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5 **IN THE COMPETITION**

Case No:1537/5/7/22

6 **APPEAL**

7 **TRIBUNAL**

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

12 Tuesday 13<sup>th</sup> June 2023

13  
14 Before:  
15 Andrew Lenon KC  
16 (Sitting as a Tribunal in England and Wales)

17  
18 **BETWEEN:**

19  
20 **OT COMPUTERS LIMITED (IN LIQUIDATION)**

21 **Claimant**

22 **and**

23 **MICRON EUROPE LIMITED**

24  
25 **Second Defendant / Part 20 Claimant**

26 **and**

27 **SAMSUNG SEMICONDUCTOR EUROPE LIMITED**

28 **Part 20 Defendant**

29  
30  
31 **A P P E A R A N C E S**

32  
33 Stefan Kuppen (On behalf of OT Computers Limited (in Liquidation))  
34 Daniel Jowell KC and Joshua Pemberton (On behalf of Micron Europe Limited)  
35 Robert O'Donoghue KC and Kristina Lukacova (On behalf of Samsung Semiconductor Europe  
36 Limited)

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**Tuesday, 13th June 2023**

**(10.30 am)**

JUDGE: Some of you are joining our live stream on our website. So I must start therefore with a customary warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anybody else to make an unauthorised recording, whether audio or visual, of the proceedings, and a breach of that provision is punishable as contempt of court. Thank you.

**INTRODUCTORY COMMENTS BY CLAIMANT**

MR KUPPEN: Sir, I appear for OT Computers, OTC, the Claimant. Mr Jowell and Mr Pemberton appear for Micron Europe Limited, the Second Defendant, and Mr O'Donoghue KC and Kristina Lukacova appear for Samsung Semiconductor Europe Limited, who are referred to as the Part 20 Defendant, because they have been joined as an additional defendant before transfer from the High Court.

In terms of housekeeping I think we are now getting there in terms of bundles. I apologise that there was a slight delay in getting these updated for you but I see you have the four bundles behind you. The skeleton arguments you may have loose and behind our skeleton arguments, with the Claimants skeleton, there is also a set of draft directions.

JUDGE: Yes. Thank you very much for the skeleton arguments.

MR KUPPEN: In the first set of the CMC bundle there is an agenda which sets out the various items for the discussion today. I am pleased to say that at least the first item on the agenda in terms of confidentiality has now been agreed between the parties and there's an order, which I believe is at tab 99 of the CMC bundle, which records the compromise that has been made between the parties in terms of the

1 Confidentiality Ring Order.

2 JUDGE: Do you want me to look at that?

3 MR KUPPEN: Not unless you wish to, otherwise the parties simply ask you to make  
4 that order in the terms that have been agreed, which then leaves two major issues  
5 for today. The first one is disclosure, which covers both disclosure by the Claimant,  
6 on which there is a good amount of agreement, and disclosure by the Defendant and  
7 the Part 20 Defendant, on which there is significantly less agreement.

8 The second big issue is the future conduct of the proceedings and how far that  
9 should be decided today, which has raised a question of whether a trial date should  
10 be set and directions given to that trial and a question -- rather an application -- by  
11 the Claimant whether these proceedings should be cost managed from here on in.

12

13 BACKGROUND TO CASE SET OUT BY CLAIMANT

14 MR KUPPEN: Before I address any of these issues I propose briefly to set out the  
15 background to the case. I will do that quite quickly, but I think it will assist in  
16 particular when we come to the disclosure issue.

17 The starting point for that really is the Decision of the European Commission which is  
18 at tab 21 of the CMC bundle. If you have it electronically, it is page 429. I'll try to  
19 take this at a bit of a canter. On the cover page we see that it is the Decision in the  
20 case DRAMs, which are computer memory modules. The Decision is for a breach of  
21 Article 101 of the Treaty on the Functioning of the European Union and Article 53 of  
22 the EEA Agreement, as the cover page tells us.

23 If we turn to page 435 in the bundle, paragraph 1 sets out briefly that the Decision  
24 relates to a single and continuous infringement, that the parties to the infringement  
25 entered into a scheme under a network of contacts and secret information sharing by  
26 which they coordinated their conduct on general pricing levels and quotations, to

1 major personal computer and server original equipment manufacturers, ultimately  
2 amounting to price coordination to such clients.

3 In other words, it is a price coordination and price fixing cartel. The other important  
4 feature of the sentence is that the Decision itself is concerned with sales to what is  
5 described as major OEMs, which in the case of PC rather than server, which is what  
6 we are concerned with here, are the likes of Dell or perhaps HP, but importantly it  
7 does not include the Claimant, who were a much smaller manufacturer of computers.

8 If we turn over the page to page 436 under the heading "Procedure" it sets out at  
9 paragraph 3 that the case was triggered by an immunity application by the Second  
10 Defendant, Micron.

11 Paragraph 5 tells us that all parties requested settlement discussions. The third  
12 line in:

13 "During the meetings that followed the Commission informed the parties of the  
14 objections it had against them and disclosed the evidence in the Commission File  
15 used to establish these objections."

16 Paragraph 8 over the page then tells us that in essence, having regard to the  
17 settlement submissions, it can be found that there was a cartel.

18 JUDGE: Have there been follow-on claims by the OEMs?

19 MR KUPPEN: I believe there have been follow-on claims in the US. I am not sure  
20 whether there have been follow-on claims in Europe. My learned friends may be  
21 better placed to answer that.

22 Continuing on with the Decision just very briefly, paragraph 9 tells us that the product  
23 is DRAM. Over the page we see the companies involved, which at 3.2.1 includes  
24 Micron, further down Samsung, who here is the Part 20 Defendant. Under section 4,  
25 which is on the following page again, we have a brief overview of the cartel, which  
26 again tells us that it aimed to coordinate and monitor prices -- paragraph 26 -- that

1 happened by means of regular and repeated contacts. Cartel participants  
2 exchanged information on pricing intentions and general pricing strategies.

3 Over the page, paragraph 29, it just says:  
4 "The overall purpose was in a rising market to maximise profits and in a falling  
5 market to keep prices from falling too quickly."

6 There then comes a section which describes the company's specific behaviour. The  
7 only feature of that I would want to point out is on page 443 where we are dealing  
8 with Micron. It is apparent that every statement tends to have a footnote, and the  
9 footnotes in this version of the Decision are redacted, but it says:  
10 "See, for example ..."

11 I think it is probably not giving too much away that these tend to be references to the  
12 Commission File and to the evidence that backs up the various statements that are  
13 made in the Decision.

14 Skipping forward to page 455, then in the calculation of the fine and under 8.3.1 it  
15 says this starts with the value of sales and the value of the undertaken sales of  
16 goods and services to which the infringement directly or indirectly related in the  
17 relevant geographic market.

18 Over the page on 456 we then see a table with indicative values of sales. The only  
19 point I am taking from that is that it is clear that Micron and Samsung, the two parties  
20 here today, were the two largest cartelists by some margin.

21 Finally, moving to page 465, this is then the operative part of the Decision, which  
22 simply records what we have already seen, that it was a breach of Article 101 in  
23 price coordination in respect of major PC and server OEMs.

24 Over the page at Article 2 we then see the fines that were imposed. In the case of  
25 Micron no fine was imposed because it was the leniency applicant, the whistle  
26 blower essentially. Then (d) tells us the fine for Samsung was close to €146 million.

1 The final thing I want to take from the Decision, as we see on page 470, is it is  
2 41 pages long. So it's a fairly compact document, which reflects the nature of it as  
3 a settlement decision rather than a result of a fully contested process.  
4 We can put the Decision away. The only thing -- turning from there then to the claim,  
5 the claim is brought by OT Computers, who during the 1990s and until early 2,000 --  
6 the early 2000s were a PC manufacturer in the UK under the brand Tiny and I think  
7 Opus as well. They became insolvent in January 2002, which was shortly before the  
8 end of the cartel.  
9 I forgot to highlight that in the Decision the cartel operated from 1996 to the middle of  
10 2002, and OTC became insolvent shortly before the end of the cartel.  
11 As discussed, it is not a major OEM itself, but its claim says that the effect of the  
12 cartel was, in fact, further reaching and extended to the so-called spot market on  
13 which it bought its DRAM products.  
14 The core of the issues at this trial, therefore, as is not unusual for a follow-on claim,  
15 is not the liability, which is established, but causation and ultimately quantity of any  
16 loss.  
17 There is an agreed list of issues, which was first prepared early on in the course of  
18 the High Court proceedings but updated last year. That is at tab 16 of the core case  
19 bundle.  
20 Skipping ahead beyond the common ground to the list of issues at page 131, we see  
21 there that the first two issues are volume of commerce potentially affected and then  
22 the second issue is liability, causation and loss, and in particular there to highlight at  
23 3(a) what has been described as the major OEM issue, which is what I described  
24 earlier, whether the infringement which, as found by the Decision, concerned only  
25 sales to major OEMs which caused an increase in price as charged by cartel  
26 participants to non-major OEMS and in particular any increase in price charged to

1 the Claimant.

2 For completeness, over the page the remaining issues are interest, the additional  
3 claim against Samsung. It is in square brackets here, because at that time no  
4 additional claim was extant, because the original additional Claimant had settled.  
5 The claim had to be brought again by Micron.

6 Finally on page 133 there is an issue also in square brackets called "Title to Sue",  
7 which I will come back to later, which is an allegation or un-pleaded allegation  
8 I should say, by Micron that OTC may not have title to bring the present claim. The  
9 Claimant does not agree that it is an issue in these proceedings simply on the basis  
10 that it has not been pleaded.

11 To complete the background of the case, just to give a brief outline of the  
12 chronology, the claim was originally issued in May 2016 by OTC and the former C1  
13 and C2 against five defendants. The Claimants reached a first confidential  
14 settlement with the third, fourth and fifth defendants in 2018, two years after issue.

15 It was then agreed between the remaining parties that a preliminary issue trial should  
16 be heard. That happened in January 2020 and as a result the claims of C1 and C2  
17 were struck out, but the claim by OTC, the current Claimant, was found not to be  
18 time-barred.

19 That issue was appealed by the defendants to the Court of Appeal unsuccessfully. It  
20 was dismissed by a judgment in April 2021. It then took another year until April 2022  
21 for the Supreme Court to refuse permission on a further appeal.

22 The confidential settlement with the First Defendant was reached shortly thereafter in  
23 September 2022, which then left Micron as the only active Defendant. Samsung, as  
24 I already pointed out, had originally been joined as an additional Claimant by the  
25 First Defendant and was then re-joined by Micron after the claim against D1 was  
26 discontinued.

1 The plan was to have a CMC in the High Court in October of last year. The parties  
2 agreed at Micron's request that the case should be transferred to the Tribunal. That  
3 was partly done on the understanding that we could have a first case management  
4 conference quite quickly. In the end, of course, it took slightly longer.

5 That takes us to today. So through various meandering stages in essence we are  
6 now seven years almost exactly after the claim was originally issued and OTC as the  
7 Claimant is therefore understandably keen to move things on and make as much  
8 progress as possible today to shape the future conduct of the proceedings, which  
9 then brings me on to the first issue, which is disclosure and starting in the order it is  
10 on the agenda with Claimants' disclosure, which may also be more straightforward,  
11 because it has a certain extent of agreement at least.

#### 12 13 SUBMISSIONS RE CLAIMANT'S DISCLOSURE

14 MR KUPPEN: Micron originally sought an order with its application, which is --

15 MR JOWELL: Mr Chairman, I think it is our application. I don't want to be too  
16 formalistic about this, but it is the Claimant's disclosure and it is our application, but  
17 I am in your hands.

18 JUDGE: I will hear what Mr Kuppen has to say about it first.

19 MR JOWELL: Very well.

20 MR KUPPEN: The main point that I want to make, and then, of course, to hand over  
21 to Mr Jowell, is mostly that we are agreed in terms of the scope of the disclosure that  
22 the Claimant should give in relation to the issues that are pleaded and agreed in  
23 these proceedings, which are the issues 1 and 2 in the list of issues that we --

24 JUDGE: You say it is too prescriptive, what is being sought against the Claimant.

25 MR KUPPEN: Yes. Our two objectives are, one, that the order that's actually being  
26 sought is too prescriptive, and two, we say that it would not be right for us to give



1 disclosure in relation to the title to sue issue.

2 JUDGE: Yes, of course there is that issue, yes.

3 MR KUPPEN: Which has not been pleaded. If you would like me to address these,  
4 I can take these quite briefly in that order.

5 JUDGE: Well, title to sue point is quite straightforward. You say it has not been  
6 pleaded and therefore should not be the subject of disclosure.

7 MR KUPPEN: It is not just that it has not been pleaded. The issue was first raised  
8 in correspondence in 2019. So it is not a novel issue that is just about to be pleaded.  
9 The Claimant has repeatedly invited Micron to plead the issue. The Claimant has  
10 disclosed to Micron the sale and purchase agreement of the sale of its business  
11 assets to the former C1 and C2, and our position is if there is a claim or an allegation  
12 that with that sale the title passed, clearly it must be possible to plead that on the  
13 basis of the agreement that governed that sale.

14 So on that basis even in the slightly reduced requests that came by correspondence  
15 yesterday evening to just look for documents in relation to this issue whilst looking  
16 for other things, we do not agree that disclosure should be given on this issue at all.

17 JUDGE: Okay.

18 MR KUPPEN: On the prescriptiveness issue, just in terms of the most  
19 straightforward background to the Claimant's disclosure, the Claimant has two sets  
20 of documents in its possession. One of them are the documents that were collected  
21 at the time of the insolvency. They are all in hard copy. There are no electronic  
22 documents surviving from that period. They are in 416 boxes. The second set of  
23 documents are what has been referred to as the insolvency documents, which is  
24 anything on the case file of the administrators and then liquidators, which at the risk  
25 of stating the obvious post-dates the business activity of the Claimant. The Claimant  
26 went into administration one day and ceased trading the next.

1 The Claimant has brought more than one claim. It has also brought follow-on claims  
2 in relation to LCD displays and CRT displays, and as a result it has already done  
3 some review of its documents because it made obvious sense to review them  
4 together with the other claims. The other claims mostly because of the appeal, have  
5 overtaken this one in terms of timetable, and disclosure in those claims was provided  
6 last year, I believe in the summer. During that process the boxes were all classified  
7 into boxes that were obviously relevant by their description. If it was unclear if they  
8 were relevant, in which case samples were taken of boxes with similar descriptions  
9 or boxes that were clearly relevant, which were reviewed.

10 JUDGE: Clearly relevant. I didn't catch what you said.

11 MR KUPPEN: Sorry. I may have -- these are clearly not relevant or clearly relevant.

12 JUDGE: And some in the middle.

13 MR KUPPEN: For the ones in the middle samples were taken of boxes with similar  
14 descriptions to determine whether they were relevant or not.

15 JUDGE: The conclusion was it wasn't relevant. Is that correct?

16 MR KUPPEN: It was a mixture. A large number of those boxes in the middle are  
17 what has been described as warranty invoices which on description turned out to be  
18 invoices that were rendered to the Claimant by independent contractors which said  
19 something like "Labour one hour, replaced fuse". Essentially for warranty repairs  
20 rather than anything to do with warranties that the Claimant sought. There are  
21 samples in the bundle if you want to go there.

22 JUDGE: But some of the samples from the middle group, if you like, do appear to be  
23 relevant. Is that right?

24 MR KUPPEN: I believe some additional boxes were identified, which were then  
25 reviewed as a result of that. In essence the four sets of boxes -- I should also be  
26 clear what I mean by review. The boxes so far were reviewed on the basis of

1 detailed instructions given to paralegals, which were written on the basis of the list of  
2 issues for all three of the cases, including this case. They have not yet been, the  
3 documents that have been identified in that way in the first level review, so to speak,  
4 have not yet been reviewed for a second time. That's the disclosure process that is  
5 obviously still to come in this case.

6 In essence the setup is that there is a list of boxes all of which have a description  
7 which gives some indication of the content and where that description is such that it  
8 appears it may be relevant, and things that have been excluded are, for example,  
9 invoices for printing supply or similar titles. They have then been reviewed by  
10 paralegals on a first pass to identify potentially relevant documents and these at the  
11 moment are in a pool that then forms the basis for the second level review, which  
12 hasn't happened.

13 JUDGE: Right. So the disclosure that you are proposing should take place extends  
14 to the boxes that were -- appear to be relevant and the boxes in the middle group  
15 that on the basis of sampling also appear to be relevant. Is that right?

16 MR KUPPEN: I mean, the disclosure that we are proposing is an order that says  
17 disclosure by reference to the issues and we fully expect that, as has happened over  
18 the last few days, in that process there will be an on-going discussion between the  
19 parties about exactly what those searches involve.

20 One of the difficulties that we have identified over the last few days with the order  
21 that Micron originally sought is that it said reasonable and proportionate searches,  
22 but to include in any event all boxes labelled "Invoices and Receipts". They have  
23 just described a lot of these boxes that seem to relate to invoices that are clearly not  
24 relevant. Micron now appears to have backed away from that request quite sensibly,  
25 but at the same time once you include in the order a specific list of boxes to review --

26 JUDGE: Shall we have a look at the order that's proposed? I am conscious

1 Mr Jowell probably wants to address me shortly. Let's look at it for now. Where is  
2 it?

3 MR KUPPEN: The updated order -- I may need -- it is tab 98 of the ...

4 MR JOWELL: Tab 95 and it is page 811.

5 MR KUPPEN: I am grateful. This order in terms of basic structure is paragraph 1,  
6 which deals with the first issue on volume of commerce, which is the subparagraphs  
7 A and B that match the wording in the list of issues. There is no dispute there.  
8 Paragraph 2 deals with the second issue on causation, liability and quantum, which  
9 again matches what the list of issues says and there is no dispute.

10 JUDGE: So far, so good. Those paragraphs are not contentious. Is that right?

11 MR KUPPEN: The subparagraphs are not contentious. What is contentious is what  
12 it says beforehand. We can see, for example, in paragraph 1 in now red struck  
13 through text, that originally -- first of all, your order stipulates that the Claimant shall  
14 undertake reasonable and proportionate searches, which may be redundant, but  
15 obviously there is no objection there. It then said:

16 "To include in any event" and that's the struck through text, "boxes that are identified  
17 in the paragraph of the witness statement as well as additional invoices."

18 Originally it said here -- sorry -- at the bottom of paragraph 1 it then says:

19 "Boxes previously identified as being relevant and/or those that refer to invoices  
20 and/or receipts."

21 This has now been taken out because it has been clear through discussions  
22 between the parties that it would not be sensible to include all of these boxes.  
23 Instead what has been put in is what's at the beginning of paragraph 1, the  
24 description of the precise boxes that are to be reviewed and I believe there is some  
25 overlap between the categories 2, 3 and 4, which again highlights the difficulty of  
26 trying to regulate these things in advance.

1 In essence what the Claimant says is "We are perfectly happy to have an order  
2 which says that we should provide disclosure by reference to these issues as set out  
3 in the paragraphs here. We are perfectly happy to say that the searches shall be  
4 "reasonable and proportionate", and we are perfectly happy to give a disclosure  
5 certificate afterwards that describes exactly what we have done and to engage along  
6 the way, as we have done with the other parties, and primarily Micron so far, as to  
7 exactly what searches we should conduct. I am just saying having this level of  
8 prescriptiveness in an order is liable to -- is not helpful and is liable to lead to further  
9 discussions and potential changes having to be made to an order.

10 In essence what has happened here is that the Claimant has been proactive in terms  
11 of approaching disclosure before the CMC, trying to get on top of the set of  
12 documents and trying to communicate as fully as possible to the other side what it  
13 has and what it is intending to do. The right response to that is to engage and  
14 identify problems and try to resolve them. In my submission it is not to try to pick  
15 holes in it and record, as is apparent here, an ever-moving target, minutiae in  
16 an order for disclosure, which should just say disclosure by reference to these  
17 issues.

18 JUDGE: Yes. I mean, just looking at the specifics, is there an objection to the  
19 searches being made in relation to the 101 boxes?

20 MR KUPPEN: The only thing to note in this respect, the searches as such of those  
21 boxes have already happened. So what needs to happen now is the review of the  
22 documents that have been identified.

23 JUDGE: You have already done a first search. Is this what you were talking about  
24 before?

25 MR KUPPEN: Yes.

26 JUDGE: That doesn't seem to be contentious from what you are saying. Then we

1 have these smaller number of boxes, five boxes, six boxes, four boxes.

2 MR KUPPEN: Which I understand are not mutually exclusive but partly overlapping.

3 JUDGE: How many documents are there in these boxes?

4 MR KUPPEN: I don't think that's the issue. I think the issue is the parties are still  
5 corresponding with lists of boxes about which boxes to review and it seems arbitrary  
6 to record not even the individual boxes but paragraphs of letters in the order.

7 JUDGE: I agree it is difficult to understand the order on the face of it, but on the  
8 other hand ideally the order today should make quite clear what it is that has to be  
9 done rather than leaving it open for future discussion, if you like.

10 MR KUPPEN: May I just take instructions on this issue?

11 JUDGE: Yes, sure.

12 MR KUPPEN: I understand that some of this refers to exchanges of letters  
13 yesterday evening and that apparently the numbers of the boxes aren't quite right  
14 and some of them overlap. So, as I understand it, there is no principal objection to  
15 reviewing these boxes, but there is an objection that this particular wording in the  
16 order records what actually are the boxes that have been discussed and agreed.

17 JUDGE: Right.

18 MR KUPPEN: If that makes sense.

19 JUDGE: If the order was clarified to make sure which of these fairly small number of  
20 boxes were to be reviewed, it wouldn't appear to be that --

21 MR KUPPEN: I understand, then we would be content with that.

22 JUDGE: Very good. All right. So that is paragraph 1. Did you say paragraph 2 is --  
23 well, it relates to the same boxes, but subject to that, is paragraph 2 agreed?

24 MR KUPPEN: No. Paragraph 2 has a further issue, which is that it says:  
25 "Reasonable and proportionate searches, but in any event to include the targeted  
26 searches specified at annex 1."

1 JUDGE: Oh, yes.

2 MR KUPPEN: Where there is again an issue that my client provided some  
3 clarifications to those targeted -- there are two points there. The first one is again,  
4 it's at page five -- it may be worth bringing it up.

5 JUDGE: Let's have a look at it.

6 MR KUPPEN: Sorry? Apologies.

7 JUDGE: What page is it?

8 MR KUPPEN: It is in the CMC bundle at tab 4, pages 66 to 70.

9 JUDGE: What this seems to be asking for is not so much identification of documents  
10 but information extracted from the documents. Is that how you read it?

11 MR KUPPEN: Well, that's part of the difficulty. It is not entirely clear how this relates  
12 to a search of hard copy documents.

13 JUDGE: Well, we can --

14 MR KUPPEN: What we have said in response is that we agree in principle that  
15 documents that match these descriptions or contain this kind of data are disclosable  
16 and will be disclosed to the extent that they are identified in these boxes.

17 JUDGE: Yes.

18 MR KUPPEN: It is somewhat -- it is not so much a request for targeted searches,  
19 but it is an indication of the documents that are likely to be helpful, and as such again  
20 entirely welcome as part of exchanges between the parties in the disclosure process,  
21 but certainly we would have some difficulty if it is ordered with the wording that's  
22 presently in the order.

23 JUDGE: Yes.

24 MR KUPPEN: Going back to the draft order, which I have now lost, that is the  
25 additional difficulty with paragraph 2, otherwise you have already identified it is the  
26 same as paragraph 1 in terms of the prescription of the boxes.

1 JUDGE: Yes.

2 MR KUPPEN: As to the remainder of the order, paragraph 3 is where the title to sue  
3 issue comes in.

4 JUDGE: Yes.

5 MR KUPPEN: It has been reverted to say:

6 "To the extent that any documents are identified in looking for the other two issues,  
7 one should disclose them".

8 First of all, it seems somewhat unlikely that such documents would be identified just  
9 simply in terms of timing, because the boxes all relate to the operation of the  
10 business.

11 JUDGE: Yes.

12 MR KUPPEN: The sale of the assets happened two or three days into the  
13 administration, and I believe until very shortly before the business went into  
14 administration a share sale rather than the asset sale was contemplated.

15 The principal position in any event is that it just would not be right to require the  
16 Claimant to give disclosure in relation to an issue that was first canvassed four years  
17 ago and hasn't been pleaded.

18 JUDGE: Yes.

19 MR KUPPEN: Paragraph 4 I don't think there are any objections other than the  
20 reference to paragraph 3.

21 Paragraph 5 asks the Claimant to identify in which box each disclosed document  
22 came from, and I believe we have indicated in correspondence that we are happy to  
23 do that to the extent we are able to. In that sense there's no objection there.

24 Paragraph 6 asks for a disclosure certificate, which, of course, we don't object to.

25 Paragraph 7 then says that:

26 "Upon providing the disclosure statement, it should also be filed with the Tribunal for



1 review."

2 We have no objection to filing the disclosure statement at the same time. It is up to  
3 the Tribunal whether it wants to order itself to review it at that point or leave it to the  
4 normal course of the parties engaging with each other.

5 Paragraph 8 then leaves the topic of disclosure. Whilst we are here I might as well  
6 address that at the same time, it asks for a case management conference to be  
7 listed in early 2024 to determine the issue of security for costs. It's a slightly odd  
8 position. Micron has not to date made an application for security for costs. It has not  
9 canvassed the issue with the Claimant, but apparently its position is that, come next  
10 year, it will definitely be an issue and the CMC should --

11 JUDGE: That final paragraph needs to be considered in the context of the overall  
12 timetable.

13 MR KUPPEN: I am grateful. I am just checking my notes, but I believe that  
14 concludes the points on Claimant's disclosure.

15 JUDGE: Thank you. Yes, Mr Jowell.

16 MR JOWELL: I am grateful, Mr Chairman.

17 The Claimant's disclosure in these proceedings will obviously be of some  
18 considerable importance. It will be critical to the volume of commerce that they  
19 allege. It will be important as one piece of the assessment of any overcharge, and it  
20 will also be absolutely critical in relation to the question of pass-on as to whether  
21 they had passed on their own -- any overcharge that they may have suffered in the  
22 prices that they charged to their own customers. So their disclosure is obviously  
23 going to be critical.

24 At the same time, the form in which they apparently hold documents is not ideal.  
25 They have 400 odd boxes of documents that the liquidators have obtained. Many of  
26 them have labels that are extremely opaque. We do not know for sure what is in

1 those boxes and they have certainly not been comprehensively searched by any  
2 means.

3 All of that said, it is also obviously very important to all parties in these proceedings  
4 that matters proceed in a way that is proportionate, given the amounts that are  
5 potentially at stake here, which are not high by the standards of these things, and  
6 there could easily come a situation that the costs of carrying out disclosure, which, of  
7 course, can be notoriously high, exceed any possible value of the claim. That is  
8 a position that we and I think all parties wish very much to avoid.

9 It is for that reason that we are prepared to take a reasonable stance in relation to  
10 what must be done and also wish to take a staged approach both to the Claimant's  
11 disclosure and to our own disclosure in order to avoid enormous disclosure  
12 exercises, which may not be essential for the resolution of the dispute.

13 So against that background my learned friend is quite right to say that there has  
14 been a large measure of agreement in relation to our application. It was made  
15 particularly -- a particularly helpful development was the development that occurred  
16 late on Friday night, when the Claimants wrote to us with various proposals following  
17 the explanations that they had given in their witness statement in reply to our  
18 application.

19 You can see the letter that they wrote, which is on page 771 of the bundle. You see  
20 at paragraph 2 that they say that -- in paragraph 1 they note that the letter responds  
21 to "Issues raised in our letter that have not already been addressed and the Claimant  
22 hopes the parties will be able to agree the detailed points raised in your letter and  
23 that there will be no need to trouble the Tribunal with a disclosure application."

24 They say they are prepared to carry out reasonable and proportionate searches. If  
25 you go forward to paragraphs 10 and 16 -- you don't perhaps need to read them in  
26 detail -- you will see that they identify additional boxes that they say they are now

1 prepared to review. You see a schedule to the letter, which provides a schedule of  
2 box numbers with additional boxes to be reviewed.

3 So against that background we wrote back yesterday and we -- you will see our letter  
4 starts on page 807. It is just behind the draft order that you were looking at. We did  
5 two things. First, we sought to embody what we understood to be their proposal in  
6 the terms of the draft order. Secondly, we wrote essentially expressing our  
7 agreement to their proposals for these additional boxes and limiting ourselves to  
8 those additional boxes for now, subject to three provisos, which I will come to in  
9 a moment.

10 But in terms of the draft order that you have been looking at, we are very puzzled by  
11 the objections that they now raise to the specific boxes that we identify in  
12 paragraph 1 on page 812. The reason that we are puzzled is because all we were  
13 seeking to do there was to identify the specific boxes that we had understood their  
14 own correspondence to be proposing should be searched. We find it slightly  
15 concerning that they are now possibly seeking to resile from that.

16 JUDGE: Let me see if I can understand what's being said here.

17 MR JOWELL: Yes.

18 JUDGE: Just looking at the references to the 9th June letter, six boxes referred to in  
19 paragraph 10. That's the one we just looked at. That's to be reviewed boxes. Then  
20 four boxes referred to at paragraph 16.

21 MR JOWELL: Yes. Now we understand that number (ii), the five boxes referred to  
22 at paragraph 35 of PC, that's Ms Coomb's witness statement, we understand from  
23 subsequent e-mails that we have received that those may be duplicates of what's in  
24 3 and 4. Now if that's the case, of course, (ii) can simply be taken out, but if it is not  
25 the case then it shouldn't be taken out. If there is merely overlap, then it shouldn't  
26 be.

1 JUDGE: No.

2 MR JOWELL: If it is, then it can, of course, be taken out. We do say that the boxes  
3 referred to in the June letter and the schedule should be included and that's what  
4 they propose.

5 JUDGE: Yes. It might be better if they were described in a more specific way  
6 than by reference to --

7 MR JOWELL: Then perhaps by reference to the box number.

8 JUDGE: Yes.

9 MR JOWELL: If we can be provided with the box numbers.

10 Now in relation to paragraph 2 my learned friend took objection to the direct  
11 reference to the annex to the Allen & Overy letter. I think this may be really a matter  
12 of semantics. As long as it is understood, and perhaps this could be reflected in  
13 a recital, that those categories of information that we identify in that annex are  
14 relevant to the issues in dispute, or potentially relevant to the issues in dispute, and,  
15 therefore, if documents contain such information they should be disclosed, then that  
16 is what we are after. We don't necessarily say that they need to make specific  
17 targeted searches for each one of those particular things, but if we come across  
18 something that corresponds to that information then, of course, that is a relevant  
19 document that should be disclosed.

20 JUDGE: Yes.

21 MR JOWELL: So I think that can probably be ironed out by a suitable recital or  
22 perhaps by a tweak, possibly taking away the words "The targeted searches" and  
23 saying instead "The searches specified in paragraph 2 shall include information" or  
24 "shall be made by reference inter alia to the information specified in that annex".

25 JUDGE: I don't really read annex 1 as being a specification of a targeted search as  
26 such.

1 MR JOWELL: No.

2 JUDGE: I agree with you. I think that it would be better if it was put in that way that  
3 it was acknowledged that that information is relevant and whenever the searches  
4 were conducted with that in mind, something along those lines.

5 MR JOWELL: I am grateful for that indication and hopefully we will seek to agree  
6 something.

7 Now the provisos, if I can take you to those.

8 JUDGE: Where do I find those?

9 MR JOWELL: You find the provisos on page 807.

10 The first is we propose a second CMC to be listed in the first quarter of 2024, at  
11 which there will be an opportunity for us to make additional targeted searches if so  
12 advised, requests for further targeted searches if so advised.

13 Now the reason that this is appropriate is because we are, of course, at this stage  
14 flying completely blind as to what documents we are going -- are going to come out  
15 of these boxes, and as I said, this information is going to be crucial for any fair  
16 resolution of the dispute. They are really craving our indulgence by saying "We are  
17 simply going to take a sampling approach to vast swathes of these boxes". Now that  
18 may well do the trick, but if we get back information that is woefully inadequate in the  
19 areas that are crucial to the resolution of this dispute, then it is appropriate that we  
20 should be able to come back and look at it.

21 That corresponds both with the general practice of this Tribunal, which is to order  
22 disclosure in phases like this and not by reference to standard disclosure all in one  
23 go, and it also corresponds --

24 JUDGE: If you want to make it a proviso. I mean, if there's a need for further  
25 directions, then an application can be made.

26 MR JOWELL: I accept that except for this, that what you don't have in the bundle

1 unfortunately is the response to this letter which we are going to seek to obtain in  
2 hard copy. The response was a very firm no, not on the basis you have put, but on  
3 the basis essentially that this is supposed to be disclosure that is once and for all  
4 and that's the basis on which we are providing it. That really is not acceptable in this  
5 case, because we simply don't know until we see what comes out of these boxes  
6 whether what we are going to get is going to suffice to fairly resolve this dispute.

7 We are also -- only after we obtain the documents, after the first round of disclosure,  
8 we will be in materially a different position when it comes to requesting further  
9 searches, not only because of what we might learn about the issues, but also  
10 because we will be able to tell which documents have come from which boxes. So  
11 we might be able to say in support of a further request, for example, that the box  
12 descriptions don't correspond with the actual contents or that a certain sort of  
13 document appears across all boxes, so the remainder need to be searched. So it  
14 will be informative both as to the identity of the documents in these different boxes  
15 as well. So it may then be possible to make these further targeted searches.

16 So we are prepared to accept this but on the basis that this is just a first round and  
17 we are not in any way tying our hands.

18 JUDGE: Well, I certainly don't have in mind that an order I make in relation to the  
19 Claimant's disclosure today is to be the final order in relation to it. Clearly not.  
20 That's obvious and it doesn't need to be a proviso.

21 MR JOWELL: We are grateful for that indication.

22 The second issue is the title to sue issue. Now the position here is there is, to say  
23 the least, somewhat of an oddity in that the entire business of OTC was transferred,  
24 as you have heard, shortly after administration to -- and sold to the Granville  
25 Claimants. The Granville Claimants' claims are time-barred, as has been  
26 established by the Court of Appeal but it said OTC, the shell company OTC in

1 liquidation, whilst it sold its entire business, assets and liabilities, it retained the title  
2 to sue causes of action of this nature. That is to say the least an unusual situation,  
3 because you would expect in a sale for all claims also to go over to the purchaser.  
4 Now we have been provided with one document, which is an asset sale agreement  
5 and that asset sale agreement does not contain any express assignment or sale of  
6 causes of action of this nature. It might by implication, but it doesn't expressly. So  
7 they have given, if you like, some partial disclosure on this potential issue.  
8 We are, of course, giving anxious consideration to whether we should raise as  
9 a defence that, in fact, the right to sue had passed over to Granville, in which case  
10 the claim will be time-barred, but we do not wish, not least for proportionality  
11 reasons, to set another enormous hare running in these proceedings if it is  
12 unnecessary to do so.  
13 So what we have proposed is that if they are sitting effectively on known adverse  
14 documents that are relevant to this potential issue, or if they come across those  
15 documents in the course of their searches, which they say is unlikely, then they  
16 should disclose them.  
17 Now you might hope that they would disclose them as a matter almost of  
18 professional obligation, because if having provided us with the asset sale agreement,  
19 if there's a further agreement or a further understanding that is recorded in the  
20 documents, that they would provide that anyway, but we think that their reluctance to  
21 do so and to volunteer that does in our submission make it appropriate that this  
22 Tribunal should order them to do so. It is not a burdensome request. It is  
23 a proportionate matter. It could either establish the existence of this potential  
24 defence or it could eliminate our concerns, but it's -- and if such an order is not  
25 made, then there is a risk that this will become a further issue, an unnecessary  
26 further issue in this litigation.

1 So we proposed that and thought that that might be uncontroversial but they are  
2 standing on their rights, and we say that this Tribunal should require them to make  
3 this reasonable disclosure of known adverse documents.

4 The final proviso is one that consists of two matters, which you see in paragraphs 11  
5 and 12 on page 808. The second one is that we have asked that when they provide  
6 disclosure they will inform the Defendants of the specific box that the document was  
7 found in.

8 Now in the letter, as I said, in response which unfortunately we don't have in hard  
9 copy yet, they have agreed to that element of the proviso. They have said they will  
10 tell us the specific box from which documents come. That is important, because it  
11 could then inform us when it comes to any further necessary requests.

12 The other aspect is we did seek additional improved box descriptions from the boxes  
13 that are being searched, because a number of these descriptions are inadequate,  
14 and that is resisted. They say essentially it would be terribly burdensome. We don't  
15 consider that providing somewhat improved descriptions of the contents of the boxes  
16 that are being searched, given that there are 109 approximately of them, is  
17 particularly burdensome and we consider that they should be obliged to do that. It is  
18 not a huge request in the circumstances and again could be helpful in targeting any  
19 further specific disclosure requests. Their reluctance to provide that information is all  
20 of a piece, I am afraid, with their reluctance to countenance any further disclosure  
21 after this round, but, as we have discussed, that is not a tenable or fair position to  
22 take.

23 So those are our submissions on our application.

24 JUDGE: Thank you.

25 MR KUPPEN: Can I pick up two points, one before the provisos? My learned friend  
26 was saying that he is puzzled by our objection to the individual boxes being named



1 and sensed potentially that we were resiling from what we had agreed in  
2 correspondence. I can confirm that we are not trying to resile from anything. The  
3 objection was purely that the difficulty with recording these boxes properly illustrates  
4 why in our submission that level of detail should not feature in the order, but as we  
5 discussed in some detail earlier, there is no actual objection to the boxes that are  
6 being referred to once that description has been sorted out and there is certainly no  
7 attempt to resile from anything that has been offered in correspondence. I just  
8 wanted to clarify that point.

9 JUDGE: I mean, are you able to give a better description of the boxes which are  
10 said to be not sufficiently well described?

11 MR KUPPEN: Yes. As I understand it, the issue is simply that there's an overlap  
12 between those three categories and the suggestion that was made to perhaps  
13 identify them by box numbers seems perfectly sensible.

14 JUDGE: Yes. I understood Mr Jowell to be saying more generally there was  
15 a desire on the part of Micron for clearer descriptions to be given. Is it just limited to  
16 those boxes? Mr Jowell, is it only those boxes specified in the order that you want?

17 MR JOWELL: We also wish as a separate matter that they should provide improved  
18 description of all of the boxes.

19 MR KUPPEN: I think those are two separate things. At the moment all I was talking  
20 about was his earlier comment, our discussion about the order seemed to indicate  
21 we might be resiling when --

22 JUDGE: The main point there seems to be that the five boxes referred to in (ii) may  
23 be duplicates, but, I mean, that can be easily covered by a wording in the order.

24 MR KUPPEN: Entirely, and I fully expect the parties to be able to solve that.

25 JUDGE: Yes, five boxes to the extent they are not in the other categories. Okay.

26 MR KUPPEN: The second point is to address various provisos that Micron laid out

1 in its letter. The first one is the second CMC. Now it is being said that we  
2 categorically reject this and say this is the be all and end all of disclosure, but that  
3 has never been the point. The point is simply this is not staged disclosure. The  
4 request that is being made is a request for disclosure by issue and ultimately by all  
5 documents that are relevant to those issues. The Claimant fully accepts that, as  
6 these processes go, there may well be disputes that remain and that are unresolved,  
7 and in the normal course the party that is unhappy with where disclosure got to then  
8 applies and makes application for a further specific disclosure. Our objection is  
9 simply to putting a CMC into the diary now on the full assumption that will be the  
10 result of it, that nothing else can happen in these proceedings, because we are all  
11 just working towards the next CMC. Ultimately the disclosure that has been ordered  
12 in relation to the Claimant is a full order for disclosure. There is no -- it is by the  
13 issues that have been agreed between the parties in the list of issues. It is not some  
14 form of limited subset of that, and whilst there may be disputes around the edges, as  
15 they happen, what we say is it is wrong to put a second CMC into the timetable just  
16 in case.

17 The effect that this is going to have is that everything else is being pushed out further  
18 again. We will come to that in terms of future conduct of the proceedings, but we are  
19 quite keen and at the moment we are very much getting the sense that everything on  
20 the Defendant's side is heading towards let's take our time. Let's do it in stages.  
21 Let's not do too much and ultimately it will just draw out the process. Whilst  
22 disclosure, these kind of things, are expensive, ultimately they will need to happen.  
23 What adds costs which is avoidable is further and further hearings, further and  
24 further correspondence and more and more delay. Therefore, we are very keen to  
25 get the timetable set out towards trial and, of course, if there are disputes about  
26 disclosure, they will need to be decided at a further hearing, but that will be

1 an application hearing, not one that is to be put into the diary now just in case.

2 JUDGE: No.

3 MR KUPPEN: That's our only point on the second CMC proviso. There is certainly  
4 no assumption or no desire to lay down the rule when disputes might arise.

5 JUDGE: No.

6 MR KUPPEN: In terms of title to sue, I made our position clear earlier. It is really  
7 a struggle to understand the position. The issue was raised in late 2019 in  
8 correspondence. Promptly two or three weeks later we provided the sale and  
9 purchase agreement. What's being said now is that the sale and purchase  
10 agreement obviously doesn't support that there was an assignment but maybe there  
11 are other things. I mean, at that point it does become a fishing expedition. If there  
12 was a transfer of the right to sue with that sale of assets, surely the sale and  
13 purchase agreement is the starting point for that, and if that doesn't give Micron  
14 enough to at least plead the issue, which by the way is also not an onerous  
15 request -- it is a small amendment -- then I am not quite sure on which basis we  
16 should be required to go and look for things. It is not as trivial as saying "Well, if you  
17 come across them anyway". Those boxes have, as I said earlier, had their first level  
18 review. That was obviously done on the basis of the list of issues as agreed  
19 between the parties, which did not include the title to sue issue at the time.

20 I don't think there is more to say on that point.

21 The final point, the final proviso is the better and improved description. As I have  
22 already said earlier, we are perfectly happy to provide when we disclose a document  
23 an indication which box it came from. That certainly can be done. The difficulty with  
24 providing an improved description, first of all, where the boxes have been reviewed,  
25 the descriptions have already been improved. Looking at the list of descriptions, it is  
26 quite clear that some of them are quite short. Others are as long as 100 words.

1 Again if there's a dispute about individual boxes, we are perfectly happy to look at  
2 them, but it is not a matter of simply going through 100 boxes and improving the  
3 description, because that would require somebody to go back to the hard copy boxes  
4 rather than the documents that have already been retrieved, but so far as concerns  
5 the boxes that have been reviewed, in my submission that same purpose will be  
6 achieved in any event if we say for each document that we disclose which box it  
7 came from, because then it would obviously be possible to see what certain boxes of  
8 the reviewed boxes contain. We are perfectly happy to be cooperative there, but it  
9 doesn't seem right to have to go back to hard copy boxes and look through them  
10 again just to provide a better description of boxes that we have already agreed to  
11 review.

12 JUDGE: Uh-huh.

13 MR KUPPEN: Those are the boxes that have been asked for, as I understand it.

14 JUDGE: Thank you.

15

16 **RULING**

17 JUDGE: The first issue I have to decide is as to the terms of the order for disclosure  
18 of the Claimant's documents. I am glad to say that there is a large measure of  
19 agreement between the parties as reflected in the draft order which I have been  
20 shown.

21 Paragraph 1 requires the Claimant to undertake reasonable and proportionate  
22 searches of documents within a number of boxes which contain hard copy  
23 documents recovered by the administrator when the Claimant went into  
24 administration. It would be helpful if the order could include descriptions of the  
25 relevant boxes rather than references to other documents where the boxes are  
26 referred to. There is some uncertainty as to whether the five boxes referred to in (ii)

1 of paragraph 1 of the draft order are duplicates. If that is the case, that can be easily  
2 covered as a matter of drafting. The reasonable and proportionate searches are to  
3 be carried out in relation to issues which are not in dispute as being relevant issues.  
4 Paragraph 2 is in a similar form and relates to other issues, which again it is not  
5 disputed are relevant. Paragraph 2 includes wording to the effect that the searches  
6 are to be inclusive of, without being limited to the targeted searches specified in  
7 a letter from Allen & Overy of 24th May 2023, as modified by an annex to a letter  
8 from the Claimant dated 9th June 2023. The annex referred to in the draft order lists  
9 various categories of information rather than details of how a targeted search is to be  
10 carried out.

11 I am glad to say that it is accepted by Mr Kuppen for the Claimant and by Mr Jowell  
12 for Micron that instead of requiring the searches to be inclusive of what are said to  
13 be targeted searches, instead there should be a recital to the order recording that the  
14 information specified in the annex is relevant information and that the searches to be  
15 carried out by the Claimant shall be conducted taking into account the relevance of  
16 that information.

17 The areas of contention were as to three provisos advanced by Mr Jowell as  
18 conditions to the draft order. The first is that there should be a CMC fixed in early  
19 2024 to review the disclosure provided by the Claimant on the basis that the order  
20 made today is part of a staged approach to disclosure. That proviso is opposed by  
21 Mr Kuppen on the footing that the order is not really an order for staged disclosure,  
22 but it is actually a more general order for disclosure by reference to issues.

23 Whether or not there should be a second CMC and when it should take place is  
24 something that I am going to have to consider in the context of the timetable of the  
25 proceedings as a whole. I certainly don't see that it is necessary to include it as  
26 a proviso to the order for disclosure.

1 The second proviso is that the Claimant, while conducting the searches in relation to  
2 the issues specified in paragraphs 1 and 2 of the draft order, should also disclose  
3 any known adverse documents that are relevant to what is called the title to sue  
4 issue to the extent that the Claimant comes across any such documents in the  
5 course of the searches that it is conducting.

6 The title to sue issue relates to an argument advanced by Micron that the transfer of  
7 business assets by the Claimant to the former First Claimant, Granville, in  
8 January 2001 prevents the Claimant from having standing to pursue its claims.

9 The proviso is objected to by Mr Kuppen on the basis that this is not an issue that  
10 forms part of Micron's pleaded case. The issue has apparently been around for  
11 a considerable time, having been raised in advance of the preliminary issue trial in  
12 January 2020 and Micron having had extensive opportunity to amend its pleadings to  
13 reflect that issue.

14 The parties in their skeleton arguments both refer to the applicable principles applied  
15 by the Tribunal in relation to disclosure as summarised by the Tribunal in the case of  
16 *Ryder v MAN* [2020] CAT 3, in which the Tribunal held that disclosure is confined to  
17 relevant documents, to be determined by the issues in the case in general by  
18 reference to the pleadings.

19 In my judgment there is no proper basis for requiring the Claimant to disclose  
20 documents relating to an issue which has not been pleaded by Micron. If and when  
21 this defence is added to Micron's defence, the situation will, of course, be different,  
22 but as of now it doesn't seem to me there's any sustainable basis for requiring the  
23 Claimant to have an eye to these other documents relating to the title to sue issue  
24 while it is conducting its relevant searches.

25 The third proviso advanced by Mr Jowell relates to descriptions of the boxes to be  
26 provided by the Claimant. The draft order at paragraph 5 specifies that:

1 "The disclosure provided shall specify which box each disclosed document came  
2 from by reference to the 'Box Number' and 'Reviewer's Contents Description'" as set  
3 out in a schedule dated 2nd September 2022.

4 Mr Jowell I believe was seeking a more general order requiring descriptions of other  
5 boxes -- all the boxes perhaps to be more fully described, but it seems to me that it is  
6 sufficient for present purposes if the boxes referred to in paragraph 1 are properly  
7 described and if the disclosure provided by the Claimant specifies which box each  
8 disclosed document came from.

9 So on that basis I hope that the order can now be drawn up.

10 MR JOWELL: Mr Chairman, on that last point, we understood you to be agreeing  
11 that at least in relation to the boxes that are to be reviewed in paragraph 1 the  
12 descriptions could be helpfully improved upon where necessary.

13 JUDGE: Yes, yes.

14 MR KUPPEN: Sir, I believe on our side the suggestion wasn't to re-review those  
15 boxes with a view of updating the description. I think our position was to say that  
16 because we are reviewing the documents and will be disclosing documents saying  
17 which box they came from, that will in essence serve the same purpose.

18 JUDGE: Yes.

19 MR KUPPEN: Having a list of documents with the box number attached to it, which  
20 in my submission is going to be a better description.

21 JUDGE: Sorry, I wasn't clear. What I have in mind is that the reference to the five  
22 boxes, the six boxes and the four boxes should be more fully described and that the  
23 disclosure should specify which box. I am not asking for a fuller description of the  
24 101 boxes.

25 MR KUPPEN: Thank you for that clarification.

26 JUDGE: Okay.

1 I am going to suggest we now have a five-minute break before we move on to the  
2 other matters.

3 (Short break)

4

5 SUBMISSIONS RE THE DEFENDANT'S AND THE PART 20 DEFENDANT'S  
6 DISCLOSURE

7 MR KUPPEN: This moves us on to the next issue, the Defendant's and Part 20  
8 Defendant's disclosure, which it is safe to say is slightly more controversial between  
9 the parties than the Claimant's disclosure has been.

10 This covers two matters. One of them is OTC's application for disclosure of the  
11 Commission Decision and its working file, which is in good part agreed, and any  
12 further disclosure beyond that which OTC says will be required.

13 In relation to the latter I will need to address you on two things. First, whether the  
14 Tribunal should need to consider that issue at all. It has been put against me that  
15 because my client did not make an application for disclosure beyond the Decision  
16 and the Commission File, the Tribunal should not consider any further directions for  
17 disclosure.

18 The second issue is even if the Tribunal were minded to consider it, disclosure  
19 should in any event, so the Defendants say, proceed in a staged way and therefore  
20 no further disclosure should be given at this point.

21 Before I get there it is perhaps helpful to look very briefly at the principles that govern  
22 disclosure in the Tribunal as set out in Ryder. The Tribunal has already referred to  
23 them, so I will take this very briefly.

24 JUDGE: Sorry to interrupt. I hope not too much time is going to be taken up with the  
25 question of whether I should make orders for disclosure beyond the Decision. I am  
26 not entirely clear why the Claimant did not make an application relating to other



1 documents, but we are where we are. This would seem to be a convenient time to  
2 deal with all disclosure matters, but anyway I will wait and see what Mr Jowell and  
3 Mr O'Donoghue have to say about that, but that is my fairly clear view at the  
4 moment.

5 MR KUPPEN: Sir, I am grateful for that indication, which makes my submissions  
6 even shorter. Picking up Ryder very briefly nonetheless, which is at tab 21 of the  
7 authorities bundle.

8 JUDGE: Yes.

9 MR KUPPEN: That's partly to answer your question as to why the Claimant did not  
10 make an application. Paragraph 23 which is on page 175 of the bundle, the  
11 judgment sets out the general approach to disclosure and it starts unsurprisingly by  
12 looking at Rule 60 of the Tribunal Rules, and down the page it is Rule 60(2), which  
13 says that:

14 "Subject to paragraph 3", which is a general discretion of the Tribunal to make  
15 directions as to disclosure, "at the first case management conference the Tribunal  
16 shall decide whether and when the Disclosure Report and a completed EDQ should  
17 be filed, and at a subsequent case management conference the Tribunal shall  
18 decide, having regard to the governing principles and the need to limit disclosure to  
19 that which is necessary to deal with the case justly, what orders to make in relation  
20 to disclosure."

21 As a result the Claimant had, it appears mistakenly, understood disclosure to be on  
22 the agenda for the CMC in any event and the direction to make written applications  
23 solely to cover those matters which are ordinarily subject to applications such as the  
24 Claimant's application for costs management, but also the application for disclosure  
25 of the Commission File, a decision which the Claimant considered should be notified  
26 to the Commission itself as a matter of courtesy, if not following the requirement of

1 the Tribunal. That explains the position we found ourselves in.

2 The second point, just to finish on that point, that I would like to add to that, our  
3 specific requests are set out in a schedule 1 to our draft directions, which came  
4 loose with the skeleton arguments. If I could ask you briefly to turn this up, and if  
5 I could also ask you to turn up the CMC bundle.

6 JUDGE: Where is the schedule 1?

7 MR KUPPEN: The schedule should have come with our skeleton argument. It is not  
8 in the bundle. It would be loose I am afraid.

9 JUDGE: I am not sure I have that. Is it in the electronic file? Yes, I have that  
10 somewhere. It is attached to one of the letters, isn't it?

11 MR KUPPEN: It probably is. Perhaps I can make the point without it. The point  
12 I am making was simply to take you to a letter from 9th November last year.

13 JUDGE: Yes.

14 MR KUPPEN: Which is at tab 37 of the CMC bundle, which is the beginning of  
15 bundle 2. Apologies. That may not be right. It may be at the end of CMC 1.

16 JUDGE: Yes.

17 MR KUPPEN: At the end of that letter at page 543 is a schedule 1, which is not  
18 entirely identical, but almost identical.

19 JUDGE: Yes.

20 MR KUPPEN: To the schedule that is now attached to our order. We then did not  
21 receive any response from the Defendant. We sent a chaser on 16th May this year,  
22 which is at tab 47. We don't need to turn that up. Then at tab 50 of the CMC bundle,  
23 which was on 22nd May, so four days before the application deadline, we wrote  
24 again to the Defendant and attach at page 601 a schedule 1, which is now in  
25 identical form to the one that was attached to our draft directions.

26 I make that point only because both the Defendant and the Part 20 Defendant

1 complain in their skeletons that they were prejudiced by being denied the opportunity  
2 to consider a concrete proposal or that OTC made further detailed requests only  
3 eight days before the CMC, and while Samsung had done its best to review the  
4 request in the limited time available, it had not had the chance to do so fully.

5 It is slightly puzzling, to adopt my learned friend's words, in the sense that this  
6 schedule, in substantially the terms it is now, was first provided more than six  
7 months ago.

8 Turning back to Ryder, which was in the authorities bundle, tab 21, having taken the  
9 point on Rule 60 and where the Claimant came from, moving on to -- I think I only  
10 need to take one paragraph, which is I think on page 182, it is paragraph 35 which  
11 sets out the broad principles, which in this case were distilled. I don't understand this  
12 to be in dispute between the parties. The Tribunal has already referred to them.

13 Orders for standard disclosure are rare. Orders are typically by reference to specific  
14 pleaded issues and specific categories of documents. That's subparagraph 6.

15 Subparagraph 7 tells us it should be limited to what's reasonably necessary and  
16 proportionate, bearing in mind a number of factors, which also include at (e) the  
17 specific factors listed in Rule 4(2)(c), which is in the governing principles where  
18 proportionality is set out, which includes as a sub point, apart from the amount of  
19 money involved, the importance of the case, also the financial position of each party.

20 My learned friends in their skeletons draw a fourth or a further principle from that,  
21 that disclosure in the Tribunal generally takes place in a staged way.

22 JUDGE: Yes, I see that. You say it was just on the facts of that case that it was  
23 staged.

24 MR KUPPEN: In my submission the Tribunal would have said so when setting out  
25 the general principles if that was a general principle.

26 JUDGE: It may not be a general principle, but, I mean --

1 MR KUPPEN: The only way it features in this case is once one gets to practicalities  
2 of disclosure. It is paragraph 46 I believe is being cited against me.

3 JUDGE: Yes.

4 MR KUPPEN: Which sets out by way of a quotation there from the Peugeot case  
5 the benefit of such a staged disclosure.

6 If I can briefly jump back to tab 19, which is the Peugeot ruling just to illustrate that  
7 there it clearly was a question that turned very much on the particular facts of the  
8 case why staged disclosure was required.

9 JUDGE: Given that we have 240,000 documents that apparently here are potentially  
10 relevant, there has to be staged disclosure here, hasn't there?

11 MR KUPPEN: Well, the question of whether there should be -- accepting that staged  
12 disclosure really is a question of the circumstances of each case, the principle is that  
13 we do what's proportionate, what's right to move things forward. The question then  
14 is: is this a case where it is appropriate?

15 JUDGE: Uh-huh.

16 MR KUPPEN: Our submission is no, because the question is simply what other  
17 stages are said to involve? What's put to us is that we should take disclosure of the  
18 Commission File and the unredacted Decision -- the emphasis I assume is on the  
19 File -- and some sales data that both parties are now happy to disclose, and go away  
20 and review that and then formulate more targeted and specific requests of what we  
21 are missing. This argument is based entirely on the assumption that the disclosure  
22 of the Commission File is going to move things on and is going to provide greater  
23 clarity as to what disclosure is needed. That's where we say this argument falls  
24 down, because in our submission that's just simply not the case. The issues in this  
25 case are fairly clear. The issues are the quantum of our purchases. It is whether  
26 there was an overcharge, which invariably is going to be subject to some form of

1 econometric modelling, and importantly, stressed also by the Defendants, whether  
2 the effects of the cartel found by the Decision, i.e. for sales to major OEMs also had  
3 an effect on the market that we actually bought on. I don't accept there is any lack of  
4 clarity of the issues. The question is then which of these is the Commission File  
5 going to help us to address, which would then lead us at a later stage to come with  
6 different disclosure requests from the ones that we are making at the moment? I just  
7 can't see what that would be.

8 As to the issue of overcharge, the Commission File, as it has been described to us,  
9 is 1,800 pages of scanned pdfs -- sorry -- 1,800 pdf files, not pages -- apologies --  
10 I did not mean to misstate that -- 1,800 files of scanned pdfs. This is not going to  
11 provide data that's going to be of assistance to the economists in modelling any  
12 potential overcharge, which in addition to price data will invariably need data on  
13 other things such as input prices in essence to control for effects other than the  
14 cartel.

15 The Commission File also won't resolve the major OEM issue. The issue is precisely  
16 that we are concerned with a sales channel that is not covered by the Decision. The  
17 Decision is a settlement decision that in its file will have documents that support the  
18 finding of infringement which was ultimately agreed. As such it is a useful and  
19 clearly relevant set of documents, but it is not going to significantly narrow, or we  
20 can't see how it could possibly narrow, the requests that we have actually  
21 formulated. In reality all we would do is come back and essentially have the same  
22 discussion as in my submission we can have today.

23 The requests we formulated were formulated -- maybe I should take a step back.  
24 The starting point we say in this case, just as with Claimant's disclosure, should be  
25 disclosure by issue. What we have tried to do in these requests is try to ensure that  
26 this is a more targeted and proportionate exercise, not in the same way as Micron's

1 targeted searches, because we're not saying to include in any event, but we say  
2 instead of going away and searching generally this is the stuff we think we will need  
3 from discussion with our experts, from having experience of similar cases.

4 JUDGE: But what do you say to the objection that conducting a search on that basis  
5 is going to cost hundreds of thousands of pounds, because there are so many  
6 documents?

7 MR KUPPEN: What is being thrown at me it is not even in respect to that, but it is in  
8 respect to the Commission File when Micron says, "We have gone away and we  
9 have found a large number of files, 244,000, which, however, are all on a disclosure  
10 platform already". Searching these is not rocket science. It is not. I mean, 240,000  
11 documents is not an unusual number as a pool to search once it is on an electronic  
12 platform already.

13 But more specifically than that what we are trying to do with schedule 1 is in part to  
14 avoid entirely free form searches by saying there are specific documents or  
15 categories of documents, which include things like expert reports or industry  
16 analysis, financial reports and accounts, best available data, which is a separate  
17 category, of course, sales contracts, which may well be identifiable in a different way  
18 and not require a general disclosure exercise and review.

19 Also, to be clear, it is not accepted that the 240,000 documents are necessarily the  
20 right pool of documents to be reviewed. Micron's original position and the position in  
21 its evidence is that this is believed to be a partial copy of the Commission File, but  
22 we understand from correspondence now and from the draft order that is before the  
23 Tribunal that actually it is unclear what they are, and what Micron is offering is simply  
24 to undertake some steps to understand better what the files are that it has.

25 JUDGE: How do you propose that these disclosure requests are pursued then?  
26 You have 64 CDs with all these documents on. As I understand it from what the

1 Defendants say, some element of electronic searching is possible. How do you --

2 MR KUPPEN: The Defendants say it has been uploaded to an electronic disclosure  
3 platform and some of it is text searchable. In the normal way disclosure documents  
4 that have been uploaded, some of them will be passable by OCR software or similar  
5 and will be searchable and others won't. It is not an inherently complicated task.  
6 But the starting point is Mr Jowell earlier made the point that Claimant's disclosure  
7 will be absolutely critical in this case. The same, of course, is true about Defendants'  
8 disclosure. It is not Defendants' disclosure about liability, because that is established  
9 by the Decision and will likely be supported by further documents on the Commission  
10 File. It is additional disclosure that allows the issues that are agreed between the  
11 parties, in particular the overcharge, in particular the question whether the effect  
12 extended to other sales channels, to be determined, and the starting point has to be  
13 that for a fair disposal of this case it can't be that just the Claimant gives disclosure,  
14 but the Defendant, of course, also has to give disclosure. Therefore the question of  
15 how complex that disclosure is going to be, to some point, is merely if the disclosure  
16 has to be given anyway. The question is what can be done to make it more  
17 proportionate? We say going away and looking at the Commission File is going to  
18 make no difference whatsoever.

19 JUDGE: You say that is not right, but what do you say is the right way then?

20 MR KUPPEN: We have identified as a step in this process what we say are the  
21 documents that are most likely to be helpful and the documents that we need. It is  
22 not really for us to tell the Defendant how to identify them. We could have come and  
23 said simply, "We want an order for disclosure by issue". That is the standard order  
24 that the disclosure will take. What we have done instead is to say, "From our  
25 experience in other cases these are the types of document". That was done in the  
26 hope that that makes the disclosure exercise more straightforward.

1 Now if it is being said against me that it doesn't, I am not sure the solution to that is  
2 that the Defendant doesn't give disclosure, because clearly they will have to give  
3 disclosure.

4 JUDGE: Your answer is they give disclosure, and if it costs hundreds of thousands  
5 of pounds, too bad.

6 MR KUPPEN: Not quite. I mean, we are very happy to continue to engage in  
7 discussions of how disclosure can be narrowed, but at the moment it is unrealistic to  
8 expect the Claimant to prescribe a road map for the Defendant on how to search the  
9 documents and how to identify documents that are relevant.

10 Again this is a case where we have been proactive in trying to identify what we think  
11 is helpful. The schedule was sent for the first time half a year ago. We did not have  
12 any engagement with it in substance until Samsung replied a day before the skeleton  
13 argument with some suggested mark-ups to the schedule, with the provision that  
14 nonetheless they didn't agree that any disclosure should be ordered.

15 I am not sure where we are left if the position is that it is for the Claimant to identify  
16 how the Defendant should discharge its disclosure obligation. The disclosure  
17 obligation for us as a starting point should be disclosure by the issues which are  
18 agreed in this case.

19 There is really a secondary issue how one can make that more proportionate. We  
20 are willing to be as constructive as we can be. In my submission we have made  
21 a fair stab at trying to narrow this down by reference of what we have experienced in  
22 other claims, but there is only so far we can take it, but it can't be enough for the  
23 Defendant to say, "Well, this is still too difficult, so no disclosure seems a better  
24 option".

25 In Micron's case this is essentially what it is now amounting to, because Micron says,  
26 "Well, we have these 240,000 documents. We don't really know what they are. So



1 | what we are suggesting is we disclose the Samsung version of the Commission  
2 | File". The only obligation on Micron beyond assisting with redacting things in the  
3 | order is now to go away and undertake steps to understand what they actually have  
4 | in their file, which, of course, will be necessary for them. That is not a disclosure  
5 | order.

6 | JUDGE: Yes.

7 | MR KUPPEN: I am not sure I can take this point much further. There is a basic  
8 | consideration of fairness as well if we end up in a position where the Claimant is  
9 | required in essence to give full disclosure and the Defendants are required to do  
10 | very little at all because they take the position it is all terribly difficult.

11 | JUDGE: Yes. I mean, at present I am faced with two unpalatable alternatives. One  
12 | is to disclose nothing beyond the fairly limited number of documents that Micron and  
13 | Samsung are offering; the other is to embark on what would appear to be a very  
14 | large-scale and expensive disclosure exercise without any real limitation other than  
15 | the fairly general categories of documents that are in your schedule. I can't help  
16 | thinking there is a way forward that is somewhere between those two alternatives,  
17 | but I am not at the moment clear what it is.

18 | MR KUPPEN: In my submission, first of all, the reason we are in this position is  
19 | because we have had very little to no engagement from the Defendant or the Part 20  
20 | Defendant on this until the last few days, which is not helpful in trying to explore  
21 | these things in the run-up to a CMC, especially if they were first canvassed six  
22 | months ago.

23 | The general way disclosure works, there is an order, and an order for disclosure by  
24 | issue is clearly not an unusual one. If that can be further narrowed, whether by form  
25 | of recital or some other way by reference to a list of documents that are most likely to  
26 | be helpful, or some combination that the parties engage with each other, we stand

1 ready to be as constructive as possible. Our difficulty is that at the moment with the  
2 proposal that's on the table we will be back here at whatever date the second CMC  
3 might happen. We will have exactly the same discussion and we will come back with  
4 the same set of requests.

5 JUDGE: Yes. What do you say about the -- what do you say about the disclosure  
6 that Micron has offered in relation to its own documents, not the Commission File?

7 MR KUPPEN: Micron has offered to provide largely, as I understand it, sales data  
8 contained in certain files it has identified, in certain spreadsheets it has identified,  
9 which is very helpful and certainly welcome, but it is equally not going to solve the  
10 problem.

11 As I indicated earlier, we are almost certainly going to be in a position where  
12 an expert will run a regression model. A regression model may have price as one  
13 variable, but it needs data to control for effects other than the cartel. I understand  
14 the data that's being offered is also limited to the UK and I understand it is limited to  
15 a time period that is less than we believe is required. So in that sense, of course, we  
16 are grateful for the data being offered, but it is in a way of the same as the  
17 Commission Decision or the File. It is right and it is useful, but it doesn't take us  
18 there.

19 JUDGE: Anything else?

20 MR KUPPEN: That's it.

21 MR JOWELL: Mr Chairman, could I first start by showing you where we, in fact, are  
22 in terms of our proposals? You will find that in tab 101 of the bundle. Forgive me. It  
23 is the second bundle. I imagine you might not have had an opportunity to read this  
24 letter. Perhaps if I could give you the opportunity to do so.

25 JUDGE: Yes.

26 MR JOWELL: You asked whether there is a middle way and that is it. It is a very

1 reasonable middle way. If I could invite you just to put that in context to show you  
2 our Disclosure Report, which you will find in the other bundle, the case management  
3 conference bundle at tab 34. Forgive me. It is called the core case bundle.  
4 This is the annex to our Disclosure Report. You will see it starts at paragraph 233.  
5 Do you have that?  
6 JUDGE: Yes.  
7 MR JOWELL: You will see at the bottom of 233 the documents created as part of  
8 the European Commission investigation. We say some of those appear to be in 15  
9 boxes of hard copy records.  
10 Then we have in 2 the 40 CDs. Those are the CDs we have now discovered have  
11 about a quarter of a million documents in.  
12 Then you will see various other electronic documents, back-up tapes related to the  
13 US proceedings and various other electronic communications.  
14 Then you see starting at 237 category C data. You will see these are the -- 11 is the  
15 legacy sales data collected by Micron Technology for the UK between '98 to 2002.  
16 So what we are proposing in the letter is to go back and try to expand that category  
17 11, provide them with all of that, expand it by date.  
18 Then in categories 12 to 14 you see other Excel files relating to DRAM pricing that  
19 we have located and are with my solicitors. What we are proposing is to effectively  
20 give them all of the data that is listed therefore and a little bit more between 12 and  
21 14.  
22 Then the possible extension of that, which we don't think we really should have to do  
23 at this stage, is you see up on page 236 there out of the 15 standard boxes in  
24 number 8 there are 15 hard copy lever arch files in number 9, and that's what we  
25 make reference to in those final -- in that final main paragraph of our letter,  
26 potentially searching that.

1 JUDGE: So what are you saying about those boxes?

2 MR JOWELL: We think that actually that -- we think that the boxes clearly go too far.  
3 We think that the 15 hard copy lever arch files we are reluctant to do at this stage  
4 until they have looked at what Samsung are going to give them in terms of the  
5 Commission File, but if we are pushed to do so, if you think it is appropriate, then we  
6 can review those, but we would have thought it is probably more sensible for them  
7 first to take the 1,600 PDFs and review those and then come back --

8 JUDGE: Are the boxes all lever arch files?

9 MR JOWELL: There are boxes and then there is a subset of the boxes which are 15  
10 hard copy lever arch files.

11 JUDGE: Okay. So I am looking at the hard copy documents.

12 MR JOWELL: In number 9 you see the second sentence:

13 "These documents are included in the 15 boxes of hard copy records set out in row 8  
14 above."

15 So they are a sub-set of what is in row 8, the boxes. So there are boxes and then  
16 within the boxes there are these 15 files effectively. So we say this is a -- then on  
17 top of that you see also the proposal in relation to Mr Bokan and the proposal to  
18 provide the expert report from the US proceedings. We think that that is a very  
19 reasonable proposal and a middle way.

20 I do wish to make some general comments about my learned friend's approach to  
21 disclosure here, because we think it is very misconceived. The idea that you come  
22 along with a sort of wish list of disclosure of issues and then say that it's for the other  
23 party to decide then how to implement that is not how disclosure is done in the  
24 modern day world, and it is not practicable, and it is certainly not practicable in cases  
25 in this Tribunal. That is why the Tribunal Rules stipulate that you have these  
26 Disclosure Reports and EDQs first, and then after you have those you then decide

1 | what categories of documents and potentially it even goes to what specific search  
2 | terms are to be applied.

3 | Putting forward a list like their schedule 1, a wish list of every possible type of  
4 | document that could be relevant and then saying to another party with hundreds of  
5 | thousands of potentially relevant documents, "Go off and review all of your  
6 | documents to find those that are relevant to those issues" without any further  
7 | guidance is a recipe for massive disproportionality in relation to disclosure.

8 | What is required and almost invariably insisted upon are that -- and as is reflected  
9 | indeed in the judgment in *Ryder* -- is that the party seeking the disclosure should  
10 | identify specific categories of documents and potentially even identify what types of  
11 | searches they are seeking the other side to carry out. That's the only way to keep  
12 | disclosure in these sorts of circumstances within proper bounds.

13 | So those are what we say and that is our proposal. So we say it may go a little too  
14 | far, if anything, in terms of what we are disclosing, but it is a sizeable amount of  
15 | disclosure that we are proposing. It is effectively all of the data that we have located  
16 | to date, plus some more that we are searching for, and other documents as well.

17 | With that and the disclosure that they will get from Samsung there is an ample  
18 | amount for them to bite on and to seek to come back -- we have always taken the  
19 | position it is sensible for them to have the opportunity, as it is sensible for us to have  
20 | the opportunity, to come back on a subsequent occasion and seek further specific  
21 | categories of documents if they are necessary.

22 | Now, just coming back to the agenda, I think number 3 on the agenda is the question  
23 | of the disclosure of the confidential version of the Commission Decision and the  
24 | documents on the File. I think in relation to that the parties are agreed. I mean, I will  
25 | be corrected if I am wrong, but I think you will find -- Mr O'Donoghue has indicated  
26 | he may have some further submissions -- but the proposal that we have made in

1 relation to that is embodied in a draft order that you will see at tab 98. I don't  
2 understand -- I will be corrected -- that the Claimant has any objection to that. I think  
3 Mr O'Donoghue may have some points he wishes to make in relation to it.  
4 Then there is the question of what further disclosure we should make and you have  
5 heard my submissions on that.

6 JUDGE: Looking at Mr Hitchin's third witness statement -- can I just take you to  
7 that?

8 MR JOWELL: Yes.

9 JUDGE: It is in tab 17. I notice that after referring to the difficulties of searching the  
10 CDs because of the way that they are stored, he does say at paragraph 10 that the  
11 documents are at least partially text searchable.

12 MR JOWELL: Yes.

13 JUDGE: I mean, I am not an IT expert, but would that suggest that there is scope for  
14 some kind of filtering of these 240,000 documents?

15 MR JOWELL: Well, potentially they could be -- search terms would be the ordinary  
16 method to apply to them, but that requires, you know, careful liaison between the  
17 parties. Normally one would expect the Claimants to propose search terms and then  
18 potentially for those to be run to see how many documents those give rise to.  
19 Obviously if they are going to give rise to tens of thousands of documents, then they  
20 are not suitable.

21 JUDGE: Yes.

22 MR JOWELL: One can potentially do combinations of search terms.

23 JUDGE: Yes.

24 MR JOWELL: Certainly one would hope that the parties would liaise to discuss such  
25 proposals if it is really necessary, but one can also I think potentially get a little bit --  
26 I mean, it may be that a lot of these -- this is not the key to resolving this case,

1 because if one is going to do really an economic analysis, it is the data that they  
2 need, and I am not sure how much data there will -- it doesn't seem like there is  
3 going to be that much data in these 244,000 documents, or at least most of them  
4 appear to be -- that I think -- the nature of the documents suggests that.

5 Of course one would expect the parties to liaise and seek to agree search terms and  
6 so on, but this is a process that has to be gone through, and there's a real danger in  
7 sort of making a very general order as is proposed that then the person that is  
8 a recipient of that order then feels compelled to go and take steps that are massively  
9 disproportionate.

10 JUDGE: Yes.

11 MR JOWELL: But we have no objection from our side to liaising in order to seek to  
12 agree search terms in due course, if that's desired.

13 JUDGE: All right.

14 Mr O'Donoghue.

15 MR O'DONOGHUE: I am not going to finish in four minutes. I am content to start if  
16 you want to come back at 1.55.

17 JUDGE: Yes. Let's start at 1.55 then. Thank you.

18 (12.57 pm)

19 (Lunch break)

20 (1.55 pm)

21 JUDGE: Yes.

22 MR O'DONOGHUE: Sir, I can be extremely brief. I respectfully and gratefully adopt  
23 Mr Jowell's submissions on behalf of Micron. I have a small handful of points I want  
24 to supplement. First of all by way of context, there has been more than one  
25 accusation of foot dragging in our direction and the Tribunal will understand we were  
26 brought into this case late last year. That's the first point.

1 The second point, if I can ask you, Sir, to open the first CMC bundle, tab 29,  
2 page 519. This is a letter dated 6th September from SSEL's solicitors, Covington, to  
3 OTC and copied to Micron. You will see, Sir, that we did not sit on our hands or drag  
4 our heels. Straightaway you can see in paragraph 3 we made a proposal to disclose  
5 the Commission Case File and to give the sales data set out in 3.2. I am bound to  
6 say that had that proposal been accepted, as it should have been nine months ago,  
7 the Claimants might well today have been in the position to make a second stage of  
8 disclosure, but for some reason it was not. So we do not accept the foot dragging  
9 insinuation, at least in the case of SSEL. It is simply untrue.

10 The second preliminary point I wanted to make, I hear you, Sir, loud and clear, you  
11 are not interested in points on the lateness of the application, these sort of  
12 technicalities and formalities, and I am not going to make that point, but there is  
13 a fundamental question of fairness to SSEL and to Micron which is that the reality is  
14 these extensive categories in the schedule, they have been under discussion, but  
15 that discussion has not crystallised to a point where it is ripe.

16 If I can just show you one recent letter which in my submission makes this point. It is  
17 in the second CMC bundle, tab 66.

18 Sir, this is a letter of 2nd June from OTC to SSEL. It is page 659, paragraph 27. Sir,  
19 you will see at 26 there is a reference to our EDQ and then at 27 there's a series of  
20 supplemental questions on that EDQ, and you will see, Sir, there is a discussion of  
21 precisely what data is and is not held and so on.

22 Now, as you may have seen from that letter of 6th September last year the EDQ was  
23 completed in around September, October of last year. It is in tab 26 of the core  
24 bundle. Here we are again nine months later where apparently for the first time  
25 there is engagement by OTC on some of the detailed data questions.

26 Now I don't make this point to be critical. I make a neutral point, which is there is



1 a substantial ongoing and evolving discussion on issues to do with the categories in  
2 schedule 1. As one can see from this letter of 2nd June, quite fundamental points  
3 remain to be resolved. That's why we say it is not a question of a technicality of  
4 them being late on an application. It is that these issues, through no-one's fault, had  
5 not yet crystallised to a point at which a decision can be made.

6 In a sense I would suggest, Sir, you see that very clearly from the witness evidence,  
7 because in the ordinary course of events what you would expect to see for the  
8 schedule is a witness statement from the Claimant going category by category:  
9 "Here is why we need it" and so on, responsive evidence on our side and then reply  
10 evidence, and that simply has not occurred -- again no criticism -- in this case.

11 So we are where we are. I don't make a point about lateness but I do make a point  
12 about fairness to Micron and SSEL that we have simply not reached a stage where  
13 this can be bottomed out. That is by way of introduction.

14 Now, Sir, on the categories themselves three points if I may. First of all, it is simply  
15 not correct to suggest that the high water mark of Micron's and SSEL's proposal is  
16 the Commission File and nothing else. As Mr Jowell showed you, there are about  
17 half a dozen discrete categories which have been offered up. We saw the letter at  
18 tab 101, the various items. I don't need to go back to that. On my side we had the  
19 SSEL data in relation to OTC covering four years.

20 So we say if one cumulates these proposals, they are on any view a substantial and  
21 meaningful first stage that will give the Claimants a lot to chew over and interrogate  
22 and will move things forward in a meaningful way.

23 JUDGE: Yes. Has the offer in relation to sales data been incorporated in any draft  
24 order?

25 MR O'DONOGHUE: Sir, we are checking. As you saw on 6th September last year  
26 our data was offered.

1 JUDGE: Yes.

2 MR O'DONOGHUE: I think Mr Jowell's data requests had been made in different  
3 pieces of correspondence. I think the letter last night crystallises the current state of  
4 play but it is really a mechanical exercise to translate that into an order.

5 JUDGE: Yes.

6 MR O'DONOGHUE: In my submission that's a serious proposal and it is not correct  
7 to say it is the Commission File and nothing else. That is simply wrong.

8 Now if we can quickly look at the schedule 1 proposals themselves. They have  
9 evolved. There were originally nine distinct categories with, I counted, 36  
10 subcategories. Then on Friday evening there was a degree of refinement. It is at  
11 the second bundle, tab 86, please, page 755. This is the refined proposal we  
12 received on Friday evening. As you will see, it is still six categories with, I count, 26  
13 subcategories.

14 If I can ask you, sir, for example, to look at 6.5, you will see something called SRAM,  
15 which is Static Random Access Memory. There's a whole series of data requests in  
16 relation to that. That is a product which is not even pleaded by OTC. This is a vast  
17 series of data and information and documentary requests on its face. So that is the  
18 starting point.

19 Now, Sir, if we can go on to the next tab, you have a helpful table which sets out the  
20 composite comments from OTC and SSEL on the individual categories and  
21 subcategories, and I am not going to, you will be relieved to hear, Sir, go through  
22 these one by one, but let me just make two headline points, if I may.

23 First of all, as you will see, for example, under 1(a), 1(b), 3(b), 4(a) and 5(a). OTC  
24 now accept the point we have been making consistently that the data they request at  
25 least in relation to those categories will be located or will be likely located within the  
26 Commission File. That is why we have always suggested the Commission File is

1 a very important starting point and there is highly likely to be duplication if that  
2 repository is not first interrogated. So that's the first point.

3 Now you will see, Sir, for example, that at Category 1(c) and 1(d), 1(e), 2(a), 2(b),  
4 3(a) and 3(b), we continue to make the point -- you see, Sir, where it says:

5 "As above ..."

6 If you go back to the first page we say:

7 "Highly likely to be covered by the Commission File disclosure as well as further  
8 disclosure by Micron."

9 So we make the same point in relation to a series of the other categories which are  
10 still sought, and we have a good faith and reasonable belief that there is a realistic  
11 prospect that that information will be included in the Commission Case File. Now we  
12 are not warranting that, but we think there's a reasonably good likelihood that is the  
13 case. Again that is why we say the logical starting point should be the Commission  
14 File coupled, of course, with the other disclosure categories which have been put  
15 forward.

16 Two final points, Sir. Second, a point which is I think to my client SSEL. You may  
17 have picked up from the papers that SSEL is not involved in manufacturing of  
18 DRAMs or production. It is essentially a sales company. As a result there are  
19 a whole series of categories, for example, 5(f), 6(a), 7(a) and indeed all of 9, which  
20 seek production-related information, including from my client. We say it is  
21 impossible on its face to consider why my client would even hold this information.  
22 So we say it is not proportionate to force my client to run round and comply with  
23 an order that is vanishingly unlikely to apply to it in any event.

24 You will see, Sir, that information is also sought in relation to overseas court  
25 proceedings and administrative investigations. Again, as we have made clear  
26 repeatedly to OTC, SSEL has not been involved in any investigation or court

1 | proceedings apart from the Commission investigation and the present proceedings.  
2 | So that is another fruitless or pointless request.  
3 | So we say there are a number of these requests that SSEL frankly should not be  
4 | required to run around and waste time and money trying to comply with in the very  
5 | unlikely event that it has in its possession a document.  
6 | The final point, Sir, is we say in many ways the schedule 1 approaches the question  
7 | of data requests in a way that is backwards or upside down. Vast amounts of data  
8 | requested on sort of what I would call a blunderbuss approach, and the data are not  
9 | even limited in many cases to the United Kingdom, but we say the logical starting  
10 | point is that, as, Sir, you will have seen in multiple other cases, the Claimant should  
11 | first come forward and set out ideally in a statement from its economic expert:  
12 | "Here is the economic methodology I propose to use. Here are the data I need to  
13 | adopt that methodology" and explain the approach and the necessity and  
14 | proportionality of data.  
15 | Instead what we have in the present case is really an amorphous approach seeking  
16 | all the data under the sun in a way that is completely decoupled or (inaudible) any  
17 | specific methodology.  
18 | Now I wrote down what Mr Kuppen said before lunch. He said -- I think this is the  
19 | first time I have heard it -- that they will almost certainly need a regression model.  
20 | So they are not even certain that it would be a methodology based on regression. It  
21 | seems very likely, but not certain.  
22 | In any event that really begs the question of well, what particular type of regression  
23 | methodology do you have in mind? Is it based on sales to OTC? Is it based on  
24 | sales to customers? Is it based on data from all suppliers or is it something else?  
25 | This really reinforces my point that to justify these extraordinary wide-ranging  
26 | requests you would need a comprehensive statement, ideally from their economist,

1 explaining and justifying why these particular data sets are necessary and  
2 proportionate. With respect, we have had barely a hint of a suggestion addressing  
3 that effectively done on the hoof for the first time this morning.

4 So for those reasons we say this wide-ranging request is premature, has not  
5 crystallised and that the middle ground we have proposed of half a dozen or so  
6 categories of data and other documents is a sensible way forward in these  
7 proceedings.

8 One final point. It's a very small point. As Mr Jowell indicated, the mechanism  
9 whereby the Commission File documents would be disclosed is largely agreed.

10 There is one point I want to clarify on our side.

11 Sir, as Mr Kuppen intimated, we have around 1,800 files which comprise the  
12 Commission File and they are in pdf format.

13 If we can quickly go to the second CMC bundle at tab 61, please -- go to tab 53, Sir.

14 Forgive me. It is a letter from Micron. You, Sir, have already taken us to some of  
15 this. So it is paragraph 8 on page 622. It is the second sentence. Micron say:

16 "We have successfully extracted approximately 244,000 documents and uploaded  
17 them to a data site where we found that the majority of the documents are  
18 searchable."

19 So Micron already has up and running what seems to be a third party data site  
20 where it has uploaded the nearly quarter of a million documents, some of which  
21 appear searchable.

22 Sir, what we propose is to add our 1,700 pdf documents to that existing database,  
23 including, of course, the index, which we have. As you will have seen, Sir, from  
24 Micron's letter last night, there is then a process whereby in relation to the 244,000  
25 there is a proposal to effectively see to what extent that also includes some or all of  
26 the Commission Case File and potentially other things.

1 So, Sir, in a nutshell our proposal is that we would hand over those documents and  
2 the index. They would be uploaded to Micron and at that stage SSEL's role would  
3 cease.

4 Now, as you will see in the order, there is a provision whereby third party redactions  
5 would have to be sought and made if third parties come forward. The suggestion in  
6 Micron's draft order that this would be done jointly, we don't frankly understand that  
7 and it seems to us extremely cumbersome. In circumstances where their database  
8 is up and running, we will add our documents. It seems to us this is a job that is far  
9 better done by a single law firm. Indeed, in every case I have been involved in it has  
10 been a single law firm which takes the lead. We say as a Part 20 Defendant and not  
11 a main party Defendant it would be quite odd if we were doing this jointly.

12 JUDGE: Can you remind me where is that draft order?

13 MR O'DONOGHUE: Sir, it appears in multiple places. Tab 98 of the second CMC  
14 bundle. It comes up in multiple places. You will see, for example, at 3.1(b)  
15 essentially there's a reference to Micron. There's a reference to "and the Part 20  
16 Defendant". What we propose is we will hand over the File and the index, upload it  
17 to the database and at that stage the subsequent process of redactions and  
18 engagement with others should be handled by Micron. In my experience that's  
19 exactly what happens in every one of these cases. I have yet to see a case where  
20 this would be done jointly. It seems to us cumbersome and unnecessary and  
21 inappropriate in a case of a Part 20 Defendant.

22 That's only the small point I wanted to raise there. I don't know if it is opposed.

23 Sir, those are my submissions.

24 MR JOWELL: May I just reply to that?

25 JUDGE: Yes.

26 MR JOWELL: I think in terms of whether it should be uploaded to the specific data

1 site, I think that's really not a matter for the order. I mean, it may not be practical to  
2 upload it on to the same data site. I certainly don't have instructions as to whether  
3 that's even possible. So I think that should be left at large.

4 As regards the more general question --

5 JUDGE: It doesn't make reference to that in the draft order.

6 MR JOWELL: No, it doesn't and there is no reason for the court to go into that level  
7 of specificity.

8 As regards who should be responsible for the redactions, I think there is a difficulty in  
9 a sense with Micron doing it unilaterally and that is that some of the information that  
10 requires redaction is information that Samsung is uniquely in a position to know  
11 should be redacted. So, for example, its leniency --

12 MR O'DONOGHUE: We would provide our redactions to them and then we would  
13 send.

14 MR JOWELL: I see. So the proposals is the documents should come to us in  
15 a redacted form and we would provide further redactions provided on having written  
16 to the third parties as to the position. On that basis we think that's acceptable.

17 JUDGE: Very good.

18 MR KUPPEN: Mr O'Donoghue made the point that it was never right that only the  
19 File was being offered. I don't think I made that point. It was always understood that  
20 there is some limited data being offered in addition, however, it is also important not  
21 to overstate the scope of that data. We are talking about limited sales data in the  
22 case of Samsung, as Mr O'Donoghue has just confirmed, in relation to sales to OTC,  
23 so one purchaser in the market. In the case of Micron it is slightly wider, but limited  
24 in terms of years, limited in part to the UK market.

25 None of this is a complaint about the provision of that data for which we are grateful  
26 and we say it should clearly be disclosed, but it is also not going to solve the

1 | problem.

2 | As I mentioned in my submissions earlier, there is really two things. There is not just  
3 | data. There will be an exercise of trying to get to the bottom of the overcharge. In  
4 | my submission it is not fanciful and we don't need expert evidence to say that this is  
5 | going to be a regression model unless something really rather surprising happens.

6 | But there is also the major OEM issue which clearly is not a data issue but will  
7 | require disclosure of documents and of documents that we don't accept are likely to  
8 | be on the Commission File, because the Commission Decision specifically is not  
9 | concerned with sales to anyone but major OEMs.

10 | Now it was put to me that we should have really come with an expert witness  
11 | statement explaining category by category what we are searching and I accept that  
12 | that is one way of doing it but that's really gold plating the process. We are talking  
13 | about a claim here which has been variously described as modest in value or really  
14 | not that big earlier.

15 | So the approach that we took is to set out categories of documents which we don't  
16 | accept are just about any document imaginable, but are categories that are informed  
17 | by the experience the Claimant had in its other claims and shared that with the  
18 | Defendants, and shared that with the Defendants half a year ago.

19 | I do need to repeat my point that we have had no engagement on that. The  
20 | schedule that my learned friend just showed you to illustrate that concessions had  
21 | been made as a result of discussions, that's quite right and it came on Friday  
22 | evening, but that's because the letter which for the first time engaged with these  
23 | came two days earlier on 7th June. Ideally we would have been further advanced  
24 | with this, but it cannot be right to say because of that we are now in a position where  
25 | it is just simply not possible to progress matters.

26 | If the solution to that is to say the order really should be one for disclosure by issue



1 and it is for the parties to discuss how that can sensibly be narrowed to specific  
2 documents or categories of documents, we would be very happy to engage in that  
3 process.

4 We have no position as to how Micron and Samsung between themselves organise  
5 the question of how documents should be disclosed, but bringing it back to the  
6 categories of documents and to the 244,000 documents which are still somewhere  
7 out there, it has been put repeatedly today that it will cost hundreds of thousands to  
8 review these and be terribly difficult.

9 I have some difficulty with understanding this. These are documents that are on  
10 a disclosure platform. These are documents where apparently it was possible to  
11 conduct a search for the word "Subject" to identify that most of them would be  
12 e-mails. It is not a difficult exercise and is not an exercise that by definition costs  
13 hundreds of thousands of pounds to search documents that are already on  
14 an electronic disclosure platform. Yes, it is right that the next step in the process is  
15 to agree search terms, but again it is the question of the order which way round one  
16 does these things. Typically there is an order for disclosure and then the parties go  
17 away and try to agree search terms rather than the other way round.

18 Other than that I have probably made my points.

19 From the Claimant's perspective it is crucial to move things on. The Commission  
20 File is, of course, useful and important disclosure, but it is not going to get us there.  
21 At the moment I really can't see how if we come back for a second CMC later in the  
22 year or early next year we are going to be in any different position in terms of what  
23 we are going to ask for in terms of disclosure than where we are today. Really it is  
24 just to impress on the Tribunal that from the Claimant's point of view making  
25 progress today is critical.

26 JUDGE: Yes, I understand. Can we have another look at the schedule from Micron

1 -- I am afraid I can't remember where it is in the bundle -- with the documents they  
2 say they are happy to disclose?

3 MR KUPPEN: It is paragraph 5 of the letter, tab 101. It should be the last in the  
4 bundle.

5 JUDGE: Where is the schedule referring to the 15 lever arch files?

6 MR JOWELL: In tab 34.

7 JUDGE: I still do not have it. 34 in which --

8 MR JOWELL: It says "Volume 1. Core case bundle".

9 JUDGE: Yes, I have it. Thank you.

10 MR JOWELL: It is 34. It is at tab 34. I think the relevant part is 236.

11 MR KUPPEN: This, of course, begs the question why it should be easier to search  
12 hard copy documents than electronic documents, which on the face of it have a very  
13 similar description.

14 JUDGE: I am sorry. I have now lost the most recent Allen & Overy letter. What tab  
15 is that in?

16 MR JOWELL: Tab 101.

17 JUDGE: I am sorry. Do you have anything more to say about that schedule?

18 MR KUPPEN: In the letter it suggested the 15 lever arch -- is that what you are  
19 asking me about?

20 JUDGE: Yes. I think I was inviting you to comment on the suggestion that the 15  
21 lever arch files should be disclosed but not the 15 boxes.

22 MR KUPPEN: We are happy for the 15 lever arch files to be searched. It is not  
23 clear to us why that would be preferable to searching the electronic files that are also  
24 described as files relating to the European Commission investigation and certainly  
25 not clear to us why it will take until the end of October to review 15 lever arch files,  
26 which is two and a half of these stows to give a sense of scale.

1 JUDGE: Do you have anything to say about the draft order providing for disclosure  
2 of the Commission Decision?

3 MR KUPPEN: No. We are content with the order as it is drafted. The detail is  
4 primarily one between Micron and Samsung.

5 JUDGE: Okay.

6 MR KUPPEN: At the moment it provides an additional paragraph 4, which says that:  
7 "Micron is to take reasonable steps to determine whether the Micron file contains  
8 some or all of the Samsung case file."

9 It is unclear to us what the purpose of that is or why it should be ordered, but again if  
10 Micron suggests it be ordered to do that, then we are not going to object. It just  
11 doesn't seem to serve any obvious purpose to us.

12 JUDGE: Yes. Thank you.

13

14

#### RULING

15 JUDGE: The next issue I have to deal with is the disclosure to be provided by  
16 Micron and Samsung. There are various elements to this. First, there is the  
17 unredacted copy of the Commission Decision itself. The terms on which that is to be  
18 disclosed are agreed.

19 Second, there are the Commission investigation materials referred to as the  
20 Commission File. Samsung has informed the Claimant that it holds a copy of the  
21 Commission File consisting of some 1,800 documents or pdf files. Disclosure of that  
22 file has also been agreed. Mr Kuppen submits, however, that provision of those  
23 documents is not going to advance matters to any material extent and that further  
24 disclosure should be provided. Micron has what it believes to be a copy of the  
25 Commission File consisting of a collection of 64 CDs, which were provided to  
26 Micron's solicitors by its former legal counsel in the United States. The CDs are

1 described in the following way in Mr Hitchin's third witness statement:

2 "The data that was able to be extracted from the CDs amounts to a collection of  
3 244,353 documents. 402 of those documents are native files and are stored in their  
4 original format with accompanying metadata such as file name and date of creation.  
5 The remaining 243,151 documents were only able to be extracted as image files.  
6 They do not contain file names or any other metadata in the load files beyond the  
7 document IDs used to extract them from the CDs. Of the 244,353 documents,  
8 244,104 are at least partially text searchable. The Second Defendant's external  
9 Relativity provider under the instructions of A&O has conducted some initial high  
10 level searches across the documents to determine what kind of documents are  
11 included and have found that a search for "subject" returned 186,217 documents  
12 indicating that a large number of the documents are likely to include e-mails."

13 Mr Hitchin goes on to describe a high level review, from which he says:

14 "It is apparent that the sample documents consist of a range of types of documents  
15 and a mixture of simple and complex material, much of which is likely to require  
16 a detailed level of knowledge of the context and the technical points at issue in this  
17 claim in order to be understood and assessed for relevance. Given the number of  
18 documents and their nature, as well as the lack of almost any metadata and the  
19 absence of an index, the task of manually reviewing the entire file of 244,353  
20 documents for relevance is likely to be a large, labour-intensive and costly  
21 endeavour. Such review would have to be conducted by a large team of paralegals  
22 and lawyers who are briefed on technical issues relevant to the dispute. Based on  
23 A&O's experience in conducting document reviews, it seems entirely plausible that  
24 the costs of conducting a review like this could run into hundreds of thousands of  
25 pounds.

26 The Second Defendant's view is, therefore, that the cost of conducting such

1 an extensive review would clearly be disproportionate to the value of the claim. It  
2 would not be reasonable for A&O to conduct the review requested at this stage.  
3 Rather, Osborne Clarke should be required to propose the specific search terms it  
4 proposes should be applied to the documents in order to identify the disclosure it  
5 seeks."

6 The Claimant wrote in November of last year to the Defendants with a list of  
7 disclosure requests consisting of various categories of documents described in  
8 general terms. Unfortunately matters did not really advance in terms of narrowing  
9 the requests or refining how the requests were to be pursued until this hearing.  
10 Mr Kuppen's position was that it really wasn't for the Claimant to suggest how to go  
11 about searching the 244,000 documents and it was a matter for Micron to come up  
12 with realistic proposals.

13 It seems to me that there is scope for further liaison between the parties in relation to  
14 how the 244,000 documents are to be reviewed and disclosed and that it would not  
15 be right for me to order disclosure in the broad terms proposed by the Claimant.

16 Mr Kuppen has quite rightly emphasised the need for proportionality in the way that  
17 disclosure is conducted and it seems to me that the appropriate course here is for  
18 the parties, as I say, to liaise and for the matter to be restored to the Tribunal after  
19 the initial disclosure has been provided with a view to seeing how then things can  
20 best be moved forward.

21 In addition to the Commission File both Micron and Samsung have proposed that  
22 archived financial and sales documents should be disclosed and that ought to be  
23 reflected in the order that will be drawn up after this hearing.

24 So that I hope deals with the outstanding matters in relation to the Defendants'  
25 disclosure.

26 MR JOWELL: There is one point of clarification I should make. I don't think it affects

1 anything. Simply I think you may have said, Sir, that we believed that the 244,000  
2 documents are the Commission File. I think the actual position is much more  
3 uncertain than that.

4 JUDGE: Is included somewhere in it.

5 MR JOWELL: It may include the Commission File.

6 JUDGE: I am happy to adopt that correction.

7 MR JOWELL: Thank you.

8

9 SUBMISSIONS RE FUTURE CONDUCT OF CASE

10 MR KUPPEN: Thank you, Sir. That then leaves the issue of how to organise the  
11 timetable from here.

12 JUDGE: Yes.

13 MR KUPPEN: Especially in light of the fact we will now have the second CMC.

14 JUDGE: Shall I tell you what I have in mind and then the parties can persuade me  
15 that I am wrong? I have in mind that there should be a second CMC in the  
16 Michaelmas term of this year after the initial round of disclosure has been completed,  
17 and it seems to me it ought to be possible to do that by September. So we are  
18 looking at a date in October or November.

19 I also have in mind that the trial date should be fixed now, but not the intermediate  
20 steps. I am told there is a window for the main hearing between 17th March and  
21 28th April of 2025.

22 MR KUPPEN: May I take instructions on that?

23 JUDGE: Yes.

24 MR O'DONOGHUE: We are very content.

25 MR JOWELL: I think we are also generally content with that. Just two points. One  
26 on the trial date. We were actually going to propose a very similar start date of

1 17th March. I think if we are working on the basis of a full four-week trial, then  
2 I think -- or a month's trial, that takes one to 17th April, which I understand to be the  
3 day before Easter Friday in any event. So it may be that the window should be  
4 a little bit shorter than the one that you mentioned.

5 The only other point that I would raise is it might be possible to complete the  
6 disclosure by, say, the end of September, but even then it does need the other side  
7 to have a chance to look at it and consider it and then formulate what further  
8 documents are required. So it might make sense, yes, to have it in the Michaelmas  
9 term, but perhaps in the second half of that term, perhaps from 14th November,  
10 something like that.

11 JUDGE: I take that point. There is apparently availability for a CMC between  
12 23rd and 31st October.

13 MR JOWELL: Is that the only --

14 JUDGE: That is the only one I have been given, but maybe I didn't ask the question  
15 in the right way.

16 MR JOWELL: That is a little bit early I would suggest.

17 JUDGE: That would give the parties a few weeks. Maybe it might be possible to  
18 complete the disclosure before the very end of September.

19 MR JOWELL: Maybe, but there are third parties that need to be written to and so on  
20 and redactions need to be made.

21 MR KUPPEN: I understand that there is a process to be followed. It's not a hugely  
22 complicated one and it is not a huge Commission File when we are talking about  
23 1,800 documents. Essentially those letters can be written within a week or two and  
24 give another couple of weeks to respond and yes, it takes some time to apply the  
25 redactions, but it is not -- this need not be a long and elaborate process.

26 MR JOWELL: This is one of these things where I am always told from behind "You

1 barristers always say that but you haven't had to do it". Actually I think it can take  
2 some time to identify the third parties who need to be written to, find their addresses  
3 and all that.

4 MR KUPPEN: The addresses are already in the --

5 MR JOWELL: There are ten different addressees.

6 JUDGE: Brian, do we know what it is looking like in November? Let's deal with  
7 anything else and then we will rise for five minutes and then ask the court office what  
8 the dates are in November, if any. Yes.

9 MR KUPPEN: I am grateful. I think that takes care of most of the directions. There  
10 is the question of expert evidence, which in our submission would be useful to  
11 decide now, partly because the process that's ahead of us will also involve  
12 engagement with the experts.

13 JUDGE: Well, there is no dispute, as I understand it, as to what the experts should  
14 be -- their fields of expertise. Are you saying I should order dates?

15 MR KUPPEN: No, it is not dates. I believe we need permission for expert evidence.  
16 So the order we are looking for is simply one that says that the Claimant and the  
17 Defendant have permission to adduce expert evidence in those two fields. There is  
18 a question whether Micron would require an expert on the market, given that it is  
19 likely to have that expertise in-house as opposed to the Claimant, who, of course, is  
20 represented by its liquidators. That's the only order we are asking for.

21 MR JOWELL: In terms of experts, I think it is common ground that economic  
22 expertise will be required. I think whether there's room for industry expertise is less  
23 certain. There is also the question of whether possibly a forensic accountant may be  
24 useful in relation particularly to the pass on side of things. We think it's a little early  
25 to say that those -- to make a decision now as to those two other categories of  
26 expert evidence. We can certainly agree and all operate on the assumption that



1 | economists will be required.

2 | JUDGE: Let's go that far, shall we?

3 | MR JOWELL: Yes.

4 | MR KUPPEN: The other issues -- the other topics I have on my list is just simply to  
5 | note that the pleadings, there is outstanding amendments to the Particulars of Claim.  
6 | These now been agreed between the parties and the proposal is that the Claimant  
7 | serves the Amended Particulars within the next few days. I believe the proposal  
8 | from Micron was to file an Amended Defence within four weeks, or 28 days I think it  
9 | said and a Reply on the same -- a Reply in the same timescale. We are content with  
10 | that proposal.

11 | JUDGE: Yes.

12 | MR KUPPEN: There is in Micron's draft order still the issue of the CMC to consider  
13 | security for costs. Now that we have a second CMC in the diary my only submission  
14 | on that would be that if that issue is to be raised, ideally it should be raised at that  
15 | CMC rather than having another one in early 2024 just to discuss that issue, but  
16 | again, of course, that is an issue that ordinarily is subject to an application, and if  
17 | such an application is being made it will need to be dealt with.

18 | JUDGE: Yes.

19 | MR KUPPEN: The big outstanding issue then on the agenda is the Claimant's  
20 | application for these proceedings to be cost managed. Really it's a relatively  
21 | straightforward point that the Claimant makes in this regard. The Tribunal will  
22 | naturally be concerned that the proceedings are conducted at proportionate and  
23 | reasonable costs. I think all of the parties today have made it amply clear that they  
24 | share this concern.

25 | In competition litigation this is also regularly challenged. Defendants have  
26 | highlighted disclosure and written submissions and also experts as the typical costly

1 steps. In the Claimant's submission that's only one source of cost in the sense that  
2 these are big blocks, but ultimately they are relatively fixed and need to happen.  
3 What tends to inflate costs perhaps beyond what steps will be necessary is delay in  
4 the proceedings.

5 The Claimant, therefore, in the present case really seeks ways to control the costs  
6 and keep discipline in the proceedings, which is partly, of course, achieved simply by  
7 case management, but the Claimant says that it would also be useful to have a more  
8 formal and closer supervision of costs in these proceedings. The factors that are  
9 also relevant in that context, of course, is that the Claimant is not a large industrial  
10 company, as the Defendants are, but it is a company in insolvency with limited  
11 resources.

12 The order that we are proposing is a relatively straightforward one for the moment.  
13 We are asking for cost budgets to be filed and budget discussion reports and to put  
14 provision for a cost management conference into the directions, which could be  
15 an hour or an hour and a half if those budgets can't be agreed. If the budgets can be  
16 agreed that's, of course, the preferable course.

17 For the moment we don't propose to take any further steps, but what we do say is  
18 that it would be useful discipline to take that step. What is being put against me  
19 really is two objections. One of them is to say it is premature, because I think the  
20 words being used are the basic shape of these proceedings is not known and the  
21 true quantum isn't known. That was Samsung's complaint in its letter in response to  
22 our application, which is in CMC bundle 11.

23 Mr Hitchin's witness statement adopts these concerns of prematurity, and ironically  
24 also complains that the Claimant had six years to apply for cost management and  
25 did not do so yet.

26 The basic complaint seems to be that if the shape is not clear one does not know

1 | what costs to manage, and if the true quantum is not known it is impossible to say  
2 | what's proportionate, but quite frankly these are points that apply to every cost  
3 | management exercise. Quantum is always in dispute. It is at the moment as it  
4 | stands following settlements estimated by the Claimant at about 7 million in  
5 | damages, plus another 10 million in interest.

6 | Both the Defendant and the Part 20 Defendant -- Micron says that on any  
7 | reasonable view this is a vast over valuation. It says really 1.2 million might be  
8 | a good estimate if one just takes a few tweaks. That's their skeleton paragraphs 8  
9 | and 10. Samsung equally stresses it's a claim of relatively modest value.

10 | So in our submissions the shape of the proceedings is tolerably clear. We have  
11 | a trial date. We know what steps we are facing in terms of disclosure, even if the  
12 | precise scope of disclosure is not known, and the uncertainty as to value really can't  
13 | stand in the way. Yes, we accept it is above theoretically in the pleaded sense the  
14 | 10 million cut-off employed in the CPR, but it is also clear it is, as has been put,  
15 | a competition claim of modest value.

16 | Our submission, therefore, is that it would be of benefit to have that additional  
17 | discipline on costs. The order that we are proposing, as I said, is one for cost  
18 | budgets to be filed as a first step, and that matches the order given in a recent case  
19 | in the Tribunal in Vattenfall, as set out in our skeleton -- I am not sure I need to take  
20 | you to it -- where very much the same considerations were at play in terms of  
21 | uncertain value, but ultimately the benefit was seen in having cost budgets at least  
22 | and then to take things from there.

23 | JUDGE: Yes. What does your proposed timetable have in mind when it says:

24 | "Parties to file budget discussion reports."

25 | Is that -- does that mean a response to the present day cost budgets?

26 | MR KUPPEN: Yes.

1 JUDGE: So what you are suggesting is that these cost budgets should be filed, but  
2 that I shouldn't necessarily tie my own hands today as to whether eventually to make  
3 a costs management order.

4 MR KUPPEN: That is exactly right. That's not an unusual approach to take to cost  
5 management, as with all of these things, there is at least some hope that the budgets  
6 can in any event be agreed and a costs management order is very much a second  
7 step that may follow after that.

8 JUDGE: Okay. All right. Yes. What do you say, Mr Jowell?

9 MR JOWELL: Sir, although we share entirely the desire to keep these proceedings  
10 proportionate and within proportionate costs, as I think we have demonstrated today,  
11 we don't think this is a sensible order to make, certainly not at this juncture.

12 I don't know whether you've had an opportunity to look at the authority in another  
13 case brought by the same group of companies or by the Granville companies. It is  
14 a judgment of Mr Justice Picken in the authorities bundle at tab 25. This is a claim  
15 brought by Granville and OTC. You will see the discussion starts in paragraph 11.  
16 Perhaps I could just invite you to read paragraphs 11 to 24, where Mr Justice Picken  
17 deals with the application.

18 JUDGE: Yes.

19 MR JOWELL: There are essentially two features of the reasoning that are applicable  
20 also here. One is the difficulty in gauging the steps which will be required for this to  
21 proceed to trial and the other is the true size of the claim.

22 Now on the latter, my learned friend said this is a claim for 7 million plus 10 million in  
23 interest and that is what, of course, takes it over the CPR's 10 million threshold, but it  
24 is very important to note that the reason that as currently pleaded the claim is made  
25 up of so much interest is because there is a claim for compound interest.

26 Now, as matters stand that claim for compound interest is demurrable based upon

1 the principles recognised by the court in the Granville v Chunghwa Picture case,  
2 which you will see in the previous tab, which I don't need to take you through. In that  
3 case the claim for compound interest was struck out by Adrian Beltrami KC sitting as  
4 a judge. Now that judgment is on appeal and we will hopefully know the position in  
5 the next few months from the Court of Appeal as to whether that judgment is upheld.  
6 If one takes the claim for compound interest off the table, then the value of this claim  
7 very substantially decreases. Of course, that's one critical part of the equation when  
8 it comes to proportionality, what is the size of the claim. So rather than a claim for  
9 7 million plus 10 million interest, we will have a claim for 7 million plus very low  
10 millions in interest, if any.

11 I mean, of course, it is fair to say that they have sought to plead a case for 8%  
12 simple interest, but that's a very, very optimistic claim indeed to try to get 8% simple  
13 interest.

14 The other side is also, of course, that there is uncertainty as to the precise steps that  
15 are needed to get this case to trial. One has very much seen that today, because,  
16 as you recognised, we are in the business of staged disclosure. We will have to see  
17 exactly how things pan out in terms of what is going to be required of the parties.  
18 That will be critical, of course, when it comes to cost budgeting.

19 Now cost budgeting can be a very burdensome process. Indeed, it can take a lot of  
20 time to do it and needs to be done properly. There is no point doing it on the basis of  
21 when a key -- probably the single most important factor, which is the amount of  
22 disclosure, further disclosure that is going to be needed, is still entirely at large. So  
23 cost budgets, if they should be provided at all, should be provided in due course  
24 once we have a much better idea of what disclosure is going to be required,  
25 particularly of the Defendants.

26 Of course, it is an irony that's not lost on practitioners that the process of cost

1 management itself can run up very substantial costs, and what is important is that we  
2 don't lose the wood for trees here and that the Tribunal keeps its eye on the true  
3 objective, which is keeping costs proportionate to the amount at stake. We say that  
4 actually, rather than doing that, what one is going to do by introducing cost budgeting  
5 at this stage is just introduce more complexity, more burden on the parties and more  
6 costs.

7 Finally, I should make mention of the other point that my learned friend relies on,  
8 which is that he is a -- we are both representing two large Defendant companies and  
9 he is acting for a company in liquidation. We say actually there should be given no  
10 weight to that factor at all. All of the Defendants' steps to date have shown that we  
11 very much share the objective of keeping the incurrence of costs down to  
12 a proportionate level, and if anyone's conduct to date has endangered that objective  
13 it is the Claimant through its very expensive disclosure requests.

14 It is not proper in my submission to use a device of cost management and potentially  
15 cost capping as a device to protect a Claimant that brings a relatively speculative  
16 claim from exposure to the Defendants' costs. That's not the proper role of these  
17 provisions. The Claimant here was a substantial commercial business, albeit it is  
18 now in liquidation, and there's no reason why it shouldn't pay adverse costs if it  
19 brings a speculative claim and fails. The purpose of these provisions is not to  
20 insulate an insolvent claimant from adverse costs awards. That's not in our  
21 submission a proper use of those provisions.

22 No doubt there are those creditors, presumably banks, who stand to gain ultimately  
23 from a successful prosecution of this claim, but they shouldn't do so on a risk-free  
24 basis.

25 Those are my submissions.

26 MR O'DONOGHUE: Sir, can I make one point based on Prysman? It is in tab 26 of

1 the authorities bundle. This is the only case my learned friend relies on positively.  
2 Can we just turn up the case? While we are waiting it really is the exception that  
3 proves the rule. It is the only case I am aware of in this Tribunal in a follow-on  
4 sphere that has imposed some type of cost budgeting. One can read into that what  
5 one likes, but it is certainly unusual.

6 Of course, Sir --

7 JUDGE: Which tab, is it?

8 MR O'DONOGHUE: Tab 26.

9 JUDGE: Unfortunately my tab 26 is blank. It must be a late edition.

10 MR O'DONOGHUE: Can I hand it up?

11 JUDGE: Yes. Thank you.

12 MR O'DONOGHUE: This is the only example where the Tribunal ordered cost  
13 budgeting in the follow on sphere. We would suggest that it is obvious why cost  
14 budgeting in general has much less traction in this Tribunal, is because standard  
15 disclosure is rarely, if ever, ordered, and it is at the core of the Tribunal's functions on  
16 case management that at all stages proportionality is front and centre of everybody's  
17 minds.

18 So, with respect, the read across from a Commercial Court context where disclosure  
19 operates differently to this Tribunal is not correct. There is a different context which  
20 is to be appreciated.

21 Two final points. First, one needs to look at what exactly happened in Prysmian.  
22 Sir, if you can look at paragraphs 5, 6 and 7. So what happened in Prysmian as  
23 a first stage, the parties were asked to put in how much they had spent to date and  
24 how much they projected spending going forward. You will see then, Sir, at 9 that  
25 somewhat surprisingly the Claimant's amount spent to date quadrupled. The  
26 Defendant and the amounts projected going forward at trial were more than double

1 on the Claimant's side. So there was a substantial and surprising disparity.  
2 By contrast in this case what Mr Kuppen proposes is that we forget about stage one.  
3 We jump straight to stage two full cost budgeting and without any indication at all  
4 before the Tribunal as to what amounts had been spent to date by any of the parties,  
5 we say that really puts the cart before the horse. We are long, long way away both  
6 for the reason that Mr Jowell gave that disclosure in the general shape of the  
7 proceedings remains large and because we have no idea what has been spent to  
8 date. So we say this really gets things backwards.

9 The final point, Sir, is one specific to SSEL.

10 JUDGE: So sorry. Let me just be clear what happened here. So there was initially  
11 summary estimates exchanged.

12 MR O'DONOGHUE: Yes. You will see in paragraph 5 there was an order that they  
13 would provide sums spent to date and projected sums going forward. At 9 you will  
14 see when those figures were put forward the Claimants were quadruple or double  
15 the Defendant, which was surprising. This is an application by the Defendant in that  
16 case, given the surprising disparity. We say, if anything, it is a point against OTC,  
17 not a point in their favour.

18 In any event finally, my final point --

19 JUDGE: Sorry to interrupt. So there were not ever formal cost budgets exchanged  
20 then?

21 MR O'DONOGHUE: Sir, it seems to have occurred in two stages. The first stage  
22 was at paragraph 5. Then, that having been completed and the disparity having  
23 become apparent, there was then a second stage of more formal cost budgeting.

24 JUDGE: Yes. Okay.

25 MR O'DONOGHUE: My point is we have not even got to stage one in this case yet.  
26 We have no idea what sort of amounts are at stake and the shape of disclosure and



1 so on remains to be seen.

2 The final point is at 22, 23, which is specific to the Part 20 Defendant. You will see,  
3 Sir, there was a question as to whether if there was to be cost budgeting should it  
4 extend to Part 20 Defendants. You will see at 23 the Chair decided it should not  
5 extend to third party defendants. It is the last sentence of 23:

6 "In my view, it is not clear that the nature and extent of such parts of the contribution  
7 proceedings as are to be tried with the main action requires the provision of costs  
8 budgets by the Nexans third parties."

9 So we would submit that in any event, given the somewhat limited nature of the  
10 dispute between the Part 20 Claimant and Part 20 Defendant, cost budgeting should  
11 not apply in any event to the Part 20 Defendant. That is something that stands apart  
12 from the other points I have made.

13 Sir, before I sit down there was a suggestion of Samsung as a huge undertaking and  
14 so on. SSEL, which is the only entity before this Tribunal is, in fact, a dormant  
15 company formerly based in Weybridge, so that does need to be taken in my  
16 submission with a grain of salt.

17 MR KUPPEN: Just to stay briefly on the Prysmian v Vattenfall case, I accept that in  
18 this particular case preliminary estimates of what had been spent and what was  
19 going to be spent were exchanged, but I don't accept that is a normal first step  
20 before cost budgeting. That may have been the context of that particular case. Cost  
21 budgeting is forward looking. In this case perhaps the issue arose because of what  
22 had been spent to date, but that's not the point or the basis on which the Claimant  
23 applies for cost budgeting in this case.

24 Paragraph 19 of the Vattenfall ruling has the judge concluding that:

25 "Properly prepared costs budgets are a useful case management tool, particularly  
26 where questions of proportionality arise, as they do in the present case."

1 Now the issues of proportionality there may have been different, but my learned  
2 friend for Micron spent significant time explaining that the true value of this claim is  
3 significantly smaller, which in my submission just makes clear that the point of  
4 proportionality is a very acute one. He said that one should not take into account  
5 that OTC is a company in liquidation. I think the Tribunal's governing principles, to  
6 which I took you, Sir, earlier at 4.2(c) are quite clear that the financial position of the  
7 Claimant is relevant to the question of proportionality and how to proportionately  
8 conduct the case.

9 There is always, Sir, the usual argument that cost budgeting itself can create  
10 significant costs and should therefore be avoided, but that's really a question that  
11 has been answered a long time ago when cost budgeting was put in place, that  
12 frankly it is worth doing it. I don't think it is a question that can be re-answered every  
13 single time to say that cost budgeting is just simply too difficult and so that in low  
14 value claims it is just not worth it. It is an argument that in my submission runs  
15 counter to the whole rationale of the scheme.

16 Those are my points, unless I can assist you further.

17 JUDGE: Thank you.

## 19 RULING

20 JUDGE: The next issue I have to deal with is whether or not to make an order for  
21 cost management. Mr Kuppen submits that his client is a company in liquidation  
22 which has limited funds available to conduct the litigation. By contrast Micron and  
23 Samsung are part of two very substantial corporate groups and essentially free to  
24 decide what resources to dedicate to defending the claim. He submits that, given  
25 this disparity, the Claimant is anxious that costs be kept within reasonable bounds so  
26 as to avoid a situation where high costs resulting from multiple opposing parties

1 taking a no stone unturned approach to this claim puts pressure on the Claimant as  
2 an opponent with lesser financial resources.

3 Quite apart from these considerations it is now incumbent on all parties to litigation  
4 and he submits on the Tribunal to strive to reduce the overall costs of litigation in  
5 accordance with the governing principles in Rule 4.

6 The application is opposed by Mr Jowell and Mr O'Donoghue. Mr Jowell submits  
7 that it is not a sensible order to make at this juncture, given the difficulty of knowing  
8 what the quantum of the claim is and the difficulty of knowing what steps are needed  
9 to get the case to trial. He referred me to a decision of Mr Justice Picken in a case  
10 brought by the Claimant amongst others in relation to a different follow-on claim in  
11 which the court decided that cost budgeting was not appropriate essentially because  
12 the claim in that case was put higher than £10 million whereas CPR 3.12 provides  
13 that cost management applies to all multi-track cases except where the claim is  
14 £10 million or more. The claim in this case may be more than 10 million. It is not  
15 clear what the quantum of the claim is. He also submits that the purpose of the cost  
16 management provisions is not to insulate a company from an adverse costs order.

17 Mr O'Donoghue submits that it is not surprising that cost management orders are  
18 rarely made by the Tribunal, which has a more restrictive approach to disclosure  
19 than the Commercial Court, and it is through making proportionate directions for  
20 disclosure that the Tribunal manages costs rather than via costs management  
21 orders.

22 I should also say it is suggested by Mr Jowell that the very process of cost budgeting  
23 is in itself an expensive exercise.

24 I was initially attracted by the procedure that was adopted in the case of Vattenfall by  
25 Mr Justice Adam Johnson, in which he initially provided for an exchange of informal  
26 costs estimates. When those were produced, the difference between the parties'

1 | respective estimates led to a more formal exchange of cost budgets. I have,  
2 | however, decided that in this case it would be appropriate to order at this stage  
3 | formal cost budgets, but on the basis that the Tribunal has not yet determined  
4 | whether or not this is an appropriate case to make any further directions in relation to  
5 | costs management. The exchange of cost budgets will enable the court to have  
6 | a clearer view of what directions it should make in the future to ensure that the case  
7 | is case managed in a reasonable and proportionate way.

8 | That order extends to Samsung, although I appreciate that in the Vattenfall case the  
9 | court decided that it was not appropriate to make an order against the Part 20  
10 | Defendant in that case.

11 | So we just need to fix dates.

12 | MR KUPPEN: Yes, I believe that's correct, for --

13 | JUDGE: I have some more information about November dates for a CMC. Actually  
14 | there is quite a lot of availability in November. Between 1st and 3rd November  
15 | apparently there would be availability for a CMC and that must I would have thought  
16 | allow enough time for disclosure and consideration of disclosure before the hearing.

17 | MR KUPPEN: Apparently there are some difficulties with those precise dates on our  
18 | side, Sir. I have been asked whether we could enquire what other --

19 | JUDGE: The other dates in November are 17th, 24th or 28th.

20 | MR KUPPEN: I have been asked whether we can take five minutes to try to figure  
21 | out arrangements.

22 | JUDGE: Yes.

23 | (Short break)

24 | MR KUPPEN: I am grateful. Out of the dates that were suggested if we could go  
25 | right to the end of it, 28th November --

26 | JUDGE: Yes.

1 MR KUPPEN: -- that would work best.

2 JUDGE: Did you reach any agreement with regard to the other dates?

3 MR KUPPEN: We have not. I think the suggestion earlier was towards the end of  
4 September for the disclosure of the File and the Decision.

5 MR JOWELL: Yes. We will do our best to get it done by the end of September. The  
6 good news about 28th November is that it allows a little bit of leeway if there is need  
7 for it.

8 JUDGE: Yes.

9 MR JOWELL: I should just mention as a matter of courtesy as things currently stand  
10 I will not be able to make the hearing on 28th November, but that should not stand in  
11 its way at all. Mr Pemberton will be available.

12 JUDGE: Very good. What about the dates for the -- sorry, Mr O'Donoghue.

13 MR O'DONOGHUE: Out of courtesy, I may have a difficulty on 28th. It's not entirely  
14 clear yet.

15 JUDGE: Let's hope not. What about the costs management?

16 MR KUPPEN: May I just ask very briefly? Best endeavours to provide the Decision  
17 by the end of September. I wonder whether we could, in fact, record a date by which  
18 it is likely to --

19 MR JOWELL: Why don't we say 30th September -- or 29th.

20 MR KUPPEN: Okay. In terms of the dates for budgets, the proposal we had made  
21 is by 14th July to file the Precedent H budgets and budget discussion reports  
22 subsequently on 11th August.

23 JUDGE: Well, that can clearly be put back quite a long way, can't it? I should have  
24 thought a date after completion of the first round of disclosure and then a date two  
25 weeks after that for budget reports.

26 MR KUPPEN: We would still suggest they be filed earlier. It is not entirely clear to

1 us why they should be delayed, because the idea in any event is to have then  
2 discussions about them with the hope to agree them. Leaving all of that to the back  
3 end doesn't seem wise to us.

4 JUDGE: Well, it is just that the later the provision of the cost budgets, the better  
5 informed they will be. Maybe two weeks is too short to allow for discussion. If we  
6 have a date shortly after the end of September and four weeks after that for reports,  
7 that will still allow several weeks before the hearing.

8 Is there anything else?

9 MR KUPPEN: Not from our side.

10 JUDGE: Who is going to take responsibility for finalising the various orders? Can  
11 you agree them?

12 MR JOWELL: Can we split it between us?

13 JUDGE: Yes.

14 MR JOWELL: Perhaps the Claimant can do the general directions. We can do the  
15 disclosure orders I think.

16 JUDGE: Very good. If you can try to get them back to the Tribunal by, say, the end  
17 of this week.

18 MR JOWELL: We will do our best.

19 JUDGE: Thank you very much.

20 MR JOWELL: Thank you.

21 **(3.42 pm)**

22 **(Hearing concluded)**

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