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IN THE COMPETITION

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

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 13th – Wednesday 14th May 2025

Before:

Justin Turner KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimant

JJH Enterprises Limited (trading as ValueLicensing)

V

Defendants

Microsoft Corporation and Others

A P P E A R A N C E S

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

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

1 Wednesday, 14 May 2025

2 (10.30 am)

3 Opening remarks

4 THE CHAIR: Some of you are joining us live stream on our
5 website. I must start with a warning. An official
6 recording is being made and an authorised transcript
7 will be produced. It is strictly prohibited for anybody
8 else to make an unauthorised recording, whether audio or
9 visual, of the proceedings, and breach of that provision
10 is punishable as contempt of court.

11 MR LAWRENCE: I have just had a discussion with
12 Mr O'Donoghue. We've agreed there are three
13 applications this morning. I have a very brief --

14 THE CHAIR: I was just going to give judgment on the waiver
15 point first. Is that convenient?

16 MR LAWRENCE: Of course.

17 (10.44 am)

18 (Judgment given)

19 (10.45 am)

20 Proceedings

21 MR GRUBECK: Sir, in the light of your ruling, I apply for
22 Microsoft's costs in relation to this application. Both
23 parties have provided costs schedules and I would invite
24 you to do a quick summary assessment. It should be
25 a matter of minutes. They are very short.

1 THE CHAIR: Mr Lawrence?

2 MR LAWRENCE: I don't resist the application for costs.

3 I have had a look at the schedule and if Mr Grubeck

4 wants to talk you through it, I can then comment on how

5 he justifies the amount.

6 THE CHAIR: Yes. We have other costs to deal with. Should

7 we deal with them at the same time, when we get down to

8 the cost schedules?

9 MR GRUBECK: Sir, I am in your hands. This may be very

10 quick to do.

11 THE CHAIR: Let's have a look at it, if you think it is

12 convenient.

13 MR GRUBECK: I can hand up both cost schedules while you

14 have the point in front of you.

15 THE CHAIR: What are these two documents?

16 MR GRUBECK: The one that says "Statement of Costs" is

17 Microsoft's costs schedule in relation to this

18 application. The other one is only relevant as

19 a comparator to the one that has been put in by VL.

20 THE CHAIR: Okay.

21 MR GRUBECK: The headline point from our perspective is the

22 total costs claimed by Microsoft are £24,854.50.

23 The comparator for that --

24 THE CHAIR: Is just short of £50,000.

25 MR GRUBECK: £50,000, so almost exactly double. That, in

1 and of itself, is a very clear indication that the costs
2 sought are reasonable and proportionate.

3 I just make two points. One is VL's claimed
4 solicitor's costs on this issue are almost five times
5 those claimed by Microsoft. And on counsel fees, my
6 learned friend's claimed fees alone are higher than the
7 fees claimed by Mr O'Donoghue KC, Ms Lukacova and me put
8 together.

9 THE CHAIR: It is not one of those applications where it is
10 both parties doing the same. You argued the point
11 forcefully on the law and there has been a lot of
12 digging around, obviously, through disclosure on the
13 claimant's side. So I am not sure to what extent I can
14 determine the issue by reference to your costs, but
15 obviously, it is helpful to have a full picture --
16 determine it by reference to VL's costs rather, but it
17 helps to have the full picture.

18 MR GRUBECK: Exactly. Yes, sir, in the light of it, it is
19 reasonable and proportionate.

20 MR LAWRENCE: Sir, you have made the point I would have
21 made, which is that my costs are not relevant to an
22 assessment in this context of Mr Grubeck's costs. I am
23 not going to stop and quibble about the amounts. The
24 rates, we would say, are above the guidance rates but on
25 a broad assessment, we would suggest 70 to 80 per cent

1 of this would be appropriate.

2 THE CHAIR: I am going to assess these costs at £21,000.

3 MR GRUBECK: Payable within 14 days, sir?

4 THE CHAIR: Is 14 days acceptable?

5 MR LAWRENCE: Yes.

6 THE CHAIR: Thank you.

7 Right, where next?

8 MR LAWRENCE: Sir, there are three applications. One I am

9 bringing and two that Mr O'Donoghue, I understand, is

10 bringing.

11 Mine relates to database disclosure by Microsoft.

12 The starting point to look at this is the order that was

13 made at CMC5, please. Which is in bundle B.

14 THE CHAIR: Yes.

15 MR LAWRENCE: -- at tab C23. The page reference is

16 page 400.

17 It is paragraph 4B. If I can just remind you --

18 THE CHAIR: You will need to remind me, yes.

19 MR LAWRENCE: Yes. So disclosure was ordered on the basis

20 of schedule 2, but there was a saving provision in

21 respect of disclosure resulting from database searches,

22 which the defendant was to carry out. No date was set

23 at CMC5. The order stated --

24 THE CHAIR: Yes, I recall this now, yes.

25 MR LAWRENCE: Yes.

1 THE CHAIR: What does this disclosure go to? What issue
2 broadly -- very broadly speaking?

3 MR LAWRENCE: All of the issues, as I understand it, in the
4 case. So the databases will cover -- will have data and
5 emails and other information relevant to the existence
6 of the campaign.

7 THE CHAIR: Right. But it is not relevant to the
8 preliminary issue?

9 MR LAWRENCE: It's not relevant to the preliminary issue,
10 no.

11 THE CHAIR: I understand.

12 MR LAWRENCE: I should say this, this is very largely agreed
13 between the parties.

14 THE CHAIR: Okay.

15 MR LAWRENCE: We were going to come back and ask for a date
16 for disclosure of all of this. There was some
17 correspondence -- I am not going to trouble you with it
18 unless my learned friend wants me --

19 THE CHAIR: Just tell me what the dispute is and what you
20 want.

21 MR LAWRENCE: The dispute is this. There are three
22 databases in issue, as I understand it: VL central
23 approvals, MSX CRM, and DD360.

24 THE CHAIR: Sorry, VL central approvals. What's the next
25 one?

1 MR GRUBECK: VL central approvals.

2 THE CHAIR: Yes, I have that.

3 MR O'DONOGHUE: MSX CRM which is a relationship management
4 product.

5 THE CHAIR: Yes.

6 MR LAWRENCE: And DD360.

7 THE CHAIR: Yes.

8 MR LAWRENCE: In the correspondence we were told before
9 making the application that there were technical
10 difficulties unresolved and would be delays --
11 potentially significant delays --in relation to MSX CRM
12 and DD360. But all the issues in relation to VL central
13 approvals had been resolved.

14 The latest correspondence that I have is from 12 May
15 2025, when we were told that all three would be provided
16 by 27 July of this year. We asked two things. Two
17 points arise: one, it is not clear why VL central
18 approvals cannot be disclosed now. We would like to
19 look at it and get on and see it, if possible. We
20 asked, sir, and I don't believe we have had a response.

21 The other point that we were unclear about from the
22 correspondence is whether we are being assured and we
23 can have an order which we would like for the 27 July
24 deadline on MSX CRM and DD360. What we don't want to do
25 is to get to 27 July and then be faced with

1 correspondence that says that technical difficulties
2 have arisen and they can't produce on that date.

3 You may remember the exchange at CMC5, where you
4 indicated that if there was going to be continued delay
5 in providing the database disclosure, it should be
6 supported by technical evidence -- independent technical
7 evidence -- to justify that.

8 THE CHAIR: Yes.

9 MR LAWRENCE: So we have been asking --

10 THE CHAIR: Is there any evidence on this?

11 MR LAWRENCE: No evidence as to what the technical problems
12 are or the reasons for delay. We are just bringing it
13 to you now, to try to get a line drawn, as it were, in
14 the sand, by which date these databases should be
15 disclosed.

16 THE CHAIR: Right.

17 Mr O'Donoghue?

18 MR O'DONOGHUE: Sir, I can be brief. What Mr Lawrence says
19 in terms of the chronology is not quite right. Just one
20 preliminary point. We have already given very extensive
21 disclosure to VL. Indeed, the (inaudible) of
22 Mr Lawrence yesterday attests to that. You will recall,
23 sir, at CMC2 we gave organograms, lists of databases and
24 so on. Can we quickly look at CMC3? We disclosed,
25 I think, more than 10,000 documents. The order is at

1 BC15 --

2 THE CHAIR: Just before you do, what is the issue between
3 the parties? Just tell me, please.

4 MR O'DONOGHUE: In a nutshell, we have committed that we
5 will -- so as I understand it, there are nine databases.
6 Pursuant to paragraph 5.6, there is no issue in relation
7 to those, the only issue is in relation to the three
8 databases.

9 THE CHAIR: Yes.

10 MR O'DONOGHUE: We have committed to provide that by the end
11 of July.

12 THE CHAIR: Right.

13 MR O'DONOGHUE: We have said to them, if we apprehend there
14 are technical difficulties, we will set out in good time
15 in advance, including with technical evidence, if we
16 need more time. At the moment we do not envisage that.

17 What VL propose is in two weeks' time, we produce
18 a witness statement, and then they have an arbitrary
19 date, I think at the end of June. It is a complete
20 distraction. We want to get on with the work, not of
21 some satellite statement. Because what is the point in
22 two weeks' time, of us trying to forecast all the work
23 for June and July? We would rather get on with it and
24 complete the exercise and if we need more time, we will
25 try to agree this with VL and not trouble the Tribunal.

1 If we need to come back, we of course accept there will
2 need to be technical evidence as to what on earth is
3 going on. So that seems to be the way through it. Of
4 course, as you had said, sir, this is completely
5 unnecessary for the preliminary issue. It is agreed
6 between the parties that if the main trial ever occurs,
7 it will not be until Easter Term 2027. So the
8 suggestion that if they don't get this within a month
9 the sky will fall, it's absurd.

10 THE CHAIR: So when will you -- can you undertake to make an
11 application for any extension, if you need it, by
12 a certain date?

13 MR O'DONOGHUE: Yes.

14 THE CHAIR: What date would you envisage?

15 MR O'DONOGHUE: The date we have committed to for the
16 (inaudible) is 28 July. I would suggest not later than
17 14 days before then.

18 THE CHAIR: I will say 21 days before that.

19 MR O'DONOGHUE: Yes.

20 THE CHAIR: Yes. Sorry to cut through this. Mr Lawrence,
21 is that acceptable?

22 MR LAWRENCE: Yes, it is, yes.

23 THE CHAIR: Very good.

24 MR O'DONOGHUE: Okay.

25 So, sir, two further short issues. One, of course,

1 is yet another costs issue.

2 THE CHAIR: I have that in mind.

3 MR O'DONOGHUE: There is a short point on VL's disclosure.

4 Now the Tribunal will recall from the last CMC that

5 VL was ordered to give certain disclosures by the end of

6 April. If we can quickly look at the order. It is at

7 BC23, at page --

8 THE CHAIR: Sorry?

9 MR O'DONOGHUE: Bundle B, C.23.

10 THE CHAIR: Which paragraphs?

11 MR O'DONOGHUE: Paragraphs 1 and 2.

12 THE CHAIR: Yes.

13 MR O'DONOGHUE: You will see, sir, there are three distinct

14 buckets. One is the CRM itself. So in 1A you get

15 something called trackers and 1B, you have Verba, which

16 is the audio system.

17 THE CHAIR: Yes, I remember that, yes.

18 MR O'DONOGHUE: Two is the contents of the CRM itself.

19 THE CHAIR: Just remind me, what was the CRM?

20 MR O'DONOGHUE: That is the customer relationship management

21 database. The interactions with customers.

22 THE CHAIR: Thank you.

23 MR O'DONOGHUE: The issue for today, sir, is on the trackers

24 which are essential to navigating the CRM itself. The

25 Tribunal will appreciate that supply and demand for

1 secondhand licences is a critical issue in this case.

2 THE CHAIR: Yes.

3 MR O'DONOGHUE: And the initial disclosure in this case

4 suggests they could not even sell the stock they had,

5 never mind the stock they would have had.

6 THE CHAIR: Yes. (Inaudible words), yes.

7 MR O'DONOGHUE: There is a question as to whether they are

8 an efficient competitor and a question as to was there,

9 indeed, any demand.

10 So we need to be able to navigate the CRM to

11 interrogate that question and the trackers were the sort

12 of key to unlocking this and finding the needle in the

13 haystack.

14 Now I should say we understand there are

15 13.5 million documents in the CRM, so one can see why

16 a tool to find the needle in a haystack is useful.

17 I will come back to that.

18 So there were three different buckets. Trackers is

19 the one for today. Something was disclosed at the end

20 of April but it is, unfortunately, quite problematic.

21 I can give you the headline points. It is in a letter

22 at F103.

23 THE CHAIR: There is no evidence on this?

24 MR O'DONOGHUE: It is in correspondence.

25 THE CHAIR: Okay.

1 MR O'DONOGHUE: These issues, so far as they go, are not in
2 dispute.

3 THE CHAIR: No, no, fine.

4 MR O'DONOGHUE: Sir, to cut to the quick, they are being
5 resolved.

6 THE CHAIR: Yes.

7 MR O'DONOGHUE: We reached an impasse on trackers and that's
8 what I want to get a direction on today.

9 THE CHAIR: So bundle F.

10 MR O'DONOGHUE: Just to give you a flavour of the problems,
11 it is F103 and starts at 441.

12 THE CHAIR: 441?

13 MR O'DONOGHUE: Yes.

14 THE CHAIR: 7 May?

15 MR O'DONOGHUE: Yes. You see paragraph 2 under "CRM
16 system", last sentence in the middle:
17 "No working version of CRM is provided. The data
18 provided were in a format that means our clients are
19 unable to easily access, navigate and view the same."
20 Then you see the next paragraph:
21 "We were promised on 25 April 'a working version of
22 the CRM underlying SQL database'."
23 Then over the page, paragraph 4:
24 "Our clients still do not have access to your
25 working version of the CRM system, as anticipated in

1 your letter."

2 Then 5 and 6:

3 "We propose to call a meeting with the appropriate

4 individual from the claimants who has a working

5 knowledge of the database."

6 And at that stage there was a flat "No", and they

7 said they would not attend a call with our clients

8 regarding how the dynamic CRM works.

9 So at that stage it was "No, no, no."

10 Now they have somewhat softened their position. But

11 the practical point at this stage is that more than two

12 weeks after this disclosure was meant to be given, we

13 don't even have login details to the database.

14 THE CHAIR: That's a separate matter to trackers.

15 MR O'DONOGHUE: It is, but it is part of the picture.

16 Now they had thought better of the suggestion we

17 might actually cooperate and meet to discuss this.

18 THE CHAIR: Excellent.

19 MR O'DONOGHUE: Well, sir, they give with one hand and take

20 with the other. If I can just give you a letter of 12

21 May from VL.

22 Sir, over the page at paragraph 6, they say: well,

23 okay, fine, we will have a call, but it has to be only

24 one hour, despite the fact they don't even know what we

25 wish to discuss. Again, that isn't very helpful or

1 cooperative. Then they say: well, we can't meet until
2 early June, without giving any dates.

3 Anyway, this isn't terribly helpful for the most
4 part.

5 Now on trackers, sir, there is a particular impasse
6 reached. I will briefly explain the point to you and
7 then tell you what we would like done, if possible,
8 today. In a nutshell, we have had a series of quite
9 evasive responses on what is going on with trackers.
10 Effectively, they have reached an impasse, where they
11 say: well, we are not going to tell you anything else
12 other than what we have told you. I will just give you
13 a flavour of what is going on. If we start at bundle G,
14 A.7. It starts at 97.

15 THE CHAIR: Yes.

16 MR O'DONOGHUE: It is page 99, sir, the part of discussion
17 on the trackers. Paragraph 18A. They say:

18 "...we have fashioned searches for CRM trackers
19 based upon either the document's title or phrases used
20 in the document."

21 That's the limit of the explanation on trackers.

22 THE CHAIR: So this is searching for trackers?

23 MR O'DONOGHUE: Indeed.

24 THE CHAIR: I'm not quite sure I understand --

25 MR O'DONOGHUE: Indeed.

1 THE CHAIR: -- why one needs to search for trackers. That's
2 my ignorance, rather than -- it's not a pointed --
3 MR O'DONOGHUE: That is the very point. Because this is
4 about lead generation and pursuit. There must be
5 a method or system internally within VL to follow up
6 customer leads --
7 THE CHAIR: I see --
8 MR O'DONOGHUE: -- and the suggestion that one needs to run
9 key word searches --
10 THE CHAIR: To find the trackers. Right.
11 MR O'DONOGHUE: -- really is not very helpful. Anyway,
12 a couple of further references and then I will get to
13 the point.
14 If we then look at F, A.86, please.
15 THE CHAIR: Back to F?
16 MR O'DONOGHUE: Yes.
17 THE CHAIR: Page number again, please?
18 MR O'DONOGHUE: 393. It is paragraphs 4 and 5 of that
19 letter. Again, this isn't terribly helpful. It
20 suggests they are focusing within the CRM itself,
21 whereas our understanding is that the tracker is
22 something which is not exactly the CRM itself, it's
23 a system or method of lead generation.
24 Then if we look at paragraph 4, they say:
25 "According to Mr Henderson, your clients were

1 seeking contemporaneous documents extracted from the CRM
2 system in order to share between members of our client's
3 team and give status updates."

4 Then at 5, they say:

5 "Your letter now seems to require our client to
6 disclose ... 'to make the CRM system accessible and
7 navigable once disclosed'. Such a document would not be
8 a CRM tracker as the parties had previously understood
9 it to mean. Instead, it seems you are requesting some
10 kind of database schematic. As we have previously
11 informed [you] ... our client does not have any such
12 document in its control."

13 We responded -- if we then go to F, A.103, please.

14 THE CHAIR: Page number?

15 MR O'DONOGHUE: 441. The bit I am interested in, sir, is in
16 442.

17 THE CHAIR: Yes.

18 MR O'DONOGHUE: You see, sir, where it says "Has your firm
19 ..."? It is paragraph 10. Top of page 443.

20 THE CHAIR: "Has your firm asked your client ...?" Okay,
21 I understand, yes.

22 MR O'DONOGHUE: "Has your firm asked your client to explain
23 how it uses trackers in the CRM Dynamics system in the
24 normal operation of your client's business? This seems
25 like a sensible and proportionate step to take."

1 Again, it is a rather obvious point. What is the
2 point of banging in key words? Surely the logical
3 starting point is you ask your client what, in real
4 time, were you doing to track these leads to generate
5 them. Again, this has not been responded to.

6 Now, the final thing I want to show you, and then
7 I will tell you what we would like to be done, we have
8 had a response to the letter you have just seen which
9 I can hand up (Handed).

10 You have had it. It is what I handed up. They say
11 at paragraph 7 --

12 THE CHAIR: This is?

13 MR O'DONOGHUE: The letter of 12 May. They say:

14 "With regard to CRM trackers, we have nothing
15 further to add to what we have said in our previous
16 correspondence."

17 THE CHAIR: Yes.

18 MR O'DONOGHUE: So the simple question I showed you, "Well,
19 have you discussed this with your client and what do
20 they say about trackers?" Nothing. So they have buried
21 their head in the sand and said "Well, that's the end of
22 it." In terms of what we want today, it is really
23 a direction, sir. What we want to avoid, to put our
24 cards on the Tribunal, the Tribunal expects that the
25 parties will cooperate, particularly on disclosure. On

1 things like trackers and databases, there is an
2 asymmetry of information. They know how it works, they
3 know where the trackers are located and we don't.
4 What we really want to avoid is a pointless
5 application, a waste of the Tribunal's time.
6 THE CHAIR: You need to be able to navigate through this
7 database.
8 MR O'DONOGHUE: Yes, we have a 13.5 million haystack. There
9 is tracker which is an important tool to navigation and
10 they need to get off the fence --
11 THE CHAIR: You don't know how they navigated through
12 that --
13 MR O'DONOGHUE: No.
14 THE CHAIR: -- database themselves?
15 MR O'DONOGHUE: They won't tell us.
16 THE CHAIR: Right, I understand.
17 MR O'DONOGHUE: So, sir, in terms of -- sir, on the
18 cooperation point -- so, for example, Microsoft has
19 given VL direct access to its lead E-disclosure manager
20 when it comes to our disclosure. So we have been
21 cooperating. We have been giving technical access,
22 where appropriate, on a direct basis, with a very, very
23 senior person from the company --
24 THE CHAIR: So maybe the response -- it may be a question
25 for VL, but they say they have complied with paragraph 1

1 of the order of 2 April. That required any trackers
2 within its possession or control to be provided and any
3 metadata in respect of the Verba data. So just 1A.

4 MR O'DONOGHUE: Yes.

5 THE CHAIR: I have only seen snapshots of the correspondence
6 but VL's position is they have complied with that.

7 MR O'DONOGHUE: Sir, they have, it seems, plugged in search
8 terms, such as the word "tracker" and said "Well, there
9 you go." But that's not we're looking for, with
10 respect.

11 THE CHAIR: Right.

12 MR O'DONOGHUE: We had a much more basic request which is
13 "You have these tracker tools. What are they and where
14 can we find them?"

15 THE CHAIR: I understand.

16 MR O'DONOGHUE: That is a very simple explanation, one would
17 have thought.

18 THE CHAIR: I understand your position.

19 Let me hear from --

20 MR LAWRENCE: I want to dispel any suggestion that we have
21 been evasive or uncooperative on this. We have done
22 quite the opposite. We have provided a CRM database
23 which is a Microsoft product, as I understand it, and
24 which Microsoft ought to be able to navigate its way
25 around. We provided it on an open-book basis, rather

1 than going to all the cost and expense of trying to sift
2 out what was relevant to the proceedings. We have done
3 open-book and handed the database to Microsoft to
4 navigate its way around.

5 Insofar specifically as the trackers are concerned,
6 it is really important, I think, just to look at one
7 document --

8 THE CHAIR: Is the database indexed?

9 MR LAWRENCE: I am not the right person to ask. My
10 instructions are that we have given what we have. If
11 there is something more that Mr O'Donoghue's clients
12 need --

13 THE CHAIR: How do you navigate through this database?

14 MR LAWRENCE: So, accessed through the front end, and then
15 there is a database which is searched through the front
16 end.

17 THE CHAIR: Right.

18 MR LAWRENCE: We are going to provide login details to the
19 CRM database. So there has been an issue as to whether
20 we -- we didn't want to provide access to a live version
21 of the system that could then be altered from outside.
22 So we are providing access direct into the system.

23 But the question here, sir, is what exactly is
24 Mr O'Donoghue asking for? We believe we have given what
25 we understood to be trackers. We have set that out in

1 our letter of 2 May.

2 THE CHAIR: Let's have a look at that.

3 MR LAWRENCE: My instructions are "CRM tracker" is not

4 a technical term.

5 THE CHAIR: Where are the --

6 MR LAWRENCE: Page 392 of bundle F. It is in the

7 correspondence bundle.

8 THE CHAIR: Just give me that reference again.

9 MR LAWRENCE: 392. It is a letter that Mr O'Donoghue didn't

10 take you to. It deals with what we think we were

11 required to disclose under the order --

12 THE CHAIR: Which paragraph? CRM trackers.

13 MR LAWRENCE: Under A. If you look at page 392A "CRM

14 trackers", with regard to paragraph 1A -- so that is

15 compliance with the order. The early part of the letter

16 sets out the CMC order paragraphs 1 and 2. So:

17 "We note that a CRM tracker is not a technical term

18 ..."

19 THE CHAIR: But "tracker" is a technical term. A term you

20 understand. It is in the order.

21 MR LAWRENCE: And there appears to have been either

22 a misunderstanding as to what that meant --

23 THE CHAIR: What did you think it ant?

24 MR LAWRENCE: We thought it meant the things that we have

25 described if you read paragraphs 3, 4 and 5 of the

1 letter.

2 THE CHAIR: Let me just read this then.

3 MR LAWRENCE: Yes.

4 MR O'DONOGHUE: Where it says "league generation", that

5 should obviously be "lead".

6 THE CHAIR: So what did you understand "tracker" to be?

7 MR LAWRENCE: Sir, what we have given. There is, I believe,

8 some correspondence that sets out exactly what we have

9 given to them.

10 THE CHAIR: You say what isn't a CRM tracker, but you don't

11 say what tracker you have provided.

12 MR LAWRENCE: May I cut through this? Our suggestion is

13 that there should be a call, as suggested, to try to

14 identify what it is exactly that Mr O'Donoghue is asking

15 for. At the moment --

16 THE CHAIR: I think what Mr O'Donoghue is asking for is the

17 means by which to navigate through and interrogate this

18 database.

19 MR LAWRENCE: And my understanding is we don't have

20 a schematic for that. We don't have the thing that he's

21 asking for.

22 THE CHAIR: If you had to do it, how would you do it?

23 Mr O'Donoghue wants the tools so that he can do it the

24 way you do it.

25 MR LAWRENCE: So, I mean, it is a Microsoft system.

1 Microsoft know how to navigate their way around it. It
2 is just something you navigate your way around.

3 THE CHAIR: It depends how it is indexed.

4 MR LAWRENCE: I don't know. I don't have the information.

5 I am probably the least technically knowledgeable --

6 THE CHAIR: We are not getting anywhere at the moment.

7 MR O'DONOGHUE: We are not, sir, but in two minutes we have
8 had more than we have had in the last two weeks. May
9 I suggest a practical way forward. I think it is common
10 ground --

11 THE CHAIR: Mr Lawrence was about to suggest a practical --
12 let me hear what his proposal is.

13 MR LAWRENCE: We have suggested that there should be --
14 well, my learned friend's clients have suggested that
15 there should be a --

16 THE CHAIR: A meeting.

17 MR LAWRENCE: A call meeting. We have said "Absolutely fine
18 but please give us an agenda." We would like to know
19 who is going to be on the call so that we know what
20 technical expertise they are putting forward and we will
21 put forward. So we will have a discussion to try to
22 work out what more they need.

23 THE CHAIR: I don't think it needs to be overly formal.
24 Obviously, you know what the issue is. They need to be
25 able to --

1 MR LAWRENCE: Since --

2 THE CHAIR: -- identify documents in this database.

3 MR LAWRENCE: Since the suggestion was made, the issues have

4 narrowed. If it has come down just to trackers --

5 THE CHAIR: All right.

6 MR LAWRENCE: -- then maybe we just have a call that

7 discusses trackers.

8 THE CHAIR: I am not sure it is just -- Mr O'Donoghue, in

9 a paragraph, can you identify what it is you hope to

10 achieve from the call.

11 MR O'DONOGHUE: Yes.

12 THE CHAIR: I am not asking you to do it on your feet, but

13 if you can do that.

14 MR O'DONOGHUE: I can tell you now, sir. We would like

15 three things. I think it is common ground we will get

16 access to the live version of the database. That's

17 something we have not had to date.

18 THE CHAIR: Hold on, I'm not sure that's --

19 MR LAWRENCE: Not live.

20 MR O'DONOGHUE: Well, the business is no longer trading. I

21 am not sure what live means in this context, but we want

22 a working version of access to the database. You can't

23 have it both ways. You can't say there are tools within

24 Dynamics by which we can access this but not give us

25 access to the live version itself. That is one. I have

1 already shown you we want a very simple explanation. We
2 have had shades of this already: how do they use the CRM
3 database, including in particular, for tracking? As we
4 understand it, within Dynamics there is a specific tool
5 marked "Track," to follow these leads. And it is common
6 ground that there should be a meeting or a call or
7 something soon, including technical people, where all
8 this can be hammered out.

9 THE CHAIR: Right.

10 MR O'DONOGHUE: It is quite concerning that in a few minutes
11 this morning, we have had far more information -- it is
12 not satisfactory -- than we have had in the last few
13 weeks.

14 THE CHAIR: I think it is common ground there should be
15 a meeting. I think it would be useful for Microsoft to
16 set out in a paragraph what it hopes to achieve from
17 that meeting, so there is no cross-purpose.

18 MR O'DONOGHUE: Yes.

19 THE CHAIR: I see no reason why the meeting should be
20 limited to an hour. I would have thought it could be
21 anything up to half a day if that is necessary.

22 The appropriate technical people need to be there.
23 And I think the guiding principle is that the Claimant
24 should be providing every assistance to Microsoft, to
25 make sure that they can identify material within the

1 database efficiently.

2 And, of course, that applies both ways.

3 MR O'DONOGHUE: Yes. Sure, on that, rule 4.5 says "Active
4 case management includes encouraging the parties to
5 cooperate with each other in the conduct of
6 proceedings."

7 THE CHAIR: Yes.

8 MR O'DONOGHUE: Sir, I really, really want to avoid that we
9 are back in front of you on a pointless basis. You,
10 sir, have a day job. You have better things, I am sure,
11 to be doing than some of this. There needs to be
12 cooperation.

13 MR LAWRENCE: May I just comment on that. We would like to
14 make sure that the correct or the appropriate technical
15 people from the Microsoft side are on the call as well.
16 So while we will cooperate --

17 MR O'DONOGHUE: We will provide that within 48 hours.

18 THE CHAIR: It needs to be -- obviously, the right questions
19 need to be asked.

20 MR O'DONOGHUE: With the right people. And we need
21 a meeting quickly. This idea of an unspecified date in
22 early June is kicking for touch.

23 MR LAWRENCE: We are going through a major disclosure
24 exercise at the moment. The suggestion was we should
25 park the call until after the disclosure exercise is

1 completed.

2 THE CHAIR: I see no reason why this shouldn't be in the

3 next two weeks.

4 MR O'DONOGHUE: It should have been done two weeks ago.

5 MR LAWRENCE: It's not clear to me what the urgency is.

6 THE CHAIR: An order was made that trackers be provided --

7 MR LAWRENCE: We don't accept for a moment that we have

8 breached the order.

9 THE CHAIR: I know you don't. But it is not clear to me

10 that you have articulated what it is you provided which

11 was a tracker.

12 MR LAWRENCE: It's in the correspondence.

13 THE CHAIR: Do you want to show me -- what have you provided

14 that is a tracker?

15 Whether it is there or not, I see no reason why this

16 meeting can't take place in the next two weeks. Up

17 to -- I say half a day, up to two hours. I do not think

18 it should be guillotined at an hour. Hopefully it can

19 be done in half an hour, with technical people talking

20 to each other. If it is necessary to come back to

21 court, we will need proper technical evidence on this.

22 MR LAWRENCE: I am being instructed that Mr Horley will make

23 himself available.

24 THE CHAIR: Very good.

25 MR O'DONOGHUE: I think we have a way forward.

1 THE CHAIR: Okay.

2 MR O'DONOGHUE: We will provide our --

3 THE CHAIR: Yes. It is a direction that a meeting should

4 take place within two weeks and that you will provide

5 within the next 48 hours, a paragraph of what it is you

6 hope to achieve from that meeting.

7 MR O'DONOGHUE: Yes.

8 The last item is summary judgment costs. Do you

9 want a break now, sir?

10 THE CHAIR: I think we had better -- no, we don't need to

11 break quite yet, do we? Let's press ahead to summary

12 judgment and costs.

13 MR O'DONOGHUE: You recall that we resisted summary judgment

14 and you made a determination that we would get

15 90 per cent of the costs of that application.

16 THE CHAIR: Yes.

17 MR O'DONOGHUE: There have been costs orders in these

18 proceedings before. There was a jurisdiction challenge

19 that we failed on. We paid that within two months.

20 There was a Court of Appeal procedural deadline issue.

21 THE CHAIR: Subject to hearing Mr Lawrence, I don't need to

22 hear you on the fact that you should have some costs on

23 an interim basis.

24 MR O'DONOGHUE: Yes.

25 THE CHAIR: I am not with you that they should be going off

1 to assessment at this stage.

2 MR O'DONOGHUE: We do not want that, sir.

3 THE CHAIR: Okay.

4 MR O'DONOGHUE: We seek an interim payment.

5 THE CHAIR: Fine. Yes. I am with you so far. Let's hear

6 from Mr Lawrence.

7 MR O'DONOGHUE: Then it's for Mr Lawrence to --

8 THE CHAIR: Persuade me why there shouldn't be an interim

9 payment.

10 MR LAWRENCE: I am not resisting an interim payment on that

11 basis. What I was concerned to do was to resist having

12 an interim payment and then a full assessment at this

13 stage.

14 THE CHAIR: I am with you on that. So we need to make an

15 interim assessment.

16 Remind me where the document is. I did see the

17 figure at some stage.

18 MR O'DONOGHUE: Yes, the irreducible minimum we saw was

19 75 per cent of the total.

20 THE CHAIR: Is there a cost schedule?

21 MR O'DONOGHUE: Yes.

22 THE CHAIR: Just remind me where it is.

23 MR O'DONOGHUE: It's at F157.

24 THE CHAIR: It is not possible to hand it up, is it? It is

25 not behaving on this. I am only getting half of it

1 coming through. Do you have a hard copy anywhere?

2 Okay, thank you. I have it now, yes.

3 MR O'DONOGHUE: So it's 75 per cent of the 90 per cent.

4 THE CHAIR: So you are asking for 75 per cent of the figure;

5 yes?

6 MR O'DONOGHUE: Of the 90 per cent.

7 THE CHAIR: Of the 90 per cent.

8 MR O'DONOGHUE: Just over 298.

9 THE CHAIR: Mr Lawrence?

10 MR LAWRENCE: Yes. This is a case, I think, where there

11 needs to be a really healthy degree of scepticism about

12 the amount that is being claimed. The hourly rates, we

13 would make the usual point about --

14 THE CHAIR: Do we know what your costs were on this?

15 MR LAWRENCE: We don't have that in the bundle, I don't

16 think. No. But the hourly rates are very substantially

17 below what is being asked for by CMS.

18 There is another fundamental point. I wonder if

19 I can explain one particular point that I want to raise

20 on the bill of costs. Many of the witness statements

21 did not have the correct statement of truth. And we

22 have asked repeatedly for the witness statements to be

23 put in proper form. That has not happened.

24 In consequence, we say all the costs of those

25 witness statements should be disallowed. That's

1 particularly important in this case, and if necessary,
2 I can take you to Mr Baker's witness statement, which
3 maybe that would be a good thing to do.

4 If we have a look at page 3 of bundle G. I just
5 want to make one point in relation to this by reference
6 to Mr Baker's witness statement and the RFI response
7 that we received.

8 So Mr Baker's witness statement, bundle G, page 3,
9 goes on to deal with the reasons for the introduction of
10 the New From SA Condition. At page 7, you can see the
11 reasons he sets out.

12 If you remember the document that I drew to your
13 attention, Baker to Levitt, where the reasons for the
14 New From SA Condition being introduced did not at all
15 bear any relationship to copyright issues, we are
16 concerned that Mr Baker has been, at best, economical
17 with the truth and at worst, misleading in his evidence.

18 If you turn to page 10 of that bundle, the form of
19 statement of truth is not a proper form of statement of
20 truth. It makes no reference in particular to the
21 contempt of court risk that is in the court form.

22 One thing we know from the RFI response that we
23 received very late on 7 May, which is bundle F,
24 page 362 -- I would ask you to turn this up. It is
25 going to be relevant at a future point in any event.

1 I may not have the right reference there, actually.

2 THE CHAIR: I am slightly struggling with what this has to

3 do with the cost schedule.

4 MR LAWRENCE: Well, in the cost schedule one can't identify

5 exactly how much cost has been spent on the witness

6 statements, but the witness statement costs should be

7 disallowed.

8 THE CHAIR: Why?

9 MR LAWRENCE: Why? Because, if you can bear with me --

10 THE CHAIR: If you were concerned about the statement of

11 truth, why wasn't an application made in relation to

12 this before the hearing, so that they should be

13 re-served with an appropriate statement of truth? You

14 could have made that application.

15 MR LAWRENCE: We asked for it. We were told it was going to

16 be done, and it wasn't done. But we haven't issued

17 a formal application. I accept that.

18 THE CHAIR: Right. I don't see really -- I am not in

19 a position today to say that this is so egregious that

20 costs should be disallowed, am I?

21 MR LAWRENCE: What I am arguing for is a healthy degree of

22 scepticism over the overall amount.

23 THE CHAIR: You have not told me what your costs are.

24 Unlike the last application, this is a case where one

25 might expect ballpark for each side's costs to be in the

1 same order, I would have thought.

2 MR LAWRENCE: May I just take instructions --

3 THE CHAIR: Yes.

4 MR LAWRENCE: -- as to what our costs were. If we know. We

5 may not have drawn up a bill of costs.

6 MR O'DONOGHUE: They never filed a cost schedule.

7 MR LAWRENCE: We didn't file a costs schedule. It was

8 longer than a day's hearing and no cost schedule,

9 I think was filed by the other side at that time.

10 THE CHAIR: No, okay, I understand. I have that

11 information.

12 MR LAWRENCE: Microsoft served a schedule, initially

13 claiming £530,000, and it tumbled down a few weeks later

14 in the cost schedule to £400,000. If you remember,

15 there is a 10 per cent disallowance.

16 MR O'DONOGHUE: Because time was written off. It is the

17 indemnity principle.

18 MR LAWRENCE: It is because -- well, there was also the

19 foreign law point, you may remember, sir, that to the

20 extent the costs were awarded to Microsoft, only

21 90 per cent of the costs --

22 THE CHAIR: Yes, I understand.

23 MR LAWRENCE: -- were awarded.

24 So the points I make are: there is uncertainty, at

25 least, as to the recoverability of the amounts in

1 relation to the witness statements. The hourly rates
2 are way above the guidelines.

3 THE CHAIR: Just show me that. So the guidelines are?

4 MR LAWRENCE: I don't have the precise figures with me, but
5 we have questions around the number of hours that are
6 spent. I can go through the schedule if you think this
7 is a useful use of time. So the solicitor's area, the
8 guideline numbers are 566 --

9 THE CHAIR: Yes.

10 MR LAWRENCE: -- for solicitors and legal execs with over
11 eight years' experience and then 385 for legal execs
12 with over 4 years' experience.

13 THE CHAIR: Okay. You say they are high. Any other points?
14 In terms of the number of hours, what do you say?

15 MR LAWRENCE: Number of hours, well we have a point about
16 the time that has been claimed for attendance at the
17 hearing. The hearing was only 1.5 days and we have very
18 high numbers in the schedule in relation to,
19 particularly, partner attendance at the hearing.

20 THE CHAIR: Show me that.

21 MR LAWRENCE: Sir, the partner hours --

22 THE CHAIR: Attendance at court.

23 MR LAWRENCE: I am being instructed that those hours got
24 taken out in the drop from the 500 to the 400.

25 THE CHAIR: Okay. Anything else you want to say?

1 MR LAWRENCE: No.

2 THE CHAIR: All right. I am going to order 65 per cent
3 costs. That's the 65 per cent of the 90 per cent.
4 Payment?

5 MR LAWRENCE: There is one other point that I have forgotten
6 to raise. If we are going to do these interim payment
7 awards, we will be issuing an application for an interim
8 payment award in respect of the restricted documents
9 costs.

10 THE CHAIR: Yes, you mentioned that in the skeleton.

11 MR LAWRENCE: We wondered whether that could be netted off
12 now, at this stage.

13 MR O'DONOGHUE: The first time this is mentioned is their
14 skeleton.

15 THE CHAIR: How much are the costs?

16 MR LAWRENCE: We claim 170,000.

17 THE CHAIR: Right.

18 MR LAWRENCE: We say we should get the same percentage of
19 that -- we don't have a detailed bill of costs, we just
20 have the statement that's been sent --

21 THE CHAIR: Right. I am not netting that off until you --
22 you know, if you want to produce a schedule, produce
23 something in writing, we can --

24 MR LAWRENCE: I am instructed that we have given the other
25 side a schedule but it's not a detailed bill of costs at

1 this stage. So cost schedule, which is in the bundle.

2 THE CHAIR: Shall we have a look at it?

3 MR O'DONOGHUE: Yes.

4 MR LAWRENCE: We sent it to them on 13 February.

5 MR O'DONOGHUE: We will consider that, sir, if we need to

6 trouble you.

7 THE CHAIR: Okay.

8 MR O'DONOGHUE: We will come back to that. But the first we

9 heard of this was in their skeleton.

10 THE CHAIR: Yes, but it can still be dealt with. I mean --

11 MR O'DONOGHUE: Yes, we have no objection in principle to

12 dealing with it.

13 THE CHAIR: Right. Obviously, having ordered 65 per cent

14 here, you might think that is going to be a likely

15 guide, subject to any big points on the costs.

16 MR O'DONOGHUE: Perhaps. But 170,000 to look at blank pages

17 is --

18 THE CHAIR: Yes. I mean if you have substantive points, of

19 course, yes.

20 MR O'DONOGHUE: There will be things to say. On payment

21 date, we again request 14 days.

22 MR LAWRENCE: Can we have a little longer, to see whether we

23 can do a netting with the restricted documents?

24 THE CHAIR: I will order 28 days on this, for that reason.

25 MR O'DONOGHUE: Sir, for the record on Mr Baker, we do not

1 accept for one second what was said --

2 THE CHAIR: You don't need to address me on that. You may

3 just want to say something on the transcript.

4 MR O'DONOGHUE: Yes.

5 THE CHAIR: Anything else?

6 MR O'DONOGHUE: No.

7 THE CHAIR: We are all up to date now? I know things have

8 been bumping along from case management conference to

9 case management conference. But we are all up to date

10 now. The next hearing will be the pre-review in July.

11 (11.33 am)

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