take two or three years to come to a trial, and there is potentially ongoing interest throughout.

You will have seen, both in the practice direction and in the High Court judgment which is in the authorities bundle for the Dieselgate litigation, that there does seem to be a turning of the tide in relation to how confidentiality rings are being dealt with. They were quite rare 10 to 15 years ago, and increasingly they've been relied on, including in competition cases. You can understand in a competition case why acute confidentiality issues could arise in some cases, because potentially the parties are competitors in the market and what is being disclosed can be confidential business secrets by one competitor to another. That obviously doesn't arise in this litigation because the PCR is not a market participant. But anyway, for that reason, they

become quite common. I think, as they have become common and as these cases have reached trial, courts have increasingly become conscious of the downsides of an excessive and easy use of confidentiality rings because of the sorts of problems that I have told you.

So, for that reason, what we're pushing for is for Valve to actually carry out, notwithstanding that there's a lot of material that's already been disclosed in the US, a proper confidentiality review by reference to the principles set out in the practice direction and applied under English law more generally at the time of disclosure. That will hopefully result in a much smaller quantity of documentation being designated as confidential and disclosed into the confidentiality ring which will alleviate the problems that I referred to.

You will have seen that yesterday, we put in a revised version of the confidentiality protocol that was designed to respond to some of the points that had been made by Valve in its evidence which was served last Thursday. So, in general, we think the standard approach applies, so Valve has to identify the relevant confidential material and provide a justification for going into the ring.

In respect of the material that's already been disclosed in the US, what we are proposing is that that can be dealt with at a category level. So, Valve should merely -- well, provide a good summary of the nature of the documents and the type of confidential information which is contained within each category of documents. Potentially, that could be done through the use of the disclosure of illustrative samples of some of the material, for example, illustrative spreadsheets that either could be anonymised or displayed in the first instance into a ring so that we and, if necessary, you can take a view on an informed basis as to whether this material is actually confidential or not.

We put in the protocol that Valve can ask us to agree that categories of material can

be disclosed into the ring on that basis, on the basis of a category-level assessment, rather than an individual document assessment, and that the PCR's consent to that should not be unreasonably withheld. There's a challenge mechanism in which case if Valve does feel we're unreasonably refusing, they can obviously bring it to the Tribunal in the same way that we can bring the Tribunal documents that we feel are being inappropriately categorised as confidential in the first place.

I think that, in a nutshell, is the issue. We say that the principles of English law and the practice direction should be applied and they shouldn't be disapplied simply because a US court has taken a different approach.

THE CHAIR: So, it's really -- I mean, you're both agreed that there will have to be a confidentiality ring?

MR KENNELLY: Yes.

THE CHAIR: So, the scepticism of an almost sort of antipathy to confidentiality rings, which perhaps the practice direction exemplifies and the decision of Mrs Justice Cockerill in the broader field also illustrates, is to that extent not really in play. We're going to have, in other words, a CRO.

So, what we're arguing about is the constitution of the CRO. What is it to comprise? Within that, and this is your point as I understand it, the question is: on whom should be the burden of selection? Should it be automatic pursuant to what the US court has done and for the whole lot to go into the CRO, subject of course to some provision for you to be able to query, having seen the documents, whether any greater protection than rule 102 allows is required, or should it be a pre-selection before it goes in to the CRO?

Now, in terms of when all this would happen, when would this all happen in your assessment?

MR GREGORY: Well, I think potentially imminently. We agree that we're going to

have a confidentiality ring; a lot of the terms are fairly standard. As you said, the critical terms are going to be the ones that affect our (inaudible) initial burden.

The big unknown in all of this is the extent of information on which Valve is going to want to rely for the purpose of the CPO hearing.

THE CHAIR: Yes.

MR GREGORY: So, the CPO hearing, one category of documents which has been ordinarily disclosed into a ring are the funding documents. But the PCR and the funder, in the light of the guidance provided by the practice direction, have agreed that in this case, the funding documentation can be disclosed outside the confidentiality ring simply subject to the terms of 1 and 2.

THE CHAIR: Yes.

MR GREGORY: So, the relevant documentation is, I think, going to come exclusively from Valve; documentation that may be confidential. We simply do not know what volume of documentation that is because they haven't served their response yet and they haven't identified what the categories of documentation are.

THE CHAIR: Do you mean what within the class of US confidential documents they are going to rely on in opposition to any --

MR GREGORY: Yes. I mean, we certainly hope it's not going to be 350,000, but it could be, you know, a great deal smaller than that. It may be a great deal, but we just don't know at the moment.

THE CHAIR: Yes. But you will see that from their skeleton, won't you?

MR GREGORY: Well, I'm not sure if we've got a figure in terms of the volume of documentation which is due --

THE CHAIR: Well, you'll just know what is due because they can't go beyond what they say is their evidence for the purposes of that application.

MR GREGORY: Sorry, we'll see the documentation from their skeleton for the CPO?

THE CHAIR: Well, your problem at the moment is you don't know what documents they will rely on to counter your application. I'm wondering whether the answer isn't that you will know that upon them putting in their response, because they won't be able to travel outside what they rely on then.

MR GREGORY: Yes. I mean, if it is a small quantity of documentation, that may not be a particularly big issue. There is obviously -- it's a bigger problem if there's a larger quantity of documentation. Then you start to get into more of the problems.

THE CHAIR: But that's not the problem that you're addressing at the moment. The problem you're addressing at the moment, unless I've misunderstood, and please correct me, is if it's one of a sea of documents, you don't know which of those documents they will immediately rely on for the purposes of the October hearing. I'm simply querying with you whether that's realistic or whether the fact is that they will have to select which ones they rely on for the purpose of that hearing. And if they say, "Well, we're relying on some super-confidential documents", you will at that stage be able to query it, having defined what it is.

MR GREGORY: Yes. Sorry, sorry, I must have misspoken. We misunderstood. I'm not saying we won't know from their response which documents they're proposing to rely upon.

THE CHAIR: Yes.

MR GREGORY: What I'm saying is at the moment, ahead of the response, we don't know what documents or categories of documents they will rely on, and we have no idea of the volume of documents that they may seek to rely on for the purpose of the CPO hearing.

THE CHAIR: Well, you won't, and that's a different exercise than a confidentiality exercise. That's a question of proof and counterproof. I just -- that's why I asked you about sequencing. I don't know. I mean, do you envisage that you would be able to

see these documents before 14 October?

MR GREGORY: Well, I think that might be a question for Mr Kennelly.

THE CHAIR: Just, you know, you've put forward a plan, as it were. Your plan doesn't say when you anticipate seeing these documents and I just wondered what you had in mind.

MR GREGORY: Well, our understanding or expectation is that when it puts in its response, that Valve will identify a number of documents on which it wishes to rely, including some documents which are confidential.

THE CHAIR: Yes.

MR GREGORY: And at the moment, we don't know how big that tranche of confidential documents is going to be.

THE CHAIR: Right.

MR GREGORY: It may be a very large number of confidential documents, in which case we have more of the issues that I raised earlier. If it's a very small quantity of documents, we have less of those issues and it's less of a concern.

The other wider point is you obviously can choose to just deal with the confidentiality issues up to the CPO hearing now and simply park for later what happens if and when certification is granted.

One of the reasons against doing that is that actually the reasons why Valve is saying it needs a confidentiality ring are not limited to this stage of the proceedings prior to the CPO hearing. The reasons they rely on, that it doesn't want to incur the cost of doing a disclosure review, that it needs to disclose into the confidentiality ring order to comply with the terms of the US disclosure order and also the terms of its contracts with publishers and developers, will continue to apply throughout the whole of the proceedings.

So, given that the issues have arisen in this way, in general terms not simply limited

to what happens right now, and given that we do not yet have any guidance from the Tribunal as to how the principles in the practice direction or set out recently in the Dieselgate judgment should be applied in the context of competition proceedings, including at this stage and including whether a parallel forum proceeding is going on, it seems sensible for you to issue some guidance on these matters more generally, rather than simply say, "Well, just as a short-term measure, we're going to deal with things in one way up to the certification hearing, and then we'll just revisit it all later".

THE CHAIR: Well, two points -- probably borne of my ignorance of the CAT process, and you must bear with me; I've got two experts on my side, but in the middle is a vacuum. But, one, looking at the practical realities between now and October, the likelihood is that, whatever pruning is done will either not be accomplished within that time, or alternatively, will repeat the process which is undertaken in the States, and that you won't suddenly go from 800,000 to 10,000. You might possibly go from 800,000 to 600,000. Possibly. But where does that get you? That's the first point.

The second point is, there is something to be said for dealing with this in two bites, isn't there? Because one doesn't know whether you will be certified, nor does one know the shape of the process after certification. So, unless you expect to see these documents -- and, in one sense, your process of pruning is going to delay you seeing those documents -- isn't it inevitable that we take two bites of the cherry? Do you see what I mean? I haven't put myself very clearly.

MR GREGORY: Yes, I do see what you mean. I'm not sure if it's inevitable that you take two bites of the cherry. It's certainly possible for you to take that approach. Can I just give one example of one category of document? So, Steam enters into distribution agreements with its publisher and developer clients. I understand that Mr Kennelly has about 30,000 of these agreements. We asked for them in the letter before action. They're about seven pages long, each. So, if you simply disclose the

full agreement into the confidentiality ring, we're going to be getting 210,000 pages of contractual documentation.

The overwhelming majority of those terms are not properly regarded as confidential. The agreement says that they're confidential, purports to categorise them as confidential, but they're not actually confidential. I can show you them if you want me to later. But they're not actually -- they're standard contractual terms and, in fact, a template copy of these distribution agreements has been disclosed and made public in the US litigation. So, it's out there.

The only thing in these 210,000 pages of documents which is confidential may be some numbers. So, for example, commission rates that are paid by individual publishers and developers. A much more proportionate way to deal with that category of disclosure is to accept that the template terms are not confidential. They can be disclosed outside of a ring. They can be referred to in court documents, referred to in open court and so on, and just have the numbers displayed in the form of a spreadsheet, potentially into the confidentiality ring. We would, you know, like to see an example of what these numbers look like, because we don't really know, but if they look like they're properly confidential, I don't imagine we will have any objections to that being the approach taken.

So we do think, actually, it's not going to take a huge amount of work to do some paring back at this stage. In certain respects, it could significantly reduce the volume of documentation which is disclosed into the confidentiality ring, even for the CPO hearing.

THE CHAIR: Have you proposed that?

MR GREGORY: I have. I haven't had a formal response from Mr Kennelly yet. I don't know whether he's in a position to say whether his side are willing to do that.

THE CHAIR: I don't mean to sound excessively grouchy, but there's been a bit of

a pattern of you going quiet for some many months, and then turning up with great enthusiasm and saying, "answer by tomorrow, please". There's a slight feeling of the issue being slightly half-baked, underdone, and these sorts of things are matters which it's curious to be ventilating in open court. They should be matters which you should be capable of agreeing if you have formulated them.

MR GREGORY: Well, I'm not going to say that, you know, that proceedings have proceeded at breakneck speed and that we are without any responsibility for the time it's taken. What I will say is we did raise as far back as November that actually, in the light of the practice direction, there may well be no need for a ring. And given the practice direction it fell to Valve to justify why it was necessary for certain categories of material --

THE CHAIR: But it's never -- you first of all said let there be a ring. Then you said, let there be a protocol, without saying whether there should also be a ring. Then you said there'll be a ring and a protocol, please. That's the sequence of it; isn't it?

I mean, we are where we are, but I have a slight feeling that there might be more pragmatic solutions to this, in that you get what you want for the purposes of October, and possibly we lay down some ground rules for thereafter. That's a matter for discussion. But, at the moment, you're sort of trailing possibilities, which we can't really say yay or nay to because they're exemplars, they're not solutions. They're simply, "well, there's one area where we think this might happen", and the other side look to me as if they're saying, "well, you haven't given us time to think about that". I may be wrong about that, but that's my sense.

MR GREGORY: Well, I understand. I mean, my understanding is the disclosure in the US was provided some time ago, and they've obviously had the request for material and also (inaudible) documents for several months. We are open to trying to find practical solutions to get to the CPO hearing without the need for a full

confidentiality ring into which the documents are going to be disclosed. That was the reason why we put in the amended version of the protocol.

We are entirely happy to engage in constructive conversations with Mr Kennelly and his clients, to try and find solutions to different categories of documents, such as the contractual arrangements I just talked about. We are somewhat in the dark because we do not know what categories of documents they are going to rely on for the purpose of the CPO hearing.

THE CHAIR: Can we go back to sequencing a moment. Your basic position is that, whilst you accept a CRO, nothing should go into the CRO unless it's been justified in accordance with the English practice direction and the English rules?

MR GREGORY: Well, subject to the, sort of, compromise position that we --

THE CHAIR: The compromise is that when I say "nothing", you say no category of documents should go in without it having gone through the sieve of the English approach to confidentiality and the CAT's practice direction. So, you have to ask yourself: is it confidential? And you have to ask yourself: is there any good reason for it being so confidential that rule 102 will not protect?

MR GREGORY: Yes, you know, with a high-level category only with you at this stage, but yes.

THE CHAIR: So, you say that's what's got to happen. So, there's this sluice before it all goes into the CRO, which you accept will contain some categories of documents.

MR GREGORY: Yes.

THE CHAIR: And we're discussing, when will that exercise of putting them into the sluice happen? You're saying, well, we'd like that to happen before the exchange of evidence for the purposes of October. I'm saying, is that practical? I dare say Mr Kennelly may take that up.

Then the question is: what is to be done if they suddenly put forward documents by

way of objecting to certification which you've never heard about? I wondered whether that would come out in the wash of them having to put forward what they relied on, and you having to say, well, thanks.

MR GREGORY: Well, my expectation is that having to go through the exercise to apply your mind to the confidentiality question, even if the category may well reduce the quantity of --

THE CHAIR: It may or may not. You don't tell me, and I have no idea, what the relevant rules are in the United States. They may be very similar; they may be miles apart. They may be loosely applied, or they may be tightly applied. I have no idea.

MR GREGORY: We know from our submissions and evidence, we know there are 350,000 documents. We know they're being categorised at a document level rather than by reference to individual text or figures, and we know that no justifications have been provided for why those documents should be treated as confidential. In terms of the practicalities that you talked about; again, it's difficult for us to say, because we don't know what categories --

THE CHAIR: No, I completely see that, yes.

Well, anyway, what you've helped identify -- and I'll ask those sitting with me whether they wish to ask any questions -- but what you've helped identify is that the real question is: should there be a sluice; who is to be determining what documents to put forward, or what categories of documents to put forward; and who should then have the burden of justifying whether or not they are confidential enough to warrant greater protection under rule 102?

MR GREGORY: In general terms, yes, subject to the practical caveat that we are very happy if Mr Kennelly is able to say, well, we're proposing to rely on approximately x number of documents in these categories, to have discussions with him about what those documents are and trying to find a balance.

THE CHAIR: You've indicated practical flexibility.

MR GREGORY: Yes.

THE CHAIR: Yes.

PROFESSOR AKMAN: May I just ask to confirm; is there any concern on the part of the PCR in terms of actually having access to these documents, any category, or any individual documents, based on how they were classified in the US?

MR GREGORY: Well, I think my understanding is Valve accepts that the PCR herself would go within the confidentiality ring. The other potential interested parties are the members of the advisory panel and the funders. If so, we need to take instructions from them. I don't think I actually know whether Valve's permitted -- whether it's content for those persons to go within the ring or not.

THE CHAIR: The downside for you is that if they -- I'm not saying they wouldn't do it entirely properly, but you will get what they say is properly admissible into the CRO. I suppose you will get the other, because it'll just be generally subject to 102.

MR GREGORY: Yes.

THE CHAIR: Yes, all right. So, it's really a question of on whom the burden and therefore the cost is. And timing, yes.

Well, shall we have more of a dialectic than a formal set of submissions, but I'd like to hear from Mr Kennelly.

MR GREGORY: Yes, yes. I think there are some uncertainties, and we'd be happy to have them clarified.

THE CHAIR: Yes.

MR KENNELLY: Thank you. That was a helpful exchange, in my respectful submission, although the fundamental question, "What is the PCR really bothered about?", is still unclear.

THE CHAIR: Yes.

MR KENNELLY: Because really we are only concerned with what to do with the documents that will be needed for the certification hearing. If the CRO was to be relabelled an interim CRO, such that the thing could be revisited after any certification, we would be content. It's common ground that we need the CRO in order for us to give the PCR the documents they want, and, for the same reasons given by my learned friend, it is -- although I cannot give a specific figure now, because of the nature of the certification hearing, because it cannot be a mini-trial, it is highly unlikely that we will be advancing significant documentation along with our response on 1 July. That would be highly unusual and unlikely. What is really in issue is a relatively net pool of documents which the PCR seeks, which we have, and we want to give them, which are, we say, highly confidential, and certain documents that we may produce with our response in a few weeks, which, again, we say are highly confidential. The fundamental point we have is the protocol, even the revised protocol we got yesterday at 5.30, is just unnecessary. We agree we need an order. The order is in the standard form. The order contains a mechanism for disputing our confidentiality claims, and although, as a matter of process, it is for the receiving party to raise an objection, the burden to justify the designation lies with the disclosing party.

So, it really doesn't matter upon whom it falls to say we don't think this is confidential, or it is. Ultimately, if it goes before the Tribunal, it is for us, consistently with principles of English law and the Cavallari judgment, to adduce evidence and justify the confidentiality claim.

THE CHAIR: Well, that's a little overstated, isn't it, Mr Kennelly? I mean, there's a sort of -- there's an overall point which is rather amorphous, which is that it's right that you should review all your documents in the English CAT proceedings, having regard to English confidentiality rules and the practice direction. That's one point. The second point is that process will be of itself quite an expensive process, and they do not wish

to undertake it as your proxy. They want you to operate the sluice.

MR KENNELLY: Indeed -- forgive me -- and there has been a sluice, in substance, for the purposes of this hearing, because we have in our evidence justified by category the confidentiality claims for the narrow categories of documents which the PCR seeks.

THE CHAIR: Yes.

MR KENNELLY: We have done that, and I can take you to it in Mr Ross's witness statement. That is, to quote my learned friend, the high-level by-category explanation.

THE CHAIR: Yes.

MR KENNELLY: And that suffices, for the purposes of our compliance with the CAT principles, which is that we must not claim the confidentiality designation unless we are satisfied that the information is genuinely confidential, applying the statutory test. We provide this relatively small number of documents to the other side, having given the by-category justification, which we have done, and then, true, it is for them to say -- and the practice in this Tribunal is to say, a single line, it can be a couple of sentences; the Tribunal has seen this. If a designation is challenged, the burden on the receiving party is very light. They simply say, "we don't accept this is confidential, it's back to you to justify". Then, because we are the ones with the evidence and the reasons for why it's confidential, the burden is on us then to justify.

What that means is, in practice, when the dispute is escalated to the Tribunal, only a very narrow pool of documents needs to be reviewed by you. The truth is, before the certification hearing in October, it's extremely unlikely that we will have a dispute about confidentiality claims, and if we do have one, it will be narrow, and you, members of the Tribunal, will probably resolve it on the papers very shortly.

So my learned friend and his team are getting rather ahead of themselves in worrying about reviewing hundreds of thousands of documents. Nobody is suggesting that that

will happen before October.

Now, we can either -- if they are certified, we will have a separate debate about whether that is appropriate. The initial position the PCR took was that it fell on Valve now to review, from scratch, over 300,000 documents, and to satisfy ourselves, pursuant to English law principles, that they are, and which parts of them, are properly confidential, which would cost millions of pounds. It would be a colossal waste of time and money, because, first of all, many of the documents may never see the light of day in an actual trial bundle and, secondly, the exercise has been done in the US. We're not saying that's determinative, but it would mean the Tribunal and the parties would lose the benefit of the fact that the exercise had been performed in the US already.

But, in any event, that's a discussion for another day. We are only concerned now with what has to be done with the confidentiality claims of Valve between now and October. As I said, we'd be happy to call the CRO interim, and I don't see -- my learned friend appears to have no objections to the form of the CRO; it's in the standard form. We can call it an interim CRO. We can give my learned friend the documents they seek immediately. And --

THE CHAIR: You've collated those, have you?

MR KENNELLY: Absolutely, they're ready to go.

THE CHAIR: You've collated the documents that you need for the purposes of October?

MR KENNELLY: No, my Lord. Sorry. So, we have collated the documents that they have requested. There are two categories, two tranches. One is the request from them which we've had and that's -- we can't give it to them until they agree that it goes into the CRO. Then, there's a separate question of which documents we propose to rely on, if any, that we will attach to our response in July.

But that, if it reassures my learned friend, will necessarily be a limited pool of documents, because the nature of the certification hearing means we are precluded. It would be most unwise for us to try and throw in thousands of documents if we were, for example, to seek to strike out a point on a legal basis or a process methodological basis. That would be a recipe for our failure and so -- and that has never happened, as far as I'm aware, in the Tribunal in a certification stage.

So, that may give my learned friend some reassurance. The basic point is the protocol is a good idea. The protocol works in many cases where the parties haven't had a proper discussion about confidentiality, where dialogue is encouraged and points should be narrowed, and possibly the need for a CRO is avoided.

This is not such a case. We've had the dialogue. We agree a CRO is needed and we have produced, through Mr Ross's evidence and the correspondence from my solicitors, detailed explanations by category as to why these particular narrow tranches of documents ought to be designated in the first instance as confidential and included within the ring.

Now, I think unless I can assist you further, I won't take you to any documents or points now. I'm happy to show you, if you need the terms of the --

Forgive me, I meant to mention on the SDAs. If the Tribunal wants to engage with why we say the Steam distribution agreements are confidential, I can address you on that.

THE CHAIR: Yes.

MR KENNELLY: My learned friend didn't show you the terms of the agreements; he raised a concern that there were thousands of them. I'm sure we can agree to disclose to his clients a sample -- a selection of those agreements, but obviously within the CRO to protect their confidentiality. But those are confidential as between us and the third parties who have entered into them, and that's a point which, again, the PCR

hasn't acknowledged; it's not just our confidential information; much of this information belongs to third parties -- documents belong to third parties, and the information in our documents belongs to third parties.

Without the protection of a CRO, we are exposed to the third party, and the third parties could come before you and insist on protection, which before October seems like a complete waste of time and money.

I said we could produce the documents that they have sought immediately. Actually, I've been reminded that it can't be done immediately; we need 30 days to gather those documents, because it's not just the documents, it's financial information requests which need to be extracted from our financial documents. So sorry, it's not a question of having a pack that you could simply hand over. I misspoke. Thank you.

THE CHAIR: So, there are three categories of confidential documents, all of which you seek the umbrella protection of a CRO?

MR KENNELLY: Yes.

THE CHAIR: The first category are the documents which you have identified to the CRO and explained are confidential for one of the reasons, or more of the reasons, set out in the witness statement.

MR KENNELLY: Yes.

THE CHAIR: The second category is some further documents on which you may wish to -- subject, of course, to your point that it would be inappropriate to rely on too many documents at this stage -- put forward to the Tribunal in October. In which case, once you have identified and collated those, those two would go into the CRO and those two would be -- you would explain, in the way you have with respect to the first category, the broad basis of your claim to confidentiality.

MR KENNELLY: Yes.

THE CHAIR: Then there is a third category, which is going to be the documents

additional to that, which will become relevant for greater interrogation after the decision in October. What you want is for that interrogation to be under the umbrella of a CRO; that's where it comes down to, isn't it?

MR KENNELLY: Absolutely, yes. My point is that that third category could be addressed after certification, if the Tribunal is so minded.

THE CHAIR: In the meantime, you take some comfort -- though, not security, as it were -- from the fact that the indication presently from last night's exchange is that, with regard to that third category, they are likely to be interrogated by category as opposed to document by document.

MR KENNELLY: Yes.

THE CHAIR: You say that that is both realistic, but also probably the only reasonable thing without enormous expense, if you have to revisit every document to determine whether or not, though it satisfied US strictures, it satisfies English strictures and the practice direction?

MR KENNELLY: Yes.

THE CHAIR: Is that what it comes down to?

MR KENNELLY: That's what it comes down to. If the Tribunal is minded to make orders in respect of the approach post certification, how we deal with US disclosure, the relevance of the fact that it has been subject to a contact check, and how we would go about explaining by category the designation that would be attached to those millions of documents -- hundreds of thousands, depending on how you look at it. That is something I would need to address you on further, because that could -- even by dealing with it by category -- be very difficult depending on the numbers of categories that we have in mind or that the other side had in mind for the purposes of that huge pool of US disclosure. But if we're only concerned with between now and October, the Tribunal has everything you need to address the points.

THE CHAIR: Then your overall submission is that this is not, as it were, contrary to the new practice direction, which is the first exemplar, as I understand it, because the negotiations have been with a view to reaching an accommodation between the parties as to how confidentiality is to be treated, and with full regard to the English rules being the guiding light.

MR KENNELLY: Indeed, yes. That is why in other similar cases where there are parallel proceedings in the US and significant disclosure that could be ported over from the US, CROs in the standard form have been made even this year, even this week, because these kinds of orders remain appropriate in these types of cases.

THE CHAIR: I think the point there is that, unlike those, is a CMC after the introduction to the practice direction.

MR KENNELLY: In fact, there have been several CMCs.

THE CHAIR: So, we are not as unique as we thought.

MR KENNELLY: Well, obviously there are unique aspects to the case, and I mean no disrespect, but the short answer is no.

This order -- the example has been made many times at CMCs since the practice direction. There are examples in the bundle made by the acting president to the Tribunal Mr Justice Roth, Mr Justice Bacon, and other chairmen of the Tribunal, experienced chairmen, who have the practice direction well in mind.

That really is the (inaudible).

THE CHAIR: Were those before or after certification?

MR KENNELLY: Before certification.

THE CHAIR: Before certification.

MR KENNELLY: I can show them to you, but I think the Tribunal has the broad point.

THE CHAIR: Do you accept that?

MR GREGORY: We accept that this type of CRO (inaudible) lot of cases, and we

accept that, following the introduction of the obligation to the practice directions, this type of CROs have been approved.

My understanding is that those cases were cases where formal sets of proceedings were being case managed together, so for practical reasons it was considered expedient that the later case simply adopt the confidentiality arrangements which were put in place in the earlier case (several inaudible words) case managed.

We were not aware of any judgments or reason from the Tribunal in which it is considered how the approach (inaudible) the practice direction should be applied in the particular cases.

MR KENNELLY: Two lessons there: under the judgment that says the practice direction is being considered, and/or (inaudible) nonetheless but I can say that what is not in dispute is that in several important cases, since the practice direction was made, at CMCs prior to certification, CROs in the standard form have been made. And --

THE CHAIR: Was the first CMC after the practice direction?

MR KENNELLY: Yes. Yes, indeed. The Stasi case against Microsoft in February this year, and --

THE CHAIR: Well, you listed them, but you didn't provide them, so I must simply take your guidance on those.

MR KENNELLY: Yes. My learned friend has at least one of those orders; I gave it to him. If he wants to speak to the point, I will show it to the Tribunal. I don't want to waste your time.

MR GREGORY: May I respectfully make a comment in response?

THE CHAIR: Yes, of course.

MR GREGORY: So the first -- we obviously welcome the proposal that if the CRO is put in place now, it could be an interim CRO that will only operate up to certification.

That has not been the position of Valve to date, including in its skeleton and the evidence, which is quite (inaudible). Can I just ask you briefly to turn to the skeleton, which is at tab B of the hearing bundle?

THE CHAIR: Yes.

MR GREGORY: Tab 3, page 26, I would like to go to.

THE CHAIR: Para 26?

MR GREGORY: Page 26, paragraph 3.

THE CHAIR: Say again?

MR GREGORY: Paragraph 3, page 26 of the bundle.

THE CHAIR: Thank you.

MR GREGORY: "(Inaudible) the PCR sought early disclosure of certain categories of documents." [as read] Valve say the confidentiality ring is necessary.

Paragraph 3.1:

"Disclosure in these proceedings will involve substantial amounts of information which is highly sensitive."

And at the end:

"Such material warrants enhanced protection." [as read]

And then at 3.2:

"There are related US proceedings where a large-scale discovery exercise has taken place and much of that discovery is subject to the strictures of a Protective Order of the US court A CRO would allow that scope to be more efficiently deployed in these proposed proceedings, especially should the proposed proceedings progress to the disclosure phase." [as read]

So, similar wording was used in Mr Ross's statement, and I won't take you to the passages, but it's at tab 7.

THE CHAIR: Yes.

MR GREGORY: And the page references are page 71, paragraph 10, page 75, paragraph 27. It will be noted that all the reasons relied on by Valve for its position applied generally throughout the whole of the proceedings.

The second point that I wanted to make is that Mr Kennelly said that Valve provided adequate explanation of the different categories of documents, in particular with respect to Mr Ross, which was served last Thursday. I'd be grateful if you could turn that up at tab 7 in the hearing bundle.

THE CHAIR: Yes.

MR GREGORY: If you can turn to page 75, paragraph 27, and read paragraph 27.

(Pause)

THE CHAIR: Yes.

MR GREGORY: So it's under one heading, but in fact, there are several different categories of document that appear to be referred to. The final sentence:

"It may be expected that the PCR would seek similar information here in due course." [as read]

... seems to suggest that actually this is material the PCR has not actually requested so far, but they're relying on these arguments in the expectation that it may be requested at some point in the future.

THE CHAIR: Yes. (Pause)

What's your point there?

MR GREGORY: Well, it's simply that the position Valve is adopting in this hearing, that all that it's asking for is a CRO up to the certification stage and not beyond, is not the position that it's adopted up to now. Up to now, it's been asking you to put in place a CRO for the purpose of disclosure throughout the entire proceedings, because the considerations which will apply throughout the whole proceedings were obviously -- the issues have considerably narrowed in what we are now considering a

CPO at the certification stage.

THE CHAIR: Well, I should have asked Mr Kennelly this. So, although it's an interim CRO, it is likely to be a permanent CRO, but different rules could apply as to how the inclusion of documents is to be justified, and there will have to be a regime established during certification -- after certification in that regard.

This isn't unlike the decision that you did provide me, the Cavallari decision, where there was a CRO and where there was a process of having to subtract from the CRO rather than include within the CRO.

But I think whatever one calls it, the scheme -- which I think you're beginning to agree upon as being a reasonably practical scheme -- is for the documents in the two categories, that I have identified, all to be put in before October under the protection of the CRO, and for the third category to go into the CRO, subject to whatever sluice arrangements are then made or thereafter made.

MR GREGORY: Yes, in terms of the position after the certification, I think we, like Mr Kennelly, would like an opportunity to make further submissions in due course if we get there. I think our position would still be that the initial view, even if only on a category-by-category level, the burden to that should lie on Valve rather than it simply disclosing everything (inaudible) across.

THE CHAIR: Yes. The CRO architecture will be there, but the only things that will be in it up to October are the documents that you've already asked for, the documents that they choose to rely on, and no others, because they won't be disclosed, as I understand it, at all.

Then after, assuming certification, the wodge of documents -- the 800,000 or whatever it is -- and in particular the cohort of documents identified under US rules to be confidential, which haven't already come in under categories one and two, will have to be put into the CRO, but you will say "selected and justified" by them, and they will

say, "Well, we want to put the whole lot in and it's then for you to justify." It'll be a question of burden after October.

Maybe I misunderstood, but that's where I think you're beginning to alight upon as a reasonable agreement.

MR GREGORY: I think that's helpful. Can I just take a moment to turn around?

THE CHAIR: Yes. Well, why don't we have five minutes and then I can chat to my colleagues, and we'll come back and see whether there are any problems that we can see.

(11.26 am)

(A short break)

(11.31 am)

MR GREGORY: I'm grateful for the opportunity. Yes, so the good news is we are at least broadly content with the outlined solution. We obviously take comfort from the fact that a limited number of documents are likely to be disclosed up to the certification stage, and that post-certification, the burden will not necessarily remain on us to carry out the confidentiality review, essentially. We may, of course, need to have fresh argument, post-certification, as to exactly what those arrangements are. But we take comfort in your indication about your current thinking.

THE CHAIR: Comfort in what sense?

MR GREGORY: Well, just that it's not simply to be assumed that the nature of the interim ring, where Valve can disclose into it without identifying specific information, without --

THE CHAIR: Won't necessarily apply thereafter.

MR GREGORY: Yes. I think there are simply two minor points on the wording of the ring: one is, because we've been focusing on the higher level issues, I think we'd like an opportunity just to review the detailed drafting and raise any points with Valve.

THE CHAIR: Yes.

MR GREGORY: I'm sure we can agree those with our -- we're aware you don't want this coming back in front of you in any form.

The second point is we would like -- just to limit the number of practical issues that can arise -- both the funder and, if possible, the members of the advisory panel to be inside the ring. I think Mr Kennelly was trying to take instructions on that. Obviously, if they have legitimate concerns in relation to any specific individuals, we can discuss that. But in principle, we would like those people within the ring.

THE CHAIR: Well, the second of your points was a point which we had wanted to clarify with you as to whether the funders and advisory committee would or would not be within the interim ring, as it were. Can clarity be brought to that?

MR KENNELLY: In principle, the members of the funder organisation and the advisory panel can be, and normally advisory panel members are within the ring, except where the individuals in the advisory panel are, for example, potentially involved with the competing businesses of the defendant, which is why under the order, as is the standard form, there's a mechanism for objecting to the inclusion of individuals sought to be included in the ring for whatever reasons the objecting party wants to advance.

Since I currently don't have the identities of the members of the advisory panel, I'm not in a position to confirm conclusively that no objection like that will be made. I know in some of the Apple and Google cases, objection was taken because members of the panel were involved in the very industry which was raising concerns about anti-competitive conduct.

But really, we need to see the names of the individuals and then take a view, bearing in mind, of course, that if we object for some misconceived reason, that will not go down well with the Tribunal. But since I don't know who we're talking about, I cannot say conclusively that no objection will be raised.

THE CHAIR: In principle, you don't object to the committee being part of it, but it may be members of the committee who are objectionable.

MR KENNELLY: Yes.

MR GREGORY: We're content with it being dealt with in that way.

Protocol

THE CHAIR: Yes. The only other thing is, in order to give proper obeisance to the practice direction, whether any of this needs to be put forward or summarised in a document called, "Protocol".

MR GREGORY: I think we would quite like that. In terms of the collective proceedings regime generally, we would think that would be helpful because, as I said, these are relatively novel issues, and I think other people will be interested that these issues have arisen and the way in which they have been resolved in these proceedings. Hopefully that will allow the parties to reach suitable compromise arrangements in other cases more quickly.

MR KENNELLY: Our concern is that the protocol is now unnecessary and may lead to unnecessary work and confusion if it remains, since it does impose entirely overlapping duties on Valve in particular, with those which it has under the order. Really, when the Tribunal comes to look at the protocol, in a case at this stage, having advanced to this point, it really adds nothing. May I ask the Tribunal to look at it? The revised protocol is at page 67.1 of the hearing bundle. So, behind tab 6.

THE CHAIR: The one that you sent last night.

MR KENNELLY: Yes, it should be now on page 67.1.

THE CHAIR: Yes.

MR KENNELLY: So, paragraph 1:

"The parties acknowledge they've read rule 102." [as read]

It's really unnecessary. And then paragraph 2:

"The following forms of enhanced protection shall be potentially available." [as read]

Again, that's just a statement of the obvious. It's already covered by the guide proceedings. And then over the page --

THE CHAIR: Well, all these are generic stipulations reflective of the general law of the practice direction.

MR KENNELLY: Indeed. Then over the page, and this is the bit that could generate some waste and confusion. Since all the documents that will be produced for the hearing in October will come from the US disclosure, we are concerned only with the US disclosure section, and there, the revisions that were made last night, tell us that we no longer are required to do a line-by-line review of the US disclosure, but then it says:

"Where [we] request permission to disclose the US documents into the ring, [we] must identify by category." [as read]

But we've done that in Mr Ross's witness statement, so that again falls away.

8 tells us we may comply by "providing illustrative examples". I understand now it's common ground that, for the purposes of October, we have done enough by way of correspondence with Mr Ross to explain why each category of document ought to go into the ring in the first instance.

MR GREGORY: Sorry, it may be helpful for me to clarify. I'm not proposing that the protocol should be adopted in the precise form that we suggested, partly because it does not reflect the sort of compromise approach that you have articulated and we've coalesced around.

I think the point is more that it would be helpful to have some sort of public explanation of the issues that have arisen and how they have been resolved, in particular, what has been proposed that, for the purpose of the CPO stage, there will be an interim

confidentiality ring that operates in the way in which these rings have operated, but that that question will be revisited post-CPO, where the question will be live as to whether we should revert to what we would say is the standard approach under the practice direction, and also under the principles set out in Mrs Justice Cockerill's judgment, which is that the burden may well shift onto the defendant.

It should not be assumed that the approach that's taken pre-certification is simply going to continue. I think if that indication is given, that will be a helpful indication for the purpose of all the other people who are engaged in these sorts of claims.

THE CHAIR: I'm rather inclined to think -- I mean, there will have to be an order --

MR GREGORY: Yes.

THE CHAIR: -- which will record what has emerged and which will reflect the division between pre- and post-October, and that, to the extent necessary, that should be recited to suffice as a protocol for the purposes of the practice direction, and it should recite, if necessary in the recitals to the order, that consideration is being given as to rule 102, and as to the need which is consensual for a CRO for certain documents to be protected by it.

MR KENNELLY: We are entirely content with that, sir.

THE CHAIR: The problem is with these sorts of things is one can get sort of entirely bamboozled by the wording, but I think that the actual exercise has been undertaken and the order will be sufficient for these purposes. But to give it extra luminosity for the purposes of the practice direction, some recital recording what has been the background to this temporary regime -- subsequent regime -- can be given.

MR GREGORY: We are content with that as well.

THE CHAIR: Yes. So, I'm rather hoping -- but you must say now or forever hold your peace -- I don't propose to give a formal judgment in this matter, because I think that the content of our discussions has focused attention on what is now a consensus

between you as regards the position pre-October and as to the stand off between you with respect to post October.

MR KENNELLY: Possibly --

THE CHAIR: Are you content with that?

MR KENNELLY: Yes, we are. We are content. Thank you, sir.

THE CHAIR: Yes. Well, thank you very much. It's, in my case, a toe dipped into unknown waters, but I shall be guided by all of you. Thank you very much.

(11.46 am)

(The hearing concluded)